THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

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

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

AUGUST - 2020

Pages : 481 to 656

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice MOHAMMAD RAFIQ, *M.Com., LL.B.*

PUISNE JUDGES

The Hon'ble Justice KUMARI SANJU PANDA, *B.A., LL.B.*

The Hon'ble Shri Justice S.K. MISHRA, *M.Com., LL.B.*

The Hon'ble Shri Justice C.R. DASH, *LL.M.*

The Hon'ble Shri Justice BISWAJIT MOHANTY, *M.A., LL.B.*

The Hon'ble Shri Justice Dr. B.R. SARANGI, *B.Com.(Hons.), LL.M., Ph.D.*

The Hon'ble Shri Justice DEBABRATA DASH, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice SATRUGHANA PUJAHARI, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice BISWANATH RATH, *B.A., LL.B.*

The Hon'ble Shri Justice S.K. SAHOO, *B.Sc., M.A. (Eng.&Oriya), LL.B.*

The Hon'ble Shri Justice PRAMATH PATNAIK, *M.A., LL.B.*

The Hon'ble Shri Justice K.R. MOHAPATRA, *B.A., LL.B.*

The Hon'ble Shri Justice Dr. A.K.MISHRA, *M.A., LL.M., Ph.D.*

The Hon'ble Shri Justice BIBHU PRASAD ROUTRAY, *LL.B.*

The Hon'ble Shri Justice SANJEEB KUMAR PANIGRAHI, *LL.M.*

The Hon'ble Miss Justice SAVITRI RATHO, *B.A., (Hons.), LL.B.*

ADVOCATE GENERAL

Shri ASHOK KUMAR PARIJA, *B.Com., LL.B.*

REGISTRARS

Shri MALAYA RANJAN DASH, *Registrar General*
Shri RAJENDRA KUMAR TOSH, *Registrar (Administration)*
Shri LALIT KUMAR DASH, *Registrar (Judicial)*

NOMINAL INDEX

ACTS & RULE

Acts & No.

1950	Constitution of India, 1950
1947-14	Industrial Disputes Act, 1947
1860-45	Indian Penal Code, 1860
1957-67	Mines and Minerals (Development & Regulations) Act, 1957
1985-61	Narcotic Drugs and Psychotropic Substances Act, 1985
1963-2	Odisha Co-operative Societies Act, 1962

Rule : Orissa Civil Service (Pension) Rules, 1992

SUBJECT INDEX

PAGE

the prosecution case? – Ans. – No. – Held, minor discrepancies in the statements of witnesses as given in court vis-a-vis their previous statement before police cannot be the reason to discard the case of the prosecution such discrepancies are natural as against parrot like version of the witnesses – It cannot be lost site of the fact that the eye witnesses gave their evidence in court almost a year after the statement were recorded by the investigating officer – Such discrepancies are bound to occur for variety of reasons, for instance lack of education, social background, nature of witnesses, duration of their observation and lapse of time when the witnesses are called upon to give their evidence in court after the incident occurred.

Gulia Majhi -V- State of Odisha.

2020 (II) ILR-Cut…… 596

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Murder of eight years old son by mother – Mother made her son sat on her lap and dealt blows by 'Trisul' – Conviction by court below – Plea of benefit under section 84 of IPC for insanity pleaded – Evidence of D.W.1- Jail Doctor has categorically stated that on the next day of the incident he examined the accused inside the jail and had seen abnormal behavior and such behavior started improving after receiving treatment – D.W.2- Psychiatric Specialist of the jail also testified and found that the accused was talking to her-self, screaming and was not taking food – Accused was suffering from schizophrenia which means gross deviation of thinking, perception and behavior and a person could not understand rationally –

The evidence of D.W.1 and D.W.2 clearly proves that the accused was suffering from medical insanity and was unable to know the nature of the act – Held, trial court has committed error in not appreciating the evidence of D.W.1 and D.W.2 in the proper perspective – Conviction set aside.

Bidyulata Swain @ Saraswati Swain -V- State Of Orissa.

2020 (II) ILR-Cut…… 509

Sections 378 & 379 – Lifting of minerals without any lease or licence or authority – Whether it amounts to theft ? – Held, Yes.

Jitendranath Patnaik -V- State of Odisha (Vig.)

2020 (II) ILR-Cut…… 634

MINES AND MINERALS (DEVELOPMENT & REGULATIONS) ACT, 1957 – Section 22 r/w Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 - Rule 15 – Offences U/s.21 of MMDR Act, U/s. 379/120-B of IPC r/w section 3A of Forest Conservation Act,1980 – F.I.R lodged & Charge sheet filed by Vigilance D.S.P – Cognizance of the offences taken – Order of cognizance challenged on the

application as per provision of the Act – However after the cut off date the registering authority by exceeding jurisdictions modify/change the bye law – Such action was challenged in appeal as well as in review and were dismissed by the Government – Both the orders challenged – Held, the order passed by the registrar transpires that the opposite party no. 2 has acted beyond its power conferred under the statute, since he has passed orders by making correction in the bye law which is beyond his jurisdiction – Moreover there is no provision under the act which confers power on the registrar for correction of the bye laws and registering the same – Orders impugned quashed, matter remanded.

All Orissa State Bank Officers Housing Co-Operative Society State of Odisha & Ors.

2020 (II) ILR-Cut…… 611

SERVICE LAW – Appointment by back door entry – Regularization – Scope of – Held, Petitioner was neither appointed on direct recruitment basis nor was he transferred on deputation basis from any other government organization to the OHRC, rather on consideration of a plain paper application and conducting a formal interview, he was engaged as stenographer with a consolidated remuneration of Rs.3000/- per month vide office order dated 29.08.2003 – Thereby, the petitioner, being a rank outsider engaged on contractual basis and getting consolidated remuneration, cannot and could not be absorbed under Rule-8 of OHRC Rules, 2012 – In other

words, the entry of the petitioner in service was irregular one and not in accordance with the rules and thereby was a back door entrant to such service – More so, his recruitment to the post of junior stenographer under the OHRC was de hors the rules – In the above backdrop, it is the settled legal proposition that no person can be appointed even on a temporary or *ad hoc* basis without inviting applications from all eligible candidates – If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc., that will not meet the requirement of Articles 14 and 16 of the Constitution – Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered – A person employed in violation of these provisions is not entitled to any relief including salary – For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled – The equality clause enshrined in article 16 requires that every such appointment be made by an open advertisement so as to enable all eligible persons to compete on merit – It is a settled legal proposition that appointment to any public post is to be made by advertising the vacancy and any appointment made without doing so violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.

Nihar Ranjan Tripathy -V- State of Odisha & Ors.

2020 (II) ILR-Cut…… 532

WORDS & PHRASES – 'Education' – Meaning of – The word "education" is derived from the latin word "educa" which means bringing out latent faculties – 'Education' means the act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself of others intellectually or mature life; the act or process of imparting or acquiring particular knowledge or skills – It is the result produced by instruction, training or study.

A.S. Ananya Pradhan -V- Government of India & Ors.

2020 (II) ILR-Cut…… 551

—— o ——

2020 (II) ILR - CUT- 481

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

WRIT PETITION (PIL) NO. 15771 OF 2020

TAPAN JYOTI BARIHA & ORS. .....Petitioners

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition (PIL) – Direction is sought for to stop construction of a bridge and to construct the same on the alternative site – Core question as to whether Court in exercise of its power of judicial review would be justified in quashing the decision in selecting a particular site for construction of a bridge which essentially lies in the policy domain of the State Government? – Held, No.

"Though as per prayer of the petitioners this petition has been styled as a Public Interest Litigation but the petitioners have utterly failed to show how construction of the bridge at the proposed site is opposed to public interest. It is neither within the domain of the courts nor does the scope of judicial review extends to embark upon an enquiry as to whether such decision is wise or whether better decision can be taken. This Court is not inclined to strike down the impugned decision at the behest of petitioners merely because it has been urged on their behalf that a different location would be more suitable. Whether construction of the proposed bridge at the site selected by the authorities less suitable or another site suggested by the petitioners is more appropriate, is something which has to be decided by the respondent-State authorities as it essentially lies in their policy domain. The action of the respondent-authorities warrants no interference of this Court." *(Para 9)*

Case Laws Relied on and Referred to :-

1. (2000) 10 SCC 664 : Narmada Bachao Andolan Vs. Union of India & Ors.
2. (2002) 2 SCC 333 : BALCO Employees' Union (Regd.) Vs. Union of India & Ors.
3. (2009) 7 SCC 561 : Villianur Iyarkkai Padukappu Maiyam Vs. Union of India & Ors.

For Petitioner : M/s. K.M.H. Niamati & D. Shukla.

For Opp.Parties : Mr. M.S. Sahoo, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 15.07.2020

PER: MOHAMMAD RAFIQ, C.J.

This Public Interest Litigation (PIL) writ petition has been filed by four petitioners jointly *inter alia* with the prayer that the opposite parties-

State authorities be directed to stop construction of big bridge at Ekamakana Chhaka over Pipili-Konark Road under Tahasil-Nimapada in the district of Puri and further, if at all necessary, they may be directed to construct the bridge in question on the alternative site at Srimukha near the present disputed site, which is having an existing culvert and is connected to an existing canal, for water drainage or alternatively, the respondents be directed to construct a small canal from Ekamakana to Srimukha for drainage of water.

2. Mr. K.M.H. Niamati, learned counsel for the petitioners argued that the bridge, which is proposed to be constructed at Ekamakana, is a huge bridge but its planning is faulty. There is an existing road, which is 5 feet above the land and if the bridge is constructed at 10 ft height above of the road, its base would be fifteen feet above the ground level. It has no link with any canal for proper drainage of water. According to the petitioners, after completion of the said bridge at Ekamakana, the farmers as well as the local people, who are having their homestead lands in the vicinity, towards southern side of the bridge, shall suffer irreparable loss and injury as the entire agricultural area and homestead land will be submerged under water. There is also a High School i.e. Panchayat Uchha Ingraji Vidyalaya adjacent thereto. If the bridge is constructed, the school area will also be submerged under water at the time of rainy season. Consequently, the students of the said school will also face difficulty to attend the school. There is also a factory area in the vicinity of the proposed bridge. If such bridge is constructed, almost 400 workers will also lose their livelihood. Construction of the bridge would also pose danger to the livelihood of the farmers as well as the local people. It is also contended that one culvert is situated at Srimukha just 200 meters from the proposed bridge at Ekamakana, which is linked to a canal. The opposite parties be directed to reconsider the prayer of the petitioners to construct the bridge on the alternative site.

3. Mr. M.S. Sahoo, learned Additional Government Advocate for the opposite parties has opposed the writ petitioners. He submits that location of the proposed bridge has been selected after proper survey. It appears that the writ petition has been filed by the petitioners who are having vested interest.

4. Core question that requires consideration is whether this Court in exercise of its power of judicial review under Article 226 of the Constitution would be justified in quashing the decision of the opposite parties in selecting

a particular site for construction of a bridge which essentially lies in the policy domain of the State Government.

5. This Court does not have any material before it held that action of the concerned authorities of the State Government in constructing the bridge on the proposed location is inappropriate. There is no reason to presume that the respondents have not taken due care in selecting the site of the bridge. The State Government must have certainly taken the decision after inviting suggestions/objections from the local people and conducted popular survey about load of traffic and need of the people of the area and then must have decided for construction of the bridge at the proposed site.

It is trite to say that the dispute regarding construction of the bridge at the proposed location is best left to the discretion of the state authorities. This Court is not inclined to interfere with the decision of the opposite parties. Its taking that view, this Court is fortified from various decisions of the Supreme Court, which we shall discuss presently.

6. In *Narmada Bachao Andolan vs. Union of India and others, reported in (2000) 10 SCC 664,* the Supreme Court has held that there are three stages with regard to the undertaking of an infrastructural project. One is conception or planning, second is decision to undertake the project and the third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision. While there is always a need for such projects not being unduly delayed, it is at the same time expected that as thorough a study as is possible will be undertaken before a decision is taken to start a project. Once such a considered decision is taken, the proper execution of the same should be taken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role which a Court may have to play is to see that the system works in the manner it was envisaged. The Court has further held that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and peoples fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be

before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of latches if the petitioner had the knowledge of such a decision and could have approached the Court at that time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Latches is one of them. The courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law.

7. The Supreme Court in the case of *BALCO Employees' Union (Regd.) vs. Union of India and others, reported in (2002) 2 SCC 333,* has held that in a democracy, it is the prerogative of each elected Government to follow it's own policy. In regard to judicial review of policy decision of the Government by this Court, any such policy or its change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

8. In *Villianur Iyarkkai Padukappu Maiyam vs. Union of India and others, reported in (2009) 7 SCC 561,* before the Hon'ble Supreme Court, challenge was made to the award of the Contract for the development of the Pondicherry Port. It was held that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In the matter of

policy decision taking upon issues of economy, the scope of judicial review is very limited. The court cannot examine the relative merits of different economic policies and cannot strike down the same merely on ground that another policy would have been fairer and better. Unless the decision is shown to be contrary to any statutory provision or the Constitution, the Court would not interfere with an economic decision taken by the State and the same are not subjected to judicial review. Similarly, unless any illegality is committed in the execution of the policy or the same is contrary to law or malafide, a decision bringing about change cannot per se be interfered with by the court. Moreover, there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest.

9. Though as per prayer of the petitioners this petition has been styled as a Public Interest Litigation but the petitioners have utterly failed to show how construction of the bridge at the proposed site is opposed to public interest. It is neither within the domain of the courts nor does the scope of judicial review extends to embark upon an enquiry as to whether such decision is wise or whether better decision can be taken. This Court is not inclined to strike down the impugned decision at the behest of petitioners merely because it has been urged on their behalf that a different location would be more suitable. Whether construction of the proposed bridge at the site selected by the authorities less suitable or another site suggested by the petitioners is more appropriate, is something which has to be decided by the respondent-State authorities as it essentially lies in their policy domain. The action of the respondent-authorities warrants no interference of this Court.

10. In the result, we find no merit to entertain the writ petition. Accordingly, the writ petition stands dismissed.

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

—— o ——

2020 (II) ILR - CUT- 486

MOHAMMAD RAFIQ, C.J & K. R. MOHAPATRA, J.

W.P.(C) NO.12518 OF 2020
WITH FOLLOWING BATCH OF WRIT PETITIONS

GOPINATH SAHU & ORS. .....Petitioners

.V.

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

SL. No.	Case No.	Petitioner(s) name	Advocate for the petitioner(s) appeared by Video Conferencing mode:-
1.	WP(C) NO.12518 OF 2020	Gopinath Sahu	Amar Kumar Mohanty, K.A.Guru, S.K.Mohapatra
2.	WP(C) NO.11792 of 2020	Mukesh Kumar Gupta	Prasanta Kumar Nayak, A.K.Mohapatra, S.Mishra, S.N.Dash
3.	WP(C) NO.12001 of 2020	Rajesh Kumar Sahu	Arun Kumar Patra, B.Shadangi
4.	WP(C) NO.12520 of 2020	Narayan Sahu	Amar Kumar Mohanty, Kousik Ananda Guru, S.K.Mohapatra
5.	WP(C) NO.12522 of 2020	Gopinath Sahu	
6.	WP(C) NO.12523 of 2020	Raj Narayan Patanaik	
7.	WP(C) NO.12524 of 2020	Gopinath Sahu	
8.	WP(C) NO.12525 of 2020	Gopinath Sahu	
9.	WP(C) NO.12526 of 2020	Raj Narayan Patanaik	
10.	WP(C) NO.12527 of 2020	Gopinath Sahu	
11.	WP(C) NO.12745 of 2020	Jagdeo Prasad	Santanu Kumar Sarangi, A.K.Nayak, S.K.Sarangi
12.	WP(C) NO.13090 of 2020	N.Basava Raju	Amar Kumar Mohanty, Kousik Ananda Guru, S.K.Mohapatra
13.	WP(C) NO.13092 of 2020	Uma Shankar Sahu	
14.	WP(C) NO.13106 of 2020	Namita Kumari Biswal	
15.	WP(C) NO.13107 of 2020	Santosh Kumar Biswal	
16.	WP(C) NO.14085 of 2020	Nakula Charan Behera	Prafulla Kumar Rath, A.Behera, S.K.Behera, P.Nayak, S.Das, S.Rath
17.	WP(C) NO.14304 of 2020	Jagdeo Prasad	Santanu Kumar Sarangi, A.K.Nayak, S.K.Sarangi, S.B.Sarangi
18.	WP(C) NO.15426 of 2020	Mamatamayee Lenka	Aruna Kumar Patra, B.Mohanty,M.K. Mohanty,K.K. Gaya
19.	WP(C) NO.15693 of 2020	Nrusingha Charan Routray	Arun Kumar Patra, B.Shadangi
20.	WP(C) NO.15709 of 2020	Arvind Kumar Sahu	
21.	WP(C) NO.15907 of 2020	Sukanta Kumar Panigrahy	Kousik Ananda Guru, A.K.Mohanty, S.K.Mohapatra
22.	WP(C) NO.15908 of 2020	Almas Khan	
23.	WP(C) NO.15965 of 2020	Manoj Kumar Nahak	
24.	WP(C) NO.15972 of 2020	Deepak Mohanty	
25.	WP(C) NO.16059 of 2020	Dibakar Swain	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
26.	WP(C) NO.16060 of 2020	Jagadish Sahoo	
27.	WP(C) NO.16061 of 2020	Pradeep Kumar Sahoo	
28.	WP(C) NO.16062 of 2020	Janaki Patra	
29.	WP(C) NO.16064 of 2020	Swarnalata Sahoo	

30.	WP(C) NO.16070 of 2020	Jay Prakash Gupta	Santanu Kumar Sarangi, A.K.Nayak, S.K.Sarangi
31.	WP(C) NO.16081 of 2020	Rabindra Kumar Biswal	Arun Kumar Patra, B.Shadangi
32.	WP(C) NO.16084 of 2020	Prakash Panigrahi @ Prakash Chandra Panigrahi	
33.	WP(C) NO.16087 of 2020	Alok Sahoo	
34.	WP(C) NO.16268 of 2020	Hemanta Ku.Sahu	Prasanta Kumar Nayak A.K.Mohapatra, S.Mishra, S.N.Dash
35.	WP(C) NO.16347 of 2020	Amar Kumar Sahu	Prafulla Kumar Rath, A.Behera, S.K.Behera, P.Nayak, S.Das, S.Rath
36.	WP(C) NO.16349 of 2020	K.Pratap Kumar Sahu	
37.	WP(C) NO.16352 of 2020	Deepak Kumar Sahu	
38.	WP(C) NO.16354 of 2020	Manoj Kumar Nanda	
39.	WP(C) NO.16357 of 2020	Khageswar Rout	
40.	WP(C) NO.16358 of 2020	Debasis Jena	
41.	WP(C) NO.16359 of 2020	Abhaya Kumar Das	
42.	WP(C) NO.16361 of 2020	Ajaya Kumar Das	
43.	WP(C) NO.16363 of 2020	Asit Kumar Das	
44.	WP(C) NO.16365 of 2020	Vivek Kumar Sahu	
45.	WP(C) NO.16366 of 2020	Hemanta Kumar Sahu	
46.	WP(C) NO.16367 of 2020	Manoj Kumar Panigrahi	
47.	WP(C) NO.16368 of 2020	Jampana Laxmi	
48.	WP(C) NO.16369 of 2020	Ramakanta Pradhan	
49.	WP(C) NO.16387 of 2020	Manoj Kumar Sahoo	Biraja Prasanna Das, J.S.Maharana,D.K.Panda, S.Das
50.	WP(C) NO.16395 of 2020	Kanhu Charan Pradhan	
51.	WP(C) NO.16400 of 2020	Golaka Bihari Pattanaik	
52.	WP(C) NO.16404 of 2020	Prakash Chandra Pradhan	
53.	WP(C) NO.16406 of 2020	Bibekananda Pradhan	
54.	WP(C) NO.16417 of 2020	Sukanta Dhal	Arun Kumar Patra, B.Shadangi
55.	WP(C) NO.16419 of 2020	Nirmal Kumar Das	
56.	WP(C) NO.16422 of 2020	Hulas Pradhan	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
57.	WP(C) NO.16423 of 2020	Nanda Kishore Mallick	Arun Kumar Patra, B.Shadangi
58.	WP(C) NO.16424 of 2020	Prafulla Kumar Pradhan	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
59.	WP(C) NO.16425 of 2020	Narayan Rout	Arun Kumar Patra, B.Shadangi
60.	WP(C) NO.16426 of 2020	Rama Chandra Mohanty	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
61.	WP(C) NO.16427 of 2020	Dipu Ranjan Sahoo	Arun Kumar Patra, B.Shadangi
62.	WP(C) NO.16428 of 2020	Pranaya Kishore Pattanaik	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
63.	WP(C) NO.16429 of 2020	Arun Kumar Sahu	Arun Kumar Patra, B.Shadangi

64.	WP(C) NO.16430 of 2020	Golaka Bihari Pattanaik	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
65.	WP(C) NO.16432 of 2020	Bimal Prasad Pattanaik	
66.	WP(C) NO.16434 of 2020	Bibhuti Bhusan Pradhan	
67.	WP(C) NO.16436 of 2020	Subash Chandra Patnaik	
68.	WP(C) NO.16438 of 2020	Kishor Kumar Sharma	
69.	WP(C) NO.16440 of 2020	Sadhu Saran Gupta	
70.	WP(C) NO.16443 of 2020	Smruteeshree Routray	
71.	WP(C) NO.16445 of 2020	Rajendra Kumar Rout	
72.	WP(C) NO.16453 of 2020	Tarakanta Sahoo	
73.	WP(C) NO.16456 of 2020	Pramod Chandra Nayak	
74.	WP(C) NO.16459 of 2020	Hara Prasada Mohapatra	
75.	WP(C) NO.16460 of 2020	Binodini Routray	
76.	WP(C) NO.16461 of 2020	Manmohan Routray	Kousik Ananda Guru, A.K.Mohanty, S.K.Mohapatra
77.	WP(C) NO.16462 of 2020	Urmila Behera	
78.	WP(C) NO.16463 of 2020	Nibas Kumar Subudhi	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
79.	WP(C) NO.16464 of 2020	Kabita Patnaik	Kousik Ananda Guru, A.K.Mohanty, S.K.Mohapatra
80.	WP(C) NO.16465 of 2020	Prasadini Samal	
81.	WP(C) NO.16466 of 2020	Priya Ranjan Pradhan	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
82.	WP(C) NO.16467 of 2020	Nibedita Bishoyi	Kousik Ananda Guru, A.K.Mohanty, S.K.Mohapatra
83.	WP(C) NO.16468 of 2020	Sibaji Samal	
84.	WP(C) NO.16469 of 2020	Danardan Parida	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
85.	WP(C) NO.16470 of 2020	Jitendra Pradhan	
86.	WP(C) NO.16472 of 2020	Bijay Kumar	
87.	WP(C) NO.16474 of 2020	Ranjit Prasad	
88.	WP(C) NO.16476 of 2020	Kedar Prasad	
89.	WP(C) NO.16477 of 2020	Yogesh Sahu	
90.	WP(C) NO.16478 of 2020	Prasanta Kumar Sahoo	
91.	WP(C) NO.16479 of 2020	Bhaja Gobinda Routray	
92.	WP(C) NO.16481 of 2020	Sabitri Das	
93.	WP(C) NO.16483 of 2020	Rajesh Swain	
94.	WP(C) NO.16485 of 2020	Manzoor Ali	
95.	WP(C) NO.16487 of 2020	Samarendra Jena	
96.	WP(C) NO.16489 of 2020	Laxman Samantara @ Samantaray	
97.	WP(C) NO.16491 of 2020	Anita Mohapatra	
98.	WP(C) NO.16493 of 2020	Braja Kishore Nanda	
99.	WP(C) NO.16496 of 2020	Paresh Mallick	
100.	WP(C) NO.16498 of 2020	Pramod Kumar Nanda	
101.	WP(C) NO.16502 of 2020	Umakanta Majhi	
102.	WP(C) NO.16504 of 2020	Bhaja Gobinda Routray	
103.	WP(C) NO.16507 of 2020	Ranjit Prasad	
104.	WP(C) NO.16509 of 2020	Dinanath Singh	
105.	WP(C) NO.16511 of 2020	Mahendra Dash	
106.	WP(C) NO.16519 of 2020	Sukumar Maity	
107.	WP(C) NO.16521 of 2020	Suvendu Jena	
108.	WP(C) NO.16523 of 2020	Manoj Kumar Sahoo	
109.	WP(C) NO.16526 of 2020	Ranjit Prasad	
110.	WP(C) NO.16530 of 2020	Paresh Mallick	
111.	WP(C) NO.16541 of 2020	Sadhu Saran Gupta	
112.	WP(C) NO.16547 of 2020	Siddhartha Sahu	
113.	WP(C) NO.16552 of 2020	Ashok Kumar Sahu	
114.	WP(C) NO.16556 of 2020	Pitamber Mallick	
115.	WP(C) NO.16566 of 2020	Rabindra Kumar Mallick	
116.	WP(C) NO.16569 of 2020	Gouri Barik	
117.	WP(C) NO.16571 of 2020	Champarani Mandal	
118.	WP(C) NO.16573 of 2020	Bibekananda Pradhan	
119.	WP(C) NO.16575 of 2020	Manoj Kumar Sahoo	
120.	WP(C) NO.16577 of 2020	Hemanta Kumar Sahoo	
121.	WP(C) NO.16578 of 2020	Jayanta Kumar Swain	
122.	WP(C) NO.16584 of 2020	Duryodhan Bariki	Laxmidhar Dash, S.Mohanty, P.K.Mohanty
123.	WP(C) NO.16585 of 2020	Sujata Sahu	

124.	WP(C) NO.16587 of 2020	Suryamani Nanda	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
125.	WP(C) NO.16589 of 2020	Bibekananda Routray	
126.	WP(C) NO.16590 of 2020	Bijay Kumar Ghadei	
127.	WP(C) NO.16593 of 2020	Sabita Nanda	
128.	WP(C) NO.16595 of 2020	Gunamani Biswal	
129.	WP(C) NO.16598 of 2020	Bikash Ranjan Biswal	
130.	WP(C) NO.16601 of 2020	Sambit Mohanty	
131.	WP(C) NO.16603 of 2020	Puspalata Mallick	
132.	WP(C) NO.16720 of 2020	Shreeharsa Mishra	Bibhu Prasad Mohanty, B.Mohapatra, S.Sahani, S.Satpathy, R.Dalai
133.	WP(C) NO.16722 of 2020	Pramil Kumar Dalai	
134.	WP(C) NO.16812 of 2020	Dusmanta Kumar Palai	Kousik Ananda Guru, A.K.Mohanty, S.K.Mohapatra
135.	WP(C) NO.16817 of 2020	L.Sanjukta Sahu	
136.	WP(C) NO.16820 of 2020	Rama Krushna Lenka	
137.	WP(C) NO.16823 of 2020	Baikuntha Charan Sahoo	Arun Kumar Patra, B.Shadangi
138.	WP(C) NO.16834 of 2020	Kshamanidhi Samal	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
139.	WP(C) NO.16870 of 2020	Rama Krushna Lenka	Kousik Ananda Guru, A.K.Mohanty, S.K.Mohapatra
140.	WP(C) NO.17016 of 2020	Balaram Panigrahi	Bigyan Kumar Sharma, S.K.Singh, S.Palei, S.Sethi
141.	WP(C) NO.17112 of 2020	Satrughana Patra	Biraja Prasanna Das, J.S.Maharana, D.K.Panda, S.Das
142.	WP(C) NO.17114 of 2020	P.Subash Chandra Patra	
143.	WP(C) NO.17219 of 2020	Rajan Prasad	Prafulla Kumar Rath, S.K.Pattnaik, A.Behera, S.K.Behera, P.Nayak, S.Das, S.Rath
144.	WP(C) NO.17220 of 2020	Surendra Nath Barik	
145.	WP(C) NO.17221 of 2020	Sanghamitra Mohanty	
146.	WP(C) NO.17224 of 2020	Chhaya Sahu	
147.	WP(C) NO.17634 of 2020	Sri Vivek Kumar Sahu	
148.	WP(C) NO.17660 of 2020	Sanghamitra Dash	A.Routray, M.Routray
149.	WP(C) NO.17673 of 2020	Sri Bijan Kumar Sahoo	Prafulla Kumar Rath, A.Behera, S.K.Behera, P.Nayak, S.Das, S.B.Rath
150.	WP(C) NO.16748 of 2020	Santi Lata Sahu	Kousik Ananda Guru, Amar Ku. Mohanty, Sanjay Ku. Mohapatra
151.	WP(C) NO.16798 of 2020	Raghunananda Dalai	
152.	WP(C) NO.16815 of 2020	Bikram Kumar Sahoo	
153.	WP(C) NO.17599 of 2020	Shantanu Kumar Dash	A.N.Routray, M.Routray
154.	WP(C) NO.17614 of 2020	Shantanu Kumar Dash	
155.	WP(C) NO.17691 of 2020	Shantanu Kumar Dash	
156.	WP(C) NO.17635 of 2020	Anita Patra	Arun Kumar Patra, B.Shadangi
157.	WP(C) NO.17680 of 2020	Manas Kumar Sarkar	
158.	WP(C) NO.17681 of 2020	Shyamsundar Sahoo	
159.	WP(C) NO.17696 of 2020	Fakira Charan Behera	
160.	WP(C) NO.17697 of 2020	Sandhyarani Ghadei	
161.	WP(C) NO.17780 of 2020	Manish Sahu	Achyutananda Routray, M.Routray
162.	WP(C) NO.17789 of 2020	Sukanti Sahoo	Sidhartha Das, A.K.Mohanty,S.P.Tripathy, V.R.Behera

For Opp. Parties : Mr. A. K. Parija,Adv. General, Mr. M.S. Sahoo, A.G.A. (for State of Orissa)

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to a decision of the State in Excise Department imposing a condition – A common question of law arose as to whether

the Government of Orissa in its Department of Excise can insist on furnishing Bank Guarantee, instead of Solvency certificate, for grant or renewal of Excise Licenses in respect of IMFL 'ON' Shops/IMFL 'OFF' Shops, Beer Parlour 'ON' shops, CL Shops/OS Shops, retail vend of IMFL, country spirit, fermented Tari, Pachwai and Bhang etc. – Held, no – Reasons indicated.

"In view of the above discussed position of law, it must be held that the statutory prescription enumerated in the statutory Rules namely; Rule 51 and Rule 150 of the Rules of 2017 and Rule 3 and Rule 4 of the Certificate Rules, cannot be overridden by mere executive order issued by the Revenue & Disaster Management Department dated 02.01.2020. As a logical corollary thereto, the impugned order issued by the Excise Department dated 30.03.2020, being ultra vires of the Rules aforementioned, is wholly incompetent. Even if the Government were to suitably amend the Rules now, in so far as the present batch of petitions is concerned, such amendment cannot completely omit the provision of producing the Solvency certificate and require the production of the Bank Guarantee. Even if such provision is brought in the Rules by way of amendment, it shall obviously be applicable only prospectively and not retrospectively."

Case Law Relied on and Referred to :-

1. (2007) 15 SCC 129 : State of Orissa & Ors. Vs. Prasana Kumar Sahoo

JUDGMENT Date of Judgment: 03.08.2020

PER: MOHAMMAD RAFIQ, CJ.

All these writ petitions are founded on identical facts and raise a common question of law whether the Government of Orissa in its Department of Excise can insist on furnishing Bank Guarantee, instead of Solvency certificate, for grant or renewal of Excise Licenses in respect of IMFL 'ON' Shops/IMFL 'OFF' Shops, Beer Parlour ON shops, CL Shops/OS Shops, retail vend of IMFL, country spirit, fermented Tari, Pachwai and Bhang etc. As agreed upon by learned counsel for the parties, all writ petitions were taken up together for analogous hearing and passing a common judgment and order.

2. Under challenge in all these writ petitions is the letter No.2009 dated 30.03.2020 addressed by the Additional Secretary to Government, Government of Odisha, Department of Excise to the Excise Commissioner, Odisha conveying that the Revenue & Disaster Management Department as per their order No.465 dated 02.01.2020 has decided to phase out issue of

Solvency certificate by Revenue Authorities for grant or renewal of excise licenses and therefore insisted on producing for Bank Guarantee in lieu thereof for renewal and issuance of license. Since W.P.(C) No.12518 of 2020 has been taken up as the leading case, we shall briefly narrate the averments made therein to examine legality of the impugned action of the State Authorities. The petitioner in this case is a licensee in respect of Sikula IMFL Shop. The license was originally issued to him under the Bihar and Odisha Excise Act and the rules made thereunder. However, the license in the year 2017 was issued under the Odisha Excise Act 2008 (for short, "the 2008 Act"). The petitioner has been paying monthly consideration amount along with other statutory dues for issuance of license. Copy of the license of the year 2019-20 has been produced on record. It is contended that the State Government in the Department of Excise vide order No.2003 dated 28.03.2020 renewed the different excise licenses for the 1st quarter of the financial year 2020-21. While the excise licenses are renewed automatically, the Government made changes in rates and guidelines as applicable. The Government in the aforesaid order mentioned that all excise Duty and Margin Structure along with Regulatory Guidelines, which are not mentioned specifically in the order, would continue as per the policy of the year 2019-20. When the petitioner submitted documents along with Solvency certificate for renewal of license as required under Rule 51 read with Rule 150 of the Odisha Excise Rule 2017 (for short, "the Rules of 2017"), the Competent Authority refused to receive the same and required the petitioner to submit the documents along with Bank Guarantee and not the Solvency certificate. It has been contended that the State Government in its Revenue and Disaster Management Department vide order No.465 dated 02.01.2020 directed to phase out the practice of issuing of Solvency certificates and instructed all the department not to ask for such certificate for grant of any kind of license, such as license to storage agents, grant or renewal of Excise License, query license, etc. and advised them to insist on producing IT Returns or Bank Guarantee, etc. for issuance of license. The Excise Department of the Government of Orissa accordingly vide impugned letter dated 30.03.2020 directed the authorities to substitute Solvency certificate by Bank Guarantee.

3. Learned counsel for the petitioners submitted that the Government of Orissa by the aforesaid letter dated 30.03.2020 cannot supersede or override the statutory provisions contained in Rule 51 and Rule 150 of the Rules of 2017. Rule 51 inter alia provides that an application for grant of license of

Foreign Liquor or IMFL or Beer "ON" shops shall be submitted in Form XI-B and such application shall be accompanied by the documents enumerated in sub-rule (2) thereof, in clause (e) of which it is mentioned that attested copy of Solvency certificate indicating the solvency of the applicant to the extent of three lakhs rupees shall be furnished. Rule 51 being statutory rule, the impugned order dated 30.03.2020, which is an executive instruction, has to yield to it. Rule 150 of the Rules of 2017 also provides for furnishing Solvency certificate for license of retail vend of IMFL, country spirit, fermented Tari, pachwai and Bhang. It is contended that the Rules of 2017 have been framed by the State Government in exercise of powers conferred upon it under Section 90 read with Section 94 of the 2008 Act, which have been published in the Odisha Gazette dated 10.03.2017. It is settled principle of law that a statutory provision of law or the Rules cannot be overridden by the executive instructions and in the event of conflict, the former will prevail. It is contended that Solvency certificates are issued under Rule-3 of the Odisha Miscellaneous Certificate Rule 2017 (for short, "the Certificate Rules"). Rule-4 thereof provides that a person desirous of obtaining Solvency certificate would apply to the Revenue Officer concerned. Such application should be accompanied by an affidavit sworn in before a Magistrate incorporating the details of immovable properties, the income and source thereof. The Revenue authority on receipt of the application shall cause an enquiry and scrutinize the documents furnished by the applicant. After verification, the Sub-Divisional Officer by invoking power under Rule-3 of the Certificate Rules is competent to grant a Solvency certificate. It is therefore prayed that the writ of mandamus may be issued in the terms as prayed for and the impugned order of the Government of Orissa dated 30.03.2020 be quashed and set aside.

4. Shri Ashok Parija, learned Advocate General appearing for the State opposed the writ petitions and submitted that Government has taken a uniform decision in respect of all the departments wherever lease/license are issued. Attention of the Court was invited towards order of Government in its Revenue & Disaster Management Department dated 02.01.2020 to argue that a policy decision has been taken to phase out the practice of issuing the Solvency certificates as it consumes a significant amount of time of both of the citizens and the Revenue Officers. It is contended that clause-6 of the aforesaid letter provides that no Department shall now ask for Solvency certificate for, grant of license to storage agents, grant or renewal of excise license, quarry lease, etc. They would instead ask for IT returns or Bank

Guarantee, etc. for issuing such licenses. The concerned Department including the Excise Department were asked to follow the instructions. It is pursuant to the aforesaid that the Excise Department of the Government of Orissa has issued the impugned letter dated 30.03.2020.

5. Learned Advocate General, however, when confronted with the statutory prescription made in Rule 51 and Rule 150 of the Rules of 2017 and asked to explain how the statutory rules can be superseded by the executive instructions, fairly submitted that the Government is in the process of incorporating the appropriate amendments in the Rules of 2017 to provide for Bank Guarantee in place of Solvency certificate.

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

7. In order to appreciate the issue involved, we deem it appropriate to reproduce hereunder sub-rules (1) and (2)(e) of Rule 51 of the Rules of 2017:-

> *"**51. Application for grant of license of Foreign Liquor or IMFL or Beer "ON" shop.—**(1) Subject to the provisions of these rules, an application for Foreign Liquor or IMFL or Beer "ON" shops shall be submitted in Form XI-B only by those who are having hotels or restaurants.*
>
> *(2) The application shall be accompanied with the following documents, namely:-*
>
> *xxx xxx xxx*
>
> *(e) attested Copy of Solvency Certificate indicating the solvency of the applicant to the extent of Three lakhs rupees;*
> *xxx."*

Since sub-rules 1 and 2 (e) & (f) of Rule 150 of the Rules of 2017 would also be relevant for the purpose of deciding the case, they are reproduced hereunder:-

> ***"150. Manner of fixation and realization of fees.–** (1) The fees for licences for the retail vend of IMFL, country spirit, fermented Tari, pachwai and Bhang shall be such as fixed by auction, or e-auction, tender, e-tender or otherwise subject to reserve price determined in each case by the State Government.*
>
> *(2) Where the retail sale of intoxicant is made through e-auction the following conditions shall be fulfilled by the bidder along with other terms and conditions to be notified by State Government, from time to time, namely :—*

xxx *xxx* *xxx*

(e) the bidder from inside the State shall furnish solvency certificate equivalent to six times of the monthly reserve price in respect of immovable property or Bank Guarantee;

(f) the bidders from outside the State shall furnish Bank Guarantee equivalent to six times of the monthly reserve price done with local surety"

Rule 3(1)(iv), 3(3), 4(1)(iv) and 4(3) of the Certificates Rules 2017, being relevant for deciding the present batch of writ petitions, are also reproduced hereunder:-

"**3. Categories of miscellaneous certificates:-** (1) Subject to the provisions hereinafter contained, a Revenue Officer shall be competent to grant following categories of miscellaneous certificates, namely:-

(i) xxx
(ii) xxx
(iii) xxx
(iv) Solvency certificate (Form No.IV)
(v) xxx
(v-1) xxx
(vi) xxx

(2) xxx

(3) The solvency certificate for an amount exceeding five lakh rupees shall be granted by the Tahasildar and Additional Tahasildar subject to the approval of Sub-Collector.

4.(1) Application for miscellaneous certificates:- A person desirous of obtaining a certificate shall file before a Revenue Officer an application,-

(i) xxx
(ii) xxx
(iii) xxx
(iv) for issuance of Solvency certificate, in Form No.4;
(v) xxx
(vi) xxx

(2) xxx

(3) An application for solvency certificate shall be accompanied by the list of immovable properties along with the encumbrance certificate."

8. Sub-rule 1 of Rule 51 of the Rules of 2017 inter alia provides that subject to the provisions of these rules, an application for Foreign Liquor or IMFL or Beer "ON" shops shall be submitted in Form XI-B. Form XI-B is captioned as "APPLICATION FORM FOR GRANT OF LICENSE FOR RETAIL VEND OF IMFL/BEER FOR CONSUMPTION IN VENDOR'S PREMISES FOR THE YEAR 20". Clause-10 of the said application in Form XI-B requires the applicant to answer "whether Solvency is the extent of Rs.3.00 (Three lakhs) and that copy of the Solvency certificate to be enclosed". Rule 51 (2) provides that the application shall be accompanied with the documents mentioned in various clauses thereof. Clause (e) of sub-rule (2) of Rule 51 of the Rules of 2017 mentions attested copy of Solvency certificate indicating the solvency of the applicant to the extent of three lakhs rupees as one of the requisite documents. Rule 150 of the Rules of 2017 provides that the fees for licenses for the retail vend of IMFL, country spirit, fermented Tari, pachwai and Bhang shall be such as fixed by auction, or e-auction, tender, e-tender or otherwise subject to reserve price determined in each case by the State Government. Sub-rule 2 of Rule 150 of the Rules of 2017 provides that where the retail sale of intoxicant is made through e-auction, the conditions enumerated therein shall be fulfilled by the bidder along with other terms and conditions to be notified by State Government, from time to time. Clause (e) of Rule 150 of the Rules of 2017 provides that the bidder from inside the State shall furnish Solvency certificate equivalent to six times of the monthly reserve price in respect of immovable property or the Bank Guarantee. Clause (f) of sub-rule 2 of Rule 150 supra however does not give that option to the bidders from outside the State and requires them that they shall furnish Bank Guarantee equivalent to six times of the monthly reserve price along with local surety.

9. Comparison of clause (e) with clause (f) of sub-rule 2 of Rule 150 of the Rules of 2017 makes it abundantly clear that State has the policy of giving the facility to bidders from inside the State to furnish either the solvency certificate equivalent to six times of the monthly reserve price in respect of immovable property or the Bank Guarantee. This apparently leaves it at the option of the bidders to choose from either of the two, but no such facility has been given to the bidders from outside the State, who are required to necessarily submit the Bank Guarantee equivalent to six times of the monthly reserve price along with local surety. While Rule 51 does not at all mention about the requirement of Bank Guarantee but Rule 150(2)(f) has mentioned about the necessity for the bidders from outside the State to

furnish Bank Guarantee equivalent to six times of the monthly reserve price done with local surety.

10. Let us now examine the matter from the perspective of the Certificate Rules. Rule-3(iv) and Rule 3(3) thereof provide for issuance of Solvency certificate. Rule-4(1)(iv) of the Certificate Rules provides that a person desirous of obtaining a Solvency certificate would apply to the Revenue Officer concerned on application in Form No.IV. Rule 4(3) of these Rules provides that application should be accompanied by an affidavit sworn in before a Magistrate, incorporating the details of immovable properties, the income and source thereof. On receipt of such application, the Revenue Officer shall cause an enquiry and scrutinize the documents furnished by the applicant. After the process of verification is complete, the Revenue Officer concerned by invoking power under Rule-3 (iv) of the Certificate Rules shall issue solvency certificate on Form No.IV.

11. In view of the above discussed position of law, it must be held that the statutory prescription enumerated in the statutory Rules namely; Rule 51 and Rule 150 of the Rules of 2017 and Rule 3 and Rule 4 of the Certificate Rules, cannot be overridden by mere executive order issued by the Revenue & Disaster Management Department dated 02.01.2020.As a logical corollary thereto, the impugned order issued by the Excise Department dated 30.03.2020, being ultra vires of the Rules aforementioned, is wholly incompetent. Even if the Government were to suitably amend the Rules now, in so far as the present batch of petitions is concerned, such amendment cannot completely omit the provision of producing the Solvency certificate and require the production of the Bank Guarantee. Even if such provision is brought in the Rules by way of amendment, it shall obviously be applicable only prospectively and not retrospectively.

12. We may in this connection usefully refer to the judgment of the Supreme Court in **State of Orissa & ors. Vs. Prasana Kumar Sahoo**, reported in (2007) 15 SCC 129. Their Lordships of the Supreme Court, while dealing with a similar situation of conflict between executive instructions and statutory rules, in para-12 of the report, held as under:-

> "12. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of the Constitution of India. A purported policy

> decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions."

13. In view of the foregoing discussion, all the writ petitions deserve to succeed and are accordingly allowed. The impugned order dated 30.03.2020 is quashed and set aside. Interim orders passed in all the writ petitions except W.P.(C) Nos.16585, 16748, 16798, 16815, 17599, 17614, 17691, 17635, 17680, 17681, 17696, 17697, 17780 & 17789 of 2020, directing the authorities to renew the licenses of the petitioners on production of the Solvency certificate, subject to fulfillment of other conditions are made absolute. Such order shall also obtain in all other writ petitions.

14. In the light of the view that we have taken of the matter, the State Government and its authorities are directed to renew the licenses of the petitioners on production of the Solvency certificate, subject to fulfillment of other conditions. There shall be no order as to costs.

—— o ——

2020 (II) ILR - CUT- 497

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

WRIT PETITION (CIVIL) (PIL) NO. 235 OF 2020

AJAY BADA JENA .....Petitioner

.V.

COMMISSIONER OF BHUBANESWAR MUNICIPAL CORPORATION & ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of public interest litigation – Pleadings and prayer in the writ petition – Held, should be based on correct fact supported by materials – In absence thereof – Effect of – Indicated.

"Law is well settled that pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question(s) in issue, so that the parties may adduce appropriate evidence on the said issue. It is also well settled in law that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties." (Para 13)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of public interest litigation – Pleadings and prayer in the writ petition – Held, should be regulated properly to avoid any misuse.

"Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation' or the latest trend 'paisa income litigation'. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration."

Case Laws Relied on and Referred to :-

1. AIR 2011 SC 1989 : Narmada Bachao Andolan .Vs. State of Madhya Pradesh.
2. (1999) 6 SCC 552 : Malik Bros .Vs. Narendra Dadhich.
3. 2003 (9) Scale 741 : Ashok Kumar Pandey .Vs. State of West Bengal.
4. (2006) 5 SCC 28 : T.N. Godavarman Thirumulpad .Vs. Union of India.
5. AIR 1982 SC 149 : 1981 Supp. SCC 87 : S.P. Gupta .Vs. President of India.
6. AIR 1993 SC 892 : Janata Dal .Vs. H.S. Chowdhary.
7. AIR 1993 SC 852 : Ramjas Foundation .Vs. Union of India.
8. (1994) 6 SCC 620 : K.R. Srinivas .Vs. R.M. Premchand.
9. (1995) 1 SCC 242 : Noorduddin .Vs. K.L. Anand
10. AIR 1996 SC 2687 : Dr. Buddhi Kota Subbarao .Vs. K. Parasaran.
11. AIR 1997 SC 1236 : Ramniklal N. Bhutta .Vs. State of Maharashtra.
12. AIR 1996 SC 2687 : Dr. Budhi Kota Subbarao .Vs. K. Parasaran.
13. AIR 1998 SC 1297 : K.K. Modi .Vs. K.N. Modi.
14. AIR 2004 SC 280 : Ashok Kumar Pandey .Vs. State of West Bengal.
15. AIR 2006 SC 1774 : T.N. Godavarman Thirumulpad .Vs. Union of India.
16. AIR 2006 SC 3106 : B. Srinivasa Reddy .Vs. Karnataka Urban Water Supply & Drainage Board Employees' Association.
17. AIR 2008 SC 913 : Holicow Pictures Pvt. Ltd. .Vs. Prem Chandra Mishra.
18. (2015) 3 SCC 552 : Chaman Lal Saraf (dead thr. LRs.) .Vs. State of Haryana.
19. AIR 1999 SC 2284 : Sabia Khan .Vs. State of Uttar Pradesh.
20. (2011) 8 SCC 161 : Indian Council for Enviro-Legal Action .Vs. Union of India.

For Petitioner : M/s. Antaryami Swain & A.N. Swain.

For Opp.Parties : Mr. B.K. Dash, Mr. M.S. Sahoo, (Addl. Govt. Adv.)

JUDGMENT Date of Judgment: 12.08.2020

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

The petitioner, claiming to be a social worker, has filed this public interest litigation with the following prayer:-

> *"In the premises, it is therefore prayed that your Lordship would be graciously pleased to allow this writ petition, issue a Rule NISI calling upon the opposite parties to file show cause as to why the prayer of the petitioner shall not be granted, if the opposite parties fail to file show cause or give insufficient cause, your Lordship would be graciously pleased to make the rule absolute and issue an appropriate writ to the appopos. Further direction be given directing to the opposite parties to examine the correctness of allegations, after finding at the truth take immediate steps to prevent the dumping yard on the cremation field on plot no.568, khata no.492, mouza-Patia, the area of land Ac.0.650 decimals the status of the land is cremation, to prevent the dumping yard near the human inhabited area near the public road, public office."*

2. The factual matrix of the case, in hand, is that plot no.568 corresponding to khata no.492 measuring Ac.0.650 decimals of mouza-Patia has been recorded in Record of Right (RoR) published on 06.12.1973 as "smasan" (cremation ground). It is alleged in the writ petition that the said land is being utilized by Bhubaneswar Municipal Corporation (BMC) for dumping yard to accumulate waste materials, drain materials, latrine materials, etc. collected from different areas of Bhubaneswar Smart City. Consequentially, the nature and character of the land as cremation ground is being changed. Previously, dead bodies of the locality, including the village Patia and people residing in the apartments, were being cremated in the said land. The authorities with the help of some contractors cleaned the cremation ground by JCB machines and started construction of dumping yard which is just adjacent to the village road and human inhabited area, where apartments, private buildings, public offices and schools are situated. Since local people as well as outsiders, after making buildings and apartments, are permanently residing around the said land, in the event of construction of any dumping yard, the pungent gas emitted out of accumulated waste materials shall cause inconvenience to human inhabitants in the area. Even though the petitioner represented to the Commissioner, Bhubaneswar Municipal Corporation under Annexure-3, the same was not acceded to. Hence this application.

3. Mr. A. Swain, learned counsel for the petitioner contended that Bhubaneswar Municipality is contemplating to construct a dumping yard over the land in question, which has been described as 'smasan' (cremation ground) in the RoR, by which the nature and character of the land will be changed and it will cause immense difficulties to the local people if such dumping yard would be constructed in the said locality. As such, due to emission of pungent gas, out of accumulated waste materials, drain materials, latrine materials, etc. in the dumping yard, environmental hazardous would be created which would cause immense difficulties to the human inhabitants in the area. It is further contended that if the land in question is permitted to be utilized for dumping yard, no cremation ground will be available for the local people. Therefore, by way of this public interest litigation, the petitioner, who is a social worker, has approached this Court by filing this writ petition seeking interference of this Court.

4. Mr. B.K. Dash, learned counsel appearing for opposite party no.1, relying upon the preliminary counter affidavit, argued with vehemence and contended that the writ petition is not maintainable at the instance of the petitioner in view of the fact that the petitioner has not approached this Court with clean hand and, as such, the writ petition suffers from suppression of material facts. It is contended that in the name of public interest litigation, the petitioner has tried to vindicate his personal interest. Therefore, the writ petition should be dismissed in limine. It is further contended that the Bhubaneswar Municipal Corporation is not constructing any dumping yard on the case land, rather it is constructing a Micro Compositing Centre (MCC) for ward no.3 only and, as such, Micro Compositing Centre (MCC) is being constructed as per the direction of the National Green Tribunal and guidelines enumerated in Solid Waste Management Rules, 2016. Therefore, it is contended that the writ petition should be dismissed with cost.

5. Mr. M.S. Sahoo, learned Addl. Govt. Advocate appearing for the State opposite parties contended that since the petitioner sought relief as against opposite party no.1, the State opposite parties have not filed their counter affidavit. As such, he supports the contention raised by learned counsel appearing for opposite party no.1-BMC.

6. This Court heard Mr. A. Swain, learned counsel appearing for the petitioner; Mr. B.K. Dash, learned counsel appearing for opposite party no.1 and Mr. M.S. Sahoo, learned Addl. Government Advocate appearing for

State opposite parties through video conferencing, and perused the record. Since pleadings have been exchanged, with the consent of learned counsel for the parties, the matter is disposed of finally at the stage of admission.

7. Before delving into the core issue involved in this writ petition, it is essential to have a glance over the back-ground facts available on record. It is pleaded that due to conferment of Bhubaneswar Municipal Corporation with the status of Smart City and increase of socio-economic status of surrounding families of mouza Patia, which once upon a time was treated as a village, lost all characteristics of a village. As a result, the people of the area started to lead urban life style and being urbanized no people of the area preferred to cremate the dead bodies in the schedule plot, which has been mentioned in the RoR as "smasan". But for their convenience, on the proposal of the people of the ward and their elected representatives, BMC developed the modern crematorium over plot nos.582 and 583 with an area of Ac.2.00 decimals named as "Patia-Gada Smasan", which situated a few meter away from disputed plot no.568 and, as such, for that purpose the BMC has spent near about Rs.32.39 lakhs and the local people are using the same from the year 2016-17. Furthermore, a proposal was also submitted before the Sub-Collector, Bhubaneswar for change of kissam of plot no.568, khata no.492 from "smasan" to "Unnata Jyojana Joga", which is still pending for consideration. The entire edeavour has been taken place by the BMC, in pursuance of the order dated 26.03.2019 passed by the National Green Tribunal, Principal Bench in O.A. No.606 of 2018 for implementation of various provisions of Solid Waste Management Rules, 2016 in a time bound manner. In the said order, the Tribunal has directed the Chief Secretary, Government of Odisha to submit the quarterly reports. To give effect to such direction of the Tribunal, BMC has identified sites in different parts of the city for establishment of 43 nos. of Micro Compositing Centre and 11 nos. of Material Recovery Facility (MRF) in BMC area as part of decentralized solid waste management system. Out of 43 nos. of MCCs, one MCC is going to be functional very soon, six MCCs are in the advance stage of completion and another 19 nos. of MCCs are in different stage of construction. Out of 11 nos. of MRFs, two MRFs are going to be functional very soon and other nine MRFs are in different stage of construction. The household segregated door to door waste collection and street sweeping garbage will be directly transported to MCCs and MRFs where the segregated garbage will be unloaded for MCCs and the dry waste will be unloaded at the MRFs for further segregation and chanalization to the recyclers.

8. In the above backdrop, it cannot be said that the BMC has constructed any dumping yard on the case land where waste materials, latrines band drain materials and other foul waste materials collected from different areas of Bhubaneswar are being dumped. Rather, BMC is constructing a MCC for ward no.3 only, which is in compliance of the direction given by National Green Tribunal and guidelines enumerated in Solid Waste Management Rules, 2016. In MCC, the wastes are generally segregated and the bio-degradable wastes are processed to compost, which will be used by community people in agriculture and allied activities. The bio non-degradable wastes are taken to MRF centres for processing to produce reusable products and by this process all the wastes generated in the locality will be managed and, as such, all liquid waste will be taken to treatment plant made functional at Basuaghai.

9. At this stage, it is pertinent to mention that there are five plots, such as, plot nos.583, 562, 564, 582 and 568 measuring Ac.1.780 decimals, Ac.0.660 decimals, Ac.0.080 decimals, Ac.0.220 decimals and Ac.0.650 decimals respectively totaling to Ac.3.390 decimals within 300 meters radius having kissam-"smasan" (cremation ground). These plots are surrounded by high raised buildings and apartments. Mouza Patia, which once upon a time was treated as village, lost all its characteristics of a village due to rapid urbanization and development of BMC to Smart City and Corporation. Mouza Patia included to Corporation area, vide Government notification no.HUD/2205 dated 05.09.1988. The owners of the side plots, including the petitioner, are using these vacant "smasan" lands for their own purposes. Considering the demand of local people and their elected representatives, a cremation ground with modern amenities has been developed over plot nos.582 and 583 measuring Ac.2.00 decimals and rest plots of kissam-"smasan" are not used for the purposes of cremation since long and the local people have encroached those lands. Therefore, BMC proposed to construct the MCC over plot no.568 having area Ac.0.650 decimals after thorough discussion with local people and, as such, BMC has also submitted a proposal for change of kissam and de-reservation of the said plot to the Sub-Collector, Bhubaneswar to facilitate the execution of MCC, as there was no other feasible land for the said purpose. As per the work order issued in favour of the contractors, when the same was under execution, at this juncture, the petitioner has approached this Court by filing the present application and this Court, vide order dated 09.06.2020, directed the parties to maintain status quo and thereafter the said interim order was continued vide order dated 15.07.2020. Therefore, the work has not been progressed.

10. The above mentioned facts have not been brought on record by the petitioner in his public interest litigation petition, save and except the BMC is going to construct a dumping yard on the schedule plot. Thereby, the background facts, which lead BMC to go for construction of a MCC on the schedule land, have not been placed on record by the petitioner. Thereby, the writ petition suffers from suppression of material facts.

11. It is worthwhile to note that in paragraph-2 of the writ petition, the petitioner has described himself as a social worker and stated that he had not filed any public interest litigation earlier regarding this particular matter. In paragraph-3 of the counter affidavit filed by opposite party no.1, it has been stated as follows:-

> *"That, the present writ petition is not maintainable in view of the fact that the present writ is not all a PIL, rather, it is a Personal Interest Litigation. Therefore, the allegations are based on vested interest of the petitioner and suppression of many material facts."*

To give more emphasis to the contents in paragraph-3 of the counter affidavit, in paragraph-5 of the counter affidavit filed by opposite party no.1, it has been stated as follows:-

> *"…… It is most relevant to mention here that the petitioner's objection on the case land is baseless and guided by own vested interest as the petitioner himself has un-authorizedly constructed a Marriage Mandap in name of 'Lal & LAWANS' over plot no.569 and 579 which is Gramya Jungle and Bagayat-II in Kissam and also encroaching a piece of smasan land adjoining plot no.568 and using the case land as parking place. For such illegal use of land, notice has been issued to the owner of Marriage Mandap/Kalyan Mandap in the name of Lal Lawns by the Dy. Commissioner (North Zone) vide Notice under Letter No.2454 dated 20.11.2019. The petitioner has filed this writ petition on his own as self-declared social worker and no other person from the locality has objected on the project. ……"*

12. The petitioner has also filed rejoinder affidavit, paragraph-8 whereof reads as under:-

> *"…… It is further alleged by opposite party no.1 that the petitioner had unauthorizedly constructed a marriage Mandap in the name of 'Lal and Lawns' over plot no.569 and 579 which is Gramya Jungle and Bagayat-II in Kissam and also encroaching upon a place of smasan land adjoining plot no.568 and using the case land as parking space, for such illegal use of land notice has been issued to the owner of marriage Mandap, Kalyan Mandap in the name of 'Lal and Lawns' by the Deputy Commissioner, BMC (North Zone) vide notice under letter no.2454 dated 20.11.2019 which allegation by Deputy Commissioner, BMC North Zone are*

false and baseless. No marriage Mandap has been constructed on the communal land. If it is in the communal land then why action has not yet been done to evict encroachers."

13. Law is well settled that pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question(s) in issue, so that the parties may adduce appropriate evidence on the said issue. It is also well settled in law that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties.

In ***Narmada Bachao Andolan v. State of Madhya Pradesh***, AIR 2011 SC 1989, the apex Court held that it is a settled proposition of law that a party has to plead its case and produce/adduce sufficient evidence to substantiate the averments made in the petition and in case the pleadings are not complete the Court is under no obligation to entertain the pleas.

In view of the above principle of law laid down by the apex Court, as it appears from the pleadings available on record, the petitioner has not pleaded nor adduced any evidence to substantiate his claim with regard to construction of dumping yard on the schedule land.

14. Now, it is to be seen whether the present writ petition filed in the guise of public interest litigation is for the betterment of the society at large or for benefiting any individual.

In ***Malik Bros v. Narendra Dadhich,*** (1999) 6 SCC 552, the apex Court held as follows:-

"... a public interest litigation is usually entertained by a Court for the purpose of redressing public injury enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effect access to justice to the economically weaker class and meaningful realization of the fundamental rights. The direction and commands issued by the courts of law in a public interest are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be the bounden-duty of the Court not to entertain such petitions as otherwise a very purpose of innovation of public interest litigation will be frustrated. It is in fact a litigation in which a person is not aggrieved personally but brings an action on behalf of the downtrodden mass for the redressal of their grievance."

In view of the law laid down by the apex Court, in our considered opinion, on Public Interest Litigation (PIL), redressal of public injury, enforcement of public duty, protection of social rights and vindication of public interest must be the parameters for entertaining a PIL. The Court has a bounden duty to see whether any legal injury is caused to a person or a cluster of persons or an indeterminate class of persons by way of infringement of any Constitutional or other legal rights while delving into a PIL. The existence of any public interest as well as bona fide are the other vital areas to come under the Court's scrutiny. In absence of any legal injury or public interest or bona fide, a PIL is liable to be dismissed at the threshold. It is to be borne in mind that ultimately it is the rule of law that is to be vindicated. As such, there is a need for restrain on the part of the Public Interest Litigants when they move courts. The Courts should also be cautious and selective in accepting PIL as well.

15. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation' or the latest trend 'paisa income litigation'. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration.

16. In ***Ashok Kumar Pandey v. State of West Bengal***, 2003 (9) Scale 741, the apex Court held as follows:

> *"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil and public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It*

should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique consideration. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserves to be thrown out by rejection at the threshold and in appropriate cases with exemplary costs."

Laying down certain conditions on which the Court has to satisfy itself it was observed:

"The Court has to be satisfied about-

(a) the credentials of the applicant;

(b) the prime facie correctness or nature of the information given by him;

(c) the information being not vague and indefinite;

The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interest;

(i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and

(ii) *avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive action. In such case, however, the Court cannot afford to be liberal."*

The apex Court, on the point of exercising restraint, held that that it has to be very careful that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to be executive and legislature. The Court hardening its stand said:-

"The court has to act ruthlessly while dealing with imposters and busy-bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono public, though they have no interest of the public or even of their own to protect."

17. In ***T.N. Godavarman Thirumulpad v. Union of India***, (2006) 5 SCC 28, the apex Court, relying upon the judgments of ***S.P. Gupta v. President of India,*** AIR 1982 SC 149 : 1981 Supp. SCC 87, ***Janata Dal v. H.S. Chowdhary***, AIR 1993 SC 892, after noticing that lakhs of rupees had been spent by the petitioner to prosecute the case, held as under:

> *"it has been repeatedly held by the Court that none has a right to approach the Court as a public interest litigant and that Court must be careful to see that the member of the public who approaches the Court in public interest, is acting bona fide and not for any personal gain or private profit or political motivation or other oblique consideration.*
>
> *..... while the Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow their process to be abused by a mere busybody, or a meddlesome interloper or wayfarer of officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."*

18. Applying the test as laid down by the apex Court in the aforesaid judgments to the present context, it appears that the forum of public interest litigation is being misused and become hindrance for carrying out developmental activities in the villages, towns and cities including BMC and there is a procedure prescribed for carrying out the developmental activities, which in this case in order to implement the direction given by the National Green Tribunal and to give the benefit of Smart City to the local people if BMC is constructing a MCC for ward no.3, it cannot be said that illegality or irregularity has been committed by the authority so as to cause interference by this Court.

19. Undisputedly, the petitioner has approached this Court of equity invoking jurisdiction under Articles 226 and 227 of Constitution of India.

In ***Ramjas Foundation v. Union of India***, AIR 1993 SC 852, the apex Court held that who seeks equity must do equity. The legal maxim "*Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem*", means that it is a law of nature that one should not be enriched by the loss or injury to another.

Similar view has also been taken in ***K.R. Srinivas v. R.M. Premchand,*** (1994) 6 SCC 620, where the apex Court held that when a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective.

In ***Noorduddin v. K.L. Anand*** (1995) 1 SCC 242, the apex Court held that Judicial process should not become an instrument of oppression or abuse

of means in the process of the Court to subvert justice for the reason that the interest of justice and public interest coalesce. The Courts have to weigh the public interest vis-à-vis private interest while exercising their discretionary powers. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions.

Similar view has also been taken in ***Dr. Buddhi Kota Subbarao v. K. Parasaran*****,** AIR 1996 SC 2687, and ***Ramniklal N. Bhutta v. State of Maharashtra*****,** AIR 1997 SC 1236.

20. Considering the facts of the present case vis-à-vis the law laid down by the apex Court, this court is of the considered view that the writ petition suffers from suppression of material facts and, as such, the entire endeavor made by the learned counsel for the petitioner to pursue the Court for grant of relief by wasting the valuable time of the Court amounts to abuse of process of Court. Thus, we condemn the filing of such frivolous and vexatious litigation at the instance of the present petitioner.

21. In view of filing of such misconceived and frivolous petition, the petitioner has abused the process of Court and in that case, such litigant is not required to be dealt with lightly.

In ***Dr. Budhi Kota Subbarao v. K. Parasaran***, AIR 1996 SC 2687, the Supreme Court observed as under:-

> *"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."*

Similar view has also been reiterated by the apex Court in ***K.K. Modi v. K.N. Modi***, AIR 1998 SC 1297, ***Ashok Kumar Pandey v. State of West Bengal***, AIR 2004 SC 280, ***T.N. Godavarman Thirumulpad v. Union of India***, AIR 2006 SC 1774, ***B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association***, AIR 2006 SC 3106, ***Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra***, AIR 2008 SC 913 and ***Chaman Lal Saraf (dead thr. LRs.) v. State of Haryana***, (2015) 3 SCC 552.

22. In ***Sabia Khan v. State of Uttar Pradesh***, AIR 1999 SC 2284, the apex Court held that filing totally misconceived petition amounts to abuse of process of the Court and such litigant is not required to be dealt with lightly.

23. In ***Indian Council for Enviro-Legal Action v. Union of India***, (2011) 8 SCC 161, the apex Court held as under:-

> *"In consonance with the principle of equity, justice and good conscience judges should ensure that the legal process is not abused by the litigants in any manner. One way to curb this tendency is to impose realistic costs, which the Respondent or the Defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused."*

Accordingly, in that case, the applicant-industry was directed to pay costs of litigation on account of enormous court's time which had been wasted for all those years. The apex Court directed the applicant-industry to pay costs of Rs.10 lakhs in both the interlocutory applications.

24. In view of the facts and circumstances, as well as settled position of law, as discussed above, this Court is of the considered view that the writ petition is devoid of any merit and thus dismissed.

However, for wasting Court's time, which amounts to abuse of the process of Court, this Court imposes cost of Rs.10,000/- (rupees ten thousand) against the petitioner so as to give a caution to the litigants not to file such frivolous application in future seeking blanket relief from this Court. The aforesaid cost so imposed shall be deposited by the petitioner in the Advocate's Welfare Fund of the Orissa High Court Bar Association within a period of one month hence, failing which recovery will be made by following due process of law.

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

—— o ——

2020 (II) ILR - CUT- 509

JCRLA NO. 72 OF 2007

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

BIDYULATA SWAIN @ SARASWATI SWAIN ……Appellant

.V.

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Murder of eight years old son by mother – Mother made her son sat on her lap and dealt blows by 'Trisul' – Conviction by court below – Plea of benefit under section 84 of IPC for insanity pleaded – Evidence of D.W.1- Jail Doctor has categorically stated that on the next day of the incident he examined the accused inside the jail and had seen abnormal behavior and such behavior started improving after receiving treatment – D.W.2- Psychiatric Specialist of the jail also testified and found that the accused was talking to her-self, screaming and was not taking food – Accused was suffering from schizophrenia which means gross deviation of thinking, perception and behavior and a person could not understand rationally – The evidence of D.W.1 and D.W.2 clearly proves that the accused was suffering from medical insanity and was unable to know the nature of the act – Held, trial court has committed error in not appreciating the evidence of D.W.1 and D.W.2 in the proper perspective – Conviction set aside.

Case Laws Relied on and Referred to :-

1. AIR 2002 S.C. 3399 : Shrikant Anandrao Bhosale Vs. State of Maharashtra.
2. 2008 (I) OLR 118 : State of Orissa Vs. Duleswar Barik.
3. 1993 (I) OLR 97 : Ajaya Mahakud Vs. State of Orissa.

For Appellant : Mr. H.K. Mallik.

For Respondent : Mr. Seikh Zafarullah (A.S.C.)

JUDGMENT Date of Hearing & Judgment : 20.02.2020

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 imprisonment for life vide judgment dated 24.06.2007 in S.T. Case No.7/31 of 2005 passed by the learned Adhoc Addl. Sessions Judge (F.T.C.), Balasore.

2. Adumbrated in brief, the prosecution case is that the appellant, mother of the deceased a eight years old son while staying at Jarkapada, Balasore on 8.6.2004 at 5.30 A.M. made her son sat on her lap and holding a Trishul dealt blows, as a result, the son expired in the hospital. The husband and family members were not available in the house, then the informant hearing the sound could make a sneak peek and called the other witnesses and within one hour lodged the written F.I.R.-Ext.1 which was registered U/s.307 of the IPC

as Balasore Industrial Area P.S. Case No.62 of 2004. The accused was arrested on the same day from the spot.

3. In course of investigation, 'Trishul' was seized. Inquest was made so also the post-mortem by Doctor-P.W.8. After completion of investigation, charge-sheet was submitted U/s. 302 of the IPC. Learned SDJM took cognizance and committed the case to the Court of Session. The accused faced trial U/s.302 of the IPC.

4. The plea of defence was insanity U/s. 84 of the IPC. Prosecution examined 11 witnesses in all. P.W.1, the informant and P.Ws.2, 3, and 4 are eye-witnesses. P.W.5 is a seizure witness while P.W.6 is the police constable. P.W.7 is the Scientific Officer. P.W.8 is the Doctor who conducted the post-mortem examination. P.Ws.9, 10 and 11 are Investigating Officers. Post-mortem Report, F.I.R., spot map etc. are marked as Ext.1 to Ext.11. Pitch fork is marked as M.O.V. On behalf of the defence, a Doctor and Psychiatric Specialist were examined as D.W.1 and D.W.2 and Ext.-A series are documents to show the medical treatment of the deceased.

5. Learned trial court believing the eye-witnesses and disbelieving the plea of insanity, convicted the accused U/s.302 of the IPC and passed sentence as stated above.

6. Learned counsel for the appellant-Mr. H.K. Mallik would submit that the circumstances behind the murder of son by mother coupled with the evidence of D.W.1 and D.W.2 that soon after the incident, she was treated in the jail for her insanity is sufficient to indicate that the accused is entitled to get the benefit of Section 84 of the IPC.

Learned Addl. Standing Counsel, Mr. Sk. Zafarullah submits that there is a difference between the legal insanity and medical insanity and the mother-accused is not found to have suffered legal insanity.

7. The evidence of Doctor-P.W.8 and post-mortem report-Ext.10 coupled with his opinion-Ext.11 that Trishul-M.O.V could have caused such injuries proves that the death of the deceased son of the accused was homicidal in nature.

The plea of insanity is not only taken during trial but also in the examination of accused U/s.313 of Cr.P.C.

8. D.W.1-Jail Doctor has categorically stated that on 9.6.2004 i.e. the next day of the incident on being requisitioned by the jailor, he examined the accused inside the jail and had seen abnormal behaviour and such behaviour started improving after receiving treatment. D.W.2-Psychiatric Specialist of the jail also testified that he found on 14.06.2004 that the accused was talking to her-self, screaming and was not taking food and he gave psychotropic drugs. He has proved the treatment document vide Ext-A series. He has also stated that he collected the history and learnt that the accused was under unusual stress. He has categorically stated that the accused was suffering from schizophrenia which means gross deviation of thinking, perception and behaviour and a person could not understand rationally. He has also stated that the accused was suffering from medical insanity. The evidence of D.W.1 and D.W.2 clearly proves that the accused was suffering from medical insanity and was unable to know the nature of the act. This is a factual finding we have to record from the evidence. Learned trial court has committed error in not appreciating the evidence of D.W.1 and D.W.2 in the proper perspective.

9. Under Section 84 of the IPC, the accused can be exonerated from liability from doing an act on the ground of unsoundness of mind if she at the time of doing the act is either incapable of knowing the nature of the act or that she is doing what is neither wrong or contrary to law.

It is difficult to prove the precise state of accused mind at the time of commission of offence but some indication thereafter is often furnished by the conduct of the accused while committing it. The standard to be applied is whether according to ordinary standard adopted by a reasonable man, the act is right or wrong.

> ***Section 105*** *of the Indian Evidence Act which deals with burden of proof stipulates that the burden of proving the existence of circumstances bringing the case within the General Exception is on the person seeking its benefit. A specific illustration to Section 105 of the Evidence Act in reference to Section 84 provides as under:-*
>
> *"(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.*
>
> *The burden of proof is on A."*
>
> In the decision reported in AIR 2002 S.C. 3399: ***Shrikant Anandrao Bhosale v. State of Maharashtra,*** it has been stated that *the question whetherthe appellant has proved the existence of circumstances bringing his case within the*

> *purview of Section 84 will have to be examined on the totality of the circumstances. The unsoundness of mind, as a result whereof, one is incapable of knowing the consequence of his actions, is a state of mind of a person which ordinarily can be inferred from the circumstances.*

The above judgment is relied upon by this Court in the case of **State of Orissa vrs. Duleswar Barik:** 2008 (I) OLR 118 to hold that the behaviour of the appellant on the date of occurrence and the medical evidences are indicators of insanity U/s.84 of the IPC particularly, when there is no provocation and there is no attempt to conceal what the accused has done.

10. In the case at hand as stated above there was no premeditation or pre-planning of the act to commit murder of her son.

In another case of **Ajaya Mahakud vrs. State of Orissa:** 1993 (I) OLR 97, it is also held by the Division Bench of this Court at para-11:-

> ***"11.*** *xxx xxx xxx. To be entitled to the protection of this section, the person must be non compos men-tis at the time of commission of the offence. The pattern of the crime, the circumstances under which it was committed, the manner and method of its execution and the behaviour of the offender before or after the commission of the crime furnish some of the important clues to ascertain whether the accused had no cognitive faculty to know the nature of the act or that what he was doing was either wrong or contrary to law. Merely establishing that sometime prior to the occurrence, the accused was behaving, in strange manner or had been taciturn, moody or saturnise, will' not be sufficient to bring his case Under Section 84. The question as to whether the accused was insane at the time of occurrence so as to attract the application of Section 84 is a question of fact to be decided on merits in each case on the facts of that case."*

11. Now descending to the facts at hand, it is decipherable legally from the evidence on record that the accused had made her son sit on her lap and used 'Trishul' to give blows. She did not try to conceal or abscond. She had no motive to inflict injury to her son. The evidence of D.W.1 and D.W.2-two specialists found that there was unsoundness of mind soon thereafter inside the prison and was treated for the same.

12. We are satisfied that the accused was incapable of knowing the nature of the act by the time she dealt 'Trishul' blows to her son unfortunately who succumbed to his injuries and the plea U/s.84 of the IPC is available and she is to be protected under the said provision. In view thereof, the conviction is not sustainable. Accused is to be acquitted of the charge.

13. In the result, the conviction of the appellant U/s.302 of the IPC and sentence passed thereon vide judgement dated 24.04.2007 by the learned Adhoc Addl. Sessions Judge (F.T.C.), Balasore in S.T. Case No.7/31 of 2005 are hereby set aside.

14. The appellant is set at liberty forthwith from jail unless she is required in any other case.

15. Accordingly, the appeal is allowed.

16. LCRs. be returned immediately.

—— o ——

2020 (II) ILR - CUT- 514

S. K. MISHRA, J & KUMARI SAVITRI RATHO, J.

WRIT PETITION (CRIMINAL) NO. 57 OF 2020

CHINMAYEE JENA @ SONU KRISHNA JENA .....Petitione
.V.
STATE OF ODISHA & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of Habeas Corpus seeking recovery of partner and making serious allegations of violation of the constitutional rights under Articles 14 and 21 – Self determination of gender and self-expression – Whether falls within the realm of personal liberty guaranteed under the Constitution – Held, yes.

"Taking into consideration the aforesaid principles of human right, the Hon'ble Supreme Court at Paragraph-74, held that the recognition of one's gender identity lies at the heart of the fundamental right to dignity. It was further held by the Hon'ble Supreme Court that gender constitutes the core of one's sense of being as well as an integral part of a person's identity; legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under the Constitution. At paragraph-75, the Hon'ble Supreme Court referred to Article 21 of the Constitution and indicated that Articles 21 guarantees the protection of personal autonomy of an individual. Quoting Anuj Garg vs. Hotel Association of India, (2008) 3 SCC 1, the Hon'ble Supreme Court reiterated that the personal autonomy includes both the negative right of not to be subject to interference by others and

positive rights of individuals to make decisions about their life, to express himself and to choose what activity take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution. The above view was taken by Hon'ble Sri Justice K.S.P. Radhakrishnan in the aforesaid judgment. Concurring with Hon'ble Sri Justice K.S.P. Radhakrishnan, Hon'ble Dr. Justice A.K. Sikri held that the basic spirit of our Constitution is to provide each and every person of the nation, equal opportunity to grow as human being, irrespective of race, caste, religion, community and social status, Hon'ble Dr. Justice A.K. Sikri further quoted Granville Austin, who analyzing the functioning of Indian Constitution in the last 50 years, has described three distinguished strands of the Indian Constitution. They are: (i) protecting national unity and integrity, (ii) establishing of institution and spirit of democracy; and (iii) fostering social reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as a seamless web. There cannot be social reforms till it is ensured that each and every citizen of the country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words "We the People". The most important gift to the common person given by the Constitution is fundamental rights which may also be called Human Rights. The concept of equality in Article 14 so also the meaning of words life, liberty and law in Article 21 has been considerably enlarged by judicial decision. Anything, which is not reasonable, just and fair, is not treated to the equal and is, therefore, violative of Article 14." (Para 11)

"Law is a reflection of current social values or norms. Social norms undergo change with time and law keeps abreast with the same Courts recognize these changes and rule on the same. The oft quoted maxim – love knows no bounds has expanded its bounds to include same sex relationships. A reading of the Supreme Court judgements will indicate that individual rights have to be balanced with social expectations and norms. The freedom of choice is therefore available to the two individuals in this case who have decided to have a relationship and live together and society should support their decision. The decisions of the Hon'ble Supreme Court in NALSA vs Union of India : (2014) 5 SCC 438, Anuj Garg vs Hotel Association of India : (2009) 3 SCC 1 and, Navtej Singh Johar vs Union of India : (2008) 10 SCC1 referred to and discussed by S.K Mishra J., have settled the law regarding the right of a person for self determination of his/her sex/gender and consequently the right to have a live in relationship. Therefore the observations of the Hon'ble Apex Court in the case of Shakti Vahini vs Union of India : (2018) 7 SCC 192 ,will also apply to this case. In the Shakti Vahini case, the Hon'ble Court was dealing with the distressing fallout of "honour crimes" and the illegal activities of "khap panchayats" and laid down various preventive, remedial and punitive measures for dealing with the same by stating the broad contours and modalities. Observations in the said judgment, which are relevant for the present case are quoted below. "Assertion of choice is an insegregable facet of liberty and dignity and that is why the French philosopher and thinker, Simone Weil, has said :- " Liberty , taking the word in its concrete sense consists in the ability to choose." xxx

xxx xxx "45. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, 20 the same is bound by the principle of constitutional limitation but in the absence of such limitation , none , we mean ,no one shall be permitted to interfere in the fructification of the said choice .If the right to express one's choice is obstructed , it would be extremely difficult to think of dignity in its sanctified completeness .When two adults marry out of their own volition , they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law"--." (Para 14)

Case Laws Relied on and Referred to :-

1. (2014) 5 SCC 438 : National Legal Services Authority Vs. Union of India & Ors.
2. (2008) 3 SCC 1 : Anuj Garg Vs. Hotel Association of India.
3. (2008) 10 SCC 1 : Navtej Singh Johar Vs. Union of India.
4. (2014) 5 SCC 438 : NALSA Vs. Union of India .
5. (2009) 3 SCC 1 : Anuj Garg Vs. Hotel Association of India.
6. (2008) 10 SCC1 : Navtej Singh Johar Vs. Union of India.
7. (2018) 7 SCC 192 : Shakti Vahini Vs. Union of India.

For the Petitioner : Ms. Clara D' Souza, Ms. S. Soren & Mr. H.B. Dash.

For the Opp. Parties : Mrs. Saswata Pattnaik, Addl. Govt. Adv.
Mr. Arun Kumar Budhia

JUDGMENT Date of Judgment: 24.08.2020

S.K.MISHRA, J.

The petitioner originally belonging to female gender, has exercised his rights of self gender determination and preferred to be addressed as he/his. Therefore, we have recognized the petitioner's right to be treated as a male and referred him as he/him/his.

2. This judgment arises out of an application filed under Article 226 and 227 of the Constitution of India, 1950 in which the petitioner-Chinmayee Jena @ Sonu Krishna Jena, aged about 24 years has approached this Court with the grievance that his life partner "Rashmi" (not the original name, which is withheld) has been forcibly taken away by her mother and uncle, i.e.

Opposite Party Nos. 5 and 6. The petitioner, therefore, prays for issuance of a writ of Habeas Corpus directing opposite parties to produce his partner of the petitioner before the Court and to pass appropriate orders.

3. In course of hearing, Ms. Clara D' Souza along with Ms. S. Soren, learned counsel for the petitioner urged that both the petitioner and his life partner (Rashmi) are major and have been enjoying consensual relationship since, 2017. They were studying in one school and later on, in one college. After finishing their studies, the petitioner got a private job at Bhubaneswar and was staying on rent in a housing colony of Bhubaneswar. The learned counsel for the petitioner relying upon the joint affidavit by Chinmayee Jena @ Sonu Krishna Jena and Subhashree Priyadarshini Samal, which is sworn before the Executive Magistrate, Bhubaneswar on 16.03.2020 and contents of the writ petition, argued that both of them fell in love with each other in 2011. Thereafter, they decided to stay together. It was also contended by the learned counsel for the petitioner that, as per the ratio decided by the Hon'ble Supreme Court in the case of ***National Legal Services Authority vs. Union of India and others,*** (2014) 5 SCC 438, self- determination of gender is an integral part of personal autonomy and self-expression and falls with the realm of personal liberty guaranteed under Article 21 of the Constitution. It is further submitted that in the aforesaid judgment, the Hon'ble Supreme Court has given weightage to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". According to the petitioner, as per the ratio decided by the Hon'ble Supreme Court in the aforesaid case, he availed certification of Gender Dysphoria for Trans Man from Dr. Amrit Pattojoshi, D.P.M., M.D. (Neuro-Psychiatry), Central Institute of Psychiatry, Ranchi on dated 25.01.2020 (Annexure-3). The Dr. Amrit Pattojoshi has issued the living certificate. We find it expedient to quote the exact findings given by the expert.

> " Date: 25/01/20
> **CERTIFICATION OF GENDER DYSPHORIA TRANS MAN**
>
> **To Whom It may Concern:**
>
> I have assessed the individual (sex assigned at birth: female, gender identity: male, Date of Birth: 02/03/1996, assigned name: Chinmayee Jena, father: Bibhuti Bhusan Jena, preferred name: Sonu Krishna Jena, preferred pronouns: He/him) who consulted me regarding acute discomfort with his assigned gender.

On taking detailed case history, I have found that the client has had gender dysphoria (diagnosis, DSM-V)/gender incongruence (diagnosis, ICD-11) from an early age.

The individual is living in the preferred gender in real life and undergone two (number of) sessions of psychiatric evaluation since 30/11/19.

The individual has no psychotic symptoms or other psychiatric morbidities. The only diagnosis is that of gender dysphoria.

The client is well informed about his condition and treatment options. Considering that his cognitive functions are normal, and he is legally an adult, he is fully capable of taking medical decisions.

In my opinion he is psychiatrically fit to undergo gender-affirming procedures (hormone therapy/gender affirming surgery/others please specify-_____."

Dr. Amrit Pattojoshi
D.P.M., M.D. (Neuro-Psychiatry), Central Institute of Psychiatry, Ranchi
Regd. No.14110
Professor and HoD, Hi-tech Medical College and Hospital
Bhubaneswar"

4. From the aforesaid certification, it is clear that the petitioner had gender dysphoria (diagnosis, DSM-V)/gender incongruence (diagnosis, ICD-11) from an early age after two sessions of psychiatric evaluation since 30.11.2019. The doctor opined that the petitioner has no psychotic symptoms or other psychiatric morbidities. The only diagnosis is that of gender dysphoria. In other words, it means that the petitioner is a major having no psychological problem, except gender dysphoria/gender incongruence and that he has cognitive functions, which are normal and, therefore, being an adult, he is capable of taking medical decision.

5. Then, the learned counsel for the petitioner relied upon Annexure-4, which is a copy of affidavit jointly sworn by the petitioner and his partner before the Executive Magistrate, Bhubaneswar. It is evident from the affidavit that both the petitioner and his partner were living together in a live-in relationship at the same place. It is further clear that they have sworn the affidavit in the light of the Supreme Court decision in the case of NALSA vs. Union of India (supra).

6. While they were residing so, in a live-in relationship, on 09.04.2020, mother and uncle of the petitioner's partner came to the house of the

petitioner and forcibly took the petitioner's partner against her will. It was done against her will even though both the petitioner and his partner have attained the age of majority and decided to stay together and be life partner. It was further contended that in the provisions of Protection of Women from Domestic Violence Act, 2005, legislature has acknowledged live-in relationship by giving rights and privileges. Therefore, the learned counsel for the petitioner contends that even if the parties, who are living together in a 'live-in relationship' though they belong to the same gender, are not competent to enter into wedlock, but still they have got a right to live together even outside the wedlock. Thereafter, the petitioner filed a report before the Inspector In-Charge, Khandagiri Police Station, Khandagiri, Bhubaneswar and the Inspector In-Charge, Bari Police Station, Bari, Jajpur. But, the police authorities have not taken any action. The petitioner, when came to know that the family members of his partner are going to forcibly arrange her marriage with someone else, filed this writ application for issuance of a writ of Habeas corpus.

7. The Opposite Party Nos. 1 to 4, being the State Government functionaries, represented by Mrs. Saswata Pattnaik, learned Addl. Government Advocate, have not filed any counter affidavit. Recognizing right of persons belonging to the same gender for live-in relationship, Mrs. Saswata Pattnaik, learned Addl. Government Advocate submitted that the State is willing to carry out any orders passed by this Court.

8. Notice was sent to the Opposite Party nos. 5 and 6 and they have appeared by engaging Mr. Arun Kumar Budhia, learned counsel. They have not filed any counter affidavit in the case. While issuing notice, this Court has directed the Superintendent of Police, Jajpur i.e. Opposite Party No.2 to ascertain wishes of "Rashmi", petitioner's partner and whether she wants to stay with the petitioner and also to ensure her marriage should not be solemnized against her will. Thereafter, on 10.08.2020, we directed the Superintendent of Police, Jajpur to secure attendance of the victim and have a video conferencing with her on 17.08.2020. We have talked over phone with the lady, who was identified by the S.P., Jajpur, as the lady, who happens to be the daughter of Opposite Party No.5 and who is in a relationship with the petitioner. We have conversed with her. It was explained to her that merely because the writ petition has been filed making allegation of illegal restraint, she was not under obligation or compulsion to join the company/society of the petitioner and she could stay with her family, if she chose to do so. But,

she categorically stated that she wants to join the petitioner without any further delay but the order was not passed on that day and it was deferred to 19.08.2020 on the prayer of Mr. A.K. Budhia, learned counsel for the Opposite Party Nos. 5 and 6. On 19.08.2020, the learned counsel for the Opposite Party Nos. 5 and 6 again sought for adjournment and the matter was directed to be listed on 20.08.2020. But, as the Bench did not function on that day, it was listed on 21.08.2020. Mr. A.K. Budhia, learned counsel, while admitting that the legal position has been set at rest by judgments passed by the Hon'ble Supreme Court on the rights of the individuals belonging to the same gender, has expressed his concern about the well being of the daughter of the Opposite Party No.5. He prays that, if any, order is passed in favour of the petitioner, then appropriate safeguards should be given to the petitioner's partner for her well being and safety.

9. In the case of ***National Legal Services Authority vs. Union of India*** (Supra), the Hon'ble Supreme Court has taken into consideration the views of the United Nations, other human rights bodies, gender identity and sexual orientation and has quoted extensively from Yogyakarta Principles. It is appropriate to take note of the exact words used by the Hon'ble Supreme Court in the aforesaid case. We are quoted hereunder:

> " **23**. United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to States human rights obligations.
>
> **24**. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta

Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.

YOGYAKARTA PRINCIPLES:

25. Principle 1 which deals with the right to the universal enjoyment of human rights, reads as follows :-

"**1**. **The right to the universal enjoyment of human rights.-** beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

(a) embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

(b) amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

(c) undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

(d) integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

2. ***The rights to equality and non-discrimination.-*** Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

(a) embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

(b) repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different- sex sexual activity;

(c) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

(d) take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

(e) in all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

(f) take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. The right to recognition before the law.- recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each persons self- defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self- determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a persons gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

(a) ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

(b) take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

(c) take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex including birth certificates, passports, electoral records and other documents reflect the persons profound self-defined gender identity;

(d) ensure that such procedures are efficient, fair and non- discriminatory, and respect the dignity and privacy of the person concerned;

(e) ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

(f) undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

4. **The right to life.-** Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

(a) repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

(b) remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

(c) cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

6. The right to privacy.- Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to ones sexual orientation or gender identity, as well as decisions and choices regarding both ones own body and consensual sexual and other relations with others.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

(b) repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(c) ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent;

(d) Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

(e) release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

(f) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others

9. The right to treatment with humanity while in detention.- Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

(a) ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

(b) provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

(c) ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

(d) put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

(e) ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

(f) provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

(g) undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality identity.

18. ***Protection from medical abuses.-*** No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a persons sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

(b) take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

(c). establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

(d) ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

(e) review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

(f) ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. The right to freedom of opinion and expression.- Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

(b) ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

(c) take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

(d) ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

(e) ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

(f) ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

26. The UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and

> fulfill the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:-
>
> "**32.** ***Sexual orientation and gender identity***.- 'Other status' as recognized in Article 2, para (2), includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivors pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

10. From the Yogyakarta principles, it is evident that all humans have the universal right of enjoyment of human rights, right to equality and non-discrimination, the right to recognition before the law, right to life, the right to privacy and right to treatment with humanity while in detention etc. It was also repealed that all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex, who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them; remit sentences of death and release all those currently waiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent. Several such resolutions were passed, which have been quoted above.

11. Taking into consideration the aforesaid principles of human right, the Hon'ble Supreme Court at Paragraph-74, held that the recognition of one's gender identity lies at the heart of the fundamental right to dignity. It was further held by the Hon'ble Supreme Court that gender constitutes the core of one's sense of being as well as an integral part of a person's identity; legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under the Constitution. At paragraph-75, the Hon'ble Supreme Court referred to Article 21 of the Constitution and indicated that Articles 21 guarantees the protection of personal autonomy of an individual. Quoting ***Anuj Garg vs. Hotel Association of India,*** (2008) 3 SCC 1, the Hon'ble Supreme Court reiterated that the personal autonomy includes both the negative right of not to be subject to interference by others and positive rights of individuals to make decisions about their life, to express himself and to choose what activity take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution.The

above view was taken by Hon'ble Sri Justice K.S.P. Radhakrishnan in the aforesaid judgment. Concurring with Hon'ble Sri Justice K.S.P. Radhakrishnan, Hon'ble Dr. Justice A.K. Sikri held that the basic spirit of our Constitution is to provide each and every person of the nation, equal opportunity to grow as human being, irrespective of race, caste, religion, community and social status, Hon'ble Dr. Justice A.K. Sikri further quoted Granville Austin, who analyzing the functioning of Indian Constitution in the last 50 years, has described three distinguished strands of the Indian Constitution. They are: (i) protecting national unity and integrity, (ii) establishing of institution and spirit of democracy; and (iii) fostering social reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as a seamless web. There cannot be social reforms till it is ensured that each and every citizen of the country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words "We the People". The most important gift to the common person given by the Constitution is fundamental rights which may also be called Human Rights. The concept of equality in Article 14 so also the meaning of words life, liberty and law in Article 21 has been considerably enlarged by judicial decision. Anything, which is not reasonable, just and fair, is not treated to the equal and is, therefore, violative of Article 14.

12. The Hon'ble Supreme Court of India in the case of ***Navtej Singh Johar vs. Union of India,*** (2008) 10 SCC 1 has held that Section 377 of the Indian Penal Code, 1860, which penalizes self-same couples, transgresses Article 14, 15, 19 and 21 of the Constitution of India. In that case, the Hon'ble Supreme Court has held that (i) Section 377 of the IPC, in so far as it criminalises consensual sexual conduct between two adults of the same sex, is unconstitutional; (ii) members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including liberties protected by the Constitution; (iii) the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation; (iv) members of the LGBT community are entitled to the benefit of equal citizenship, without discrimination, and to equal protection of law; and the earlier decision of the Supreme Court in Koushal's case is overruled.

13. Thus, taking into consideration the aforesaid authoritative pronouncements of the Hon'ble Supreme Court, there is hardly any scope to

take a view other than holding that the petitioner has the right of self-determination of sex/gender and also he has the right to have a live-in relationship with a person of his choice even though such person may belong to the same gender as the petitioner.

Therefore, we allow the writ application (criminal) and direct that the petitioner and the daughter of the Opposite Party No.5 have the right to decide their sexual preferences including the right to stay as live-in partners. The State shall provide all kind of protection to them, which are enshrined in Part-III of the Constitution of India, which includes the right to life, right to equality before law and equal protection of law. Hence, we direct the Opposite Party No.2 to clear the way by taking appropriate administrative/police action to facilitate Rashmi to join the society of the petitioner. However, we are also alive to the apprehensions of the Opposite Party No.5, mother of the girl. Hence, we further direct that the petitioner shall take all good care of the lady as long as she is residing with him and that the Opposite Party Nos. 5 and 6 and the sister of the lady would be allowed to have a communication with her both over phone or otherwise. They have the right to visit the lady in the residence of the petitioner. The lady shall have all the rights of a woman as enshrined under the Protection of Women from Domestic Violence Act, 2005. The Opposite Party No.3, Inspector In-Charge of the Khandagiri Police Station, Khandagiri, Bhubaneswar shall obtain a written undertaking (to that effect) from the petitioner and shall keep a copy thereof in his office and send the original to this Court to form a part of this record. It should be sent in the address of the Registrar General of this Court.

SAVITRI RATHO, J.

(concurring) – I have carefully gone through the well considered decision of my Brother Mr S.K Mishra, J. I whole heartedly agree with his reasoning and ultimate conclusion. But since this is an unusual case, and alongwith the rights of the two individuals who have exercised their right to live together, the interest of two other individuals will be affected because of the mindset of the society they live in, I want to supplement the same with some reasons and observations.

14. Law is a reflection of current social values or norms. Social norms undergo change with time and law keeps abreast with the same Courts recognize these changes and rule on the same. The oft quoted maxim – love

knows no bounds has expanded its bounds to include same sex relationships. A reading of the Supreme Court judgements will indicate that individual rights have to be balanced with social expectations and norms. The freedom of choice is therefore available to the two individuals in this case who have decided to have a relationship and live together and society should support their decision. The decisions of the Hon'ble Supreme Court **in NALSA vs Union of India : (2014) 5 SCC 438, Anuj Garg vs Hotel Association of India : (2009) 3 SCC 1** and, **Navtej Singh Johar vs Union of India : (2008) 10 SCC1** referred to and discussed by S.K Mishra J., have settled the law regarding the right of a person for self determination of his/her sex/gender and consequently the right to have a live in relationship. Therefore the observations of the Hon'ble Apex Court in the case of **Shakti Vahini vs Union of India : (2018) 7 SCC 192** ,will also apply to this case. In the Shakti Vahini case, the Hon'ble Court was dealing with the distressing fallout of "honour crimes" and the illegal activities of "khap panchayats" and laid down various preventive, remedial and punitive measures for dealing with the same by stating the broad contours and modalities. Observations in the said judgment, which are relevant for the present case are quoted below.

> *"Assertion of choice is an insegregable facet of liberty and dignity and that is why the French philosopher and thinker, Simone Weil, has said :- " Liberty, taking the word in its concrete sense consists in the ability to choose."*
>
> *xxx xxx xxx*
>
> ***"45**. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation , none , we mean ,no one shall be permitted to interfere in the fructification of the said choice .If the right to express one's choice is obstructed , it would be extremely difficult to think of dignity in its sanctified completeness .When two adults marry out of their own volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law"……..*

15. But taking the mindset of the society in which Opp Party No 5 lives, and which is embodied in the mindset of Opp party No 5 herself, it will take some time for her to accept the decision of Rashmi. Her mindset is apparent from the submissions of her counsel Mr A.K Budhia which are referred to in the next paragraph.

16. In this case, although no counter affidavit has been filed on behalf of the Opp parties No 5 and 6, Mr A.K Budhia learned counsel has submitted that the mother of the partner of the petitioner had been widowed at an early age and has brought up her two daughters undergoing great hardship and sacrifice and like all Indian mothers had educated her daughter with the hope that she would stand on her feet and ultimately settle down (get married). She is disturbed with the decision of her daughter and is hopeful that given time, her daughter would change her mind . She is also worried about the future of her daughters - Rashmi who has decided to lead a life which is different from what is expected by society and her younger daughter.

17. Ms D'Souza learned counsel for the petitioner had responded to these submissions by stating that the petitioner would ensure that the relationship between the petitioner and Rashmi would not affect the latter's relationship with her mother and the petitioner would ensure that Rashmi stays in touch with her mother and sister and extends monetary support to them.

18. It goes without saying that Rashmi's decision will affect her mother - Opp party No 5 and her younger sister, both mentally and socially . But on account of the possibility of social stigma or mental turmoil caused to them, Rashmi's right to select her life partner, cannot be stifled or negated. However, while recognizing the right of Rashmi, this Court cannot remain oblivious to the pain and tribulations of the mother and sister who have to live in society. It is well known when a girl decides to settle down with (marry) a person of her choice, usually her family members especially her parents, view the decision with trepidation, believing that they would have found a better candidate for her. In this case because of the nature of choice, this trepidation is multiplied. Therefore while exercising her right to reside with the partner of her choice, Rashmi should not forget her duty towards her mother and younger sister i.e. to look after their financial, social and emotional well being.

19. The Legislature has of course recognized the financial plight of parents and senior citizen who are often neglected by their offspring by

enacting the "The Maintenance and Welfare of parents and Senior Citizens Act, 2007" whose provisions of which can be invoked by Opp party No 5 if the need arises. But, it is made that the Opp Parties No 5 and 6 should not create problems in the life of petitioner and Rashmi.

20. It is also clarified that merely because Rashmi will join the company of the petitioner on account of our intervention, there is no bar for her to separate ties with the petitioner in case their relationship falls apart or she wants to go back to her mother, whatever be the reason. As regards well being of the daughter of Opp Party No 5, my brother S.K Mishra, J. has taken care by imposing suitable conditions. But it is made clear that the petitioner apart from taking care of Rashmi should not compel or coerce Rashmi to leave the society of the petitioner against her will.

21. We hope and trust that the petitioner and his partner Rashmi will lead a happy and harmonious life so that their family members have no cause for worry and society has no excuse to raise a finger at them. The WP (CRL) is accordingly allowed.

—— o ——

2020 (II) ILR - CUT- 532

DR. B.R.SARANGI, J.

W.P.(C) NO. 14345 OF 2017

NIHAR RANJAN TRIPATHY .....Petitioner

.V.

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

SERVICE LAW – Appointment by back door entry – Regularization – Scope of – Held, Petitioner was neither appointed on direct recruitment basis nor was he transferred on deputation basis from any other government organization to the OHRC, rather on consideration of a plain paper application and conducting a formal interview, he was engaged as stenographer with a consolidated remuneration of Rs.3000/- per month vide office order dated 29.08.2003 – Thereby, the petitioner, being a rank outsider engaged on contractual basis and getting consolidated remuneration, cannot and could not be absorbed under Rule-8 of OHRC Rules, 2012 – In other words, the entry of the

petitioner in service was irregular one and not in accordance with the rules and thereby was a back door entrant to such service – More so, his recruitment to the post of junior stenographer under the OHRC was de hors the rules – In the above backdrop, it is the settled legal proposition that no person can be appointed even on a temporary or *ad hoc* basis without inviting applications from all eligible candidates – If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc., that will not meet the requirement of Articles 14 and 16 of the Constitution – Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered – A person employed in violation of these provisions is not entitled to any relief including salary – For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled – The equality clause enshrined in article 16 requires that every such appointment be made by an open advertisement so as to enable all eligible persons to compete on merit – It is a settled legal proposition that appointment to any public post is to be made by advertising the vacancy and any appointment made without doing so violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.

Case Laws Relied on and Referred to :-

1. (2007) 8 SCC 264 : M.P. State Coop. Bank Ltd. Bhopal .Vs. Nanuram yadav.
2. (1994) 1 SCC 44 : Ram Chand .Vs. Union of India.
3. (1999) 7 SCC 209 : Ajit Singh (II) .Vs. State of Punjab.
4. (2006) 12 SCC 724 : Rashmi Mishra .Vs. M.P. Public Service Commission.
5. (2007) 1 SCC 408 : Indian Drugs & Pharmaceuticals Ltd. .Vs. Workmen Indian Drugs & Pharmaceuticals Ltd.
6. (1994) 2 SCC 204 : State of Uttar Pradesh .Vs. U.P. State Law Officers' Association.
7. (2009) 5 SCC 65 : State of Bihar .Vs. Upendra Narayan Singh.
8. AIR 2006 SC 1165 : Union Public Service Commission .Vs. Girish Jayanti Lal Vaghela.
9. (2006) 4 SCC 1 : State of Karnataka .Vs. Umadevi.
10. (2011) 3 SCC 436 : State of Orissa .Vs. Mamata Mohanty.
11. (2013) 11 SCC 357 : State of Madhya Pradesh .Vs. Ku. Sandya Tomar.
12. 1971 (2) All ER 1278 : Malloch .Vs. Aberdeen Corporation.
13. AIR 1994 SC 1558 : Ravi S. Naik .Vs. Union of India.
14. [1967] 1 All ER 226 : HK (An Infant) in re.
15. (1978) 1 SCC 248 : Maneka Gandhi .Vs. Union of India.
16. AIR 1965 SC 1767 : Bhagwan .Vs. Ramchand.
17. (1975) 1 SCC 421 : Sukdev Singh .Vs. Bhagatram.

18. (1978) 1 SCC 405 : Mohinder Singh Gill .Vs. The Chief Election Commissioner.
19. AIR 1981 SC 818 : Swadeshi Cotton Mills .Vs. Union of India.
20. 1995 Supp (1) SCC 552 : State of U.P. .Vs. Vijay Kumar Tripathi.
21. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited .Vs. Government of Andhra Pradesh.

For Petitioner : Mr. D.K. Sahoo-1 & S.N. Nayak.

For Opp.Parties : Mr. B. Senapati, Addl. Govt. Adv.
M/s A.K. Mohapatra, S.J. Mohanty & Mr. V. Narasingh.

JUDGMENT Date of Judgment : 06.08.2020

DR. B.R.SARANGI, J.

The petitioner, who is working as a stenographer in Orissa Human Rights Commission, has filed this writ petition seeking to quash Annexure-10 dated 21.06.2017 issued by the Senior Audit Officer/GSA (V) in the office of the Accountant General (G&SSA), Odisha, Bhubaneswar with an observation that absorption of the petitioner is irregular as he was not appointed according to the relevant rules or in adherence to Articles 14 and 16 of the Constitution of India; and consequential office order dated 13.07.2017 at Annexure-11 issued by Deputy Secretary, Odisha Human Rights Commission withdrawing the annual periodical increment sanctioned w.e.f. 01.11.2016 and directing the petitioner to make repayment of an amount of Rs.4264/- by depositing the same by way of treasury challan in appropriate government head within a fortnight otherwise action shall be taken for such recovery as per rules.

2. The factual matrix of the case, in hand, is that Odisha Human Rights Commission (in short "OHRC") was established in the year 2003 in exercise of the power conferred under Section 21 of the Protection of Human Rights Act, 1993. It being an autonomous body regulated by its own rules and regulations and the State Government provided funds for establishment and payment of salary to its employees. A post of junior stenographer was created in the OHRC on 24.04.2003 with administrative approval of the Law Department of Government of Odisha. Instead of filling up of the post either by direct recruitment or by transfer on deputation basis, on a plain paper application submitted by the petitioner and by conducting a formal interview, he was appointed for a period of one year as junior stenographer, vide order dated 29.08.2003, with monthly consolidated remuneration of Rs.3000/- per month. Although the service of the petitioner was temporary in nature, owing to need of his services, the same was extended from time to time uninterruptedly till 2013.

2.1 In exercise of powers conferred by the sub-section (1) read with clause (b) of sub-section (2) of Section 41 of the Protection of Human Rights Act, 1993, the State Government framed a set of Rules regulating the method of recruitment and conditions of service of the officers and other staff of the Odisha Human Rights Commission called "Odisha Human Rights Commission (Method of Recruitment and Conditions of Service of Officers and other Staff) Rules, 2012 (for short "OHRC Rules, 2012"). In the year 2013, a selection committee was constituted to consider regularization of service of persons like the petitioner. By decision dated 13.11.2013 of the selection committee, the service of the petitioner was regularized in the scale of pay of Rs.5200-20200/- with grade pay of Rs.1900, which was communicated vide office order dated 16.11.2013. According to the fixation of pay, the petitioner was also allowed to draw periodical increments on 01.11.2014, 01.11.2015 and 01.11.2016. Such absorption of the petitioner was made referring to Rule 8 of OHRC Rules, 2012. By the time the petitioner was absorbed in OHRC on 16.11.2013, the petitioner was doing stenography work in the OHRC as an outsider on annual contract basis and was receiving consolidated payment every month as per the terms and conditions of the contract, though the contract does not stipulate that the petitioner would be absorbed in future against the regular post of junior stenographer.

2.2 While conducting audit, the auditors observed in para-20(A) of the inspection report no.03/2014-15 that absorption of the petitioner in OHRC was irregular and was not in consonance with Rule-8 of OHRC Rules, 2012 and, as such, Rule-8 has not been relaxed by the State Government in exercise of powers conferred under Rule-11 on regular absorption in Group-C government service. Thereby, basing upon the observation made in para-20(A) of the inspection report no.03/2014-15 vide Annexure-10 dated 21.06.2017 issued by opposite party no.3, the order dated 13.07.2017 in Annexure-11 was issued stating that the appointment/ absorption of the petitioner having been considered to be irregular, he was liable for repayment of the excess amount of remuneration as raised in para-20(B) and, as such, he was not entitled to accrue further annual increment in normal circumstances as sanctioned w.e.f. 01.11.2016 vide office order no.8009/OHRC dated 23.05.2017. Thereby, the petitioner was called upon to make repayment of an amount of Rs.4264/- by way of treasury challan in the appropriate government head within a fortnight and accordingly office order no.8009/OHRC dated 23.05.2017 sanctioning annual periodical increment in

favour of the petitioner w.e.f. 01.11.2016 was withdrawn. Hence this application.

3. Mr. D.K. Sahoo-I, learned counsel for the petitioner strenuously urged before this Court that though the petitioner was initially appointed on contract basis, but considering his performance his contractual appointment was extended till 2013 and by constituting the selection committee, pursuant to Rule-6 of the OHRC Rules, 2012, the petitioner was absorbed on regular basis against a regular vacancy of junior stenographer in the pay scale of Rs.5200-20200/- with Grade Pay of Rs.1900/-, vide office order dated 16.11.2013, and subsequently he was allowed to draw annual periodical increment w.e.f. 01.11.2014. But, on the basis of the audit observation, the OHRC passed office order dated 13.07.2017 stating that the appointment and absorption of the petitioner having been considered as irregular, the petitioner is liable for repayment of the excess amount of remuneration as raised in Para-20(B) and is not entitled to accrue further annual increment in normal circumstances as sanctioned w.e.f. 01.11.2016, vide office order no.8009/OHRC dated 23.05.2017. Therefore, he was directed to make repayment of an amount of Rs.4264/- by depositing the same by way of treasury challan in the appropriate government head within a fortnight of receipt of the order, otherwise necessary action shall be taken against him for such recovery as per rules. It is contended that such order dated 13.07.2017 for repayment has been passed in gross violation of the principle of natural justice, as no opportunity of hearing was given to the petitioner while withdrawing the periodical increment granted to the petitioner pursuant to office order dated 23.05.2017 giving effect from 01.11.2016. Thereby, the order so issued cannot sustain in the eye of law.

It is further contended that the audit observation made by the office of the Accountant General, Odisha in Annexure-10 dated 21.06.2017 at para no.20(A) of inspection report no.03-2014-15, on the basis of which the office order was issued on 13.07.2017, also cannot sustain as observation made in the audit report was not substantiated giving opportunity of hearing to the petitioner. Therefore, seeks for quashing of the letter dated 21.06.2017 in Annexure-10 issued by the Office of the Accountant General, Odisha, as well as the consequential office order dated 13.07.2017 in Annexure-11 issued by the OHRC.

4. Mr. B. Senapati, learned Additional Government Advocate appearing for opposite party no.1 contended that the petitioner being an employee of

the OHRC, the State has no role to play with regard to his engagement and consequential absorption thereof, and the action taken pursuant to audit observation is in accordance with law. As such, no counter affidavit has been filed by the State Government for the aforesaid reasons.

5. Mr. A.K. Mohapatra, learned counsel appearing for opposite party no.2-OHRC, basing on the counter affidavit, admitted the fact that the petitioner, by submitting a plain paper application and on conducting a formal interview, was appointed as a junior stenographer with monthly consolidated remuneration of Rs.3,000/-, vide OHRC order dated 29.08.2003, and that service of the petitioner was temporary in nature and was extended from time to time uninterruptedly till 2013 owing to need. After the enactment of the OHRC Rules, 2012, a selection committee was constituted to consider regularization of service of persons like the petitioner. Accordingly, the selection committee decided on 13.11.2013 to regularize the service of the petitioner in the scale of pay of Rs.5200-20200/- with Grade Pay of Rs.1900/- which was communicated vide office order no.19552/OHRC dated 16.11.2013. It is contended that keeping in view the administrative discipline and decorum correspondences were made with the Law Department, Govt. of Odisha and A.G., Odisha, Bhubaneswar and eventually the observation of the Finance Department, Govt. of Odisha communicated vide letter no.4355/L dated 24.04.2017 was sent to the A.G., Odisha, Bhubaneswar vide OHRC letter no.8947 dated 07.06.2017. The audit authorities have not taken into consideration the aforesaid letter issued by the OHRC, but, however, retained para no.20(A) & (B) of the inspection report no.03/2014-15/308 dated 21.06.2017. Thereby, the periodical increment sanctioned in favour of the petitioner was withdrawn and steps were taken for recovery of excess payment of Rs.4264/- vide OHRC office order no.11147 dated 13.07.2017. The entire steps have been taken in compliance of the observation made by the Accountant General, Odisha, which is mandatory in view of Rule-170 of S.R. of the Odisha Treasury Code. As such, the withdrawal of the increments has been done by opposite party no.2 basing on the undertaking dated 20.05.2017 of the petitioner. Thereby, no illegality or irregularity has been committed in passing the impugned order for recovery of the amount indicated above.

6. Mr. V. Narsingh, learned counsel appearing for opposite party no.3 argued with emphasis that the petitioner, having been engaged on contractual basis with consolidated salary, cannot and could not have been absorbed on

regular basis without following OHRC Rules, 2012, that is to say by issuing advertisement and following due recruitment process in accordance with law. Mere constitution of a selection committee cannot obliterate the provisions of OHRC Rules, 2012 to absorb the petitioner on regular basis in the post of junior stenographer Grade "C". As such, the absorption of the petitioner has been stated to be made by following Rule-8 of OHRC Rules, 2012, but, on scrutiny of such Rules, it is made clear that the petitioner was neither appointed by way of direct recruitment nor transfer on deputation basis. As the petitioner was an outsider and his engagement was made on contractual basis and he received consolidated remuneration in every month as per terms and conditions of the contract, he should not have been absorbed against a regular post of junior stenographer without following OHRC Rules, 2012. Further, the terms of engagement of the petitioner, being on contractual basis, do not indicate that he would be absorbed in future against regular post of junior stenographer, and he being neither a direct recruitee from OHRC nor transferred from another government department, his absorption is per se illegal. Consequentially, while conducting audit the auditors observed that absorption of the petitioner in OHRC was irregular and not in consonance with Rule-8 of OHRC Rules, 2012 and as such, Rule-8 has not been relaxed by the State Government in exercise of power conferred under Rule-11 of OHRC Rules, 2012 in order to regulate absorption in Group "C" government service. Consequentially, the audit observation made in para-20(A) of inspection report no.03/2014-15 was retained vide impugned letter dated 21.06.2017 under Annexure-10. Thereby, no illegality or irregularity has been committed by opposite party no.3 as the appointment of the petitioner has been done de hors the rules. Therefore, seeks for dismissal of the writ petition.

7. This Court heard Mr. D.K. Sahoo-1, learned counsel for the petitioner; Mr. B. Mr. B. Senapati, learned Addl. Government Advocate for opposite party no.1; Mr. A.K. Mohapatra, learned counsel for opposite party no.2; and Mr. V. Narasingh, learned counsel for opposite party no.3, by virtual mode. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

8. For just and proper adjudication of the case, relevant provisions of OHRC Rules, 2012 are quoted below:-

"***3. Officers and other staff of the State Commission***— *(1) The number of posts of officers and other staff of the State Commission shall be as specified in the Schedule:*

Provided that depending on work load, the number of posts of each category of post may be varied, from time to time, by the State Commission in consultation with the State Government.

(2) In discharge of the functions under the Act by the officers and other staff referred to in Section 27 of the Act shall, while they are in the service of the State Commission, be subject to the exclusive administrative and disciplinary control of that Commission.

4. Method of appointment and other qualification— *(1) Subject to the provisions of these rules, appointment to different categories of posts shall be made either by direct recruitment which shall be by holding competitive examination or by promotion or by deputation of officers and employees from Government or from Judiciary, who is eligible for appointment to the post in the grade.*

(2) The direct recruitment to a post specified in the Schedule shall be held by a competitive examination to be conducted by the State Commission and it shall decide the standard, syllabus and subjects of examination and the manner of conduct of examination.

(3) The number of officers and other staff of the State Commission, their classification, method of appointment, qualification and scale of pay attached thereto shall be as specified in the Schedule.

5. Appointing Authority— *(1) All appointments to the Group 'A' and 'B' Posts shall be made by the State Commission.*

(2) All appointments to the Group 'C' posts shall be made by the Registrar of the State Commission.

(3) All appointments to Group 'D' posts shall be made by the Under-Secretary to the State Commission.

6. Selection Committee— *(1) The State Commission may constitute a Committee consisting of such number of members as may be decided by it for filling up of the posts in the State Commission.*

(2) The State Commission may constitute different committees for filling up different categories of posts.

7. Eligibility—*No persons shall be eligible for appointment to any post under the State Commission—*

(a) unless, he or she is citizen of India;

(b) unless, he or she has passed a test in Odia equivalent to Middle School Standard;

(c) if, he or she is dismissed from service by Government or by any Statutory or Local Authority;

(d) if, he or she has been convicted of an offence involving moral turpitude;

(e) unless, passed the minimum qualification prescribed for a post mentioned against each in Column (7) of the Schedule;

(f) if, he or she has entered into or contracted a marriage with a person having a spouse living; and

(g) if, he or she having a spouse living and has entered into or contracted marriage with any person:

Provided that if the State Commission is satisfied that such married is permissible under the personal Law applicable to such person or there are other grounds for doing so, exempt any person from the operation of the rule.

***8. Absorption of existing employees**— (1) Notwithstanding anything contained in the provisions of these rules, the persons holding posts in the State Commission on the date of commencement of these rules either on direct recruitment or transfer on deputation basis and who fulfill the qualifications and experience laid down in these rules and who are considered suitable by the Committee, shall be eligible for absorption in the respective grades subject to the condition that such persons obtain a no objection certificate from their parent department for their absorption in the State Commission.*

(2) The seniority of the officers and other employees mentioned in sub-rule (1) shall be determined with reference to the dates of their regular appointment to the post concerned.

***11. Power to relax**—Where the State Government is of the opinion that it is necessary or expedient to do so, it may, by order, and for reasons to be recorded in writing, and in consultation with the State Commission, relax any of the provisions of these rules with respect to any class or category of person."*

9. The constitutional changes resulting from the Government of India Act, 1935 made it necessary to revise the existing rules regarding treasury procedure, and the revised rules were issued as the Orissa Treasury Code in July, 1943. The Orissa Treasury Code consists of two volumes of which the

first contains the text of the Code, and the second contains the appendices and forms. The first volume divided into three parts, i.e., Part-I-The Treasury Rules (Orissa), Part-II, The subsidiary Rules under Treasury Rules (Orissa) and Part-III, Executive instructions. For just and proper adjudication of the case, Codes-170 and 171 are quoted below:-

> "*170. Audit objections and recoveries—Every Government servant must attend promptly to all objections and orders communicated to him by the Account-General.*
>
> *171. When the Accountant General disallows a payment as unauthorised, the disbursing officer bound not only to recover the amount disallowed without listening to any objection or protest but to refuse to pay it in future till the Accountant-General authorises the payment to be resumed, that no warning slip has been received by the Government servant against whom the retrenchment has been ordered or that being received, it has been answered, are facts with which the disbursing officer shall have no concern.*
>
> ***NOTE 1** —If a Government servant from whom a recovery is ordered, is transferred to the jurisdiction of another disbursing officer, the order of recovery should be passed on to that disbursing officer without delay.*
>
> ***NOTE 2**—A disbursing officer, must not, when a retrenchment is ordered, enter into any correspondence with either the Accountant General or the Government servant concerned, it is his duty simply and promptly to carry out the orders has received to leave the person aggrieved to refer the case to Government through the proper channel.*
>
> ***NOTE 3** —Representation and protests against retrenchments ordered by the Accountant - General may not ordinarily be considered by the administrative authorities, if submitted later than three months from after the date of receipt of the intimation by the aggrieved Government servant. This provision does not remove from the disbursing officer, the duty of enforcing immediately the recovery of a retrenchment order under this rule.*
>
> ***NOTE 4** —When a Government servant is under suspension and is in receipt of subsistence grant, the retrenchment order so respect of any overpayment caused to him in the past, shall be issued by the Accountant-General in consultation with the authority competent to place the Government servant under suspension. The aforesaid administrative authority will exercise discretion whether recovery should held wholly in abeyance or it should be effected at full or reduced rates depending on the circumstances of each such cases."*

10. In view of the aforesaid provision of the OHRC Rules, 2012, appointment to different categories of posts shall be made either by direct recruitment which shall be by holding competitive examination or by

promotion or by deputation of officers and employees from Government or from judiciary, who is eligible for appointment to the post in the grade. Direct recruitment to a post specified in the schedule shall be held by a competitive examination to be conducted by the OHRC and it shall decide the standard, syllabus and subjects of examination and the manner of conduct of examination. Rule-5 stipulates about the appointing authority. As per Rule-6, the OHRC shall constitute a committee consisting of such number of members as may be decided by it for filling up of the posts in the State Commission. The eligibility criteria for appointment to any post under the OHRC are prescribed under Rule-7. So far as absorption of existing employees is concerned, provisions are made under Rule-8 and power to relax has also been provided under Rule-11. In view of the statutory provisions governing the field, necessary recruitment has to be made in accordance with OHRC Rules, 2012.

11. Admittedly, a post of junior stenographer was created in OHRC on 24.04.2003 with the administrative approval of the Law Department of Government of Odisha. By the time the post was created, OHRC Rules, 2012 had not seen the light of the day. Instead of filling up of the post either by way of direct recruitment or transfer on deputation basis, OHRC vide office order no.26 dated 29.08.2003 engaged the petitioner as stenographer on contract basis for a period of one year on a fixed monthly pay of Rs.3000/- under Annexure-1 and the petitioner continued in service as stenographer as an outsider on contract basis till he was absorbed against a regular vacant post of junior stenographer under Group-C by letter dated 16.11.2013 under Annexure-3. While absorbing the petitioner as junior stenographer, reference was made to Rule-8 of Rules, 2012. On perusal of the said rule, it appears that persons holding posts in the OHRC on the date of commencement of the Rules, 2012 either on direct recruitment or transfer on deputation basis and who fulfill the qualifications and experience laid down in the Rules and who are considered suitable by the committee, shall be eligible for absorption in the respective grades subject to the condition that such persons obtain a no objection certificate from their parent department for their absorption in the OHRC.

12. The petitioner was neither appointed on direct recruitment basis nor was he transferred on deputation basis from any other government organization to the OHRC, rather on consideration of a plain paper application and conducting a formal interview, he was engaged as

stenographer with a consolidated remuneration of Rs.3000/- per month vide office order dated 29.08.2003. Thereby, the petitioner, being a rank outsider engaged on contractual basis and getting consolidated remuneration, cannot and could not be absorbed under Rule-8 of OHRC Rules, 2012. In other words, the entry of the petitioner in service was irregular one and not in accordance with the rules and thereby was a back door entrant to such service. More so, his recruitment to the post of junior stenographer under the OHRC was de hors the rules. Therefore, when the Accountant General, Odisha conducted audit in its inspection report no.03/2014-15, in para-20(A) made the following observation:-

> *"Although OHRC is an autonomous body all the relevant Act/Rules/Regulations as well as instructions issued by the Government are applicable to this organization also. In the instant case, i.e., the absorption of Sri Nihar Ranjan Tripathy is irregular as he was not appointed according to the relevant rules or in adherence to Articles 14 and 16 of the Constitution of India and subsequently absorbed. Hence, the para is retained."*

In view of such observation made by the Accountant General, Odisha, vide letter dated 21.06.2017 under Annexure-10, the consequential letter was issued by opposite party no.2-OHRC for repayment of amount of Rs. 4264/-, which had been paid to the petitioner in the shape of annual periodical increment, and pursuant to order dated 23.05.2017 sanctioning annual periodical increment granted in favour of the petitioner was withdrawn vide office order dated 13.07.2017 in Annexure-11.

13. In ***M.P. State Coop. Bank Ltd. Bhopal v. Nanuram yadav*****,** (2007) 8 SCC 264, the principles to be adopted in the matter of public appointments have been formulated by the Supreme Court to the following extent:-

> *1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Arts. 14 & 16 of the Constitution of India.*
>
> *2) Regularisation cannot be a mode of appointment.*
>
> *3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization.*
>
> *4) Those who come by back door should go through that door.*

5) No regularization is permissible in exercise of the statutory power conferred under article 162 of the Constitution of India if the appointments have been made in contravention of the statutory Rules.

6) The Court should not exercise its jurisdiction on misplaced sympathy.

7) If the mischief played so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

14. In ***Meera Massey v. S.R. Mehotra,*** (1998) 3 SCC 88, the apex Court observed as under:-

"If the laws and principles are eroded by such institutions it not only pollutes its functioning deteriorating its standard but also exhibits ..... wrong channel adopted.....If there is any erosion or descending by those who control the activities all expectations and hopes are destroyed. If the institutions perform dedicated and sincere service with the highest morality it would not only up-lift many but bring back even limping society to its normalcy."

In ***Ram Chand v. Union of India,*** *(1994) 1 SCC 44,* the apex Court held that the exercise of power should not be made against the spirit of the provisions of the statue; otherwise it would tend towards arbitrariness.

15. In ***Ajit Singh (II) v. State of Punjab,*** (1999) 7 SCC 209, a Constitution Bench of the Supreme Court held that any action being violative of Article 14 of the Constitution is arbitrary and if it is found to be de hors the statutory rules, the same cannot be enforced.

Similar view has also been reiterated in ***Rashmi Mishra v. M.P. Public Service Commission,*** (2006) 12 SCC 724; and ***Indian Drugs & Pharmaceuticals Ltd. v. Workmen Indian Drugs& Pharmaceuticals Ltd.,*** (2007) 1 SCC 408.

16. In ***State of Uttar Pradesh v. U.P. State Law Officers' Association,*** (1994) 2 SCC 204, the Supreme Court held that those who come by back door should go through that door.

Similar view has also been taken in ***State of Bihar v. Upendra Narayan Singh,*** (2009) 5 SCC 65 wherein the apex Court held that the equality clause enshrined in article 16 mandates that every appointment to public posts or office should be made by open advertisement so as to enable all eligible persons to compete for selection on merit.

17. In the above backdrop, it is the settled legal proposition that no person can be appointed even on a temporary or *ad hoc* basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc., that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in article 16 requires that every such appointment be made by an open advertisement so as to enable all eligible persons to compete on merit. (*emphasis supplied*)

It is a settled legal proposition that appointment to any public post is to be made by advertising the vacancy and any appointment made without doing so violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.

18. In ***Union Public Service Commission v. Girish Jayanti Lal Vaghela,*** AIR 2006 SC 1165, the Supreme Court held that the appointment to any post under the State can only be made after a proper advertisement has been issued inviting applications from eligible candidates and holding of selection by a Body of Experts, and any appointment made without following the procedure, would be in violation of the mandate of article 16 of the Constitution of India.

Therefore, it is evident that any appointment made without advertising the vacancy cannot be held to be in conformity with the mandate of Articles 14 and 16 of the Constitution of India and in a nullity.

Similar view has also been taken in ***State of Karnataka v. Umadevi,*** (2006) 4 SCC 1; ***State of Orissa v. Mamata Mohanty,*** (2011) 3 SCC 436; and ***State of Madhya Pradesh v. Ku. Sandya Tomar,*** (2013) 11 SCC 357.

19. Considering the factual matrix of the case vis-à-vis the law discussed (supra), this Court is of the considered view that the engagement of the petitioner from the date of initial appointment on contractual basis is in gross violation of Articles 14 and 16 of the Constitution of India. More particularly, his absorption made against the post of junior stenographer even after commencement of OHRC Rules, 2012 is illegal and de hors the rules governing the field, as the same has not been done in conformity with the provisions of the rules governing the field. Therefore, audit observation made by the Accountant General, Odisha is well founded and the same has been acted upon by the opposite parties by issuing consequential letter under Annexure-11 dated 13.07.2017. Thereby, no illegality or irregularity has been committed by opposite parties no.3 and 2 by issuing letter under Annexure-10 dated 21.06.2017 and office order under Annexure-11 dated 13.07.2017 respectively.

20. The petitioner having not been appointed in consonance with the rules and by following due recruitment process which violates Articles-14 and 16 of the Constitution of India, the principles of natural justice do not require to be observed.

21. In ***Malloch v. Aberdeen Corporation,*** 1971 (2) All ER 1278, it has been observed as under:-

> *"A breach of procedure, whether called a failure of natural justice or an essential administrative fault cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The Court does not act in vain."*

22. In ***Ravi S. Naik v. Union of India,*** AIR 1994 SC 1558, the apex Court held that in such cases even principles of natural justice do not require to be observed.

23. Coming to the contention of learned counsel for the petitioner that absorption of the petitioner as junior stenographer, having been made by the selection committee constituted under Rule-6 of the OHRC Rules, 2012, the same cannot be subsequently declared as irregular by the OHRC, it is seen on close scrutiny of Rule-6 of Rules, 2012, that OHRC has been vested with power for constitution of a committee consisting of such number of members as may be decided by it for filling up of the posts in the OHRC. As such, filling up of the posts has to be done by following Rule-4 of the OHRC

Rules, 2012. Therefore, constitution of the committee by the OHRC, as stated under Rule-6, and absorbing the petitioner against a regular vacancy and giving regular scale of pay is contrary to Rule-4 of OHRC Rules, 2012. Thereby, any recommendation made by such committee for absorption of the petitioner cannot sustain in the eye of law. As a consequence thereof, the recommendation made by such committee for absorption of the petitioner as junior stenographer against a regular post cannot have any justification and the same cannot be given effect to in view of the fact that such recommendation is not in consonance with the provisions contained in Rule-4 of the OHRC Rules, 2012.

24. In the present context the State Government has not exercised power of relaxation, as provided under Rule-11, by passing an order and recording reasons in writing in consultation with the OHRC. In absence of any material to that context, absorption of the petitioner as junior stenographer on mere constitution of a committee under Rule-6 of the OHRC Rules, 2012 cannot sustain in the eye of law. Thereby, the action taken by the OHRC absorbing the petitioner as junior stenographer is contrary to the rules governing the field and is violative of Articles 14 and 16 of Constitution of India. The consequential office order dated 13.07.2017 directing for repayment of the amount paid towards the annual periodical increment is inconsonance with the provisions contained in Rules-170 and 171 of the Orissa Treasury Rules under the Orissa Treasury Code-1. Therefore, the office order issued under Annexure-11 dated 13.07.2017 is well justified and cannot be interfered with.

25. Now, it is to be considered as to if, in order to give effect to the order under Annexure-11 dated 13.07.2017, opportunity of hearing should have been afforded to the petitioner. In all fairness, when the OHRC decided to ask the petitioner for repayment of an amount of Rs.4264/-, by withdrawing the letter dated 23.05.2017 towards the annual increment with effect from 01.11.2016, the petitioner should have been given opportunity of hearing. While issuing notice, at the time of entertaining the writ petition, this Court passed order on 20.07.2017 to the following effect:-

> *"Heard Mr. D.K. Sahoo-1, learned counsel for the petitioner and Mr. A.K. Mishra, learned Addl. Government Advocate for the State.*
>
> *The petitioner, who was working as Stenographer under opposite party no.2-OHRC, files this application seeking to quash the order dated 21.06.2017 passed in Annexures-10 and order dated 13.07.2017 in Annexure-11, by which the office order dated 23.05.2017 sanctioning annual periodical increment in favour of the*

petitioner has been withdrawn and he has been directed to repay a sum of Rs.4264/- by depositing the same by way of a treasury challan in the appropriate Govt. head within a fortnight of receipt of that order on the basis of the inspection report no. 03/2014-15 communicated by Sr. Audit Officer/GSA(V) dated 21.06.2017.

Mr. D.K. Sahoo, learned counsel for the petitioner states that the petitioner is rendering service as Stenographer. Though he has absorbed as regular basis, he is entitled to get the benefit of increment which has been extended by the opposite parties. Now on the basis of the report of Sr. Audit Officer/GSA(V) dated 21.06.2017, the opposite party no.2 by order dated 13.07.2017 directed for recovery of the amount of Rs.4264/- without affording an opportunity of hearing to the petitioner.

This Court is the considered view the matter requires consideration.

Issue notice.

One extra copies of the writ petition be served on learned Addl. Government Advocate for the State appearing for opposite party no.1 within three days.

Steps for issuance of notice by registered post with A.D. on opposite parties no. 2 and 3 be taken within three days. Office shall send notice fixing a short returnable date.

As an interim measure, there shall be stay operation of order dated 21.06.2017 passed by Sr. Audit Officer/GSA(V) in Annexure-10 and order dated 13.07.2017 passed by Deputy Secretary in Annexure-11 till 10th August, 2017.

Issue urgent certified copy as per rules.

Sd/-Dr. B. R. Sarangi, J."

From the above quoted order, it can be safely inferred that the sole reason for entertaining the writ petition was, there was non-compliance of principle of natural justice by the authority while directing for repayment of the amount from the petitioner. Though counter affidavits have been filed by opposite parties no.2 and 3, nothing has been spelt out in that regard. In view of such position, this Court is of the considered view that before implementing the order under Annexure-11 dated 13.07.2017 the opposite party no.2 should have given opportunity of hearing to the petitioner in compliance of principle of natural justice.

26. The word 'nature' literally means the innate tendency or quality of things or objects and the word 'just' means upright, fair or proper. The expression "natural justice" would, therefore, mean "the innate quality of being fair".

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

28. In ***Ridge v. Baldwin,*** [1962] 1 All ER 834 (CA), *Harman, LJ, in the Court of Appeal, countered natural justice with 'fair play in action'.*

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

30. In ***Maneka Gandhi v. Union of India****,* (1978) 1 SCC 248, P.N. Bhagwati,J, as his Lordship then was, favoured the phrase 'fair play in action'.

31. In ***Bhagwan v. Ramchand***, AIR 1965 SC 1767, the apex Court held that the rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

32. In ***Sukdev Singh v. Bhagatram,*** (1975) 1 SCC 421, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice.

33. In ***Mohinder Singh Gill v. The Chief Election Commissioner,*** *(*1978) 1 SCC 405, the apex Court held as follows:-

> "*Natural justice is treated as "a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam-and of Kautilya's Arthasastra-the rule of law has had this stamp of natural justice which makes it social justice."*

34. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the apex Court, while considering meaning of natural justice has observed as follows:-

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

35. In ***State of U.P. v. Vijay Kumar Tripathi***, 1995 Supp (1) SCC 552, the apex Court held that it is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration.

36. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held that principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

37. Applying the above principles of law to the present context, even if this Court already held that letter issued by the Accountant General in Annexure-10 dated 21.06.2017 and consequential office order dated 13.07.2017 in Annexure-11 are within the complete domain of the authority concerned and as such the same are well founded, but in order to give effect to letter dated 13.07.2017 in Annexure-11 with regard to repayment of an amount of Rs.4264/- by depositing the same by way of treasury challan in appropriate government head within a fortnight, the authority should have complied the principles of natural justice. Due to non-compliance of the same in letter and spirit, this Court holds that action so taken directing the petitioner to make repayment of an amount of Rs.4264/- within a fortnight in appropriate head of accounts is in gross violation of principle of natural justice, inasmuch as, while giving effect to the office order dated 13.07.2017 the opposite party no.2 should have complied the principle of natural justice by affording opportunity of hearing to the petitioner.

38. In view of the facts and circumstances as well as the principles of law, as discussed above, this Court, while upholding the letters issued by opposite parties no.3 and 2 in Annexure-10 dated 21.06.2017 and Annexure-11 dated 13.07.2017 respectively, directs that office order dated 13.07.2017 in Annexure-11, so far it relates repayment of an amount of Rs.4264/-, shall be given effect to by opposite party no.2 only in compliance of principles of natural justice.

39. With the above observation and direction, the writ petition stands disposed of. There shall be no order as to costs.

—— o ——

2020 (II) ILR - CUT- 551

DR. B.R.SARANGI, J.

W.P.(C) NO. 16669 OF 2020

A.S. ANANYA PRADHAN .....Petitioner

.V.

GOVERNMENT OF INDIA & ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 16 – Provisions under – Advertisement or prospectus for admission/recruitment – Terms and conditions – Some changes were made in terms and conditions after selection process was started without notice – Whether permissible under law? – Held, no, it amounts to violation of Article 16 of the Constitution of India – Reasons indicated.

"Applying the ratio, as discussed above, to the present context, there cannot be any second opinion with regard to law laid down by the apex Court as well as this Court and the same can also be applicable to the present context, in view of the fact that once the process of selection started for admission in Class-VI of Jawahar Navodaya Vidyalaya, Bagudi, Balasore pursuant to prospectus in Annexure-1, the same cannot be changed or altered pursuant to subsequent notice issued under Annexure-3 dated 31.03.2020, which is violative of Article-16 of the Constitution of India." *(Paras 20 to 23)*

(B) WORDS & PHRASES – 'Education' – Meaning of – The word "education" is derived from the latin word "educa" which means bringing out latent faculties – 'Education' means the act or process of imparting or acquiring general knowledge, developing the powers of

reasoning and judgment, and generally of preparing oneself of others intellectually or mature life; the act or process of imparting or acquiring particular knowledge or skills – It is the result produced by instruction, training or study.

Case Laws Relied on and Referred to :-

1. (2012) 4 SCC 103 : Kishor Kumar Vs. Pradeep Shukla.
2. 100 (2005) CLT 465 : Mrs. Madhumita Das Vs. State of Orissa.
3. 101 (2006) CLT 185 : State of Orissa Vs. Bharat Ch. Jena.
4. 2016(I) ILR-CUT-738 : Subhaya Prusty Vs. Union of India.
5. 2017 (I) ILR-CUT-1077 : Dr. Smrutisudha Pattnaik Vs. Acharya Harihar Regional Cancer Centre, Cuttack.
6. 2017 (Supp.-II) OLR 1107 : Suchitra Sethi Vs. Union of India.
7. AIR 1999 ORI 97 : Padmanav Dehury Vs. State of Orissa.
8. (2005) 6 SCC 537 : P.A. Inamdar Vs. State of Maharastra.
9. (2002) 8 SCC 481 : T.M.A. Pai Foundation Vs. State of Karnataka.
10. (2014) 6 SCC 798 : Major Saurabh Charan Vs. NCT of Delhi.
11. (2014) 2 SCC 305 : Christian Medical College, Vellore Vs. Union of India.
12. (2003) 1 SCC 687 : Rohit Singhal Vs. Principal, Jawahar N. Vidyalaya.
13. (1999) 7 SCC 120 : Preeti Srivastava Vs. State of M.P.

For Petitioner : M/s. S.K.Mishra, S.S. Pradhan, & P.K. Rout.
For Opp. Parties : Mr. A.K. Bose, Asst. Solicitor General of India.

JUDGMENT Decided On 28.08.2020

DR. B.R. SARANGI, J.

The petitioner, being a minor, has filed this writ petition represented through her father guardian seeking direction to opposite party no.4, Principal, Jawahar Navodaya Vidyalaya, Bagudi, Balasore to admit her in Class-VI taking into consideration her caste certificate.

2. The factual matrix of the case, in hand, is that in accordance with the National Policy of Education (1986), Government of India started Jawahar Navodaya Vidyalayas (JNVs). Presently, the JNVs are spread in 28 States and 7 Union Territories. The JNVs are co-educational residential schools fully financed and administered by Government of India through an autonomous organization, Navodaya Vidyalaya Samiti. Admissions to Class VI in JNVs are made through Jawahar Navodaya Vidyalayas Selection Test (JNVST). The medium of instruction in JNVs is the mother tongue or regional language up to Class VIII and thereafter 'English' for Mathematics and Science and 'Hindi' for Social Science. Students of the JNVs appear for board examinations of the Central Board of Secondary Education. While

education in the schools is free including boarding & lodging, uniform and textbooks, a sum of Rs. 600/- per month is collected only from the students of Classes IX to XII towards Vidyalaya Vikas Nidhi. However, students belonging to SC/ST categories, all Girl students and the students whose family income is below poverty line (BPL) are exempted. In respect of wards of Government employees other than exempted category (Students of Classes VI to VIII, all SC/ST & girl students and wards of BPL families) Vikas Nidhi are charged @ Rs.1500/- per month or actual children education allowance received by the parent per month whichever is less. However, VVN (Vidyalaya Vikas Nidhi) shall not be less than Rs.600/- per student per month.

2.1 The objectives of the scheme are to provide good quality modern education including a strong component of culture, inculcation of values, awareness of the environment, adventure activities and physical education to the talented children predominantly from rural areas; to ensure that students attain a reasonable level of competency in three languages; to promote national integration through migration of students from Hindi to non-Hindi speaking State and vice-versa; and to serve in each district as focal point for improvement in quality of school education in general through sharing of experiences and facilities.

2.2 In order to have the admission for the academic year 2020, Navodaya Vidyalaya Samiti issued a prospectus for Jawahar Navodaya Vidyalaya Selection Test-2020, vide Annexure-1, for admission to Class-VI. As per the prospectus, the candidates were to apply for JNV Selection Test as per the procedure envisaged thereunder. In pursuance of such prospectus, the petitioner applied for admission in Class-VI of JNV, Bagudi in prescribed form. In the bio-data prescribed for submission of application clearly indicates the category General, OBC, SC and ST. As the petitioner belonged to SEBC category, she had given tick mark under the heading OBC, because SEBC category was not mentioned in the application form itself. As per the scheduled date and time prescribed in the prospectus, the petitioner appeared the test with necessary admit card issued. After the examination was over on 11.01.2020, a notice was issued on 31.03.2020 that reservation of seats for SC and ST students would be made in proportion to their population in the district concerned subject to minimum of national average and maximum of 50% for both the categories taken together and 27% reservation would be provided to the OBC students over and above the reservation for SCs and

STs. Thereafter, the selection list was published on 13.05.2020 where the petitioner's name was found place and she was called upon to take admission. Accordingly, intimation was issued, vide Annexure-6 dated 19.06.2020, indicating that the petitioner was provisionally selected for admission in Class-VI of Jawahar Navodaya Vidyalaya, Bagudi, Balasore, subject to fulfillment of required conditions, and she was directed to report on 29.06.2020 at 10.00 a.m. for verification of documents. On the date fixed, the petitioner appeared along with her father and copies of all the relevant documents, but she was denied admission on the ground that she did not belong to OBC category, though she produced certificate of SEBC category. Hence this application.

3. Mr. S.K. Mishra, learned counsel appearing for the petitioner argued with vehemence and contended that in the prospectus issued by Navodaya Vidyalaya, there was no mention about the reservation of seats for admission of OBC category students. After examination was over on 11.01.2020, a notice was issued on 31.03.2020 keeping 27% of the seats reserved for OBC students. It is contended that once an advertisement was issued and pursuant thereto the petitioner applied for, the rule of selection should not have been changed at the midst of selection process, as the same contravenes the principle of law that once the game started its rule should not be changed. It is further contended that the application for admission submitted by the petitioner was filled up by the school authority indicating as OBC category, as there was no mention about SEBC category. Therefore, the petitioner, having belonged to SEBC category, should have been given admission in the said category, inasmuch as the selection process was to be followed in accordance with the advertisement and prospectus issued, without taking into consideration the notice issued on 31.03.2020 under Annexure-3, and accordingly the admission process was to be made applicable to all the candidates.

To substantiate his contentions, he has relied upon the ratio decided in ***Kishor Kumar v. Pradeep Shukla***, (2012) 4 SCC 103; ***Mrs. Madhumita Das v. State of Orissa***, 100 (2005) CLT 465; ***State of Orissa v. Bharat Ch. Jena***, 101 (2006) CLT 185; ***Subhaya Prusty v. Union of India***, 2016(I) ILR-CUT-738; ***Dr. Smrutisudha Pattnaik v. Acharya Harihar Regional Cancer Centre, Cuttack***, 2017 (I) ILR-CUT-1077 and ***Suchitra Sethi v. Union of India***, 2017 (Supp.-II) OLR 1107.

4. Mr. A.K. Bose, learned Assistant Solicitor General of India contended that the prospectus does not contain any reservation for OBC category students. For the first time, notice dated 31.03.2020 was issued with a provision for reservation of OBC category students. By that time, the examination for admission to Class-VI was over on 11.01.2020. He also contended that the petitioner's application indicates that she had applied under OBC category and as and when the petitioner will produce OBC certificate, the authority will have no impediment to provide her a seat for admission, otherwise the claim made by the petitioner has no justification. Accordingly, the writ petition has to be dismissed.

5. This Court heard Mr. S.K. Mishra, learned counsel appearing for the petitioner and Mr. A.K. Bose, learned Assistant Solicitor General of India through video conferencing. Since the issue involved in this case relates to admission in Class-VI, opportunity was given to learned Assistant Solicitor General of India to obtain instructions or file counter affidavit. On the basis of instructions received and upon hearing learned counsel for both the parties, with their consent this writ petition is being disposed of finally at the stage of admission.

6. For the purpose of just and proper adjudication of the case, the relevant portion of the prospectus filed as Annexure-1 is quoted below:-

"WHO IS ELIGIBLE

FOR ALL CANDIDATES

4.1 Only the candidates from the district concerned where the Jawahar Navodaya Vidyalaya has been opened are eligible to apply for admission. However, if the district where JNV is opened is bifurcated at a later date, the old boundaries of the district are considered for the purpose of eligibility for admission into JNVST, in case a new Vidyalaya is not started in the newly bifurcated district as yet.

4.2 A candidate seeking admission must not have been born before01-05- 2007and after 30-04-2011 (Both dates are inclusive).This will apply to candidates of all categories, including those who belong to the Scheduled Caste (SC) and Scheduled Tribe (ST). In case of doubtful cases of overage in comparison to the age recorded in the certificate, they may be referred to the Medical Board for confirmation of the age. The decision of the medical board will be treated as final.

4.3 A candidate appearing for the selection test must be studying in Class-V for the whole of the academic session 2019-20 in a Government/Government aided or other recognized schools or ' B' certificate competency course of National Institute of

Open Schooling in the same district where he/she is seeking admission. A school will be deemed recognized if it is declared so by the Government or by any other agency authorized on behalf of Government. Schools where students have obtained 'B' certificate under National Institute of Open Schooling should have accreditation of NIOS. A candidate must successfully complete Class-V in the session 2019-20. Actual admission in Class-VI for the session 2020-21 will be subject to the mentioned condition.

4.4 A Candidate claiming admission under rural quota must have studied and passed classes III, IV and V from a Govt. / Govt. aided / recognized school spending one full academic session each year in a school located in rural area.

4.5 Candidates passing 'B' certificate competency course of National Institute of Open Schooling on or before 30th September 2019 are also eligible to write admission test provided they are in the prescribed age group. The rural status of a child from National Institute of Open Schooling will be decided on the basis of a certificate to be issued by Tehsildar/District Magistrate of the District indicating that the child has been residing in rural areas for the last three years. Students studying under the above scheme and residing in urban and notified areas are not eligible for obtaining seat in rural quota.

4.6A Candidate who has not been promoted and admitted to Class-V before 15thSeptember, 2019 is not eligible to apply.

4.7 No candidate is eligible to appear in the selection test for the second time, under any circumstances.

FOR RURAL CANDIDATES

A) At least 75% of the seats in a district will be filled by candidates selected from rural areas and remaining seats will be filled from the urban areas of the district.

B) A candidate seeking admission under the rural quota must have studied in Classes-III, IV and V completing full academic session from the Government/ Government Aided/Government recognized school(s) located in rural areas. However, the candidate should study full academic session in Class-V from the same district where admission is sought.

C) Candidates studying under the schemes of National Institute of Open Schooling should produce their rural status certificate issued by District Magistrate / Tehsildar / Block Development Officer.

FOR URBAN CANDIDATES

A candidate who has studied in a school located in an urban area even for a single day of session in Class-III, IV and V will be considered as an urban candidate. Urban areas are those which are so defined in 2011 census or

through a subsequent Government notification. All other areas will be considered as rural.

FOR TRANSGENDER CANDIDATES

No separate reservation for transgender category candidates is provided and they will be included in Boys category for reservation purpose, under various sub-categories viz Rural, Urban, SC, ST and Divyang.

RESERVATION OF SEATS

a) At least 75% of the seats in a district are filled by candidates selected from rural areas and remaining seats are filled from urban areas of the district.

b) Reservation of seats in favour of children belonging to Scheduled Castes and Scheduled Tribes is provided in proportion to their population in the district concerned provided that in no district, such reservation will be less than the national average (15% for SC and 7.5% for ST) but subject to maximum of 50% for both the categories (SC & ST) taken together. These reservations are interchangeable and over and above the candidates selected under open merit.

c) Minimum One third of the total seats are filled by girls.

*d) There is a provision for reservation for ** Divyang children (i.e. Orthopedically Handicapped, Hearing Impaired and Visually Handicapped) as per GOI norms.*

*** " Blindness" refers to a condition where a person suffers from any of the following conditions namely:-*

(i) Total absence of sight; or

(ii) Visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or

(iii) Limitation of the field of vision subtending an angle of 20 degree or worse.

*** "**Hearing Impairment**" means loss of sixty decibels or more in the better ear in the conversational range of frequencies.*

*** "**Locomotor disability**" means disability of the bones joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy.*

*** "**Person with disability**" means a person suffering from not less than forty percent of any disability as certified by a medical authority."*

7. For admission in Class-VI for the academic Session 2020-21, so far as Orissa State is concerned, was scheduled to be held on 11.01.2020 at 11.30 a.m.. The application submitted by the petitioner, being in order, she was issued with an admit card to appear at the selection test scheduled to be held on 11.01.2020. In the application form, while furnishing the bio-data, the petitioner though belonged to SEBC category had given a tick mark in the OBC category, as there was no option in the application form to give tick mark under the SEBC category, because the application form contained four categories, viz., General, OBC, SC and ST. In any case, the petitioner appeared the selection test on 11.01.2020 and while awaiting the result a notice was issued by opposite party no.3 on 31.03.2020 to the following effect:

"NOTICE

Read with Letter No.F.No.17-37/2019-UT-3 dated 30th March 2020 from the Department of School Educational Literacy Ministry of Human Resource Development.

Consequent to the acceptance of the recommendations of the Parliamentary Committee on Welfare of OBCs (2019-20) by the competent authority, partial medication is hereby made in the reservation policy for admission to class VI through Jawahar Navodaya Vidyalaya Selection Test (JNVST) from the academic session 2020-21. With the provision of reservation to OBC students. The provisions of reservation to OBC students in the admissions to class VI Jawahar Navodaya Vidyalaya from the academic session 2020-21 and onwards will be as under.

"Reservation of seats for SC and ST students shall be made in proportion to their population in the district concerned (subject to minimum of National average and maximum of 50% for both the categories taken together) and 27% reservation shall be provided to the OBC students over and above the reservation for SCs and STs."

All other existing reservations including reservations for Girls Rural Divyang etc., will remain unchanged. The reservations to the OBC students shall be implemented as per central list as applicable from time to time."

On perusal of the aforesaid notice, it would be seen that the provision for reservation of OBC students for admission in Class-VI in Jawahar Navodaya Vidyalaya for the academic session 2020-21 has been prescribed specifying that reservation of seats for SC and ST students shall be made in proportion to their population in the district concerned subject to minimum of national average and maximum of 50 % for both the categories taken together and 27% reservation shall be provided to the OBC students over and above the reservation for SCs and STs. All other existing reservations, including

reservations for Girls, Rural, Divyang etc. will remain unchanged. The reservations to the OBC students shall be implemented as per central list as applicable from time to time. After such notice was published on 31.03.2020, a select list was prepared on 13.05.2020 vide Annexure-4, in which the petitioner's name found place. A guidelines for admission of provisionally selected candidates in Class-VI JNVST-20 and Class-IX LEST-2020 was prepared by Navodaya Vidyalaya Samiti and as per the said guidelines, the petitioner was intimated on 19.06.2020 vide Annexure-6 that she had been provisionally selected for admission in Class-VI of Jawahar Navodaya Vidyalaya, Bagudi, Balasore, Odisha and she was called upon to appear on 29.06.2020 for verification of documents. On the date fixed, the petitioner appeared along with her father but she was denied admission in reserved category of OBC, as she possessed SEBC category certificate at Annexure-7 issued by the competent revenue authority on 26.06.2020.

8. In the above premises, the question that arises for consideration is once the advertisement was issued on 11.01.2020 can the authority issue notice on 31.03.2020 vide Annexure-3 specifying reservation for OBC category, meaning thereby, if by issuing prospectus the game had started could the rule of game in the midst be changed.

9. To recapitulate, in accordance with the National Policy of Education (1986), the Government of India started Jawahar Navodaya Vidyalayas (JNVs) in 28 States and 7 Union Territories as co-educational residential schools fully financed and administered by Government of India to impart education to the students.

10. Needless to say, foundation of every State is the education of its children. Education has for its object the formation of character. The founding fathers in their wisdom decided that children were an unnatural strain on parents. So they provided jails called "schools", equipped with torture called "education".

11. In ***Padmanav Dehury v. State of Orissa***, AIR 1999 ORI 97, while considering the word "education", it is held as follows:

> *"The word "education" is derived from the Latin word "educa" which means bringing out a latent faculties. "Education" means the act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself of others intellectually or mature life; the act or process of imparting or acquiring particular knowledge or skills. It is the result produced by instruction, training or study. Thus the word has very wide import."*

12. In ***P.A. Inamdar v. State of Maharastra,*** (2005) 6 SCC 537, the apex Court, referring to India Vision 2020 published by the Planning Commission of India at page 250, held as follows:-

> *"Education is an important input both for the growth of the society as well as for the individual. Properly planned educational input can contribute to increase in the gross national products, cultural richness, build positive attitude towards technology and increase efficiency and effectiveness of the governance. Education opens new horizons for an individual, provides new aspirations and develops new values. It strengthens competencies and develops commitment. Education generates in an individual a critical outlook on social and political realities and sharpens the ability to self examination, self monitoring and self criticism."*

13. In ***T.M.A. Pai Foundation v. State of Karnataka***, (2002) 8 SCC 481, the apex Court held that the expression 'educational institutions' occurring in various Articles of the Constitution of India means institutions that impart education from primary school level up to the postgraduate level and includes professional educational institutions.

14. In view of the above, the education can be viewed as the transmission of the values and accumulated knowledge of a society. In this sense, it is equivalent to what social scientists terms socialization or enculturation. A society becomes ever more complex and schools become ever more institutionalized, educational experience becomes less directly related to daily life, less a matter of showing and learning in the context of the workaday world, and more abstracted from practice, more a matter of distilling, telling, and learning things out of context. This concentration of learning in a formal atmosphere allows the child to learn far more of his culture than he could by merely observing and imitating. As society gradually attaches more and more importance to education, it also tries to formulate the overall objectives, content, organization and strategies of education.

15. In ***Major Saurabh Charan v. NCT of Delhi***, (2014) 6 SCC 798, the apex Court held as follows:-

> *"Imparting elementary and basic education is a constitutional obligation on the States as well as societies running educational institutions. Children are not only future citizens but also the future of the Earth. Elders in general and parents and teachers in particular owe a responsibility for taking care of the well-being and welfare of the children."*

16. In ***Christian Medical College, Vellore v. Union of India***, (2014) 2 SCC 305, the apex Court held as follows:-

> *"Norms of admission will have a direct impact on the standards of education. The standards of education in any institution or college would depend upon several factors and the caliber of the students to be admitted to the institutions would also be one of the relevant factors."*

17. In ***Rohit Singhal v. Principal, Jawahar N. Vidyalaya,*** (2003) 1 SCC 687, the apex Court held as follows:

> *"Education is an investment made by the national in its children for harvesting a future crop of responsible adults productive of a well-functioning society. However, children are vulnerable. They need to be valued, nurtured, caressed and protected."*

18. In ***Preeti Srivastava v. State of M.P.,*** (1999) 7 SCC 120, the apex Court held as follows:-

> *"It is important to provide adequate educational opportunities for all since it is education which ultimately shapes life. It is the source of that thin stream of reason which alone can nurture a nation's full potential. Moreover, in a democratic society, it is extremely important that the population is literate and is able to acquire information that shapes its decisions*."

19. Keeping in view the purpose of education, as discussed above, vis-à-vis objectives of the scheme of Navodaya Vidyalaya Samiti, as enumerated in the prospectus itself, in order to achieve such objectives steps had been taken for admission of the students for the session 2020 in Class-VI by holding a test in consonance with the conditions stipulated in the prospectus itself. As has been stated, the petitioner was eligible to make an application and pursuant to the advertisement the petitioner, having satisfied the requirement thereof, applied for admission in Class-VI. So far as reservation of seats is concerned, nothing had been mentioned in the prospectus with regard to reservation for OBC category students. Basing on the conditions stipulated in the prospectus itself, the petitioner applied for admission in Class-VI course of Navodaya Vidyalaya and appeared the test scheduled to be held on 11.01.2020. By that time, the notice issued on 31.03.2020 making provision for reservation for OBC category students had not seen the light of the day nor could the same be read as part of the prospectus to extend the benefit to OBC category students. Pursuant to the prospectus issued if the students had applied for and they had been considered and called upon to appear the test, consequently, when the game had already started, by issuing a notice on 31.03.2020 in the midst of selection process the rule of game should not have been changed.

20. In ***Kishor Kumar*** (supra), the apex Court, while interpreting Rule 15(2) of U.P. Pharmacists Services Rules, 1980, held that having recruitment process started, norms/principles/rules applicable cannot be changed during pendency of selection process to disadvantage of those candidates who were denied appointment by virtue of same rules, and directed that the candidates to be appointed in order of their inter se seniority as per vacancies available in each year in terms of pre-existing practice.

21. In ***Mrs. Madhumita Das*** (supra), while dealing with a matter relating to recruitment of Ad-hoc Addl. District Judges under the Odisha Judicial Service (Special Scheme) Rules, 2001, the question in regard to change of norms published in the advertisement, without notice to the candidates and the general public, was under consideration. The process of selection was conducted in the changed norms. Hence, the Division Bench of this Court held the action so taken was violative of Article 16 of the Constitution of India, reason being that once norms were published in the advertisement for notice of all, whether the same could be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum to the advertisement in question. Therefore, the Division Bench of this Court held that once advertisement was issued to fill up a post in any office under the State, then it is the duty of the recruiting authority to give necessary information to all in a precise and clear manner.

22. In ***Bharat Ch. Jena*** (supra), the Division Bench of this Court held that once the selection process was started, the norms fixed in the advertisement could not have been changed and if they were liable to be changed, then the same should have been published in the like manner in which initial advertisement was published. Non-publication of the norms changed subsequently after starting of the selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law.

This Court has also taken similar view in ***Subhaya Prusty*** (supra), ***Dr. Smrutisudha Pattnaik*** (supra) and ***Suchitra Sethi*** (supra).

23. Applying the ratio, as discussed above, to the present context, there cannot be any second opinion with regard to law laid down by the apex Court as well as this Court and the same can also be applicable to the present context, in view of the fact that once the process of selection started for admission in Class-VI of Jawahar Navodaya Vidyalaya, Bagudi, Balasore pursuant to prospectus in Annexure-1, the same cannot be changed or altered

pursuant to subsequent notice issued under Annexure-3 dated 31.03.2020, which is violative of Article-16 of the Constitution of India.

24. While entertaining the writ petition, this Court on 17.07.2020 passed the following order:-

> *"Heard learned counsel for the petitioner.*
>
> *Learned counsel for the petitioner served four extra copies of the writ application on the learned Assistant Solicitor General appearing for O.Ps. 1 to 4 in Court today to enable learned Assistant Solicitor General to obtain instruction with regard to I.A. no. 7838 of 2020.*
>
> *Put up this matter on 03.08.2020."*

Again on 03.08.2020, this Court passed the following order:-

> *"The matter is taken up through Video Conferencing.*
>
> *Heard Mr. S.K. Mishra, learned counsel for the petitioner and Mr. A. K. Bose, learned Assistant Solicitor General of India.*
>
> *Mr. S.K. Mishra, learned counsel for the petitioner contended that in the prospectus, reservation of seats for OBC category students for admission has not been mentioned. After examination was over, notice was issued keeping 25% seats reserved for OBC students. It is contended that once advertisement was issued and the petitioner applied for, the rule of game cannot be changed in the midst of selection process. It is further contended that so far as OBC category is concerned, OBC certificate has to be filed, but the application for admission having been filled up by the School authority, the petitioner may be permitted to provide SEBC certificate at the moment.*
>
> *Mr. A. K. Bose, learned Assistant Solicitor General of India on having received instructions stated that in the event the petitioner files OBC certificate, there shall be no impediment on the part of the authority to consider her case.*
>
> *In course of hearing, learned counsel for the petitioner states that he will file an affidavit to the effect that on the previous occasion the students belonging to SEBC category had been admitted against the seats of OBC category.*
>
> *Put up this matter next week to enable learned counsel for the petitioner to cite case laws in support of his contention."*

In compliance of the above order dated 03.08.2020, an affidavit was filed by the petitioner on 07.08.2020 paragraph-3 whereof reads as follows:-

"That the petitioner is a small student and with full preparation she appeared the qualifying examination for admission in opposite party no.4's institution in Class-VI. The examination was held on 11.01.2020. But after a long lapse of time the notification under annexure-3 has come and now the school authorities playing mischief and demanding the OBC certificate from the petitioner. Admittedly the petitioner has the SEBC certificate. The plea taken by the opposite parties that the petitioner has applied under OBC category is not sustainable. In the application from there was options for the SC and ST, for the general, for PH and for OBC. Neither the petitioner belongs to SC and ST nor general. So as per the normal practice the school authorities put right mark in the OBC option. It is pertinent to mention here that it is the school authorities, who have filled up the forms in respect of the students as the students are small students. Knowing fully well that the petitioner belongs to SEBC category the school authorities have allowed the petitioner to participate in the selection procedure. Because it was a regular practice for years together. The candidates having the SEBC certificate have been allowed to take admission and now they are prosecuting their study in the school. Number of students having SEBC certificate has been allowed to take admission in the school, even if in their application form they have opted the OBC option. But here in this case the small student has been debarred in the guise of the notification under annexure-3. For better appreciation of the case the SEBC certificates of some students and other documents are annexed herewith as Annexure-8 series."

25. The documents available on record clearly indicates that for the academic session 2019-20, students belonging to SEBC category have been given admission. Thus, there is no valid and justifiable reason available to the opposite parties to deny admission to the petitioner on the plea of issuance of notice under Annexure-3 dated 31.03.2020. The contention raised that if the petitioner produces OBC certificate then opposite parties will admit her in Class-VI without any difficulty, cannot also sustain. Rather, the opposite parties have to proceed in accordance with the guidelines prescribes in the prospectus itself and fill up the seats accordingly.

26. In view of the factual scenario and legal proposition of law, as discussed above, this Court is of the considered view that issuance of notice under Annexure-3 dated 31.03.2020 introducing reservation for OBC category, after issuance of prospectus under Annexure-1, and action taken thereof cannot sustain in the eye of law. Therefore, the same is liable to be quashed and is accordingly quashed. The opposite parties are thus directed to take steps for admission of the selected candidates in Class-VI, pursuant to selection list published in consonance with the prospectus issued under Annexure-1, as expeditiously as possible, preferably within a period of four weeks from today.

27. The writ petition is thus allowed. However, there shall be no order as to costs.

2020 (II) ILR - CUT- 565

D. DASH, J.

CRA NO.129 OF 1988

1. **PRASANA KUMAR BEHERA (SINCE DEAD)**
2. **MURALIDHAR BEHERA** ……..Appellants

.V.

STATE OF ORISSA ……...Respondent.

CRIMINAL TRIAL – Offence under sections 324 & 326 of IPC against the appellant No.2 – Appeal is abetted against appellant no.1 – Discrepancies/contradictions in statements of PWs and also not tallied to the statements in F.I.R – Injuries on the accused persons not been explained properly – Held, the conviction and sentence is set aside.

For Appellant : M/s. S.C. Sahoo, M/s. D.P. Patnaik, S. Das, B.K. Jena,D.K. Behera. Mr.Jayadev Behera (Amicus Curie) M/s. J.P. Ghose, D.K. Mohanty & H.K. Sethi.

For Respondent : K.K.Nayak, Addl. Standing Counsel.

JUDGMENT Date of Hearing & Judgment:10.08.2020

D. DASH, J.

The appellants by filing this appeal have assailed the judgment of conviction and order of sentence dated 14.04.1988 passed by learned Sessions Judge, Keonjhar in S.T. Case No.61 of 1986.

By the said judgment, the appellant no.1 (accused) has been found guilty for commission of offence under sections 304-II and 324 of the Indian Penal Code (for short, 'the IPC') and the appellant no. 2 (accused) has been held guilty for commission of offence under sections 324 and 326 IPC. Accordingly, both of them have been convicted thereunder. The appellant no. 1 has been sentenced to undergo rigorous imprisonment for a period of eight years for committing the offence under section 304-II IPC and rigorous imprisonment for one year for the offence under section 324 IPC with the stipulation that the sentences are to run concurrently.

The appellant no. 2 has been sentenced to undergo rigorous imprisonment for a period of one year for committing the offence under section 324 IPC and rigorous imprisonment for a period of five years and pay fine of Rs.500/- in default to undergo rigorous imprisonment for one

month with the stipulation that substantive sentence of imprisonment imposed on both the counts would run concurrently.

2. In response to the letter of this Court, report has come to be received from the Superintendent of Police, Keonjhar that the appellant no. 1 (accused-Prasana) has expired on 3.6.2020 on account of sudden illness.

On 16.06.2019, Mr. Debi Prasad Patnaik, learned counsel filing Vakalatnama had appeared on behalf of the appellants. He submits to have no such instruction either from the legal representatives of appellant no. 1 or the appellant no.2 (accused- Muralidhar) to further pursue the appeal in so far as appellant no.1 is concerned. He however submits to have the instruction to argue the appeal in assailing the judgment of conviction and order of sentence in respect of appellant no.2 (accused-Muralidhar).

In view of the above, the appeal in so far as the appellant no. 1 (accused-Prasanna) is concerned stands abetted and it now runs only at the instance of the appellant no.2 (accused-Muralidhar)

3. The case of the prosecution in short is that on 9.8.86 around 5.30 P.M. the informant namely, Bhaskar Chandra Sethi (P.W.1) was there in front of their house running by the side of the road of village Karanjia under Champua Police Station in the district of Keonjhar. The informant was then talking with Dayanidhi Behera (P.W.3) and Pratap Charan Giri (P.W.4). Around that time, accused Prasana Behera (appellant no.1-since dead) returned from the village football field side and questioned P.W.1 as to why he addressed his brother Hrushikesh Behera as Mulia (Servant). P.W. 1 having denied to have said so, wanted a direct confrontation. It is said that accused Prasana then got enraged and while scolding, went to his house. Immediately, thereafter, he returned from the house being followed by his brother accused Muralidhar (appellant no.2), his parents, namely Jadumani and Raimani. It is further stated that accused Prasana lifted a stone from the ground and threw it as such. He then came towards P.W.1 to assault him. At this sight, P.W.1's mother and father i.e. Fulmani (deceased) and Nakfodi (P.W.2) came to rescue P.W.1. After words accused Prasana scolded P.W. 1 and having come closure brought out a 'Chhuri' (Knife) from near his waist and attempted to stab at P.W. 1. In the process, P.W.1 having been able to avoid the said blow to the sit aimed at, the knife struck at his left hand finger causing bleeding injury. At this point of time, when his mother came on the front to save P.W. 1, the attempted second blow by the accused Prasana hit at

her belly resulting severe bleeding injury and bulging of the intestine. Having received the blow, she made a cry that accused Prasana had killed her and went to the veranadah of Khetrabasi Sahu (P.W.5) where she fell down and died. It is further stated that at that time, accused Muralidhar in respect of whom the appeal is being prosecuted dealt axe blow on the face of the father of P.W. 1 examined as in the trial P.W. 2 resulting bleeding injury on his person and causing loss of 2/3 teeth. He then called out Khetrabasi (P.W.5) to have been so assaulted. When Khetrabasi (P.W.5) and others rushed to the place, accused persons Prasana and Muralidhar holding the weapons fled away.

It is stated that informant's father i.e. P.W. 2 had purchased a piece of land measuring Ac.0.30 decimals from the father of the accused persons and in respect of the said transaction as also the possession of the land, there was dispute between the accused persons on one hand and the informant P.W. 1 on the other. So there was ill-feeling for which accused Prasana purposely made false allegation that his brother namely, Hrushikesh had been addressed by P.W.1 as 'Mulia' (Servant) with the sole intention to see that quarrel would ensue so that he would fulfill his evil desire in assaulting the informant (P.W.1) and others for being visited with fatal consequences.

Khetrabasi Sahu (P.W.5) having first reported the incident at Champua Police Station; the Sub-Inspector of Police (P.W.11) present there entered the said fact in the Station Diary Book of the police station vide Entry no. 253 dated 9.8.86 (Ext.17). The S.I. of Police Station (P.W.11) then informed the fact to the Office-In-Charge of the Police Station (P.W.12) by VHF as he was then on duty at Jhumpura. He proceeded to the spot and there the plain FIR Ext. 1 from P.W. 1 was received which led to the registration of the case.

In course of investigation, the informant and other witnesses were examined; post mortem examination was held over the dead body of the deceased; the injured persons P.Ws. 1 and 2 were medically examined and incriminating articles were also seized and sent for chemical examination. On completion of investigation, charge sheet having been submitted against the accused persons (appellants), they faced the trial being charged with the commission of offence under section 302/324/326/34 IPC.

4. In the trial, the plea of accused is that of denial of the incident and their role as placed/projected by the prosecution. It is their further case that

on the relevant date and time when accused Prasana was returning from the village foot ball field side, he found that Bhaskar Sethi (P.W.1) and his parents were standing in front of their house. He was then holding a 'Budia' (Axe); and his parents carrying lathis. It is further stated that all of them suddenly surrounded him in order to assault and then Bhaskar (P.W.1) aimed a blow by that axe at his head which ultimately hit on the back of the shoulder as he moved a bit. As result of that, accused Prasana fell down. When he was trying to get up, Bhaskar (P.W.1) again wanted to assault him by that axe, by when P.W.10's mother namely, Fulmani, the deceased came to stand there and attempted to snatch away that axe from Bhaskar (P.W.1). Thereafter when Bhaskar (P.W.1) again attempted to hit accused Prasana by that axe, it somehow missed and then the second blow aimed at accused Prasana by that axe, accidentally was received by his mother, the deceased at her abdomen.

5. From the side of the prosecution, twelve witnesses have been examined. Out of them P.W. 1 is the informant-cum-injured and P.W. 2 is his farther, the other injured. Two other witnesses such as P.Ws. 3 and 4 have been examined along with P.W. 5 who had first reported the incident at the police station. Witness to the seizure, the Gramarakhi has been examined as P.W. 6. The doctor who had conducted autopsy over the dead body of the deceased and examined the injured P.W.2 has come to the witness box as P.W. 8. P.W. 9 is the Doctor who had examined accused Prasana as well as the informant Bhaskar (P.W. 1) and P.W. 10 is the Doctor who had examined Ramani, the mother of the accused persons. P.W. 7 is the police constable who had assisted the OIC, the Investigating Office of the case, here examined as P.W.12 and P.W. 11 is the S.I. of Police Station who had first received the information at the police station from P.W. 5.

The prosecution has proved the FIR Ext. 1, seizure lists, the registered sale deed Ext. 2 executed by Jadumani, the father of the accused persons. The post mortem report and injury repots have also been admitted in evidence and marked exhibits from the side of the prosecution. The axe as well as other incriminating articles having been produced in the trial have been marked as the Material Objects (M.Os.). The defence has examined one doctor as D.W. 1.

6. The trial court on examination of the evidence and upon their analysis has finally come to the conclusion that the prosecution has proved

its case beyond reasonable doubt in proving the offence under sections 304-II and 324 IPC against accused Prasana (since dead) and against accused Muralidhar under sections 324/326 IPC which we are presently concerned in this appeal.

7. Mr. D.P. Patnaik, learned counsel for the accused Muralidhar, the appellant no. 2 submits that the evidence of P.W. 1, the informant-injured has not been properly scrutinized by the trial court with due care and caution, particularly keeping in view the fact that he is a highly interested witness as of longstanding enmity. It is submitted that his evidence being read with the FIR (Ext.1) as well as with that of P.W. 2 clearly go to show that he has been suppressing some important part of the incident and the actual manner of its happening and that is becomes more glaring when the prosecution has not explained the injury on the accused Prasana as well as his mother, Ramani who have been medically examined during investigation.

According to him, even though the injuries found on the person of accused Prasana and his mother are simple in nature, yet under the circumstances those ought to have been explained properly and for such non-explanation, the prosecution has to share the blame. He also submits that with said suppression when P.Ws.3 and 4 have not supported the prosecution case and given a different picture as to the incident, the prosecution case cannot be said to have been established beyond reasonable doubt. It is further submitted that the evidence of P.W. 1 being highly discrepant with regard to said blow said to have been given by the accused Prasana, his evidence ought not to have been accepted in respect of the role of accused Muralidhar as in view of the manner of happening of the incident, that part cannot be segregated being inextricably mixed up. It is his submission that the evidence of P.W. 2 although does not inspire confidence when together taken up for consideration with the evidence of P.W. 1, being wholly inconsistent on material aspects, the trial court has committed grave error in placing the reliance on the version of the said witnesses in recording the finding of conviction against accused-Muralidhar. He further submitted that on proper appreciation of evidence on record, the findings of the trial court as regards the complicity of accused Muralidhar in commission of the offences under sections 324/326 IPC is unsustainable.

8. Learned counsel for the State refuting the above submission contended that the trial court on thread bare of analysis of the witnesses examined from the side of the prosecution as also the defence and taking into

account the documents admitted in evidence, marked exhibits has rightly arrived at the conclusion as regards the commission of offence under section 324/326 IPC by accused Muralidhar, the appellant no.2. It is submitted that the discrepancy in the evidence of P.Ws. 1 and 2 are too minor to be taken note of and those are not enough to discard their evidence, especially with regard to the role played by accused Muralidhar, the appellant no.2 in the incident.

9. On the above rival submission, this Court is called upon to judge the sustainability of the finding of the trial court in respect of accused Muralidhar who has been held guilty for commission of offence under sections 324/326 IPC and for that the need arises to have an exercise in carefully going through the evidence for their appreciation.

I have read the depositions of all the prosecution witnesses as also the one examined by the defence. The documents marked Exhibits have been perused.

It is the evidence of P.W. 1 the informant-injured that on the relevant date, time and place after the altercation, accused Prasana ran towards his house and then he came from his house with a 'Chaku' when accused Murali came with a 'Gupti' (a long pointed sharp cutting weapon and ordinarily, its of much narrower in width than ordinary knife) and their father came with a Budia (Axe). It is stated that when his father (P.W.2) told as to why as they were quarrelling; accused Muralidhar with the gupti that he was holding gave a blow on the left side of his face causing bleeding injury and loss of one tooth which led to his fall on the ground and at that time, mother of the accused persons and their sister were present when their grand-mother also arrived there. He has further stated that after his father fell down, the father, mother, sister and grandmother of the accused persons pounced upon his father and caught hold of him when accused Prasana raised the 'Chaku' aiming at his chest which however hit at his left hand. He further stated that at that point of time, his mother, the deceased came to his rescue, when accused Prasana stabbed at her belly resulting bulging of the intestine. In view of the above discussion, the tendency of this P.W.1 to rope in the female members of the accused persons clearly comes out when nothing had been so said while lodging the FIR (Ext.1) nor in the earlier statement before Police more particularly as to the role of Jadumani, the father of the accused persons coming there holding 'Budia' (Axe) and playing further role. Next, so far as the role of accused Muralidhar is concerned, it is the evidence of

P.W. 1 that he by means of that Gupti had given blows at his father which had hit on the left hand and left side of face. During cross-examination, he has stated that accused Muralidhar had also assaulted his mother. Several important omissions amounting to contradictions as well as major contradictions are seen in the evidence of P.W. 1 in view the sharp departure as to the role of the accused persons when he has deposed in the trial. Attention of this witness has been drawn to the said parts of his statement recorded by the Investigating Officer under section 161 Cr.P.C., which have been subsequently proved through the Investigating officer (P.W.12) as finds noted at para-11 of the deposition of P.W.12.

P.W. 2, the father of P.W. 1 has stated that accused Muralidhar had given a blow on his face by means of a Gupti and thereafter had also assaulted him with that Gupti on his left upper arm and it is he who by means of that Gupti stabbed at the abdomen of his wife (deceased) and thereafter accused Prasana had given the second blow by means of the knife (Chaku) at the belly of the deceased. Having carefully gone through his evidence, several material omissions and major contradictions as to the role of the accused persons are noticed. The attention of P.W. 2 having been drawn to said parts of the statement recorded under section 161 Cr.P.C. those have been proved during examination of the Investigating Officer (P.W.12) as can be seen at para-12 of his deposition. P.W. 3 having not supported the prosecution case has rather favoured the part of the story projected by the defence that Bhaskar P.W. 1 had dealt a Budia blow on the left scapular region of accused Prasana and when he wanted to dealt the other blow, his mother intervened for which the same hit at her belly. Same is the state of the affair in respect of evidence of P.W. 4.

Admittedly, the parties were having dispute with regard to the landed property, the relationship was strained. When P.Ws. 1 and 2 are stating the incident to have taken place in one manner, the other two witnesses P.W.3 and 4 have stated it to have taken in a different manner. There appears serious discrepancy in the evidence of P.Ws. 1 and 2 as to the role of accused Muralidhar as also the other accused Prasana in the said incident. In the FIR Ext. 1 lodged by P.W. 1, it is stated that accused Prasana's knife blow on the second attempt hit at the belly of the deceased which led to the bulging of her intestine and accused Muralidhar had given the 'Budia' blow on the face of his father. During evidence, it is however stated differently. Thus, the evidence of P.Ws. 1 and 2 and the version in the FIR (Ext.1) lodged by that

P.W.1 are irreconcilable particularly with regard to the role of the accused Muralidhar in the said incident. To add to this, in view of the above discussed discrepancy, the injuries on the accused Prasana and his mother Ramani even though are of minor nature yet, their non-explanation under the circumstances bears significance and in my considered opinion the benefit of doubt as to the manner of happening of the incident and parts played by all concerned stands squarely extended. Thus on the obtained evidence, this Court is constrained to hold that the finding of the trial court that the prosecution has proved its case beyond reasonable doubt against accused Muralidhar in committing the offence under section 324/326 IPC cannot be sustained. Accordingly, the said finding is hereby set aside.

10. Resultantly, the appeal presently pursued at the instance of accused Muralidhar, the appellant no.2 is hereby allowed. The judgment of conviction and order of sentence recorded against him are hereby set aside. The bail bonds executed by accused Muralidhar, the appellant no. 2 shall stand discharged.

—— o ——

2020 (II) ILR - CUT- 572

S. PUJAHARI, J.

BLAPL NO. 729 OF 2020

JAGAMOHAN KANHAR .....Petitioner

.V.

STATE OF ODISHA .....Opp.Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 37 – Provisions under – Offences punishable under Sections 307, 323, 353/34 of I.P.C. and Section 20(b)(ii)(C) of the N.D.P.S. Act – Co-accused persons released on bail – Plea of benefit of parity pleaded – Whether can be granted? – Held, no, – Reasons indicated.

"It appears from the aforesaid orders that a Bench of this Court in exercise of its discretionary jurisdiction to grant bail in the Code of Criminal Procedure taking note of the facts and situation in the case relating to the petitioners therein, has exercised its jurisdiction to grant bail as aforesaid. The petitioners therein are undisputedly co-accused of the present petitioner and similarly situated with the

present petitioner. But, I humbly disagree with the contention advanced that the aforesaid orders enure to the benefit of the petitioner on the rule of parity in as much as, if I may be permitted to say so, in the aforesaid orders the mandate of law provided in Section 37 of the NDPS Act has not been addressed to while releasing them on bail, more so in view of the ratio laid down in the case of Narcotics Control Bureau (supra), so also a decision of this Court in the case of Sudam Karan vrs. State of Odisha, (2014) 58 OCR 747 wherein this Court has also taking note of the decisions in the cases of Narcotics Control Bureau (supra), Chander alias Chandra Chandra vrs. State of U.P., 1998 CRI.L.J. 2374 and Gopi @ Gopal Rout vrs. State of Orissa passed in BLAPL No.983 of 2013 with regard to the application of the rule of parity in granting bail to the co-accused persons, refused to extend the benefit of rule of parity to the petitioner therein, in similar facts and situations. In the case of Chander alias Chandra (supra), a Bench of the Allahabad High Court has held that if the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity, so also a Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail."

Case Laws Relied on and Referred to :-

1. AIR 1980 SC 785 : Niranjan Singh & Anr Vs. Prabhakar Sajram Kharote & Ors.
2. AIR 1990 SC 625 : State of Maharashtra Vs. Anand Chaintaman Digha.
3. (2001) 4 SCC 280 : Prahalad Singh Bhati Vs. NCT, Delhi.
4. (2004) S.C.C. 619 : Narcotics Control Bureau Vs. Dilip Pralhad Namade.
5. (2014) 58 OCR 747 : Sudam Karan Vs. State of Odisha.
6. 1998 CRI.L.J. 2374 : Chander alias Chandra Chandra Vs. State of U.P.

For the Petitioner : M/s.S.K. Baral, S.Kanhar, G. Khilar, D. Mishra, A. Das., N.Behera, J. Sahoo.

For the State : Addl. Standing counsel

ORDER Date of Order : 26.08 2020

S. PUJAHARI, J.

The petitioner being in custody in G.R. Case No.26 of 2016, arising out of Gochhapada P.S. Case No.17 of 2016, has filed this petition for his release on bail as his prayer for bail has been refused by the learned Addl. Sessions Judge-cum-Special Judge, Phulbani vide the impugned order dated 17.01.2020. The petitioner has been indicted in the aforesaid case for the alleged commission of offences punishable under Sections 307, 323, 353/34 of I.P.C. and Section 20(b)(ii)(C) of the N.D.P.S. Act.

2. In the wake of the Pandemic Covid-19, the case was taken up through Video Conferencing and I have heard learned counsel appearing for the petitioner and learned Addl. Standing counsel appearing for the State.

3. It appears that the petitioner had earlier approached this Court being aggrieved by the order of the learned Sessions Judge-cum-Special Judge, Phulbani, but the same was withdrawn. Thereafter, the petitioner has again approached the learned Sessions Judge-cum-Special Judge, Phulbani for his release on bail, but the same having been refused, the petitioner has challenged the same by filing this bail application.

4. It is alleged that the accused-petitioner along with co-accused persons was engaged in transportation of 'Ganja' and commercial quantity of 41 Kgs. of 'Ganja' was recovered from a Bolero vehicle while the petitioner and the co-accused persons were engaged in transporting the same. It is further alleged that the petitioner and his crime associates had hatched a conspiracy to carry on such clandestine transportation, and to cause hurt and do away with lives of the Police or Excise personnel whoever came to obstruct them. It is further alleged that when Sri Mrutyunjaya Pradhan, O.I.C., Gochhapada Police Station and his staff conducted the raid, the accused-petitioner and his associates assaulted them causing injuries. On the report of the O.I.C., Sri Mrutyunjaya Pradhan, a case was registered, and on completion of investigation, charge-sheet has been submitted against the petitioner and the co-accused persons for the offences indicated above.

5. In support of the bail plea, the learned counsel appearing for the petitioner submitted, inter-alia, that with the available materials on record, the alleged recovery and seizure of the contraband articles can not be attributed to physical and conscious possession of the petitioner nor can it be prima-facie held that there was any conspiracy or pre-concert of mind of the petitioner with the co-accused persons for causing the alleged hurt to police personnel. It is his further contention that since the co-accused persons, namely, Lokanath Sahu and Rabindra Dhalachatra have already been released on bail by this Court vide orders passed in BLAPL Nos.2051 of 2016 and 7646 of 2016, the petitioner who is in custody for more than four years, should be released on bail.

6. Learned Addl. Standing counsel appearing for the State has opposed the prayer for bail of the petitioner on the ground of the nature and gravity of the indictment. According to him, in the facts and circumstances of the case, the petitioner cannot be taken at par with the co-accused persons who have been granted bail.

7. Since the petitioner has been implicated in an offence under the N.D.P.S. Act for transporting 'Ganja' of commercial quantity and sought for

bail in this case, it would be apposite to have a look to Section 37 of the N.D.P.S. Act as the same deals with the limitations prescribed with regard to grant of bail to a person indicted in an offence under Section 20(b)(ii)(C) of the NDPS Act. The said Section reads as thus;

> **"37. Offences to be cognizable and nonbailable.-** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) –
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for [offences under section 19 or section 24
>
> or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]"

8. A perusal of the aforesaid section would go to show that Court while addressing the bail application of a person accused of the offences mention in Section 37(1)(b) of the N.D.P.S. Act, the Court must give an opportunity to the Public Prosecutor to object the prayer for bail and if he objects, should not grant bail without recording the satisfaction that there are reasonable ground for believing that the accused is not guilty of the offence alleged and not likely to commit any offence if allowed to go on bail. Any offence has been held by the Apex Court to be an offence of similar nature. The aforesaid limitations are in addition to the limitations provided for grant of bail in the Cr.P.C. as well as in any other law.

9. In the case of ***Niranjan Singh and another vrs. Prabhakar Sajram Kharote and others, AIR 1980 SC 785***, the Apex Court while dealing with the "law of bails" have held as follows;

> "The law of bails, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict the liberty of a man

> who is alleged to have committed a crime and the presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt. The granting of bail in the case of a non-bailable offence is a concession allowed to an accused person. In the case of a bailable offence, bail can be obtained as of right under Sec. 436(1), Cr.P.C., subject to restrictions under Sec. 436(2). While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been prejudged. Existence of a prima-facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required……."

10. In the case of ***State of Maharashtra vrs. Anand Chaintaman Digha, AIR 1990 SC 625***, the Apex Court have held that where the offence is of serious nature the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public.

11. In the case of ***Prahalad Singh Bhati vrs. NCT, Delhi, (2001) 4 SCC 280***, the Apex Court have held as follows;

> "8…… While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviours, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable ground for believing 'instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

12. With regard to grant of bail to accused-petitioner indicted for commission of offence as mandated in Section 37(1)(b) of the N.D.P.S. Act, the Apex Court in the case of ***Narcotics Control Bureau vrs. Dilip Pralhad Namade, (2004) S.C.C. 619,*** dealing with the provisions of Section 37 of the N.D.P.S. Act at paragraphs-9, 10, 11 and 12 have held as follows;

> "9. As observed by this Court in Union of India v. Thamisharasi clause (b) of subsection (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court

that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

10. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present respondentaccused is concerned, are: (1) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and (2) that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence and he is not likely to commit any offence while on bail. This nature of embargo seems to have been envisaged keeping in view the deleterious nature of the offence, necessities of public interest and the normal tendencies of the persons involved in such network to pursue their activities with greater vigour and make hay when at large. In the case at hand the High Court seeks to have completely overlooked the underlying object of Section 37 and transgressed the limitations statutorily imposed in allowing bail. It did not take note of the confessional statement recorded under Section 67 of the Act.

11. A bare reading of the impugned judgment shows that the scope and ambit of Section 37 of the NDPS Act was not kept in view by the High Court. Mere non-compliance with the order passed for supply of copies, if any, cannot as in the instant case entitle an accused to get bail notwithstanding prohibitions contained in Section 37.

12. The circumstances under which the bail can be granted in the background of Section 37 have been indicated above. The case is not one to which the exceptions provided in Section 37 can be applied." [*Underlining by me*]

13. The materials collected by the Investigating Agency reveal a prima-facie case against the petitioner under Section 20(b)(ii)(C) of the N.D.P.S. Act, inasmuch as the vehicle in which the petitioner was an occupancy, commercial quantity of 'Ganja' was allegedly seized. The accusation is serious in nature, inasmuch as it is an offence against the Society. The punishment provided for the aforesaid offence on conviction is minimum imprisonment for ten years, which may extend to twenty years and minimum fine of rupees one lakh which may extend to rupees two lakhs and, therefore, a stringent one. Besides the same, an attack was made on the police party

while effecting the aforesaid seizure by one of the culprits. Hence, considering the character of incriminating materials, the quantum of punishment provided on conviction and the offence, which is against the Society, stated to have been committed, this Court is of the view that the petitioner has prima-facie made out no case for his release on bail overcoming the limitations for grant of bail under Section 439 of Cr.P.C. Otherwise also, the petitioner being indicted in a heinous and serious offence of drug trafficking of Narcotic drugs of commercial quantity and from the materials available on record, it being hard to record a satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged or not likely to commit similar offence, if released on bail, the petitioner also has no case for his release on bail in view of the mandate of Section 37(1)(b) of the N.D.P.S. Act.

14. With regard to the contention of the learned counsel for the petitioner to release the petitioner on the ground of parity as this Court had already allowed the similarly situated co-accused persons, namely, Lokanath Sahu and Rabindra Dhalachatra on bail vide orders dated 12.06.2017 and 06.12.2016 respectively passed in BLAPL Nos.2051 of 2016 and 7646 of 2016. For better appreciation of the contention advanced by the learned counsel for the petitioner, the orders passed in the aforesaid two bail applications are extracted hereunder;

> **"BLAPL No.2051 of 2016**
> Order dated 12.06.2017
>
> Heard learned counsel for the petitioner and learned Additional Standing Counsel on th e application under section 439 Cr.P.C. praying for bail for the offence under sections 120(B) /307/341/353/323/324 I.P.C. and sections 20(b)(ii)(c)/29 of N.D.P.S. Act.
>
> Learned counsel for the petitioner submits that the there is no allegation as to which of the accused tried to cause assault upon the Officer conducting search and seizure. Apart from this the petitioner is a passenger in the vehicle from which the Ganja was seized. He further submits that the Ganja was not seized from his exclusive possession and the co-accused person in the similar footing have been released on bail by this Court and that the petitioner is a handicapped person, for which lenient view may be taken to release the petitioner on bail. Learned Additional Standing Counsel while opposing the prayer for bail, submits that there is nothing in the case diary as to which of the accused tried to assault the Officer conducting search and seizure.

Considering the submissions of learned counsel for the respective parties, regard being had to the facts and circumstances of the case including the fact that the case diary does not spell out about the exclusive conscious possession of the petitioner over the seized Ganja, fact that the case dairy is silent to show that the present petitioner was the driver, but not a passenger and also the petitioner is a handicapped person. Fact that the charge sheet in this case has been submitted and the petitioner is a local person having no chance of absconding or tampering with the prosecution evidence, let the petitioner be released on bail on furnishing bail bond of Rs.50,000/- (rupees fifty thousand) with two solvent sureties each for the like amount to the satisfaction of learned District & Sessions Judge- cum-Special Judge, Kandhamal-Phulbani in G.R. Case No.26 of 2016 with the conditions that (i) he shall appear before the court in seisin over the matter on each date of posting; (ii) he shall not tamper with the prosecution witnesses directly or indirectly; and (iii) he shall not commit any offence while on bail.

Violation of any of the aforesaid terms shall entail cancellation of the bail.

Accordingly, the BLAPL is disposed of.

Urgent certified copy of this order be granted on proper application.

BLAPL No.7646 of 2016
Order dated 06.12.2016

Heard learned counsel for the petitioner and the learn ed State Counsel on the application under section 439 Cr.P.C. for release of the petitioner on bail who allegedly involved with the offence under Sections 120-B/307/341/353/323/324/ of the Indian Penal Code read with Sections 20(b)(ii)(c)/29 of the N.D.P.S. Act. 2.

Learned counsel for the petitioner submits that there is no material against t he petitioner except the statement of the co-accused person implicating the petitioner with th e commission of offence. He further submits that in the meantime charge sheet has been submitt ed for which he prays that a lenient view may be taken to release the petitioner on bail with any condition as deemed fit and proper. Learned counsel for the State opposes the prayer for bail. 3.

Considering the submission of the learned counsel for the respective parties, regard being had to the facts and circumstances of the case including the fact that there is n o other material against the petitioner except the statement of the co-accused person, fact th at in the meantime charge sheet has been submitted and the fact that the petitioner being a lo cal person, there is no chance of his absconding and tampering the prosecution witnesses, let the petitioner be released on bail in connection with G.R. Case No.26 of 2016 (T.R. No.39 of 2 016) pending in the court of learned District and Sessions Judge-

cum-Special Judge, Kandhamal, Phulbani on furnishing bail bond of Rs.50,000/- (rupees fifty thousand) with two solvent su reties each for the like amount to the satisfaction of the Court in seisin over the matter wit h the conditions that (i) The petitioner shall appear before the Court in seisin over the mat ter on each date of posting; (ii) He shall not tamper with the prosecution witnesses directly or indirectly; and (iii) He shall not commit any offence while on bail.

Violation of any of the aforesaid terms shall entail cancellation of the bail.

Accordingly, the BLAPL is disposed of.

Urgent certified copy of this order be granted on proper application."

It appears from the aforesaid orders that a Bench of this Court in exercise of its discretionary jurisdiction to grant bail in the Code of Criminal Procedure taking note of the facts and situation in the case relating to the petitioners therein, has exercised its jurisdiction to grant bail as aforesaid. The petitioners therein are undisputedly co-accused of the present petitioner and similarly situated with the present petitioner. But, I humbly disagree with the contention advanced that the aforesaid orders enure to the benefit of the petitioner on the rule of parity inasmuch as, if I may be permitted to say so, in the aforesaid orders the mandate of law provided in Section 37 of the NDPS Act has not been addressed to while releasing them on bail, more so in view of the ratio laid down in the case of ***Narcotics Control Bureau (supra),*** so also a decision of this Court in the case of ***Sudam Karan vrs. State of Odisha***, (2014) 58 OCR 747 wherein this Court has also taking note of the decisions in the cases of ***Narcotics Control Bureau (supra), Chander alias Chandra Chandra vrs. State of U.P., 1998 CRI.L.J. 2374 and Gopi @ Gopal Rout vrs. State of Orissa*** passed in BLAPL No.983 of 2013 with regard to the application of the rule of parity in granting bail to the co-accused persons, refused to extend the benefit of rule of parity to the petitioner therein, in similar facts and situations.

In the case of ***Chander alias Chandra (supra***), a Bench of the Allahabad High Court has held that if the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity, so also a Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail. So also, a Bench

of this Court taking note of the aforesaid decision of Allahabad High Court, in the case of ***Gopi @ Gopal Rout (supra)*** in paragraph-17, held as follows;

> "Keeping in mind the gravity of offence, materials available on record and the above principles of law, now I have to consider the present petition for grant of bail. Undoubtedly, in the present case, accusations are of serious in nature. In a broad daylight, the petitioner along with other co-accused persons entered into the house of the informant on the pretext of courier agent. On the point of pistol and knives, they took the godrej almirah keys from the informant, committed dacoity and took MRS away cash, gold and silver ornaments. The materials already on record are recovery of stolen property from the possession of the accused-petitioner and identification of the accused-petitioner in T.I. parade. The petitioner has criminal antecedents as he is involved in five other criminal cases. The order granting bail to the co-accused Kunia is not supported by any reasons. Therefore, the same cannot form the basis for granting bail to the petitioner on the ground of parity."

15. For the reasons stated above, the prayer for bail of the petitioner is devoid of merit and stands rejected.

Accordingly, the BLAPL stands disposed of being dismissed.

As lock-down period is continuing for COVID-19, learned counsel for the petitioner 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.

——— o ———

2020 (II) ILR - CUT- 581

BISWANATH RATH, J.

O.J.C. NO. 6479 OF 2002

SUNIL KUMAR MOHANTY .....Petitioner

.V.

KALAHANDI ANCHALIKA GRAMYA BANK & ORS. .....Opp. Parties

CONSTITUTION OF INDIA,1950 – Arts.226 & 227 – Disciplinary Proceeding – Dismissal of Bank Employee – Order of dismissal also confirmed by the Appellate Authority – Interference by the High Court – Scope – Discussed. (Paras 8 to 10)

Case Laws Relied on and Referred to :-

1. (2006) 5 SCC 201 : South Indian Cashew Factories Workers' Union Vs. Kerala State Cashew Development Corporation Ltd. & Ors.
2. (2011) 13 SCC 541 : Rajasthan Tourism Development Corporation Ltd. & Anr Vs. Jai Raj Singh Chauhan.
3. (2011) 10 SCC 249 : State Bank of India Vs. Ram Lal Bhaskar & Anr.
4. (2011) 4 SCC 584 : State Bank of Bikaner & Jaipur Vs. Nemi Chand Nalwaya.
5. (2006) 5 SCC 201 : Factories Workers' Union Vs. Kerala State Cashew Development Corporation Ltd. & Ors.

For Petitioner : Mr. J.K. Rath, Sr. Adv.

For Opposite Party Nos.1 to 3 : Mr. R.K. Rath, Sr. Adv.
Mr. P.V. Ramdas & Mr. P.V.Balakrishna,

For Opp. Party No.4 : None

JUDGMENT Date of Hearing : 05.03.2020 : Date of Judgment : 30.03.2020

BISW ANATH RATH, J.

This writ petition involves the following prayer:

> "It is, therefore, humbly prayed that this Hon'ble Court be graciously pleased to admit the writ application, issue notice to the opp. parties calling upon them to show cause as to why the disciplinary authority order dated 31.7.2001 in Annexure-18 and the appellate Authority order confirming the disciplinary authority order dated 18.5.2002 in Annexure-24 shall not be quashed;
>
> If the Opp. parties fail to show cause or give insufficient cause, make the rule absolute by quashing Annexurs-18 and 24 and issue a writ of mandamus directing the authorities to reinstate the petitioner forthwith and grant all consequential service benefits as due and admissible to him in accordance with law within a stipulated period of two months from the date of passing of the order;
>
> And pass such order/order(s), direction(s) as this Hon'ble Court deems just and proper in the facts and circumstances of the case;
>
> And for which act of kindness, the petitioner as in duty bound shall ever pray."

2. Short background involving the case is that petitioner joined as a Branch Manager in the erstwhile Kalahandi Anchalika Gramya Bank, Sagada Branch, Kalahandi on 23.11.1981. During his service career, petitioner dependant on a departmental proceeding was already imposed with major penalty and while continuing as such, petitioner was served with charge-sheet, vide Annexure-1 on 25.07.1994 on the premises of violation of

provisions under Regulation 19, 22(2), 30(1) of Kalahandi Anchalika Gramya Bank (Staff) Service Regulation, 1980 (in short 'KAGB Regulation, 1980'). Disciplinary Proceeding was concluded in participation of the petitioner based on the report of the Enquiry Officer submitted on 14.03.2001. Chairman as Disciplinary Authority passed an order of dismissal of the petitioner from Bank service under Regulation 30(1) of KAGB Regulation, 1980, however with liberty to the petitioner to prefer appeal. In the meantime entertaining the review application, the Disciplinary Authority kept the final order of punishment in abeyance asking the petitioner to submit his written statement of defence to the enquiry report, which order was again recalled by the Chairman by his order dated 03.08.2001 asking the petitioner to file appeal before the Appellate Authority. Petitioner preferred appeal. In the meantime for non-disposal of the appeal, petitioner preferred O.J.C. No.3285 of 2002 before this Court. The said writ petition was disposed of with a direction to the Appellate Authority for early disposal of this appeal within a period of four months. Appellate Authority in the meantime disposed of the appeal with an order of dismissal of the appeal on 18.5.2002, vide Annexure-24.

3. Mr.J.K. Rath, learned Senior Advocate for the petitioner taking this Court to the fact that petitioner has already been superannuated requesting the Hon'ble Court instead of entering into the merit involving the enquiry proceeding, vis-à-vis, the order of the Disciplinary Authority for converting the punishment by order of dismissal to that of compulsory retirement, more particularly keeping in view the fact that petitioner is suffering throughout his life for the dismissal order on his head. Taking this Court to the charges involving the petitioner and the establishment of charges through the enquiry proceeding on the premises of involvement of minimal allegations being established through the enquiry report, Sri Rath, learned Senior Advocate attempted to justify his request for modification of the final order of dismissal.

4. To the contrary, Mr. R.K. Rath, learned Senior Advocate appearing for the contesting opposite parties being assisted by Mr. P.V.Balakrishna, learned counsel taking this Court to the charges and the establishment of most of the charges through enquiry proceeding contended that petitioner being a Bank employee and allegation involving misappropriation and misutilization of funds as well as power being established, referring to the decision in the case of ***South Indian Cashew Factories Workers' Union Vrs.***

Kerala State Cashew Development Corporation Ltd. and others, reported in (2006) 5 SCC 201 contended that for the involvement of a bank employee in serious allegations, being established through enquiry not only this Court has limited scope to interfere in such matter but for the decision of the Hon'ble apex Court, no leniency should be shown involving such allegations.

5. Considering the rival contentions of the parties and looking to the charge-sheet vide Annexure-1, this Court finds the following charges and statement of imputations against the petitioner:

> CHARGESHEET:
>
> 1. Under Regulation 30(2) of Kalahandi Anchalika Gramya Bank (Staff) Service Regulations, 1980, this charge-sheet is served on Sri Sunil Kumar Mohanty, Officer since placed under suspension. The Article of Charges and the statement of imputations are enclosed which are self-explicit.
>
> 2. The list of documents on which the charges rest and the list of witnesses on which testimony the charges are sought to be established are placed as Annexure-A and Annexure-B respectively. These lists are, however, not self limiting. So, any new document may be presented and any new witness examined to establish a charge. Any of the listed items may be dropped, too.
>
> 3. Sri Mohanty is to acknowledge receipt of this letter on the duplicate hereof along with his signature and date and submit his statement of defence within 30 days from the date of receipt thereof and forward the acknowledged copy to reach the undersigned as soon as possible, through the Branch Manager, K.A.G.B., Boudh.
>
> 4. Sri Mohanty may inspect the relevant books/records at our Sagada(K) Branch on any working days if he so needs to submit his statement of defence. For the purpose he is allowed three days which is inclusive of the 30 days granted to him to submit his statement of defence.
>
> 5. Further, Sri Mohanty is to specifically admit or deny each charge for it is on specific denial of any charge(s) that an enquiry will be ordered into the same.
>
> ARTICLE OF CHARGES:
>
> Sri Sunil Kumar Mohanty, Officer since placed under suspension for his alleged involvement in other serious irregularities elsewhere, has also during his incumbency at our Sagada (K) branch committed such serious irregularities as misappropriation of Rs.10,000/- from Branch cash, and, later tampering with the debit voucher and the Head Office A/c. Register maintained at the Branch; siphoning off of a large sum of money for his personal use through various factious a/cs by misutilising his financial powers as Branch Manager; blatant violation of

the Bank's laid down instructions in the matter of following the accounting procedure as well as general administration; failure to exercise effective control over staff posted under him; unauthorised absence and manipulation of records to suppress the same; gross irregularities in the documentation, conduct and follow up of advances thereby causing heavy loss to the Bank; incurring loss to the Bank by making unrelated payments to third parties and further by allowing interest concession to ineligible borrowers under the Agriculture Head; and, above all acting in a manner highly detrimental to the interest of the Bank. Thus Sri Mohanty has failed to serve the Bank honestly and faithfully and has by his above acts of omission and commission violated Regulations19, 22(2), 30(1) of Kalahandi Anchalika Gramya Bank (Staff) Service Regulations, 1980.

STATEMENT OF IMPUTATIONS:

1. That on 23.10.86 Sri Mohanty took Rs.10,000/- (Rupees ten thousand only) from the branch Sagada(K) to deposit the same in the Current Account of the Bank maintained at State Bank of India, Bhawanipatna. But instead of depositing the sum in the said current A/c. Sri Mohanty has misappropriated the entire sum. When detected later Sri Mohanty has tampered with the relative voucher supporting the aforesaid transaction and has fraudulently substituted the original voucher with another unconnected transaction and also tampered the Head Office A/c register.

2. That Sri Mohanty by misutilising his position as Branch Manager, has misappropriated Rs.23,000/- by showing the amount as disbursal of loans to various fictitious persons on different dates. The details of these fraudulent transactions are as under:

No.	Date	Loan A/c. No.	Name of the borrower	Amount (in Rs.)
i)	19.9.86	TL 121	Butia Majhi	3,000.00
ii)	23.9.86	TL 122	Poki Harijan	3,000.00
iii)	25.9.86	TL 124(A)	Anirudha Bag	2,000.00
iv)	10.12.86	TL 127	Ratu Harijan	2,000.00
v)	11.11.86	TL 125(A)	Purandar Singh	2,000.00
vi)	10.12.86	TL 128	Gurubaru Majhi	2,000.00
vii)	17.1.87	TL 128(A)	Dukhishyam Rout	2,500.00
viii)	17.1.87	TL 128(B)	Tankadhar Rout	2,500.00
ix)	20.1.87	TL 124(C)	Durbasa Naik	4,000.00

Sri Mohanty has even destroyed some of the payment vouchers such as those mentioned at items (ii) and (iii) with the intention of destroying some of the evidence of such fictitious transactions. In some of the cases the paying cashier has signed the payment vouchers. To avoid detection, Sri Mohanty has not sanctioned these alleged loans, not furnished the borrowers' address anywhere, not filled up the documents and not signed the documents, too. The transactions at item (i), (ii) and (iii) have taken place when he was in single custody.

3. That in connivance with Sri P.Mohapatra, JCC, who paid the vouchers, Sri Mohanty has further misappropriated Rs.7,000/- by showing the sum as disbursal of loan in the following three fictitious a/cs. on 22.8.86.

Date	A/c. No	Name	Amount (in Rs.)
22.8.86	TL 109	Ramjanam Singh	2,500.00
22.8.86	TL 110	Khirabati Sha	2,000.00
22.8.86	TL 111	Chandrasekhar Sha	2,500.00

Here, too, to avoid detention Sri Mohanty has not sanctioned the loans, not recorded the address of the alleged beneficiaries and where not filled up the documents properly and not signed the loan agreements. Thus Sri Mohanty had ulterior motive to defraud the Bank, through these fictitious loans.

4. That Sri Mohanty has further misappropriated a sum of Rs.5,000/- by showing the same as disbursal of loans to various fictitious beneficiaries, the details of which are as under:

Date	A/c. No	Name	Amount (in Rs.)
11.4.86	TL A/c. No.87(A)	Apurba Sahoo Vill:Bundelguda	2,500.00
11.4.86	TL A/c. No.87(B)	Kandarpa Sahoo, Vill:Bundelguda	2,500.00

Sri Mohanty has caused both the payment vouchers to be missing so as to destroy evidence against him.

5. That on 2.9.85 Sri Mohanty had arbitrarily issued a Bankers' Cheque for Rs.1042/- in favour of the New India Assurance Co. without any relative credit voucher to support the same. The cheque was eventually paid by collection through Head Office and has resulted in a loss to the Bank.

6. On 7.6.85 Sri S.K.Mohanty has withdrawn Rs.600/- from his S.B. a/c. No.416 without maintaining sufficient balance in the A/c. Later, he has scored through this debit entry to suppress the fact of the unauthorised overdrawal in the a/c. This unauthorised overdraft continued till as late as 1.4.88.

7. Sri Mohanty has absented himself from the branch and later signed sporadically some books of a/cs to register his presence on the following days as he has not signed many important vouchers transacted at the Branch including charges and Savings Bank drawal vouchers. He has not signed the DTR on many occasions.

27.12.84	18.11.85	
23.1.85	23.11.85	
18.6.85	28.11.85	
10.7.85	29.11.85	
16.7.85	10.1.86	
19.7.85	11.1.86	
26.8.85	3.2.86	
28.8.85 to 2.9.85	28.2.86	
6.9.85	22.3.86	
18.10.85	31.3.86	
13.11.85	26.4.86	
	24.5.86 to 7.6.86	Not signed DTR, vouches not signed (30.5.86)
28.6.86 to 8.7.86	(Not signed DTR)	
23.7.86		
16.8.86		
30.8.86 to 3.9.86		
3.10.86 to 7.10.86	(vault not signed)	
7.10.86		
13.11.86		
14.11.86		
1.1.87		
7.1.87		
12.1.87		
13.1.87		
14.1.87		

8. That on 13.1.86, Sri Mohanty has either not checked he ledger with the voucher or has deliberately overlooked the posting of the amount of Rs.30/- withdrawn by Sri P. Mohapatra, JCC in the latter's S.B. a/c No.16 to suppress the fact of overdraft in the said a/c. On 25.10.86, too, another drawal of Rs.200/- was not posted to the said a/c. The fact of the unauthorized overdraft has not been brought to the notice of Head Office, too. Thus, Sri Mohanty has failed to discharge his duty as Branch Manager honestly and faithfully and acted malafides by allowing unauthorised overdraft in a staff a/c and deliberately suppressed this fact from the knowledge of Head Office.

9. Sri Mohanty has violated the laid down guidelines of the Bank and is charged with dereliction of duty for his failure of suppression for which the employees posted under him have not performed their duties properly. Sri Mohanty has failed to bring the same to the notice of the Head Office. The details are as under:

Date		Irregularity
A) SHRI P. MOHAPATRA, JCC		
11.1.85	-	Not signed most of the vouchers of the day.
23.1.85	-	Passed a credit voucher of Rs.10,000/- in Head Office a/c towards receipt of cash remittance .
7.3.85	-	Not signed many deposit vouchers.
12.3.85	-	Not signed a SB drawal of Rs.100/- (A/c. No.9)
21.3.85	-	Not signed payment voucher of Rs.400/-
25.3.85	-	Not signed SB cheque for Rs.300/- (A/c. No.9)
17.4.85	-	Not signed SB cheque for Rs.350/- (A/c. No.9)
23.5.85	-	Money paid to supplier towards supply of bullock carts. Supplier's signature not taken towards receipt of money.
4.9.85	-	Not signed many deposit vouchers.
6.11.85	-	Not signed any voucher.
7.11.85	-	Not signed the deposit vouchers.
10.4.86	-	Not signed the vouchers of the day.
11.4.86	-	Not signed many vouchers of the day.
23.4.86	-	Paid an SB withdrawal voucher for Rs.3000/- without its being passed for payment by Branch Manager.
31.7.86	-	Not signed the vouchers.
13.8.86 to 14.8.86	-	-do-
25.8.86 to 26.8.86		-do-
5.9.86 to 6.9.86	-	-do-
27.10.86	-	-do-
11.11.86	-	-do-
14.11.86	-	Not signed gold loan payment voucher and ACC payment (No.149)
5.12.86	-	Not signed the vouchers of the day.
10.12.86		Not signed the vouchers of the day.
22.12.86		Not signed many vouchers of the day.
23.12.86		Not signed payment voucher for Rs.13,000/- (GL No.181)
B) I.P. PADHI, JCC		
3.1.87	-	Not signed the vouchers of the day.
5.1.87	-	Not signed many vouchers.

6.1.87	-	Two gold loan payment vouchers
7.1.87	-	Many vouchers
9.1.87	-	Many vouches
12.1.87	-	Cash Credit Payment Rs.300/- (A/c. No.421)
14.1.87	-	Not signed any voucher
17.1.87	-	Two TL payment vouchers
19.1.87	-	Not signed many the vouchers of the day.
20.1.87	-	Not signed many vouchers of the day.

C) Sri K.C.patnaik, **Field Supervisor** has passed a S.B. withdrawal voucher of Rs.23,000/- on 10.7.85 which is ultravires, i.e. beyond his passing powers.

10. Leave was granted to Sri Mohanty from 9.6.86 to 14.6.86 which he availed himself of and his leave a/c. Maintained at Head Office was debited for the aforesaid period. But although Sri Mohanty overstayed his leave without permission, and, reported for duty on 27.6.86, he has not submitted his leave application for the period of overstayal and thus leave a/c. has not been debited for the period of overstayal. Thus Sri Mohanty has remained unauthorizedly absent and did not bring to the notice of Head Office for post facto approval, in a dishonest manner.

11. By misutilizing his position as Branch Manager, Sri Mohanty just two days before his being relieved from the branch has advanced two pump set loans to Sri Mahendra Majhi and Sri Narahari Majhi both of village Kenduguda, without involving the Field Supervisor processing the loan proposals which reveal the following irregularities:

i) No pre-sanction visits were made by the Branch Manager and the loans proposals were not properly appraised.

ii) The loan applications were incomplete and no land particulars were furnished therein.

iii) No charge on land was created under Section 4(i) of the OACOMP (Banks) Act or no security obtained to protect the Bank's interest.

iv) No delivery orders were placed with the suppliers and the bills were dated 17.1.87 whereas the loan applications and the documents bear date 18.1.87 on them.

v) The documents were incomplete and not properly executed.

vi) Sri Mohanty has himself signed on the observe of the suppliers bills as a token of having received the pump sets instead of borrowers doing the same.

vii) The bills were paid to the suppliers in one day before this relief without verifying the installation and operational effectiveness of the pump sets.

The loans have gone bad with bleak prospects of recovery. As the applications were not sponsored under any anti-poverty scheme, no subsidy was available, too.

12. Sri Mohanty has granted an SBF loan of Rs.4,000/- to one Smt. Laxmi Dei, w/o. Thaker Majhi of village Dalguma and not submitted the Discretionary power Returns to Head Office. On 04.11.85 a drawal of Rs.2000 was taken from this a/c by Sri Mohanty for his personal use without posting the voucher which was in excess of the limit granted.

13. That Sri Mohanty has granted the following gold loans against pledge of inferior quality of gold in violation of the laid down instructions. Margin and net weight have proved detrimental to the interest of the Bank and advance value specified for 22 carat gold were granted to the borrowers for inferior (17/18)carat gold. Loans were granted to the persons belonging to Bhawanipatna, that is, outside the area of operation of the Branch and primarily to benefit them with lesser interest rates as agriculture is not the primary avocation of any of the borrowers. No land particulars were furnished in the application form. No sanction was recorded by the Branch manager Sri Mohanty too. Thus the Bank has suffered a loss on account of lesser interest income. The details of the gold loans are given as under:

G.L. A/c. No.	Name of the borrower	Date of sanction	Amount sanctioned (Amount in Rs.)	Purity of gold
179/86	Mahavir Prasad Agrawal	14.11.86	15,000/-	19 carat
127/85	Sudhansu Sekhar Deo, Statue Para, Bhawanipatna	20.11.85	7,500/-	17 carat
190	Suresh Kumar Agrawal, Bhawanipatna	14.1.87	11,000/-	18 carat 21 carat
1/73	Bibhuti Bhusan Deo, Statue Para, Bhawanipatna	07.1.85	25,000/-	18 carat

Further, there has been unsubstantiated and unauthorised cuttings in the gross and net weights mentioned in the gold loan ledger which is detrimental to the Bank's interest.

14. By misutilizing his position as Branch Manager, Sri Mohanty has sanctioned loans to fictitious persons in respect of the following a/cs. and in order to eliminate evidence and avoid detection, has not furnished the addresses of the beneficiaries properly, not obtained their photographs, not executed the documents properly and not submitted the control returns to Head Office, and,

thus has misappropriated for his personal purpose the money shown as disbursed under these fictitious a/cs. The a/cs. are detailed under:

ACC A/c. Nos. 56, 57, 58, 59, 60, 61, 62, 63.

Term Loan A/c. Nos. 144, 322, 323, 314 (sanction letter and loan applications are not available except for a/c. No.144)

Cash Credit A/c. Nos.460(A), 560."

6. Looking to the Enquiry Report, Annexure-17, this Court finds based on the materials available on record, the Enquiry Officer gave the following observations:

Charge No.1:- In view of the above, it is proved that Sri S.K. Mohanty, C.O. during his incumbency as B.M. of Sagada (K) branch, on 23.10.86 took Rs.10000/- from the branch cash towards cash remittance but he has not deposited in C.A. with S.B.I. Further the C.O. has substituted the original voucher with another unconnected transaction and also tampered the H.O. a/c. Register. Hence the Charge No.1 is proved.

Charge No.2:- In view of the above, I observed that the C.O. has committed gross irregularities in documentation, disbursement of loans but the PO has not presented before the inquiry as regards the misappropriate of Rs.25,000/- by the C.O. by showing the amount as disbursal of loan to various fictitious persons. Hence the charge is not proved.

Charge No.3:- In view of the above, I observed that the CO has committed gross irregularities in documentation and disbursement of loan but the misappropriation of money by the CO is not proved.

Charge No.4:- In view of the above, the Charge No.4 is not proved.

Charge No.5:- In view of the above, it is proved that the CO has arbitrarily issued a Banker's Cheque for Rs.1042 in favour of N.I.A. CO. without any credit voucher which eventually resulted in loss of Rs.1042/- to the bank.

Charge No.6:- Charge No.6 is proved.

Charge No.7:-Taking into account of the above exhibits and the facts that came out in course of inquiry, I am of the opinion that the charge is partially proved.

Charge No.8:- Charge No.8 is proved.

Charge No.9:- In view of the above, I observed that the CO has failed to supervise the staffs posted under him and hence the charge is proved.

Charge No.10:- Charge No.10 is proved.

Charge No.11:- Charge No.11 is proved.

Charge No.12:- Charge No.12 is not proved.

Charge No.13:- In view of the above, it is observed that the CO has acted in a manner detrimental to the interest of the bank by sanctioning loan for AGL purpose without mentioning the land particulars of the borrowers for which it is proved that the bank has sustained a loss on account of lesser interest income and also there has been unsubstantiated and un-authorized cuttings on the net and gross weight of the ornament.

Charge No.14:- In view of the above, I observed that the charge of misappropriation of money by the CO has not been proved. But gross negligence in execution of documents have been observed in some of the accounts mentioned in the charge.

7. Looking to the gravity of allegations and the Charge Nos.1, 5, 6, 8, 9, 10, 11 and 13 are fully established, Charge nos.2, 3, 4, 12 and 14 have not been proved against the petitioner and Charge No.7 is partially established. For the nature of allegation involving the above charges, this Court finds not only there is serious allegation involving the Bank Officer but there has been also establishment of serious allegations through a duly constituted Departmental Proceeding. This Court here finds the decision of the Hon'ble apex Court, vide in the case of ***Union of India v. Sardar Bahadur,*** **reported in** (1972) 4 SCC 618 and observed in SCC p. 623, para 15 as follows:

> "15. .....Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials. If the enquiry has been properly held the question of adequacy or reliability of the evidence cannot be canvassed before the High Court."

In the case of ***Union of India v. Parma Nanda*****, reported in (1989) 2 SCC 177**, this Court while dealing with the scope of the Tribunal's jurisdiction to interfere with the punishment awarded by the disciplinary authority observed in SCCp.189, para 27 as follows:

> "27. We must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the

> enquiry officer or competent authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of legislature or rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice, what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority."

Further in the case of ***B.C. Chaturvedi v. Union of India, reported in (1995) 6 SCC 749***, Hon'ble apex Court reviewed some of the earlier judgments and in SCC p.762, para 18 held as under:

> "18. A review of the above legal position would establish that the disciplinary authority, and on appeal, the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

This Court here finds decision of the Hon'ble apex Court, vide in the case of ***Rajasthan Tourism Development Corporation Limited and another Vrs. Jai Raj Singh Chauhan***, reported in (2011) 13 SCC 541 has also clear support to the case of petitioner.

8. Further in the case of ***State Bank of India Vrs. Ram Lal Bhaskar and another***, reported in (2011) 10 SCC 249, in paragraphs-12 and 13 of the above judgment, Hon'ble apex Court observed as under:

> "12. This Court has held in *State of A.P. v. S. Sree Rama Rao*, reported in AIR 1963 SC 1723 at pp.1726-27, para 7).
>
> "7. ..... The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and

according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under article 226 to review the evidence and to arrive at an independent finding on the evidence."

13. Thus, in a proceeding under Article 226 of the Constitution, the High Court does not sit as an appellate authority over the findings of the disciplinary authority and so long as the findings of the disciplinary authority are supported by some evidence the High Court does not re-appreciate the evidence and come to a different and independent finding on the evidence. This position of law has been reiterated in several decisions by this Court which we need not refer to, and yet by the impugned judgment the High Court has re-appreciated the evidence and arrived at the conclusion that the findings recorded by the enquiry officer are not substantiated by any material on record and the allegations levelled against Respondent no.1 do not constitute any misconduct and that Respondent no.1 was not guilty of any misconduct.

9. In the case of ***State Bank of Bikaner & Jaipur Vrs. Nemi Chand Nalwaya***, reported in (2011) 4 SCC 584, Hon'ble apex Court in paragraph-7 held as under:

7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (Vide *B.C.Chaturvedi v. Union of India, reported in (1995) 6 SCC 749, Union of India v. G.Ganayutham, reported in (1997) 7 SCC 463, Bank of India v. Degala Suryanarayana, reported in (1999) 5 SCC 762 and High Court of Judicature at Bombay v. Shashikant S. Patil, reported in (2000) 1 SCC 416)*

10. From the above, this Court finds there is little scope available with the High Court to re-examine or re-appreciate the evidence and materials

involving the enquiry report. Similarly in the case of ***South Indian Cashew Factories Workers' Union Vrs. Kerala State Cashew Development Corporation Ltd. and others***, reported in (2006) 5 SCC 201, this Court finds the Hon'ble apex Court in paragraphs-11, 12 and 14 observed as follows:

> 11. In *Delhi Cloth and General Mills Co. Ltd. v. Labour Court,* reported in (1970) 1 LLJ 23 (SC), this Court has held that merely because the enquiry officer is an employee of the management it cannot lead to the assumption that he is bound to decide the case in favour of the management.
>
> 12. In *Saran Motors (P) Ltd. v. Vishwanath*, reported in (1964) 2 LLJ 139 (SC), this Court held as follows: (LLJ p. 141)
>
> "It is well known that enquiries of this type are generally conducted by the officers of the employer and in the absence of any special individual bias attributable to a particular officer, it has never been held that the enquiry is bad just because it is conducted by an officer of the employer."
>
> 13. xx xx xx.
>
> 14. The only other ground found by the Labour Court against the enquiry officer is that he made some unnecessary observations and, therefore, he was biased. The plea that the enquiry officer was biased was not raised during the enquiry or pleadings before the Labour Court or in the earlier proceedings before the High Court. The bias of the enquiry officer has to be specifically pleaded and proved before the adjudicator. Such a plea was significantly absent before the Labour Court. We also note that the Labour Court itself found that the enquiry officer relied on the evidence adduced in the enquiry and his findings were not perverse. After such a finding, even if he has stated some unwarranted observations, it cannot be stated that the report is biased. In *TELCO v. S.C. Prasad,* this Court held that: (SCC pp. 380-81, para 13)
>
> "13. Industrial Tribunals, while considering the findings of domestic enquiries, must bear in mind that persons appointed to hold such enquiries are not lawyers and that such enquiries are of a simple nature where technical rules as to evidence and procedure do not prevail. Such findings are not to be lightly brushed aside merely because the enquiry officers, while writing their reports, have mentioned facts which are not strictly borne out by the evidence before them."

11. This Court here finds involving Bank employees itself the Hon'ble apex Court already given the view that there should be heavy punishment to prevent such offences being taking place in the financial institutions. Hon'ble apex Court observed therein to have strict approached involving such employees. For the establishment many of the serious charges against the petitioner through the enquiry report, for support of the decisions referred to herein above to the case of opposite parties, this Court finds there is no scope for showing leniency in such cases and accordingly there is no scope of interfering in the order of punishment as well as in the order of the Appellate Authority under Annexures-18 and 24 respectively. The writ petition thus stands dismissed. There shall be no order as to cost.

2020 (II) ILR - CUT- 596

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 278 OF 1988

GULIA MAJHI .....Appellant

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – Minor discrepancies in the statement of the eye witness with reference to their previous statement before the police – Whether it is fatal to the prosecution case? – Ans. – No. – Held, minor discrepancies in the statements of witnesses as given in court vis-a-vis their previous statement before police cannot be the reason to discard the case of the prosecution such discrepancies are natural as against parrot like version of the witnesses – It cannot be lost site of the fact that the eye witnesses gave their evidence in court almost a year after the statement were recorded by the investigating officer – Such discrepancies are bound to occur for variety of reasons, for instance lack of education, social background, nature of witnesses, duration of their observation and lapse of time when the witnesses are called upon to give their evidence in court after the incident occurred. (Para 12)

(B) CRIMINAL TRIAL – Injuries on the person of the accused – No explanation by the prosecution – However no question have been asked to prosecution witnesses to that effect – Effect on the prosecution case – Held, there was no necessity on part of the prosecution to explain such injuries when no question have been asked to the eye witness to that extent – Further the evidence of the eye witnesses are clear and cogent. (Para 13)

(C) CRIMINAL TRIAL – Right of private defence – Meaning and definition – Indicated.

Law is well settled that question of self defence is one of both law and fact. The right of self defence is not a right to take revenge but it is purely preventive. A plea of right of private defence cannot be based on surmises and speculation. The accused is not required to prove the plea of right of private defence beyond all reasonable doubt but he has to raise a doubt in the mind of the Court to satisfy that his defence is probable one. Even if specific plea of self defence is not taken, it is not enough to denude the accused the right if the same is otherwise made out. To succeed in the plea of private defence, the accused has to prove that he exercised right of private defence in his favour and this right extended to the extent of causing death. Sections 96 to 106 of the Indian Penal Code deal with right of private defence and it also indicate as to how much right of private defence can be exercised and under what circumstances. It is of course true that such exercise of right of private defence cannot be weighed in golden scales in as much as person should not be expected to modulate his defence step by step. (Para-14)

(D) CRIMINAL TRIAL – Imposition of sentence – Various circumstances – Duty of the Court – Discussed.

In the case of **Sumer Singh -Vrs.- Surajbhan Singh and Ors. reported in (2014) 7 Supreme Court Cases 323**, it is held that it is the duty of the Court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the Court of law to curtail the evil. While imposing the sentence, it is the Court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. It was further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. The law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court held as follows:

"We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society." (Para-16)

Case Laws Relied on and Referred to :-

1. (2006)35 O.C.R. 100 : Ratnakar Mallik .Vs. State of Orissa.
2. A.I.R. 1976 S.C. 2263 : Lakshmi Singh .Vs. State of Bihar.
5. A.I.R. 1972 S.C. 2593 : Ramlagan Singh .Vs. State of Bihar.
4. (2014) 7 S.C.C. 323 : Sumer Singh .Vs. Surajbhan Singh and Ors.
5. (2015) 3 S.C.C. 441 : State of Punjab .Vs. Bawa Singh.

For Appellant : Mr. Smruti Ranjan Mohapatra (Amicus Curiae)
For State of Odisha : Sk. Zafarulla, A.S.C.

JUDGMENT Date of Hearing: 21.08.2020 : Date of Judgment: 26.08.2020

S. K. SAHOO, J.

The appellant Gulia Majhi along with his father Mathei Majhi and brother Salo Majhi faced trial in the Court of learned Sessions Judge, Mayurbhanj, Baripada in Sessions Trial No. 133 of 1987 for offence punishable under section 302 read with section 34 of the Indian Penal Code on the accusation of commission of murder of Kanda Majhi (hereafter 'the deceased') in village Kendua under Bisoi police station in the district of Mayurbhanj, Baripada in furtherance of their common intention.

The learned trial Court vide impugned judgment and order dated 03.10.1988 found the appellant and the co-accused persons guilty under section 304 Part-II read with section 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for seven years each.

2. The appellant and the co-accused Mathei Majhi and Salo Majhi preferred this appeal on 01.11.1988 and the appeal was admitted on 15.11.1988 and all of them were directed to be released on bail on that day. Basing on the report submitted by the learned Sessions Judge, Mayurbhanj, Baripada regarding death of Mathei Majhi, the appeal stood abetted against him on 22.02.2008. Similarly basing on the instruction received by the learned Addl. Standing Counsel for the State from officer in charge, Bisoi police station regarding death of Salo Majhi, the appeal also abetted against him on 06.08.2020

3. During investigation, the appellant was taken into custody on 01.08.1987 and forwarded to Court on 02.08.1987 and he was released on bail on 21.10.1987. Again on his conviction, he was taken into custody on 03.10.1988 and he was released on bail by this Court on 15.11.1988.

4. The prosecution case, as per the first information report (Ext.1/1) lodged by Ananta Majhi (P.W.1) of viilage Kendua before the officer in charge of Bisoi police station on 30.07.1987 is that his villagers had constructed an embankment in Kelua canal to accumulate water for bathing purpose and drinking of cattle. The appellant and the two co-accused who belonged to village Ambabeda cut a portion of the embankment in the morning hours on 30.07.1987. Hearing about this, P.W.1 along with some co-villagers came to the spot to confront the accused persons and for a settlement. At that time they found the accused persons and some female labourers were transplanting paddy seedlings in their land. When P.W.1 and other co-villagers called the accused persons, they challenged the villagers and also threatened them with dire consequences. The accused persons did not show any inclination for compromise. While P.W.1 and other co-villagers were talking amongst themselves, co-accused Mathei Majhi and Salo Majhi each being armed with an axe and the appellant being armed with a tangia came nearer them. The deceased challenged the accused persons as to how they cut the embankment for transplanting paddy seedlings which was constructed for accumulation of water for the purpose of cattle bathing. The accused persons assaulted the deceased on different parts of the body with the

weapons which they were holding. The deceased sustained severe bleeding injuries and died at the spot and the villagers getting panicked left the spot.

4. On the basis of such first information report, Bisoi P.S. Case No.38 of 1987 was registered under sections 302/34 of the Indian Penal Code on 30.07.1987 against the appellant and his father and brother. P.W.8, the officer in charge of Bisoi police station himself took up investigation. He sent Havildar P.Naik and another constable to the spot to guard the dead body. On the next day morning, he arrived at the spot where the dead body was lying and found the paddy seedlings were lying scattered and blood was found near the dead body. A check gamucha and a lungi were found near the dead body. The embankment was found cut of three feet wide. P.W.8 conducted inquest over the dead body in presence of the witnesses and prepared the inquest report vide Ext.10. The witnesses were examined and their statements were recorded. Blood stained earth, sample earth etc. were seized as per seizure list Ext.4. One green coloured printed lungi in a torn condition having stains of blood was seized under seizure list Ext.3 from near the spot. On production by accused Mathei Majhi, one tangia was seized under seizure list Ext.5 and one axe was seized under seizure list Ext.6. Some other seizures were made and seizure lists were prepared. The dead body was sent for post mortem examination.The accused persons were arrested on 01.08.1987 and forwarded to Court on 02.08.1987. The wearing apparels of the deceased were seized on being produced by the Havildar after post mortem examination under seizure list Ext.12. On requisition being made to the Tahasildar, Rairangpur by P.W.8, the land was measured and report was furnished as per Ext.14. P.W.8 handed over the charge of investigation to his successor Amiya Kumar Sahoo (P.W.9) on 24.08.1987 who in turn sent the material objects to S.F.L. through Court for chemical and serological examination on 04.09.1987 and on completion of investigation submitted under sections 302/34 of the Indian Penal Code on 20.10.1987.

5. After commitment of the case to the Court of Session, charge was framed against the appellant and the two co-accused persons under sections 302/34 of the Indian Penal Code on 08.02.1988 by the learned trial Court to which they pleaded not guilty and claimed for trial and accordingly, the sessions trial procedure was resorted to establish their guilt.

6. In order to prove its case, the prosecution examined nine witnesses.

P.W.1 Ananta Majhi is the informant in the case and he is an eye witness to the occurrence.

P.W.2 Daman Majhi came to the spot with P.W.1 and he is also an eye witness to the occurrence.

P.W.3 Sugda Majhi stated to have informed the villagers regarding cutting of embankment and planting of paddy seedlings by some female labourers including the wife of accused Salo Majhi. He is also an eye witness to the occurrence.

P.W.4 Singrai Majhi is a witness to the seizure of seizure lists Exts.2 to 6.

P.W.5 Dr. Bijoy Kumar Sahu was the Asst. Surgeon in Rairangpur Hospital who conducted the post mortem examination over the dead body of the deceased and proved his report Ext.7.

P.W.6 Purusottam Naik was the Havildar attached to Bisoi police station who escorted the dead body of the deceased to Rairangpur Hospital for post mortem examination. He also brought the wearing apparels of the deceased after the post mortem examination and produced before P.W.8.

P.W.7 Dr. Santosh Kumar Pattnaik was the Medical Officer of Bijatala P.H.C. who examined the accused Mathei Majhi and Salo Majhi on 30.07.1987.

P.W.8 Mardaraj Mishra was the officer in charge of Bisoi police station who is the investigating officer.

P.W.9 Amiya Kumar Sahoo, the successor of P.W.8 took over charge of investigation from him and submitted charge sheet.

The prosecution exhibited nineteen documents. Ext.1/1 is the F.I.R., Exts. 2 to 6, 11 and 12 are the seizure lists, Ext.7 is the post mortem report, Ext.8 is the dead body challan, Ext.9 is the command certificate, Ext.10 is the inquest report, Ext.13 is the office copy of requisition, Ext.14 is the office copy of letter of Tahasildar, Ext.15 is the office copy of forwarding letter of chemical examination, Ext.16 is the chemical examination report, Ext.17 is the serologist report, Ext.18 is the Internal Divisional Examination Report and Ext.19 is the entry in O.P.D. Register of Bijatala P.H.C..

The prosecution also proved two materials objects. M.O.I is the tangia and M.O.II is the axe.

7. The defence plea of the appellant and his father Mathei Majhi was one of denial. However, the co-accused Salo Majhi took a specific plea in the accused statement that when they were transplanting paddy seedling in their own land, the deceased and others came and surrounded them. Someone hit on his head and the deceased tried to throttle his neck and there was push and

pull between them and he fled away from the spot becoming naked and his father Mathei Majhi whirled a Budia.

The defence exhibited the Khatian of Mouza Kendua and trace map of plot no.212 as Exts. A and B respectively.

8. The learned trial Court after assessing the evidence on record came to hold that the death of the deceased was homicidal in nature. It is further held that from the number and sites of the injuries, the question of the injuries being sustained accidentally due to whirling of an axe does not arise. The ocular evidence adduced by the prosecution is supported by the medical evidence. It is further held that it might be said that P.Ws.1 to 3 have tried to suppress the fact that the deceased put his hand on the neck of accused Salo but that is not of much consequence. It is further held that the accused persons had their land adjoining the area which was recorded as 'Nala'. The injuries sustained by the two accused persons were too minor to attract the attention of the prosecution witnesses. The deceased being accompanied by some others came to the scene of occurrence where there was exchange of words and it cannot be said to be a case of premeditated action by the accused persons. The case of the accused that the deceased put his hand on the neck of accused Salo cannot be discarded. The deceased was previously been convicted in a case of murder. The accused persons had some provocation but that was not grave enough to retaliate in the manner they did. The accused persons are tribals and they use to have volatile temperament and the occurrence took place after some exchange of words and it might be said to be somewhat sudden. It is further held that the accused persons exceeded their limits and from the nature of injuries sustained by the deceased, there cannot be any doubt that they intended causing such injuries which were likely to cause death.

9. Mr. Smruti Ranjan Mohapatra, learned Amicus Curiae contended that in the first information report, it is mentioned that accused Bucha Majhi along with accused Mathei Majhi and Salo Majhi committed the crime and even during trial, the eye witnesses have also implicated accused Bucha Majhi but there is no material that the appellant Gulia Majhi and accused Bucha Majhi are one and same person. P.W.1 is related to the deceased and an interested witness. He argued that there are discrepancies in the evidence of the eye witnesses with reference to their previous statements before police and though the eye witness (P.W.2) has stated that Bucha gave a number of cut blows around the neck of the deceased but there are no such injuries

around the neck as per the post mortem report (Ext.7) and therefore, there are inconsistencies between the ocular evidence and medical evidence. He further contended that though the doctor (P.W.7), Medical Officer of Bijatala P.H.C. examining the co-accused Mathei Majhi and Salo Majhi on 30.07.1987 found injury on them but the prosecution has not offered any explanation in that respect which shows that the genesis of the case has been suppressed. It is further contended that the accused Salo Majhi has taken a specific plea of right of private defence and the deceased was convicted in a murder case and he caught hold of the neck of accused Salo Majhi first after initial confrontation between the parties and in such a situation, the finding of the learned trial Court that even though the accused persons had some provocation but they exceeded their limits is not justified. He placed reliance in the case of **Ratnakar Mallik -Vrs.- State of Orissa reported in (2006)35 Orissa Criminal Reports 100** and contended that it is a fit case where benefit of doubt should be extended to the appellant. While concluding his argument, it was argued that the appellant is now more than sixty years and the occurrence has taken place more than thirty three years back and the appellant has remained in judicial custody for some months during investigation and after conviction and therefore, even if the conviction is upheld, the sentence may be reduced to the period already undergone.

Sk. Zafarulla, learned A.S.C. on the other hand supported the impugned judgment and contended that the forwarding report of the accused persons clearly indicate that the appellant is also known as Bucha. He argued that except accused Salo Majhi in his accused statement, neither the appellant nor the other co-accused Mathei Majhi has taken any plea of right of private defence. Even the plea of right of private defence has not been suggested to the eye witnesses. He argued that only one superficial injury has been sustained by accused Mathei Majhi and Salo Majhi each and there was no requirement on the part of the prosecution to explain such injury. He further argued that none of the prosecution party members including the deceased were armed with any weapon and there was no reasonable apprehension of danger to the lives of any of the accused persons and therefore, the manner in which the deceased, an unarmed person was brutally assaulted by the accused persons with slight provocation clearly shows the act was done with the knowledge that bodily injuries were likely to cause death. He placed the evidence of the eye witnesses and the doctor (P.W.5) who conducted post mortem examination and contended that the evidence is consistent and minor discrepancies here and there cannot be ground to disbelieve the prosecution

case. As per the order of this Court passed on 21.08.2020, he submitted a report of the officer in charge of Bisoi police station dated 22.08.2020 relating to the age, health condition and family status of the appellant.

10. It is first to be seen how far the prosecution has proved the death of the deceased to be homicidal in nature.

P.W.8 conducted the autopsy over the dead body of the deceased on 01.08.1987 and found the following external injuries:

> **(i)** Incised wound of 4½" x 3" x 2" with cutting of the underneath muscles over the middle portion of the exterior aspect of the right forearm;
>
> **(ii)** Incised wound of size 5" x 3" with fracture of the right side maxilla. The direction of the wound was towards the mandibular aspect;
>
> **(iii)** Incised wound of 4" x 3"x 2" over the right side of the face severing nerves, vessels and parotid gland in that region;
>
> **(iv)** Incised wound of size 5" x 3" over the temporal region extending to the occipital area with fracture of the temporal bone. The direction of the wound was towards the neck. The injuries nos.(ii), (iii) and (iv) were superimposed and might have been caused by heavy cutting weapon. The injuries contained dried up blood;
>
> **(v)** One stab wound of size 2½" x 1" x bone deep over middle portion of the forehead;
>
> **(vi)** One lacerated wound of size 2" x 1" over left index finger with fracture of the proximal phalanx and the finger was loosely hanging from the rest of the hand;
>
> **(vii)** Compound fracture of the squamous portion of the right temporal bone;
>
> **(viii)** Compound fracture of the occipital bone towards the right side with laceration of the meninges and there was intracerebral haematoma. This fracture corresponds to injury no.(iv);
>
> **(ix)** Fracture dislocation of the right side portion of the mandible.

He opined that the fracture of the temporal bone corresponds to injuries nos.(iii) and (iv). Injury no.(i) could have been caused by a heavy cutting weapon and tangia and axe are heavy cutting weapons. The angular portion of a tangia or axe can cause the stab wound on the forehead. He further opined that either with M.O.I or M.O.II, stab wound could be caused. All the injuries were opined to be ante mortem in nature. He further opined that cause of death was due to shock and haemorrhage and time since death was within 48 to 72 hours of the time of examination. He further opined that injuries nos.(ii) to (iv) were individually sufficient to cause death in the ordinary course of nature. The post mortem report has been marked as Ext.7.

The finding of the post mortem report has not been challenged by the learned Amicus Curiae. The learned trial Court has held that the death of the

deceased was homicidal in nature. After perusing the evidence of the doctor (P.W.8), inquest report (Ext.10) and the post mortem examination report (Ext.7), I am of the humble view that the prosecution has successfully proved the death of the deceased to be homicidal in nature.

11. It is not in dispute that in the first information report, it is mentioned that accused Bucha Majhi along with accused Mathei Majhi and Salo Majhi committed the crime and even during trial, the eye witnesses have also implicated accused Bucha Majhi but it cannot be lost sight of the fact that the forwarding report of the accused persons clearly indicate that the appellant is also known as Bucha. The defence has never raised any objection at any point of time that accused Bucha Majhi and the appellant are not one and same person. Therefore, the contention raised by the learned amicus curiae on this score is not acceptable.

12. Coming to the evidence of the eye witnesses, P.W.1 has stated that when they asked the accused persons seeing them transplanting paddy seedlings, the accused Mathei Majhi claimed the land not to be a part of Nala. He further stated that none of the villagers were armed and the deceased was holding the hand of accused Salo and at that time accused Mathei Majhi brought an axe from under the creepers and hit the deceased on his hand, a little above the wrist. When the deceased left the hand of accused Salo, the later brought the axe from accused Mathei Majhi and hit the deceased on his back. The appellant then assaulted the deceased on different parts of his body with a tangia. The deceased fell down and there was profuse bleeding. P.W.1 identified the axe and tangia. In the cross examination, P.W.1 admitted that the deceased was his agnatic uncle and conviction of the deceased in a murder case and also about pendency of 107 Cr.P.C. proceeding between the parties. He stated that there was no quarrel and no tussle preceding the occurrence and the deceased did not catch hold of the neck of the deceased. It has been confronted to P.W.1 and proved through the I.O. (P.W.8) that he has not stated about accused Mathei bringing an axe from under the creepers. This contradiction is not of such a nature to disbelieve the evidence. Similarly, merely because P.W.1 is related to the deceased, his evidence cannot be discarded as it appears to be clear, clinching and trustworthy. Related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the Court, it would not be proper to discard their evidence straightaway. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefits from the result of litigation. Close relatives of the deceased are most reluctant to spare the real assailants and falsely mention the

names of other persons. Therefore, close relationship of a witness to the deceased is no ground for not acting upon his testimony, if the evidence is otherwise found to be reliable after close scrutiny.

P.W.2 has stated that when they asked the accused persons not to plant paddy seedling, they claimed the land and accused Salo took the deceased holding his hand to show their land. Accused Mathei Majhi hit the deceased on his hand with a hulia and accused Salo took it from Mathei and assaulted on the back of the appellant. The appellant gave a number of cut blows around the neck of the deceased with tangia. The deceased fell down receiving bleeding injuries and died at the spot. In the cross examination, he has stated that the accused persons were planting paddy seedlings inside the Nala and the water receded after the embankment was cut. It has been confronted to P.W.2 and proved through the I.O. that he has stated before him to have seen the accused persons transplanting in the field inside the Nala. He has not stated before the I.O. to have seen himself about the cutting of embankment. He has also not stated that the accused Solo asked the deceased to show the boundary of the land and took the deceased to show the boundary. He has stated before police that the deceased held the neck of the accused Salo and there was shouting. The doctor noticed incised wounds on the right side maxilla and right side of the face of the deceased and therefore, it cannot be said the statement of P.W.2 that the appellant gave a number of cut blows around the neck of the deceased with tangia is not corroborated by medical evidence. Therefore, the contradictions brought out in the cross examination are not sufficient to discard the evidence.

P.W.3 stated that when he saw the embankment was cut, he informed the villagers and the villagers including P.Ws.1 and 2 and the deceased and he himself came to the spot and when they asked the accused persons not to plant paddy seedlings, they told that it was their land. Accused Salo and the deceased holding hands of each other went into the Nala as accused Salo asked him to show the boundary. Accused Mathei hit the deceased on his hand with Budia and then accused Salo took the same from Mathei and hit the deceased on his backside. The appellant then gave cut blows to the deceased with tangia on the neck and on face for which the deceased fell down inside the Nala and died at the spot. He identified the weapons used by the accused persons as Mos.I and II. In the cross examination, he has stated that accused Mathei was asked prior to the date of occurrence not to cultivate the land. He stated that he was told by the villagers to inform them in case the

accused persons came to cultivate the land. It has been confronted to him and proved through the investigating officer that there was shouting and he saw the deceased holding the neck of accused Salo.

Even though there are some discrepancies in the statements of the eye witnesses with reference to their previous statement before police but those are so minor in nature that it cannot harm the case of the prosecution. Minor discrepancies in the statements of witnesses as given in Court vis-à-vis their previous statements before police cannot be the reason to discard the case of the prosecution. Such discrepancies are natural as against parrot like version of the witnesses. It cannot be lost sight of the fact that the eye witnesses gave their evidence in Court almost a year after the statements were recorded by the Investigating Officer. Such discrepancies are bound to occur for variety of reasons, for instance, lack of education, social background, nature of witnesses, duration of their observation and lapse of time when the witnesses are called upon to give their evidence in Court after incident.

After careful scrutiny of the evidence of the eye witnesses, I am of the humble view their evidence appears to be clear, clinching and trustworthy and therefore, the same can be safely acted upon.

13. There is no dispute that P.W.7, the doctor examined co-accused Mathei Majhi and Salo Majhi on the date of occurrence itself and noticed one injury on the chin of accused Mathei Majhi of size ½" x ½" x ¼" which was opined to be simple in nature. Similarly he noticed one injury on the scalp of accused Salo which was also minor in nature.

In the case of **Lakshmi Singh -Vrs.- State of Bihar reported in A.I.R. 1976 Supreme Court 2263**, it is held that where the injury sustained by the accused are minor and superficial or where the evidence is so clear, cogent, so independent and disinterested, so probable, consistent and credit worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries, non-explanation of the injuries may not affect the prosecution case.

Out of the three eye witnesses, P.W.1 was asked about the injuries on the accused persons and he has stated that none of the accused persons sustained any injury nor did any of the villagers inflict any injury on them. P.W. 2 and P.W.3 have not been asked about the injury sustained by the accused persons. In the case of **Ramlagan Singh -Vrs-. State of Bihar**

reported in A.I.R. 1972 Supreme Court 2593, it is held that when no questions have been put to any of the prosecution witnesses regarding to the injuries caused to the accused persons, there arose no occasion for the prosecution witnesses to explain the injuries on the person of the accused.

Therefore, I am of the humble view that merely because accused Mathei Majhi and Salo Majhi received one injury each which are minor in nature, there was any necessity on the part of the prosecution to explain such injury particularly when two of the eye witnesses have not been asked regarding such injury and the evidence of the eye witnesses are clear and cogent. The decision relied upon by the learned amicus curie i.e., the case of **Ratnakar Mallik** (supra) in its factual aspects is clearly distinguishable from this case as in that case, number of accused persons had sustained various injuries and few of them had sustained grievous injury on the vital part of the body which were not explained by the prosecution and therefore, this Court held that the prosecution suppressed the genesis of the case and true story and held the evidence of the witnesses to be not trustworthy.

14. No plea of right of private defence has been taken by the accused Mathei Majhi or the appellant in their statements recorded under section 313 of Cr.P.C. No suggestion regarding plea of right of private defence has been given to any of the eye witnesses. Though accused Salo has taken a plea of right of private defence in his accused statement and stated that the deceased tried to throttle his neck and there was push and pull between them and his father Mathei Majhi whirled a budia but Mathei Majhi is completely silent in that respect.

Law is well settled that question of self defence is one of both law and fact. The right of self defence is not a right to take revenge but it is purely preventive. A plea of right of private defence cannot be based on surmises and speculation. The accused is not required to prove the plea of right of private defence beyond all reasonable doubt but he has to raise a doubt in the mind of the Court to satisfy that his defence is probable one. Even if specific plea of self defence is not taken, it is not enough to denude the accused the right if the same is otherwise made out. To succeed in the plea of private defence, the accused has to prove that he exercised right of private defence in his favour and this right extended to the extent of causing death. Sections 96 to 106 of the Indian Penal Code deal with right of private defence and it also indicate as to how much right of private defence can be exercised and under

what circumstances. It is of course true that such exercise of right of private defence cannot be weighed in golden scales in as much as person should not be expected to modulate his defence step by step.

In the case in hand, the plea regarding self defence has been taken for the first time in the statement of only one accused recorded under section 313 of Cr.P.C. and no suggestions regarding such plea was put in the cross-examination of any of the eye witnesses. The plea put forth by accused Salo that accused Mathei Majhi whirled a budia is not acceptable particularly when accused Mathei Majhi has not taken any such plea. In other words, the defence plea is inconsistent. Therefore, I am of the humble view that the plea of right of private defence put forth by accused Salo Majhi is not acceptable.

15. The learned trial Court has rightly held that it was not a pre-meditated action by the accused persons and when the deceased put his hand on the neck of accused Salo, the possibility of some kind of provocation to the accused persons who are tribals cannot be ruled out. However, it cannot be lost sight of the fact that there is no evidence that any of the prosecution party members including the deceased were armed with any weapon or there was any reasonable apprehension of grave danger to the lives of any of the accused persons. In such circumstances, after one blow each has been given by appellant Mathei Majhi and Salo Majhi, the manner in which the appellant assaulted the deceased by means of a tangia clearly indicates that he has exceeded the limits as rightly held by the learned trial Court. The deceased suffered at least injuries nos.(ii) and (iii) on account of such assault which were individually sufficient to cause death in the ordinary course of nature as opined by the doctor who conducted autopsy. Therefore, the learned trial Court has rightly convicted the appellant under section 304 Part-II of the Indian Penal Code.

16. Now, the question remains to be considered is what sentence would be the appropriate to be imposed on the appellant. The total period the appellant seems to have remained in custody in connection with this case during investigation as well as after conviction till he was enlarged on bail was for a period of about four months. The officer in charge of Bisoi Police Station has indicated in the report dated 22.08.2020 that the appellant is now aged about sixty five years and he is not involved in any other case under the police station and his wife is residing with him and he is blessed with two sons and one of the son is aged about 36 years and the other son is aged about

22 years. The elder son is a cultivator who maintains the family and the younger son is serving as a Constable in the army. There is no dispute that more than thirty three years have already passed since the date of occurrence but in my humble view, looking at the nature and gravity of the accusation proved, the same cannot be the sole ground to reduce the sentence to period already undergone.

In the case of **Sumer Singh -Vrs.- Surajbhan Singh and Ors. reported in (2014) 7 Supreme Court Cases 323**, it is held that it is the duty of the Court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the Court of law to curtail the evil. While imposing the sentence, it is the Court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. It was further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. The law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court held as follows:

> "We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society."

In the case of **State of Punjab -Vrs.- Bawa Singh reported in (2015) 3 Supreme Court Cases 441**, the Hon'ble Supreme Court held that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. It has been further

held that one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. Emphasis was laid on the solemn duty of the Court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers.

Taking into account the age of the appellant at present, passage of thirty three years since the date of occurrence, the fact that the appellant has not indulged himself in any criminal activities during this period, the immense trauma, mental agony and anguish he might have suffered and particularly the socio-economic factors, I am of the humble view that imposition of sentence of rigorous imprisonment for five years would meet the end of justice.

Accordingly, while upholding the conviction of the appellant under section 304 Part II of the Indian Penal Code, the sentence is reduced from rigorous imprisonment for seven years to rigorous imprisonment for five years. With the above modification of sentence, the criminal appeal stands dismissed.

The bail bonds furnished by the appellant before the learned trial Court as per the order dated 15.11.1988 of this Court stand cancelled. The appellant shall surrender before the learned trial Court forthwith within a period of two weeks from today to serve the remainder of sentence failing which the learned trial Court shall take appropriate step for his arrest. The appellant shall be entitled to the benefit of set off under section 428 of Cr.P.C.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to the learned Amicus Curiae for rendering his valuable help and assistance in deciding this oldest pending appeal. The hearing fees is assessed to Rs.10,000/- (rupees ten thousand) in toto which would be paid to the learned Amicus Curiae immediately.

—— o ——

2020 (II) ILR - CUT- 611

P. PATNAIK, J.

W.P.(C) NOS.13076 OF 2017, 19962 OF 2017 & 502 OF 2018

ALL ORISSA STATE BANK OFFICERS HOUSING CO-OPERATIVE SOCIETY. ……Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp.Parties

W.P.(C) No.19962 of 2017

DINESH KUMAR RAY & ORS. ……Petitioners.

.Vs.

CO-OPERATIVE TRIBUNAL, ODISHA & ORS. ……Opp.parties

W.P.(C) No.502 of 2018

DINESH KUMAR RAY & ORS. ……Petitioners

.Vs.

COMMISSIONER-CUM-SECRETARY, GOVT. OF ODISHA, CORP. DPT.& ORS. ……Opp.parties

ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 12 (4-a) – Provisions under – Amendment in by-laws of the society – Proposed Amendment sent for registration on dated 31.8.2013 – The registering authority did not take any action within 60 days from the date of application as per provision of the Act – However after the cut off date the registering authority by exceeding jurisdictions modify/change the bye law – Such action was challenged in appeal as well as in review and were dismissed by the Government – Both the orders challenged – Held, the order passed by the registrar transpires that the opposite party no. 2 has acted beyond its power conferred under the statute, since he has passed orders by making correction in the bye law which is beyond his jurisdiction – Moreover there is no provision under the act which confers power on the registrar for correction of the bye laws and registering the same – Orders impugned quashed, matter remanded. (Paras 17 to 20)

Case Laws Relied on and Referred to :-

1. (2014) 3 SCC 502 (para-61) : Dipak Babaria & Anr. Vs. State of Gujarat & Ors.
2. (2018) 9 SCC 171 (Para-17) : M.Aamira Fathima & Ors. Vs. Annamalai University & Ors.
3. (1978) 3 SCC 383 (Para-12) : Gurupad Khandappa Magdum Vs. Khandappa Magdum & Ors.
4. (2006) 12 SCC 53, (para-7) : Union of India Vs. S.I.verma & Ors.

W.P.(C) No.13076 of 2017 :
For the Petitioner : Mr.Sangram Senapati
For Opp. Party No.3 : M/s. R.B.Mohapatra,
N.N.Mohanty & S.Sen
For Opp.Party No.4 : Mr.Somya Sekhar Parida

W.P.(C) No.19962 of 2017 :
For the petitioner : Mr.Sangram Senapati
For Opp. Party Nos.4 and 5 : M/s. R.B.Mohapatra.

W.P.(C) No.502 of 2018 :
For the Petitioner : Mr.Shakti Datta Tripathy,
For Opp. Party No.4 : M/s.Ras Bihari Mahapatra

JUDGMENT Date of Hearing : 29.01.2020 : Date of Judgment: 03 .07.2020

P.PATNAIK, J.

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

2. In W.P.(C) No.13076 of 2017 the petitioner calls in question the order dated 18.04.2017 passed by the opposite party No.1 in Appeal No.01 of 2014 whereby and whereunder the appeal filed by the petitioner society has been dismissed confirming the action of opposite party no.2 in deleting/modifying/changing the clause of the Bye-law of the society. The petitioner has sought for issuance of a writ of certiorari for quashing the impugned order under Annexure-6 and order under annexure-8.

The brief facts leading to filing of the writ petition are that the petitioner society was registered under the Odisha Co-operative Societies Act, 1962 with the avowed objective of providing pucca building and to provide loan to members for construction of houses as per the Bye-law of the petitioner society as evident from Annexure-1. While the matter stood thus, another Act namely, Self Help Co-operative Societies Act, 2001 was enacted and the petitioner society was registered under the said Act vide registration no.35 dated 11.06.2010. In order to protect the interest of the members, those who are on the verge of retirement, a Resolution was passed by the Society by following due procedure as provided under section 7 of the Act 2001 for clarification/amendment of the Article of association by adding once admitted the membership will continue till death/withdrawal or cessation of

the membership. The said Resolution was forwarded to the opposite party no.2 vide letter under Annexure-3. In the year 2013 the Self Help Co-operative Societies Act, 2001 was repealed with effect from 06.06.2013 vide Odisha Gazette Notification dated 01.10.2013. As per the deeming clause (repeal Act, 2013) the petitioner society automatically got registered under Odisha Cooperative Societies Act, 1962. After repeal of the said Act, 2001, the petitioner society took decision to amend the Bye-law and the petitioner society forwarded the proposed amendment to opposite party no.2 for registration vide letter dated 31.08.2013 as per Annexure-5 and the proposed amendment with all documents forwarded to opposite party no.2 was received by opposite party no.2 on 02.09.2013. In view of the provisions of Section 12(4-a) of O.C.S.Act, 1962 on expiry of 60 days from the date of application of registration of amendment in Bye-law, the amendment of the Bye-law of the petitioner society is deemed to have been registered with effect from 01.10.2013, but the opposite party no.2 by exceeding its jurisdiction made certain changes in the Bye-law after the cut-off date in deleting Clause-6 and modifying/changing clause 8(5) of the Bye-law of the petitioner society vide Registration dated 03.09.2014. Being aggrieved by the action of opposite party no.2, the petitioner society preferred an appeal before the State Government under section 109-(2-b) of O.C.S.Act, 1962 which was registered as Appeal No.01 of 2014 vide Annexure-7 and the said appeal has been dismissed vide impugned order dated 18.04.2017 under Annexure-8.

In the aforesaid factual backdrops the instant writ petition has been filed by the petitioner society under Articles 226 and 227 of the Constitution of India for redresal of its grievance.

3. In W.P.(C) No.19962 of 2017 the petitioner has challenged the order dated 16.08.2017 passed by the learned Co-operative Tribunal, opposite party No.1 in Misc.Case No.18 of 2016 arising out of Election Dispute Case No.17 of 2015 filed by opposite party no.4 in deciding the issue of maintainability. The petitioner sought for setting aside the impugned order dated 16.08.2018 under Annexure-16 passed by the learned Co-operative Tribunal to the extent of maintainability of election dispute and restraining the petitioner from taking policy decision involving the financial implication.

The brief facts of the case are that the provisions of Clause-5 of the Bye-law speaks about members of Odisha State Bank Officers Housing Co-operative Societies Ltd. Shall be deemed to be the members of the society

registered under the Co-operative Societies Act, 1962. The Society issued election Notification dated 13.12.2014 for election of members to the committee of the management of the society. The petitioners being the members filed their nominations. Since there was no objection to the nomination, nor any election dispute, the petitioners were elected to different positions of the committee of the management of the society and the results were declared as per Annexure-7 series. The opposite party no.4-plaintiff never objected to the nomination of the petitioners. While the petitioners were continuing as office bearers of the society, the opposite party no.4-plaintiff filed election dispute dated 06.05.2015 before the Co-operative Tribunal challenging the election of the petitioners much after the period of limitation as provided under the Statute on the ground that the petitioners were not members after retirement from services. Copy of the election dispute and written statement filed by the petitioners are annexed as Annexures-9 and 10 to the writ petition. The learned Tribunal vide order dated 05.05.2016 restrained the petitioners from dealing with the day to day business of the society and directed not to participate in the decision in the matter of financial implication as per Annexure-14. Being aggrieved by the said order, the petitioners preferred W.P.(C) No.9872 of 2016 which was disposed of on 09.01.2019 by setting aside the order dated 05.05.2016 in remanding the matter back for hearing afresh as per Annexure-15. The learned Tribunal vide order dated 16.08.2017 though allowed the petitioners to deal with the day to day business of the society, but restrained them to take policy decision involving the financial implication till disposal of the election dispute as per Annexure-16.

In the aforesaid backdrops, the impugned order dated 16.08.2017 under Annexure-16 is under challenge in the instant writ petition.

4. In W.P.(C) No.502 of 2018 the petitioners, who are senior citizens and shareholder members of opposite party No.3 society have sought for quashing of the order dated 29.11.2017 passed by opposite party No.1 under Annexure-1 along with order dated 18.04.2017 passed by opposite party no.1 in Appeal No.01 of 2014 under Annexure-3.

Bereft of unnecessary details, the facts as delineated in writ petition in nutshell are that the petitioners being directly affected by the order of opposite party no.1 dated 18.04.2017 passed in Appeal No.01 of 2017 the petitioners moved this Court in W.P.(C) No.9152 of 2017 which was

disposed of on 19.07.2017 with a direction to the petitioners to file a review petition containing all the points raised before opposite party no.1 in deference to order dated 19.07.2017 passed in W.P.(C) No.9152 of 2017, but the opposite party No.1 dismissed the review vide order dated 19.11.2017 in Review No.01 of 2017 under Annexure-1. The petitioners being aggrieved by the order in Appeal No.01 of 2017 as well as the consequential review case No.01 of 2017 have been constrained to approach this Court under Articles 226 and 227 of the Constitution of India for redressal of their grievance.

5. Controverting the averments made in the writ petition, a counter affidavit has been filed by opposite party no.2, wherein it has been submitted that on receipt of proposal for conversion of All Odisha State Bank Officers Housing Cooperative Society, registered under the OCS Act, 1962 to a Cooperative under Orissa Self Help Cooperatives Act, 2001 (repealed) vide its letter dated 21.07.2009 and letter dated 19.03.2010 the petitioner society was registered under Orissa Self Help cooperatives Act, 2001 (Repealed) vide Registration No.35 dated 11.05.2010. The proposal for amendments of Clause-7 of the Article of associations that once admitted, the membership will continue till death/withdrawal or cessation of membership, was submitted vide letter No.31 dated 16.05.2011 to the Registrar was not taken on record by the Registrar as per provisions of section 7(4) of the Orissa Self Help Cooperatives Act, 2001 (since repealed) as the said proposal was not in consonance with the provisions of section 7(1) and Section 2(40) of the Orissa Self Help Cooperatives Act, 2001 (Repealed) and the same was communicated to the Chief Executive of the petitioner society vide letter No.12910 dated 27.06.2011. As per the provision of section 7(4) of the Orissa Self Help Co-operatives Act, 2001 (Repealed), the petitioner society has been intimated the decision as per Annexure-A/2. Further, it has been submitted that as per the provisions of Clause-3 of the Orissa Self Help Cooperatives (Repeal) Act, 2013, the provisions which are inconsistent with the provisions of the Odisha Cooperative Societies Act, 1962 be amended in accordance with the provisions of that Act. Therefore, the provisions of Articles of association, which were existing prior to Orissa Self Help Cooperatives (Repeal) Act, 2013 and inconsistent to the OCS Act, 1962 are to be amended and accordingly the provisions of the Bye-laws of the petitioner society was amended, which were inconsistent with the provisions of OCS Act, 1962. It has been further submitted that the proposal for amendment of continuance of membership after retirement was not taken on record and it was communicated to the petitioner society vide letter dated

27.06.2011 at Annexure-A/2. Further, the Bye-laws/Articles of association submitted vide letter dated 31.08.2013 was not within the purview of the Statute and contrary to the provisions of the OCS Act 1962, since the proposal for amendment regarding membership after retirement was not taken on record and intimated vide Annexure-A/2. Further, it has been submitted that the proposal for amendment of the Bye-laws of the petitioner society was submitted vide letter No.17 dated 31.08.2013 and received in the Office of the Registrar, opposite partyNo.2 on 02.09.2013 and the Bye-laws after due amendment was communicated vide letter dated 05.09.2014 of the Registrar. So, there is no question of application of deeming provisions of section 12(4) of the OCS Act in the instant case. Since the Clause 6 and 8(5) of the Bye-laws of the petitioner society were not in consonance with the Orissa Self Help (Repeal) Act, 2013 and inserted by the petitioner society arbitrarily, the Clause No.6 was deleted and Clause No.8(5) was modified to keep the Bye-laws to its original position in consonance with the provisions of the Odisha Self Help Cooperatives (Repeal) Act, 2013. It has been further submitted that the proposed amendments were made pursuant to the Orissa Self Help Cooperatives (Repeal) Act, 2013 stipulates that every Cooperative existing immediately before the commencement of the Act, which has been registered under the Act, so repealed, shall be deemed to be registered under the corresponding provisions of the OCS Act, 1962, be amended in accordance with the provisions of the Act. The petitioner has, in a misinterpretation of position of law, stated that in view of the provisions of section 12(4-a) of the OCS Act, 1962, the amendment of Bye law/Articles of association is deemed to have been registered on expiry of sixty days from the date of its application. The stated provision is not applicable to the petitioner society, where the amendment of the Bye-laws was required to be made pursuant to the Odisha self Help Cooperatives (Repeal) Act, 2013 and there is no deeming provision in Odisha self Help Cooperatives (Repeal) Act, 2013 pursuant to which the Bye-law/Articles of Association of the petitioner society was to be amended. It has been further submitted that the Bye-laws of the petitioner society has been amended pursuant to the provisions of section-3 of the Odisha Self Help Cooperatives (Repeal) Act, 2013 and as such there was no scope or requirement under the Odisha Self Help Cooperatives (Repeal) Act, 2013 for consultation.

6. Counter Affidavit has been filed by opposite party no.3 raising the following substantial objection to the maintainability of the writ petition.

a) Whether the present writ petition is maintainable when alternative remedy is available under the statutory provisions of law ?

b) Whether the present writ application is barred by resjudicata under the principle of Section 11 of the Code of Civil Procedure, 1908 in view of the final order dated 19.07.2017 passed in W.P.(C) No.9152 of 2017 ?

Copy of the order dated 19.07.2017 the Government of Odisha, opposite party No.1 has been annexed as Annexure-A/3 to the Counter Affidavit.

07. It has been submitted that the President of the petitioner Society, Mr.Dinesh Kumar Ray and four Directors were set up to file a writ petition challenging the appellate order dated 18.04.2017 of the opposite party No.1 in Appeal No.01 of 2014. The said writ application bearing W.P.(C) No.9152 of 2017 was disposed of vide order dated 19.07.2017 giving liberty to those petitioners to prefer a Review Application within a period of two weeks before the opposite party no.1, who after affording reasonable opportunity of being heard to the petitioners passed a speaking order as per Annexure-D/3 to the counter affidavit. It is further submitted that the petitioner society is playing hide and seek role to the process of judiciary and many material facts have been suppressed to mislead this Court. There is no/any illegality in the impugned appellate order under Annexure-8. When the issue has already been decided in order dated 19.07.2017 passed in W.P.(C) No.9152 of 2017, the alternative remedy is available as per the recent notifications in Annexure-A/3 and B/3 before the learned State Co-operative Tribunal, Odisha to whom, in view of Section 110 of this Act, State Government delegated their power of hearing of appeal under section 109 of Odisha Co-operative Societies Act, 1962 read with Rule 144-A of the Odisha Co-operative Societies Rules, 1965, which constituted under section 67-A of the said Act. The present writ petition is barred by the principle of resjudicata under the principle of Section – 11 of the Code of Civil Procedure, 1908. It has been further submitted that from the inception the membership of the Society is restricted for Officers of S.B.I. on permanent employment. Consequent upon repeal of the Odisha Self Help Cooperatives Act, 2013 the petitioner society was required to be amended which are inconsistent to the provisions of O.C.S.Act. On scrutiny, the proposal of the petitioner society was found that Article-7 has been changed and the provisions of the Membership of retied employees has been inserted which hit the second provision to section 6(2)(h)(i) of the OCS Act. Similarly the addition of

Article-7 to admit nominal members is against the mandate of Repeal Act, since from the inception of the introducing nominal members in Article 6 and continuance of employees after retirement in Article-7 of the Bye-law were new to the existing provisions of Bye-law and the said articles were not acceptable and further, the Secretary of the petitioner society manipulated its Bye-laws in respect of Article 8(5) and it came to knowledge of the opposite party no.2 i.e., Registrar of Co-operative Societies, Odisha who corrected the same. Further, it has been submitted that in the Bye-laws registered under Self Help Co-operative Act, the membership was open for Officers working as permanent employees in S.B.I. residing in the area of operation of the Society. After repeal of the Act, the petitioner society regained its original name and status. At the same time, it came to the fold of O.C.S.Act. The opposite party no.2 intimated the petitioner society to submit the Bye-laws for amendment of Clauses which are inconsistent with the provisions of OCS Act, 1962, but the Secretary of the petitioner Society, who has retired as a SBI Officer on 30.11.2007, manipulated the existing Bye-law and submitted the same for approval. So it is finding of the appellate authority that the rejection of the said manipulated Bye-Law which was submitted for its approval and corrected the same. It is also submitted that the appellate authority has given a finding to the extent that the election of the members to the committee of the management of the petitioner society was held on January, 2015 by the Registrar, Co-operative Societies to be illegal and the Registrar has rightly corrected the manipulation of the said Bye-Law which came into force with effect from 05.09.2014, but some retired employees of State Bank of India contested the election in utter violation of the Bye-Law and came to the office of the petitioner society, which was under challenge before the learned Co-operative Tribunal in Election Dispute No.78 of 2015 which is still subjudice. It is further submitted that instead of going for the amendment of the Bye-law of the petitioner society, as per the liberty granted by the appellate authority as per the provisions under section 12 of the O.C.S.Act, the petitioner approached with ulterior and mala fide intention.

08. Mr.Manoj Mishra, learned senior counsel being assisted by Mr.Sangram Senapati, learned counsel on behalf of the petitioners in W.P.(C) No.13076 and 19962 of 2017 while assailing the impugned order under Annexures-6 and 8 has strenuously urged that on a plain reading of the Clauses of the Bye-law, it would be clear that the membership is restricted to officers in the permanent employment of the State Bank of India once admitted, there is no provision in Bye-law for cessation of membership after

retirement, but in order to obviate the doubt and to protect the interest of the members, those who are on the verge of retirement, a Resolution was passed in amending Clause-7 of Articles of the association by clarifying/amending the membership clause by adding that once admitted the membership will continue till death/ withdrawal or cessation of the membership as per the Bye-law, but the opposite party no.2 passed the impugned order deleting Clause-6 and modifying Clause 8(5) of the Bye-law of the petitioner society under Annexure-6 which has been confirmed by the appellate authority vide order dated 18.04.2017 under Annexure-8. Learned senior counsel further submitted that the appellate authority has come to a perverse finding since the appellate authority could not deal with the justification of the amendment.

In a bid to assail the impugned order, learned Senior Counsel has referred to the provisions of section 12 (4-b) of the O.C.S.Act, 1962. Learned senior counsel also submitted that once the proposed amendment and all documents was forwarded to the Registrar, opposite party No.2 for registration on 31.08.2013 which was duly received by the Registrar on 02.09. 2013 in view of section 12(4-a) of O.C.S.Act, 1962 on expiry of 60 days from the date of its application for amendment of the Bye-law, the amendment of the Bye-law of the petitioner society is deemed to have been registered with effect from 01.11.2013. After the cut-off date the Registrar becomes functo officio regarding refusal and has the authority only to forward the amendment and documents along with copy of registered amendment. Learned senior Counsel further submitted that there is no provisions for amendment and correction of the Bye-law by the Registrar suo motu and suggested his own view without assigning any reason thereby opposite party no.2 has exceeded his jurisdiction and made some changes on his own in the Bye-law after the cut-off date in deleting Clause-6 and modifying/changing clause-8(5) of the petitioner society vide registration dated 03.09.2014 which is not permissible in the eye of law. Learned senior counsel further submitted that the appellate authority mis-constructed the facts and dismissed the appeal by non-application of mind, which is contrary to the provisions of O.C.S.Act, 1962. Learned senior counsel further submitted that the opposite party no.2 without consulting the society without asking for any clarification from the society deleted the Clause-6 of the Bye-law and modified clause-8(5) of the Bye-law of the society in replacing the word ‘after’ by the word ‘till’. The Registrar had also not asked any clarification from Central Co-operative Society in which the society has been affiliated. Further the opposite party no.2 has also deleted some clauses and

changed some clauses of the Bye-law of the society without giving any opportunity of being heard to the society and issued certificate of registration dated 03.09.2014 with some modification in the Bye-law. Therefore, the impugned order vide registration dated 03.09.2014 under Annexure-6 is illegal, improper, erroneous and suffers from non-application of mind being contrary to the provisions of the Statute and settled position of law.

Learned senior counsel further submitted that it is the settled principle of law that where the Statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. In view of Section 12(4) of the Act, 1962 the Registrar can refuse the amendment and communicate the order of refusal together with the reasons therefor to the Society, but there is no provisions for correction of the bye-law by the Registrar. Since the Registrar at Annexure-6 had made correction in the Bye-laws without any reason, the same is not permission in the eye of law.

Learned senior counsel has relied upon the decision reported in **(2014) 3 SCC 502 (para-61) (Dipak Babaria and another-vrs.-State of Gujarat and others)**. Learned senior counsel submitted that when the legislature uses a deeming provisions to create a legal fiction, it is always used to achieve a purpose and has to be given full effect. Once the deeming clause kicked in, on the cut-off date, by the deeming legal fiction, the amendment is registered. In view of section 12(4-a) of the Act, 1962 if the certificate referred to in sub-section (3) or order of refusal referred to in sub-Section (4) as the case may be, is not communicated to the society within a period of sixty days from the date of its application for registration, the amendment of the Bye-laws, shall be deemed to have been registered with effect from the date following the date of expiry of the said period and upon such registration, the Registrar shall forward to the society a certificate of registration of such amendment along with a copy of the registered amendment within seven days from the date of such registration. Thus, in view of section 12(4-a), the Registrar becomes functus officio on 30.11.2013 as the proposed amendment had been received by the Registrar on 02.09.2013 and the amendment of the Bye-laws of the petitioner society is deemed to have been registered with effect from 01.11.2013. Learned senior counsel in order to buttress his submissions has also referred to the decision reported in **(2018) 9 SCC 171 (Para-17) (M.Aamira Fathima and others-vrs.-Annamalai University and others)**, **(1978) 3 SCC 383 (Para-12) (Gurupad Khandappa Magdum-vrs.-Hirabai Khandappa Magdum and others)** and **(2006) 12 SCC 53, (para-7) (Union of India-vrs.-S.I.verma and others)**.

09. Mr.S.Mishra, learned Additional Government Advocate has vociferously submitted that the order passed under Annexure-8 is legal, justified and does not suffer from any illegality so as to warrant interference by this Court. Learned counsel for the State further submitted that on perusal of paragraphs-6 and 7 of the impugned order under Annexure-8, it would be quite luculent that liberty has been given to the petitioner society to amend the bye-law as and when necessary in terms of section 12 of Odisha Co-operative Societies Act read with the relevant Rules. Therefore, the petitioner society cannot have any grievance so far as the amendment of the Bye-law is concerned.

10. Mr.R.B.Mohapatra, learned counsel for opposite party no.3 vehemently submitted that the petitioner society, who was under the fold of Odisha Self Help Co-operative Act 2001 submitted an application on 16.05.2011 before the opposite party no.2, the Registrar of Co-operative Societies, Odisha for amendment of the Bye-law/Article of association. Opposite party no.2 issued a letter on 16.05.2011 assigning the reasons for amendment to the Bye-law/article of association could not be taken on record due to the following deficiencies.

> a) It is not forthcoming from the information sheet as to whether notice along with the proposed amendment with reasons therefore have been sent to each members as provided under section 7(1) of Odisha Self Help Co-operative Act, 2001 ?
>
> b) It is also not forthcoming as to whether a special resolution has been adopted in the General Body dated 24.04.2011 for the purpose of amendment as per the provisions under section 2(40) of Odisha Self Help Co-operative Act, 2001 ?
>
> c) The name of the cooperative reveals that it is for the Odisha State Bank Officer, whereas the proposed amendment allows the retired officers without changing the clause of the Bye-law in the Annual General Body meeting.

The Registrar of Co-operative Societies, opposite party no.2 also intimated the petitioner society vide letter No.12910 dated 29.06.2011 as per Annexure-A/2 to the counter affidavit filed by opposite party no.2. Learned counsel for opposite party no.3 further submitted that the proposal for amendment of the Bye-law of the petitioner society was submitted vide letter No.17 dated 31.08.2013 and received in the Office of the Registrar, opposite party no.2 on 02.09.2013 and the Bye-law after due amendment was communicated vide letter dated 05.09.2014 of the Registrar. So there is no question of application of deeming provision of Section 12(4) of the O.C.S.Act, 1962 in the instant case. Since Clause-6 and Clause-8(5) of the

Bye-laws of the petitioner society was not in consonance with the Odisha Self Help Co-operative (Repeal) Act, 2013 and inserted by the petitioner society arbitrarily, the Clause-6 was deleted and Clause-8(5) was modified to keep the Bye-laws in original position in consonance with the provisions of the Odisha Self Help Co-operative (Repeal) Act, 2013.

Learned counsel for the opposite party no.3 further submitted that since the proposal for amendment of Clause-6 and 8(5) are contrary to the mandate of Section 3 of Odisha Self Help Co-operative (Repeal) Act, 2013 which provided that the provisions of Bye-law or Article of Association inconsistent with the provisions of OCS Act, 1962 are to be amended. Therefore, the proposed amendment of Clause-6 and 8(5) was not permissible as per Odisha Self Help Co-operative (Repeal) Act, 2013. Under Clause-6 and 8(5) of the Bye laws were not in their Bye-laws under the Odisha Self Help Co-operative Act, 2001. So, incorporation of new provisions beyond the scope of mandate of the Odisha Self Help Co-operative (Repeal) Act, 2013 in the Bye-law for the purpose of said amendment is illegal and not sustainable in the eye of law. Therefore, the deletion/modification/correction of the Bye-law under Annexure-6 is appropriate and in consonance with the provisions of Odisha Self Help Co-operative (Repeal) Act, 2013.

11. Mr.S.D learned counsel appearing in W.P.(C) No.502 of 2018 has referred to Annexure-4 whereby liberty was given to the petitioner to seek remedy under section 111 of the O.C.S.Act for review of the impugned order dated 29.11.2017 passed in Review No.01 of 2017 and the order dated 28.04.2017 passed in Appeal Case No.01 of 2014 is not sustainable in view of Section 12(4-a) of O.C.S.Act, 1962. Further the learned counsel submitted that no reason has been assigned in dismissing the review vide order dated 29.11.2017.

12. In order to appreciate the rival contentions of the respective parties in the aforesaid writ applications the following relevant clauses of the Bye-law are required to be referred to.

Clause-3: Objects:

The primary objects of the society shall be to provide pucca buildings with cement flooring and with fire proof roof to the members and to provide loan to the members for construction of houses.

In pursuance of the main objectives:-

a) The Society shall take lease/outright purchase of lands from Government, Municipality and N.A.C. or any other agencies/individual as the case may be in lot and shall purchase land and shall develop the same to provide to members on receipt of salami or cost, either in installments or in full for construction of new pucca building for residential purposes, the plan and estimate being approved by the Society.

b) The Society may also construct pucca building over the lands purchased or taken on lease and allot to the members on payment of cost either in installment or in full. In case of necessity the Society may also allot land after development to the members for construction of houses by the members with the loan available from the Society.

c) To raise funds for its business by means of share capital from members, deposit from members, loan or cash credit from OSLB Co-operative Banks and Commercial banks, HUDCO, SBI Home Finance Ltd. etc.

d) To undertake welfare activities for the benefits of the members and employees and do such other things as are incidental and conducive to the attainment of the above objectives.

Clause-6 : Membership :

The membership shall be open to the permanent employee officers of state Bank of India Branches/Offices in Orissa.

a) Any employee above the age of 18 years and is competent to contract and reside within the area of operation of the Society. But no person can claim admission as a matter of right.

b) The persons who are not eligible to become members in accordance with provision of Orissa Co-operative Societies Act and Rules cannot be admitted as members.

c) The land-owners intending to sell land to the Society will become members of the Society by acquiring at least one share, but they will have no voting right.

Clause-12 : Expulsion of members :

a) If a member deceives the Society in any way or if his general conduct is such as to render his removal necessary in the interest of the Society it shall open to the Committee to expel such member provided he has been given a reasonable opportunity of being heard.

b) The member so expelled will have a right of appeal to the General Body against the decision of the Committee within two months from the date of such decision.

c) A person, who has ceased to be a member, shall be paid all his money due to him from the Society after deducting there from any money due from him to the Society and he shall be liable as provided in Bye-laws No.4 for the dues of the Society as they stand on the date of cessation of membership for a period of 2 (two) years from such date.

13. After coming into force of the Orissa Self Help Co-operatives Act, 2001, the petitioner society was registered under the said Act and was issued a certificate bearing Registration No.35 dated 11.05.2010 vide Annexure-2 to the writ petition. Clauses-6,7 and 9 of the Bye law are relevant which are referred to herein below.

Clause 6 : Objects/Core Service:

The primary objects of the cooperative shall be to provide plot of land/pucca Buildings/flats with fire proof roof to members and to provide loan to the members for acquisition of house/construction of house/maintenance & repair of house or for renovation of house.

In furtherance to the above mentioned objective:-

a) The cooperative shall take land on lease or on outright purchase from Government, Quashi-Government Bodies, any other agency or individuals, as the case may be, in lot and shall develop the same to provide to members on receipt of salami or cost either in installments or in full for construction of pucca building for residential purposes, the plan and estimate being approved by the concerned authorities and duly accepted by the cooperative.

b) The cooperative may construct pucca Building over the land purchased or taken on lease and allot to the members on payment of its costs either in installments or in full. If necessary the cooperative may also allot land before or after development to members for construction of houses by members either with loan availed from cooperative or at their own cost.

c) The cooperative may also enter into arrangement with reputed builders to construct Buildings/Flats in the land acquired by the cooperative and allot houses/flats to members on payment of cost in installments or in full or may allow the Builders to commercially develop the housing site on surplus sharing basis with the cooperative and its members.

d) To create funds to be utilized for the purposes noted in (b) and (c) above.

e) To lend or advance money to members for construction of houses etc. as per (a) above and as per subsidiary rules to be approved by the General Body.

f) To provide services to the potential members as may be decided by the Board of the Directors subject to the provision of the Co-operatives Act.

g) To acquire and develop house sites and construct buildings for allotment among potential members on payment of cost thereof under such terms and conditions as may be decided by the Board of Directors and to sanction loan for the purpose, provide they shall be enrolled as member within 90 days from the date of such allotment.

h) In case the Cooperative provides Flats/Building in a particular place (exceeding 20 houses), the Cooperative will arrange for provision of road, water supply, sanitation, electricity etc. on payment of such amount as shall be decided by the Board.

i) The Cooperative may take care of the security and maintenance of the colony/complex so developed on payment of cost by the members as decided by the Board.

j) The Cooperative may develop Swimming Pool, Gymnasium, Tennis Court, Badminton Court and other facilities for indoor and outdoor games, recreation Centre, marriage mandops, shops and schools etc. for the benefit of its members as well as their family members on payment of normal users fees as decided by the Board from time to time with approval of the General Body.

k) The above facilities as at Clause 'l' may also be extended to outsiders on payment of ready cash with due approval of the Board.

l) To undertake welfare activities for benefit of the members and employees and do such other things as are incidental and conducive to the attainment of the above objectives.

m) Service to non-members shall be such as may be decided by the General Body subject to the provisions of Orissa Self Help Co-operative Act, 2001.

Clause-7 : Membership :

All the members of All Orissa State Bank Officers' Housing Cooperative Society Ltd. Shall deemed to be the members of this Cooperative Registered under Cooperatives Act from the date of registration of the Cooperative under the said Act.

(i) Membership of the cooperative shall be open at the time of admission to officers in the permanent employment of State Bank of India and working/residing in the area of operation of the Cooperative.

(ii) For admission as member the applicant shall be required to deposit non-refundable admission Fee of Rs.50/- (rupees fifty only) or such other higher

sum as may be stipulated by the Board and at least Rs.100/- (Rupees one hundred only) towards the value of one equity.

(iii) **Qualification for admission of the applicant as member shall be as under:**

a) That the applicant is an officer in the permanent employment of State Bank of India functioning in the State of Orissa.

b) That the applicant is competent to contract under the Indian Contract Act, 1872,

c) That the individual is not of unsound mind

d) That he/she resides in the member drawing area of the cooperative,

e) That he/she has not failed to pay any amount due to cooperative,

f) That he/she is not convicted of any criminal offence involving moral turpitude.

g) That he/she is not a member of any other Co-operative/Cooperative Society having similar business/objectives.

(iv) **Ineligibility for membership :**

An individual who is of unsound mind, residing outside the member drawing area of the Cooperative, fails to pay any amount due whether in cash or in kind to the cooperative or to any other cooperative/cooperative society/financing bank, convicted of any criminal offence involving moral turpitude, engaged employed in a business competing/conflicting with the business of the Cooperative or a member of any other Cooperative having similar business, shall not be eligible to be admitted as a member or be allowed to continue his membership.

Provided that in case of acquiring any disqualification, the member concerned shall be given an opportunity by the Board to show cause of the proposed termination within 15 days from the date of issue of notice by registered post.

Clause-9 : Cession of membership:

(i) A member shall cease to be a member, if he or she

(a) Incurs disqualification for membership, or

(b) Resigns from his membership and such resignation is accepted by the Board, but no member shall be permitted to resign if is indebted to the Cooperative, or

(c) Is expelled, or

(d) Dies, or

(e) Has been adjudged insolvent by a competent Court or is of unsound mind, or

(f) Has been punished with imprisonment for an offence involving moral turpitude, or

(g) Has made change of residence permanently from the area of operation of the Cooperative, or

(h) Has transferred all the equities on application to the account of any other existing member.

(ii) The member intending to resign or withdraw from membership shall apply in writing to the Cooperative for the purpose. The Chief Executive shall place the same along with claims of the cooperative against him/her and the vice-versa in the meeting of the Board to be held after the date of receipt of such application. The Chief Executive shall intimate the decision of the Board to the member within 15 days from the date of meeting of the Board by Registered post or by personal service with due acknowledgment.

(iii) In case of cession of membership due to death or transfer of all equities, the Chief Executive of the Cooperative shall intimate to the Board in the first meeting from such cessation and to the legal heirs or the nominee/member as the case may be, within 15 days from the date of such cessation.

14. The Self Help Co-operatives Act, 2001 was repealed vide Annexure-4 dated 06.06.2013. After repeal of the said Act, the petitioner society took decision to amend the Bye-law for the benefit of the members and for the fulfillment of the object of the society.

15. Clause-8 of the Bye-law which relates to admission and continuance as members. In Clause 8.5 stipulates once admitted, the membership shall continue after retirement from service as an officer of State Bank of India till his/her resignation or cessation of membership as the case may be." The proposed amendment with all documents was forwarded to the Registrar for registration, which was received on 02.09.2013.

16. Section-12 of the Orissa Cooperative Societies Act, 1962 deals with amendment of the Bye-laws of a society. Section 12(4) of the Act provides that " where the Registrar refuses to register an amendment of the Bye-laws of a Society, he shall communicate the order of refusal together with the

reasons there for to the Society. Section 12 (4-a) of the Act, 1962 provides that "if the certificate referred to in Sub-Section (3) or order of refusal referred to in Sub-section (4), as the case may, is not communicated to the society within a period of sixty days from the date of its application for registration, the amendment of the Bye-laws, shall be deemed to have been registered with effect from the date following the date of expiry of the said period and upon such registration, the Registrar shall forward to the society a certificate of registration of such amendment along with a copy of the registered amendment within seven days from the date of such registration."

17. On perusal of the impugned order passed by the Registrar vide Annexure-6 dated 03.09.2014, it appears that after expiry of one year, the order has been passed deleting some clauses and modifying/changing Clause 8(5) by the word 'till' and other clauses of the Bye-law of the petitioner society.

Being aggrieved by the order of the Registrar, the petitioner society filed appeal challenging the action of the registrar in Appeal No.01 of 2014 which has been dismissed vide Annexure-8.

18. Further the impugned order passed by the Registrar transpires that the Registrar has acted beyond its power conferred under the Statute. Since he has passed order by making correction in the Bye-law which is beyond his jurisdiction. Moreover, there is no provision under the Act which confers powers on the Registrar for correction of the Bye-law and registering the same. Therefore, the impugned order under Annexure-6 is bereft of the provision of Statute and contrary to the settled position of law as has been referred to supra.

19. So far as the order passed by the appellate authority is concerned, the same has been passed basing on a letter dated 27.06.2011 of the Registrar regarding amendment under the Repeal Act, 2001 which has never been served as alleged by the petitioner society. Moreover the letter dated 27.06.2011 has no relevance after repeal of the Self Help Cooperatives Act, 2001 in the year 2013. On that score the order passed by the appellate authority is not legally sustainable.

20. On cumulative effect of the aforesaid facts coupled with judicial pronouncement, the impugned order under Annexure-6 of opposite party no.2. the Registrar, Cooperative Societies regarding deletion and correction

of the clauses of the Bye-laws under Annexure-6 and order dated 18.04.2017 passed by the appellate authority in Appeal No.01 of 2014 under Annexure-8 is quashed and set side and the case is remitted to the Registrar, Cooperative Societies to consider afresh in accordance with law as per the relevant provisions of the Co-operative Societies Act as expeditiously as possible preferably within a period of three months from the date of receipt of the copy of the order.

21. In the light of the aforesaid order, W.P.(C) No.19962 of 2017 and W.P.(C) No.502 of 2018 stand disposed of accordingly.

—— o ——

2020 (II) ILR - CUT- 629

K.R. MOHAPATRA, J.

C.M.P. NO. 317 OF 2020

SANTOSH KUMAR PARIDA .....Petitioner

.V.

NARAYAN CHANDRA DASH & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE,1908 – Order 26 Rule 09 – Appointment of survey knowing Commission – Dispute with regard to construction of boundary wall – Order of trial court challenged on the ground that, trial court has deferred the hearing of the petition till closure of the evidences from both the parties – Appropriate stage to appoint /depute the survey knowing commission – Held, the court before whom the suit is pending is in the best position to determine at what stage of the suit a commission, if any, is to be issued – The decision taken by the court before whom the suit is pending, either refusing or granting the prayer for issuance of commission, or for that purpose deferring consideration of such prayer, should not be interfered with lightly unless it is arbitrary or there is patent illegality or material illegality in the impugned order. (Para-7)

Case Laws Relied on and Referred to :-

1. 2012 (Supp.II) OLR-520 : Ram Prasad Mishra Vs. Dinabandhu Patri & Anr.
2. (2015) Supp.II OLR 418 : Ramakanta Nayak Vs. Bhanja Dalabehera.

For Petitioner : Mr.Goutam Mishra, Sr. Adv, M/s. Anupam Dash, J.R.Deo, S.Jena & A.K.Dash

For Opp. Parties : --

ORDER Date of Hearing & Disposed of on: 01.07.2020

K.R. MOHAPATRA, J.

Due to outbreak of COVID-19, this matter is taken up through Video Conferencing.

2. Heard Mr. Goutam Mishra, learned Senior Advocate along with Mr. Anupam Dash, learned counsel for the petitioner.

3. The petitioner (plaintiff no.1) in this CMP assails the order dated 18.02.2020 (Annexure-6) passed by the learned Civil Judge (Senior Division), Rourkela in C.S. No.180 of 2015 deferring the hearing of the petition filed by the plaintiffs under Order XXVI Rule 9 CPC till closure of the evidence from all parties.

4. Mr.Mishra, learned Senior Advocate appearing for the petitioner submits that the crux of the dispute involved in the suit is with regard to the boundary of the suit land. As such, if a Survey knowing Commissioner is appointed at the threshold, the same will save the precious judicial time of the Court and the parties will be aware of the report of the Commissioner, so that they will come prepared to the Court and lead evidence accordingly. In support of his case, he relied upon a Division Bench decision of this Court in the case of ***Ram Prasad Mishra Vs. Dinabandhu Patri and another***; reported in 2012 (Supp.II) OLR-520, wherein at paragraphs-6 and 7, it is held as follows:-

> *"6. Learned Single Judge after referring to the judgments of the Hon'ble Supreme Court in the case of* ***Sri Prasanta Kumar Jena v. Choudhury Purna Ch. Das Adhikari,*** *reported in 99 (2005) CLT 720, wherein this Court has ruled that the application under Order 26 Rule 9 of the Code of Civil Procedure be considered only after closure of the evidence when it finds difficult to pass an effective decree on the existing evidence. Further, reliance is also placed on judgments of the Hon'ble Supreme Court in the case of* ***State of Uttar Pradesh and others Vs. Ram Sukhi Devi, AIR 2005 SC 284 and Sri Krishna Tyres and another Vs. J.K.Industries Ltd. and another****, 2009 (4) Supreme 16, in support of the proposition of law that the final relief sought for in the suit is for demarcation of the of the case land, so an interim order cannot be granted in favour of the plaintiff to demarcate the suit land during pendency*

> *of the suit and such an order can only be passed after final adjudication of the suit. Relying on the above decisions, learned Single Judge has set aside the order ignoring the decision of this Court in the case of* ***Mahendranath Parida Vs. Purnananda Parida and others,*** *reported in AIR 1988 Ori 248 relied on by learned counsel for the plaintiff-appellant, wherein this Court has held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties can be aware of the report of the commissioner and can go to trial with all preparedness.*
>
> *7. The party against whom, a report might have given may choose an evidence in rebuttal. Therefore, further it is in the said case observed that ordinarily in such type of cases, local investigation should not have been deferred after closure of the evidence. Placing reliance on the said decision, having regard to the pleading of the parties learned trial Judge is right in allowing appointment of survey knowing commissioner. The same should not have been interfered with by the learned Single Judge applying various decisions referred to supra and the decision in 2006 (II) OLR 43 which decision has no application to the fact situation."*

4.1 He, therefore, submits that the Court should not have directed to consider the petition after closure of the evidence of the parties. As such, he prays for a direction to the learned Civil Judge to entertain the petition at the threshold before commencement of trial of the suit.

5. Upon hearing Mr. Mishra learned Senior Advocate for the petitioner and on perusal of the materials on record including the impugned order, this Court feels that in order to analyze the scope and power available under the provision, a close reading of Order XXVI Rule 9 of the Code of Civil procedure is essential, which reads as follows;

> *"9. Commissions to make local investigations- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of asce rtaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*
>
> *Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."*

5.1 Thus, it is apparent that in a suit, the Court may issue a commission to any person for the purpose of *'elucidating any matter in dispute'* and for

all other purposes mentioned in the provision itself. According to Oxford dictionary, the word '*elucidate'* means '*to throw light or to make clear, to explain, to remove obscurity from and render intelligible or to illustrate'*. According to Cambridge dictionary, it means '*to explain something or make something clear'*. According to Chambers dictionary, it means '*to make lucid or clear or to throw light upon, to illustrate, making clear, explanatory*'. Thus, from the reading of the provision it is manifest that if a matter in dispute in a suit needs any clarification or further explanation, the Court may consider issuance of a commission for that purpose. The language employed in the provision makes it abundantly clear that the Court exercises its judicial discretion while making order for issuance of a commission. But, it must be kept in mind that all matters in dispute in a suit cannot be elucidated through issuance of a commission. Thus, the party seeking issuance of a Commission must establish a *prima facie* case to invoke the provision. He cannot use the Court to collect evidence on his behalf in the guise of invoking the power of the court under the provision, unless the occasion so arises. Thus, the party to the suit seeking issuance of a commission must, at the first instance, make an endeavour to lead evidence to prove his case on the issue involved. Only when the evidence or material on record is insufficient or needs clarification or the parties are unable to lead evidence on any particular matter in dispute or it becomes expedient to make a local investigation by a Commission to lead further evidence in the matter, to pass an effective decree, then the Court has the power to exercise its discretion under the provision and issue such a commission for any purpose mentioned in the provision itself.

6. The provision is silent about the stage at which such a commission should be issued. The power conferred under the provision can be exercised at any stage during pendency of the suit. In other words, the Court in its discretion may issue a commission at any stage of the suit, when it thinks necessary to do so for the purpose of elucidating any matter in dispute or for any other purposes prescribed in the Rule itself. There are divergent views with regard to the stage of a suit at which a Commission can be issued. There cannot be any straightjacket formula to prescribe any particular stage of the suit at which a Commission, if required, can be issued. It depends upon the facts and circumstances of each case. In the case of ***Ramakanta Nayak Vs. Bhanja Dalabehera***, reported in (2015) Supp.II OLR 418, this Court held that issuance of a commission for local investigation is the discretion of the Court. While considering the prayer for issuance of a Commission, the Court must apply its mind to the facts and circumstances of the case and pass

orders. Before issuance of a Commission, the Court must be satisfied that there is *prima facie* material in favour of the applicant for issuance of such a Commission. Again, in case of *Ramakanta Nayak (supra)*, it is held that when the Legislature in its wisdom has not prescribed the stage of appointment of Survey knowing Commissioner, the power of the Court to appoint the Survey knowing Commissioner cannot be cabined, cribbed or confined. Thus, the power of the Court to issue commission under the provision cannot be abridged or curtailed by prescribing a particular stage of the suit for issuance of a Commission for a particular purpose.

7. With utmost respect to the decision cited by Mr.Mishra, learned Senior Counsel, this Court is of the humble opinion that there are divergent views on the point of issuance of Commission at any particular stage of the suit. As discussed above, there cannot be any particular stage for issuance of a Commission. It depends upon the facts and circumstances of each case. Hon'ble Division Bench has opined in the case of ***Ramprasad Mishra*** (supra) that when the dispute is with regard to demarcation of land or there is a boundary dispute, survey knowing commissioner should be appointed at the earliest so that the parties may lead evidence keeping in mind the the report submitted by the Commissioner. The opinion of the Hon'ble Division Bench is suggestive taking into consideration the facts and circumstances of the said case and cannot have a universal application. Thus, I am of the humble opinion that the Court before whom the suit is pending is in the best position to determine at what stage of the suit a Commission, if any, is to be issued. The decision taken by the Court before whom the suit is pending, either refusing or granting the prayer for issuance of commission, or for that purpose deferring consideration of such prayer, should not be interfered with lightly unless it is arbitrary or there is patent illegality or material illegality in the impugned order.

8. In the case at hand, the petitioner is also at liberty to examine his private Amin (Survey knowing person) in support of his case, which has the same effect as that of the Survey knowing Commissioner, if any, to the appointed by the Court. The report to be submitted by any private Amin or Commissioner appointed by the Court shall have to sustain the scrutiny of the Court to be considered as a piece of evidence. The parties to the suit may also cross-examine the Amin/Commissioner to test the veracity of the report submitted by him.

9. In that view of the matter, when the learned Court has kept it open to consider the petition under the Order-XXVI Rule-9 CPC at the closure of evidence, I am not inclined to interfere with the same in exercise of extra-ordinary jurisdiction under Article 227 of the Constitution, as it does not, in any way prejudice the plaintiffs and the impugned order does not suffer from any patent illegality or material irregularity.

9.1 It is, however, made clear that the petitioner is at liberty to make a prayer for consideration of his petition filed under Order-XXVI Rule-9 CPC at any appropriate stage, before closure of evidence, if occasion so arises, which shall be considered in accordance with law keeping in mind the observations made hereinabove.

10. Accordingly, this Court disposes of the CMP with the aforesaid observations. Authenticated copy of this order downloaded from the website of this Court shall be treated at par with the certified copy of this order in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

——— o ———

2020 (II) ILR - CUT- 634

B.P. ROUTRAY, J.

CRLREV Nos. 534, 615, 616, 699, 700 and 701 of 2019

JITENDRANATH PATNAIK .....Petitioner

.V.

STATE OF ODISHA (VIG.) .....Opp. Party

IN CRLREV NO.615 OF 2019

AKSHYA KUMAR DAS .....Petitioner

.V.

STATE OF ODISHA (VIG.) .....Opp. Party

IN CRLREV NO.616 OF 2019

NITYANANDA MOHANTY .....Petitioner

.V.

STATE OF ODISHA (VIG.) .....Opp. Party

IN CRLREV NO.699 OF 2019
ASHOK KUMAR SAHU .....Petitioner
.V.
STATE OF ODISHA (VIG.) .....Opp. Party

IN CRLREV NO.700 OF 2019
PRANANATH DASH .....Petitioner
.V.
STATE OF ODISHA (VIG.) .....Opp. Party

IN CRLREV NO.701 OF 2019
RABINDRANATH SARANGI .....Petitioner
.V.
STATE OF ODISHA (VIG.) .....Opp. Party

(A) MINES AND MINERALS (DEVELOPMENT & REGULATIONS) ACT, 1957 – Section 22 r/w Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007- Rule 15 – Offences U/s.21 of MMDR Act, U/s. 379/120-B of IPC r/w section 3A of Forest Conservation Act,1980 – F.I.R lodged & Charge sheet filed by Vigilance D.S.P – Cognizance of the offences taken – Order of cognizance challenged on the ground that, no written complaint by the competent authority has been filed, as mandated under section 22 of the MMDR Act – Provisions under section 22 of MMDR Act pleaded by the Petitioner – However State/Opposite party pleaded that, as per notification(Home Dept.) police officer above in rank of Inspector in vigilance dept. has the power to investigate/enquire or to file the final report in relation to offences of illegal mining – Validity of the said notification has not been challenged/questioned by the parties – Held, the complaint at the instance of vigilance police and investigation conducted by them against the petitioners is maintainable. (Para-15)

(B) INDIAN PENAL CODE, 1860 – Sections 378 & 379 – Lifting of minerals without any lease or licence or authority – Whether it amounts to theft? – Held, Yes. (Para-16)

(C) ORISSA CIVIL SERVICE (PENSION) RULES, 1992 – Rule 7 (2) (c) – Bar provided there under – Whether Criminal Prosecution against the retired employee is maintainable? – Answer is yes – Held, Rule 7 has a limited field of application and cannot be extended to put an absolute bar against criminal prosecution. (Para-18)

Case Laws Relied on and Referred to :-

1. (2014) 9 SCC 772 : State of NCT of Delhi Vs. Sanjay.

2. 2019 SCC Online Ori.226 : Ramesh Kumar Agrawal Vs. State of Odisha & Ors.
3. (1999) 9 SCC 479 : State of Maharashtra Vs. Keshav Ramchandra Pangare & Anr.
4. 2018 SCC Online 310 : Fani Bhusan Das & Anr. Vs. State of Odisha (CRLMC Nos. 258 &686 of 2004, and 2626 of 2007)

IN CRLREV NO. 534 OF 2019
For Petitioner : Mr.U.C.Pattnaik,
For Opp Party : Mr.Sangram Das, Standing Counsel (Vig).

IN CRLREV NO.615 OF 2019
For Petitioner : Mr.G.Mukherji, Sr.Adv. Mr.S.Panda,
For Opp. Party : Mr.Sangram Das, Standing Counsel (Vig).

IN CRLREV NO.616 OF 2019
For Petitioner : Mr.G.Mukherji, Sr.Adv. Mr.S.Panda.
For Opp. party : Mr.Sangram Das, Standing Counsel (Vig)

IN CRLREV NO.699 OF 2019
For Petitioner : Mr.R.K.Mohanty, Sr.Adv. Ms.Sumitra Mohanty.
For Opp. Party : Mr.Sangram Das, Standing Counsel (Vig).

IN CRLREV NO.700 OF 2019
For Petitioner : Mr.R.K.Mohanty, Sr.Adv. Ms.Sumitra Mohanty.
For Opp. Party : Mr.Sangram Das, Standing Counsel (Vig).

IN CRLREV NO.701 OF 2019
For Petitioner : Mr.R.K.Mohanty, Sr.Adv. Ms.Sumitra Mohanty.
For Opp. Party : Mr.Sangram Das, Standing Counsel (Vig).

JUDGMENT Date of Judgment : 06.08.2020

B.P. ROUTRAY, J.

All the petitioners in these Criminal Revisions have challenged the order dated 19.07.2019 passed by the learned Special Judge (Vigilance), Keonjhar in VGR Case No. 19 of 2011 and have further prayed to discharge them from the offences under Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act,1968, Sections 379/120-B of the Indian Penal Code, Sections 21 of the Mines and Minerals (Development and Regulations) Act, 1957 (hereinafter in short called "MMDR Act"), Section 3-A of the Forest Conservation Act, 1980 and Section 58 of the Mineral Conservation and Development Rules, 1988.

2. Since all these Revision Petitions are arising out of the very same impugned order dated 19.07.2019 passed in VGR Case No. 19 of 2011 by the

learned Special Judge (Vigilance), Keonjhar, they are heard together analogously and disposed of by this common order.

3. The case in nutshell is that a mining lease was granted in favour of Late Banshidhar Patnaik, the father of the accused petitioner in CRLREV No.534/2019 Jitendranath Patnaik over an area of Ac.260.00 dec. for Manganese and Iron Ore. Mining lease so granted for Manganese was for 20 years and for Iron Ore was for 30 years. The lease period started on 31.07.1959. However, in the year 1967 said Banshidhar Patnaik surrendered the mining lease in respect of Manganese but continued in respect of Iron Ore. Before expiry of the said lease period, he applied for renewal of the lease on 30.07.1988 for the break up area, but without the de-reservation proposal though there were forest areas within the applied area. However, no renewal of fresh lease was granted in his favour after 31.07.1989, but the period was further extended for one year more i.e., till 31.07.1990 in view of Rule 24-A of the Mineral Concession Rules, 1960 as it then was.

4. Allegedly accused Jitendranath Patnaik (petitioner in CRLREV No. 534/2019), on 7.11.1991 applied on behalf of his father Bansidhar Patnaik to the Government in the Department of Steel and Mines through the Deputy Director of Mines, Joda for grant of working permission pending renewal of mining lease. The working permission was granted for 6 months and extended from time to time till 26.12.1994 without any approval by the Ministry of Environment and Forest. Said Banshidhar Patnaik (father of the petitioner) died on 5.11.1995. The Ministry of Environment and Forest in its letter dated 3.9.1998 communicated the permission for DRP (De-reservation Proposal) over an area of Hc.18.02 for 10 years which was coterminous with the permission granted under the MMDR Act.

5. In the meantime accused Jitendranath Patnaik in his letter dated 6.9.1996 requested the Government in Steel and Mines Department for 20 years renewal of the mining lease, however, without submitting the application in proper form. Further, another proposal for renewal was submitted by the said accused Jitendranath Patnaik on 25.07.2008 for 20 years enclosing a WILL, allegedly executed by his father Late Banshidhar Patnaik, which was already declared forged by the learned District Judge, Keonjhar vide its order dated 26.3.2001 passed in Misc. Case No. 5 of 1996.

6. It is the case of the prosecution that, the said accused Jitendranath Patnaik in conspiracy with other accused persons continued the illegal mining

activities from 1999 to 2009 causing heavy pecuniary loss to the Government to the tune of Rs.130.39 crores, and to their personal gain.

7. The FIR was lodged on 18.11.2009 by the D.S.P.,Vigilance and charge sheet was submitted on 26.03.2013. The learned Judge took cognizance of the aforesaid offences on 11.06.2013. There were 15 numbers of accused persons and due to death of one accused, namely, S. Sahoo, presently 14 accused persons are there.

8. Except the petitioner-accused Jitendranath Patnaik, all other petitioners-accused persons are Government Officials. The common submission on behalf of all the petitioners in challenging the impugned order of the learned Vigilance Judge, with prayer for discharge, is that the court below has failed to appreciate the provision of law that, in absence of the complaint being presented by the competent authority, the order of cognizance is not sustainable in the eye of law. As per Section 22 of the MMDR Act, since there is a bar for taking cognizance of any offence under the said Act unless the complaint in writing is made by a person authorized in this behalf by the Government, the cognizance taken on the report of Vigilance Police is bad in the eye of law. It is further submitted that in the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 (hereinafter referred as OMPTS Rules), the 'competent authority' as defined under Rule 2(1)(b) is any officer mentioned in Schedule-I appended to the said Rules. Bringing attention of this Court to said Schedule -I, it is pointed out that the name of any such Vigilance Official is not appearing as such in the schedule. Therefore, the complaint at the instance of the Vigilance Police and initiation of the proceeding thereof by taking cognizance of the offences by the court below is vitiated. It is also submitted that, whatever may be the contravention is, of the provisions of the MMDR Act or MCD Rules, the same never mean to constitute the offence of theft. The learned court below has not appreciated the law properly, and held that, since the petitioner did not challenge the order taking cognizance of the offences, their prayer for discharge at this stage cannot be entertained. In addition to this submission, it is also submitted on behalf of the petitioners Akshya Kumar Das (petitioner in CRLREV No.615/2019) and Nityananda Mohanty (petitioner in CRLREV No.616/2019) that, they have retired from service on 30.04.1994 and in the year 1996 respectively and therefore, initiation of any judicial proceeding

against them after four years of their retirement is not permissible in view of the provision contained in Rule 7(2)(c) of the OCS (Pension) Rules, 1992.

9. In support of their contention that, the cognizance of the offences under the MMDR Act and MCD Rules without the complaint being lodged by any competent authority as per the mandate in Section 22 of the MMDR Act and Schedule-I of the OMPTS Rules is unsustainable and the proceeding against the petitioners is also vitiated, they rely on the decision in the case of ***State of NCT of Delhi Vs. Sanjay***, ***reported in (2014) 9 SCC 772*** and a judgment of this Court dated 9.7.2019 passed in CRLMC No. 2440 of 2010 (***Ramesh Kumar Agrawal Vs. State of Odisha & Ors***.), ***reported in 2019 SCC Online Ori.226.***

10. On the other hand it is submitted on behalf of Vigilance Department that, the Vigilance Officials have been duly empowered and authorized to conduct enquiry and investigation in respect of all such offences by the Notification of Government dated 14.01.2010. Therefore, the contention of the petitioners that the Vigilance D.S.P. is not authorized to lodge the complaint in respect of those offences is not at all correct and liable to be rejected.

11. To examine this submission, it is first required to see Sec.22 of the MMDR Act and the relevant provisions of the OMTPS Rules. Section 22 speaks as follows:

> **"22. Cognizance of offences**.—No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government."

12. Rule 15 of the OMPTS Rules prescribes that, no court shall take cognizance of any offence punishable under the act except upon any complaint in writing is made by the *competent authority or person authorized in this behalf* by the Government. The term 'competent authority' has been defined in Rule 2(1)(b) as 'Officers mentioned in Schedule-I' of the said Rules. In Schedule-I, 15 Mining Officers including the Director and Dy. Director of Mines for different areas of jurisdiction have been named. Further the Government in the Department of Steel and Mines, in exercise of power conferred under Sections 22 and 23B of the MMDR Act, in its Notification dated 19.12.2009 has named the Director of Mines and two Joint Directors

authorizing them to exercise the powers of detection/seizure and confiscation etc. in connection with illegal mining activities for all type of minerals covering the entire State of Odisha. For better appreciation, the said Notification is reproduced below:

"DEPARTMENT OF STEEL & MINES
NOTIFICATION
The 19th December 2009

No.8096—IV(A)-SM-101/2009-SM.—Whereas, the Government of Orissa have been considering delegation of original powers of detection, seizure, investigation, prosecution, etc. under the provisions of M.& M. (D. & R.) Act, 1957 and O.M.P.T.S. Rules, 2007 to the Joint Director/Deputy Director/Mining Officer deputed to State Level Enforcement Squad (S.L.E.S.) for checking illegal mining to exercise such powers all over the State;

Now, therefore, in exercise of the powers conferred under Sections 22 & 23B of M. & M. (D.& R.) Act, 1957, the State Government have been pleased to authorize the following Officers to exercise the powers of detection, seizure and confiscation, etc. in connection with illegal mining activities covering the entire State of Orissa under the relevant provisions of the aforementioned Act & Rules in respect of the area mentioned against each. Further they are declared as competent authority as defined in rule 2(1)(b) of Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 from the date of issue of this notification.

Sl.No.	Name of the Officers	Jurisdiction	Minerals
1.	Director of Mines, Orissa	Entire State	All Minerals
2.	Joint Director of Mines/Deputy Director of Mines/Mining Officer working in the o/o Director of Mines	Entire State	All Minerals
3.	Joint Director of Mines/Deputy Director of Mines/Mining Officer deputed to State Level Enforcement Squad (S.L.E.S.)	Entire State	All Minerals

By order of the Governor
S.DASH
Commissioner-cum-Secretary to Government"

13. Again the Government of Odisha in the Home Department in their Notification dated 14.01.2010 have specified the Officers of and above the rank of Inspector of Police under the Director of Vigilance, Odisha to conduct investigation/enquiry and to take legal action under the provisions of the IPC, other relevant Acts and Rules pertaining to illegal mining in the State and to file charge sheet/final report accordingly after obtaining approval/sanction of the competent authority as and when required in the corresponding Act /Rules. The list of offences includes offences under the MMDR Act, the Forest Conservation Act, OMPTS Rules etc. For better appreciation, the said Notification is reproduced below:

"HOME (SPECIAL SECTION) DEPARTMENT
NOTIFICATION

The 14th January, 2010

S.R.O.No.49/2010---In exercise of the power conferred by Clause (S) of Section 2 of the Code of Criminal Procedure, 1973, the Government in Home Department has issued the Notification vide Order No.31045-D.& A, dated the 7th August, 2004 specifying the offences which can be investigated by the Vigilance Organization.

As per the Clause 1, Schedule II of the Notification, dated the 7th August, 2004 of Home Department, any other particular offence or class of offences that may be specified by the State Government from time to time can be enquired and investigated into by Vigilance Organization. During enquiry/investigation of the allegations on illegal mining, it is felt imperative that other sections of I.P.C. in addition to sections mentioned in Schedule II of the above Notification, dated the 7th August, 2004 and the provisions of the Acts/Rules mentioned below may be applicable for the purpose of investigation of the cases.

1. The Orissa Forest Act, 1972
2. The Wildlife (Protection) Act, 1972
3. The Indian Forest Act, 1927
4. The Forest (Conservation) Act, 1980
5. The Forest (Conservation) Rules, 2003
6. The Environment (Protection and Control of Pollution) Act
7. The Environment (Protection) Rules, 1986
8. The Air (Prevention and Control of Pollution) Act, 1981
9. The Air (Prevention and Control of Pollution) Rules, 1982
10. The Water (Prevention and Control of Pollution) Act, 1974
11. The Water (Prevention and Control of Pollution) Rules, 1975

12. The Water (Prevention and Control of Pollution) Cess Act, 1977

13. Orissa Minor Mineral Concession Rules, 2004

14. The Mines Act, 1952

15. The Mines and Minerals (Development and Regulation) Act, 1957

16. The Mineral Concession Rules, 1960

17. Orissa Minerals (Prevention of Theft, Smuggling and other Unlawful Activities) Act, 1988

18. Orissa Minor Minerals Concession Rules, 2004

19. Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007.

The State Government do hereby empower the officers of and above the rank of Inspector of Police posted under the Director, Vigilance, Orissa to conduct investigation/enquiry, take legal actions under the provisions of I.P.C. other relevant Acts and Rules pertaining to the illegal mining in the State and file Charge Sheet/Final Report as it is applicable after obtaining approval/sanction of the Competent Authority as and when required in the corresponding Acts/Rules.

The devolution of the above power shall be limited to the purpose of taking up enquiry/investigation into the alleged mining activities referred to by the State Government or till the latter withdraws the same.

[No.128-C.]
By order of the Governor
A.P. PADHI
Principal Secretary to Government"

14. In the case of State of NCT (supra), the Hon"ble Supreme Court has held at paragraphs 69 and 70 as follows:

"69. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.

> 70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the Jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorised officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code."

Similarly this Court in the case of ***Ramesh Kumar Agrawal*** (supra), relying on the aforesaid decision of the Supreme Court has quashed the order of cognizance taken for the offence under Section 21 of the MMDR Act.

15. It is true that in the aforesaid two cases relied upon by the petitioners, the Police had instituted the complaint and submitted the final report. The Police had no authorization for doing enquiry or investigation or to take any legal action in respect of any offence under the MMDR Act. But here is a case, which clearly shows that the Vigilance Police of and above the rank of Inspector, have been specifically authorized to conduct the investigation/enquiry and to take all legal action pertaining to illegal mining activities in the State including the offences under the MMDR Act, Forest Conservation Act and OMPTS Rules. It is true that none of the petitioners have challenged or are questioning the power of Government to issue the Notification dated 14.01.2010 authorising Vigilance Police in that respect. Undisputedly the validity of notification dated 14.1.2010 is not questioned. The averments and submissions made on behalf of the petitioners are completely silent about the said Notification made in favour of the Vigilance Police. On the other hand, as seen from the Notification dated 14.01.2020 issued by the Government in Home Department and the Notification dated 19.12.2009 issued by the Steel and Mines Department, Government of Odisha, they are neither overlapping to each other nor the Notification dated 14.01.2010 is found in conflict with the provisions of the MMDR Act or the OMPTS Rules. A bare perusal of the notification dated 14.01.2010 clearly shows that it has given power to the Vigilance Police to investigate or lodge

complaint for such offences under the MMDR Act and other relevant Acts / Rules. Therefore, in view of the specific authorization made in favour of the Vigilance Officials in that respect, the contentions of the petitioners cannot be accepted that the Dy. Superintendent of Police (Vigilance) is not authorized to file the complaint for the offences against the requirement of Section 22 of the MMDR Act. Therefore, in my considered opinion the complaint at the instance of Vigilance Police and investigation conducted by them against the petitioners is maintainable.

16. It would not be out of place to mention here that the *'competent authority'* as prescribed in Rule 15 of the OMPTS Rules is in addition to the *'person authorized'* as mentioned in Section 22 of the MMDR Act. Therefore, it is immaterial to discuss who would be the competent authority for the purpose, because the term 'competent authority' is in addition to the 'person authorized in this behalf' as per Rule 15 of the OMPTS Rules, against the prescription of Section 22 of the MMDR Act.

17. It is argued on behalf of the petitioners that the action in lifting the mineral even by violating the provisions as per the allegations would never amount to theft under the Indian Penal Code. But, in my considered view, this argument does not appear convincing in view of the observation of the Hon'ble Supreme Court made in the case relied upon by the petitioners in the case of State of NCT (supra). It is further observed in the said decision that where a person without any lease or license or authority extract minerals and remove and transport them with an intent to remove dishonestly, is liable to be punished of committing such offence under Sections 378 and 379 of the IPC. In paragraphs 71, 72 and 73 of the judgment the Hon'ble Supreme Court held as follows:

> "71. However, there may be a situation where a person without any lease or licence or any authority enters into river and extracts sand, gravel and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Penal Code.
>
> 72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely

> because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.
>
> 73. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

18. The additional argument, what is urged on behalf of the petitioners in CRLREV Nos.615 and 616 of 2019 that they retired from service since 1994 and 1996 respectively and cognizance being taken on 11.06.2013, the same is barred under Section 7(2)(c) of the OCS (Pension) Rules, 1992, is not found acceptable. It is because Rule 7 has a limited field of application and cannot be extended to put an absolute bar against criminal prosecution. In the case of ***State of Maharashtra Vs. Keshav Ramchandra Pangare & Another,*** reported in (1999) 9 SCC 479, the respondent Keshav Ramchandra Pangare retired as Dy.Engineer, P.W.D. in the State of Maharaashtra. Prosecution launched against him under Sections 120-B, 406, 420, 465, 466, 467, 468, 471, 477 and 109 IPC and Sections 5(i)(c),(d) read with Section 5 (2) of the Prevention of Corruption Act, 1947. His challenge before the Bombay High Court was that the complaint being filed beyond the period of four years from the date of commission of the offence, it is barred by Rule 27(3) of the Maharashtra Civil Services (Pension) Rules, 1982. The Bombay High Court accepted the plea and held that Rule 27 of the Pension Rules was directly applicable and it is mandatory that prosecution should be launched within four years from the date of commission of offence and consequently quashed

the criminal proceeding against the respondent. The said judgment was challenged by the State of Maharashtra before the Supreme Court. Rule 27 of the Maharashtra Civil Services (Pension) Rules 1982 is a pari materia provision with Rule 7 of the OCS (Pension) Rules, 1992. On interpretation, it is held by the Supreme Court that, those provisions of the Pension Rules is only meant for the purpose of granting, withholding or withdrawing the pension and it"s operation would be in the limited field and cannot supersede the period of limitation prescribed under the Cr.P.C. The relevant observation of the Supreme Court is reproduced below:

> "9. Similarly, in the present case, Rule 27(1) provides the right of Government to withhold or withdraw a pension and in that context the said rule is to be interpreted. Under the said rule, the Government may, inter alia, order withholding or withdrawing a pension or any part thereof, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service. It also empowers the Government to order the recovery from such pension of the whole or part of any pecuniary loss caused to the Government if, in any departmental or judicial proceedings the pensioner is found guilty of grave misconduct or negligence during the period of his service. In the context of the second part of sub rule (1), sub rule (3) is to be read and interpreted. If something is to be recovered from the pension payable to the employee then the judicial proceeding or departmental inquiry is required to be started within the period prescribed under the sub-rule (2) or sub-rule (3) but that would not debar the prosecuting agency from launching the prosecution for the offence of grave misconduct. This rule is to be read with the previous Rule 26 which provides that future good conduct shall be an implied condition of every grant of pension and Government may withhold or withdraw a pension or part thereof, if the pensioner is convicted of a serious crime or is found guilty of grave misconduct. But the Pension Rules 26 and 27 do not lay down any period of limitation for prosecution or could not supersede the period of limitation prescribed under the Cr.P.C. Rule 27 is only meant for the purpose of granting, withholding or withdrawing the pension and hence its operation would be in the limited field of granting or withholding pension to the Government employees.
>
> 10. Relying upon the decision in State of Punjab Vs. Kailash Nath,(1989)1 SCC 321, the learned Single Judge of the Bombay High Court in Prabhakar Govind Sawant v. State of Maharashtra and others, (1991) Maharashtra Law Journal 1051, rejected the contention that the prosecution was barred under Rule 27 of the Pension Rules as it was launched after the period of four years. In that case, the learned Judge also referred to Article 254 of the Constitution and held that the provisions of the Criminal Procedure Code shall have an overriding effect and shall prevail notwithstanding any provision in the Pension Rules framed by the State Government. It is unfortunate that the attention of the learned Single Judge was not drawn to the said decisions which are of a binding nature at least as far as the High Court is concerned. That apart, learned Single Judge, instead of jumping to a

> conclusion solely based on Rule 27 of the Pension Rules should have examined the relevant provisions of the Code before axing down the criminal prosecution in respect of serious offences."

This Court also by relying the said decision of the Supreme Court, in the case of ***Fani Bhusan Das & Anr. Vs. State of Odisha*** (CRLMC Nos. 258 &686 of 2004, and 2626 of 2007), **reported in 2018 SCC Online 310**, has observed that the provision of the Cr.P.C. shall have an overriding effect and shall prevail notwithstanding any provision in the Pension Rules, and therefore, the provisions of OCS (Pension) Rules, 1992 would not give any relief to the petitioners.

So the contention of these two petitioners to give them immune from criminal prosecution by virtue of Rule-7 of the OCS (Pension) Rules is found without substance and accordingly rejected.

19. A further contention is made on behalf of the petitioner Jitendranath Patnaik that in absence of all legal heirs of the lessee Late Bansidhar Patnaik, the prosecution against him alone is not maintainable. This contention has no leg to stand because as per the allegation he is the only legal heir of late Bansidhar Patnaik, who applied for renewal by producing the forged WILL and is also the beneficiary of the ill-got minerals. When other legal heirs have not played any role in such illegal mining, they need not be brought into the sphere of prosecution because only being the legal heirs under the law will not attract any offence itself, without *actus reus* and mens rea.

20. In view of the discussions made above, the CRLREVs are found devoid of any merit and accordingly all these Criminal Revisions stand dismissed. No order as to costs.

—— o ——

2020 (II) ILR - CUT- 647

S.K. PANIGRAHI, J.

BLAPL NO.10152 OF 2019

ISWAR TIWARI .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 36-A (4) read with Section 167 (2) of the Code of Criminal Procedure, 1973 – Provisions under – Offences under Section 20(b)(ii)(C)/29 of the N.D.P.S. Act – Charge sheet not filed, extension of time sought for – Extension granted without issuing notice to the accused – Effect of – Considered – Principles crystallized for better appreciation.

"In the light of the aforementioned case laws relied upon, it is felt that the law on the subject needs to be crystallized for better appreciation by the courts below. In the event the investigation is not completed within 180 days, the Court is empowered under Section 167 (2) of the Code of Criminal Procedure, 1973 read with Section 36-A (4) of the NDPS Act to authorize detention for a period up to one year, the law as it stands mandates that the same shall be subject to the following, being complied in letter and spirit.

The legal position can be thus summarized as follows: -

i) Report of the Public Prosecutor indicating the progress of investigation must accompany the application for extension of time;

ii) Specific and compelling reasons for seeking detention of the accused beyond 180 days must be mentioned; a merely formal application will not pass muster;

iii) A notice must mandatorily be issued to the accused and he must be produced in court whenever such an application is taken up,

iv) An application seeking extension of time in filing of chargesheet by the prosecution ought not to be kept pending and must be decided as expeditiously as possible and certainly before expiry of the statutory period.

v) In cases where any such default occurs, the question of it being contested doesn"t arise and a right accrues in favour of the accused.

vi) The restrictions under Section 37 will have no application in such cases. It will have application only in the case of an application being decided on merits.

vii) Violation of any of the aforesaid would be construed as a "default" and the accused become entitled to admitted to bail by such a default.

viii) When an application under Section 167(2) Cr.P.C. r/w Section 36A(4) of the NDPS Act has been filed after expiry of the 180 days period and no decision thereupon, an indefeasible right to be released on bail accrued to the accused which cannot be defeated by keeping the said applications pending.

In case there is violation of any of the above, an indefeasible right to bail will be accrued to the accused. Applying the aforesaid parameters as laid down hereinabove, it is quite evident that there have been such "defaults" in the instant case, especially non-service of notice on the accused which is violative of the most cardinal principle of natural justice i.e. Audi Alteram Partem which creates an indefeasible entitlement to bail to the Petitioner." (Para 17)

Case Laws Relied on and Referred to :-

1. (2018) 71 OCR-31 : Lambodar Bag Vs. State of Orissa.
2. A.I.R. 1979 S.C. 1377 : Hussainara Khatoon Vs. Home Secretary.
3. (1989) 3 SCC 532 : Rajnikant Jivanlal Vs. Intelligence Officer, Narcotic Control Bureau.
4. (1992) 4 SCC 272 : Aslam Babalal Desai Vs. State of Maharashtra.
5. (1996) 1 SCC 718 : Bipin Shantilal Panchal (Dr) Vs. State of Gujarat.
6. 2017 SCC Online Raj 3418 : Pappu Ram Vs. State of Rajasthan.
7. 2018 SCC Online Del 7769 : Arvind Kumar Saxena Vs. State.
8. 2019 SCC OnLine Mad 995 : Venkatesh Vs. State, Rep. by Inspector of Police.
9 (1994) 4 SCC 602 : Hitendra Vishnu Thakur Vs. State of Maharashtra.
10. (1994) 5 SCC 410 : Sanjay Dutt Vs. State through CBI, Bombay (II).
11. (2009) 17 SCC 631 : Sanjay Kumar Kedia Vs. Narcotics Control Bureau.
12. 2010 SCC OnLine Cal 1503 : Pradip Maity Vs. Union of India.
13. 2012 SCC OnLine Gau 8 : Jayanandan Prasad Vs. State of Assam.
14. 2014 SCC Online P&H 221652 : Manpreet Singh Vs. State of Punjab.
15. 2014 SCC OnLine P&H 9629 : Jaspal Singh @ Jassa Vs. State of Punjab.
16. CRA S-35502 of 2011, decided on December 16, 2011 : Rajwinder Singh Vs. State of Punjab.
17. 2015 SCC Online P&H 812 : Sanjiv Kumar @ Banti Vs. State of Punjab.
18. CRM-M-17260-2014 decided on 29.5.2014 : Hardeep Singh Vs. State of Punjab.
19. CRM-M-22760-2014 decided on 12.8.2014: Kaka Singh Vs. State of Punjab.
20. (2014) 9 SCC 457 : Union of India through CBI Vs. Nirala Yadav @ Raja Ram. Yadav @ Deepak Yaday.
21. (1995) 4 SCC 190 : Union of India Vs. Thamisharasi.

For the Petitioner : M/s. Jyotirmaya Sahoo & S.K.Pattnaik.

For the Opp. Party : Mr. Tapas Kumar Praharaj, Standing Counsel

JUDGMENT Date of Hearing : 15.07.2020 : Date of Judgment: 20.08.2020

S.K. PANIGRAHI, J.

1. The present application seeking bail under Section 439 of the Code of Criminal Procedure, 1973 has been preferred in connection to an FIR against the present Petitioner and other accused persons which was registered as Jeypore Sadar P.S. Case No. 72 dated 15-04-2019, U/s 20(b)(ii)C/29 of the N.D.P.S., Act, corresponding to T.R. Case No. 19 of 2019 pending in the file of the learned Dist. & Sessions Judge-cum-Special Judge, Koraput at Jeypore.

2. The brief facts of the case, shorn of unnecessary details, is that while the informant along with other staff were performing their patrolling duties, they noticed that one full body truck bearing Regd. No. UP- 78-DJ-0111 carrying five persons including the driver were being escorted by one Toyota Innova vehicle boarded by one person i.e. the driver of the Car. They were allegedly coming from Jeypore side and over took the Bolero Vehicle of the Informant at Teliguda chhak, at a very high speed making them suspicious. Thereafter, the informant allegedly chased the said vehicles and detained the accused. On search, the informant found plastic bottles and polythene bags which were loaded inside and also emitting some pungent smell. Thereafter, upon further search, the informant and his staff discovered eleven polythene packets containing 270kg 200gms of Ganja from the said truck.

3. The Petitioner along with other accused persons were forwarded to the court of Learned Sessions Judge-cum-Special Judge, Koraput at Jeypore on 15.04.2019. Thereafter, one S.I. Sima Pradhan of Jeypore Sadar Police Station was directed to commence investigation. During investigation, the case was posted on 4.10.2019 before the Ld. Sessions Judge-cum-Special Judge, Koraput at Jeypore awaiting receipt of the chargesheet. On the same day, the I.O. has submitted up-to-date case diary, statement U/S 161 of Cr.PC and other connected papers. He also moved an application to extend the stipulated time for submission of chargesheet for a further period of 60 days on the ground that although the major part of the investigation had been completed, but the ownership particulars of the seized vehicle were yet to be received from the RTO, Koraput. On that ground, an application for extension of 60 days time to submit the charge sheet was sought by the prosecution, after an elapse of the statutory period of 180 days i.e. the stipulated period was going to expire on 12.10.2019.

4. The learned Sessions Judge-Cum- Special Judge, Koraput at Jeypore, without issuing Notice to the Accused persons, heard the submissions of the Ld. Special Public Prosecutor and proceeded *exparte* to extend the time for submission of chargesheet as envisaged under Section 36-A (4) of the NDPS Act. Consequently, an extended time of 30 days was granted with effect from 13.10.2019.

5. The Ld. Counsel for the Petitioner Shri Jyotirmaya Sahoo contended that since the accused has been in custody since 15.4.2019, Ld. Court below has erred in proceeding to decide the application moved by the prosecution in terms of Section 36-A (4) of the NDPS Act without issuing notice to the

accused. The learned Court below passed an ex-parte order which is violation of Section 36-A(4) of the N.D.P.S. Act. Sub-section 4 of Section 36-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 mandates that an opportunity of hearing must be given to the accused before granting extension for a further period of 60 days for completing the investigation. He, thus, contends that non-grant of an opportunity of hearing to the Petitioner has prejudiced him seriously. To buttress his submission, he relied on ***Lambodar Bag Vs. State of Orissa***[1] and ***Hussainara Khatoon Vs. Home Secretary***[2] which holds that at the stage of granting extension of time to the prosecution for submission of Charge-sheet is mandatorily required under the NDPS Act to serve notice to the accused.

6. Shri Tapas Kumar Praharaj, learned Standing Counsel for the State, has succinctly submitted that the Petitioner is a resident outside the state hence there are higher chances of fleeing from justice. He also vehemently contended that considering the nature and gravity of the offence, the Petitioner ought not be released on bail.

7. Heard learned Counsel for the parties and perused the documents. For better appreciation of the submission of the Petitioner, the relevant law on the subject warrants a proper evaluation. In the case of ***Rajnikant Jivanlal v. Intelligence Officer, Narcotic Control Bureau***[3] the Hon'ble Supreme Court has held that an order for release on bail under proviso (*a*) to Section 167(2) may appropriately be termed as *an order-on-default*. It was held to be a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (*a*) thereto is absolute. It is a legislative command and court's discretion cannot supersede. At that stage, merits of the case are not to be examined to tailor the relief. A similar view was echoed in the case of ***Aslam Babalal Desai v. State of Maharashtra***[4]. It was also held that subsequent filing of the charge-sheet (challan) is not by itself relevant to have the bail cancelled**.** On curing the defect by filing the charge-sheet (challan) if the prosecution seeks to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest and commit him into custody, prima facie even at that stage, strong grounds indeed would be necessary.

8. In ***Bipin Shantilal Panchal (Dr) v. State of Gujarat***[5] it was clarified that although a default in filing the chargesheet would confer an indefeasible

(1) (2018) 71 OCR-31 (2) A.I.R. 1979 S.C. 1377 (3) (1989) 3 SCC 532 (4) (1992) 4 SCC 272
(5) (1996) 1 SCC 718

right of the accused to be admitted to bail**.** However, if an accused fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet has been filed. On the other hand, if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet. Similar views have been nicely echoed in the cases of ***Pappu Ram v. State of Rajasthan***[6]***, Arvind Kumar Saxena v. State***[7] and ***Venkatesh v. State, Rep. by Inspector of Police***[8].

9. The most poignant aspect of the case, however, is the non-issuance of notice to the accused at the stage of hearing the application for extension of time. In the case of ***Hitendra Vishnu Thakur v. State of Maharashtra,***[9] while dealing with a case under Section 20 of the TADA Act, the Hon'ble Supreme Court held that when a report is submitted by the Public Prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension of time on all legitimate and legal grounds available to him. It was further held that even though under the Scheme of that Act, neither clause (b) nor clause (bb) of sub-section (4) of Section 20 of the TADA Act specifically provide for issuance of such a notice, it was held therein that the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution in order to do complete justice to the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the Public Prosecutor, as the case may be, would ensure a fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a proper balance between the cherished interest of the liberty of an accused and the society at large through the prosecuting agency. There is no prohibition to issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused on issuance of such a notice to any party. It was also held that no other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 of the TADA Act on account of the 'default' of the prosecution. The principle of

(6) 2017 SCC Online Raj 3418 (7) 2018 SCC Online Del 7769 (8) 2019 SCC OnLine Mad 995
(9) (1994) 4 SCC 602

"reading in" into a statute adopted in this case assumes much significance as the principle laid down here extended to the reading of Section 36-A (4) of the NDPS Act subsequently while holding that both the provisions were *pari materia*.

10. Similar views have been further evolved in the case of ***Sanjay Dutt v. State through CBI, Bombay (II)***[10] where the Hon'ble Supreme Court held that the requirement of such notice to the accused before granting the extension of time for completing the investigation is not erely a written notice to the accused, rather production of the accused at the relevant time in the court informing him that the question of extension of the period for completing the investigation is alone sufficient for the purpose.

11. In yet another landmark judgement in the case of ***Sanjay Kumar Kedia v. Narcotics Control Bureau***[11] the jurisprudence on the subject further evolved when the Hon'ble Supreme Court relied upon the law laid down in the case of *Hitendra Vishnu case (supra)* while holding that the proviso inserted as clause (bb) in sub-section (4) of Section 20 of TADA, was *pari materia* with the proviso to sub-section (4) of Section 36-A of the NDPS Act. It is further held that although an extension beyond 180 days could be granted but laid a rider that it could be so subject to satisfaction of certain conditions. The facts of the case reveals, it did not indicate the *compelling* reasons which required an extension of custody beyond 180 days. It was further held that a notice was mandatorily required to be issued to the accused to satisfy the provisions of law.

12. A similar view was taken by the Hon'ble High Court of Calcutta in the case of ***Pradip Maity v. Union of India***[12] which held that before the grant of extension of time, notice should be issued to the accused so that he may have an opportunity to oppose the extension which is *sine qua non* for seeking extension under section 36A(4) of the N.D.P.S Act. Any sort of violation thereof would entitle the benefit to the accused to get enlarged on bail. A similar view has been taken by the Hon'ble High Court of Guwahati in ***Jayanandan Prasad v. State of Assam***[13].

13. In ***Manpreet Singh v. State of Punjab***[14] the Hon'ble High Court of Punjab and Haryana held that the objective of an application under Section 36A(4) of the NDPS Act mandates the Public Prosecutor to intimate the

(10) (1994) 5 SCC 410 (11) (2009) 17 SCC 631 (12) 2010 SCC OnLine Cal 1503
(13) 2012 SCC OnLine Gau 8 (14) 2014 SCC Online P&H 221652

Court regarding the progress of the investigation and the specific reasons for the detention of the accused for non-submission of Charge sheet beyond a period of 180 days. In ***Sanjay Kumar Kedia*** (supra), it is held that in case no notice is given to the accused or application is not filed by the Public Prosecutor or it does not contain a report regarding the progress of investigation, the application ought to be declined.

14. In ***Jaspal Singh @ Jassa v. State of Punjab***[15] the Hon'ble High Court of Punjab and Haryana followed an earlier judgement of the same High Court in ***Rajwinder Singh v. State of Punjab***[16] and held that as per the ratio of the judgment in Sanjay Kedia's case (supra), it is mandatory that a notice of the application under Section 36A(4) of the NDPS Act should be issued to the accused. In case there is noncompliance of the provisions of Section 36 A (4) of the NDPS Act the accused would be entitled to the benefit of provisions of Section 167(2) Cr.P.C and be released on bail. In ***Sanjiv Kumar @ Banti v. State of Punjab***[17] the Hon'ble High Court of Punjab and Haryana has followed yet another earlier decision, in the case of ***Hardeep Singh v. State of Punjab***[18] relying on ***Sanjay Kumar Kedia*** (supra) held that under the provisions of Section 36 A (4) of the NDPS Act and Section 167(2) Cr.P.C., an indefeasible right accrued in favour of the accused who had a right to be released on bail in the event of non-compliance of Section 36-A(4) of the NDPS Act. A similar view has been reiterated in ***Kaka Singh v. State of Punjab***.[19]

15. The Hon'ble Supreme Court in the case of ***Union of India through CBI v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav***[20] considered the applicable law on the subject and proceeded to affirm the view taken in ***Hitendra Vishnu Thakur*** (supra). It was held that upon expiry of the prescribed period without filing of the charge sheet is an indefensible, non-discretionary and mandatory right accrued to the accused to be enlarged on bail. An application for extension of the period of custody without the chargesheet not filed cannot be entertained if the prescribed period has already expired. It has also been held that once the statutory period has expired without the chargesheet being filed the court must dispose of the bail application of the accused under Section 167 (2) on the same day itself. In such case where the statute envisages a compulsive bail there is no question of the same being contested.

(15) 2014 SCC OnLine P&H 9629 (16) CRA S-35502 of 2011, decided on December 16, 2011 (17) 2015 SCC Online P&H 812 (18) CRM-M-17260-2014 decided on 29.5.2014 (19) CRM-M-22760-2014 decided on 12.8.2014 (20) (2014) 9 SCC 457

16. Another aspect that stands out like a sore thumb in the present case is that the Special Judge has dismissed the bail application in the light of Section 37 of the NDPS Act despite the fact that investigation had not been completed. Such a view is impermissible in view of the unequivocal pronouncement of the law by the Hon'ble Supreme Court in the case of ***Union of India v. Thamisharasi***[21] wherein it has been categorically held that the limitations on granting of bail specified in clause (*b*) of sub-section (1) of Section 37 come in only when the question of granting bail arises on merits. By its very nature, the provision is not attracted when the grant of bail is automatic on account of such "default" in filing the chargesheet within the maximum period of custody permitted during investigation by virtue of sub-section (2) of Section 167 CrPC. The only fact material to attract the proviso to sub-section (2) of Section 167 is the default in filing the chargesheet within the maximum period specified therein to permit custody during investigation and not the merits of the case which till the filing of the complaint are not before the court to determine the existence of reasonable grounds for forming the belief about the guilt of the accused. The reasoning behind such a view is that till the complaint is filed the accused is supplied no material from which he can discharge the burden placed on him under Section 37(1)(*b*) of the NDPS Act. It is held that such a construction of clause (*b*) of sub-section (1) of Section 37 is not permissible.

17. In the light of the aforementioned case laws relied upon, it is felt that the law on the subject needs to be crystallized for better appreciation by the courts below. In the event the investigation is not completed within 180 days, the Court is empowered under Section 167 (2) of the Code of Criminal Procedure, 1973 read with Section 36-A (4) of the NDPS Act to authorize detention for a period up to one year, the law as it stands mandates that the same shall be subject to the following, being complied in letter and spirit. The legal position can be thus summarized as follows: -

i) Report of the Public Prosecutor indicating the progress of investigation must accompany the application for extension of time;

ii) *Specific and compelling reasons* for seeking detention of the accused beyond 180 days must be mentioned; a merely formal application will not pass muster;

iii) A notice must mandatorily be issued to the accused and he must be produced in court whenever such an application is taken up,

iv) An application seeking extension of time in filing of chargesheet by the prosecution ought not to be kept pending and must be decided as expeditiously as possible and certainly before expiry of the statutory period.

(21) *(1995) 4 SCC 190*

v) In cases where any such default occurs, the question of it being contested doesn't arise and a right accrues in favour of the accused.

vi) The restrictions under Section 37 will have no application in such cases. It will have application only in the case of an application being decided on merits.

vii) Violation of any of the aforesaid would be construed as a "default" and the accused become entitled to admitted to bail by such a default.

viii) When an application under Section 167(2) Cr.P.C. r/w Section 36A(4) of the NDPS Act has been filed after expiry of the 180 days period and no decision thereupon, an indefeasible right to be released on bail accrued to the accused which cannot be defeated by keeping the said applications pending.

In case there is violation of any of the above, an indefeasible right to bail will be accrued to the accused. Applying the aforesaid parameters as laid down hereinabove, it is quite evident that there have been such "defaults" in the instant case, especially non-service of notice on the accused which is violative of the most cardinal principle of natural justice i.e. *Audi Alteram Partem* which creates an indefeasible entitlement to bail to the Petitioner.

18. 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 comes to an irresistible conclusion that the Petitioner is entitled to be released on bail.

19. Accordingly, the bail application filed on behalf of the accused petitioner under Section 439 Cr.P.C. is allowed and the Petitioner shall be released on bail forthwith. The bail bond may be fixed by the Ld. Trial Court in seisin over the matter subject to its satisfaction. In the light of the above, I.A. No. 480 of 2020 filed by the petitioner for interim bail is rendered infructuous and the same is accordingly disposed of.

—— o ——