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

WRIT PETITION (CIVIL) NO. 12859 OF 2020

UNION OF INDIA, REPRESENTED THROUGH THE SECRETARY, MINISTRY OF FINANCE (DEPT. OF REVENUE) & ORS. ……..Petitioners

V.

ASHIQUZZAMAN .....Opp. Party

WRIT PETITION (CIVIL) NO.12861 OF 2020

UNION OF INDIA, REPRESENTED THROUGH THE SECRETARY, MINISTRY OF FINANCE (DEPT. OF REVENUE) & ORS.

……Petitioners

.V.

SANDEEP YADAV @ YADAV SANDEEP G.M .....Opp. Party

SERVICE LAW – Suspension – Continuing for a long time – The opposite party at (A) has been under suspension for a period of about one and half year and the other opposite party at (B) for a period of more than two years – Both have been transferred from the place of their posting as they were on the date when the allegations were levelled, detection was made – Effect thereof and scope of interference by court – Held, the order of suspension cannot be continued for a indefinite period – Reasons indicated.

"In case of Ajay Kumar Choudhury (supra); the appellant was suspended on 30.09.2011 and continued thereafter with its first extension on 28.08.2011 for a period of 180 days. Thereafter, the extension was repeated thrice. The Tribunal saying that no employee could be indefinitely suspended finally directed that in case no charge memo was issued to the appellant on or before 29.06.2013, he would be entitled to be reinstated in the service. This order was assailed by the Union of India on the ground that the Tribunal had no power to give a direction circumscribing Government's power to continue the suspension. The High Court held that the Tribunal by directing as above, has substituted the judicial determination to that of the authority possessing the power as to the decision was rational to continue with the suspension. So the writ application filed by the Union of India was allowed directing for passing of appropriate order as to whether it wishes to continue, or not, with the suspension having regard to all relevant factors. The aggrieved Officer then carried the matter to the Supreme Court. It would be profitable to place here the relevant paras of the judgment which read as under:-

11. Suspension, specially preceding the formulation of charges, is essentially transitory or temporary in nature, and must perforce be of short duration. If it is for an indeterminate period or if its renewal is not based on sound reasoning contemporaneously available on the record, this would render it punitive in nature. Departmental/disciplinary proceedings invariably commence with delay, are plagued with procrastination prior and post the drawing up of the memorandum of charges, and eventually culminate after even longer delay.

12. Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspended person suffering the ignominy of insinuations, the scorn of society and the derision of his department, has to endure this excruciation even before he is formally charged with some misdemeanour, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is to determine his innocence or iniquity".

XXXX XXXX XXXX XXXX XXXX
XXXX XXXX XXXX XXXX XXXX

"20. It will be useful to recall that prior to 1973, an accused could be detained for continuous and consecutive periods of 15 days, albeit, after judicial scrutiny and supervision. The Code of Criminal Procedure, 1973 contains a new proviso which has the effect of circumscribing the power of the Magistrate to authorise detention of an accused person beyond a period of 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and beyond a period of 60 days where the investigation relates to any other offence. Drawing support from the observations of the Division Bench in Raghubir Singh v. State of Bihar (1986) 4 SCC 481 and more so of the Constitution Bench in Antulay (1992) 1 SCC 225, we are spurred to extrapolate the quintessence of the proviso to Section 167(2) CrPC, 1973 to moderate suspension orders in cases of departmental/disciplinary enquiries also. It seems to us that if Parliament considered it necessary that a person be released from incarceration after the expiry of 90 days even though accused of commission of the most heinous crimes, a fortiori suspension should not be continued after the expiry of the similar period especially when a memorandum of charges/charge-sheet has not been served on the suspended person. It is true that the proviso to Section 167(2) CrPC postulates personal freedom, but respect and preservation of human dignity as well as the right to a speedy trial should also be placed on the same pedestal.

21. We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of

charges/charge-sheet is not served on the delinquent officer/employee; if the memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognise that the previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time-limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice" (Paras 6&7)

Case Laws Relied on and Referred to :-

1. AIR 2015 SC 2389 : Ajay Kumar Choudhury Vs. Union of India through its Secretary & Anr.

WRIT PETITION (CIVIL) NO. 12859 OF 2020

For Petitioners : Mr.Sanjib Swain
For Opp. Party : Mr.Ashiquzzaman (In person)

W .P. (C) NO.12861 OF 2020

For Petitioners : Mr.Sanjib Swain
For Opp. Party : Mr.Prateek Tushar Mohanty and Payal Mohanty (through caveat)

JUDGMENT Date of Judgment : 31.07 2020

PER: DEBABRATA DASH, J.

These writ applications as at (A) and (B) above have been filed in assailing the common order dated 31.01.2020 passed by the Central Administration Tribunal, Cuttack Bench, Cuttack (in short, 'the Tribunal') in Original Application Nos.260/617/2019 and 260/693/2019 wherein the opposite parties before us were the respective applicants.

Since both the writ applications arise out of a common order and involve identical questions of law; on consent of learned Counsel for the parties, those have been taken up together for hearing at this stage of admission for their final disposal.

2. The facts leading to the present proceedings under (A) and (B) as culled out from the pleadings as well as the documents annexed thereto are as follows:-

(I) The opposite party as at (A) is presently posted as Deputy Commissioner, CGST in the Office of the Chief Commissioner, Central Goods and Services Tax, Rourkela, Odisha and under suspension. Prior to that, he was working as Deputy Commissioner, Special Intelligence Bureau (in short, 'SIIB') at Air Port Special Cargo (ASPC) Commissionerate, Mumbai Customs Zone-III, Mumbai. During then, special intelligence developed by DRI, MZU indicated that fourteen (14) consignments of 'Rough Diamonds' of very low quality, were being imported by two IEC holders, i.e., namely M/s.Antique Exim Private Limited and M/s.Tanman Jewels Private Limited at Bharat Diamond Bourse (BDB), Mumbai declaring to be of the value of Rs.156.00 crores and that has been accepted by the panel of experts valuers. A team of officers from DRI thus intercepted those fourteen (14) consignments. Revaluation of the imported diamonds was made and accordingly, assessed to be of the value of Rs.1.2 crores. It was thus found that rough diamonds of cheap quality; being procured at lesser price being grossly overvalued were being imported from Hong Kong in connivance with exporters in these countries. On arrival in BDB, Mumbai, the opposite party with the assistance of some members of the panel of valuers of diamond, had got the consignment verified and expressed their satisfaction as to the value of the same a just and proper. It was thus detected that the over-valuation in that case was to the tune of Rs.150.00 crore. Basing upon the post consignment of some IEC holders, it was further ascertained that a sum of Rs.2000.00 crores have been illegally laundered/transferred to overseas destination. Four persons were arrested in the case so far. Recovery of some of demand drafts and the cash have been made during subsequent raids and the DRI further found an abnormally huge cache of cheque books, Aadhar Cards, PAN Cards from one of those arrested persons. The petitioner vide order dated 19.07.2018 was transferred as the Deputy Commissioner, GST & CE Commissionerate, Rourkela, where he is there at present. It was ascertained in course of investigation that the opposite party with others had also played the role in the illegal import of highly overvalued diamonds at BDB, Mumbai. So, in contemplation of departmental proceeding; he was placed under suspension by order dated 25.10.2018 with immediate effect. The period of suspension was further extended by order dated 21.01.2019 and 19.07.2019 respectively for a period of 180 days on each occasion. The

opposite party finally challenged the last order of extension of the period of his suspension passed on 19.07.2019.

The above move was contested by the present petitioners in asserting that the order of extension of suspension as passed on 19.07.2019 for a period of further 180 days is well within the four corners of law.

It is pertinent to state here that after that order of extension of suspension dated 19.07.2019 for 180 days which was called in question before the Tribunal; by order dated 15.01.2020, said period of suspension has been further extended for 180 days w.e.f. 20.01.2020 and the period has also expired on 17.07.2020. The Tribunal although decided the application on 31.01.2020; this fact of passing of order on 15.01.2020 as it appears had not been brought to its notice.

(II) The opposite party as at (B) is now posted as Deputy Commissioner in the Office of the Chief Commissioner, Central Goods and Services Tax, C.R. Building, Rajaswa Vihar, Bhubaneswar and under suspension. Prior to that, he was working as Deputy Commissioner CGST in the Office of the Chief Commissioner of CGST, Mumbai Zone, Mumbai and before that was posted as Deputy Commissioner of Customs, Commissionrate, NS-III, Customs, Mumbai Zone-II. During his incumbency as Deputy Commissioner of Customs at Mumbai, on the basis of the written complaint dated 25.04.2018, the Central Bureau of Investigation (CBI) has registered a criminal case against him, i.e., RC/BA1/2018/A0012 dated 29.04.2018 for commission of offence of criminal conspiracy and receipt of illegal gratification as also criminal misconduct under section 120-B of the IPC and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988. In the said case, the opposite party and six others were arrested by the CBI on 30.04.2018. The petitioner was released on bail by the order passed by the learned CBI, Special Judge, GR Mumbai and remained in custody till 14.05.2018. In view of the above by order dated 11.05.2018, the opposite party was placed under suspension with effect from 30.04.2018, the date of his arrest and thereafter by order dated 21.08.2018, the opposite party as was transferred from Mumbai to Bhubaneswar in the State of Odisha. Said order of suspension dated 11.05.2018 has been extended from time to time on the recommendation of the Suspension Review Committee vide orders dated 23.07.2018 and 22.01.2019; each time for a period of 180 days. Again, on 22.07.2019, basing upon the recommendation of said Committee, the period

of suspension was extended for further 180 days with effect from 24.07.2019. The opposite party had submitted two representations dated 22.07.2019 and 18.10.2019 to the Chief Vigilance Officer, Central Board of Indirect Taxes & Customs, Department of Revenue, Ministry of Finance, Government of India with a prayer for revocation of his suspension which have been taken note of in the order dated 15.01.2020. The petitioner moved the Tribunal in assailing the last order of extension of the period of suspension passed on 22.07.2019.

It is pertinent to state here that after that order dated 22.07.2019 extending the suspension period for 180 days; again by order dated 15.01.2020, the period of suspension has been extended for 180 days with effect from 22.01.2020. The Tribunal although decided the application on 31.01.2020; this fact of passing of order on 15.01.2020; as it appears had not been brought to its notice. As seen from the last order of extension of period of suspension passed on 15.01.2020, the said extended period has also expired on 17.07.2020.

3. The Tribunal has allowed both the Original Applications having taken note of certain decisions of the Principal Bench of the Tribunal passed in O.A.Nos.915 and 1224 of 2018 as well as the decision of the Apex Court in the case of ***Ajay Kumar Choudhury –v- Union of India through its Secretary and another; AIR 2015 SC 2389.*** At paragraph-15 of the impugned judgment, followings have been stated which appears to have persuaded the Tribunal to finally allow the applications :-

> "There is no doubt that Rule-10(6) of CCS (CCA) Rules, 1965 empowers the Competent Authority to extend suspension order of a Government employee. But the same should be based on cogent and justifiable reasons. Admittedly, the headquarters of both the applicants have been shifted to the jurisdiction of the authorities in the State of Odisha. Neither in the orders extending the suspension of the applicant nor in the counter-replies filed in both the OAs, there has been any whisper made by the Respondents that in case the orders of suspension are revoked there is every possibility of the applicants to tamper the evidence and influence the witnesses in order to put a spanner in the process of inquiry. The object of placing a Government employee under suspension is with a view to keeping him/her away from the duties so that he/she cannot not be able to tamper the evidence or influence the witness based on which charges are sought to be established. By shifting of headquarters of both the applicants, such an apprehension appears to be out of place. Respondents have also not adduced any justifiable reason as to why there has been delay in issuing charge-sheets to both the applicants. Besides the above, the recommendations made by the Review Committee for extension of the duration of suspension of the applicants appear to be based on no good and

sufficient reasoning. As a matter of course, in the absence of any memorandum of charge being issued to the applicants, although these facts ought to have been considered by the Competent Authority while extending the period of suspension, the same have not been considered at all. Therefore, we are to conclude that even if Rule-10(6) of CCS (CCA) Rules, 1965 authorizes the Competent Authority to extend the duration of suspension beyond a period of 90 days, that extension by no stretch of imagination could be bereft of good and sufficient reasons."

With the conclusion, as afore-stated, the following orders have been passed:-

"In view of this, following the ratio decided by the CAT, Principal Bench, cited supra, we make the following orders:

(i) Orders of suspension in respect of the applicants in both the OAs beyond the initial period of 90 days are quashed and set aside;

(ii) As a consequence of quashment of the orders of suspension, the applicants shall be reinstated in service within a period of 45 days from the date of receipt of this order;

(iii) The applicants shall be entitled to salary minus the subsistence allowance already received by them for the interregnum period, i.e. from the respective date(s) when their initial suspension ended after 90 days and till the date(s) they are reinstated in service;

(iv) The treatment of the initial period of suspension up to 90 days shall be decided in accordance with the rules on the subject; and

(v) This order will not stand in the way of the Respondents to proceed against the applicants by issuing Memorandum of Charges."

4. Mr. Sanjib Swain, learned counsel for the petitioners submitted as under:-

(i) the Tribunal having held that as provided in rule-10(6) of CCS (CCA) Rules, 1965, the competent authority has all the power to extend the suspension order of a Government employee, it was not within the Tribunal's domain, to look into the sustainability of the reasons as assigned being cogent or justifiable in accepting the report of the Suspension Review Committee which according to him, is beyond the purview and scope of judicial review;

(ii) the Tribunal has dealt the matter in routine manner and arrived at an erroneous conclusion that the reasons assigned for extension of suspension of the petitioners are not good and sufficient. The view taken by the competent authority on the report of the Suspension Review Committee, is based upon cumulative assessment of all the attending circumstances and therefore, the Tribunal has erred in law in substituting its view that those reasons are not cogent and justifiable;

(iii) the facts and circumstances of the cases, more importantly that of the ***Ajay Kumar Choudhury Vrs. Union of India; through its Secretary and another*** (supra) relied upon by the Tribunal being completely distinguishable from the cases in hand; the principle settled therein having no universal applicability are not attracted for the purpose in these cases. Reliance has been placed on the decision of Delhi High Court in case of ***Government of NCT of Delhi Vrs. Dr. Rishi Anand***; 2017 SCC Online Del 10506 and that of this Court in case of **Bishnu Prasad Sahoo Vrs. State of Odisha & Others;** 2017 SCC Online Ori 416.

(iv) the disciplinary proceeding against the opposite party of the writ application as at (A) when is still under contemplation as also the enquiry to collect all the relevant materials is still in progress; the order of extension of the period of suspension of said opposite party is free from any legal infirmity;

Charge-sheet in the meantime has already been filed in the criminal case after grant of sanction although no charge memo has been placed in initiating the departmental proceeding against the opposite party in the writ application as at (B). Keeping in view the serious nature of the offences said to have committed by the opposite party and its affect in general over the functioning of the administration of the department, the order of extension of the period of suspension of the service of said opposite party is not to be found fault with; and

(v) the opposite parties when had only questioned the order of extension of suspension passed on 19.07.2020 and 22.07.2020; the Tribunal has committed grave error in quashing all the previous orders of extension of the period of suspension beyond the initial period of 90 days.

5. Mr. Prateek Tushar Mohanty, learned counsel for the opposite parties in refuting the above submissions of the learned counsel for the petitioners has placed the followings in support of the orders passed by the Tribunal which have been impugned in the present writ applications:-

(i) that the opposite party in the writ application (A) has been placed under suspension by order dated 25.10.2018 which has been subsequently extended from time to time; each time for a period of 180 days. Despite the same even at the time of the last order of extension of the period of suspension which is now placed to have been passed on 15.01.2020 by extending the period of suspension for 180 days with effect from 20.01.2020 and thereafter, the same stage still continues that a disciplinary proceeding against the said opposite party is under contemplation. There being no other noticeable development, in the matter of continuance of suspension of the opposite party (A), mere reason that the investigation is pending with the CBI cannot be sustained when even no departmental proceeding has yet been initiated by serving copy of charge memo after lapse of more than one and half year.

In respect of the opposite party in the writ application (B), the last order of extension of period of suspension is dated 15.01.2020, charge sheet has of course been filed before the competent court after grant of sanction for prosecution. Here in the case, the opposite party has been placed under suspension with effect from 30.04.2018. The extension of the period of suspension from the very beginning is being ordered from time to time in a routine manner and it would be evident from the order of extension of period of suspension of the opposite parties, which have been impugned in the Original Application before the Tribunal. The last order dated 15.01.2020 would show that the Suspension Review Committee has made the recommendation for such extension without application of mind and taking cognizance of some facts, which are wholly irrelevant for the purpose. When admittedly by now the opposite party had remained under suspension for a period of about two years and two months;

(ii) that principles of laws relating to the continuance of period of suspension of a Government employee have been well settled in catena of decisions of the Apex Court. In case of ***Ajay Kumar Choudhury (supra) and State of Tamil Nadu v. Pramod Kumar*;** Civil Appeal No.8427-8428 of 2018 arising out of SLP (C) No.12112-12113 of 2017 decided on 21.08.2018; while frowning upon the practice of a protracted suspension of a Government employee, it has been said that suspension must necessarily be for a short duration. Even where allegations are serious in nature, always it must not be the need of continuance of the suspension till end of the criminal trial;

(iii) that in both the cases, the reasons assigned for the purpose of continuance of period of suspension of the opposite parties are wholly unacceptable as would be evident from all those orders which find mention of the view taken by the Suspension Review Committee indicating the facts situation and the circumstances;

(iv) that in so far as the opposite party of writ application (B) is concerned, merely for the reason that charge sheet has been filed in the criminal court, the period of extension of suspension ought not to be extended and there the consideration should revolve round the facts and circumstances, in order to arrive at the satisfaction that joining in the work by employee would not only seriously affect the administration but also influence the criminal trial, which are non-existent in the present case of the opposite party of writ application (B). Two other Group-B officers namely, (1) Manish Kumar and (2) Akshat Rathore, both being Preventive Officers, were at the relevant time of detection by the Revenue Intelligence, have also been arraigned as accused persons. They were also placed uspension and now sanction for their prosecution having been granted; charge-sheet against them has also been filed. But the order of suspension which had been passed against them has not been extended further by two separate orders both dated 16.01.2020, as per the recommendation of the Suspension Review Committee. Learned counsel for the opposite party has produced copies of those two letters along with written argument which are taken on record. In such situation while not extending the suspension Group-B Officers, who are also facing the same criminal trial with the opposite party

of the writ application B, the order extension of suspension as against, this opposite party of writ application (B) is highly discriminatory which rather expose that the reasons assigned for said extension are not at all justified; and

(v) the opposite party in the writ application (A) has remained under suspension with effect from 30.04.2018 and neither any charge sheet has been filed in any criminal case showing him an accused so as to face the criminal trial nor any departmental proceeding has been initiated being served with the charge memo. Therefore, the reasons assigned for the extension of the period of suspension which are just the repetitions do not sand to scrutiny.

In both the cases, the Tribunal, therefore, did commit no mistake in holding the extension of period of suspension of the opposite party beyond the initial period of ninety days as untenable in the eye of law.

6. On the above arrival submissions; the issues arises for consideration relates to the continuance of opposite parties under suspension.

The opposite party at (A) was placed under suspension with effect from 25.10.2018 under Rule 10(1)(a) of the Central Civil Services (Classification Control and Appeal) Rules, 1965 (for short; CCS (CCA) Rules) which is still continuing whereas the opposite party at (B) was placed under deemed suspension with effect from 30.04.2018 under Rule 10(2)(a) of the CCS (CCA) Rules for being in custody for more than 48 hours. Periodic reviews were conducted for their continuance under suspension. On the recommendation of the Review Committee, the suspension of the opposite party at (A) has been extended for three times and that of the opposite party at (B) for four times which include the last order dated 15.01.2020 that has been made during pendency of the Original Applications before the Tribunal. Every time the recommendations of the Committee have not favoured for their reinstatement.

In so far as the case of the opposite party as at (A), the departmental proceeding is still under contemplation and it is said that the matter is still under investigation to ascertain the involvement/role of said opposite party. In respect of the opposite party at (B), departmental proceeding is yet to commence and no charge memo has been placed against him. Its only that the investigation of the criminal case since has been completed, sanction for prosecution having been granted, now the charge-sheet has been filed in the competent court and thus the criminal trial is pending against him and others.

The opposite party at (A) has been under suspension for a period of about one and half year and the other opposite party at (B) for a period of more than two years. Both have been transferred from the place of their posting as they were on the date when the allegations were leveled detection was made and in fact now they are in the State of Odisha.

At this stage, it cannot be said that the allegations made against the opposite parties are not serious in nature. However, the question stands as to if the continued suspension of the opposite parties for a prolonged period; one in contemplation of a departmental proceeding and the other, for the pendency of the criminal trial where the charge-sheet has been filed recently is justified.

7. In case of *Ajay Kumar Choudhury* (supra); the appellant was suspended on 30.09.2011 and continued thereafter with its first extension on 28.08.2011 for a period of 180 days. Thereafter, the extension was repeated thrice. The Tribunal saying that no employee could be indefinitely suspended finally directed that in case no charge memo was issued to the appellant on or before 29.06.2013, he would be entitled to be reinstated in the service. This order was assailed by the Union of India on the ground that the Tribunal had no power to give a direction circumscribing Government's power to continue the suspension. The High Court held that the Tribunal by directing as above, has substituted the judicial determination to that of the authority possessing the power as to the decision was rational to continue with the suspension. So the writ application filed by the Union of India was allowed directing for passing of appropriate order as to whether it wishes to continue, or not, with the suspension having regard to all relevant factors. The aggrieved Officer then carried the matter to the Supreme Court. It would be profitable to place here the relevant paras of the judgment which read as under:-

> "xxxx xxxx xxxx xxxx xxxx
> xxxx xxxx xxxx xxxx xxxx
>
> 11. Suspension, specially preceding the formulation of charges, is essentially transitory or temporary in nature, and must perforce be of short duration. If it is for an indeterminate period or if its renewal is not based on sound reasoning contemporaneously available on the record, this would render it punitive in nature. Departmental/disciplinary proceedings invariably commence with delay, are plagued with procrastination prior and post the drawing up of the memorandum of charges, and eventually culminate after even longer delay.

12. Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspended person suffering the ignominy of insinuations, the scorn of society and the derision of his department, has to endure this excruciation even before he is formally charged with some misdemeanour, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is to determine his innocence or iniquity".

xxxx	xxxx	xxxx	xxxx	xxxx
xxxx	xxxx	xxxx	xxxx	xxxx

"20. It will be useful to recall that prior to 1973, an accused could be detained for continuous and consecutive periods of 15 days, albeit, after judicial scrutiny and supervision. The Code of Criminal Procedure, 1973 contains a new proviso which has the effect of circumscribing the power of the Magistrate to authorise detention of an accused person beyond a period of 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and beyond a period of 60 days where the investigation relates to any other offence. Drawing support from the observations of the Division Bench in Raghubir Singh v. State of Bihar (1986) 4 SCC 481 and more so of the Constitution Bench in Antulay (1992) 1 SCC 225, we are spurred to extrapolate the quintessence of the proviso to Section 167(2) CrPC, 1973 to moderate suspension orders in cases of departmental/disciplinary enquiries also. It seems to us that if Parliament considered it necessary that a person be released from incarceration after the expiry of 90 days even though accused of commission of the most heinous crimes, a fortiori suspension should not be continued after the expiry of the similar period especially when a memorandum of charges/charge-sheet has not been served on the suspended person. It is true that the proviso to Section 167(2) CrPC postulates personal freedom, but respect and preservation of human dignity as well as the right to a speedy trial should also be placed on the same pedestal.

21. We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer/employee; if the memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognise that the previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time-limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice"

8. In case of *Pramod Kumar* (supra), the Officer concerned had assailed his suspension before the Tribunal as well as the charge memo received by him. The Tribunal while revoking the suspension repelled the contentions to set aside the charge memo. So, the writ application was filed by the Officer; a member of Indian Police Service allotted to the State of Tamil Nadu. At the same time, the State had also questioned the order of revocation of suspension. The High Court upheld the order of the Tribunal revoking the suspension and further quashed the charge memo, declaring it to be nonest in law. In the State's appeal, the Apex Court although confirmed the order as to the quashing of the charge memo for non-observance of mandatory requirement of All India Services (Disciplinary and Appeal) Rules, 1969, yet gave the liberty to the Disciplinary Authority to issue a charge memo afresh in accordance with the Rule. Next, taking the long period of suspension; the Officer enjoying liberty by virtue of the order of bail without violating the condition with any attempt to tamper with evidence have been taken into account. On the face of all the above factors and further keeping in view that the last order of extension of suspension had been passed on the basis of the minutes of the Review Committee that the Officer was capable of exerting pressure and influencing witnesses as also the likelihood of misusing the office in case of his reinstatement; has come to conclude that no useful purpose would be served by continuing the Officer under the suspension any longer. It however been observed that the High Court that the State has all the liberty to appoint the Officer in a non-sensitive post.

9. In case of *Dr. Rishi Anand* (supra); the Officer concerned was placed under suspension in exercise of Rule-10(1) of the CCS (CCA) Rules. It stood extended for 180 days. The departmental proceeding was initiated against him by issuance of charge memo. His suspension was further extended on two occasions. So the officer approached the Tribunal which found favour with the prayer of revocation of the suspension of the Officer. The matter being carried to the Delhi High Court; ultimately the order as to revocation of suspension was reversed and the Court directed that in case, suspension of the Officer is further extended it shall be in conformity with Rule 10(6) of the CCS (CCA) Rules and reasons therefore shall be communicated to the Officer and then it would be open to him to assail the same on all the available grounds.

The reasonings persuading the Court to pass the order as above needs little elaboration. Going to discuss the facts and circumstances of the case of

Ajay Kumar Choudhury(supra), it has been noted that the Officer therein had not been served with the charge sheet when he initially assailed his suspension or even till the hearing of the appeal before the Supreme Court and later to that the Officer having been served with the charge-sheet, issuance of any such direction had been found to be no more relevant. So, the Court then observed that the Officer if so advised may challenge his continued suspension in any manner known to law and this action of the Government would be subject to judicial review. It would be proper to place the relevant paras of the said judgment in case of *Dr. Rishi Anand* (supra) which runs as follows:-

> "14. In the said case, the tribunal had directed that if no charge memo was issued to the appellant Ajay Kumar Choudhary before the expiry of 21.06.2013, then he would be reinstated in service. The said order was assailed by the Union of India before the High Court. The High Court disposed of the petition by issuing a direction to the Central Government to pass appropriate orders as to whether it wishes to continue with the suspension or not having regard to all the relevant factors, including the report of CBI, if any, it might have received by now. This exercise should be completed as early as possible and within two weeks from today".
>
> 15. The appellant then approached the Supreme Court to assail the said direction of the High Court. The Supreme Court observed in its decision that till arguments were heard on 09.09.2014, neither the charge sheet, nor the memorandum of charge had been served on the appellant. It was represented before the Supreme Court that the charge sheet was expected to be served on the appellant before 12.09.2014. The Supreme Court considered several decisions and, eventually, concluded in para 21 as follows:-
>
> "21. We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer/employee; if the memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the person concerned to any department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognise that the previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time-limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice.

Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation, departmental proceedings are to be held in abeyance stands superseded in view of the stand adopted by us".

16. It appears that before the Supreme Court rendered its decision on 16.02.2016, the charge sheet had been served on the appellant though from a reading of the decision it is not clear as to on what date the same was so served. This development was taken note of by the Supreme Court in its decision. In para 22 of the decision, the Supreme Court observed:-

"22. So far as the facts of the present case are concerned, the appellant has now been served with a chargesheet, and, therefore, these directions may not be relevant to him any longer. However, if the appellant is so advised he may challenge his continued suspension in any manner known to law, and this action of the respondents will be subject to judicial review". (emphasis supplied)

17. Thus, even though the charge sheet had not been served on the appellant Ajay Kumar Choudhary when he initially assailed his suspension, or even till the hearing of the appeal took place before the Supreme Court on 09.09.2014 (it was only between 09.09.2014 and the date of decision on 16.02.2015 that the charge sheet appears to have been served), the Supreme Court held that since the charge sheet had been served on the appellant, therefore, the directions issued by it would not be relevant to his case. Despite the fact that the appellant Ajay Kumar Choudhary had remained under suspension right from 30.09.2011, the Supreme Court did not set aside the order of suspension since, in the meantime, Ajay Kumar Choudhary had been served with a charge sheet sometime after 09.09.2014, i.e. nearly three years after his suspension.

18. The O.M. dated 23.08.2016 and even the earlier O.M. dated 03.07.2015 issued by the DoPT (a copy whereof has been tendered in court by counsel for the respondent) evidently have misconstrued the said decision of the Supreme Court, since the facts of the said case and the eventual directions issued in para 22 of the said decision, appear to have escaped attention.

19. There can be no quarrel with the proposition that a government servant who is suspended in contemplation of a disciplinary proceedings or criminal proceedings under Rule 10 of the CCS (CCA) Rules, should not be kept under suspension indefinitely or unnecessarily. It is for this reason that a review of the on-going suspension is required to be undertaken by the government at regular intervals under Rule 10(6) of the CCS (CCA) Rules, which reads as under:-

"10(6) An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority competent to modify or revoke the suspension [before expiry of ninety days from the effective date of suspension] on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty days at a time." (emphasis supplied)

20. It may not always be possible for the government to serve the charge sheet on the officer concerned within a period of 90 days, or even the extended period, for myriad justifiable reasons. At the same time, there may be cases where the conduct of the government servant may be such, that it may be undesirable to recall the suspension and put him in position once again, even after sanitising the environment so that he may not interfere in the proposed inquiry. On a reading of Ajay Kumar Choudhary (supra), we are of the view that the Supreme Court has not denuded the Government of its authority to continue/extend the suspension of the government servant - before, or after the service of the charge sheet - if there is sufficient justification for it. The Supreme Court has, while observing that the suspension should not be extended beyond three months - if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer, has stopped short of observing that if the charge memo/charge-sheet is not issued within three months of suspension, the suspension of the government servant shall automatically lapse, without any further order being passed by the Government. No such consequence - of the automatic lapsing of suspension at the expiry of three months if the charge memo/charge-sheet is not issued during that period, has been prescribed. *In Kailash v. Nanhku,* (2005) 4 SCC 480 : AIR 2005 SC 2441, while examining the issue: whether the obligation cast on the defendant to file the written statement to the plaint under Rule (1) of Order 8 CPC within the specified time was directory or mandatory i.e. whether the Court could extend the time for filing of the written statement beyond the period specified in Rule 1 of Order 8, the Supreme Court held that the Court had the power to extend the time for filing of the written statement, since there was no consequence prescribed flowing from non-extension of time. In para 29 of this decision, the Supreme Court observed as follows:-

"29. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form." (emphasis supplied)

21. The direction issued by the Supreme Court is that the currency of the suspension should not be extended beyond three months, if the charge memorandum/charge-sheet is not issued within the period of 3 months of suspension. But it does not say that if, as a matter of fact, it is so extended it would be null and void and of no effect. The power of the competent authority to pass orders under Rule 10(6) of the CCS (CCA) Rules extending the suspension has not been extinguished by the Supreme Court. The said power can be exercised if good reasons therefor are forthcoming.

22. The decision of the Supreme Court in Ajay Kumar Choudhary (supra) itself shows that there cannot be a hard and fast rule in this regard. If that were so, the

> Supreme Court would have quashed the suspension of Ajay Kumar Choudhary. However, in view of the fact that the charge memo had been issued to Ajay Kumar Choudhary - though after nearly three years of his initial suspension, the Supreme Court held that the directions issued by it would not be relevant to his case.
>
> 23. From a reading of the decision in Ajay Kumar Choudhary (supra) and Rule 10 of the CCS (CCA) Rules, it emerges that the government is obliged to record its reasons for extension of the suspension which, if assailed, would be open to judicial scrutiny - not as in an appeal, but on grounds available in law for judicial review of administrative action."

10. In the cited case of *Bishnu Prasad Sahoo* (supra), the petitioner therein was a Town Planner and then working under the Cuttack Development Authority (CDA). A raid had been conducted on the basis of the information that said Officer had accumulated assets dis-proportionate to his known source of income. He had been placed under suspension in exercise of power conferred under sub-rule-2 of rule-12 of the Orissa Civil Services (Classification Control and Appeal) Rules, 1962 for his said involvement along with his wife for commission of offence under section 13(2) read with section 13(1)(e) of the Provisions of Corruption Act read with section 109 of the IPC. In that case, the departmental proceeding had also been initiated against the Officer and he had been served with the charge memo but had not given the reply. In the criminal case, of course final charge-sheet had not been submitted. In such factual settings, the learned Single Judge did not find any manifest illegality in the order of suspension.

11. Coming to the cases before us, the order of extension of suspension of the petitioner as at (A) dated 19.07.2019 which was assailed in the Original Application before the Tribunal reveals that the same has been passed upon acceptance of the recommendation of the Suspension Review Committee by the with the Disciplinary Authority. The facts persuading, the Committee to recommend the extension of suspension which have been accepted by the Disciplinary Authority are:-

> (a) the investigation of DRI with regard to alleged impart of overvalued diamonds vide 14 bills of entry of M/s. Antique Exim Pvt. Limited and M/s. Tanman Jewells Pvt. Limited is complete and SCN are being issued; and
>
> (b) the Competent Authority had given approval under section 17(a) of the Prevention of Corruption Act against the petitioner of (A).

That period having been expired in the meantime, the last order of extension has come on 15.01.2020. On that occasion, the Suspension Review

Committee had again recommended for continuance of suspension which has been accepted. The facts taken note of are:-

> "i. that investigation by the DRI with regard to import of overvalued rough diamonds through PCCCC Mumbai vide 14 bills of entry of M/s. Antique Exim Private Limited and M/s. Tanman Jewels Private Limited, is complete and SCN date 10.07.2019 has been issued. Shri Ashiqzzaman, Deputy Commissioner, has been made co-noticee in the said SCN;
>
> ii. that the case has been referred to CBI after seeking approval from competent Authority under section 17A of PC Act and the matter is pending investigation with CBI;
>
> iii. that, Shri Ashiqzzaman, Deputy Commissioner has submitted Representation dated 21.08.2019; and
>
> iv. that Shri Ashiqzzaman, Deputy Commissioner, has preferred O.A. No. 693/2019 before Hon'ble CAT, Cuttack Bench, which is pending for decision".

The order of extension of the petitioner as at (B) dated 22.07.2019 which was assailed in the Original Application before the Tribunal would show that the same has been passed by the Disciplinary Authority upon acceptance of the recommendation of the Suspension Review Committee. The facts persuading the Committee to recommend for extension of suspension which have been accepted by the Disciplinary Authority are that:-

> (a) all the accused Officers were granted bail vide order dated 05.05.2018 which has been challenged by the CBI by carrying the matter to the High Court which is pending;
>
> (b) aggrieved by the order dated 23.07.2018 as to shifting of head quarter, the Officer has filed Original Application before the Tribunal at Mumbai which is pending; and
>
> (c) the CBI case against the Officer pending investigation is likely to be finalized early.

That period having been expired in the meantime, the last order of extension has come on 15.01.2020. In that, the Suspension Review Committee having taken note of the following facts had again recommended for continuance of suspension which has been accepted. The facts are as under:-

> i. that the Criminal Applications (CRA) No. 259 of 2018 and 263 of 2018 filed by CBI, before the High Court have become in fructuous;

ii. that aggrieved by the order dated 23.07.2018, the Officer has filed O.A. No. 560/2018 before the Tribunal of Mumbai which is pending;

iii. that the officer has preferred OA No. 617 of 2019 before the Tribunal at Cuttack which is pending;

iv. that the officer has represented vide letters dated 27.07.2019 and 18.10.2019;

v. that CBI has recommended for continuation of suspension of the officer; and

vi. that the investigation has conducted by CBI and it has recommended prosecution & RDA against the Officer and that has been referred to CVC for advice.

The above projected reasons / grounds in support of the continued suspension of the opposite parties on a plain reading are not seen to be so relevant or of significance in the totality of the facts and circumstances as discussed. The opposite parties have been shifted from their place of posting, where the allegations were leveled. In the absence of any specific material, the likelihood on their part to influence the investigation and tamper with the evidence in the criminal trial is hardly inferable. There are no such indications that even in their present place of posting, the working atmosphere in case of their joining the work in the office is likely to be polluted when the fact remains that the petitioners are at liberty to post them in any such non-sensitive post as deemed proper. After that incident, no further allegation of their misconduct in any way has also been reported.

The other group B officers, who have also been arraigned in the criminal case arising out of the same incident wherein the opposite party as at (B) is an accused, are all on bail. The CBI has moved for cancellation of bail granted all accused persons. The investigation by CBI is complete in respect of both the set of accused. In case of those officers also, the Review Committee had submitted the recommendation. However, in the case of Manish Kumar and Akshat Rathore, both Preventive Officers, not only their suspension has not been extended, they have been allowed to continue in Mumbai office itself. The opposite party as at (B) however has been transferred to Bhubaneswar in the State of Odisha. He is thus not having any direct access to the officials record or with the persons concerned and therefore the scope for him to tamper with the evidence etc is too remote a possibility.

With these obtained factual settings, case of the opposite party at B rather stands on a better footing than those two protection officers implicated in the case. In that view of the matter, the continuation of suspension of this opposite party as at (B) is apparently discriminatory and violative of Articles 14 and 16 of the Constitution because thereby equals have been treated unequally.

For all the aforesaid, regard being had to the principles of law settled in the cited decisions (supra); we find no infirmity in the ultimate conclusion of the Tribunal that further continuance of suspension of the opposite parties would no more be useful.

However as it is found that the challenges were to the order dated 19.07.2019 extending the suspension of the opposite party of (A) with effect from 22.07.2019 and order dated 22.07.2019 extending the suspension of the opposite party at (B) with effect from 24.07.2019; We, accordingly direct that they be not treated to have been under suspension with effect from above said dates and not as has been ordered by the Tribunal as effective from the expiry of the initial period of suspension for 90 days.

The petitioners would take a decision on how to treat the period of suspension of the opposite parties and their entitlements in accordance with the Rules holding the field.

With the modification of the final orders passed by the Tribunal to the extent as indicated above; these writ applications are partly allowed.

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2020 (III) ILR - CUT- 20

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

WRIT PETITION (CIVIL) NO.14130 OF 2019

PRADEEP KUMAR PRADHAN .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the decision of merger of Bhubaneswar Regional Office of the Central Warehousing Corporation with that of Patna Regional Office – Administrative decision – Judicial review – Scope of interference by the court – Held, while exercising power of judicial review on administrative decisions of the executive authority, the scope of interference by the Court is limited and that has to be exercised with utmost care and caution. (Para 10)

Case Laws Relied on and Referred to :-

1. AIR 1989 SC 1899 : Asif Hammed Vs. State of Jammu and Kashmir.
2. 2006 (1) Supreme 271 : Union of India Vs. Flight Cadet Ashish Rai.
3. 96 (2003) CLT 454 : Harihar Swain Vs. State of Orissa.

For Petitioner : M/s. Jyoti Patnaik & Mr. A.Kr. Karmi.

For Opp. Parties : Mr. Bibekananda Mohanty, Central Govt. Counsel
M/s. U.C. Behura & D. Mishra.

JUDGMENT Date of Judgment : 12.08.2020

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

Challenging unilateral decision of merger of Bhubaneswar Regional Office of the Central Warehousing Corporation with that of Patna Regional Office w.e.f. 15.08.2019, as per office order dated 26.07.2019 at Annexure-1, the petitioner has filed this writ petition in the nature of public interest litigation invoking extraordinary jurisdiction of this Court to quash such decision and allow the Bhubaneswar Regional Office of Central Warehousing Corporation to continue as before.

2. The factual matrix of the case, in hand, is that the Central Warehousing Corporation was established on 02.03.1957 under the Agricultural Produce (Development and Warehousing) Corporation Act, 1956 and commenced its operation since July, 1957. The old Act was repealed and replaced by Warehousing Corporation Act, 1962. The main object of the Corporation is to provide scientific storage facilities for agricultural inputs and other notified commodities, besides providing logistic infrastructure. The Central Warehousing Corporation is an ISO certified Schedule-A Mini Ratna Category-I Central Public Sector Enterprises and Corporation of the Central Government.

2.1. The regional offices of the corporation are situated in different parts of India on the basis of overall logistic operations, performance, business

purposes etc. The Bhubaneswar Regional Office is one among the 13 regional offices of the country, which was established during the year 1990. Since its inception, it continued to serve not only the people of Odisha, but also people of neighboring States, i.e., part of Andhra Pradesh, Chhatisgarh and Jharkhand etc. As many as 21 Warehouse Centres are there in 15 districts of Odisha under the control of Central Warehousing Corporation Regional Office, Bhubaneswar. The operational capacity of the Odisha region is about 3.48 Lakh M.T. which is ordinarily done through the Warehouse Centres. The Food Corporation of India and the Odisha State Civil Supplies Corporation Ltd. are major depositors of Central Warehousing Corporation Bhubaneswar region, apart from many other small and medium depositors around the State.

2.2. In order to enhance the storage capacity of food grains and other notified commodities in future days, the State Government has provided lands at various places for construction of new godowns, wherein either construction is partly made and some lands are still lying vacant awaiting funds. The efforts and endeavour of the State Government to increase the potentiality of Central Warehousing Corporation Regional Office, Bhubaneswar is quite satisfactory and remarkable. Thereby, the Bhubaneswar Regional Office of Central Warehousing Corporation is fulfilling the need of storage of paddy and food grains etc. at large scale and constantly earning profit since 2014-15 to 2018-19. The objectives of Warehousing and distribution is store inventory, creation of time utility, efficient accessibility increasing turnover, better produce process, to decrease shrinkage and optional safety. Besides, importance of warehouse is to provide good customer service. At this point of time, by virtue of the order issued by the Central Government dated 26.07.2019, the Bhubaneswar Regional Office of Central Warehousing Corporation was unilaterally decided to be merged with Patna Regional Office w.e.f. 15.08.2019. The petitioner describing himself as the State Convenor, Right to Food Campaign, R.T.I. activist and a member of Advisor Body of National Human Rights Commission on right to food, has filed this writ petition seeking to quash such order dated 26.07.2019 issued by the Central Government with regard to merger of Bhubaneswar Regional Office of Central Warehousing Corporation with that of Patna Regional Office.

3. Mr. J. Patnaik, learned counsel appearing for the petitioner strenuously urged that the unilateral decision taken with regard to merger of

Bhubaneswar Warehousing Corporation with that of Patna Warehousing Corporation is an outcome of non-application of mind. Though the petitioner moved the Managing Director, Central Warehousing Corporation, opposite party no.2 by way of filing a representation on 08.08.2019, with a copy to the Secretary, Consumer Affairs, Food and Public Distribution, Krishi Bhawan, New Delhi, requesting to review the said decision or to cancel the office order dated 26.07.2019, but no action has been taken as yet. It is further contended that such unilateral action of the opposite parties is detrimental to the interest of the people of the State. It is further contended that on the basis of the knowledge gathered from the article published on 06.08.2019 in the Odia daily newspaper "Prameya", the petitioner has approached this Court by way of filing this writ petition ventilating the hardship of the people of the State.

4. Mr. U.C. Behura, learned counsel appearing for opposite parties no. 2 and 3, referring to the counter affidavit filed on behalf of the opposite parties no. 1, 2 and 3, inter alia contended that the actual business activities are concentrated at Central Warehouses with few staff and officers. Most of the staff and officers are stationed in the regional offices and corporate offices, as a result of which some of the central warehouses suffer from shortage of staff and officers. This situation resulted in high indirect expenses of the regional offices and adequate staff are not deployed in the central warehouses, for which the Corporation was forced to rationalize the function and number of regional offices for better administration of the Corporation. As a result, numbers of regional offices were merged into a single entity. Thereby, no illegality or irregularity has been committed by the opposite parties by issuing the order impugned. It is further contended that though initially it was decided to merge Bhubaneswar Regional Warehousing Corporation with Patna Regional Office into a single entity, vide letter dated 27.06.2019, but later on an administrative decision was taken to restructure the function by retaining seven officers and staff in Bhubaneswar Regional Office, vide letter dated 06.08.2019. Therefore, the order impugned dated 26.07.2019 having been modified, vide order dated 06.08.2019, consequentially no cause of action survives for the petitioner to approach this Court by way of filing this writ petition.

5. This Court heard Mr. J. Pattnaik, learned counsel appearing for the petitioner; Mr. B. Nayak, learned Central Government Counsel appearing for opposite party no.1; and Mr. U.C. Behura, learned counsel appearing for

opposite parties no.2 and 3 through video conferencing. Though learned Central Government Counsel appears on behalf of opposite party no.1, but no separate counter affidavit has been filed on its behalf. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, the writ petition has been disposed of at the stage of admission.

6. On careful perusal of the undisputed fact, as narrated above, as well as the order dated 26.07.2019 at Annexure-1, which is sought to be challenged herein, this Court finds that the impugned decision for merger of Bhubaneswar Regional Office of the Central Warehousing Corporation with that of Patna Regional Office has been taken with a view to saving overhead expenditure to the tune of crores of rupees in a year and also strengthen the Central Warehouses which are suffering from deployment of adequate staff. Thus, the impugned action clearly comes within the fold of administrative function of the authority with which the power of interference of the Court is very limited.

7. In ***Asif Hammed v. State of Jammu and Kashmir***, AIR 1989 SC 1899, the apex Court held that while exercising power of judicial review of administrative action, the Court is not an appellate authority. The Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermonize qua any matter, which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory power.

8. In ***Union of India v. Flight Cadet Ashish Rai***, 2006 (1) Supreme 271, the apex Court held that there should be judicial restraint while making judicial review in administrative matters. The principles laid down therein in respect of judicial review are as under:-

> *"The duty of the Court is (a) to confine itself to the question of legality; (b) to decide whether the decision making authority has exceeded its powers (c) committed an error of law (d) committed breach of the rules of natural justice and (e) reached a decision which no reasonable Tribunal would have reached or (f) abused its powers."*

9. The Division Bench of this Court, while considering the provisions of Sections 3 and 4 of the Orissa Gram Panchayat Act, 1964, with regard to fixation of headquarters of the Gram Panchayat, in ***Harihar Swain v. State of Orissa***, 96 (2003) CLT 454 held in paragraph-6 as follows:-

> *"6. Fixation of headquarters of a Grama Panhayat in any particular village is essentially an administrative matter and so long as relevant considerations have weighed with the Government in fixing the headquarters in a particular village, the High Court cannot interfere with the decision of the Government like an Appellate Authority and quash the decision of the Government. While exercising power under judicial review, the High Court under Article 226 of the Constitution has only to see whether the administrative power has been exercised within the limits of law and taking into account the relevant considerations and so long as the High Court is satisfied that the power has been exercised within the limits of law after taking into account the relevant considerations, the High Court will not interfere with the same on the ground that it should have been located at a different place."*

10. Keeping the above settled position of law in view, it can be safely held that while exercising power of judicial review on administrative decisions of the executive authority, the scope of interference by the Court is limited and that has to be exercised with utmost care and caution. In the present case, although the petitioner has challenged the order dated 26.07.2019 at Annexure-1 by which Regional Office of Central Warehousing Corporation, Bhubaneswar has been directed to be merged with Regional Office of Central Warehousing Corporation, Patna, but subsequently an administrative decision was taken to restructure the functions by retaining seven officers and staff in Bhubaneswar Office, vide letter dated 06.08.2019. Thereby, in view of issuance of subsequent circular dated 06.08.2019 at Annexure-D/2, the impugned office order dated 26.07.2019 at Annexure-1 has lost its force.

11. In the above context, it is pertinent to quote the relevant portion of the pleadings made in paragraphs-8 and 10 of the counter affidavit on behalf of the opposite parties which read as under:-

> *"8. That in the case of Bhubaneswar Region, looking after Odisha State, the management has taken different approach because of almost completed storage capacity in the State of Odisha. Though initially it was decided to merge Bhubaneswar Region with Patna Region into a single entity vide letter dated 27/06/2019. But later an administrative decision was taken to restructure the functions by retaining 7 officers and staff in Bhubaneswar office vide letter dated 06/08/2019. Rest of the officers and staffs have been transferred and posted within the State of Orissa except three outside the State. Vide letter dated 06/08/2019 and 14/08/2019, it is humbly submitted here that by order dated 06/08/2019 the complete merger of Bhubaneswar Region with Patna Region was modified and Bhubaneswar Regional Office will function with lesser staff so surplus staffs were deployed in Central ware Huses where there is necessity of staffs….."*

10. That in reply to paragraph 1 of the writ application, it is humbly submitted here that the restructuring of regional office of the Corporation does not affect any efficiency of the ware house of the state hence apprehension of the petitioner is baseless, without any valid reasons. Hence there is no cause of action to maintain the writ application. It is stated here that restructuring of the reasons of the Corporation are purely administrative matter of the corporation and does not affect the functions of the ware houses in the field for which no public is going to suffer in any manner for which the writ application is liable to be dismissed. It is further submitted that the petitioner has challenged the order dated 26/07/2019 wherein there was complete merger of Bhubaneswar Region with Patna Region but by letter dated 06/08/2019 the Corporation has already modified the letter dated 26/07/2019 and by modification the corporation has already taken the decision to run the regional office at Bhubaneswar which are looking after the marketing and business development activities in the State of Orissa and will maintain customer relationship at Bhubaneswar i.e. purchase of services, product participation in contract and pest control services, only administrative and finance of both the regions shall be controlled by regional office at Patna…."

12. It is pertinent to mention here, though in the rejoinder affidavit, filed by the petitioner, it has been stated that issuance of circular dated 06.08.2019 is an internal transaction of the Corporation, but the same was never brought to the limelight so as to bring to the notice of this Court by the petitioner. Be that as it may, if the circular dated 06.08.2019 has come into existence by filing counter affidavit and pleading to that effect has been made in paragraphs-8 and 10 mentioned above, this Court is of the considered view that the dispute, which has emanated from the office order dated 26.07.2019 at Annexure-1, has been taken into consideration and modified vide circular dated 06.08.2019 to the extent indicated above.

13. In the conspectus of facts and law discussed above, this Court is of the considered opinion that in view of the pleadings made in paragraphs-8 and 10 of the counter affidavit mentioned supra and being oblivious of well settled principle of law that scope of interference by the Court in administrative matters is very limited, this Court disposes of the writ petition upholding the modified state of affairs, pursuant to the circular dated 06.08.2019 allowing Bhubaneswar Regional Office of Central Warehousing Corporation to continue as per restructuring with limited number of staff.

14. The writ petition thus stands disposed of. No order as to cost.

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.

2020 (III) ILR - CUT- 27

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

WRIT PETITION (CIVIL) NO. 2521 OF 2020

ASHOK KUMAR DORA & ORS. .....Petitioners

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction in academic matters – Writ petition seeking a direction to declare five and half years course in Naturopathy and Yogic Science as equivalent to Bachelors Degree in Naturopathy and Yogic Science (BNYS),as it has been declared in case of Homoeopathy – The question arose as to whether in exercise of extraordinary jurisdiction under Articles 226 and 227 of Constitution of India the court can express any opinion? – Held, No. – Reasons explained. (Paras 10 & 11)

Case Laws Relied on and Referred to :-

1. AIR 1965 SC 491 : The University of Mysore Vs. C.D. Govinda Rao.

For Petitioners : M/s. Sailabala Jena, K. Padhi, A. Shaw & S. Mohanty.
For Opp.Parties: Mr. A. Mohanty, Central Govt. Counsel

JUDGMENT Date of Judgment : 17.08.2020

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

The petitioners, who are students of Satya Sai Medical College, Hospital and Research Centre, Bhubaneswar, by way of this writ petition, seek direction to the opposite parties to declare five and half years course in Naturopathy and Yogic Science as equivalent to Bachelors Degree in Naturopathy and Yogic Science (BNYS), as it has been declared in case of Homoeopathy.

2. The factual matrix of the case, in hand, is that Naturopathy and Yogic Science is the oldest Indian system of treatment but it has got statutory recognition only few years back. At present, that science has been legally recognized as an effective system of treatment. Therefore, Government of India, realizing its importance and system of treatment, introduced a separate Ministry and Department for its development, i.e., Department of Ministry of 'AYUSH'. Before Naturopathy and Yogic Science is legally recognized and department of Ministry of 'AYUSH' is created, various recognized and

unrecognized institutions kept the science alive by imparting education in Naturopathy and Yogic Sciences. But they were awarding degrees with different nomenclature and as on today also the same practice is continuing. Therefore, different institutions are awarding different degrees of various nomenclatures. The recruiters are also confused to decide the question of equivalence for giving appointment to the candidates and ultimately the same is affecting the interest of the candidates like the present petitioners, who have prosecuted their studies for five and half years in Naturopathy and Yogic Sciences and have qualified with the nomenclature as Diploma in Naturopathy and Yogic Sciences.

2.1 The Government of India in Ministry of Health and Family Welfare Department, by letter dated 03.01.1991, have accepted the recommendation received from Central Council of Homoeopathic that no disparity in the pay scales is maintained among the physicians belonging to different system of medicine and having completed a degree course (the duration of which now is five and half years in each recognized system of medicine), working under the Ministry. Accordingly, five and half years study in Homoeopathic having been declared as degree course, the study for same duration, that is to say for five and half years course in Naturopathy and Yogic Science should be treated as degree in place of diploma, by applying principle of equivalence, and the petitioners should have been granted similar benefits to that of the candidates having Homoeopathy degree. But due to inaction of the authority, this writ petition has been filed.

3. Mr. S. Mohanty, learned counsel for the petitioner strenuously urged that if a parameter has been fixed that five and half years course is to be treated as degree course and the same has already been extended in case of the course Homoeopathy, by applying the principle of equivalence, such five and half years course in Yoga and Naturopathy should be treated as equivalent to degree, as has been declared in case of Homoeopathy, and consequential benefits should be extended to the petitioners who have prosecuted five and half years study in Yoga and Naturopathy. It is further contended that the petitioners, along with some others had filed W.P.(C) No.13451 of 2019 before the High Court of Delhi and the said writ petition was dismissed, vide order dated 19.12.2019, granting liberty to the petitioners therein to approach the concerned High Court. Therefore, the petitioners have approached this Court, by means of this writ petition, claiming the above benefits by applying the principle of equivalence.

4. Mr. A. Mohanty, learned Central Government Counsel appearing for opposite parties no.1 to 3 vehemently contended that the writ petition is premature one and, as such, the same is not maintainable before this Court. It is contended that the Central Council for Research in Yoga & Naturopathy is an autonomous body to carry out research and development activities in the field of Yoga and Naturopathy, but it does not deal with the matters relating to regulation of education and practice in the field of Yoga & Naturopathy. It is further contended that opposite party no.2 is not an appropriate authority in redressing the grievance made in the writ petition and, as such, it is not a necessary party. Thereby, the relief sought cannot be granted by opposite party no.2 to the petitioners in the present writ petition. Accordingly, the writ petition is liable to be dismissed.

5. This Court heard Mr. S. Mohanty, learned counsel for the petitioners and Mr. A. Mohanty, learned Central Government Counsel appearing for opposite parties no.1 to 3 through video conferencing, and perused the record. Pleadings having been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. On the basis of the undisputed facts, as narrated above, and in view of rival contentions raised by learned counsel for the parties, this Court is only to examine whether the writ of mandamus can be issued to declare five and half years course in Naturopathy and Yogic Science as equivalent to Bachelors Degree in Naturopathy and Yogic Science (BNYS), as it has been declared in case of Homoeopathy. The petitioners, being the students of Satyasai Medical College, Hospital and Research Centre, Bhubaneswar, have undergone five and half years course in Naturopathy and Yogic Sciences and also declared qualified by Odisha State Council of Ayurvedic Medicine, Bhubaneswar and issued with certificate of Diploma in Naturopathy and Yogic Sciences. But the claim of the petitioners is that they having prosecuted five and half years course in Naturopathy and Yogic Sciences, they are entitled to be issued with Bachelors Degree certificate instead of Diploma certificate.

7. In support of their claim, much reliance has been placed by the petitioners on the document under Anmnexue-3 dated 03.01.1991 issued by the Director (ISM), Government of India, Ministry of Health & Family Welfare to all the Health Secretaries/Directors of ISM & Homoeopathy in

States/U.Ts requesting to declare four years' course in Homoeopathy as equivalent to Degree, by accepting the recommendation received from the Central Council of Homoeopathy. A perusal of the said communication would show that the Government of India, while accepting the recommendation made by the Central Council of Homoeopathy, contended that no disparity in the pay scales is maintained among the Physicians belonging to different systems of medicine and having completed a decree course (the duration of which now is five and half years in each recognized system of medicine) working under the Ministry.

8. But fact remains, in the case of the present petitioners, no such recommendation has been made at any point of time by the competent authority to declare five and half years course in Naturopathy and Yogic Science to be treated as degree course by getting appropriate affiliation of competent University. Nothing has been placed on record to indicate that such endeavour has ever been made either by the petitioners or by the institution, where the petitioners were prosecuting their study, or any other institutions to declare five and half years course in Naturopathy and Yogic Science as degree course, as has been done in respect of subject Homoeopathy.

9. It is of relevance to note that opposite party no.2-Central Council for Research in Yoga and Naturopathy is an autonomous body under Ministry of 'AYUSH'. Its basic object is to conduct scientific/clinical research in Yoga and Naturopathy only. It is functioning as an autonomous organization under the Ministry of 'AYUSH' since its inception and is involved in various activities related to developing the system. As such, it is not the competent authority to make any recommendation to declare five and half years course in Naturopathy and Yogic Science to be treated as Bachelor of Naturopathy and Yogic Science (BNYS), which is being conducted with approval of concerned State Governments duly affiliated to UGC and State recognized universities and subsequently registered under State AYUSH Board. But so far as Homoeopathy is concerned, the course of Homoeopathy is being conducted with the approval of Central Council for Homoeopathy (CCH), which is a statutory academic body for regulating 'Education and Practice' in the field of Homoeopathy, which equated Diploma in Homoeopathy to Degree in Bachelor of Homoeopathy and Medicine and Surgery (BHMS). As it reveals, no such regulatory apex body regulating education and practice exits in the field of Naturopathy and Yogic Science at Central level, save and

except opposite party no.2 which is involved in carrying out clinical research in Yoga and Naturopathy only. As such, it has no role to play for making any declaration with regard to equivalent treatment either to the course Diploma or Degree in Naturopathy and Yogic Science. In absence of any apex body with regard to regulating the education and practice in Naturopathy and Yogic Science, no recommendation could be made till date for declaration of five and half years course as a Bachelors degree. Therefore, it follows that the petitioners, instead of approaching the appropriate forum ventilating their grievance, have approached this Court by means of the present writ petition, which is not maintainable.

10. In ***The University of Mysore v. C.D. Govinda Rao,*** AIR 1965 SC 491, in an academic matter while considering the principle of equivalence of university degree, in paragraph-12, the Constitution Bench of the apex Court held that where one of the qualifications for the appointment to the post of a Reader in the University was that the applicant should possess a First or High Second Class Master's Degree of an Indian University or an equivalent qualification of a foreign University, the candidate should possess a First Class Master's Degree or an Indian University or High Second Class Master's degree of an Indian University or qualification of a foreign university which is equivalent to a First Class or a High Second Class Master's degree of an Indian University. Whether the foreign degree is equivalent to a High Second Class Master's degree of an Indian University is a question relating purely to an academic matter and courts would naturally hesitate to express a definite opinion, specifically when the selection Board of experts considers a particular foreign university degree as so equivalent.

11. In view of the above principle of law laid down by the apex Court that in exercise of extraordinary jurisdiction under Articles 226 and 227 of Constitution of India in academic matter regarding equivalency in university degree course the Court would not expresses any opinion and as such law laid down by the apex Court still holds the field, this Court is of the considered view that this Court cannot express any opinion with regard to declaration of five and half years course in Naturopathy and Yogic Science as equivalent to Bachelor in Naturopathy and Yogic Science (BNYS), as has been done in case of Homoeopathy. The above apart, by the time the petitioners admitted to the course of Naturopathy and Yogic Sciences, they were fully aware that they would be granted certificate of Diploma in Naturopathy and Yogic Sciences.

12. Mr. S. Mohanty, learned counsel appearing for the petitioners, after arguing the matter and knowing the mind of the Court, forgone the prayer made in the writ petition and insisted for issuing direction for disposal of the representation filed by the petitioners under Annexure-5, to which this Court is not inclined to issue any direction, as this Court has taken into consideration the order dated 06.09.2019 passed by the apex Court in W.P.(Civil) No.1119 of 2019 under Annexure-6 and also the order dated 19.12.2019 passed by High Court of Delhi in W.P.(C) No. 13451 of 2019 filed by similarly situated candidates, including the petitioners, was dismissed by permitting them to move appropriate forum. Therefore, this Court is not inclined to entertain this writ petition for issuing any direction to the opposite parties for disposal of the petitioners' representation also.

13. In view of such position, both factually and legally, the writ petition merits no consideration and the same is hereby dismissed. However, there shall be no order as to costs.

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

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2020 (III) ILR - CUT- 32

MOHAMMAD RAFIQ, C.J & DR. A.K. MISHRA, J.

WRIT PETITION (CIVIL) NO.17549 OF 2020

1. M/S. RKD-CMRGS JOINT VENTURE
2. **M/S. CMRGS INFRASTRUCTURE PROJECTS LTD**. ……..Petitioners
.V.
INDIAN PORT RAIL & ROPEWAY CORPORATION LTD. & 4 ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order rejecting the technical bid of a Tender – Allegation of illegality and misinterpretation of clauses pleaded – Reasons of rejection appears to be reasonable – No interference

called for – Held, as per the settled legal position the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable.

> *"It is settled proposition of law that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. If as per conditions of the NIT, bid security in the case of tender submitted by JV was required to be given wholly either by the JV or the lead partner, the bidder ought to submit bid accordingly and not in any other manner. It is trite that words used in the tender documents as conditions for acceptability of technical bid have to be construed in the way the Employer has used them while formulating such terms and conditions. Whether a particular condition is essential or not is a decision to be taken by the Employer. The tender inviting authorities have to be given free hands in the matter of interpretation of conditions of the tender. No words in the tender documents can be treated surplusage or superfluous or redundant. Their decision has to be respected by the court unless it is shown to be ex-facie arbitrary, outrageous, and highly unreasonable. If non-submission of a compliant bid security as per mandatory conditions of the terms of the NIT, results in tender of the bidder being rendered non-responsive, the court cannot substitute the opinion of the Employer by its own unless interpretation of such condition by the tender inviting authority suffers from mala fides or perversity." (Para 30)*

Case Laws Relied on and Referred to :-

1. (1995)1 SCC 478 : New Horizons Ltd. Vs. Union of India.
2. (1979)3 SCC 489 : Dayaram Shetty Vs. International Airport Authority of India.
3. (2016) 8 SCC 622 : Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium).
4. AIR 1936 PC 253(2) : Nazir Ahmed Vs. Kind Emperor.
5. (1999) 1 SCC 492. : Raunaq International Ltd. Vs. I.V.R. Construction Ltd.,
6. (2000) 2 SCC 617 : In Air India Limited Vs. Cochin International Airport Ltd.
7. 2006(11) SCC 549 : B.S.N. Joshi & Sons Ltd., Vs. Nair Coal Services Ltd.
8. 2007 (14) SCC 517: Jagdish Mandal Vs. State of Orissa.
9. 2016 (16) SCC 818 : Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.
10. (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.
11. (2000) 2 SCC 617 : Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.
12. (2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa & Ors.
13. (2008) 16 SCC 215 : Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors.
14. (2009) 6 SCC 171 : Meerut Development Authority Vs. Association of Management Studies & Anr.
15. (2016) 8 SCC 622 : Central Coalfields Ltd. & Anr. Vs. SLL-SML (Joint Venture Consortium) & Anr.

16. (1990) 2 SCC 488 : G.J. Fernandez Vs. State of Karnataka.
17. (2016) 15 SCC 272 : Montecarlo Ltd. Vs. National Thermal Power Corporation Ltd.
18. (2016) 16 SCC 818 : AFCONS Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.
19. (2017) 4 SCC 170 : JSW Infrastructure Ltd. & Anr. Vs. Kakinada Seaports Ltd. & Ors.

For Petitioner(s) : Mr. Ashok Mohanty, Sr.Adv., Mr. G.M.Rath & Mr. Sidharth Shankar Padhy.

For Opp. Party(s) : Mr. Partha Mukherji, & Mr. S.D.Ray.

JUDGMENT Date of Hearing: 07.08.2020::Date of Judgment: 19.08.2020

PER: MOHAMMAD RAFIQ, C.J.

This writ petition has been filed by M/s. RKD-CMRGS Joint Venture and M/s. CMRGS Infrastructure Projects Ltd. challenging the order of the opposite party-Indian Port Rail & Ropeway Corporation Ltd. rejecting the tender of the petitioner during technical evaluation, with a further prayer that the same be set aside and bid of the petitioner be declared as technically responsive.

2. The facts in brief are that opposite party no.1-Indian Port Rail & Ropeway Corporation Ltd. invited tender on 11.2.2020 for the work of "A road-cum-flyover crossing the BOT rail track to have unobstructed access to the MCHP areas." The approximate cost of the tender/work was 28.92 crores. The bidders were required to submit the tender in cover one and cover two. The cover one should contain the technical bid and the cover two should contain the price bid. As per the said tender call notice, 18.3.2020 was fixed as the last date of submission of the bid. However, the opposite party no.1 vide various corrigendum and addendum extended it to different dates and the last date of submission of the bid was finally fixed as 24.6.2020 and the date of opening of the bid was fixed as 25.6.2020. Both the petitioner no.2 and M/s. RKD Infrastructure Pvt. Ltd.-two companies incorporated under the Companies Act, entered into a Memorandum of Understanding to participate in the bidding process as a Joint Venture in response to tender notice issued by the opposite party no.1. Bid submitted by the petitioner no.1 Joint Venture was rejected during technical evaluation due to non-submission of bid security in conformity with clause 19.7 of the Instruction for Bidder (for short-ITB).

3. We have heard Mr. Ashok Mohanty, learned Senior Counsel for the petitioner and Mr. Partha Mukherjee, learned counsel for the opposite party Indian Port Rail & Ropeway Corporation Ltd.

4. Sri Ashok Mohanty, learned Senior Counsel appearing for the petitioner submitted that the opposite party has illegally rejected the technical bid of the petitioner on misinterpretation of clause 19.7 of the Instruction to Bidders (for short 'ITB') of the Bidding Documents. Even this clause stipulates that if the bid is submitted by the JV, the bid security should be in the name of Joint Venture and if the joint venture has not been legally constituted at the time of bidding, the bid security should be in the name of its partners. It is argued that the petitioner rightly submitted the bid security in two parts in conformity with clause-4 read with clause-19.7 of ITB, 51% via online transfer in the name of M/s. RKD Constructions Pvt. Ltd (lead partner) and balance 49% by way of exemption certificate in respect of petitioner no.2, which was registered with NSIC as MSME. The reason of rejection given by the opposite party is ambiguous, vague and contradictory, besides being contrary to tender conditions. Clause-19.3 of the ITB states that if any bid is not accompanied by an enforceable and compliant bid security, as required in accordance with ITB 19.1, it shall be summarily rejected by the Employer as non-responsive. In fact, the bid of the petitioner was accepted as technically qualified, which is evident from communication dated 15th July, 2020 (under Annexure-8 series at page-120). In fact, tendering authorities even opened the price bid of the petitioners which is evident from the financial bid evaluation sheet at page-123. It is only thereafter that opposite party decided to reject the price bid of the petitioners.

5. Learned Senior Counsel submitted that the petitioner has not participated in the tender process as JV and therefore, the first part of Clause 19.7 of ITB is not applicable to them. Reliance is placed on Clause-4 of the Instructions to Bidder (ITB) which states that Bidder may be a natural person, private entity, government-owned entity, or any combination of them, with a formal intent to enter into an agreement or under an existing agreement in the form of a Joint Venture (JV). In case of Joint Venture, the JV shall not have more than two (2) partners; and shall submit MOU or Joint Venture Agreement, on Proforma given in Section 4. In case a Joint Venture is the successful bidder, the Joint Venture Agreement should be entered into by the Joint Venture partners. The duly signed Joint Venture Agreement should be submitted along with the Performance Security to the employer within 28

days after notification of the award of contract. While the first part of the clause 19.7 relates to an already formed Joint Venture, the second part relates to a situation where the Joint Venture has not been legally constituted at the time of bidding. It is not even the case of the opposite party that the petitioner at any point of time has submitted any Joint Venture agreement for participating in the tender. In that view of the matter, evaluation of the tender of the petitioner on the premise of an already formed joint venture is beyond the tender terms and conditions. Relying on Clause-8 of MOU (Annexure-1 given in Form JV/4) which is captioned as 'Guarantees and Bonds', learned Senior Counsel argued that it provided that if Joint Venture has not been legally constituted at the time of bidding, the Bid Security shall be submitted in the name of all future partners through which Joint Venture is intended to be formed. It is contended that M/s. RKD Infrastructure Private Limited having 51% stake holder, the lead partner in the said proposed joint venture, has furnished the requisite cost of the bidding document and bid security proportionate to its participation as agreed in the MOU. M/s. CMRGS Infrastructure Projects Private Limited-petitioner no.2, having 49% participation in the proposed JV, was to bear its proportionate portion of the cost of the bidding document and bid security. Since the petitioner no.2 is a duly registered MSME unit, as per the "Public Procurement Policy for Micro and Small Enterprises Order, 2012", made applicable to the present tender, it is exempted from payment of bid security and tender cost. The petitioner no.2 has availed such exemption as per the tender conditions by uploading its MSME certificate and other relevant documents in accordance to the clause 19.3 of the tender condition.

6. Mr. Ashok Mohanty, learned Senior Counsel in order to explain the concept of 'joint venture' has relied on the decision of the Supreme Court in ***New Horizons Limited Vs. Union of India***, reported in (1995)1 SCC 478. Reliance is also placed on the judgment of the Supreme Court in ***Ramana Dayaram Shetty v. International Airport Authority of India***, reported in (1979)3 SCC 489 to argue that the Supreme Court in that case held that the court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. Reliance has also been placed on the judgment in the case of ***Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium)*,** reported in (2016) 8 SCC 622, holding that the terms of NIT cannot be ignored as being redundant or superfluous. They must be given due meaning and the necessary significance.

7. Per contra, Sri Partha Mukherjee, learned counsel for the opposite party has submitted that as per clause 19.7 of the ITB, if the Bid is submitted by the JV, then Bid Security is required to be submitted either in the name of Joint Venture and if the joint venture has not been legally constituted at the time of bidding, the Bid Security shall be in the name of the lead partner of the JV. In the present case, the petitioner no.1 has applied for the tender in the name of the joint venture, which fact is categorically mentioned in paragraph-2 of the memorandum of writ petition. In paragraph-5 of the writ petition, the petitioner further admits that the petitioner no.2 submitted the bid on behalf of the joint venture. Referring to Annexure-1 of the writ petition, it is argued that petitioner submitted the Memorandum of Understanding duly signed by two partners of the Joint Venture to the authorities. In clause-3 of the said MOU, it has been admitted that M/s. RKD Infrastructure Pvt. Ltd. shall be the lead member of the JV for all intents and purposes. Further at Annexure-3 dated 23.6.2020 at page-88 of the paper book, the petitioner after examining the bid documents accepted on Form PS 1 all the terms and conditions of the bid document and issued letter of acceptance to opposite party no.1. In the letter dated 2.7.2020 on Form JV/1 at page 90, M/s. RKD Infrastructure Pvt. Ltd. has categorically confirmed that "their company has formed a joint venture with opposite party no.2 by name of RKD CMRGS JV" "for the purposes associated with IFB" and in the same letter, further admitted that M/s. RKD Infrastructure Pvt. Ltd. will act as lead partner. Neither the Joint Venture nor the lead partner submitted the entire Bid Security. Only 51% of the bid security was paid by M/s. RKD Infrastructure Pvt. Ltd. and for the balance 49%, petitioner no.2 submitted an exemption certificate granted by NSIC. Even if the clause-8 of the MOU Annexure-1 is considered, neither the JV nor the lead partner has submitted the entire bid security. The tender evaluation committee on the opening of the technical bid found that neither the joint venture made the entire deposit of Bid Security nor the lead partner M/s. RKD Infrastructure Pvt. Ltd. made the entire deposit, nor even any certificate of exemption of the JV was uploaded. Therefore, the bid of the petitioner was rejected being technically not qualified. Referring to the judgment of the Privy Council in ***Nazir Ahmed vrs. Kind Emperor*** reported in AIR 1936 PC 253(2), learned counsel argued that when a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

8. Learned counsel for the opposite party argued that the second ground taken by the petitioner about the reasons of rejection not being intimated to

them, is also without any substance. Clause 26.1 of ITB makes it very clear that any information relating to evaluation and examination and rejection shall not be disclosed to the bidders or any other person unless the contract is awarded and communicated to bidders. As regards the third ground taken by the petitioner that initially their technical bid was accepted but subsequently the bid was rejected, learned counsel for the opposite party argued that the copy of the document under Annexure-8 at page 120 is an auto generated mail from the Government e-procurement system. That portal is being maintained by the Government of India e-tender department and the opposite party has no role to play in that. The email message in document Annexure-8 might have been generated from the said portal due to a technical glitch. But the opposite party has clarified this aspect in their affidavit annexing the correct document whereby the technical bid evaluation committee uploaded the result "Bid Opening Summary" on the website on the same day i.e. 17th July, 2020 at 11.15 A.M. in which status of the Bid of the petitioner has been clearly mentioned as "Not Admitted". Bid of the present petitioners was thus technically not qualified. A mail was also sent to the petitioner on the same day wherein it has been clearly mentioned that their bid was not accepted.

9. Mr. Partha Mukherji, learned counsel submitted that Supreme Court has consistently held that superior courts should not interfere in matters of tenders unless substantial public interest is involved or the transaction is mala fide. In support of this argument, reliance is placed on judgment of the Supreme Court in ***Raunaq International Ltd. vs. I.V.R. Construction Ltd*.,** (1999) 1 SCC 492. In ***Air India Limited Vs. Cochin International Airport Ltd.,*** (2000) 2 SCC 617, the Apex Court stressed the need that courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point. In ***B.S.N. Joshi & Sons Ltd., vs. Nair Coal Services Ltd.,*** 2006(11) SCC 549, it was held that it is not always necessary that a contract be awarded to the lowest tenderer. It must be kept in mind that the employer is the best judge therefore the same ordinarily being within its domain. Therefore, the court's interference in such mattes should be minimal. Reliance was also placed on judgment of the Supreme Court in ***Jagdish Mandal vs. State of Orissa*,** 2007 (14) SCC 517 wherein it was held that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Lastly, relying on judgment of the Supreme Court in ***Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd*.,** 2016 (16)

SCC 818, learned counsel argued that a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a Constitutional Court to interfere.

10. We have given our anxious consideration to rival submissions, studied the cited judgments and examined the material on record.

11. What is undeniable and which is also the categorical case set up by the petitioners in para-2 of the memorandum of the writ petition is that petitioner no.1 is joint venture of two companies namely, petitioner no.2-M/s. CMRGS Infrastructure Projects Ltd and another M/s. RKD Constructions Pvt. Ltd., both incorporated under the Companies Act with the Registrar of Companies, Odisha. Both are engaged in the business of executing various civil construction works. These two companies have entered into a memorandum of understanding for joint venture participation in the present tender process as per conditions of the tender. Petitioner no.2 has been given power of attorney by the Joint Venture to submit the tender and do all necessary acts in relation thereto. The petitioners are represented through the deponent, who is the Managing Director of petitioner no.2 Company and authorized signatory on behalf of the petitioner no.1-joint venture and a citizen of India. Memorandum of Understanding for JV between the lead partner M/s. RKD Infrastructure Pvt. Ltd and petitioner no.2-M/s. CMRGS Infrastructure Projects Ltd. has been placed on record at Annexure-1 series. Clause-2 of the MOU clearly states that the parties have studied the documents and have agreed to participate in submitting a bid jointly in the name of RKD –CMRGS(JV). Clause-3 of the MOU states that M/s. RKD Infrastructure Private Limited shall be the lead member of the JV for all intents and purpose and shall represent the Joint Venture in its dealing with the Employer. Clause-4 states that share of the lead partner would be 51%.

12. Before adverting to merits of the case, we deem it appropriate to remind ourselves of the position of law with regard to scope of jurisdiction of this Court in the matter of award of contracts by the Government and its instrumentalities. The Supreme Court in the celebrated judgment in ***Tata Cellular Vs. Union of India, (1994) 6 SCC 651,*** delineated the scope of interference by the Constitutional Courts in the matter of Government Contracts/Tenders by observing that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to

prevent arbitrariness or favouritism. There are however inherent limitations in exercise of that power of judicial review. Government is always the guardian of the finances of the State and it is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government, but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or rejecting a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation and the right to choose cannot be considered to be an arbitrary power. The judicial power of review is exercised to rein in any unbridled executive process. The Supreme Court held that it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The power of judicial review is not an appeal from the decision and therefore, the Court cannot substitute its decision since the Court does not have the necessary expertise to review. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. However, where the selection or rejection is arbitrary, certainly the Court would interfere. But it is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

13. In ***Air India Ltd. Vs. Cochin International Airport Ltd. & Ors., (2000) 2 SCC 617***, while relying on its several earlier decisions on the law relating to award of contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government, the Supreme Court observed as under:

> "7. ..... The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its

> corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

14. The Supreme Court in ***Jagdish Mandal Vs. State of Orissa & Others, (2007) 14 SCC 517,*** has also dealt with the scope of interference in contractual matters by the Constitutional Courts and held that while invoking power of judicial review in matters relating to tenders /contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, the courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Tenderer or contractor with a grievance can always seek damages in a civil court. Interference in tender or contractual matters in exercise of power of judicial review is permissible only if : (i) the process adopted or decision made is mala fide or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. The purpose and scope of judicial review is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides, its purpose is to check whether the choice or decision is made "lawfully" and not to check whether the choice or decision is "sound".

15. The Supreme Court, in the case of ***Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors., (2008) 16 SCC 215*** while dealing with the scope of judicial review of the constitutional courts, held that in matters of highly technical nature, a high degree of care, precision and strict adherence to requirements of bid is necessary. Decision making process of Government or its instrumentality should exclude remotest possibility of discrimination, arbitrariness and favoritism. It should be transparent, fair, bona fide and in public interest. However, the Supreme Court clearly held therein that it is not possible to rewrite entries in bid

document and read into the bid document, terms that did not exist therein, nor is it permissible to improve upon the bid originally made by a bidder. Power of judicial review can only be exercised when the decision making process is so arbitrary or irrational that no responsible authority acting reasonably or lawfully could have taken such decision, but if it is bona fide and in public interest, court will not interfere with the same in exercise of power of judicial review even if there is a procedural lacuna. Principles of equity and natural justice do not operate in the field of such commercial transactions.

16. The Supreme Court in the case of ***Meerut Development Authority Vs. Association of Management Studies & Anr., (2009) 6 SCC 171,*** held that the tender is an offer, which invites and is communicated to notify acceptance. It must be an unconditional, must be in the proper form, and the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to a judicial scrutiny because the invitation to tender is in the realm of contract. Only a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tender in a transparent manner and free from hidden agenda. The authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons. The action taken by the authorities in awarding contracts can be judged and tested in the light of Article 14 of the Constitution of India and the Court cannot examine details of the terms of the contract entered into by public bodies or State. The Court has inherent limitations on the scope of any such enquiry.

17. Adverting now to merits of the case in hand, while the petitioner relies on Clause-4.1 of ITB and clause-8 of the MOU, the argument of the opposite party is that bid security has not been submitted according to clause 19.3 and 19.7 and therefore the tender of the petitioner was rejected as technically non-responsive. In order to better appreciate the rival arguments, Clauses 4.1, 19.3 and clause 19.7 of the ITB and clause-8 of the MOU are reproduced hereunder:-

> "4.Eligible Bidders:
>
> 4.1 Bidder may be natural person, private entity, government-owned entity, or any combination of them with a formal intent to enter into an agreement or under an

existing agreement in the form of a Joint Venture (JV). The bidder must ensure the following:

(a) In case of Single Entity:

Submit Power of Attorney authorizing the signatory of the bid to commit the bidder.

(b) In case of Joint Venture:

(i) The JV shall not have more than two (2) partners;

(ii) Submit MOU or Joint Venture Agreement, as Proforma given in Section 4.

(iii) The JV shall nominate a Representative through Power of Attorney (Form given in Section 4) who shall have the authority to conduct all business for and on behalf of any and all the parties of the JV during the bidding process and, in the event the JV is awarded the Contract, during contract execution.

(iv) Submit Power of Attorney by individual partners to lead partners as per form given in Section 4.

(v) In case a Joint Venture is the successful bidder, the Joint Venture Agreement should be entered by the Joint Venture partners. The duly signed Joint Venture Agreement should be submitted along with the Performance Security to the employer after notification of the award of contract within 28 days.

19.3 Any bid not accompanied by an enforceable and compliant bid security, as required in accordance with ITB 19.1, shall be summarily rejected by the Employer as non-responsive. No exemption under any circumstances shall be considered for non-submission of bid security by the bidder."

19.7. The Bid Security of a JV shall be in the name of the JV that submits the bid. If the JV has not been legally constituted at the time of bidding, the Bid Security shall be in the names of lead partner of the JV.

Clause-8. Guarantees and Bonds.

The Bid Security of a JV shall be in the name of the JV that submits the bid. If the JV has not been legally constituted at the time of bidding, the Bid Security shall be in the names of all future partners through which JV is intended to be formed."

18. According to Clause 4.1, bidder may be a natural person, private entity, government-owned entity, or any combination of them, with a formal intent to enter into an agreement or under an existing agreement in the form of a Joint Venture. Sub-clause (b)(i) of Clause 4.1 provides that the JV shall not have more than two(2) partners and its Sub-clause (b) (ii) further provides that JV shall submit MOU or Joint Venture Agreement, as per Proforma

given in Section 4. Clause 4.1 (b)(iv) requires the JV to submit the Power of Attorney by individual partners to lead partners as per form given in Section-4 of the bid documents. Clause 4.1(v) provides that in case a Joint Venture is the successful bidder, duly signed Joint Venture Agreement should be submitted along with the Performance Security to the employer within 28 days after notification of the award of contract. It would therefore be clear from Clause 4.1 that it is not necessary that JV agreement should be submitted in advance for "any combination of them with a formal intent to enter into an agreement or under an existing agreement in the form of a Joint Venture".

19. There is thus no warrant on language of Clause 4.1 supra for the interpretation that the MOU (as per Proforma given in Section 4) entered into by the M/s. RKD Infrastructure Pvt. Ltd. and petitioner no.2 could not be taken as an existing arrangement in the form of Joint Venture. In any case, the MOU of JV at Annexure-1 would suffice the formal intent of parties to enter into an agreement to form a Joint Venture. As per clause-3 of the MOU, the parties agreed to nominate Sri Chitta Ranjan Swain as leader duly authorized to sign and submit all the documents and subsequent clarifications, if any, to the Employer. He signed the Price Bid in the capacity of authorized signatory of the Joint Venture. In Form :PS 2 dated 23.6.2020 at page-89 of the paper book, the bid documents have been duly signed by Sri Chitta Ranjan Swain on behalf of the JV, under the seal and signature of RKD-CMRCS. In Form No. JV/1 at page-90, duly signed by Managing Director of M/s. RKD Infrastructure Ltd., it has been categorically stated that "we wish to confirm that our company has formed a Joint Venture by name of RKD CMRGS JV with for the purposes associated with IFB referred to above.". Further it has been stated in paragraph-2 of the said letter that "in this group we act as leader and, for the purposes of applying for qualification, represent the Joint Venture." On form JV/1 at page-92, proforma letter of participation from each partner of Joint Venture(JV) has been given. On form FIN-2 at page 93 Annual Construction Turnover for the last 5 years of the lead partner of JV-RKD Infrastructure Pvt. Ltd. has been given. There are many more such documents on record which substantiate an agreement between these two companies to form a Joint Venture. In the face of all this overwhelming documentation, there is no scope for the argument that there was no formal intent of the parties to enter into an agreement to form a Joint Venture.

20. Analysis of various documents on record substantiates intention of the parties to participate in the bidding process as a Joint Venture. Examined from the perspective of all the aforesaid documents, the argument of the petitioner that they have participated in the bidding process only individually and separately and not as a Joint Venture and therefore, Clause 19.7 is not applicable to them, is liable to be rejected. Moreover, the petitioner no.1 M/s. RKD-CMRGS Joint Venture in the present writ petition is none other than the Joint Venture and petitioner no.2 is its partner M/s. CMRGS Infrastructure Private Limited, lead partner M/s. RKD Infrastructure Pvt. Ltd., having not joined the present petition as a writ petitioner.

21. In the case of ***Central Coalfields Limited & Anr. Vs. SLL-SML (Joint Venture Consortium) & Anr., (2016) 8 SCC 622,*** the Supreme Court while dealing with the matter of Government Contract/tenders, held that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. The deviation from terms and conditions of NIT is permissible so long as level playing field is maintained and it does not result in any arbitrariness or discrimination. Whether a term of NIT is essential or not is a decision taken by the employer, which should be respected, and soundness of that decision cannot be questioned by the Court. Applying the principle that "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all". It was held that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that format only and not in any other format. It is not for the employer or court to scrutinize every bank guarantee to determine whether it is stricter than the prescribed formant or less rigorous and the goalposts cannot be re-arranged or asked to be re-arranged during the bidding process to affect the right of some or deny a privilege to some. Rejecting the argument of the respondents therein that the Central Coalfields Ltd. has deviated from the terms of the NIT and GTCs with regard to submission of bank guarantee in the prescribed format on the ground that this was non-essential, the Supreme Court held as under:

> "28. The first and the foremost aspect of the case that must be appreciated is that, as mentioned above, JVC was certainly not computer illiterate. Like every bidder, it was required to have a Digital Signature Certificate which clearly indicates that any bidder (including JVC) had some degree of comfort with e-tenders and the use of computers for bidding in an e-tender. It is this familiarity that enabled JVC to access the

> "incorrect" format of a bank guarantee. Under these circumstances, it is extremely odd that JVC was not able to access the correct and prescribed format of the bank guarantee. The excuse given by JVC that NIT was vague and that it was not clear which was the prescribed format of the bank guarantee appears to be nothing but a bogey. A simple reading of the GTC and the terms of the bank guarantee would have been enough to indicate the correct prescribed format and the "incorrect" format."

22. The Supreme Court in the case of ***G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488,** relying on its earlier decision in **Ramana Dayaram Shetty (supra)** categorically held that "the party issuing the tender (the employer) has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable".

23. In ***Montecarlo Ltd. Vs. National Thermal Power Corporation Ltd., (2016) 15 SCC 272***, the appellant participated in the tender process pursuant to the NIT issued by respondent and as the appellant did not meet with technical qualifications prescribed, his bid was treated non-responsive. The appellant approached the High Court challenging action of respondent, but the High Court declined to interfere. The Supreme Court held that judicial review of decision making process is permissible only if it suffers from arbitrariness or mala fides or procedure adopted is to favour one. But if decision is taken according to language of tender document or decision sub-serves purpose of tender, then courts must exercise principle of restraint. Technical evaluation or comparison by courts would be impermissible. Principles of interpretation of tender documents involving technical works and projects requiring special skills are different from interpretation of contractual instruments relating to other branches of law. It was held that the tender inviting authorities should be allowed to carry out the purpose and there has to be free hand in exercising discretion. Tender inviting authorities have discretion to enter into contract under some special circumstances and there has to be judicial restraint in administrative action. The courts do not have expertise to correct administrative decisions and if courts are permitted to review such decisions then courts are substituting their own view without there being necessary expertise, which may be fallible. If decision is bona fide and is in public interest, courts would not interfere even if there is procedural aberration or error in assessment or prejudice to tenderer.

24. The Supreme Court in ***AFCONS Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr., (2016) 16 SCC 818***, relying on its various earlier decisions reiterated the well settled principle of law that decision in accepting or rejecting bid should not be interfered with, unless the decision making process suffers from mala fides or is intended to favour someone. Interference is also permissible if the decision is arbitrary or irrational, or is such that no responsible authority acting reasonably and in accordance with law could have reached such a decision. Further, perversity of a decision making process or decision and not merely faulty or erroneous or incorrect, is one of grounds for interference by courts. Constitutional courts are expected to exercise restraint in interfering with administrative decision and ought not to substitute their view for that of administrative authority. Constitutional courts must defer to this understanding and appreciation of tender documents unless there are mala fides or perversity in understanding or appreciation or in application of terms of tender conditions. Different interpretation given by authority which is not acceptable to court is no ground for constitutional courts to interfere with interpretation of authority unless it is proved to be perverse or mala fide or intended to favour a particular bidder. Relying on the decision of the ***Ramana Dayaram Shetty (supra)***, in paragraphs 14 and 15 of the report, the Supreme Court clearly observed as under:

> "14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.
>
> 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given".

25. The Supreme Court in ***JSW Infrastructure Ltd. & Anr. Vs. Kakinada Seaports Limited & Ors., (2017) 4 SCC 170***, has held that the words used in the NIT cannot be treated to be surplusage or superfluous or redundant. They must be given some meaning and weightage and courts should be inclined to suppose that every word is intended to have some effect or be of some use. Rejecting words as insensible should be last resort of judicial interpretation and as far as possible, courts should avoid construction which would render words used by author of document meaningless and futile or reduce or silence any part of document and make it altogether inapplicable. If interpretation of tender documents adopted by tender inviting authority suffers from mala fide or perversity then only courts can interpret documents. Interpretation given by tender inviting authority not acceptable to courts is no reason for interfering with interpretation adopted by the authority.

26. In the instant case, the tender condition as per Clause 19.3 of the ITB, provides as under:

> "19.3. Any bid not accompanied by an enforceable and compliant bid security, as required in accordance with ITB 19.1, shall be summarily rejected by the Employer as non-responsive. No exemption under any circumstances shall be considered for non-submission of bid security by the bidder."

According to above quoted clause, the bid must be accompanied by enforceable and compliant bid security in accordance with clause 19.1 of the ITB. Clause 19.1 specifically provides that the Bidder is required to furnish as part of its bid, a bid security in original form and for the said amount of Indian rupees as specified in the BDS. Clause 19.2 provides that the bid security shall be, at the Bidders option, in any of the following forms (a) A Cashiers or Banker's certified cheque or Bank draft drawn on a Scheduled/nationalized Bank in India in favour of "Indian Port Rail and Ropeway Corporation Limited" payable at Mumbai; or (b) An unconditional bank guarantees using the Form given in Section 4: Bidding Forms. The bank guarantee shall be from a bank having minimum net worth of over INR 500 million from the specified banks. Conjoint reading of all the sub-clauses of Clause 19, including clause 19.3 makes it mandatory for every bidder to submit the bid with enforceable and compliant bid security and failure to do so would make the bid liable to be summarily rejected as non-responsive.

27. The contention of the learned Senior Counsel appearing on behalf of the petitioner is that the bid of the petitioner was initially accepted as

technically qualified, as is evident from the communication sent to him by email dated 15th July, 2020 at page 120 under Annexure-8 series stating that *"you are informed that your bid for the above tender has been accepted during Technical evaluation by the duly constituted committee and the financial bid opening of the tender has been fixed on July 17, 2020 11.00 A.M."*. Thereafter, the opposite party could not have rejected the technical bid on 17th July, 2020. However, this has been clarified by the opposite party stating that the said email dated 15.07.2020 under Annexure-8 at page 120 is an auto generated mail from the Government e-procurement portal being maintained by the Government of India e-tender Department and that the opposite party has no role to play therein. The said email might have been generated due to a technical glitch. It is further clarified that the technical bid evaluation committee uploaded the result "Bid Opening Summary" on the website on the same day i.e. 17th July, 2020 at 11.15 A.M. On a careful consideration of the documents at Annexure-8, the explanation of the opposite party merits acceptance, because in the last part of the email communication dated 15-Jul-2020, on which the petitioner is relying, there is a Note at the bottom, which reads as under:-

> "**Note:** This is an auto generated mail from the e-procurement system. Please do not reply to this e-mail id."

28. A similar argument was considered by the Division Bench of this Court in the case ***of M/s. GDCL- KRISHNA-TCPL JV. Vs. State of Odisha & Others, reported in 2017 SCC Online Ori 654,*** and the same has been rejected by observing as follows:

> "19. The technical bids from all the bidders were downloaded from the website by the authorized officer of the Board on 01.08.2016 for verification and evaluation. The process of verification of documents electronically downloaded from the website was to be done manually and so is the process in case of evaluation of technical bids. The process of verification and evaluation was running concurrently and the bidders were communicated from time to time after 01.08.2016 for providing various clarifications to complete the manual process of verification as well as evaluation of technical bid. The evaluation committee sat twice on 30.08.2016 and 19.09.2016 to finalize the list of eligible bidders based on the date available in the technical bid and additional information provided by the bidders between the period 01.08.2016 and 19.09.2016. Two processes were completed on 19.09.2016, i.e., completion of verification of authenticity of all the technical bid documents submitted by all the bidders with the additional documents provided during the above period and completion of evaluation process and issued all minutes

> of evaluation committee held on 19.09.2016. Therefore, all the technical bids were clear by allowing all of them as "admitted". At the first instance, the process of admission was carried out in the system in respect of all the bidders. Then, the result of evaluation was uploaded in the programme website. The whole process was completed in about an hour or so. *In case of each operation, a programme generated e-mail and is automatically sent to all the bidders for their information. Therefore, the contention raised that on 19.09.2016 at 5.43 p.m. the bid has been admitted and on the very same day, i.e., on 19.09.2016 at 7.06 p.m. the petitioner JV has been communicated that the tender has been rejected during the technical evaluation*, no infirmity can be found for such communication. More particularly, as per clause-3.1.9 of RFP after the communication of the result, there is no provision to communicate the bidder with regard to any query or clarification in case of failure of bidder to qualify." *(emphasis added)*
>
> *[para 19 of the original judgment]*

29. In the instant case also, clause 26.1 of the ITB categorically provides that any information relating to evaluation and examination and rejection shall not be disclosed to the bidders or any other person unless the contract is awarded and communicated to bidders. Therefore, if an auto generated email has been sent to the petitioner due to glitch in the system, it cannot be said that the technical bid of the petitioner was accepted by the Technical Bid Evaluation Committee. The result of the four bidders was uploaded in the system at 11.15 A.M. on 17th July, 2020, wherein the bid of the other three bidders found to be technically responsive, whereas bid of the petitioner was shown as "Not Admitted". An email was also sent to the petitioner on the same day under Annexure-9 series at 11.17 A.M. on 17th July, 2020 at page 122 of the petition, wherein it is clearly mentioned that "It is to inform you that your bid 173880 has been opened and updated summary by the duly constituted committee. *Your bid has been Not Admitted by the committee and for further information you are asked to get in touch with the Tender Inviting Authority (TIA)*". *(emphasis supplied)*

30. In the fact situation obtaining in the case, decision of the opposite party in respect of the technical bid of the petitioner as non-responsive can neither be said to be mala fide or intended to favour someone. It cannot be termed to be so arbitrary or irrational which no responsible body of person acting under law could have arrived at. It is settled proposition of law that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. If as per conditions of the NIT, bid security in the case of tender submitted by JV was required to be given wholly either by the JV or the lead partner, the bidder ought to submit bid accordingly and not

in any other manner. It is trite that words used in the tender documents as conditions for acceptability of technical bid have to be construed in the way the Employer has used them while formulating such terms and conditions. Whether a particular condition is essential or not is a decision to be taken by the Employer. The tender inviting authorities have to be given free hands in the matter of interpretation of conditions of the tender. No words in the tender documents can be treated surplusage or superfluous or redundant. Their decision has to be respected by the court unless it is shown to be ex-facie arbitrary, outrageous, and highly unreasonable. If non-submission of a compliant bid security as per mandatory conditions of the terms of the NIT, results in tender of the bidder being rendered non-responsive, the court cannot substitute the opinion of the Employer by its own unless interpretation of such condition by the tender inviting authority suffers from mala fides or perversity.

31. In view of foregoing discussions, the writ petition being devoid of merit, is liable to be dismissed and is accordingly dismissed. There shall be no order as to costs.

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2020 (III) ILR - CUT- 51

MOHAMMAD RAFIQ, C.J & DR. A.K.MISHRA, J.

WRIT PETITION(CRIMINAL) NO. 37 OF 2020

SAGAR PARIDA ……..Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

(A) NATIONAL SECURITY ACT, 1980 – Section 3 and 4 – Provisions under – Detention – Petitioner was detained from 19.12.2019 – Government received the report from the Commissioner of Police on 27.12.2019 about the detention of the petitioner commencing from 19.12.2019 – No explanation has been given in any manner as to why report could not be submitted to the Government earlier – Effect of – Held, this is a laxity remains unexplained and this vitiates the order of detention. (Para 11)

(B) NATIONAL SECURITY ACT, 1980 – Section 3 and 4 – Provisions under – Preventive detention – Scope and ambit – Held, a detenu is not a convict – Power to detain under NSA is not a power to punish for offences – Restrictions placed upon the liberty of a detenu are well guarded by the command of time stipulated procedure – Any deviation, for its impact upon liberty, is to be earmarked to benefit the detenu.

(Para 17)

Case Laws Relied on and Referred to :-

1. AIR 2018 SC 3419 : Hetchin Haokip Vs. The State of Manipur & Ors.
2. (2018 3 SCC (Crl.) 441) : Sama Aruna Vs. State of Telangana and Anr.
3. (2015120 CLT 800) : Kapa @ Somanath Sahoo Vs. Satate of Orissa & Ors.
4. (2012 1 SCC (Cri) 889 : Munagala Yadamma Vs. State of A.P & Ors.
5. (2003 OLR Supp.) 288) : Sri Adikanda Sahu Vs. State of Orissa & Ors.
6. (2017(Supp.2) OLR 346 : Lakhe @ Laxman Bag Vs. State of Odisha and Anr.
7. (1988 0 SCC (Cri) 1788) : Smt. Shashi Aggarwal Vs. State of U.P. & Ors.
8. (2015 0 CRLJ 89) : Nari @ Narsingh Mohanty Vs. Union of India and Ors.
9. 2011 2 SCC (Cri) 596 : Rekha Vs. State of T. Nadu.
10. 2004 (7) SCC 467 : Commissioner of Police Vs. C. Anita.
11. (1982) 1 SCC 271 : A.K. Roy Vs. Union of India.
12. W.P.(CRL) 41 of 2020 : Gugu @ Subasis Khuntia Vs. State of Odisha & Ors.
13. 1990 SCR (1) 836 : Mrs. T. Devaki Vs. Government of Tamil Nadu & Ors.
14. AIR 1992 SC 979::1992 SCR (1) 234 : Harpreet Kaurharvinder Vs. State of Maharashtra and Anr.
15. A.I.R. 1952 SC 181: Dattatraya Moreshwar Vs. The State of Bombay & Ors.
16. (1982) 1 SCC 271 : A.K.Roy Vs. Union of India & Ors.
17. AIR 2018 SC 3419 : Hetchin Haokip Vs. The State of Manipur & Ors.
18. 2011(5) SCC 244 : Rekha Vs. State of T.Nadu TR. Sec. to Government & Anr.
19. (1972) 3 SCC 831 : Kanu Biswas Vs. State of West Bengal.
20. (2015) 13 SCC 722: Cherukuri Mani Vs. Chief Secretary, Government of Andhra Pradesh & Ors.
21. (2017) 13 SCC 519 : Lahu Shrirang Gatkal Vs. State of Maharashtra.
22. AIR 1974 SC 505 : Lokanath Pradhan Vs. Birendra Kumar Sahu.
23. AIR 1983 SC 239 :1983 SCR (1) 1000 : Sanjeev Coke Manufacturing Vs. Bharat Coking Coal Ltd.

For Petitioner : Mr. Chitta Ranjan Dash & Mr. P.P.Parida.

For Opp. Parties : Mr. Janmejaya Katikia (Addl. Govt. Adv.)

JUDGMENT Date of Hearing: 07.08.2020 : Date of Judgment: 19.08.2020

PER:DR. A.K. MISHRA, J.

The writ jurisdiction is invoked by the petitioner to quash the order of detention dated 19.12.2019 and its consequential proceeding passed by the Commissioner of Police, Bhubaneswar-Cuttack Police Commissionerate

(O.P. No.3) under section 3 (2) of the National Security Act,1980 (for brevity, "the NSA").

2. The petitioner was in judicial custody since 14.12.2019 at special jail Jharpada, Bhubaneswar in connection with Chandrasekharpur P.S. Case No.500 dated 13.12.2019 for commission of offence under section 394 I.P.C. While so, the Commissioner of Police, (O.P.No.3) being satisfied with the material and documents submitted by Dy. Commissioner of Police, (O.P. No.4) that prevention of petitioner was imperative from acting in any manner prejudicial to the maintenance of public order and tranquility, passed order detaining him under section 3(2) of the NSA.

2.1 The ground of detention vide annexure-2 was served upon the petitioner on 24.12.2019. Therein, the involvement of the petitioner in sixteen cases including three proceedings under section 110 of Cr.P.C. has been substantiated with particulars.

2.2 The detenu was reported to have committed mugging with lethal weapons in attacking the police. He was habitually indulged in extortion and criminal intimidation prejudicial to the maintenance of the public order. Imminent threat was noticed on 13.12.2019, when the petitioner with his associates tried to shutdown a liquor shop as the Manager did not agree to pay monthly "Dada Bati" and his aggression created panic in the locality.

3. The Government of Odisha, Home (Spl. Section), Department (O.P.No.2) approved the detention of the petitioner under Section 3(4) of the NSA on 30.12.2019, vide Annexure-3. The same was communicated to the petitioner on 1.1.2020 vide Annexure-4. On 2.1.2020, the petitioner was informed by the Secretary, N.S.A. Advisory Board to express his willingness to be heard in person before the Advisory Board. On 9.1.2020, the sitting of the Advisory Board fixed to 14.1.2020 vide Annexure-6 was intimated to the petitioner. The petitioner was heard in person by the Advisory Board. The Advisory Board found sufficient cause for his detention. Basing upon that, the Govt. of Odisha in Home Department passed order on 6.2.2020 confirming the detention of the petitioner for three months from the date of detention, i.e., 19.12.2019 vide Annexure-7. The said confirmation order was served upon the petitioner on 10.2.2020 vide Annexure-8.

3.1 Subsequently, on the recommendation of Opposite Party No.3, Commissioner of Police, the State Government on 18.3.2019 extended the detention period for another three months, thereby for six months, from the date of the detention, i.e., 19.12.2019 vide Annexure-10. The said order was served upon the petitioner on 19.3.2020.

3.2 Though the petitioner has not whispered in the writ petition about the further extension of detention from six months to nine months, it has been mentioned in the argument note filed by learned counsel for the petitioner without any specifics. On the other hand, the leaned Addl. Government Advocate, Mr. Katikia in his written argument note has mentioned and filed the extension order of Government of Odisha (Home Department) No.980/C dated 17.6.2020 showing its service upon the petitioner on 18.6.2020. The copy of the said extension order is taken into record in order to keep the matter straight.

3.3 It transpires that on the proposal of Police Commissioner, the Government on 17.6.2020 have directed the continuance of petitioner in the Special Jail, Jharpada for nine months with effect from the date of initial detention, i.e., 19.12.2019.

4. It is the specific case of the petitioner that all the allegations attributed in the ground of detention are not correct. In some cases final forms have been submitted and in two cases, the petitioner has been acquitted by the Trial Court. All the cases are magistrate triable. On the basis of old and stale cases, the petitioner should not have been detained. The respective informants in Chandrasekharpur P.S. Case No.114 dated 10.3.2019 and Chandrasekharpur P.S. Case No.360 dated 26.08.2017 have voluntarily drawn the attention of the trial court regarding innocence of the petitioner. He was never indulged in any activities which were prejudicial to public order. The procedure adopted by the opposite parties is not inconsonance with the requirement of the NSA.

5. Opposite parties 1 and 2 jointly filed counter affidavit on 15.07.2020 inter alia stating that information regarding the detention along with other relevant materials were received in the Government of Odisha Home (Special Section) Department on 27.12.2019. The same was approved by the Government on 30.12.2019. It was communicated to the Ministry of Home Affairs, Government of India and the Secretary, N.S.A. Advisory Board on

30.12.2019. The report of the N.S.A. Advisory Board dated 4.02.2020 was received in the Home(Special Section) Department on 5.02.2020 and the same was sent to the Ministry of Home Affairs, Government of India vide department letter No.319/C dated 6.02.2020. On consideration of the opinion of the Advisory Board and relevant materials, the State Government confirmed the detention on 6.02.2020. The order of detention was passed to prevent detenu from acting in any manner detrimental to the maintenance of public order.

6. Opposite Party No. 3, Commissioner of Police, filed counter affidavit supporting the ground of detention and his subjective satisfaction based on objective facts. It is categorically stated that the petitioner has not filed any representation against his detention though he was communicated with the order as per law within the scheduled time.

7. No counter affidavit has been filed by opposite party Nos. 4 and 5.

8. Learned counsel for the petitioner buttressed his argument putting forth that the grounds of detention was served upon the detenu on 24.12.2019 and the detention order dated 19.12.2019 was submitted to the Government on 27.12.2019 in contravention of Section 3(4) & Sec.8 of the NSA, and for that the liberty of the petitioner was placed on the sacrificial altar without any rhyme or reason. It is strenuously urged that as the sitting of N.S.A. Advisory Board seeking his willingness was communicated on 9.01.2020, he could not collect the documents to file representation.Such delay was so prejudicial that he could not make his representation and on that score only, the detention should be held invalid. For that learned counsel relied upon the decision reported in **AIR 2018 SC 3419: Hetchin Haokip Vs. The State of Manipur and others.** Further it is contended that the extension of detention for another six months by Government on 18.03.2020 and for nine months on 17.6.2020 was made illegally without approval of N.S.A. Advisory Board. Such extension, nothing but mere apprehension based upon stale cases, is liable to be set-aside. Learned counsel relies upon the decisions reported in:-

i) Sama Aruna vs. State Of Telangana and anr (2018 3 SCC (Crl.) 441)

ii) Kapa @ Somanath Sahoo Vrs. Satate of Orissa and others (2015120 CLT 800),

iii) Munagala Yadamma Vs. State of A.P and Ors, (2012 1 SCC (Cri) 889

iv) Sri Adikanda Sahu vs. State of Orissa and Ors, (2003 OLR Supp.) 288)

v) Lakhe @ Laxman Bag vs. State of Odisha and Anr. (2017(Supp.2) OLR 346

vi) Smt. Shashi Aggarwal Vs. State of U.P. and Ors, (1988 0 SCC (Cri) 1788)

vii) Nari @ Narsingh Mohanty Vs. Union of India and Ors, (2015 0 CRLJ 89),

viii) Rekha Vs. State of T. Nadu, 2011 2 SCC (Cri) 596.

9. Mr. Katikia, learned Addl. Government Advocate, per contra, submitted that as required under the provisions of the NSA, the copy of detention order dated 19.12.2019 has been served upon the petitioner on the same day and copy of ground of detention has been served upon him on 24.12.2019 and thereby within five days as required under Sec.8 of the NSA. According to him when ground of detention is served on 24.12.2019, it cannot be said that due to delayed service of N.S.A. Advisory Board notice, he could not collect material to file representation. It is also contended by him that the act of petitioner in using lethal weapon to terrorise the public and police in regular intervals was a threat to the maintenance of public order and such subjective satisfaction of the Commissioner of Police and the State Government should not be interfered with.

9.1 It is strenuously urged that the statutory provisions under NSA and under Article 22 of the Constitution of India are religiously followed for the detention and extension of the petitioner. The authority has considered the criminal proclivities of the petitioner leading to the disruption of public order. The grounds of detention are precise, pertinent, proximate and impelling. The impact of petitioner's overt act on society has been clearly stated in the grounds of detention for which the court should not substitute its own opinion for that of the detaining authority. On this point reliance is placed upon the decision reported in **2004 (7) SCC 467, Commissioner of Police Vs. C. Anita.** With regard to extension of detention period by the Government without approval of Advisory Board, learned Addl. Government Advocate placed reliance on the decisions reported in (1) **AIR 1952(SC) 27 Makhan Singh Tarasika Vs. State of Punjab** (2) **A.K. Roy Vs. Union of India (1982) 1 SCC 271** and the Division Bench judgment dated 27.7.2020 of this court in **Gugu @ Subasis Khuntia Vrs. State of Odisha and others** in **W.P.(CRL) 41 of 2020.** Lastly, learned Addl. Government Advocate persuaded us to revisit the judgment dated 22.8.2019 of the Division Bench of this Court in **W.P.(CRL) No.43 of 2019: Rajib Lochan Das Vs. State of Odisha and Ors.** in view of the earlier judgment of Hon'ble Supreme Court in the case of **Mrs. T. Devaki vs. Government of Tamil Nadu and Ors:**

1990 SCR (1) 836 and Harpreet Kaurharvinder vs. State of Maharashtra and anr., AIR 1992 SC 979,1992 SCR (1) 234, on the point that detention order for a period of twelve months at a stretch without proper review is deterrent to the rights of the detenu.

10. The vital aspect of the challenge in this case is the extension of detention period vide order dated 18.3.2020 and again on 17.62020 by the Government without approval of the N.S.A. Advisory Board and submission of report to the State Government by the Commissioner of Police on 27.12.2019 causing prejudice to the petitioner's right to make objection. Added to that, much emphasis is laid upon the grounds of detention which as per petitioner are either stale or not potent enough to affect the maintenance of public order.

10.1 In this nature of case, where the liberty is under threat, admitted facts obviate debate. Admittedly the report of detention order dated 19.12.2019 has been communicated to the Government on 27.12.2019. The petitioner has not filed any objection or representation though he was heard in person before the N.S.A. Advisory Board. The extension of detention period vide order dated 18.03.2020 and 17.6.2020 by the State Government, that means nine months from the date of detention order dated 19.12.2019, has been passed without approval of N.S.A. Advisory Board.

10.2 At the first flush, the attention of the court is drawn to the extension of detention period for further three months on two occasions by the Government sans approval of the N.S.A. Advisory Board. On this score, it is pertinent to make a glance that the Division Bench of this Court vide judgment dated 27.07.2020 in **W.P.(CRL) No. 41 of 2020; Gugu @ Subasis Khuntia Vrs. State of Odisha & others** (Hon'ble Chief Justice was a member) referring the decisions of the Hon'ble apex Court in the case of **Dattatraya Moreshwar Vrs. The State of Bombay and other,** reported in **A.I.R. 1952 SC 181** and in the case of **A.K.Roy Vrs. Union of India & ors.**, reported in **(1982) 1 SCC 271,** has held as follows:-

> "On reading of both the aforesaid decisions it appears, the legal position involving the above aspect has been settled expressing that it is only after the Advisory Board's opinion a duty is cast on the appropriate Government to confirm the detention order and continue the detention of person concerned for such period as it thinks fit. This Court, therefore, observes, after the opinion and report of the Board, a power is already vested with appropriate Government to fix the period for which

> the detenu shall be detained. This Court is of the opinion that discretion lies to the appropriate Government to pass extension order without further reference of the matter to the Advisory Board for its further opinion."

10.3 In view of the above, this court is disinclined to deliberate on that issue again because of the past perfect precedent reiterated in the aforesaid judgment. Result is the negation of the contention of the learned counsel for the petitioner.

11. The next facet of the challenge is a nagging question surfaced from the fact that delayed submission of report to State, i.e., on 27.12.2019 has potentially disrobed the detenu's right to object and the insensitivity of the State to the subject's liberty has been writ large when no explanation is offered for such delay.

11.1 The categorical plea of the petitioner on this point vide para-10 of the writ petition runs thus:-

> "That in this present, the mandate of Section 8 of The National Security Act, 1980 has been violated and the procedure adopted by the Opp. Parties are contrary to the provisions of the Section 3(4) and Section-8 of The National Security Act, 1980. The delay caused by the Opp. Party No.3 has also not been explained in the Grounds of Detention communicated to the Petitioner vide No. 937/CP-Judl Date: 24.12.2019."

11.2 In the decision reported in **AIR 2018 SC 3419: Hetchin Haokip Vs. The State of Manipur and others,** the Hon'ble apex Court has elucidated the law on this score in the following words:-

> "15. The High Court is not correct in holding that as long as the report to the State Government is furnished within twelve days of detention, it will not prejudice the detenu. It is settled law that a statute providing for preventive detention has to be construed strictly. While "forthwith" may be interpreted to mean within reasonable time and without undue delay, it certainly should not be laid down as a principle of law that as long as the report to the State Government is furnished within 12 days of detention, it will not prejudice the detenu. Under Section 3(4), the State Government is required to give its approval to an order of detention within twelve, or as the case may be, fifteen days.
>
> 16. The expression "forthwith" under Section 3(4), must be interpreted to mean within reasonable time and without any undue delay. This would not mean that the detaining authority has a period of twelve days to submit the report (with grounds) to the State Government from the date of detention. The detaining authority must

> furnish the report at the earliest possible. Any delay between the date of detention and the date of submitting the report to the State Government, must be due to unavoidable circumstances beyond the control of the authority and not because of administrative laxity.
>
> 17. In the present case, the District Magistrate submitted the report to the State Government on the fifth day (17 July 2017), after the date of the detention order (12 July 2017). The reason for the delay of five days is neither mentioned in the State Government's order confirming the detention order, nor in the impugned judgment. It was for the District Magistrate to establish that he had valid and justifiable reasons for submitting the report five days after passing the order of detention. As the decision in Joglekar holds, the issue is whether the report was sent at the earliest time possible or whether the delay in sending the report could have been avoided. Moreover, as the decision in Salim hold, there should be no laxity in reporting the detention to the Government. Whether there were administrative exigencies which justify the delay in sending the report must be explained by the detaining authority. In the present case, as we shall explain, this was a matter specifically placed in issue before the High Court. The District Magistrate offered no explanation. This would vitiate the order of detention."

11.3 In the case at hand, the Government received the report from the Commissioner of Police (O.P.No.3) on 27.12.2019 about the detention of the petitioner commencing from 19.12.2019. No explanation has been given in any manner as to why report could not be submitted to the Government earlier .This is a laxity remains unexplained and this vitiates the order of detention.

12. The thrust of the next argument is the subjective satisfaction of the Commissioner of Police. Learned counsel for the petitioner has averred and pointed out that in Chandrasekharpur P.S. Case No.114 dated 10.3.2019, the informant Sudam Charan Sahoo and in Chandrasekharpur P.S. Case No.360 dated 26.8.2017 one Gouranga Barik had voluntarily informed the trial court regarding the innocency of the petitioner. The result of those cases is not disclosed. Instead, the petitioner is stated to have secured acquittal in another two cases, i.e., Chandrasekharpur P.S. Case No.235 dated 5.11.2012, corresponding to G.R. Case No.4025 of 2012 and Chandrasekharpur P.S. Case No.143 dated 26.3.2016 corresponding to C.T. Case No.1428 of 2016. The ground of detention vide Annexure-2, reveals that the petitioner was involved in sixteen cases. The petitioner has not specified the particular of cases which are pending, awaiting final forms. Fact remains that petitioner was getting involved in criminal activities in regular intervals. The particulars of cases mentioned in the ground of detention cannot be said incorrect. The

incidents are highlighted in the ground of detention with definite impact on the society. The facts substantiated in the grounds of detention cannot be said vague. The petitioner has not shown any misgivings in the grounds of detention save and except that two cases have ended in acquittal.

12.1 In the decision reported in **2011(5) SCC 244 Rekha Vs. State of T.Nadu TR. Sec. to Government and another**, the Hon'ble apex Court has held as follows:-

> "35. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a 'jurisdiction of suspicion', (**Vide State of Maharashtra vs. Bhaurao Panjabrao Gawande**, **(Supra)- para-63**). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital."

12.2 The Hon'ble Supreme Court, in the decision reported in **(1972) 3 SCC 831: Kanu Biswas vs. State of West Bengal** has held as follows:-

> "7.The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, according to the dictum laid down in the above case, is a question of degree and the extent of the reach of the act upon the society. Public order is what the French call "order publique" and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, as laid down in the above case, is: Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed?"

12.3 On the touch stone of above test, if the facts mentioned in the ground of detention are considered, it would justify that the act of detenu has cast adverse impact upon the even tempo of the life of the community. The Court, therefore, finds no reason to substitute its opinion for that of the detaining authority with regard to act of threat to the maintenance of the public order. As we have already held that the detention order suffers from the vice of delayed submission of report to the Government vitiating its force, further deliberation on this point would help nothing but brevity.

13. Point advanced but not germane to the facts needs to be addressed now. Learned Addl. Government Advocate persuaded us in the written argument to revisit the judgment of this court in the Division Bench dated **22.8.2019 in W.P.(CRL) No.43 of 2019: Rajib Lochan Das Vs. State of Orissa and others;** on the ground that the earlier Hon'ble Apex Court judgment in **Mrs. T. Devaki** and **Harpreet Kaurharvinder (Supra)** speak contrary. In **Rajib Lochan** case (Supra) the Division Bench of this Court in the facts that the State Government had approved the order of detention for twelve months at a stretch commencing from 18.2.2019 held that ordering detention for a period of twelve months at a stretch without proper review was a deterrent to the rights of detenu.

13.1. To arrive at the said conclusion, the Division Bench put reliance upon two decisions of the Hon'ble apex Court, i.e., **Cherukuri Mani vs. Chief Secretary, Government of Andhra Pradesh and others: (2015) 13 SCC 722 and Lahu Shrirang Gatkal vs. State of Maharashtra reported in (2017) 13 SCC 519.**

14. In view of the virtual hearing of this court for pandemic and submission of written argument, we are unable to get assistance of learned counsel for the petitioner on this point. The **Cherikurimani** decision of the Hon'ble Supreme Court was a three judge bench judgment. On the issue as to whether the Government have power to pass a detention order to detain a person at a stretch for a period of twelve months under the provisions of Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, the Hon'ble Court referring the mandate of clause 4(a) of the Article 22 of the Constitution of India held as follows:-

> "Normally, a person who is detained under the provisions of the Act is without facing trial which in other words amounts to curtailment of his liberties and denial of civil rights. In such cases, whether continuous detention of such person is necessary or not, is to be assessed and reviewed from time to time. Taking into consideration these factors, the legislature has specifically provided the mechanism "Advisory Board" to review the detention of a person. Passing a detention order for a period of twelve months at a stretch, without proper review, is deterrent to the rights of the detenu. Hence, the impugned government order directing detention for the maximum period of twelve months straightaway cannot be sustained in law."

14.1 The **Lahu Siranga Gadkal** (supra) case is a two judge bench judgment which has referred to the ratio of the aforesaid Cherukurimani case.

14.2. In **Harpreet Kaurharvinder** case (supra) the two judge bench of the Hon'bel Supreme Court considered Section-3 (2) of the Maharashtra Prevention of Dangerous Activities of Slumlords Bootleggers and Drug Offenders Act, 1981 and held that "*the order of detention in the instant case was vitiated because it was for a period of more than three months*." In **Harpreet Kaurharvinder** case, the previous judgment of **Mrs. T. Devaki** has been referred to in Para 16-A. It is mentioned therein that those cases were decided on their peculiar facts.

14.3. In **Mrs. T. Devaki** case of three judge bench, the detention order under Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Immoral Traffic Offenders and Slum Grabbers, Act, 1982 was considered and it is held in Para-15 that "*we are, therefore, of the opinion that the impugned order of detention is not rendered illegal on account of the detaining authority's failure to specify period of detention in the order*."

15. In the case at hand, no detention order in respect of petitioner has been passed for more than three months at a time. As stated above, the initial detention order was passed on 19.12.2019 which was extended on 18.3.2020 and again on 17.6.2020. So in the facts of this case, there is no contentious issue living or raised in the pleading questioning the period of detention more than three months passed incrementally. When there is no issue in the facts of the case, the unilateral persuasion to revisit the earlier judgment of a co-lateral bench in **Rajib Lochan Das** case does not merit adjudication. It is an academic question. It has no bearing on the right or liability of the parties before us.

16. In the decision reported in **AIR 1974 SC 505: Lokanath Pradhan vs. Birendra Kumar Sahu**, their lordships have stated in categorical words that " It would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court could not engage in a fruitless exercise. It would refuse to decide a question unless it has bearing on some right or liability in controversy between the parties."

16.1. Support may also be drawn from a constitutional bench judgment of the Hon'ble apex Court reported in **AIR 1983 SC 239, 1983 SCR (1) 1000; Sanjeev Coke Manufacturing vs. Bharat Coking Coal Ltd**. Suffice to

conclude on this score that this court does not wish to revisit the judgment dated 22.8.2019 in **Rajib Lochan Das (supra)** case as there is no living issue in the facts of the case at hand available.

17. A detenu is not a convict. Power to detain under NSA is not a power to punish for offences. Restrictions placed upon the liberty of a detenu, are well guarded by the command of time stipulated procedure. Any deviation, for its impact upon liberty, is to be earmarked to benefit the detenu.

18. In the wake of above analysis of law and facts, the detention of the petitioner w.e.f. 19.12.2019 and its consequential extension, total for nine months, is found vitiated for the delayed submission of the report to the Government as required under Section 3(4) of the NSA.

19. In the result, the writ petition (criminal) is allowed. The order of detention dated 19.12.2019 passed by the Commissioner of Police, Bhubaneswar-Cuttack under Annexure-1 against the petitioner is quashed. The petitioner be set at liberty forthwith if he is not required to be detained otherwise.

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2020 (III) ILR - CUT- 63

KUMARI S. PANDA, J & K.R. MOHAPATRA, J.

W.P.(CRL.) NO. 4 OF 2020

SUJIT KU. SWAIN @ SUJIT KUMAR SWAIN @ MILAN .....Petitioner

.V.

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

NATIONAL SECURITY ACT, 1980 – Section 3(2) – Detention under – Detention on the basis of involvement of the petitioner in several serious criminal cases on 23.10.2019 – Representation of the petitioner and his wife received on 13.11.2019 – Rejection order served on 04.12.2019 – No explanation regarding the delay of 22 days – Effect of – Held, such a long un-explained delay in dealing with the representation of the petitioner-detenu has certainly infringed his personal liberty – On this score alone, the order of preventive detention is not sustainable. (Para 6)

Case Laws Relied on and Referred to :-

1. 2005 (12) SCC 482 : Chakravarthy .Vs. State of T.N.
2. (1972) 4 SCC 58 : Kalachand Saran Vs. State of West Bengal

For Petitioner : M/s. B.Mohanty, A.Tripathy,B.Sahoo & A.K.Behera
For Opp. Parties: Mr. Jyoti Prakash Pattnaik, Addl. Govt. Adv.
Mr. Udit Ranjan Jena,Central Govt. Counsel

JUDGMENT Judgment delivered on: 23.09.2020

K.R. MOHAPATRA, J.

The petitioner-Sujit Kumar Swain @ Milan @ Sujit Ku.Swain calls in question his order of detention dated 23.10.2019 (Annexure-1) passed by the Collector and District Magistrate, Jagatsinghpur in exercise of power under Section 3(2) of the National Security Act, 1980 (for short, 'the Act').

2. Short narration of facts as revealed from the writ petition is that the petitioner-detenue is a permanent resident of village Sankarpur under Biridi Police Station in the district of Jagatsinghpur. He has been booked in several criminal cases, details of which, are given hereunder:

1) Paradeep PS Case No.276 dated 09.11.2006 u/S 385/507/452/323/506/34 IPC;

2) Paradeep PS Case No.13 dated 13.01.2007 u/S 341/323/294/379/34 IPC;

3) Patkura PS Case No.126 dated 04.05.2007 u/S 392 IPC read with Section 25 of Arms Act;

4) Jagatsinghpur PS Case No.261 dated 23.10.2018 u/S 392 IPC read with Section 25 of Arms Act;

5) Jagatsinghpur PS Case No.263 dated 26.10.2018 u/S 341/387/427/294/34 IPC read with Section 25 of Arms Act;

6) Jagatsinghpur PS Case No.14 dated 29.01.2009 u/S 392 read with Section 25 of Arms Act and Section 9(b) of the Explosive Act, 1884;

7) Jagatsinghpur PS Case No.163 dated 07.07.2010 u/S 120(b) IPC/9(b)of Explosives Act/7 Crl.A. Act;

8) Jagatsinghpur PS Case No.180 dated 31.07.2010 u/S 387/294/307 IPC/25/27 of Arms Act;

9) Jagatsinghpur PS Case No.20 dated 04.02.2013 U/S 341/323/294/364/302/34 IPC/25/27 of Arms Act;

10) Raghunathpur PS Case No.127 dated 12.12.2014 u/S 307 IPC/25/27 Arms Act;

11) Biridi PS Case No.10 dated 25.01.2016 u/S399/402 IPC;

12) Paradeep Lock PS Case No.3 dated 07.01.2017 u/S 452/323/506/34 IPC/25/27 Arms Act;

13) Jagatsinghpur PS Case No.118 dated 29.05.2018 u/S 341/ 294/ 506/ 427/ 323/ 379/ 336/34 IPC/25/27 Arms Act;

14) Biridi PS Case No.79 dated 26.09.2018 u/S 448/342/294/506/34 IC/25 Arms Act/9(b) of I.E. Act;

15) Cuttack Sadar PS Case No.316 dated 18.08.2018 u/S 294/341/506/392/34 IPC/25 Arms Act;

16) Jagatsinghpur PS SDE No.19 dtd.02.10.2019

17) Biridi PS SDE No.12 dated 03.10.2019

18) Biridi PS SDE No.12 dated 09.10.2019

2.1 The District Magistrate, Jagatsinghpur (OP No.2), upon his satisfaction to the effect that the petitioner-detenue has been acting in a manner prejudicial to the maintenance of public order, passed the order of detention under Annexure-1 invoking power under Section 3(2) of the Act. The said order was made over to the petitioner-detenue on 24.10.2019 in the Circle Jail, Choudwar, as he was lodged therein by virtue of an order of remand at the relevant time. Subsequently, on the very same day, a corrigendum was issued rectifying his father's name as Siba Prasad Swain in place of Sarada Prasad Swain and the same was also made over to the petitioner-detenue. The grounds of detention (Annexure-2) was also made over to the petitioner-detinue on the very same day. A copy of the said order of detention was also served on the wife of the petitioner-Detenue, as the petitioner was in judicial custody. As narrated above, the grounds of detention was due to pendency of 18 numbers of criminal cases against the petitioner-detenue, which was the basis of recording satisfaction by the District Magistrate to the effect that the petitioner-detenue was acting in a

manner prejudicial for maintenance of the public order. Subsequently, the State Government in the Home (Special Section) Department, vide its order dated 2nd November, 2019 (Annexure-3) approved the said order of detention of the petitioner. It is also alleged that the said order along with grounds of detention ought to have been made over to the Central Government within a period of 7 days as per Section 3(5) of the Act, which was not complied with. The Central Government did not also pass any order thereof under Section 14 of the Act. Vide letter No.1643 dated 07.11.2019 (Annexure-4), the petitioner-detenue was communicated by the District Magistrate (OP No.3) that the fact of detention of the petitioner-detenue was communicated to the Advisory Board by the State Government, vide its letter No.2653/C dated 02.11.2019. The petitioner-detenue was also informed that if he wishes, he can submit a representation to the Advisory Board for its consideration and he can also ask for personal hearing in the matter, as well. The petitioner-detinue along with his representation on 12.11.2019 (Annexure-5) has submitted a representation for personal hearing by the Advisory Board. The wife of the petitioner-detinue submitted a representation on 05.11.2019 and sought for details of the case record and status of the cases, as described in the grounds of detention from opposite party No.2-District Magistrate, Jagatsinghpur. The matter was placed before the Advisory Board in compliance of Section 10 of the Act. Accordingly, the petitioner-detinue appeared before the Board on 21.11.2019. The Advisory Board holding that there is sufficient ground for detention of the detinue approved the order of detention, which was communicated to the petitioner-detenue vide letter dated 13.12.2019 (Annexure-6) and was served upon him on 19.12.2019. The State Government also rejected the representation dated 12.11.2019 submitted by the petitioner-detenue on 04.12.2019 (Annexure-7), which was served on the petitioner on 07.12.2019. Likewise, the representation submitted by the petitioner dated 12.11.2019 to the Central Government was also rejected on 09.12.2019 (Annexure-8) and it was served upon the petitioner-detenue on 19.12.2019. The petitioner-detenue in the writ petition alleged that the grounds of detention as under Annexure-2 was relating to ordinary law and order situation and did not in any manner affect the public order. It is further alleged that there is delay in considering the representation of the petitioner both by the State Government as well as the Central Government. The detinue was in jail custody at the time of serving of the impugned order of detention and no bail application was pending by then. As such, there was no likelihood of release of the petitioner on bail. As such, the order of detention would not be sustainable.

3. Mr.Mohanty, learned counsel for the petitioner-detenue, submitted that at the time of passing of the impugned order of detention, the petitioner was in jail custody in connection with Biridi PS Case No.79 dated 26.09.2018 initiated under Section 448/343/294/506/34 of IPC read with Section 25 of the Arms Act and Section 9(b) of the Explosives Act, 1884 and also was taken in remand in Cuttack Sadar PS Case No.316 of 2018 initiated under Sections 294/341/506/392/34 of IPC read with Section 25 of the Arms Act. The District Magistrate (OP No.2) has not recorded any reason for his satisfaction that there is likelihood of the petitioner-detenue being released on bail. In absence of recording of such specific satisfaction the entire proceeding including the detention order is vitiated. In support of his contentions he relied upon the following judgments of the Hon'ble Supreme Court.

(i) AIR 1964 SC 334;

(iii) AIR 1986 SC 315;

(iv) AIR 1986 SC 2090.

He further submitted that at the time of service of order of detention no bail application in respect of any case as detailed in the grounds of detention was pending. So there is no likelihood of the detenue being released on bail. As such, the impugned order of detention is without any basis. The impugned order of detention also does not disclose that the detinue was in jail custody. The order of detention was speculative in nature. It also suffers from non-application of mind. The ground Nos.1 to 15 of the memorandum of grounds of detention are stale grounds and does not have any proximity to the order of detention, which depicts that the subjective satisfaction of the District Magistrate (OP No.2) was an outcome of complete non-application of mind. It is his submission that the grounds of detention requires that there is application of mind of the detaining authority to the facts and materials before it, that is to say, it should be pertinent and proximate to each of the individual cases and it should exclude the element of arbitrariness and automation. In the instant case, the detention order has been passed on stale grounds, more particularly ground Nos.1 to 15. In support of his case, he relied upon the following decisions of the Hon'ble Supreme Court.

(i) AIR 1984 SC 211;

(ii) AIR 1985 SC 18;

He further submitted that non-supply of Annexures and documents relied upon by the detaining authority basing upon which the detention order passed vitiates the order of detention, which infringes the right of the detenue under Article 22(5) of the Constitution of India. In support of his contention, he relied upon the following decisions of the Hon'ble Supreme Court.

(i) (1981) 2 SCC 427;

(ii) (1980) 4 SCC 499;

(iii) AIR 1981 SC 1621;

(iv) (1990) 2 SCC 1;

(v) (1980) 2 SCC 270;

He further submitted that there is delay of 45 days in disposing of the representation of the petitioner dated 02.11.2019 by the State Government and 79 days delay by the Central Government. As such, the order of detention is liable to be set aside on the ground of unexplained delay alone. In this regard, he relied on the following decisions of the Hon'ble Supreme Court.

(i) AIR 1972 SC 438;

(ii) AIR 1980 SC 945;

(iii) AIR 1982 SC 1548;

(iv) AIR 1982 SC1170;

(v) (1970) 3 SCC 696;

Indian Penal Code as well as Special Acts in which the petitioner has been booked, have adequate provisions to sufficiently punish the petitioner-detinue, if found guilty of those offences. Thus, there is no necessity to resort to the measures provided under the Act. In that view of the matter, Mr.Mohanty, learned counsel for the petitioner submits that the order of detention is not sustainable and the same is liable to be set aside.

3.1 Although sufficient opportunities have been given to learned Additional Government Advocate for the State, the Collector and District

Magistrate, Jagatsinghpur has only filed his affidavit. The State Government has not filed any reply to the contentions made in the writ petition. However, Mr.Pattnaik, learned Additional Government Advocate produced relevant records concerning detention of the petitioner-detinue for perusal of this Court.

4. Mr.Pattnaik, learned AGA with reference to the affidavit filed by the District Magistrate, Jagatsinghpur (OP No.2) submitted that basing upon the report of the Superintendent of Police, Jagatsinghpur, vide his letter No.4475/IB dated 15.10.2019 and perusing copies of the FIR and other relevant records, the District Magistrate (OP No.2) recorded his subjective satisfaction that the activities of the detenue affected the public peace for which the order of detention under Section-3(2) of the Act was issued vide Annexure-1. It is his submission that the order of detention dated 23.10.2019 along with grounds of detention (Annexure-2) both in Odia and English were served on the detenue on 24.10.2019, while he was lodged in Circle Jail at Choudwar. A copy of order of detention and grounds of detention were also submitted to Smt. Pooja Swain, wife of the detenue. She was also informed regarding detention of her husband under the provisions of the Act as at Annexure-A/2 series. Subsequently, vide order No.2647 dated 02.11.2019, the State Government approved the order of detention. He further submitted that on the representation of the petitioner dated 12.11.2019, parawise comment was sent to the Secretary, Advisory Board vide letter No.1704 dated 18.11.2019 and vide Memo. No.1705 dated 18.11.2019 to the Additional Secretary to Government, Home (Special Section) Department, Odisha, Bhubaneswar. The representation of the petitioner-detenue was rightly rejected by the State Government considering his involvement in various criminal activities affecting public order and tranquility. As such, there is no infringement of right of the petitioner under Article 22 (5) of the Constitution of India. Rather the detenue was provided with the order along with grounds of detention on 24.10.2019, i.e., on the very next day of passing of the order of detention, as he was lodged in Circle Jail, Choudwar being remanded in a case of Cuttack Sadar PS. He was also afforded earliest opportunity to make representation against the said order of detention. The criminal cases pending against the petitioner-detenue does not only involve a law and order situation, but it affects the public order at large taking into consideration the nature of allegation made therein. On 03.10.2019 in the evening, the detenue arrived in a Car with his associates armed with pistol, swords, bhujali, iron rod etc. They created havoc in village Basantpur and

looking at their unruly activities the shopkeepers and inhabitants closed their doors and windows out of fear. The villagers were stunned during that period. The detenue and his associates had out turned the public order completely. However, out of fear not a single person of that village dared to submit report against them. That is not the solitary instance of affecting the public order. Mr.Pattnaik referring to all other cases referred to in the grounds of detention submitted that the activities of the petitioner-detenue is detrimental to maintenance of public order. Hence, there is no infirmity in the order of detention passed under Annexure-1. He further submitted that there is no delay in disposing of the representation of the petitioner either by the State Government or by the Central Government. He further submitted that the petitioner has not made out any case for interference with the order of detention. In the meantime, more than 11 months have already elapsed from the date of passing of order of detention under Annexure-1. As such, this Court should not interfere with the order of detention at such a belated stage. In support of his contentions, he relied upon the following decisions of the Hon'ble Supreme Court.

(i) (2006) 3 SCC 437;
(Union of India Vs. Saleena)

(ii) (2008) 5 SCC 490
(Union of India & Ors. Vs. Laishram Lincola Singh @ Nicolai)

He, therefore, prayed for dismissal of the writ petition.

5. Upon hearing learned counsel for the parties, this Court thinks it proper to deal with the issue of un-explained delay in disposing of the representation of the petitioner-detenue at the threshold. The petitioner was communicated with the rejection of his representation by the Government of Odisha in Home (Special Section) Department, vide letter No.2890/C dated 04.12.2019 (Annexure-7). Although the representation of the petitioner appears to have been received on 13.11.2019 by the State Government, but nothing with regard to the time consumed for disposal of the representation has been stated. It further appears that the order of rejection of Annexure-7 was served on the petitioner on 07.12.2019. As such, there is a delay of 22 days in disposing of the representation of the petitioner by the State Government. Likewise, the rejection of the representation of the petitioner by the Central Government was passed on 09.12.2019 (Annexure-8) and was served on the petitioner-detenue on 19.12.2019. Thus, it took almost 27 days in disposing of the representation of the petitioner and

was communicated after 37 days. The State Government has not filed any affidavit disclosing the grounds of delay in considering and disposing of the representation filed by the petitioner-detenue. From the materials available on record, it appears that the petitioner submitted his representation on 13.11.2019. He also appeared before the Advisory Board on 21.11.2019 and was heard in person. The Advisory Board submitted its report opining that the detention of the detenue (Petitioner) is necessary for maintenance of public order in the locality. As such, there exists sufficient cause for detaining the detenue under Section 3(2) of the Act and the detaining authority was justified in passing the order of detention. However, the State Government by its order dated 04.12.2019 (Annexure-7) rejected the representation of the petitioner-detinue. It appears that the State Government took 22 days (both dates inclusive) in disposing of the representation of the petitioner-detenue. On a perusal of Annexure-7 there appears no ground explaining the delay in disposal of the representation. The Hon'ble Supreme Court in the case of ***Chakravarthy vs State of T.N.*** reported in 2005 (12) SCC 482 held that the delay means 'unexplained delay'. Further, in the case of ***Kalachand Saran Vs. State of West Bengal***, reported in (1972) 4 SCC 58 held as follows:

> *"4. This explanation is extremely vague both as to the time when the so-called various movements by the employees are alleged to have been launched and their nature and duration. Reference to sudden increase in the volume of work due to increased in the volume of work due to increased number of detention cases under the Act is equally vague and it gives no clear idea to this Court as to how far the State Government could be held to be reasonably justified in delaying the consideration of the detinue-petitioner's representation for so long. As has often been pointed out by this Court deprivation of the personal liberty of an individual in our democratic Republic is considered to be a serious matter and our Constitution has been very jealous in prescribing effective safeguards against the infringement of the fundamental right of personal liberty guaranteed by it. It is noteworthy that protection of life and personal liberty guaranteed by our Constitution extends to all persons and is not limited or confined to the citizens of India: Articles 21 and 22. Article 22(5) of the Constitution contains some of those safeguards against preventive detention which have to be complied with by the detaining authority. As there is no trial in cases of preventive detention the representation and its consideration are designed by the Constitution to afford the earliest opportunity to the detinue to have his version in defence considered. No doubt, maintenance of internal security and matters connected therewith are entitled to the greatest priority beause on them depends not only the fate of orderly society and of the freedoms assured to all persons enjoying the privilege of being present in this Republic, but disturbance of internal security may also at times endanger the security of the nation as a whole. Nevertheless, we cannot on this ground alone countenance the position that the State Government is free to adopt a*

leisurely attitude in considering the detinue's representation which, according to Article 22(5) must be considered as soon as or as expeditiously as practicable and without avoidable delay."

6. In the case at hand, the State Government has neither explained the delay in the order under Annexure-7, i.e., the order of rejection of the representation of the petitioner-detenue nor has filed any affidavit explaining the delay of 22 days in considering the representation of the petitioner-detenue. Thus, we are of the considered opinion that the personal liberty of the detenue should not be dealt with in such a casual manner, more particularly when in case of preventive detention, the petitioner-detenue does not face trial to prove his innocence. Mr.Pattnaik, learned AGA relied upon the case law in the case of ***Saleena (supra)*** in which the Hon'ble Supreme Court while dealing with a case of preventive detention under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) categorically held that an order of rejecting representation need not be a speaking order nor does non-communication of the ground thereof rendered it vulnerable. What is necessary is that there should be real consideration of the representation filed by the detinue by the appropriate government /advisory board/competent authority. Even a competent authority/board may not give reasons, but there has to be application of mind. Thus, a judicial review of the order of rejection of the representation of the petitioner is available to the Court. The Court can call for record to see if there has been application of mind or not. From the record produced by Mr.Pattnaik, learned AGA, it appears that on 2nd November, 2019, the representation of the wife of the petitioner-detenue, namely, Pooja Swain was received by the Detaining Authority and the representation of the petitioner dated 13.11.2019 was received by the Government on being forwarded by the Secretary of NSA Advisory Board on 14.11.2019. Parawise comment of the detaining authority on the representation of the petitioner-detenue was received by the State Government on 29.11.2019 and thereafter on 30th November, 2019, representation of the petitioner was rejected but the same was communicated to him only on 04.12.2019. It further appears from the affidavit filed by the District Magistrate that he had sent the parawise comment to the representation of the petitioner on 18.11.2019. Had the State Government filed any affidavit or material to show, as to why it took 11 (eleven) days to be received by the State Government, then the Court could have examined the same. The long delay in receiving parawise comment to the representation of the petitioner by the detaining authority as well as communication of the order of rejection to the

petitioner-detenue has not been explained. There is also no material on record explaining such delay. As such, we are of the considered opinion that such a long un-explained delay in dealing with the representation of the petitioner-detinue has certainly infringed his personal liberty. On this score alone, the order of preventive detention as under Annexure-1 is not sustainable. Admittedly, the State Government has not filed any affidavit refuting the contentions made in the writ petition. The detaining authority-Collector, Jagatsinghpur (OP No.2) although filed its affidavit, he is not competent to explain the delay in receiving the parawise comment to the representation of the petitioner by the State Government. In that view of the matter, the order of preventive detention under Annexure-1, which has been approved by the State Government as at Annexure-3 is liable to be set aside on this score alone.

6.1 The case law cited by Mr.Pattnaik, learned AGA in ***Laishram Lincola Singh (supra)*** is not applicable to the case at hand as the State Government has not filed any material explaining the delay.

7. In view of the discussions made above, the case laws relied upon by learned counsel for the petitioner need no further elaboration.

8. Accordingly, this Court, without entering upon the merits of the contentions of learned counsel for the petitioner on all other grounds raised except the ground of unexplained delay in disposal of the representation of the petitioner, allows the writ petition and sets aside the order detention dated 23.10.2019 (Annexure-1) passed by the Collector and District Magistrate, Jagatsinghpur (OP No.2), the detaining authority under Annexure-1 and all consequential orders thereof on the ground of delay in disposal of the representation of the petitioner. The Writ Petition (Criminal) is accordingly allowed. No cost.

The records submitted by Mr. J.R. Pattnaik, Additional Government Advocate shall be returned to him forthwith.

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2020 (III) ILR - CUT- 74

KUMARI S. PANDA, J & S. K. PANIGRAHI, J.

CRA NO.183 OF 1999

PRAKASH DEHURY .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Allegation of killing of wife by the husband – No motive established – No eye witness to the occurrence – Conviction based on circumstantial evidence – Chain of circumstances not complete – Effect of – Held, in our considered opinion, only seizing the weapon used in the crime and other articles at the instance of the accused proves to be a huge circumstantial gap sans corroboration – The circumstances so found do not appear to be conclusive in nature – The entire circumstantial evidence is half-baked and seems to be more fictionalised – We, therefore, have no hesitation in holding that the submission of the prosecution has also dotted with probabilities and failed to go beyond mere suspicion – The Ld Trial Court has floundered to appreciate the evidences in proper perspective as law is well settled to exclude the evidence which is embedded in probabilities and went downhill to complete the chain of evidence – Thus, the prosecution has grossly failed to prove the charge against the accused beyond reasonable doubts to get Section 302 of IPC attracted – The accused would then at any rate be entitled to the benefit of doubt on the cause of death.

Case Laws Relied on and Referred to :-

1.Criminal Appeal No. 1134/2013 (S.C of India) : Navaneetha krishnan Vs. The State by Inspector of Police.
2. (2004) 10 SCC 657: Anter Singh Vs. State of Rajasthan.
3. (1984) 4 SCC 116 : Sharad Birdhichand Sarda Vs. State of Maharashtra.
4. AIR 1977 SC 170 : Rabindra Kumar Dey Vs. State of Orissa.
5. AIR 1979 SC 1848 : Syad Akbar Vs. State of Karnataka.

For Appellant : Shri G. K. Mohanty, G. P. Samal, S.R. Swain, D.K. Nanda & P. K. Panda.

For Respondent : Shri Janmejaya Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing :28.08.2020 : Date of Judgment :30.09.2020

S. K. PANIGRAHI, J.

1. The appellant in the present appeal has assailed the judgment dated 02.07.1999 passed by the learned Additional Sessions Judge, Angul in S. T.

No. 49-A of 1995/12 of 1998 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. The brief factual conspectus as reflected in the FIR is that one Bijaya Kumar Pradhan lodged an FIR before Handapa Police Station at 3:30 AM on 13.04.1995 alleging that on 12/13.04.1995 at about 1:00 AM, one Prahallad Dehury, the elder brother of the appellant came to the house of the informant and intimated him stating that the appellant Prakash Dehury had cut the throat of his own wife, named Soudamini (the deceased) and requested the informant to provide a truck to carry the injured to a nearby hospital. He further stated that the informant had seen the cut injury inflicted on the throat of the deceased and he was part of the pre-hospital transport arrangement facilities. Thereafter, Prahallad Dehury, Pramod Dehury and the present appellant took the injured to the hospital for treatment. Initially, the case was registered under Section 307 of IPC. Since the injured died, the case was turned to under Section 302 of IPC.

3. On the basis of the FIR, the police registered it as P.S. Case No. 17/95 and started investigation of the case and after completion of the same, charge-sheet was submitted against the present appellant for the offence punishable under Section 307 of IPC and later under Section 302 of the IPC because of the death of the victim. After commitment, the appellant was charge-sheeted under Section 302 of IPC before the learned Sessions Judge, Dhenkanal.

4. In order to prove the prosecution story, the prosecution examined as many as 13 witnesses namely;

PW-1: Dr Jayakrishna Nayak
PW-2: Lambodar Dehury
PW-3: Srinivas Roul
PW-4: Pramod Dehury
PW-5: Tilottama Dehury
PW-6: Artatrana Pradhan
PW-7: Sanak Kumar Pradhan
PW-8: Bijay Kumar Pradhan
PW-9: Prahallad Dehury
PW-10: Paramananda Dehury
PW-11: Rajkishor Dora
PW-12: Debabrata Pradhan
PW-13: Dr L.K.Sahu

It was the case of the defence that on the night of occurrence, the accused/appellant accompanied by his brother Prahallad and some other villagers had been to watch 'danda nata (Opera)' being staged in the nearby village. The appellant and some of the co-villagers who were present at the venue of the said "Danda nata" were informed about the sharp-cut injuries on the neck of the deceased which were inflicted by somebody and on getting such information; the appellant along with some other co-villagers took the injured to the hospital in promptitude for medical treatment. She made a gallant fight for life but ultimately she breathed her last. There is no ocular witness who could state that he has seen the accused attempting to kill the deceased. The facts and circumstances of the case, does not attribute a supervening role with respect to the said act of the accused. The appellant also consistently pleaded innocence as he did not have any ill-motive towards his deceased wife. He further submits that the prosecution story is dotted with probabilities and it is tainted. It is contended that important eyewitness has turned hostile yet the trial court has not given credence to this aspect.

5. The Investigating Officer has examined the informant and other witnesses. He visited the spot and seized some incriminating materials used in the commission of the offence. Since it is a case under Section 302 of IPC, the Investigating Officer sent all the information to the Court of the learned SDJM, Athamalick while examining the accused Prakash Dehury. The appellant confessed his guilt and disclosed that he had concealed the weapon of offence i.e. axe near a 'Dimiri' tree at Rajabandha Nala. The appellant led the Investigating Officer to the spot where he had concealed the weapon of offence and gave recovery of the axe stained with blood in presence of some independent witnesses. The Investigating Officer also seized the blood-stained lungi and a blood-stained napkin belonging to the accused/appellant. In addition to that, the Investigating Officer also seized one red colour saree, some chudi (bangles) and two steel rings. After seizure of those articles, the weapon of offence and other articles, the same were sent for examination. The Medical Officer also opined that the injuries had been caused on the body of the deceased, could be possible by a sharp weapon like axe produced by him.

6. According to the prosecution, the presence of extensive human blood of 'O' group, on the axe, on the napkin of the appellant and on the wearing apparels (saree) of the deceased, as is clear from the chemical examination report, which are pointer to the involvement of the appellant and establishes that he is the author of the crime.

7. On the other hand, it is pleaded in grounds of appeal that on the night of occurrence the accused along with his brothers and some other co-villagers had been to watch Danda Nata (Opera), hence no motive can be ascribed to the present appellant. It is further pleaded that the accused did not have the motive to kill his wife. Most interestingly, no independent witness has supported the prosecution case and all were in a denial mode and turned hostile, especially the prosecution has heavily relied on the evidence of PW-9 and PW-11 who were already proved the leading recovery of the alleged weapon under Section 27 of the Evidence Act. The Ld. Addl. Sessions Judge has relied on the evidence of PW-8 to prove his motive and the evidence of PW 11 has been relied upon to prove the leading to the discovery of the alleged weapon used in the offence which is erroneous. Apart from that, the witnesses don't support the factum of discovery of the seized weapon.

8. He further pleaded that the learned Additional Sessions Judge has failed to appreciate that PW-9 has stated in the Court on oath that he along with the accused appellant has gone to see opera on the night of the occurrence. At about 9:00 PM, at that time, his mother, his wife and children as well as deceased were all there in their home. They were intimated by the accused brother and others regarding the said incident in the venue of opera. Thereafter, on return, PW-9 along with the accused appellant and deceased had come to the house of the PW-8 to request him to arrange a truck to take the injured to the P.S. The truck was arranged from Bibekananda Biswal. The deceased succumbed at the hospital. It is not known under what circumstances how the statements of the injured were neither recorded by the Doctor nor by the Inspector of Police, though the injured was alive till she was treated at the Angul Hospital.

9. Learned counsel for the appellant states that admittedly there were no eye-witnesses present at the spot of occurrence and the present case is purely based on circumstantial evidence. The learned Additional Sessions Judge has solely relied on two circumstances, namely, the accused had a motive to do away with the life of his wife and secondly, the accused had led to the recovery of the weapon under Section 27 of the Evidence Act while he was in police custody. Both the observations and findings of the learned Additional Sessions Judge are erroneous and not substantiated by proper evidence which can not be taken as a cogent piece of evidence to convict the appellant.

10. He further submits that the learned Additional Sessions Judge has relied on the evidence of PW-9 (post occurrence witness), who is the elder brother of the appellant, during cross-examination. The said witness has attributed the motive to the crime by his own younger brother/the present appellant. Learned Additional Sessions Judge has failed to appreciate that the statement of PW-9 went uncooroborated. Further the brother of the deceased was also never examined by the trial court to prove that PW-9 had given such statement during examination by the Public Prosecutor. Furthermore, there was no discord or quarrel amongst the accused appellant and the deceased. No witnesses have talked about anything relating to their quarrel or disturbances in their relationship which is also wholly uncorroborated.

11. It is pleaded on behalf of the appellant that while dealing with the evidence of PW 8, the Ld Trial Court has made mountain out of mole hill and arrived at a conclusion hastily. In fact, the Apex Court in ***Navaneetha krishnan vs. The State by Inspector of Police***[1] has held that, Section 27 of the Indian Evidence Act, incorporates the theory of confirmation by subsequent facts, that is, statements made in police custody are admissible to the extent that they can be proved by subsequent discovery of facts. Discovery statements made under Section 27 of the Indian Evidence Act can be described as those which furnish a link in the chain of evidence needed for a successful prosecution. In the present case, such link is conspicuously missing. The quintessential requirements of Section 27 of the Indian Evidence Act, 1872 have been succinctly summed up in the matter of ***Anter Singh*** **V/s** ***State of Rajasthan***[2], in the following words:

> "*…16. The various requirements of the section can be summed up as follows:*
>
> *(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.*
>
> *(2) The fact must have been discovered.*
>
> *(3) The discovery must have been in consequence of some information received from the accused and not by the own act of the accused.*
>
> *(4) The person giving the information must be accused of any offence.*

1. *Criminal Appeal No. 1134/2013 (Supreme Court of India*), **2.** (*2004) 10 SCC 657*

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible…"

The aforesaid chain is grossly absent in the evidence of PW-11 before whom the appellant has allegedly made a statement which led to the discovery of the alleged weapon of offence. This demonstrates a clear inapplicability of Section 27 of the Evidence Act.

12. It is further pleaded that the facts and circumstances of the case do not indicate nor does it prove the involvement of the appellant in the said crime. The trial court has ignored the material evidence and facts available on face of record. It has failed to apply its judicial mind and grossly failed to appreciate evidence in correct perspective. Learned counsel for the appellant also submits that there is complete absence of any *mens rea* to kill his own wife. Though the cloud of suspicion is still looming large as to who has caused the grievous injury in the neck of the deceased.

13. The appellant further pleaded that the learned Additional Sessions Judge should have read the evidence of PW-9 in entirety and appreciated the evidence in proper prospective. The said PW-9 has stated in the cross examination that:

" ... So far my knowledge goes accused was pulling on well with the deceased Soudamini, there was no discord and disharmony in between them. On the night of occurrence, in day time the accused was living with the deceased happily. The brother of deceased brought the deceased Soudamini many days prior to this incident to our house"

This statement makes it abundantly clear that under no stretch of imagination, it can be said that this appellant had any motive for killing his own wife. But the Ld. Trial Court has used this piece of evidence against the appellant. Further, Ld Trial court has also erred in assessing the evidence of PW 8 to come to a conclusion that the deceased died before she was brought to the house of PW-8. On the contrary, the I.O. (PW-11) has categorically stated that the victim lady Soudamini was alive while she was brought to the Police Station.

14. In the absence of any corroboration of evidence of PWs 8, 9 and 11 are inadmissible under the law. In fact, the broad spectrum or the prosecution version has been very chequered and confusing. The Rule of Prudence, however, only requires a more careful scrutiny of the evidence of the independent witnesses, since they can be said to be interested in the result of the case projected by them but in the present case the independent witnesses have turned hostile except PW-11.

15. Learned counsel for the State Mr Katikia states that admittedly there were no eye-witnesses present at the spot of occurrence and the present case is purely based on circumstantial evidence. The learned Additional Sessions Judge has solely relied on two circumstances, namely, the accused had a motive to do away with the life of his wife and secondly, the accused had led to the recovery of the weapon under Section 27 of the Evidence Act while he was in police custody.

16. He further submits that assuming for the sake of argument but not admitting the fact that there is no ill motive of the accused against the deceased. According to him, in the absence of any *mens rea* for committing such a heinous crime, how could the deceased get such a severe injury and who has committed the murder, which is a larger issue needs to be resolved and the Ld Trial Court has rightly resolved the issue.

17. Learned trial Court in Paragraph-16 of the judgment has clearly discussed the above aspect especially with respect to the absence of knowledge by the family members of the appellant, when the offence was committed. It is also quite improbable that some unknown culprits who had committed such crime. The family members of the deceased also deposed before the Court and failed to state anything about the real culprit who had committed the crime. During the course of investigation, it was unearthed that on account of love affairs with another girl, the appellant was torturing the deceased and out of anger, he committed the murder. Shri Katikia, learned counsel for the State submits that there is no doubt over the finding of the learned trial Court that the accused is the author of the crime. Hence, this Court should not interfere with the justifiable and prudent finding of the learned trial Court.

18. We heard Mr G. K. Mohanty, learned counsel for the appellant and Mr J. Katikia, learned Counsel appearing on behalf of the respondent,

scanned through the prosecution witnesses examined during the trial. Pertinent question confronted by this Court is that who is the real culprit involved in the offence. The appellant had repeatedly stated that he had no ill motive against the deceased and he had also not present at the spot at the time of committing the offence. It was curious to know as to how the Investigating Officer could be able to recover the weapon of offence i.e. axe used by the accused which was led by the accused to recover the same though the same is also under cloud being uncorroborated.

19. In fact, PW-9 has been declared hostile as during the course of examination, PW-9 has answered in negative to all the questions put by the Public Prosecutor. In the above circumstances, the learned Additional Sessions Judge has relied upon the evidence of PW-9 to come to a conclusion that the accused appellant had a motive to kill his wife, is totally unacceptable in the eyes of law. Though motive has an important role in punishment theory as it reinforces the centrality of shared moral judgments, it is markedly absence in the present case.

20. In so far as the alleged recovery of weapon of offence used in the crime and other incriminating materials, the learned Additional Sessions Judge has relied on the evidence of PW-11, who has stated on oath that the appellant confessed his guilt and admitted that he had concealed the weapon which is again not supported by the witnesses. It is curious to know that during cross-examination, PWs-3 & 7 (i.e. seizure witness and post occurrence witness) have not whispered a single word about the seizure of the weapon of offence leading to the discovery of weapon of offence. However, the axe was seized by the Investigating Officer from an open space and it was not found to be concealed. Therefore, no stretch of imagination, it can be concluded that weapon of offence is recovered.

21. PW-9 has categorically stated on oath that on the night of occurrence, he along with the accused appellant had gone to see ‘danda nata’ and the wife of the deceased was at their home alive. They came to know about the alleged occurrence at the opera place, it means that the occurrence had taken place while the appellant was not at home. This part of the statement of PW-9 had neither been refuted nor objected by the prosecution. Hence, the present appellant cannot be said to be the author of the alleged crime. He has also heavily emphasized on the confessional statement of PW-8, which is reflected in Para-9 of the trial Court’s judgment that it cannot be said that the

wife died in the hospital. Though he has proved from the statements of PWs, the wife of the appellant was taken to PW-8's house and thereafter she was taken to the P.S., where initially the case was registered under Section 307 of IPC, at that time she was alive. Thereafter, the wife of the appellant was sent to Handapa Hospital and was referred to Angul Medical, where she was stitched. Hence, the learned Additional Sessions Judge seems to be eclipsed by prejudice which has impacted his internal calculus sentencing. In view of the facts and circumstances narrated hereinabove by the appellant, the prosecution has miserably failed to bring home the charges against the appellant as there is no other circumstance to prove that the appellant is in any manner remotely connected with the above crime.

22. Doctor of Handapa Hospital then referred the patient to the Headquarters Hospital at Angul because of her seriousness. Doctor stitched the injuries of the injured in the morning but she could not be saved and she was expired at about 12 noon. It was also stated by PW-9 that the relationship between the accused and the appellant was quite normal. There was no discord and disharmony, which could be attributable to such a heinous crime by the appellant. The statement of PW-13, who is the Medical Officer, conducted post-mortem examination and stated that Larynx injured oedematus and conjested. Trachea oedematus and conjested. Both lungs, pleura are oedematous and conjested. The above injuries have cut the platysme muscle, sternohyoid muscle and thyohyoid muscle, jugular vein and vocal cord and recurrent laryngel nerve. All other internal viscera of thorax and abdomen are intact and congested. He has opined that cause of death is due to asphyxia resulting from injury to larnynx and vocal cord.

23. The difficulty presented by the instant case in finding out the recognisable contributory causes leading to bringing about the effect and then to find whether the responsibility for the result could be assigned to the present appellant or not. But how far can indirect indictment to the present appellant be sustainable in criminal jurisprudence? Though *mens rea* as a legally essentially ingredient in fixing the criminal liability, it is not visible in the instant case.

24. The entire story is based on a heightened appreciation of circumstantial evidence with nimble narrative without substantiated by cogent evidence. In the case of **Sharad Birdhichand Sarda v. State of Maharashtra**[3], the Supreme Court opined that before arriving at the finding

3. *(1984) 4 SCC 116.*

as regards the guilt of the appellant, the following circumstances must be established:

> *152. (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(3) the circumstances should be of a conclusive nature and tendency;*
>
> *(4) they should exclude every possible hypothesis except the one to be proved; and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

Further in the case of **Navaneetha Krishnan vs The State** (Supra), the Supreme Court while allowing the appeal of the accused opined that:

> *23. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the Accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to Rule out a reasonable likelihood of the innocence of the Accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the Accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes; unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the Accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.*

25. The Investigating Officer has grossly failed to corroborate the prosecution story. Only seizing the weapon, used in the crime and other

articles at the instance of the accused, does not indicate that the accused is the brain behind the crime. The theory of cause and effect relationship is not based on the hypothesis of guilt in the present case. The entire circumstantial evidence fails to show beyond reasonable doubt regarding the involvement of the accused. The Trial Court's findings that circumstances were more than enough to install a reasonable doubt is unacceptable in the light of the discussion hereinabove.

26. PW-9, Prahallad Dehury, in his cross-examination, turned hostile. Even though a witness has turned hostile, it is not necessary that his testimony be rejected in toto as established in the cases of **Rabindra Kumar Dey v. State of Orissa**[4] and **Syad Akbar v. State of Karnataka**[5]. However, the Court may decide to rely upon the creditworthy parts of his testimony only after corroboration with other reliable evidence as iterated in the case of **Rabindra Kumar Dey** (supra):

> *"18. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."*

Even though the motive of the accused has not been proven beyond reasonable doubts, it may be a fact that the family members of the appellant did not utter a single word regarding the crime nor did anybody talk about the so-called love affairs with another girl as propounded by the prosecution. There was no sign of skirmishes reported during their day to day life and even complete absence of any kind of dressing up theory on the part of appellant. The Investigating Officer has grossly failed to corroborate the prosecution story on this aspect. In our considered opinion, only seizing the weapon used in the crime and other articles at the instance of the accused proves to be a huge circumstantial gap sans corroboration. The circumstances so found do not appear to be conclusive in nature. The entire circumstantial evidence is half-baked and seems to be more fictionalised. We, therefore, have no hesitation in holding that the submission of the prosecution has also dotted with probabilities and failed to go beyond mere suspicion. The Ld Trial Court has floundered to appreciate the evidences in proper perspective as law is well settled to exclude the evidence which is embedded in

4. *AIR 1977 SC 170*, **5.** *AIR 1979 SC 1848*

probabilities and went downhill to complete the chain of evidence. Thus, the prosecution has grossly failed to prove the charge against the accused beyond reasonable doubts to get Section 302 of IPC attracted. The accused would then at any rate be entitled to the benefit of doubt on the cause of death. In view of the above facts and circumstances, we find sufficient reasons to differ from the learned Additional Sessions Judge, Angul.

27. Accordingly, the Criminal Appeal filed by the appellant stands allowed. The judgment of conviction and sentence dated 02.07.1999 passed by the learned Additional Sessions Judge, Angul in S. T. No.49-A of 1995/12 of 1998 is hereby set aside. The bail bond of the appellant stands discharged. The LCR be returned forthwith to the Court from which it was received.

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2020 (III) ILR - CUT- 85

S. K. MISHRA, J & B.P. ROUTRAY, J.

JCRLA NO. 141 OF 2004

ANUPRAM YADAV .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Killing of a lady allegedly having illicit relationship with the brother of the accused – No eye witness to the occurrence – Conviction based on circumstantial evidence – Chain of circumstances not fully established – Effect of – Indicated.

"Thus, from above discussions, it becomes clear that, except the information leading to discovery of the weapon of offence relevant u/s. 27 of the Indian Evidence Act, all other circumstances discussed by the trial court are not free from reasonable doubts. In a case where evidence is of circumstantial in nature, each circumstance must be fully established before drawing any conclusion there from. Here it would not be out of place to have relook to the evidence of P.W.3. As discussed earlier, by excluding the confessional part from her evidence, the remaining part throws some light on post occurrence conduct of the appellant that he was seen with blood stained axe (M.O.I) and blood stains appearing on his wearing apparels. Bereft of some discrepancies in this part of evidence of P.W.3 that she had not stated

about M.O.I to the I.O. during investigation, even if the same is added as one more circumstance to that earlier circumstance useful u/s.27 of the Indian Evidence Act, still the chain of circumstance is not found complete to unerringly point towards the guilt of the accused. It is important to see that not only the chain is complete but also that no reasonable ground is left in support of innocence of the accused. Of course it is established that blood stain marks of human origin have been found on the wearing shirt and Lungi of the deceased (M.Os.II & III) and the axe (M.O.I) which were discovered at his instance, but the same are definitely not sufficient to clearly establish the guilt of murder of the deceased by the appellant even though, as per the opinion of P.W.8, M.O.I could be the possible weapon of offence in view of the nature of injuries found on the deceased. But, it is repeated that, in our considered opinion, these circumstances cannot be said completing the chain of circumstances unerringly pointing the guilt of the appellant leaving all possible hypothesis except the guilt of the appellant. Thus, prosecution case is not seen free from all reasonable doubts and in view of the discussions made above, we are constrained to hold that the prosecution has not satisfactorily established its case beyond all reasonable doubts to clearly hold that the appellant had committed the murder."

(Para 14)

Case Laws Relied on and Referred to :-

1. AIR 1952 SC 343 : Hanumant Govind Nargundkar & Anr. Vs. State of Madhya Pradesh.
2. AIR 1984 SC 1622 : Sharad Birdhichand Sarda Vs. State of Maharashtra.
3. (1969) 1 SCC 37 : M.C. Verghese Vs. T.J. Poonan & Anr..
4. (AIR 1954 SC 704) : Ram Bharosey Vs. State of Uttar Pradesh.
5. (2003) SCC Online Bombay 300: 2003(2) MahLJ 580 : Bhalchandra Namdeo Shinde Vs. the State of Maharashtra.

For Appellant : Mr. Satyabhusan Dash.

For Respondent: Mr. Janmejaya Katikia, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 23.09.2020

B.P. ROUTRAY, J.

This appeal has been preferred by the sole appellant against his conviction and sentence of imprisonment of life under Section 302 of IPC passed by the learned Additional Sessions Judge, Nuapada in Sessions Case No.74/9 of 2003 dated 22.01.2004.

2. The appellant was charged for murder simplicitor of one Bimala Bai Sahoo (hereinafter called as 'the deceased'). Prosecution's case in nutshell is that, the appellant and P.W.2 are two brothers and the deceased is the wife of P.W.1. P.Ws.2 and 1 were in good relationship. However the appellant was not pulling well with the P.W.2, his elder brother. Appellant suspected that

his elder brother (P.W.2) had illicit relationship with the deceased and doubted that she was antagonizing his brother (P.W.2) against him. On the fateful day, during noon time, when the deceased had gone near the field of the appellant to attend the call of nature, the appellant finding her alone, severed her head by means of an axe (M.O.I). The body and the head were lying severed in the field of P.W.2. The F.I.R. was lodged by P.W.1 (husband of the deceased) stating that when he returned to his house without finding the deceased in the house, he went for searching her at around 2.00 p.m. and ultimately found the body and head of the deceased laying in the paddy field of P.W.2. Upon registration of the FIR, investigation was taken up by P.W.10 (the Investigating Officer), the then O.I.C. of Nuapada P.S. He held the inquest over the dead body and head, prepared the spot map, and arrested the accused (appellant) on the next day. He also seized the weapon of offence i.e. axe (M.O.I) as per leading to discovery made by the appellant.

3. Prosecution examined 12 witnesses in total and amongst them most important are, P.W. 1, 3, 10 & 8. P.W.1 is the husband of the deceased, P.W.3 is the wife of the appellant, P.W.10 is the I.O., and P.W.8 is the Medical Officer, who conducted the postmortem examination. These four witnesses are the main witnesses for the prosecution case. Besides, 17 documents have been marked on behalf of the prosecution. On the other hand defense did not lead any evidence either oral or documentary. The defense plea was complete denial and false implication. The learned Addl. Sessions Judge, after analyzing the evidence brought on record found the appellant guilty of murder of the deceased. It is seen that, the conviction is based completely on circumstantial evidence of which extra judicial confession has played a vital link. However, before going deep into the impugned judgment, the nature of death of the deceased needs to be seen at the outset since this is a case of murder.

4. The Medical Officer who conducted post-mortem examination has been examined as P.W. 8 and the P.M. report is Ext.9. Said P.W.8 duly examined the headless body as well as the severed head and opined that the same was of the deceased. The evidence of P.W.8 reveals four external injuries around the neck severing the head from the body and two more injuries on the body below both side of the chest. All such injuries had impacted the death of the deceased due to hemorrhage and shock resulted from cutting of the great vessels of both side of the neck, spinal cord, trachea and vertebra by multiple incised injuries. It is also opined by P.W.8 that all

the injuries were homicidal in nature. Therefore, from the evidence of P.W.8, there cannot be any second opinion than the homicidal nature of death of the deceased.

5. There is no eye witness to the occurrence and the case is based completely on circumstantial evidence. As a matter of fact in the evidence laws, there is no difference between the 'direct evidence' and 'circumstantial evidence'. The difference is only regarding standard of proof. Here, it is needed to discuss certain settled principles of the cases of circumstantial evidence.

6. In the case of ***Hanumant Govind Nargundkar & Anr. Vs. State of Madhya Pradesh, reported in AIR 1952 SC 343***, the Apex Court observed as under:

> "……It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused……."

Later in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra, reported in AIR 1984 SC 1622***, the Apex Court has observed :

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> xxx xxx xxx
>
> 179. We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.
>
> 180. It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made."

On examination of record and the impugned judgment, it is seen that the circumstances founding the conviction are, extra judicial confession, leading to discovery of the weapon of offence and wearing apparels having blood stains, and the motive of the appellant.

7. First, regarding extra judicial confession, the same is seen founded upon the evidence of P.Ws. 3 and 6. P.W.6 has stated that *"before myself and villagers, the accused had admitted to have committed murder of the deceased"*. This statement of P.W.6 made in the deposition, is appearing unreliable for lack of details. He has not stated when and where the appellant confessed the same before him, who else were present there specifically and what was the occasion for the appellant to say so before P.W.6. Therefore, no reliance can be placed on this statement of P.W.6.

8. P.W.3 is the wife of the appellant and her status as wife of the appellant is not disputed though she has stated in her cross-examination that she is the 2nd wife of the accused-appellant. No material is also found on

record not to hold P.W.3 as the wife of the appellant. Therefore, all such statements so stated by P.W.3 in course of her deposition about the confession of murder by the appellant, were apparently made by the appellant before her being she is his wife. Here the status of P.W. 3 as the wife of appellant is admitted by prosecution. Now the question does arise, whether such a communication made between the husband or wife during marriage is admissible in evidence, and if so, what are those requirements to be satisfied before that?. In this regard, Section 122 of the Indian Evidence Act, 1872 speaks as follows:

> "122. Communications during marriage.—No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other."

9. The Supreme Court in the case of ***M.C. Verghese Vs. T.J. Poonan & Anr., reported in (1969) 1 SCC 37***, has made observations that evidence on communications between the husband and wife during marriage is inadmissible in criminal proceedings. In the said case, the father of the wife lodged prosecution against the husband alleging offence of defamation. The contention of the husband was that the communications in the letter sent by him to his wife is inadmissible in evidence and expressly prohibited by law from disclosure. The said contention was accepted by the District Magistrate and the husband was discharged. The said discharge being set aside by the Sessions Court, matter went to Kerala High Court, wherein the Kerala High Court set aside the order of the Sessions Judge and restored the order of the District Magistrate. The matter was again challenged before the Hon'ble Supreme Court, wherein the Apex Court by referring to various decisions of Queen's Bench as well as Madras High Court, have observed that the communications between the husband and wife during marriage is inadmissible in evidence. The relevant paragraphs of the said judgment in the case of M.C. Verghese (supra) are quoted hereunder :

> "**6.** In England the rule appears to be well settle- that except in certain well defined matters, the husband and wife are regarded as one and in an action for libel disclosure by the husband of the libel to his wife is not publication. In Wennhak case [(1888) 20 QBD 635] Manistry, J., observed:

…the maxim and principle acted on for centuries is still in existence viz. that as regards this case, husband and wife are in point of that as law one person."

The learned Judge examined the foundation of the rule and stated that it was, after all, a question of public policy or, social policy.

7. But the rule that husband and wife are one in the eye of law has not been adopted in its full force under our system of law and certainly not in our criminal jurisprudence.

8. In Queen Express v. Butchi [ILR 17 Mad 401] it was held that there is no presumption of law that the wife and husband constitute one person in India for the purpose of the criminal law. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft.

9. In Abdul Khadar v. Taib Begum [AIR 1957 Mad 339] the Madras High Court again held that there is no presumption of law in India that a wife and husband constitute one person for the purpose of criminal law, and therefore the English common law doctrine of absolute privilege cannot prevail in India.

10. It must be remembered that the Penal Code, 1860 exhaustively codifies the law relating to offences with which it deals and the rules of the common law cannot be resorted to for inventing exemptions which are not expressly enacted.

….. XXXX …… XXXX .. ..

14. The section consists of two branches — (1) that a married person shall not be compelled to disclose any communication made to him during marriage by his spouse; and (2) that the married person shall not except in two special classes of proceedings be permitted to disclose by giving evidence in Court the communication, unless the person who made it, or his representative in interest, consents thereto.

15. A prima facie case was set up in the complaint by Verghese. That complaint has not been tried and we do not see how, without recording any evidence, the learned District Magistrate could pass any order discharging Poonan. Section 122 of the Evidence Act only prevents disclosure in evidence in Court of the communication made by the husband to the wife. If Rathi appears in the witness box to giving evidence about the communications made to her husband, prima facie the communications may not be permitted to be deposed to or disclosed unless Poonan consents. That does not, however, mean that no other evidence which is not barred under Section 122 of the Evidence Act or other provisions of the Act can be given.

16. In a recent judgment of the House of Lords Rumping v. Director of Public Prosecutions [(1962) 3 All ER 256] Rumping the in mate of a Dutch ship was tried for murder committed on board the ship. Part of the evidence for the prosecution admitted at the trial consisted of a letter that Rumping had written to his wife in Holland which amounted to a confession. Rumping had written the letter on the day of the killing, and had handed the letter in a closed envelope to a member of the

> crew requesting him to post it as soon as the ship arrived at the port outside England. After the appellant was arrested, the member of the crew handed the envelope to the captain of the ship who handed it over to the police. The member of the crew, the captain and the translator of the letter gave evidence at the trial, but the wife was not called as witness. It was held that the letter was admissible in evidence. Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson and Lord Pearce were of the view that at common law there had never been a separate principle or rule that communications between a husband and wife during marriage were inadmissible in evidence on the ground of public policy. Accordingly except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act, 1898 (of which the terms are similar to Section 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.
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> ….. .. XXXX …… XXXX .. .. ..
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> **21**. When the letters were written by Poonan to Rathi, they were husband and wife. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court."

10. The Bombay High Court, in the case of ***Bhalchandra Namdeo Shinde Vs. the State of Maharashtra, reported in (2003) SCC Online Bombay 300: 2003(2) MahLJ 580***, referring to the decision of the Hon'ble Apex Court in the case of ***Ram Bharosey Vs. State of Uttar Pradesh (AIR 1954 SC 704)***, has observed as follows:

> "……In the said case, the actual communication between the accused and his wife was held inadmissible under section 122 of the Indian Evidence Act but the acts of the husband witnessed by wife are held admissible, as it has reference to the acts and conduct, of the accused and not to any communication made by the husband to his wife. Bearing in mind the ratio in the case of Ram Bharosey (cited supra), we have to exclude the inadmissible part with regard to actual communication between the appellant and his wife Jaishree PW 1. However, what Jaishree PW 1 saw at the relevant time is certainly admissible in evidence. Jaishree PW 1 saw the appellant searching and collecting Kookari (Article 12) and leaving the house with Kookari. This part of evidence is certainly admissible in evidence. However, this much evidence by itself is not sufficient to prove the complicity of appellant in crime."

11. Now, returning back to the facts of the present case, the status of P.W.3 as the wife of the appellant is not disputed and no consent has been taken from the appellant in this regard while recording her deposition. As

seen from the language of Section 122, the same provides bar as to the admissibility in evidence of communication made during subsistence of marriage, which cannot be disclosed even, without the consent of the spouse who made it, or his representative in interest, except in the proceedings between such married persons or where one spouse is prosecuted for any crime committed against the other. This privilege under Section 122, read with Section 120 of the Indian Evidence Act, though does not disqualify one spouse as a competent witness against the other, but bars disclosure of all communications made between them during subsistence of marriage. It is to be remembered that the privilege is not to the spouse who is witness, but to that other spouse who made the communication. Such communication not necessarily be a confidential only, but applies to all. Therefore, the courts are prohibited to permit the witness from making such disclosure unless, first, the witness is willing to disclose, and secondly, the other spouse against whom it is to be made has given his express consent. Here the oral evidence of P.W.3 Santabai goes to the extent that, when she saw blood stains on the weapon (M.O.I) and the person of the appellant, being asked by her, the appellant replied that he has committed murder of the deceased by M.O.I. Therefore, in view of the law enumerated in Section 122 of the Indian Evidence Act as well as the principles enunciated in the aforesaid decisions, it bars admissibility of the evidence of P.W.3 to the effect of her deposition regarding confession of the appellant of committing murder of the deceased by M.O.I, but her statement regarding other aspects is no way affected.

So, the link of extrajudicial confession in the chain of circumstances is not established and the learned trial court has lost it's sight from Section 122 before placing reliance on the above aspects.

12. Out of the remaining circumstances, the important one is 'leading to discovery of weapon of offence and blood stained wearing apparels of the appellant'. In this regard, P.Ws. 4 and 5 have supported the prosecution case. The weapon of offence i.e., the axe has been identified as M.O.I and blood stained shirt and Lungi of the appellant as M.Os.II & III. The evidence of P.Ws. 4 and 5 along with the evidence of P.W.10 is seen trustworthy on this point. The cowshed wherefrom said material objects were found, was in possession of the appellant as per the evidence of P.W.11, the Amin of Tehsil Office and other witnesses, viz. P.Ws.2, 3, 4, 5 & 10. M.O.I is found stained with human blood of group 'O' whereas M.Os.II (shirt) & III (lungi) are though found with human blood but without any opinion on grouping during

the chemical examination. The chemical examination report has been marked under Ext.16. So, except M.O.I, other two objects cannot be reasonably connected to the guilt of the appellant.

13. So far as motive is concerned, it is the consistent evidence of the prosecution witnesses that, there was previous enmity between the appellant and P.W.2. The witnesses have stated that there was long standing dispute between both the brothers, but the materials on record is silent about the connection between P.W.2 and the deceased which forms the basis of hostility between the appellant and the deceased. In this regard, there is only one bare statement of P.W.3 made during her cross-examination by the prosecution that she has made a statement before the I.O. (P.W.10) that the appellant was opposing the relationship of the deceased with P.W.2. But this is of no use for the prosecution against the appellant. Because what is stated before the I.O. cannot by itself be an evidence in court. It is important to point out here that even if hostile relationship is established between the appellant and P.W.2, but the same has nothing to do with the motive of the appellant to kill the deceased. No relationship between P.W.2 and the deceased is found on record to establish motive on the part of the appellant to kill the deceased. Therefore, in absence of any material to this aspect, the learned trial Judge has erred in taking motive as a circumstance against the appellant.

14. Thus, from above discussions, it becomes clear that, except the information leading to discovery of the weapon of offence relevant u/s. 27 of the Indian Evidence Act, all other circumstances discussed by the trial court are not free from reasonable doubts. In a case where evidence is of circumstantial in nature, each circumstance must be fully established before drawing any conclusion there from. Here it would not be out of place to have relook to the evidence of P.W.3. As discussed earlier, by excluding the confessional part from her evidence, the remaining part throws some light on post occurrence conduct of the appellant that he was seen with blood stained axe (M.O.I) and blood stains appearing on his wearing apparels. Bereft of some discrepancies in this part of evidence of P.W.3 that she had not stated about M.O.I to the I.O. during investigation, even if the same is added as one more circumstance to that earlier circumstance useful u/s.27 of the Indian Evidence Act, still the chain of circumstance is not found complete to unerringly point towards the guilt of the accused. It is important to see that not only the chain is complete but also that no reasonable ground is left in

support of innocence of the accused. Of course it is established that blood stain marks of human origin have been found on the wearing shirt and Lungi of the deceased (M.Os.II & III) and the axe (M.O.I) which were discovered at his instance, but the same are definitely not sufficient to clearly establish the guilt of murder of the deceased by the appellant even though, as per the opinion of P.W.8, M.O.I could be the possible weapon of offence in view of the nature of injuries found on the deceased. But, it is repeated that, in our considered opinion, these circumstances cannot be said completing the chain of circumstances unerringly pointing the guilt of the appellant leaving all possible hypothesis except the guilt of the appellant.

15. Thus, prosecution case is not seen free from all reasonable doubts and in view of the discussions made above, we are constrained to hold that the prosecution has not satisfactorily established its case beyond all reasonable doubts to clearly hold that the appellant had committed the murder.

Therefore, for the reasons discussed above, we hold the appellant not guilty of the charge of murder and accordingly he is acquitted thereof. The appellant be set at liberty forthwith, if his detention is not required in any other case.

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2020 (III) ILR - CUT- 95

S. K. MISHRA, J & B.P. ROUTRAY, J.

MATA NO. 150 OF 2015

RANJAN KUMAR ROUTRAY ……..Appellant

.V.

SMT. MADHUMITA MOHANTY @ ROUTRAY ……..Respondent

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 41 Rule 27 – Provisions under – Production of additional evidence before the appellate court – Scope and ambit – Held, the law is clear on the point that the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal – It does not authorize any lacunae or gaps in evidence to be filled up – The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way.

"Thus it becomes clear that under the scope of Order 41 Rule 27, C.P.C., the parties to an appeal shall not entitled to produce additional evidence, either oral or documentary, unless they have shown that in spite of due diligences, they could not produce such documents and that such documents are required to enable the court to pronounce a proper judgment." *(Paras 10 & 11)*

(B) COURT PROCEEDINGS – Adoption of falsehood or playing fraud on court – Effect of – Held, it is well settled proposition of law that a false statement made in the court or in the pleadings, or filing of any manipulated documents, intentionally to mislead the court and obtain a favorable order, amounts to criminal contempt as it tends to impede the administration of justice. (Para 18)

(C) HINDU MARRIAGE ACT, 1955 – Section 13(1) – Divorce – Application by the wife for dissolution of the marriage on the ground that her husband has already married for the second time – Permanent alimony – Determination of quantum thereof – Principles – Discussed. (Paras 19 & 20)

Case Laws Relied on and Referred to :-

1. (AIR 1965 SC 1008) : The Municipal Corporation of Greater Bombay Vs. Lala Pancham & Ors
2. AIR 2008 SC 56 : Haryana State Industrial Development Corporation Vs. M/s. Cork Manufacturing Co.,
3. (2011) 13 SCC 112 : AIR 2011 SC 2748 : Vinny Parmvir Parmar Vs. Parmvir Parmar.
4. (2013) 2 SCC 114 : AIR 2013 SC 415 : U. Sree Vs. U. Srinivas.

For Appellant : M/s. J.R. Dash, K.L. Dash, S.C. Samal, & N.Sahoo.

For Respondent : M/s. Ajodhya Ranjan Dash, S.K. Nanda (I), B. Mohapatra, N. Swain, K.S. Sahu, B.R. Mohanty.

JUDGMENT Date of Judgment:23.09.2020

B.P. ROUTRAY, J.

The appellant (husband) has assailed the judgement and decree dated 19.8.2015 passed by the learned Judge, Family Court, Bhubaneswar in Civil Proceedings No. 389 of 2010, by which the learned Judge while passing the order of dissolution of marriage, directed the appellant herein to pay Rs.35,00,000/- (thirty five lakhs only) toward permanent alimony to the respondent (wife) with a further direction to return all the articles except cost of dress materials, barat expenses and expense of sarees or in lieu thereof pay

Rs.5,00,000/- (rupees five lakhs) towards the cost of the materials to the respondent (wife).

2. The present appellant (husband) was the respondent before the Family Court. The wife (present respondent) filed the aforesaid proceeding praying for a decree for dissolution of marriage with the present appellant. The facts in nutshell of the petitioner (wife) before the Family Court are that the marriage was solemnized between the petitioner and opposite party on 13.03.2000. After some days of marriage, demanding further dowry, physical and mental torture was made on the petitioner and even she was not being provided with food and clothing. The husband was used to come in drunken condition in night and on one occasion i.e., on 25.03.2000, when she suffered from malaria fever, due to some medicines given to her by the husband, some serious mental tension developed in the wife. The husband then used to called her as 'Pagili' and as the torture became intolerable, she was forced to leave the matrimonial home on 3.8.2003 and since then she is staying separately in her parents' house. It is also alleged that in the meantime, the husband (opposite party) has married to another lady, namely, Debaki Routray and out of the said wedlock, one female child, namely, Supriya Routray has born. The husband had also filed one Civil Proceedings vide C.P. No. 766/2003 before the Family Court, Cuttack, which was dismissed on the ground of maintainability. The wife has also filed one criminal case vide G.R. Case No. 113/2004 before the S.D.J.M., Bhubaneswar and another proceedings under Section 18 of the Hindu Adoption and Maintenance Act vide C.P. No. 493 of 2004 and husband had also filed another C.P. No. 508 of 2004. But both these Civil Proceedings filed before the Judge, Family Court, Cuttack were dismissed on the ground of jurisdiction.

3. Be that as it may, the present dispute in question i.e. C.P. No. 389 of 2010 was initially filed by the petitioner (wife) praying for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, but later the petitioner knowing the fact of second marriage by the opposite party (husband), filed an application for conversion of the same to a petition under Section 13(1) of the Hindu Marriage Act with a prayer for dissolution of marriage by a decree of divorce.

4. As per the petitioner (wife), the opposite party-husband, is a 'B' Class Contractor having lot of landed property and is also the owner of two trucks, one tractor, and one trailer. Besides all these, he has also income from house

rent, and in total his income comes to more than Rs.20.00 lakhs (rupees twenty lakhs) per annum. It was also claimed that her gold ornaments and other articles given during the time of marriage has not been returned by the husband.

5. On the other hand, the opposite party-husband contested the case by averring that the allegations so brought against him in the petition by the wife are not correct as she voluntarily left the matrimonial house on 2.8.2003 without any reasonable cause and further lodged a criminal case for dowry torture against him and his family members. The mental condition of the wife is not normal and she was behaving very strangely during her stay in the matrimonial house for which she had undergone treatment by the doctor. He also submitted his no objection in the dissolution of marriage between them. However, according to him, he is an employed man without having any landed property, nor has any vehicle in his name.

6. The learned Judge, Family Court formulated three points for adjudication of the disputes between the parties, which are to the effect that (i) If there is any criminality and desertion by the wife., (ii) Her entitlement of permanent alimony, if any, in case of divorce. (iii) Her further entitlement towards properties given at the time of marriage.

7. The petitioner examined herself as the sole witness on her behalf and similarly the opposite party (husband) also examined himself as the sole witness on his behalf. Though the petitioner adduced as many as 36 documents as exhibits for her evidence, the husband adduced no documentary evidence. Basing on the evidence so adduced by the parties, the Family Judge, decreed the case in favour of the wife by dissolving the marriage granting the decree of divorce. The learned Judge, Family Court further directed the husband-opposite party therein to pay Rs.35,00,000/- (rupees thirty five lakhs) as permanent alimony with a further direction to return all the articles except the dress materials and other expenses or in lieu of the same, to pay Rs.5,00,000/- (rupees five lakhs) to the petitioner-wife.

8. Both the parties in the present appeal did not raise any question as to the dissolution of marriage by granting decree of divorce between them and their sole dispute is with regard to the quantum of permanent alimony granted by the Judge, Family Court and further amount of rupees five lakhs in lieu of return of articles of the wife. When the husband has raised objection that the

quantum of permanent alimony is on higher side, the wife by filing cross objection claimed that the same should be enhanced to rupees fifty lakhs.

9. It is contended by the appellant-husband that neither he is a 'B' Cass contractor nor he has any truck, tractor or trailer in his name except one car, which was purchased by his father and used as a taxi. It is the further stand of the appellant that in the meantime, i.e., in the year 2009 there was a family partition of the landed property and the total landed property fall into his share is around four acres only. Further the vehicles viz. trucks, tractor and trailer have been sold in the meantime. In this regard, to substantiate, an application has been filed under Order-41, Rule 27 by the appellant-husband praying to adduce the said documents as additional evidence.

10. Now, coming to examine the prayer of the appellant in respect of adducing additional evidence. The law is clear on the point that the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal – It does not authorize any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way *(see N. Kamalam (dead) Vs. Ayyasamy, AIR 2001 SC 2802).*

11. Further the Apex Court in the case of ***the Municipal Corporation of Greater Bombay v. Lala Pancham and others (AIR 1965 SC 1008)*** has observed that, the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. It is recorded at paragraph-9 as follows:

> "…….This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports in a large measure the plaintiffs contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under cl. (b) of sub-r.(1) of r.27 cannot be exercised for adding to the evidence already on record except upon one of the ground specified in the provision".

Thus it becomes clear that under the scope of Order 41 Rule 27, C.P.C., the parties to an appeal shall not entitled to produce additional evidence, either oral or documentary, unless they have shown that in spite of due diligences, they could not produce such documents and that such documents are required to enable the court to pronounce a proper judgment.

12. In the present facts of the case at hand, while pressing for additional evidence, it is submitted that due to inadvertent mistake by the lawyer of the appellant (husband) in the trial court these evidences could not be adduced and the same may be admitted by this court in terms of the provision under Rule 27(1) (b), Order 41 of the Civil Procedure Code. Now to see the evidences which the appellant proposes to adduce are, the copy of the family partition deed dated 13.11.2009, copy of the fresh enquiry report of the R.I., Balianta in Misc. Case No. 61 of 2013 regarding income of the appellant, copy of the contractor's license of the appellant to show that he was a 'C' Class contractor till 2006, and the copy of the registration certificates of the vehicles showing the name of transferees, in whose favour the vehicles have been sold.

Under Order 41, Rule 27 read with Section 107 of the C.P.C., additional evidence before the appellate court cannot be admitted except on three grounds enumerated in clause (a), (aa) & (b) in sub-rule (1) of Rule 27. Obviously, the appellant does not press for first two grounds as his case does not fall within the ambit of those two grounds. What he prays for is to consider it under Clause (b) of sub-rule(1) by citing the reason of inadvertent mistake of the conducting lawyer before the Family Court. But as discussed earlier, Supreme Court in the case of ***Municipal Corporation of Greater Bombay (supra)*** has said that, this provision does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncement of judgment in a particular way.

13. In the case of ***Haryana State Industrial Development Corporation Vs. M/s. Cork Manufacturing Co., reported in AIR 2008 SC 56***, it has been held at paragraph 17 that, lack of proper legal advice or inadvertence to produce the document in evidence is not a ground to hold that there was substantial cause for acceptance of the additional evidence. So the appellant fails to stand on his own reason.

14. Apart from these, perusal of those documents, as filed along with the petition dated 27.04.2017, reveals that the same are some Photostat copies

even without the certificate or any endorsement mentioning thereon that the same are true copies of the original. A bare perusal of the said documents does not satisfy the test of admissibility in the evidence, even within the scope of Section 65 of the Indian Evidence Act. Further, perusal of the documents reveals that in the alleged partition deed dated 13.11.2009, this present appellant has not been mentioned as a party though all other family members including the brother of the father of the appellant and his sons were parties therein. Therefore, the genuineness of any such partition deed seems to be doubtful prima facie.

15. Similarly, the copies of the registration certificates of the trucks, tractor and trailer, so produced before us, do not reveal the date of sale or date of transfer of ownership. It is relevant to mention here that originally the matrimonial dispute was filed in the year 2007 and the order of interim maintenance was passed on 29.08.2009 directing the appellant to pay sum of Rs.5,000/- (five thousand) per month to the wife as interim maintenance. Therefore, these purported documents of partition as well as sale of vehicles have been effected during the pendency of the dispute between the parties and it appears that all these have been done intentionally to frustrate the claim of maintenance of the wife.

16. Further, opposing the claim of the respondent-wife that the appellant is a 'B' Class contractor, the appellant-husband has filed certain documents. It is stated by the appellant that he is not a 'B' Class Contractor, somehow he was a 'C' Class contractor till 2006 and thereafter he is not doing the contractorship. The documents, so far filed by the appellant to show that he is not a 'B' class contractor, but was earlier a 'C' Class contractor only till 2006 is also not appearing acceptable at this point, since it is seen from the LCR that it was adduced as Ext. 'A' in I.A. No. 17/2007 (for interim maintenance in C.P. No. 389 of 2010). However, the said document is not relevant at this stage, because as per the contention of the respondent-wife, the appellant subsequently in the year 2007 has changed his status of 'C' Class Contractor to 'B' Class Contractor and in this regard he has made admission in the plaint filed by him i.e., C.S. No. 109/2007 in the Court of learned Civil Judge (Jr. Divn.), Bhubaneswar (under Ext.10) claiming that he is a 'B' Class contractor. After going through the documents in C.S. No. 109/2007, it factually appears that the appellant-husband himself has declared in the said plaint that he is a 'B' Class contractor.

17. As regards the annual income of the appellant on the basis of the fresh enquiry report of the R.I., Balianta, the same is also not found to be an admissible document at this stage as to his income, because the same has not attained finality in view of the pendency of the proceedings before the Tahasildar, besides the fact that it has excluded the income of the appellant from other sources and it is only confined to agricultural land. It is to be reminded here that as per the respondent-wife, the appellant has multiple sources of income e.g. house rent, contractorship, vehicles etc. other than the agricultural income. Thus for the aforesaid reasons, we do not see any merit in the submission and prayer of the appellant to permit him to adduce additional evidence through those aforementioned documents and accordingly, the said prayer is rejected.

18. It is also relevant here to notice that during pendency of this appeal before this Court, the appellant, in a fraudulent way, tried his best to overcome the order of the Family Court with regard to payment of Rs.5,00,000/- (five lakhs) in lieu of return of the articles given by the respondent-wife during marriage. When an objection was raised by the respondent-wife regarding the manipulation of the seizure list and zima nama by the husband-appellant, to that extent, this Court ultimately directed for an enquiry by a Deputy Superintendent of Police so as to verify the manipulation of the documents, and as per the report, the truth unveiled that this appellant, with an oblique motive, interpolated the seizure list dated 30.04.2004 and Zima Nama dated 14.06.2004 in GR Case No. 113/2004, in the Court of learned J.M.F.C. (O), Bhubaneswar, to misguide this Court and to show that the wife has taken back her gold ornaments. Reason for stating this aspect here is to highlight the conduct of the appellant to the extent that he has manipulated the documents for misguiding the Court. It is well settled preposition of law that a false statement made in the court or in the pleadings, or filing of any manipulated documents, intentionally to mislead the court and obtain a favorable order, amounts to criminal contempt as it tends to impede the administration of justice. However, we refrain ourselves in taking such action against the appellant-husband with a warning to him that he shall not repeat such conduct in future.

19. Now, to examine the quantum of permanent alimony granted by the Judge, Family Court, which is the sole subject matter of dispute between the parties before this Court, as per the contention of the appellant, the same is on very higher side whereas wife-respondent filed her cross-objection to

enhance the same to Rs.50,00,000/- (fifty lakhs). Here the principles are need to be enunciated at the outset before delving to relevant factual aspects on this point.

The Hon'ble Supreme Court in the case of ***Vinny Parmvir Parmar Vs. Parmvir Parmar,*** reported in (2011) 13 SCC 112 : AIR 2011 SC 2748, has observed as follows:

> "12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept (sic keep) in mind while determining maintenance or permanent alimony."

The Apex Court in the case of ***U. Sree vs. U. Srinivas,*** *(2013) 2 SCC 114 : AIR 2013 SC 415*, has also made it clear that while granting permanent alimony, no arithmetic formula can be adopted. The specific observations of Hon'ble Court at paragraph 33 of judgment, reads as under:

> "33. ……... As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In Vinny Parmvir Parmar v. Parmvir Parmar [(2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290] (SCC p. 116, para 12) while dealing with the concept of permanent alimony, this Court has observed that while granting permanent alimony, the court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. ……."

20. In view of the above, keeping in view that no arithmetical formula can be adopted as there cannot be any mathematical exactitude while granting permanent alimony and having regard to the present facts and situation of the case concerning the income aspects of the appellant as well as the other sources of income, which have been well taken note of by the learned Judge, Family Court in the impugned judgment, we are not inclined to disagree or diverge from the quantum fixed by the learned Judge, Family Court. The reasons being that, as it appears, besides other, the total landed property including the ancestral land are coming around 20 acres and most of the properties are situated within the area of Bhubaneswar Development Authority. Further, the number of vehicles possessed by the appellant during that relevant time shows his affluence of income. Having perused the evidence of the parties adduced as P.W.1 and R.W.1, it reveals that the statements of the appellant are simply denial in nature to all the statements of the wife (P.W.1). The appellant has also not denied about the remarriage despite the documents adduced by the respondent-wife under Exts.30 to 36, which are clear that he has remarried and also become the father of one girl child through the second marriage Debaki Routray. Similarly the wife's claim to enhance the quantum is also found devoid of any substantial reason.

21. Thus, after thorough analysis of the impugned order and the materials available in the lower court records as well as the materials produced before us, we do not see any reason to interfere with the same. However, considering the submission of the appellant that he has paid a total sum of Rs.5,35,000/- (rupees five lakhs thirty five thousand) towards interim maintenance, which should be adjusted from the permanent alimony of Rs.35,00,000/- (rupees thirty five lakhs), we are inclined to accept the same and it is directed that the amount, if any, paid by the appellant towards interim maintenance be adjusted from the amount of permanent alimony. Further, it is made clear that the direction issued by the Family Court for payment of Rs.5,00,000/- (rupees five lakhs) in lieu of return of the articles is also confirmed.

22. In the result, the appeal stands dismissed and the judgement and decree dated 19.8.2015 passed by the learned Judge, Family Court, Bhubaneswar in Civil Proceedings No. 389 of 2010 is affirmed with aforesaid clarification towards adjustment of interim maintenance, if any, paid. Appeal is dismissed. No order as to costs.

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2020 (III) ILR - CUT- 105

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

CRA NO. 259 OF 2000

LALMOHAN MUNDA ……..Appellant.

.V.

STATE OF ORISSA ……...Respondent.

CRIMINAL TRIAL – Offence under section 302 of IPC – Conviction based upon extra-judicial confession – The manner, reason & time of assault have not been stated – Such confession is not voluntary one – Legality of conviction basing upon such confession challenged – Principle reiterated – Held, Court should expect the exact words of confession to be produced before it – But such rule is not an inflexible rule – If the witnesses to the confession produce the sum and substance of the confession made by the accused-appellant and it is found to be voluntary, clean, cogent, true, correct and reliable, then the same be accepted into evidence and finding of guilty on the basis the extra judicial confession can be reached – However keeping in view of the above, the conviction is not sustainable in the present case.

Case Laws Relied on and Referred to :-

1. A.I.R. 1959 S.C. 902 : Mulk Raj .Vs. U.P.
2. A.I.R. 1985 SC 1678 : Narayan Singh & other .Vs. State of M.P.
3. 89 (2000) C.L.T. 64 : Mandangi Raju .Vs. State of Orissa.
4. (1998) 6 SCC 108 : Kavita .Vs. State of Tamil Nadu.

For Appellant : M/s. B.B. N. Dwibedi & Sanjat Das (Amicus Curiae).
For Respondent : Mrs. Suman Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment: 25.09.2020

S. K. MISHRA, J.

In this Appeal, the sole Appellant – Lalmohan Munda has assailed his conviction under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) where he has been sentenced to undergo imprisonment for life for committing the murder of his brother Biseswar Munda by giving blows on his head by means a stone, by the learned Addl. Sessions Judge, Rairangpur in Sessions Trial Case No.6/25 of 2000 vide judgment dated 19.07.2000.

02. The case of the prosecution in brief is that the accused-appellant - Lalmohan Munda committed fratricide, as he made murderous assault of his

brother - Biseswar Munda on 22.09.1999 at about 3.00 p.m. on the road leaving to village Chadheipahadi from village Jamudisahi. The prosecution further putforth that the appellant made an extra judicial confession before the villagers, especially P.Ws.4, 5 and 6 which led to lodging of the F.I.R. in Badampahad Police Station and the said F.I.R. was registered under Section 302 of the I.P.C. In course of investigation, the A.S.I. of Suleipat Out Post visited the spot, made inquest over the dead body of the deceased and seized a cycle and an umbrella and he also seized one stone, alleged to be the weapon of offence. Thereafter, the O.I.C. of Badampahad Police Station took up investigation of the case and in course of which he seized the wearing apparels of the deceased vide Ext.6. He also seized the blood stained earth, sample blood etc. and sent the material objects for chemical examination to the S.F.S.L., Rasulgarh through the learned S.D.J.M., Rairangpur and after completion of the investigation, he submitted charge sheet against the accused-appellant under Section 302 of the I.P.C. before the learned Court below.

03. The defence took a plea of complete denial and in his statement recorded under Section – 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for brevity) the accused-appellant stated that the informant has falsely implicated him in this case.

04. In order to prove its case, the prosecution examined fourteen witnesses. P.W.1 Jitendra Nath Sethi is the informant in this case. P.W.4 Sanatan Munda, P.W.5 Pratap Chandra Singh and P.W.6 Bhagabat Munda have been examined to prove the prosecution case that the accused-appellant made confession before them regarding the commission of murder by him on that day. P.Ws. 8, 9 and 10 are either formal witness or for witnesses to the seizures. P.W.2 Goura Sethi, P.W.3 Kasinath Munda and P.W.7 Subash Chandra Sethi have not stated anything against the appellant. P.W.13 Dr. Basanti Hansda conducted the post mortem examination on the dead body of the deceased. P.W.14 Harish Chandra Behera is the O.I.C. who registered the case and started the investigation which was taken over by P.W.12 Jagabandhu Naik, the O.I.C. of the Badampahad Police Station. Upon completion of the investigation, P.W.12 submitted the charge sheet. P.W.11 Kana Munda who is the nephew of the accused-appellant has been presented as an eye witness to the occurrence but he has not supported the case of the prosecution and was cross-examined after taking permission of the Court under section 154 of the Evidence Act. Besides such examination of

witnesses, nine documents were exhibited by the prosecution and one material object i.e. a stone (M.O.I) was also led in the evidence. It was the prosecution case that the M.O.I was used to commit the murder of the deceased. On the other hand, the defence has neither examined any witnesses nor exhibited any documents on its behalf.

05. Learned Trial Judge after taking into consideration the extra judicial confession as stated by P.Ws. 4, 5 and 6 together with the fact that the evidence of these witnesses are corroborated by medical evidence, convicted the accused-appellant for the offence under Section 302 of the I.P.C. and sentenced him to undergo imprison for life.

06. On the other hand, Mr. Sanjat Das, learned amicus curiae challenged/impugned the conviction of the accused-appellant under Section 302 of the I.P.C., on the ground that the prosecution has not proved the exact words used by the appellant while making the extra judicial confession before the villagers and that the confession was not true and voluntary. Learned amicus curiae also pointed out that the doctor who had conducted the postmortem examination had categorically stated that he has not reflected the length and breadth of the stone in the report to the query made by the police and has not mentioned in its forwarding report when the stone was forwarded to him. It is submitted that the doctor has very categorically stated that she has signed on a paper affixed to the stone but that paper was missing at the time of her examination in the Court.

07. Mrs. Suman Patnaik, learned Addl. Government Advocate on the other hand submits that the conviction recorded by the learned trial Judge is just and proper and the same does not require any interference in this case. It is further submitted that it is not always necessary to reproduce the exact word of 'confession' before the Court by the witnesses who have stated about the extra judicial confession by the accused. It has also pointed out before the Court that the confession has been reproduced before the Court in sum and substance and the confession is a true and voluntary one and it is free from any kind of coercion, pressure nor made in the presence of any police officer. To buttress her submission, Ms. Pattnaik has relied upon a leading judgment of the Hon'ble Supreme Court in the case of ***Mulk Raj -Vrs.- U.P., reported in A.I.R. 1959 Supreme Court 902***. At paragraph 11, the relevant portion is held as follows:-

> "11. ……..An extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence in convicting the accused. The confession will have to be proved just like any other fact. The value of the evidence as to the confession just like any other evidence, depends upon the veracity of the witness to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible, but it is not an invariable rule that the court should not accept the evidence, if not the actual words but the substance were given. It is for the Court having regard to the credibility of the witness, his capacity to understand the language in which the accused made the confession, to accept the evidence or not……..."

In the case of ***Narayan Singh and other -Vrs.- State of M.P., reported in A.I.R. 1985 Supreme Court 1678***, the question of extra judicial confession was also taken up by the Hon'ble Supreme Court at paragraph-7 of the judgment. The Hon'ble Supreme Court has laid down that it is not open to any Court to start with a presumption that extra judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak of such a confession. In that case, the Court held that the evidence of P.Ws. 5 and 9 were held to be admissible and sufficient to warrant the conviction of the accused.

In the reported case of ***Mandangi Raju -Vrs.- State of Orissa, reported in 89 (2000) C.L.T. 64***, a Division Bench of this Court has taken into consideration the reported cases of ***Mulk Raj -Vrs.- The State of U.P. (supra)*** and ***Narayan Singh and others -Vrs.- State of Madhya Pradesh (supra)***.

This Court in the aforesaid case, has held that the evidence should be appreciated, keeping in view the ratio that though the Court requires the witness to give the actual words used by the accused, as nearly as possible, but it is not an invariable rule that the Court should not accept the evidence, if not the actual words but the substance were given. If the rule is inflexible that the courts would insist only on the exact words more often as not, then the kind of evidence which is sometimes most reliable and useful, will have to be excluded for, except perhaps in the case of a person of good memory, many witnesses cannot report the exact words of the accused.

In this case the learned Addl. Govt. Advocate has relied upon the reported case of ***Kavita -Vrs.- State of Tamil Nadu, reported in (1998) 6 Supreme Court Cases 108***, wherein the Hon'ble Supreme Court has held that

there is no doubt that convictions can be based on extra-judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused-appellant must be given by the witness but it is for the Court to decide on the acceptability of the evidence having regard to the credibility of the witnesses.

08. From a conspectus of all these four judgments, we have relied upon the following principles of evidence involved while dealing with a criminal case based on extra judicial confession.

(i) There is divergent view on the probative value of an extra judicial confession, while one view is that a Court cannot proceed with a presumption that extra judicial confession by itself, is a weak piece of evidence, the second view is that because of the very nature of it/extra judicial confession is a very weak piece of evidence. There are certain grey area between the two. We are of the opinion that whether the extra judicial confession in a given case is a weak piece of evidence or a presumption should be drawn regarding its weak nature depends on the facts of that case.

(ii) Generally, Court should expect the exact words of confession to be reproduced before the Court. But such rule is not an inflexible rule. If the witnesses to the confession produce the sum and substance of the confession made by the accused-appellant and it is found to be voluntary, clean, cogent, true, correct and reliable, then the same may be accepted into evidence and finding of guilty on the basis the extra judicial confession can be reached.

09. While recording the conviction on extra judicial confession, the duty of the Court is to see that such confession is corroborated by the objective circumstances or material circumstances of the case. This is a rule of prudence. Applying this principle, in the case in hand, we have to examine the evidence of P.Ws.4, 5 and 6.

P.W.4 Sanatan Munda has stated that the accused-appellant confessed before him and the villagers that he killed the deceased. In cross-examination, he has stated that the accused-appellant is his agnatic brother. He was not examined by the police and confessed that no confession was made before him by the accused-appellant, but he has admitted that for the first time he deposed on that day in the Court about the incident.

P.W.5 Pratap Chandra Singh stated about the occurrence that the accused-appellant was staying at a distance of 50 feet from his house and he found the deceased was lying on the road having sustained severe head injuries and the accused-appellant was standing nearby and a stone was lying near the deceased. Thereafter the witness informed the incident to the villagers. He found that there was a injury on the right cheek of the deceased. Therefore, he went to search the accused-appellant but could not find him and returned to the spot and found the accused-appellant was surrounded by the villagers. The accused-appellant made an extra judicial confession by saying that he killed the deceased by means of a stone. In the cross-examination, he has stated that he could not say the name of the persons who are informed by him about the occurrence.

P.W.6 Bhagabat Munda has stated that the occurrence took place in the month of Bhadrab on a Wednesday. P.W.5 and Kana Munda told him that the accused-appellant killed the deceased by means of an axe. Then he came to the spot alone and found the deceased had sustained bleeding injury on his right cheek. He did not see anything near the spot. The accused-appellant confessed before him and others that he killed the deceased. He further stated that police made inquest before him. In the cross-examination, he has stated that in the presence of police and the villagers, the accused-appellant confessed his guilt but he denied the suggestion and the defence suggestion that no such confession has been made by the accused-appellant.

10. From the above conspectus and the materials available on record, it is seen that the sum and substance of the confession has not been stated by the witnesses P.Ws. 4, 5 and 6. Rather they have stated that the accused-appellant confessed before them that he killed the deceased. The manner of assault, the reason of the assault and the time of the assault have not been stated. Most importantly, the weapon of offence has not been reflected by two of the witnesses and that one of the witness stated that he was informed by P.W.5 i.e. Pratap Chandra Singh and Kana Munda P.W.11 that the accused-appellant killed the deceased by means of an axe which is not the case of the prosecution. The second aspect of the confessional statement made before villagers suffers from the short coming of not being voluntary. There appears to be some sort of pressure on him regarding the case. One of the witnesses i.e. P.W.6 has stated that the accused-appellant made the confession in the presence of the police and the villagers. It is no more res integra that any

confession made, not in the immediate presence of a Magistrate, before a Police Officer is not admissible in evidence.

In that view of the matter, we are of the opinion that though the case of the prosecution that the deceased died a homicidal death is not disputed by the accused-appellant, we are of the further opinion that there is no material on record to hold that the accused-appellant is the author of the crime. In that view of the mater, we are of the opinion that the judgment of conviction and order of sentence passed by the learned Addl. Sessions Judge, Rairangpur in Sessions Trial Case No.6/25 of 2000 vide judgment dated 19.07.2000 cannot be upheld. Hence, we allow the appeal and set aside the conviction of the accused-appellant and sentence of imprisonment for life under section 302 of the I.P.C. The appellant be set at liberty forthwith and the bail bond, if any, shall be cancelled. Accordingly, this CRA is disposed of. The L.C.R. be sent back to the court below forthwith.

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2020 (III) ILR - CUT- 111

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

CRA NO. 269 OF 2000

RABINARAYAN GOCHHAYAT ……..Appellant.

V.

STATE OF ORISSA ……..Respondent.

(A) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Appreciation of evidence – Distinction between the culpable homicide amounting to murder and culpable homicide not amounting to murder – Principles to be followed – Discussed. (Paras15 to 18)

(B) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Appreciation of evidence – Appellant gave a blow on the head of the deceased by means of a crowbar causing bleeding injuries – Evidence reveals that the dispute started by the accused Suria since acquitted when he dragged the deceased

Sapana Swain from his verandah and assaulted him by means of the handle of a knife – Thereafter, the other co-accused Sathia who has also been acquitted, assaulted the deceased by means of torchlight – Thereafter, the present appellant dealt a blow by means of a crowbar as a result of which the deceased fell down on the ground with profuse bleeding from his head – Narrations of the eye-witnesses reveal that the appellant had no intention of causing death of the deceased or causing such bodily injury as he knows to be likely to cause the death of the deceased to whom the harm is caused or with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient to cause death – Because of petty quarrel between the children of the informant and the appellant in course of observation of 'Khudurikuni Osha', the dispute started between their parents which led to instantaneous death of the deceased – Held, this is not a case of culpable homicide amounting to murder punishable under Section 302 of the I.P.C rather, this is a case which falls under the category of culpable homicide not amounting to murder punishable under Section 304, Part-II of the I.P.C.

(Para 18.2)

Case Laws Relied on and Referred to :-

1. 1991 Cr.L.J. 1318 : Thunin Charan and Anr. .Vs. State of Madras.
2. AIR 1998 SC 3211 : Prakash Hiramen Hingane .Vs. State of Maharastra.
3. AIR 1958 SC 465 : Virsa Singh .Vs. State of Punjab.
4. AIR 1966 SC 1874 : Rajwant and another .Vs. State of Kerala.
5. (1877) ILR 1 Bom 342 : Reg. .Vs. Govinda.
6. (1976) 4 SCC 382 : State of Andhra Pradesh .Vs. Rayavarapu Punnayya & Anr.

For Appellant : Mr. P. Behera, S.C. Mohanty, G.K. Nayak and R. Mahalik.
For Respondent : Mr. A.K. Nanda, Addl. Govt Adv.

JUDGMENT Date of Hearing and Judgment: 28.09.2020

S. K. MISHRA, J.

The sole appellant-Rabinarayan Gochhayat assails his conviction for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) and to undergo imprisonment for life, recorded by the learned Second Additional Sessions Judge, Puri in S.T. Case No.11/42 of 1997, vide., judgment of conviction and order of sentence dated 31st October, 2000.

Initially, F.I.R. was lodged against eleven persons vide Satyabadi P.S. Case No.95 dated 21.08.1994. However, charge-sheet has been submitted

against ten accused persons including the appellant in G.R. Case No.1165 of 1994 for commission of alleged offences punishable under Sections 148/ 302/ 294/ 336 read with Section 149 of the I.P.C. The case was then committed to the court of sessions. In course of trial, the prosecution witnesses named only three accused persons. They are, the present appellant, one Suria alias Suresh Gochhayat and Sathia alias Satha Gochhayat. On appreciation of evidence, the learned Second Additional Sessions Judge, Puri did not find Suria alias Suresh Gochhayat and Sathia alias Satha Gochhayat guilty of the alleged offences in addition to Malati Gochhayat, Kamala Gochhayat and Lalita Gochhayat. But, he proceeded to convict the present appellant only, for the offence under Section 302 of the I.P.C and sentenced him as stated above. However, it is seen from the records that charge was framed on 07.05.1998 against the appellant, like that of the other co-accused persons under Section 302/149 of the I.P.C. In other words, no separate charge under Section 302 of the I.P.C. was framed against the appellant.

02. Bereft of unnecessary details, the case of the prosecution in brief is as follows:

02.1. In the evening of 21.08.1994 'Khudurukuni Puja' was being observed in village Raichakradharpur (Hata Sahi). During festivities, the daughter of accused Rabinarayan Gochhayat, did not give a seat to Prasanta, son of the informant (P.W.4). Therefore, there was exchange of hot words between the informant and Anu, another daughter of accused Rabinarayan Gochhayat. All left for their respective houses after the Puja was over,. It is the further case of the prosecution that at about 8.30 P.M. accused Rabinarayan Gochhayat holding a big crow-bar, accused Suresh holding a knife and accused Sathia holding a torch light, came to the house of the informant-the wife of the deceased, and abused her and the deceased in filthy language. They pelted brickbats and stones to the house of the informant. When the deceased, Sapana Swain, opened the door and looked outside, accused Suresh Gochhayat forcibly dragged the deceased to the village road from his house and accused persons Sathia and Suresh caught hold of the deceased and assaulted him. At that time, accused Rabinarayan Gochhayat dealt a blow by the crow-bar, he was holding, on the head of the deceased, as a result of which the deceased fell down on the ground with profuse bleeding from his head. At that time, the female accused persons and their children pelted brickbats to the house of the informant. The accused persons also assaulted Prasanta, the son of the informant, as a result of which, he sustained injury. It

is the further case of the prosecution that prior to the occurrence Kalia Khatei (P.W.2) and Magta Baral (P.W.3) were present in the house of the informant and they were discussing about the quarrel during 'Khudurikuni Osha'. All the accused persons left the spot after they knew that the deceased died.

02.2. It is the further case of the prosecution that the informant apprehending that the accused persons may dispose of the dead body of her husband (deceased Sapana Swain) immediately rushed to the Police Station, but she was advised not to proceed to the Police Station alone and as such, she was returning to her house. When she was near Bhalu Bazar, she found that her husband (deceased) was being carried in an Auto-Rickshaw by Magi Pradhan, Kunja Pradhan, Kalia Khatei, Babuli Baral, Prafulla Muduli and others and she sat in that Auto-Rickshaw and proceeded to Sakhigopal Hospital where the Medical Officer declared the deceased dead. So, the informant went to Satyabadi Police Station and orally lodged report about the occurrence, which was reduced into writing and treated as F.I.R. (Ext.1/1) and a case, was registered.

02.3. During investigation, the Investigating Officer (P.W.11) examined the informant and other witnesses and visited the spot. He seized some blood stained earth, sample earth and some brickbats in presence of witnesses as per the seizure list (Ext.8). On 22.08.1994, he held inquest over the dead body of the deceased by preparing an inquest report marked Ext.3/1. He also sent the dead body of the deceased to the District Headquarter Hospital, Puri for Post-Mortem Examination as per dead body challan (Ex.9). He also seized blood stained Dhoti (M.O.II) and Napkin (M.O.III) of the deceased on production by Police Constable, B.D. Swain, as per seizure list Ext.10.

02.4. On 23.08.1994, the Investigating Officer (P.W.11) arrested accused Rabinarayan Gochhayat. The convict-appellant, while he was in custody, disclosed that he had concealed the weapon of offence (M.O.I) inside the pond situated behind his house and led the Investigating Officer (P.W.11) and witnesses to that pond and gave recovery of the weapon of offence, the crow-bar (M.O.I) which he (P.W.11) seized as per seizure list Ext.2/1. On 23.08.1994, he also seized the wearing Lungi (M.O.IV) of accused Rabinarayan Gochhayat as per seizure list Ext.12. He (P.W.11) arrested the other accused persons and forwarded them to court. After completion of investigation, the Investigating Officer submitted charge sheet against the accused persons under Sections 148/ 302/ 294/ 336 read with Section 149 of the I.P.C.

03. All the accused persons pleaded 'not guilty' to the charges and took the plea that there was no such occurrence as alleged by the informant. It is their further case that accused Rabinarayan Gochhayat did not assault the deceased by the crowbar (M.O.I) at the time of alleged occurrence. It is also their further case that the informant called Kalia (P.W.2) and Maguni (P.W.3) to her house with an intention to assault them.

04. The prosecution in order to bring home the charges against the accused persons examined eleven witnesses out of twenty-two charge-sheet witnesses and led twelve documents as exhibits. The defence neither examined any witness to substantiate its plea nor led any documentary evidence. Out of eleven prosecution witnesses, Kalia Khatei (P.W.2), Magta Baral (P.W.3), Basanta Swain (P.W.4), Kuni Nayak (P.W.8) are the eye-witnesses to the alleged occurrence; Benu Nayak (P.W.5) is a witness to the extra-judicial confession made by accused Rabinarayan Gochhayat just after the occurrence; Lingaraj Behera (P.W.6) and Madhab Chandra Sahu (P.W.11) are the witnesses leading to discovery of the weapon of offence (M.O.I) given by accused Rabinarayan Gochhayat while in custody; Dr. Jagdish Chandra Hazra (P.W.9) is the Medical Officer who conducted Post Mortem Examination over the dead body of the deceased and Dr. Laxmidhar Sahu (P.W.10) is the Medical Officer who examined the injured son of the informant.

05. After assessing the evidence on records, the learned Second Additional Sessions Judge, Puri came to the following conclusions:

(i) the evidence of P.W.9-Dr. Jagadish Chandra Hazra, Assistant Surgeon, District Headquarter Hospital, Puri conclusively established that the death of the deceased Sapana Swain was homicidal in nature;

(ii) from the evidence of prosecution witnesses P.W.2- Kalia Khatei, P.W.3-Maguni @ Magta Baral, P.W.4- Basanta Swain and P.W.8-Kuni Nayak, the eye witnesses to the occurrence, the complicity of Rabinarayan Gochhayat, the present appellant is established by the prosecution in giving fatal blows by means of a crow-bar (M.O.I) to the head of the deceased as a result of which the deceased succumbed to the injuries;

(iii) learned Second Additional Sessions Judge, Puri also held that the prosecution has established the recovery of weapon of offence i.e. iron crow-

bar, even though no question was put to the accused while recording the statement of the accused separately, and the crow-bar was not sent for chemical examination for determination whether it was blood stained or not.

(iv) learned Second Additional Sessions Judge, Puri, however, did not place reliance on the evidence of P.W.5-Benu Nayak before whom the accused-appellant allegedly made extra-judicial confession regarding the occurrence.

06. Relying upon the reported judgments, passed in the cases of ***Thunin Charan and another –vrs.- State of Madras*: 1991 Cr.L.J. 1318, and *Prakash Hiramen Hingane –vrs.- State of Maharastra*: AIR 1998 SC 3211**, learned Second Additional Sessions Judge, Puri held that the prosecution has established it to be a case of culpable homicide amounting to murder punishable under Section 302 of the I.P.C. He rejected the defence contention that it is a case of culpable homicide not amounting to murder punishable under Section 304-II of the I.P.C.

06.1. Learned Second Additional Sessions Judge, Puri, however, held that the offences under Sections 148/ 302/ 294/ 336 read with Section 149 of the I.P.C., are not made out against any of the other accused persons. Learned Second Additional Sessions Judge, Puri further held that the offences under Sections 148/ 294/ 336 read with Section 149 of the I.P.C., are not made out against the present appellant- Rabinarayan Gochhayat. However, learned Second Additional Sessions Judge, Puri proceeded to convict the appellant-Rabinarayan Gochhayat under Section 302 of the I.P.C., albeit no separate charge has been framed for that penal provision.

07. Assailing the judgment of conviction and order of sentence under Section 302 of the I.P.C. rendered by the learned Second Additional Sessions Judge, Puri, Mr. P. Behera, learned Advocate, learned counsel for the appellant, submits that though the appellant does not assail the finding of the learned Second Additional Sessions Judge, Puri that the prosecution has established that the death of the deceased- Sapana Swain is homicidal in nature, the findings of the learned Second Additional Sessions Judge, Puri that the prosecution has established that the appellant has committed the offence of culpable homicide amounting to murder is fallacious. Relying upon several judgments of the Hon'ble Supreme Court as well as of this Court in support of his contentions, he submits that the conviction of

the appellant- Rabinarayan Gochhayat under Section 302 of the I.P.C. should be converted to one under Section 304, Part-II of the I.P.C.

08. Mr. A.K. Nanda, learned Additional Government Advocate, on the other hand, very emphatically argues that since the appellant has given a single blow by means of a heavy and long crow-bar on the head, a very vital part of the body of the deceased, learned Second Additional Sessions Judge, Puri is correct in recording that it is a case of culpable homicide amounting to murder. He, therefore, urges that this Court may not disturb the finding of the trial court in any manner and may uphold the conviction and sentence meted out by the learned Second Additional Sessions Judge, Puri.

09. Since there is no controversy at the Bar regarding the homicidal nature of death of the deceased and implication of the appellant in causing the death of the deceased, we consider it not very expedient to re-examine those aspects of the case, as it will be a futile exercise. So, we confine our discussion only to the question whether the offence under Section 302 of the I.P.C. or the offence under Section 304, Part-I or Part-II of the I.P.C. has been made out. For this purpose, we need to examine the very case of the prosecution proposed to be proved and the evidence available on records, which are enumerated below:-

(i) Firstly, a careful examination of the F.I.R. reveals that in the night of 21.08.1994 'Khudurikuni Osha' was being observed by the villagers of Raichakradharpur (Hata Sahi) of Satyabadi Police Station. There was a petty dispute between two children. It is argued that the son of the informant was not allowed to sit in the festivity by the daughter (China) of the sole appellant. For that reason, there was an altercation between the elder sister of China, namely, Anu and the informant, the wife of the deceased.

(ii) Later, in that evening, the appellant who happens to be the father of China and Anu came to the house of the deceased being armed with a big crow-bar along with Suresh @ Suria Gochhayat who armed with a knife and Sathia Gochhayat who was holding a torch light in his hand. Suresh @ Suria Gochhayat called her husband and pulled him to the village road where Sathia Gochhayat and Suresh @ Suria Gochhayat assaulted the deceased by means of torch light and hands. At that point of time, the appellant gave a single blow by means of a big crow-bar on the head of the deceased as result of which the deceased fell on the ground and started wriggling with pain. The

other accused persons pelted stones to the house of the informant. But, that has not been accepted by the learned Second Additional Sessions Judge, Puri.

10. P.W.2 (Kalia Khatei) has stated on oath before the learned Second Additional Sessions Judge, Puri that the occurrence took place on 21.08.1994 at about 8.00 P.M. He heard 'hullah' from the house of Sapana Swain, the deceased, and went there. He saw all the accused persons abusing the deceased in filthy language. He requested the accused persons not to abuse the deceased. He went to the verandah of the house of Sapana Swain and was informed by the wife of the deceased that the accused persons were coming to their house time and again and quarreling with them. At that time, there was brick batting and some of the bricks were hitting the door of the house of Sapana Swain. One of the brickbats struck the leg of the son of the deceased Sapana Swain for which he cried. Sapana Swain came out and complained about the condition of his son. Then accused Rabi, Suria and Sathia came to the house of Sapana Swain and accused Suria dragged Sapana Swain outside. Accused Suria was holding a knife, accused Rabi was holding a crow-bar and accused Sathia was holding a torch light. Accused Suria assaulted the deceased by means of handle of the knife while accused Sathia assaulted the deceased by means of torch light. Then accused Rabi, the appellant gave a blow on the head of the deceased by means of a crow-bar causing profuse bleeding injury. On such assault, the deceased fell down on the ground. Magta Baral (P.W.3) and the wife of the deceased administered water but the deceased could not drink the water. He has further stated that in the evening of the date of occurrence there was quarrel between the accused persons and the deceased.

In his cross-examination, the defence brought out several contradictions regarding the role played by Sathia and Suresh @ Suria. However, in his cross-examination, this witness has further stated that accused Rabi (the appellant) fled away from the spot by throwing the crow-bar at the spot which militates against the prosecution case that there was a recovery of the weapon of offence on the discovery statement of the appellant.

11. The evidence of P.W.3 (Maguni @ Magta Baral) is also similar in nature except the fact that he has stated on oath, on being shown the weapon of offence i.e. the iron crow-bar (M.O.I), that the said crow-bar is not the crow-bar by which the accused Rabi gave the blow on the head of the deceased Sapana.

12. P.W.4 (Basanta Swain) who happens to be the widow of the deceased has attributed the overt act to the appellant, accused Suresh and accused Sathia. In cross-examination, she has stated that prior to one hour of the assault on her husband there was a quarrel regarding 'Khudurukuni Osha' between herself and the daughter of accused Rabi. She denied the suggestion of the defence that the accused persons assaulted her five year old son Prasanta mercilessly as a result of which he sustained injuries on his knee and swelling of his leg. But, in fact, it is evident from Ext.1 i.e. the F.I.R. that she has stated so in the F.I.R. lodged by her.

13. P.W.8 (Kuni Nayak) the last eye-witness examined on behalf of the prosecution has stated that the other accused persons came there and started pelting stones to the house of deceased Sapana. He dissuaded them, but they did not pay attention to him. He has further stated that a brickbat hit to the son of the deceased for which the deceased Sapana and his wife showed their injured son to Kalia and Maga complaining that how their son received injuries due to pelting of brickbats by the accused persons. At that time, accused Suria dragged deceased Sapana from his verandah and gave two pushes to him by the handle side of his knife. Accused Sathia gave a push to the deceased by means of torch light. Thereafter, accused Rabi dealt a blow by means of a crow-bar to the head of the deceased Sapana as a result of which there was profuse bleeding from the head of the deceased and he fell down on the ground. This witness raised hullah. The deceased Sapana died at the spot. M.O.I is the crow-bar by which the accused Rabi dealt a blow to the head of the deceased Sapana.

14. There is also evidence to the effect that the accused Rabi immediately after the occurrence fell on the feet of P.W.5 (Benu Nayak), an elderly man of that village, keeping the crow-bar on the ground and requested him to compromise the matter. But this witness did not agree to his request.

15. While dealing with the distinction between the culpable homicide amounting to murder and culpable homicide not amounting to murder, Hon'ble Supreme Court in the case of **Virsa Singh –vrs.- State of Punjab**: reported in AIR 1958 SC 465 held:

> "That the prosecution must prove the following before it can bring a case under Section 300 of Indian Pena Code third clause.

(1) It must establish, quite objectively, that a bodily injury is present.

(2) The nature of the injury must be proved; these are purely objective investigation.

(3) It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

(4) Itmust be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

The third clause of Section 300 of Indian Penal Code consists of two parts. Under the first part it must be provedthat there was an intention to inflict the injury that is found to be present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. The words "and the bodily injury intended to be inflicted" are merely descriptive. All this means is, that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury found to be present was the injury intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention."

16. In the case of **Rajwant and another –vrs.- State of Kerala**: reported in AIR 1966 SC 1874 the Hon'ble Supreme Court held that two offences involve the killing of a person. They are the offences of culpable homicide and the more henious offence of murder. What distinguishes these two offences is the presence of a special *mens rea,* which consists of four mental attitudes and the presence of any of which the lesser offence becomes greater. These four mental attitudes are stated in Section 300 of the I.P.C. as distinguishing murder from culpable homicide. Unless the offence can be said to involve at least one such mental attitude it cannot be murder. Hon'ble Supreme Court further held that the first clause says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matter so clearly within the general principle of *mens rea* as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies in which case the offence is reduced to culpable homicide not amounting to murder. Xx xx xx The second clause says that if there is first intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury. English Common Law made no clear distinction between intention and recklessness but in our law the foresight of the death must be present. The

mental attitude is thus, made of two elements-(a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death. Therefore, for the application of third clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established. The last clause is ordinarily applicable to cases in which there is no intention to kill any one in particular which comprehends, generally, the commission of imminently dangerous acts which must in all probability cause death. In that case, the assailants conspired together to burgle the safe of the Base Supply Office on the eve of the pay-day and had collected various articles such as a Naval Officer's dress, a bottle of chloroform, a hacksaw with spare blades, adhesive plaster, cotton wool and ropes and in presence of that there was a murder. So, the act of the assailants of that case was held to be done with the intention of causing such bodily injury as was likely to kill and the appellants' conviction under Section 302/34 of the I.P.C. was upheld by the Hon'ble Supreme Court.

17. Much prior to the judgment rendered by the illustrious Judge Vivian Bose in the case of **Virsa Singh** (supra), in the case of of **Reg. –vrs.- Govinda**: reported in (1877) ILR 1 Bom 342, the distinction between the culpable homicide amounting to murder and the culpable homicide not amounting to murder as defined under Sections 299 and 300 respectively, of the I.P.C. has been pithily brought out by Justice Melvill as follows:

Section 299	**Section 300**
A person commits culpable homicide, if the act by which the death is caused is done	Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done
(a)With the intention of causing death;	(1) With the intention of causing death;
(b)With the intention of causing such bodily injury as is *likely* to cause death;	(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused*;
(c) With the knowledge that the act is *likely* to cause death.	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinarily course of nature* to cause death;
	(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

The same table was adopted by the Hon'ble Supreme Court in the case of **State of Andhra Pradesh –vrs.- Rayavarapu Punnayya and Another**: reported in (1976) 4 SCC 382 with the exception in clause (4) of Section 300 of the I.P.C. in the table i.e. the expression "*,and without any excuse for incurring the risk of causing death or such injury as it mentioned above*" was added. Thereafter, the Hon'ble Supreme Court held that "clause (b) of Section 299 of the I.P.C. corresponds with clauses (2) and (3) of Section 300 of the I.P.C. distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the intentional harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause".

The Hon'ble Supreme Court further held:

"14. *Clause (b)* of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of *causing the bodily injury* coupled with the offender's *knowledge* of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

Section 299	**Section 300**
A person commits culpable homicide, if the act by which the death is caused is done-	Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done-

	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is *likely* to cause death; or	(2) with the intention of causing such bodily injury as the *offender knows to be likely* to cause the death *of the person to whom* the harm is caused; or
	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinarily course of nature* to cause death; or
	KNOWLEDGE
(c) with the knowledge that the act is *likely* to cause death.	(4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given *knowing* that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that *particular* person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a *bodily injury sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury …….sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature."

18. If any of the four conditions, enumerated below, is not satisfied, then the offence will be culpable homicide not amounting to murder. These are:-

(i) the act was done with the intention of causing death; or

(ii) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused: or

(iii) with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinarily course of nature to cause death; or

(iv) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

18.1. This is a case where the accused/appellant- Rabinarayan Gochhayat gave a blow on the head of the deceased by means of a crowbar causing bleeding injuries.

18.2. It is further revealed from the evidence that the dispute started by the accused Suria since acquitted when he dragged the deceased Sapana Swain from his verandah and assaulted him by means of the handle of a knife. Thereafter, the other co-accused Sathia who has also been acquitted assaulted the deceased by means of torchlight. Thereafter, the present appellant dealt a blow by means of a crowbar as a result of which the deceased fell down on the ground with profuse bleeding from his head. Narrations of the eye-witnesses reveal that the appellant had no intention of causing death of the deceased or causing such bodily injury as he knows to be likely to cause the death of the deceased to whom the harm is caused or with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient to cause death. This is fortified from the facts that immediately after the occurrence the accused/ appellant went to the village road fell in the feet of P.W.5 (Benu Nayak), an elderly man of the village, keeping the crow-bar on the ground and requested him to compromise the matter. But, P.W.5 did not agree to his request. It is, thus, evident that because of petty quarrel between the children of the informant and the accused/ appellant in course of observation of 'Khudurikuni Osha', the

dispute started between their parents which led to instantaneous death of the deceased.

19. So, we are of the opinion that this is not a case, as held by the learned Second Additional Sessions Judge, Puri, of culpable homicide amounting to murder punishable under Section 302 of the I.P.C. Rather, we are of the opinion that this is a case which falls under the category of culpable homicide not amounting to murder punishable under Section 304, Part-II of the I.P.C.

19.1. Therefore, we allow the appeal in part. Accordingly, the conviction and sentence to undergo imprisonment for life under Section 302 of the I.P.C. recorded by the learned Second Additional Sessions Judge, Puri in S.T. Case No.11/42 of 1997 vide judgment of conviction and order of sentence dated 31.10.2000 against the appellant are hereby set aside. Instead, the appellant is convicted for the offence under Section 304, Part-II of the I.P.C.

20. This case relates to the year 1994. In the meantime, 26 years have elapsed. There is no justification in sending the appellant back to the prison. Moreover, we find from the records that the appellant was arrested and forwarded to court on 24.08.1994. He was in custody during the course of trial. He was in custody on the date of pronouncement of the judgment of conviction and order of sentence on 31.10.2000. He was granted bail by this Court on 09.05.2001. The record does not reveal the exact date on which the appellant has been released from jail custody. It is also seen that the appellant has already been incarcerated at least for a period of six years and six months.

20.1. So, in our considered opinion, the period already undergone by the appellant during investigation, during the trial as an U.T.P. and after conviction is sufficient to subserve the interests of justice. He is sentenced to undergo rigorous imprisonment already undergone under Section 304, Part-II of the I.P.C.

20.2. Accordingly, this CRA is disposed of. The L.C.R. be sent back to the court below forthwith.

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2020 (III) ILR - CUT-126

D. DASH, J.

W.P.(C) NO. 20054 OF 2019

DAMAYANTI HANSDA .....Petitioner

.V.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – Section 24(2) (C) – No confidence motion against the Sarapancha – Form of notice and proposed resolution under the Act – Such notice and resolution were sent in Odia as "Alochya" & "Prastab" – Plea raised that, such words "Alochya" & "Prastab" don't form or refer to requisition or proposed resolution – It was pleaded that, no particular form or proforma of notice & resolution has been prescribed under the Act – Such notice & resolution are the mandatory requirements of the Act – The odia meaning of both the words interpreted – Whether the words 'Alochya' & 'Prastab' refer to notice and resolution ? – Held, No. – Hence, no confidence motion against the petitioner is quashed and the Writ petition is accordingly allowed.

Case Laws Relied on and Referred to :-

1. 2001 (II) OLR – 44 : Smt. Kanti Kanhar Vs. State of Orissa & Anr.
2. 2007 (Supp.-I) OLR – 242 : Dasarath Munda Vs. Collector, Kalahandi & Ors.
3. 2005 (Supp.) OLR – 917 : Padmini Nayak Vs. State of Orissa & Ors.
4. 64 (1987) C.L.T. 359 : Jagdish Pradhan & Ors. Vs. Kapileswar Pradhan & Ors.
5. 2011 (I) OLR – 677 : Smt. Sandhyatara Behera Vs. Sub-Collector, Nuapada & three Ors.

For Petitioner : M/s. Prafulla Ku. Rath, A. Behera, S.K. Behera, P. Nayak, S. Das and S. Rath.

For Opp. Parties : Mr.P.C.Das, ASC (For O.Ps.1 to 3) M/s.Niranjan Lenka, H.K. Mohanta and Mrs. N. Lenka, (Intervenor)

JUDGMENT Date of Hearing : 17.03.2020 : Date of Judgment : 06.05.2020

D.DASH, J.

The petitioner, by filing this writ application, seeks to assail the decision of the Sub-Collector, Udala (opposite party no.3) in convening a special meeting of Badagudgudia Grama Panchayat under Kapatipada Block in the Sub-Division of Udala in the District of Mayurbhanj to consider the

"No Confidence Motion" against the petitioner, who is the elected Sarpanch of said Grama Panchayat.

2. The petitioner is the elected Sarpanch of Badagudgudia Grama Panchayat and has been in the Office and discharging her duties as such since her assumption of the charge of the Office after the election.

When the matter was continuing as such, the Sub-Collector, Udala (opposite party no.3) by notice No.2957 dated 14.11.2019 convened the special meeting of the Grama Panchayat to be held on 30.10.2019 for consideration of the No Confidence Motion against the petitioner in the Panchayat Office fixing the time at 11 A.M. The challenge here is to the said decision in convening the meeting for recording of the no confidence against the petitioner by issuance of the above notice as at Annexure-1.

3. The grounds of challenge are as under:

(a) The copy of the requisition said to have been given by at least 1/3rd of the total membership of the Grama Panchayat and the proposed resolution being not sent with the notice under Annexure-1 as mandatorily required under clause-c of sub-section (2) of section 24 of the Odisha Grama Panchayat Act (hereinafter referred to as the "OGP Act"), the decision taken by the opposite party no.3 to convene the special meeting of the Grama Panchayat is unsustainable and consequentially the notice under Annexure-1 is invalid in the eye of law and as such is liable to quashed.

(b) The petitioner having received the notice on 18.10.2019 for the special meeting of the Grama Panchayat to be held on 30.10.2019 as required under clause (c) of sub-section (2) of section 24 of the OGP Act, fifteen clear days for the meeting has not been so provided. So the notice under Annexure-1 is illegal.

4. The opposite party no.3 in the counter has stated that nine out of twelve members of the Grama Panchayat including the Sarpanch have sent the requisition under their signature addressing it to the opposite party no.3 for convening the special meeting of the Grama Panchayat as they proposed to move the No Confidence Motion against the petitioner, the elected Sarpanch of the Grama Panchayat. It is stated that notice under Annexure-1 had been given to all the members of the Grama Panchayat by registered post

enclosing the copy of the requisition as well as the proposed resolution as required under clause-c of subsection (2) of section 24 of the OGP Act and thus there has been no breach of the provision of law in that behalf. It is further stated that the notice under Annexure-1 being signed on 13.10.2019, it has been dispatched to all the members of the Grama Panchayat including the Sarpanch, the present petitioner by registered post on the very next date, i.e., 14.10.2019 and thus the date fixed for the said special meeting of the Grama Panchayat falls after clear fifteen days of giving of the notice.

5. Mr. P.K. Rath, learned counsel for the petitioner confines his submission to the ground of challenge as at (a) on the score that said decision of the opposite party no.3 in convening the special meeting for discussion on the "No Confidence Motion" against the petitioner, who is the elected Sarpanch of the Grama Panchayat is in gross violation of sub-section (2) of section 24 of the OGP Act as with the notice under Annexure-1 issued to the petitioner the copy of the requisition given by the requisitionist - members of the Grama Panchayat and the proposed resolution had not been sent.

6. Inviting the attention of this Court to the contents of the notice under Annexure-1, he submits that it has not been mentioned therein that the requisition and the proposed resolution had been enclosed with the said notice. According to him, the meaning of the Odia words "ଆଲୋଚ୍ୟ" – (Alochya) and "ପ୍ରସ୍ତାବ" – (Prastab) said to have been so sent with the notice do not mean or refer to "requisition" and "proposed resolution" and, therefore, the breach of the mandatory provision of law stands established, which vitiates everything from the inception. He further submits that mere making an averment in the counter supported by affidavit on the score that the copy of the requisition and the proposed resolution had been sent with the notice under Annexure-1 would not suffice the purpose when the very notice under Annexure-1 does not so indicate.

7. Mr. P.C. Das, learned Additional Standing Counsel referring to the averments taken in the counter filed by the opposite party no.3 submitted all in favour of the said decision followed by issuance of the notice under Annexure-1 upon due observance of the provision contained under section 24 of the O.G.P. Act. It is further submitted that the meeting for the no confidence motion against the petitioner, the elected Sarpanch of the Grama Panchayat having already been held and the voting being completed on the

schedule date, time and venue, in view of the interim order dated 24.10.2019 passed by this Court, the declaration of the resolution has been withheld.

8. Mr. N. Lenka, learned counsel for the opposite party nos.4 to 12 reiterating the submission of the learned counsel for the State contends that there is no illegality or impropriety in the said decision of the opposite party no.3 in convening the special meeting for consideration of the No Confidence Motion against the petitioner pursuant to the said requisition given by the opposite party nos.4 to 12 in terms of the provision of Clause-a to sub-section (2) of section 24 of the O.G.P. Act. He further submits that there being no violation of the statutory provision in taking the decision by the opposite party no.3 in convening the special meeting for record of no confidence against the petitioner, the elected Sarpanch of the Grama Panchayat followed by issuance of notice in consonance with clause-c to subsection (2) of section 24 of the OGP Act, this writ application is devoid of any merit.

9. In order to address the rival submission, it would be appropriate to first refer to section 24 of the OGP Act which runs as under:

> "24. Vote of no confidence against Sarpanch or Naib-Sarpanch
>
> (1) xx xx xx xx
>
> (2) In convening a meeting under Sub-section (1) and in the conduct of business at such meeting the procedure shall be in accordance with the rules, made under this Act, subject however to the following provisions, namely:-
>
> (a) no such meeting shall be convened except on a requisition signed by at least one-third of the total membership of the Grama Panchayat along with a copy of the resolution of proposed to be moved at the meeting;
>
> (b) the requisition shall be addressed to the Sub-Divisional Officer;
>
> (c) the Sub-Divisional Officer on receipt of said requisition, shall fix the date, hour and place of such meeting and give notice of the same to all the Members holding office on the date of such notice along with a copy of the resolution and of the proposed resolution, at least fifteen clear days before the date so fixed;
>
> (d) xx xx xx xx
> (e) xx xx xx xx
> (f) xx xx xx xx
> (g) xx xx xx xx;
> (h) xx xx xx xx;

(i) xx xx xx xx;
(j) xx xx xx xx; and
(k) xx xx xx xx"

It provides that no such meeting shall be convened except upon receipt of a requisition signed by at least 1/3rd of the total membership of the Grama Panchayat addressed to the Sub-Divisional Officer along with the copy of the resolution proposed to be moved at the meeting. The Sub-Divisional Officer then shall fix the date, hour and place of such meeting by giving notice to all the members holding office on the date of such notice along with the copy of the requisition and the proposed resolution at least fifteen clear days before the date so fixed for the meeting.

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

10. The notice as in Odia Language under Annexure-1 = Annexure-A/3(i) insofar as the annexures to the same are concerned finds mention of the following:-

"ଏଥି ସହିତ ଆଲୋଚ୍ୟ ଓ ପ୍ରସ୍ତାବ ନକଲ ସଂଲଗ୍ନ କରାଗଲା" (ETHI SAHITA ALOCHYA 'O' PRASTABARA NAKAL SANGLAGNA KARAGALA) . The averments in the counter is to the effect that along with that notice, the copy of the requisition as at Annexure-A/3 (ii) and the proposed resolution under Annexure A/3(iii) had been sent.

The law on this point is no more res integra. A Division Bench of this Court, in the case of ***Jagdish Pradhan and others vrs. Kapileswar Pradhan***

& others, 64 (1987) C.L.T. 359, was considering a similar question under Section 46 (B)(2) of the Orissa Panchayat Samiti Act, 1959 ("Act, 1959" for short), which is a perimetria provision with Section 24 of the Act. In the said case the proposal or the proposed resolution was not in a separate sheet or document. It was there in the resolution moved by requisite number of members to the appropriate authority for recording confidence against the Chairman of the Panchayat Samiti. This Court, in paragraph-7 of the judgment, held thus :-

> "7. The revisional authority has held that the mandatory provision that no meeting shall be convened except on a requisition along with a copy of the resolution proposed to be moved, has not been complied with as a copy of the resolution proposed to be moved at the meeting in which a vote of no confidence has to be passed was not appended. True it is that Section 46-B (2) requires a copy of the resolution proposed to be moved at the meeting to be along with the requisition. In the resolution dated 24-3-1985 the proposal was clearly mentioned to be the absence of confidence of the signatories on the Chairman. Merely because the proposal is not in a separate document, it cannot be said that the action thereupon becomes illegal. There is no form prescribed for such a proposed resolution. The authority, i.e. the Subdivisional Officer well understood the intention behind the resolution and rightly treated the same to be in compliance of the requirement of Section 46-B (2). The finding of the revisional authority that the mandatory provision has not been complied is thus an error of law apparent on the face of the record."

In the case of ***Smt. Kanti Kanhar vrs. State of Orissa and another, 2001 (II) OLR - 44***, the specially convened meeting was fixed to 22.11.2000 on the basis of resolution dated 03.09.2000. It was contended before the Court that, the requisition along with the proposed resolution was adopted at a meeting on 03.09.2000 and the same cannot be said to be the proposed resolution to be moved in the meeting for No Confidence.

A Single Bench of this Court was considering the aforesaid contention in connection with Section 46-B(I) of the Orissa Panchayat Samiti Act, 1959. This Court in paragraph-6 of the judgment held thus :-

> ".....There is no requirement in the Act that, before sending such a requisition, there has to be a formal meeting of the Panchayat Samiti. It is, of course, true that in the present case the proposed resolution relating to No Confidence was also purported to have been adopted in a meeting held on 03.09.2000. Such a meeting of some of the members of the Panchayat Samiti does not have any statutory force and is not required to be held in a particular manner. It can be considered to be a convenient method for preparing requisition along with the proposed resolution (No Confidence Motion). Therefore, even assuming that such a meeting had been held

> without following any procedure contemplated under Section 46-B, the requisition on the basis of so called resolution adopted in such meeting does not become illegal and on the basis of such requisition the meeting contemplated under Section 46-B(I) could be legally convened by the prescribed authority, if other conditions are fulfilled."

In the aforesaid case also the resolution dated 03.09.2000 was accepted as the proposed resolution.

In the case of ***Dasarath Munda vrs. Collector, Kalahandi and others, 2007 (Supp.-I) OLR - 242***, a Division Bench of this Court, in paragraph-8 of the judgment, held thus :-

> 8. The 3rd contention is that the requisition did not contain the proposed resolution. It is to be noticed that the petitioner himself in paragraph-6 of the writ petition has mentioned that the meeting has been convened on the basis of the old resolution meaning thereby - he concedes that the documents sent along with the requisition was a resolution. Besides this, the words at the top of the enclosure to the letter of Annexure-3 "SWATANTRA BAITHAKARE ALOCHANA HEBAKU THIBA PRASTAB" have been mentioned, which means, the proposed discussion to be made in the special meeting with regard to the proposed no confidence motion. In that last four lines of the said enclosure the contents of the resolution have also been mentioned in clear terms. According to Chambers English Dictionary, we make it clear that 'resolution' means, "a formal proposal put before a meeting, or its formal determination thereon". Therefore, this contention is also not sustainable in the eye of law."

In the case of ***Padmini Nayak vrs. State of Orissa and others, 2005 (Supp.) OLR - 917***, a Division Bench of this Court, in paragraph-4 of the judgment held thus :-

> ".....It is alleged that, Annexure-2 is not a requisition and Annexure3 is not the proposed resolution. A close reading of Annexure-2 reveals that 8 out of 12 Ward Members of the Grama Panchayat wrote to the Sub- Collector, Panposh requesting him to take necessary steps and action on the no confidence motion brought by them against the petitioner. The wordings of this document show that it is a letter of requisition sent by the 8 Ward Members to the Sub-Collector. Annexure-3 was enclosed along with Annexure-2. In Annexure-3 it has been mentioned that on 11.3.2004 an urgent meeting under the Chairmanship of Sri Plasidas Kerketta was held with the attendance of the 8 Ward Members and that in the said meeting a thorough discussion was made about the action and manner of functioning of the petitioner - Sarpanch. Some of the alleged misdeeds of the Sarpanch have been noted in Annexure-3 and it has been mentioned that because the Ward Members have lost confidence on the Sarpanch, the signatories proposed no confidence motion against the Sarpanch. Request was also made in this document to the

> SubCollector to take steps under Section 24 of the G.P. Act. Annexure-3 can therefore, be broadly accepted as proposed resolution....."

In the case of ***Smt. Sandhyatara Behera vrs. Sub-Collector, Nuapada & three others, 2011 (I) OLR - 677***, it was contended that, in fact, Annexure-3 is not the proposed resolution, and it is a resolution wherein it was proposed to initiate No Confidence Motion against the petitioner by sending requisition in that record to the Sub-Collector. On perusal of Annexure-3, this Court held that Annexure-3 is the proposed resolution to be moved at the time of holding meeting for want of confidence against the petitioner.

Learned counsel for the petitioner leans heavily in the case of Kamala Tiria (supra). This Court, in the case of Padmini Nayak (supra) in paragraph-5 has distinguished the case of Kamala Tiria (supra) as follows :-

> "5. In Smt. Kamala Tiria's case (supra) the requisition for convening the meeting to record want of confidence was not signed by the requisite number of members, but was signed by one member in a representative capacity. The resolution proposed to be moved at the meeting was not enclosed to the requisition. Some of the members, who were shown as signatories to the requisition, denied that they were ever present in the emergency meeting and some nominated members who had no right of voting were also allowed to remain present at the meeting held for recording the no confidence motion. For all these lacunae the resolution passed regarding want of confidence was declared null and void. The ratio of the said case in no way applies to the present case as the facts and circumstances involved in that case is totally different from this case. In the present case 8 out of the 12 members of the Grama Panchayat have signed the requisition Annexure-2 and copy of the proposed resolution Annexure-3 was also enclosed with Annexure-2. So, the mandates of Section 24(2)(a) of the G.P. Act was substantially complied with."

In the case of Muktamanjari Sahu (supra) this Court quashed the Notice issued by the Sub-Collector on the ground that the resolution passed for initiating No Confidence Motion is not the resolution as contemplated under Section 24(2)(a) of the Act, as per the decision rendered in the case of Smt. Kamala Tiria (supra).

From the discussions supra, it is clear that though no form or proforma has been prescribed either for the Notice to be issued by the Sub-Collector calling upon the members including the Sarpanch or Naib-Sarpanch to attend the meeting of No Confidence, or for the requisition to be sent by 1/3rd members of the Grama Panchayat or for the proposed resolution to be

moved, yet the provision as to issuance of notice to all the members of the Grama Panchayat for the special meeting convened by the authority on receiving the requisition by at least of 1/3rd of the total membership of the Grama Panchayat is concerned, enclosing the copy of the requisition as well as the proposed resolution is the mandatory requirement as expressed in clause-c of sub-section (2) of section 24 of the O.G.P. Act.

During hearing, learned counsels for the parties have also not expressed any reservation on the score that the said provisions are mandatory and are required to be scrupulously complied with by the Authority so as to sustain the action in that regard.

11. The position is settled that when the statutory functionary issues the notice for a particular purpose, and there remains certain conditions to be fulfilled while issuing the said notice, its validity must be judged by looking at the said notice as to whether those aspects even though have not been stated in detail yet if sufficient hints to that effect have been provided or appears in support of the compliance of the mandatory conditions laid down in law in that behalf so as to hold substantial compliance of those. But certainly, its substitution cannot be through an affidavit or otherwise. The reason being that the said notice being made in the beginning without the compliance to that effect cannot be so rectified when it comes to the courts on account of challenge as indicated in the petition, by any other mode like taking averment in the counter or by affidavit.

So, for the purpose whether the copy of the requisition given by the opposite party nos.4 to 12 and the resolution that they proposed to move in the said specially convened meeting had been sent with the notice under Annexure-1 is to be construed objectively with reference to the language used or the expression given in the notice.

12. In the case at hand, the notice being in Odia language, the well accepted Odia Language Lexicon "Purna Chandra Bhasakosha" compiled by Late Gopal Chandra Praharaj, the famous celebrated writer and linguist in Odia language significantly contributing to the Odia literature by his words as well as completing such herculean task of listing, some one lakhs eighty-five thousand words and their meanings in four languages, i.e., in Odia, English, Hindi and Bengali, is bound to be referred to in order to address the rival submission. The word "ଆଲୋଚ୍ୟ" (alochya) as finds mention in the notice

under Annexure-1 is there at page-823 of Vol.1 (The Vowels) of Purna Chandra Bhasakosha. The synonyms of word "ଆଲୋଚ୍ୟ" (alochya)" is "ବିଚାର ଯୋଗ୍ୟ" (bichar jogya), i.e., "fit to be considered"; "deserving consideration". The next synonym is "ବିଚାରଧୀନ" (bicharadhina), which is "under consideration". Thus, the word "ଆଲୋଚ୍ୟ" (alochya) does not mean or represent either the english word "requisition" or "resolution".

Similarly, the next odia word "ପ୍ରସ୍ତାବ" (prastaba) as finds mention in the notice as at Annexure-1, is there at page-5142 of the 4th volume of Purna Chandra Bhasakosha. Its synonyms are "ପ୍ରସଙ୍ଗ" (prasanga) and "ବିଷୟ" (bisaya), which are "subject"; "matter" & "topic".

The Oxford English-English –ODIA Dictionary published by Oxford University Press in its 1st edition in the year 2004 gives the meaning of the word "requisition" at page 888 as "କୌଣସି କର୍ତ୍ତବ୍ୟ ସମ୍ପାଦନା ପାଇଁ ଲିଖିତ ଆଦେଶ"; "କାମ ପାଇଁ ଡାକରା;" "ଅଧିକାରଭୁକ୍ତ କରିବା ପାଇଁ ଦାବି କରିବା ବା ଆଦେଶ ଦେବା" (Kaunasi Kartabya Sampadana Paaini Sarakari Adesha; Kama Paain Dakara; Adhikarbhukta kariba paain dabi kariba or adesha deba). Similarly, the word "resolution" at page 890 of that dictionary is "ସଂକଳ୍ପ"; "ଦୃଢ଼ପ୍ରତିଜ୍ଞା"; "ଆନୁଷ୍ଠାନିକ ପ୍ରସ୍ତାବ" (sankalpa; drudha pratigyan; anusthanika prastaba).

So from the notice under Annexure-1 issued pursuant to the decision taken by the opposite party no.3 for convening the special meeting of the Grama Panchayat for record of no confidence motion, on receipt of the requisition under Annexure-A/3(ii) does not find mention that the factum standing as the mandatory requirements of the provision of law as expressed in clause-c of sub-section-(2) of section 24 of the O.G.P. Act, inasmuch as, that the copy of the requisition and resolution had also been sent along with the notice under Annexure to the members of the Grama Panchayat.

13. In the wake of aforesaid, the notice issued by the opposite party no.3 in convening a special meeting of the Grama Panchayat to consider No Confidence Motion against the petitioner, the elected Sarpanch under Annexure-1 stands quashed. Consequently, the actions which have followed the said notice under Annexure-1 stand vitiated.

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

While thus parting, it be clarified that the notice in convening the special meeting of the Grama Panchayat for vote of no confidence against the petitioner Sarpanch and the consequential actions taken in that regard being hereby annulled for the reasons as afore-discussed, this order, however, shall not stand on the way of the opposite party no.3 to proceed in the matter afresh in accordance with law.

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2020 (III) ILR - CUT- 136

D. DASH, J.

S.A. NO. 333 OF 1997

PRAFULLA CHANDRA SAMANTARAY …….Appellant.

.V.

SATYABHAMA PANDA …….Respondent.

CIVIL PROCEDURE CODE, 1908 – Suit claiming damages for malicious prosecution – Principles to be followed – Held, the position of law is well settled that in an action for malicious prosecution, the plaintiff must prove (a) that he was prosecuted by the defendant; (b) that the proceeding complained of terminated in favour of the plaintiff; (c) that the prosecution was instituted against him without any reasonable or probable cause; (d) that the prosecution was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact; and (e) that he has suffered damage to the reputation or to the safety of person, or to the security of his property.

Case Laws Relied on and Referred to :-

1. AIR 1960 Orissa 29 : Gobind Ch. Sambarsingh Mohapatra Vs. Upendra Padhi & Ors.
2. AIR 1975 Orissa 121 : Ramesh Ch. Singh Mohapatra Vs. Jagannath Singh Mohapatra.
3. AIR 1983 Allahabad 105 : Shew Singh Vs. Ranjit Singh & Ors.

For Appellan : Mr. S.P.Mishra, Sr. Adv, D.Chatterjee,
S.K.Mishra, Sk.G.Mohammad, A.K.Mishra-2 &
E.Saadhana Kumari.
For Respondent : None

JUSGMENT Date of Hearing: 26.08.2020 : Date of Judgment: 01.09.2020

D. DASH, J.

This appeal under section 100 of Code of Civil Procedure (C.P.C.) has been filed by the present appellant in questioning the judgment and decree dated 16.08.1997 and 01.09.1997 respectively, passed by the learned Additional District Judge, Khurda in Money Appeal No.1 of 1997. That appeal filed by the present respondent challenging the judgment and decree dated 17.01.1997 and 06.02.1997 respectively passed by the learned Civil Judge (Senior Division), Khurda in M.S. No.103 of 1995 has been allowed and accordingly, the suit filed by the present appellant, as the plaintiff, which had been decreed by the trial court has been dismissed.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the trial court.

3. The plaintiff has filed the suit claiming damage of Rs.15,000/- from the defendant for the false prosecution against him alleging that he with others entered into the house of the Defendant, dragged her husband, outraged her modesty and forcibly took away her husband in a jeep. Making such allegations, She lodged a complaint in the court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Khurda vide 1CC No.22 of 1994. Learned S.D.J.M., Khurda, holding an enquiry under section 202 of the Code of Criminal Procedure (Cr.P.C.), took cognizance of the offences under section 365/354/34 of the Indian Penal Code (IPC) and issued process against the plaintiff and others, placed as the accused persons therein. The plaintiff then appeared in the said proceeding before the learned S.D.J.M., Khurda on 04.03.1994 through his counsel and filed an application under section 205 Cr.P.C. seeking his representation all throughout in the case, by his lawyer. Another application was also filed for reconsideration of the order of taking cognizance. It is said that those applications having been dismissed, non-bailable warrant of arrest had been issued against the plaintiff and in order to avoid arrest and harassment, he underwent serious mental depression and agony being further not able to perform his normal duties during the said

period. The order of the learned S.D.J.M., Khurda taking cognizance of the offences and issuing process to the plaintiff and others were challenged before this Court in Crl. Misc. Case No.616 of 1994 through an application invoking the jurisdiction under section 482 Cr.P.C. This Court, by order dated 08.07.1994, allowed the said prayer of the plaintiff and another accused, namely, Ramakanta in holding that the continuance of the proceeding against them would be abuse of process. Accordingly, 1CC No.22 of 1994 stood finally concluded in so far as the present plaintiff and another are concerned. It is the further case of the plaintiff that he was then the Sarpanch of Baghamari Grama Panchayat and elected President of Baghamari Service Cooperative Societies as also the Director of Khurda Sub-Divisional House Building Society, Chairman of Baghamari UP School Committee and Member of the Managing Committee of Baghamari High School. Thus, the plaintiff stated that he was carrying/enjoying high reputation and prestige in the society and this malicious and false prosecution launched against him put him to humiliation and harassment when there was absolutely no reasonable and probable cause to institute such a complaint against him in the court of law in making the allegations. He, therefore, claimed damage of Rs.10,000/- towards mental agony and Rs.5,000/- towards legal expenses from the defendant. It is also stated that the allegations leveled in the complaint against the plaintiff were all with malicious intention and deliberately made to humiliate him in public eye and harass him unnecessary harassment.

4. The defendant, in the written statement, averred that despite the order of this Court passed in Crl. Misc. Case No.616 of 1994 in holding the continuance of the proceeding against the plaintiff as unwarranted, she had all the reasonable and probable cause in believing that the allegations made in the complaint are all true and that plaintiff was the creator of the very incident. It is stated that the plaintiff having political ambition with the objective of keeping a command in the locality was carrying a revengeful attitude towards the Defendant and her husband who has thus been entangled in several criminal cases. With all these, she prayed to non-suit the plaintiff.

5. Based on the above rival pleadings, the trial court framed as many as six issues. In the trial, the plaintiff had examined three witnesses and the defendant had two. The documents concerning the complaint case, i.e, 1CC No.22 of 1994 had been admitted in evidence. In a cryptic judgment, the trial court has answered all the issues in favour of the plaintiff without discussing

the position of law holding the field. Under the crucial issues, the finding of the trial court reads as under:-

> "Issue No.3 and 5:-
>
> Admittedly, the defendant has initiated a criminal case 1CC No.22/94 against the plaintiff along with others in the court of the learned S.D.J.M., Khurda u/s 365/354/34 IPC. In Ext.3 the Hon'ble High Court has held that continuance of the proceeding against Prafulla and Ramakanta would be sheer abuse of the process of law. Accordingly, the petition filed by Prafulla and Ramakanta are allowed and the proceeding shall not continue so far they are concerned. The statement of the plaintiff examined as P.W.1 to the effect that the husband of the defendant was involved in a criminal case instituted at Banki and he was arrested by the Banki Police has not been challenged. The defendant examined as D.W.1 has admitted in her cross-examination that on the day her husband was taken out from her house, he was (husband of the defendant) retained in the police lock up. The aforesaid observation of the Hon'ble High Court and the statement of both the plaintiff and defendant reached to the conclusion that the defendant has filed criminal case 1CC No.22 of 1994 in the court of the learned S.D.J.M. at Khurda against the plaintiff without any reasonable and probable cause with malice.
>
> "Issue No.6:-
>
> The plaintiff claims damages of Rs.10,000/- as damage due to the mental agony and Rs.5,000/- towards the litigation expenses. As it appears from the record that the plaintiff is involved in politics as well as number of criminal cases. So, considering the background of the plaintiff and the extent of mental agony and expenses sustained by him, I think it would be just and proper if the plaintiff is given a damages of Rs.1,000/- towards his mental agony and a sum of Rs.500/- as the legal expenses sustained by him. Hence, ordered."

6. The lower appellate court, being moved by the unsuccessful defendant, has held that the plaintiff has not been able to establish the absence of reasonable and probable cause on the part of the defendant in instituting the prosecution vide 1CC No.22 of 1994. Regarding the existence of the malice actuating the defendant in launching the prosecution by making the allegations, said court has also mainly found it to be absent.

7. The plaintiff having filed this appeal; it has been admitted on the substantial questions of law as indicated in paragraphs (E), (F) and (G) of the Memorandum of Appeal. Those read as under:-

"(I) Whether the learned lower appellate court has misconstrued and misinterpreted the law relating to malicious prosecution while examining the matter?;

(II) When the present appellant by oral as well as documentary evidence has established that the complaint case was initiated by the present respondent out of malice with the intention to put the present appellant to harassment whether the learned lower appellate court is justified to come to a conclusion otherwise which is an error of record; and

(III) Whether the finding of the learned lower appellate court is without specifically dealing with the finding of the learned trial court can be sustainable in the eye of law, when the same is not inconsonance with the sound proposition of law."

8. Heard Mr.S.P.Mishra, learned Senior Counsel appeaed for the appellant. Right from the beginning, despite personal service of the notice for hearing of this appeal upon the respondent, she has not entered appearance. That had also been the situation on the other dates on which the appeal had come on board for hearing. In that view of the matter, as none appeared on behalf of the respondent on 26.08.2020 in the first slot as well as the pass-over slot, this Court took the decision for hearing the appeal which is running for more than two decades.

Mr. Mishra, learned Senior Counsel for the appellant questioning the finding of the lower appellate court that the plaintiff has failed to prove that the defendant without reasonable and probable cause, had launched the prosecution by lodging the complaint against him; submitted that the view so taken against the plaintiff is erroneous. He further submitted that when here in the case, the criminal proceeding has been quashed by this Court in exercise of the inherent power under section 482 Cr.P.C. holding its continuance to be sheer abuse of process of law, the lower appellate court has erroneously again put that weighty burden upon the plaintiff to discharge as regards absence of reasonable and probable cause on the part of the defendant for the institution of that criminal case. He next submitted that here the defendant had lodged the complaint in the court of law stating an incident concerning herself and her husband, describing therein the objectionable role played by the plaintiff which were all based on her personal knowledge as she under that circumstances had projected herself as the victim and therefore, on the face of the order of quashment of the criminal proceeding that its continuance against the plaintiff is an abuse of process, the lower

appellate court ought to have gone to analyze the evidence let in by the defendant in judging as to whether she has discharged the onus that had shifted upon her in proving through evidence that complaint had been lodged by her having all the reasonable and probable cause.

In support of the above contention, Mr.Mishra has cited the decisions in case of Gobind Ch. Sambarsingh Mohapatra –V- Upendra Padhi and others; AIR 1960 Orissa 29, Ramesh Ch. Singh Mohapatra –V- Jagannath Singh Mohapatra; AIR 1975 Orissa 121 and Shew Singh –V- Ranjit Singh and others; AIR 1983 Allahabad 105.

His last limb of submission was that the finding of the lower appellate court that plaintiff (P.W.1) having not whispered a word that 1CC No.22 of 1994 was launched being actuated with malice towards him and there being no other evidence on the score even citing any such instance for bearing malice, in the given facts of the case, the conclusion holding that there has been a failure on the part of the plaintiff to prove that the defendant had initiated the criminal case being actuated by malice is also contrary to the settled principles of law governing the field in relation to a claim for damage by the suiter upon being maliciously prosecuted.

9. The position of law is well settled that in an action for malicious prosecution, the plaintiff must prove (a) that he was prosecuted by the defendant; (b) that the proceeding complained of terminated in favour of the plaintiff; (c) that the prosecution was instituted against him without any reasonable or probable cause; (d) that the prosecution was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact; and (e) that he has suffered damage to the reputation or to the safety of person, or to the security of his property.

In case of Gobind Chandra (Supra); it has been held that in a suit for damages for malicious prosecution, where the complaint was made by the defendant-complainant on facts based on his personal knowledge, the burden of proof is different from a case where the complaint is based on information believed to be true. In case the complaint based on personal knowledge, if the trial ended in acquittal on merit, there would be presumption in favour of the plaintiff that there was no reasonable and probable cause.

In the other case of Ramesh Chandra (Supra) as to the proof of absence of reasonable and probable cause which is a proof of negative fact; it has been said that it would need slight evidence to discharge the initial onus lying on plaintiff. Mere innocence of the plaintiff is also not prima facie proof of absence of absence of reasonable and probable cause.

10. In the instant case, undoubtedly the plaintiff was prosecuted by the defendant. The other facts is that the criminal complaint vide 1CC No.22 of 1994 in so far as the plaintiff is concerned terminated by the order of this Court in exercise of inherent jurisdiction under 482 Cr.P.C. by holding its further progress against the plaintiff as abuse of process.

In the backdrop, the first point comes for examination that on the admitted factual settings as also the evidence on record whether the initial burden lying on the plaintiff to prove that the prosecution at the behest of the defendant was without reasonable and probable cause and thus actuated by malice with an intention that was wrongful in point of time can be said to have been discharged causing shift of the onus of proof in positive form upon the defendant. If the answer would come in the affirmative then it would lead to judge as to whether the defendant has discharged said sifted onus of proof on on that score.

11. Coming to the case in hand, it is pertinent to take note of the fact that the suit has come to be filed after the order was passed by this Court on 08.07.1994 in Crl. Misc. Case No.616 of 1994.

Certified copy of the said order admitted in evidence and marked as Ext.3 has been carefully gone through. The allegations made in the said complaint filed by the defendant were that while one accused, namely, Soleman (against whom the continuation of the proceeding was not found to be abuse of process) was effecting the arrest of the husband of the defendant and he misbehaved the plaintiff and thereby committed the offence under section 354 IPC. The specific allegation against this plaintiff was that he and another accused, namely, Ramakanta were the mastermind in the said episode and at their behest, accused Soleman had so acted in misbehaving the defendant and in finally taking away defendant's husband by force. The petition under section 482 Cr.P.C. before this Court had been jointly filed by all the three accused persons after their move before the learned S.D.J.M. for recall of the order of taking cognizance of the offences under section

364/354/34 of the IPC failed and it was ordered that they would have to face the said case.

In deciding the application under section 482 Cr.P.C; this Court first of all, has come to a conclusion that on a bare reading of the complaint containing the allegations and even accepting the same as laid, no offence under section 365 IPC is not made out. As to the cognizance of offence under section 354 of the IPC, it has, however, been found that in so far as this plaintiff and other accused Ramakanta are concerned, neither the allegations made in the complaint filed by the defendant nor her statement as also those of the witnesses examined in course of enquiry under section 202 Cr.P.C. make out a case for commission of said offence. It has also been said that even taking that those make out a case of offence under section 354 of the IPC so as to proceed against accused Soleman, the materials do not point out that this plaintiff and the other accused Ramakanta had the common intention with said accused Soleman in doing of said offensive acts in furtherance of such intention.

Having said so, the action so as to proceed against the plaintiff has been quashed, reason being that the complaint and the materials collected during enquiry do not disclose the commission of any offence against the plaintiff so as to be proceeded against. Whether in such an eventuality, the quashment of the criminal proceeding in so far as the plaintiff is concerned as ordered by this Court while not interfering with that the order of cognizance of offence under section 354 of the IPC and the continuation of the proceeding against accused Soleman would be taken to have discharged the initial burden of proof as to absence of the reasonable or probable cause for the defendant to lodge the complaint implicating the plaintiff as an accused is thus comes up for consideration. This Court, in that proceeding under section 482 Cr.P.C., on a bare perusal of the complaint and the statement made during enquiry simply said that the continuance of the criminal proceeding against the plaintiff is not warranted. In that proceeding, there is no conclusion as to falsify of the facts especially indicting the plaintiff which might have been so held at the conclusion of the complaint case. Under the situation, factual foundation laid in the complaint cannot be taken as false and frivolous, in which case the plaintiff's would have been absolved of discharging the initial burden as to initiation of the prosecution by the defendant without reasonable and probable cause for the presumption as

available to be drawn thereby placing it upon the defendant to show that it had been so lodged with the reasonable and probable cause.

12. With the aforesaid and keeping in view the position of law as discussed; the evidence of the plaintiff need also to be glanced at. On a careful reading of deposition of P.W.1 (plaintiff), it is found that he has simply stated that it was a false prosecution which had been instituted by the defendant against him whereas, the defendant (D.W.1) in her evidence has asserted about existence of reasonable and probable cause. With this evidence on record wherein it has also not even been said that there had never been any such incident or for which the plaintiff could have been arraigned or in the incident as laid, no such inference either direct or indirect is drawable; in showing no reasonable and probable cause behind the prosecution; I am of the considered view that the finding of the lower appellate court as has been rendered that the plaintiff has failed to discharge the burden of proof that the defendant had launched the prosecution without there being reasonable and probable cause has to receive the seal of appraisal both on fact and law. The submissions of learned Senior Counsel for the appellant, therefore, cannot be countenanced with.

13. The above discussion and reason thus provide the answers to the substantial questions of law in aforesaid paragraph-7(I) and (II) against the plaintiff-appellant. In view of that the substantial question of law under paragraph-7(III) does no more survive for being further answered.

14. Resultantly, the appeal stands dismissed. No order as to cost.

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2020 (III) ILR - CUT- 144

BISWANATH RATH, J.

W.P.(C). NO. 6558 OF 2002

RAMA CHANDRA BEHERA .....Petitioner

.V.

CHAIRMAN, ODISHA GRAMYA BANK, HEAD OFFICE-POKHARIPUT, BHUBANESWAR .....Opp. Party

BALASORE GRAMYA BANK(STAFF) SERVICE REGULATION, 1980 – Regulation 2(1),3(2) & 30(3) read with Section 2(e) of the Regional Rural Banks Act,1976 – Disciplinary proceeding against the petitioner – Appointment of inquiry officer – The enquiry officer is not the direct employee of bank rather he is an officer on deputation – As per regulation 2(1) & 3(2) there is no position of enquiry officer in staffing pattern – Further regulation 30(3) makes clear that, inquiry officer must be a senior officer where as the inquiry officer is not a senior officer to the petitioner – Relevant provisions of the law interpreted – Held, the inquiry being proceeded by the incompetent officer, the proceeding against the petitioner is not sustainable.

Case Laws Relied on and Referred to :-

1. (1991) 1 SCC 319 : Central Bank of India Vs. C.Bernard.
2. AIR 2005 SC 4446 : Harshad Chiman Lal Modi Vs. D.L.F., Universal Ltd. & Anr.
3. AIR 2007 SC 2320 : Bharat Co-operative Bank (Mumbai) Ltd. Vs. Co-operative Bank Employees Union.
4. (2009)17 SCC 184 : Veer Kunwar Singh University Ad hoc Teachers Association & Ors. Vs. Bihar State University (C.C.) Service Commission & Ors.
5. (2014) 3 SCC 502 : Dipak Babaria & Anr. Vs. State of Gujarat & Ors.
6. 1990 (II) OLR-70 : Chiranjib Parida Vs. State of Orissa represented by the Secretary to the Govt. in Education & Youth Services & Ors.
7. AIR 1999 SC 1437 : Jalandhar Improvement Trust Vs. Sampuran Singh.
8. AIR 2005 SC 4446 : Harshad Chiman Lal Modi Vs. D.L.F., Universal Ltd. & Anr.
9. (2009) 17 SCC 184 : Veer Kunwar Singh University Ad hoc Teachers Association & Ors. Vs. Bihar State University (C.C.) Service Commission & Ors.
10. (2014) 3 SCC 502 : Dipak Babaria & Anr. Vs. State of Gujarat & Ors.

For Petitioner : M/s.Sanjit Mohanty, Sr. Counsel, N.Panda, S.K.Acharya, M.K.Panda, & S.Swain.

For Opp.Party : M/s. A.K.Mishra, J.Sengupta, D.K.Panda, P.R.J. Dash and G.Sinha.

JUDGMENT Date of Hearing: 16.12.2019 : Date of Judgment: 24.12.2019

BISWANATH RATH, J.

This writ petition involves a challenge to the second show-cause notice vide Annexure-1 on the premises that Sri P.K. Bose, Enquiry Officer appointed involving inquiry against the petitioner being not an Officer in the cadre of Balasore Gramya Bank and further not an Officer deployed to the service of Balasore Gramya Bank to hold any of the post of the cadre of

Officer of Balasore Gramya Bank has no authority to hold such inquiry and the enquiry conducted by Sri P.K. Bose is hit by the regulation 30 (3) read with Regulation 2(1) and Regulation 3(2) of the Balasore Gramya Bank (Staff) Service Regulation 1980 (hereinafter called as "Regulation, 1980").

2. Background involving the case is that petitioner joined as Cashier in the Balasore Gramya Bank on 13.1.1982. On 12.6.1985, the petitioner was posted in Mitrapur Branch of the Balasore Gramya Bank. On 31.5.1997, he was promoted to the rank of Officer Scale-1 with effect from 28.4.1989. While continuing as such, petitioner was suspended on the ground of financial irregularity in maintaining certain records and allowing misappropriation during incumbency at Mitrapur Branch vide order dated 24.3.1998. On 24.9.1998, charges were framed and again on 25.10.1999 additional charges were also framed. In the process, on 11.9.2000 one P.K. Bose was appointed as Enquiry Officer and on 17.4.2002 the Enquiry report was submitted resulting issuance of second show-cause notice on 2.12.2002 vide Annexure-1 impugned herein.

3. Advancing his argument, Sri Sanjit Mohanty, learned senior Advocate challenging to the illegality in the appointment of Sri P.K. Bose as the Enquiry Officer, taking this Court to the provision at Section 2(e) of the Regional Rural Banks Act, 1976 (for short "R.R.B. Act, 1976") attempted to submit the definition prescribed means prescribed by rules made under this Act. Then taking to the provision at Section 17 of the R.R.B. Act, 1976, Sri Mohanty submitted that for the provision therein, it becomes lawful on the part of the Regional Rural Bank to send such number of Officers or other employees on deputation to the Regional Rural Bank as may be necessary or desirable for the efficient performance of its functions. Referring to Section 30 of the R.R.B. Act, 1976, Sri Mohanty, learned senior counsel contended that for this provision of the Act, the Board of directors of the Regional Rural Bank may after consultation with Sponsor Bank and the National Bank and with the previous sanction of the Central Government make regulations, not inconsistent with the provisions of this Act and the rules made there under to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act. It is here, Sri Mohanty, learned senior counsel taking this Court to the provision at Section 17 of the Act, 1976 contended that even assuming that the Regional Rural Bank on the request of the sponsored Bank send Officers on deputation to this sponsored Bank but that is again should be with the previous sanction of the Central

Government. It is in the circumstance, Sri Mohanty, learned senior counsel contended that for the appointment of Sri P.K. Bose in the sponsored Bank i.e. Balasore Gramya Bank is not with the previous sanction of Central Government and thus he was even not competent to hold any such post. Sri Mohanty, learned senior counsel further taking this Court to the provisions of the Balasore Gramya Bank, more particularly, the definition chapter Regulation 2(i) read with Regulation 3 (2) of the Regulation, 1980 contended that for the definition of an Officer and the staffing pattern of the Gramya Bank there is no position of an Officer in its staffing nomenclation. Again for the clear provision at Regulation 3(2), Sri Mohanty, learned senior counsel contended that even assuming that Sri P.K. Bose was deputed to function as an Officer in the Gramya Bank for the Officer post not inclusive in the staffing pattern, there should have been a prior approval of the Central Government to such decision of the Board. It is at this stage, Sri Mohanty, learned senior counsel referring to Regulation 5 and Regulation 30 therein justified his submission that Sri P.K. Bose deputed to function as an Officer is not in accordance with the provisions of the regulation further without prior approval of the Central Government and as such was competent to hold any such enquiry. It is in the circumstance, Sri Mohanty, learned senior counsel urged this Court for interfering in the enquiry process and while requesting for declaring appointment of Sri Bose void, set aside the second showcause notice. Sri Mohanty, learned senior counsel to substantiate his above submission has also took this Court to the decisions in the case of ***Central Bank of India v. C.Bernard,*** *(1991) 1 Supreme Court Cases 319*, ***Harshad Chiman Lal Modi v. D.L.F., Universal Ltd. And another,*** *AIR 2005 Supreme Court 4446*, ***Bharat Co-operative Bank (Mumbai) Ltd. v. Co-operative Bank Employees Union,*** *AIR 2007 Supreme Court 2320,* ***Veer Kunwar Singh University Ad hoc Teachers Association and others v. Bihar State University (C.C.) Service Commission and others****, (2009)17 Supreme Court Cases 184* and in the case of ***Dipak Babaria and another v. State of Gujarat and others,*** *(2014) 3 Supreme Court Cases 502*. Taking this Court to the aforesaid decisions, Sri Mohanty, learned senior counsel also submitted that for the application of all the decisions cited above to the case at hand has case otherwise to succeed for the settled position of law.

4. Sri D.K. Panda, learned counsel appearing for the opposite party while taking this Court to the stand of the opposite party through counter affidavit as well as further affidavit and the clarification from the NABARD through Annexure-A to the further affidavit, the communication on the

Officers on deputation from sponsored bank and appointment of such officers thereof contended that there is no infirmity in the decision of the Management in appointing Sri P.K. Bose as Enquiry Officer to enquire into the allegation involving the petitioner. Sri Panda, learned counsel further also taking this Court to the stage of challenge, more particularly, writ petition being filed at the stage of second show-cause contended that the writ petition becomes premature. Further for a statutory appeal remedy being available to the petitioner, Sri Panda contended that the writ petition is not maintainable at this stage otherwise and thus prayed for dismissal of the writ petition.

5. Considering the rival contentions of the parties, this Court finds petitioner was placed under suspension and charges were framed forcing him to face enquiry proceeding involved herein. For the admitted facts, this Court looking to the appointment of P.K. Bose through Annexure-A, this Court finds Annexure-C finds place with the further affidavit sworn by Sri Nalini Ranjan Das, the Chairman Kalinga Gramya Bank, Balasore discloses the posting of said P.K. Bose, who was functioning as Manager in UCO Bank with the designation as Officer in the head office of Balasore Gramya Bank, Balasore. There is no denial to this aspect by the counsel for the opposite party. Now coming to the document surfacing at Annexure-D, again this Court finds P.K. Bose while being described as an Officer on deputation was designated as the Enquiry Officer involving Sri P.S. Bhattacharya, the petitioner vide this document issued on 26.8.2000. Looking to the provision at Section 17 of the R.R.B. Act, 1976, this Court finds this section reads as follows:

> ***"17.*** **Staff of Regional Rural Banks**.- (1) A Regional Rural Bank may appoint such number of officers and other employees as it may consider necessary or desirable (in such manner as may be prescribed) for the efficient performance of its functions and may determine the terms and conditions of their appointment and service:
>
> Provided that, it shall be lawful for a Sponsor Bank, if requested so to do by a Regional Rural Bank sponsored by it, to send (x x) such number of officers or other employees on deputation to the Regional Rural Bank as may be necessary or desirable for the efficient performance of its functions:
>
> Provided further that the remuneration of officers and other employees appointed by a Regional Rural Bank shall be such as may be determined by the Central Government, and, in determining such remuneration, the Central Government shall have due regard to the salary structure of the employees of the State Government and the local authorities of comparable level and status in the notified area.

> (2) Not withstanding anything contained in the Industrial Disputes Act, 1947, or any other law for the time being in force, no award, judgment, decree, decision or order of any industrial tribunal, Court or other authority, made before the commencement of this Act, shall apply to the terms and conditions in relation to the persons appointed by a Regional Rural Bank.
>
> (3) The officers and other employees of a Regional Rural Bank shall exercise such powers and perform such duties as may be entrusted or delegated to them by the Board."

Reading the above provision, this Court finds there is no problem in the deputation of Officers but they must hold the posts available in the Bank they are deputed**.** What this Court from Annexure- C dated 17.7.2000 finds that this is letter issued by the UCO Bank to the Regional Rural Bank to act as Officer in the Head Office of Balasore Gramya Bank at Balasore by way of an internal arrangement. For the terms of deputation, as appearing from Annexure-C, this Court finds one P.K. Bose was on deputation from Regional Rural Bank to a sponsored Bank. Now coming back to the appointment of Sri P.K. Bose as an Enquiry Officer, as available from Annexure-D and the clarification at Annexure-A by the NABARD, giving no objection in the matter of appointment of Sri P.K. Bose as an Enquiry Officer taking resort to Section 17 of the R.R.B. Act, 1976 has no application at all to the case at hand, which appears to be wholly misconstrued one. Coming back to examine the provision under the Balasore Gramya Bank, scanning through the Definition- 2 (i) along with Regulation-3(2), this Court finds there is no position of Sri P.K. Bose in the staffing pattern in the concern Gramya Bank. Reading the provision at Section 30(3), this provision of the Regulation of Balasore Gramya Bank makes it clear that inquiry in relation to an Officer can be taken through an Officer, who is senior to such Officer. It is here from the narration made hereinabove, this Court finds petitioner when was suspended was in the post of Officer Scale-I and as such inquiry, if any, involved that could have been conducted by an Officer functioning above the petitioner remaining within the staffing pattern at Regulation 3 (2). This being not the state of affair involving the case further keeping in view that Sri P.K. Bose since was just an Officer, this Court finds the entire inquiry proceeding remain grounded for being undertaken by an incompetent Officer. It is at this stage, taking into consideration the decisions cited at the instance of the petitioner this Court finds in the case of ***Chiranjib Parida v. State of Orissa represented by the Secretary to the Govt. in Education & Youth Services and others***, *1990 (II) OLR-70,* in paragraphs- 2, 3 and 5 it is held as follows*:*

"2. On the aforesaid facts, the only question which really calls for determination is whether the enquiry in the case at hand by the committee as constituted by the Managing Committee was in accordance with Law or not. A reply to this question has to be found in Rule 22 (4) of the Rules which at the relevant time reads as follows: "22.(4). On receipt of the written statement of defence, or if no such statement is received within the time specified, the disciplinary authority may itself make enquiry into such of the charges as are not admitted, or, if he considers necessary so to do, appoint any other person who shall either be a member of the Governing Body or the Headmaster or the Principle;

xx xx xx

Besides we advert to the submissions made by Dr.Dash relating to the legality of the constitution of the enquiry committee, it may be pointed out that there is no dispute that is the present case it is the Managing Committee of the School who has to be regarded as the disciplinary authority in view of what has been stated in Rule 21(2)(b) of the Rules. It is only in respect of lower grade employee that the Headmaster or the Principal can be regarded as the disciplinary authority. Dr.Dash submits that as the School had no Headmaster at the relevant time, the question of any enquiry by the Headmaster could not arise in the present case. This being so, it is the Managing Committee alone which could have made the enquiry in the view of what has been stated in Rule 22(4). Dr.Dash submits that in the enquiry committee as constituted in the present case, there was in fact one member of the Managing Committee and so the enquiry must be regarded to have been held by the Managing Committee which was the disciplinary authority in the present case; and induction of two outsiders in the committee would not make the constitution of the committee illegal in the eye of law. It is strenuously urged by the learned counsel that as the Managing Committee of the School consists of 11 persons, enquiry by the entire body was not visualize by the aforesaid rule and as such, enquiry by one member of the Managing Committee in which work he was assisted by two outsiders cannot be said to be in violation of the requirement of law.

3. Before we examine the main contention advanced by Dr.Dash, it is opposite to point out that Rule 22 (4), as it stood at the relevant time, did not permit enquiry even by one member of the Managing Committee inasmuch as the Rule as it then stood stated about enquiry by the member of the Governing Body alone, and not by a member of the Managing Committee which was, however, permitted subsequently when amendment was made in the aforesaid rule by S.R.O. No.20/86 dated 7.1.1986 as published in Orissa Gazette (Extraordinary) No.81 dated 24.1.1986. Even so, we are prepared to concede that Rule 22(4) as it was at the relevant time permitted enquiry even by one member of the Managing Committee. The important question is whether induction of two outsiders in the enquiry committee vitiated the finding arrived at by it. As to this, we may state that Rule 22 (4) having laid down as to who make the enquiry, it is not permissible in law to travel beyond the language of the rule. Dr.Dash has, however, placed reliance on three decisions of three different High Courts of the country in support of his submissions that no illegality was committed by indicating two outsiders in the committee. These decisions are: (1) **Bhagatram v. Union of India**, 1969 (3) S.L.R. 66 (Delhi), (2)

Satpal v. Himachal Pradesh Financial Corporation, 1977 (2) S.L.R. 447 (Himachal Pradesh) and (3) **Bipad Bhanjan v. State of West Bengal**, 1978 (1) S.L.R. 656 (Calcutta).

5. In view of all the above, the contention of Dr. Dash that the finding arrived at by the enquiry committee as appointed in the present case was not vitiated cannot be accepted. This being the state of affairs, it has to be held that the recommendation of the Managing Committee to terminate the service of the petitioner based on the aforesaid findings cannot be sustained."

In the case of ***Central Bank of India v. C.Bernard,*** *(1991) 1 Supreme Court Cases 319*, the Hon'ble Supreme Court in paragraph-7 held as follows:

"7. True it is that the respondent did not attribute any bias or mala fides to the Enquiry Officer nor did he complain that he was in any manner prejudiced on account of the said Enquiry Officer conducting the domestic enquiry but that will not cure the defect as to his competence. Where punishment is imposed by a person who has no authority do so the very foundation on which the edifice is built collapses and with and it fails the entire edifice. It is a case more or less akin to a case tried by a court lacking in inherent jurisdiction. We, are, therefore, of the opinion that absence of bias, prejudice or mala fides, is of no consequence so far as the question of competence is concerned. The cases which were cited at the bar (i) Delhi Cloth and General Mills Co., Ltd. v. Labour Court, Tis Hazari & Ors., [1970] 1 LLJ 23 and (ii) Saran Motors, (supra) also have no application to the special facts and circumstances of this case."

In the case of ***Jalandhar Improvement Trust v. Sampuran Singh,*** *AIR 1999 Supreme Court 1437,* the Hon'ble Supreme Court in paragraphs-13 held as follows*:*

*"***13.** The High Court as well as the lower appellate court also relied upon the fact that the Trust had made similar preferential allotments as local displaced persons in favour of other persons. Therefore, the courts below came to the conclusion that even the plaintiff-respondents were entitled to such allotment. In our opinion, before coming to this conclusion the courts below should have first decided the question whether the allotment in favour of those persons was within the scope of the rules applicable. If it was not within the scope of the rules then even those allotments in favour of other persons will not create a right in the respondents to claim equality with them; maybe, if the allotments were made wrongly in favour of those persons, the same may become liable for cancellation, if permissible in law, but that will not create an enforceable right on the respondents to claim similar wrongful allotments in their favour. In our opinion, even this ground relied upon by the High Court as well as the lower appellate court is unsustainable. The courts below next relied upon the fact that in regard to some of the respondents, the Trust itself at a point of time made allotments and accepted initial deposits towards the consideration of the plots

> which were subsequently cancelled. Based on those facts, the courts below held that the Trust having once allotted the plots and having collected part of the consideration, it could not have cancelled the allotments, probably basing the respondents' case on the principle of promissory estoppel. Here the courts below have failed to notice the legal principle that there is no estoppel against law. The allotment of plots by the Trust is controlled by the statutory rules. Any allotment contrary to those rules will be against the law. Since the allotments made in favour of some of the respondents was based on wrong application of the reservation made for "local displaced person" those allotments were contrary to law. Hence, the principle of promissory/equitable estoppel cannot be invoked to protect such illegal allotments. In the said view of the matter, we are unable to sustain the judgments and decrees impugned in these appeals."

In the case of ***Harshad Chiman Lal Modi v. D.L.F., Universal Ltd. and another,*** *AIR 2005 Supreme Court 4446*, in paragraph- 31, the Hon'ble Supreme Court observed as follows:

> "31. In Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340, this Court declared; "It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties." (emphasis supplied)."

In the case of ***Veer Kunwar Singh University Ad hoc Teachers Association and others v. Bihar State University (C.C.) Service Commission and others****, (2009) 17 Supreme Court Cases 184*, in paragraph-32 it is held as follows*:*

> *"32.* We, therefore, are of the opinion that having regard to the legal position obtaining, it is not possible to agree with the submissions of Mr. Misra. It may be that the High Court should not have constituted a committee but then constitution of a committee was directed with consent. By consent the statutory provisions cannot be violated. By consent jurisdiction cannot also be conferred. Here, however, is a case where parties consented to find out the actual number of additional posts which were required for the benefit of the students. However, in view of the order proposed to be passed, we may not enter into the said question."

Similarly, in the case of ***Dipak Babaria and another v. State of Gujarat and others,*** *(2014) 3 Supreme Court Cases 502*, in paragraph- 61 the Hon'ble Apex Court held as follows:

> "61 It is well settled 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. This proposition of law laid down in Taylor Vs. Taylor (1875) 1 Ch D 426,431 was first adopted by the Judicial Committee in Nazir Ahmed Vs. King Emperor reported in AIR 1936 PC 253 and then followed by a bench of three Judges of this Court in Rao Shiv Bahadur Singh Vs. State of Vindhya Pradesh reported in AIR 1954 SC 322. This proposition was further explained in paragraph 8 of State of U.P. Vs. Singhara 64 Page 65 Singh by a bench of three Judges reported in AIR 1964 SC 358 in the following words:-
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> "*8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted1."*
>
> This proposition has been later on reiterated in Chandra Kishore Jha Vs. Mahavir Prasad reported in 1999 (8) SCC 266, Dhananjaya Reddy Vs. State of Karnataka reported in 2001 (4) SCC 9 and Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited reported in 2008 (4) SCC 755."

For the settled position of law as narrated hereinabove, this Court finds none of the grounds taken here by the counsel for opposite parties has the legal force. On the other hand, each of the decisions discussed hereinabove favours the case of the petitioner.

6. For the observation and for the support of the law from the above decisions through the case at hand, this Court finds the enquiry proceeding initiated against the petitioner through Sri P.K. Bose remain unsustainable. In the process, this Court interfering in the inquiry process sets aside the appointment of Sri P.K. Bose as Enquiry Officer along with all proceedings conducted by him including the second show-cause notice.

7. In the result, the writ petition succeeds. However, there is no order as to cost.

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2020 (III) ILR - CUT- 154

BISWANATH RATH, J.

W.P.(C) NO.15959 OF 2013

SREECHARAN MOHANTY & ORS. .....Petitioners

.V.

THE UNION OF INDIA REPRESENTED THROUGH THE SECRETARY, RAILWAY BOARD & ORS. .....Opp. Parties

SERVICE LAW – Promotion – Claim there of – Plea that the period of working as contractual/Ad-hoc A.S.I should be counted for the purpose of promotion to the post of inspector and maintenance of seniority – Some conditions attached to the Ad-hoc engagement – Counting of Ad-hoc period by way of stopgap arrangement – Principles – Discussed.

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1607 : Direct Recruit Class II Engg. Officers' Association Vs. State of Maharashtra
2. (1993) 3 SCC 371 : State of W.B. & Ors. Vs. Aghore Nath Dey & Ors.
3. (2000) 4 SCC 476 : M.K. Shanmugam & Anr. Vs. Union of India & Ors.
4. JT 2000 (4) SC 196 : T. Vijayan and Ors. Vs. Divisional Railway Manager & Ors.

For Petitioner : Sri A. Mohanty, (Sr. Adv.)
M/s. Santosh Ku. Nanda, N. Maharana, S. Lall.

For Opp. Party : Sri P. Ptnaik, M/s. Raj Bimal Das, S.C. Dash, S.N. Jena.

JUDGMENT Date of Hearing :5.02.2020 : Date of Judgment : 19.02.2020

BISWANATH RATH, J.

This Writ Petition has been filed by the petitioners seeking a direction to the opposite parties to regularize the service period of the petitioners as Ad-hoc SIPF under the establishment and further to declare their seniority and empanelment to be eligible to get further promotion to IPF after statutory period of eight years of service as SIPF on regular basis taking into consideration that similar benefit has been granted to the batch mates of the petitioners in South East Central Railways who were retained by the said zone after such restructure is made.

2. Short background involved in this case is that while the petitioners were posted as A.S.Is. in the erstwhile South Eastern Railways, the South Eastern Railways was trifurcated into three zones as South Eastern Railways, South East Central Railways and East Coast Railways. The petitioners were

however retained in the East Coast Railways, which have three divisions namely Khurda, Waltair and Sambalpur. This East Coast Railway started its functioning w.e.f. 1.03.2003 after trifurcation of erstwhile South Eastern Railway. As per the Joint Director (Estt.) Railway Board's letter dated 8.08.2002, all manpower and resources of undivided South Eastern Railways were distributed amongst the three zones. Such as, 37.5% was allotted to East Coast Railway, 37.5% was allotted to South Eastern Railway and 25% share was allotted to South East Central Railway. Petitioners alleged that to the misfortune of the petitioners due shares of the South Eastern Railway and East Coast Railways could not be transferred to East Coast Railway. It is further urged that initially vide letter No.RPF/EA-Prop./New Zones/3-78/9415 dated 17.09.2002 the orders were issued for transfer of 892 RPF staffs of various rank to East Coast Railway. As a consequence of non-transfer of the share of 37.5% the strength of RPF staff was unilaterally reduced to 222. As a result of which areas under the control of the truncated South Eastern Railways got a staff strength of 62% of total strength of undivided South Eastern Railways, while the areas under East Coast Railway received 21% and South East Central Railway received 17% of the total strength respectively. While the matter stood thus, the Government of India in the Ministry of Railways vide resolution dated 19.11.2003 reviewed the cadre strength as a result on the basis of functional, operational and administrative requirement, it was therein decided that the Group 'C' and Group 'D' staff of RPF restructured according to certain percentage indicated therein and allotted 6.25 % for the post of Sub-Inspector. As the number of staff was reduced, the Railway Board vide letter dated 15.09.2004 revised such percentage of staff and accordingly reduced the percentage of Sub-Inspector to 4.5% and after such restructure and revised percentage the vacancy position was to be filled up. It is alleged that for the unequal distribution of Manpower, reduction in the staff strength retained by the East Coast Railways and also for the revised percentage of the staff and consequent vacancies thereto, the petitioners were deprived of promotion under cadre restructuring.

3. It is under the premises of unequal transfer taking place in different Railways more particularly the establishment under the petitioners are employees and referring to the differential treatment demonstrated from table 1 & 2 in the Writ Petition learned Senior Counsel for the petitioners contended that the petitioners are suffering to get their regular promotion to the post of Sub-Inspector for no fault of them and on the other hand, for the

ineffective manpower system being followed by the Railway authority, learned counsel for the petitioner contended that finding the newly created zones under whom the petitioners are employees felt handicapped in dealing with challenges arising out of PWG/ Naxality activities and for facing serious manpower problem and further finding that a large number of direct quota vacancies in the rank of Sub-Inspectors are not filled up, it is in the circumstance at the Railway Board's level vide letter dated 2.12.2005 it was directed for consideration of the case of suitable and eligible ASIs for their temporary absorption as Sub-Inspector. In the meantime, for the further development at the Railway Board level it was decided to give the petitioners adhoc promotion for a period of three months against the direct recruitment quota of Sub-Inspector with a condition that they will be reverted to their substantive grade on completion of three months and may be again placed on adhoc basis so long as the vacancies through direct quota remains unfulfilled. In the process vide communication dated 4.09.2006 the petitioners were empanelled for promotion to the rank of S.I/RPF purely on a stopgap adhoc arrangement for a period of three months. But however for the conditions imposed therein the petitioners were reverted to their original post on the expiry of 89 days to the rank A.S.I and again re-promoted to SIPF purely on adhoc basis with a gap of one day, which system was continuing as on the date of filing of the Writ Petition. A process continued nearly about 5 years and in the meantime there was no Departmental Promotion Committee formed from 2003 to 2009 for selection of Sub-Inspector Cadre. Petitioners alleged that the arrangement made by the Railway authority remains improper and urged that the length of continuance of service on adhoc basis in the post of Sub-Inspector may be treated under stopgap measure. The petitioners are thus deprived of their promotion in the side of promotional quota. It is also alleged that taking into consideration the requirement of promotion to the post of Sub-Inspector requiring a person completing 5 years of regular service as A.S.I and for all the petitioners having such requisite experience and further for considering the long continuance of the petitioners as A.S.I against direct recruit quota, vide order dated 28.04.2011 case of the petitioners were considered against the vacancies in the rank of Sub-Inspector/R.P.F. on 28.04.2011 and on successful completion of S.I. promotion course training all the petitioners are provisionally empanelled to the rank of Sub-Inspector. It is at this stage of the matter, learned counsel for the petitioners prays for the actual treatment amongst similarly situated persons involving the Railways establishment. It is further submitted that though the counter part of the petitioners joined together but for their joining

in other Railway establishment for the effective manpower managed therein they have got promotion earlier and for the petitioners' continuing under the East Coast Railway with lower manpower mechanism, they have all suffered for their delay in the matter of promotion to the post of Sub-Inspector as well as to the next higher post. Learned Senior Counsel for the petitioners further submitted to this Court that in the meantime, all the petitioners have been promoted to the rank of Inspector vide order dated 25.01.2012 but they are all suffering in the matter of seniority for their delayed promotion to both the post of A.S.I and S.I. Taking into account the delay in conducting the recruitment in the A.S.I & S.I. cadre and for no initiative being taken by the Board at appropriate time, learned Senior Counsel for the petitioners contended that all the petitioners have suffered for no latches on their part. Thus finding no other way all the petitioners approached the authorities to regularize the adhoc promotion period, so that they can get seniority from the date of adhoc promotion to the rank of S.I. and finally to the rank of Inspector. Ultimately the petitioners claimed that there should be equal treatment to all such employees working under one establishment. In the process ultimately it is prayed for counting the period of working of the petitioners as contractual A.S.I. in the other Railway establishment for the purpose of promotion to the post of Inspector and maintenance of their seniority accordingly.

4. To their opposition Mr. Dash, learned counsel for the opposite parties while opposing the claim of the petitioners and while also admitting the facts relating to trifurcation of the original establishment and allotment of respective share in their favour submitted that manpower requirement in each of the railway establishment came by way of trifurcation of the original establishment as well as the allegation that the East Coast Railway newly created Railway starting with less manpower, than this actual allotment of share but however contended that it is, as a consequence of requirement of manpower at different point of time and for the promotion rule prescribing promotion to the next higher post, 50% as promotion from feeder cadre and 50 % from direct recruitment, there was no room for the petitioners for being accommodated against the post of regular A.S.I. or regular S.I. as against the promotional quota. Learned counsel for the opposite parties further demonstrating the facts through the counter affidavit contended that finding no required number of candidates available in the post of A.S.I. through the direct recruitment quota, but however finding eligible personnel in the appropriate rank in the promotional side, the authority however remained

generous enough to accommodate the qualified persons and eligible persons from promotional side as against the vacancies under direct quota. Not only that, during their continuance the petitioners were also paid with regular wages attached to such posts. Under the premises that the rule for promotion being through a recruitment process learned counsel for the opposite party contended that the adhoc promotion for being given to the petitioners without following recruitment process, the same remains immaterial and has nothing to do with the claim of their regular absorption.

Learned counsel for the opposite parties taking this Court to the judgment of the Madras High Court in the case of ***Union of India represented by the General Manager, Integral Coach Factory & another*** *Vrs.* ***The Central Administrative Tribunal, Chennai Bench & another***, which has been confirmed by the Hon'ble apex Court in the case of ***Z. Ajeesudeen*** *Vrs.* ***Union of India*** in disposal of the Appeal (Civil) No.1256 of 2008 contended that for the stand of the Union of India and the support of the judgment referred to hereinabove to this case, the petitioners have no case and as such the Writ Petition ought to the dismissed.

5. Considering the rival contentions of the parties, this Court finds, the undisputed fact remains here is, admittedly the petitioners were employees of the South Eastern Railways, which was trifurcated into three zones. There is no denial that each of the trifurcated railway organization was assigned with manpower i.e. East Coast Railway was fixed at 37.5%, South Eastern Railway was fixed at 37.5% and South East Central Railway was fixed at 25%, but however, from the pleadings of the respective parties this Court finds, looking to the requirement of manpower in the higher position the promotional prospect in the East Coast Railway got reduced. The manpower arrangement is the internal matter of the establishment management and there is no role of the Court to interfere with such aspect of the establishment. It is here taking into consideration the demonstration of learned counsel for the petitioners through the chart and table 1 & 2, this Court finds, the claims made therein are all mere expectations, hypothetical and could not have been worked out looking to the actual requirement of manpower under the particular establishment. This Court therefore observes, no measure can be taken to consider the case of the petitioners taking into account such calculation. It is, at this stage of the matter this Court finds, sole consideration involved in the Writ Petition remains, as to whether the petitioners are justified in claiming to consider their period of adhoc

engagement as A.S.I. as against the direct quota for the purpose of promotion in the promotional quota?

Considering the rival contentions of the parties involved herein, the conditions attached in the adhoc engagement of the petitioners as A.S.I against promotional quota and the particular condition that their such continuance not only shall be adhoc continuance but they all are also to be reverted back on expiry of particular period but however to continue in such position in one day back till filling up of the vacancies in the direct quota, it appears, all the petitioners have accepted such conditions unhesitantly and for their acceptance of such terms and conditions unconditionally this Court is of the opinion that the petitioners are estopped from claiming otherwise. This Court further also observes, the petitioners knowing fully well regarding low manpower strength in the newly created establishment joined the establishment and continued as such. Therefore, they are bound by the manpower arrangement introduced by the Management from time to time. Once they are bound by this, there is no other option available with any of the petitioners to claim otherwise.

6. This Court here taking into consideration the decisions of the Madras High Court as well as Hon'ble apex Court in similar situation finds the settled position of Law is as follows:

W.P.(C) No.11258 of 2001 involving similar question the Madras High Court involving Central Administrative Tribunal direction framed the following question in para no.7:

> "The only point for consideration is, whether: the adhoc promotion granted with effect from 1.10.93 is to be counted from the said date in Group-B post, as claimed by the applicant-second respondent and accepted by the Tribunal or the period of adhoc service cannot be taken into account as claimed by the I.C.F. administration."

In the ultimate para the Madras High Court observed as follows:

> "Therefore the direction given by the Tribunal to take into account the adhoc service of the second respondent for regularizing the services in Group-B in the post of Assistant Engineer is illegal and contrary to the principle laid down by the Apex Court. Accordingly, the impugned order of the Tribunal is liable to be set aside."

This order being challenged in Hon'ble apex Court vide Civil Appeal No.1256 / 2008 the Hon'ble apex Court vide its judgment dated 12.02.2008 ultimately dismissed the appeal. This decision has the direct application to the case at hand.

In the case of ***Direct Recruit Class II Engg. Officers' Association*** *Vrs.* ***State of Maharashtra*** as reported in **AIR 1990 SC 1607** deciding a question on counting of adhoc officiation by way of stopgap arrangement for the purpose of seniority in para 44 therein the Hon'ble apex Court decided as follows:

> "(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
>
> (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.
>
> (C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.
>
> (D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.
>
> (E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.
>
> (F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.
>
> (G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharastra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With rest to Writ Petition No.1327 of 1982, we further hold:

(K) That a dispute raised by an application under Art.32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent Court by a judgment which became final.

In the case of ***State of W.B. and others*** *Vrs.* ***Aghore Nath Dey and others with other Civil Appeals*** as reported in **(1993) 3 SCC 371** again in similar situation in para 15 & 23 held as follows:

"**15.** The question, therefore, is whether Shri Sanghi is right in his submission that this case falls within the ambit of the said conclusion (B) in *Maharashtra Engineers case.* The submission of the other side is that this case falls, not within conclusion (B) but the corollary mentioned in conclusion (A), of that decision. Conclusions (A) and (B), which alone are material, are as under : (SCCp. 745, para 47)

"(A) Once an incumbent is appointed to a post according to rule, his seniority ahs to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted."

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that

conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other."

In the case of ***M.K. Shanmugam & another*** *Vrs.* ***Union of India & Others*** as reported in **(2000) 4 SCC 476** again entering into a similar question in paragraph nos.3 & 8 held as follows:

"3. The stand taken by the applicants before the Tribunal is that while regular promotions to the grade of Executive Engineers from the Assistant Executive Engineers cadre was made regularly from 1976, however, the seniority in respect of Assistant Engineers Class II was not finalized till November 1987 in view of certain disputes inter se the promotes in the cadre. DPC thereafter selected from the category of Assistant Engineers Class II in a meeting held only in May 1988 when DPC selected the appellants for the vacancies belonging to their quota for the years 1977 to 1982. The appellants had thus worked for a long period varying from 6 to 11 years in the post of Executive Engineer on ad hoc basis before DPC could meet for finalizing regular promotion. The revision of the seniority list which was challenged before the Tribunal, it was submitted, was only a corrective action though belated to render justice to the affected persons and is in compliance of the judgment of the Madras Bench of the Tribunal dated 12.10.1990 in O.A. No.113 of 1989 directing disposal of the representation regarding the seniority of one of the appellants. It was further made clear in the said direction that it has to be decided after taking into account the decision of the Principal Bench of the Tribunal in *N.N. Chakarborth case* and of this Court in *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharastra.* After noticing several decisions of this Court and of the Tribunal, it was held that under the statutory Recruitment Rules promotions to the post of Executive Engineer were to be made from among the Assistant Engineers Class II with eight years' regular service on seniority-cum-merit by selection method in the 1/3 quota and admittedly the appellants were promoted on ad hoc basis as executive Engineers on different dates mentioned earlier. The relevant appointments were purely temporary and on ad hoc basis and were for a limited duration and it was also made clear that services on ad hoc basis will not confer any claim in the matter of seniority, confirmation, etc. Thus it was noticed that the ad hoc promotions were made in administrative exigencies since the seniority lists of Assistant Engineers could not be finalized in view of pending litigation and therefore, the DPC meeting for regular selection could not be arranged. Non-selection for a selection post can hardly be considered to be a minor procedural deficiency selection post can hardly be considered to be a minor procedural deficiency and, therefore, the Tribunal concluded that selection was not by a competent DPCand the ad hoc promotion was itself for a limited time and therefore does not fulfil the conditions mentioned in the decisions in *State of W.B. v.* Aghore Nath Dey. The Tribunal is of the view that ad hoc service to count for seniority must be rendered continuously till the date of regularization for 15 years or more and, therefore, it held that the appellants could not take advantage of the ad hoc promotions made purely as a stopgap arrangement and it is only in special

circumstances such ad hoc service could be counted for the purpose of seniority as noticed in some of the decisions of this Court. Consequently, the application filed by the contesting respondents was allowed and it was declared that the appellants were not entitled to count their ad hoc service in the post of Executive Engineers (Electrical) for seniority, confirmation, promotion etc."

"**8.** There is another dimension to the case by reason of the introduction of the Rules called "The Posts & Telegraphs Civil Engineering (Electrical Gazetted Officers) Recruitment (Amendment) Rules, 1984", which were given retrospective effect from April 5, 1975. It is explained that the reason for introduction of these Rules is that for recruitment to the various posts in the Electrical Branch of the Civil Wing of the Posts & Telegraphs Department, the rules of recruitment were published on the April 5, 1975. Prior to commencement of the said Rules, there were officers who had joined directly as Assistant Executive Engineer (Electrical) through the Combined Engineering Services Examination held by the Union Public Service Commission. Those who had come on deputation from C.P.W.D. were also deemed to have been regularly appointed in the Posts & Telegraphs Department pursuant to a decision of the High Court of Allahabad. Some of the officers were promoted to the higher grades on ad hoc basis. In order to ensure that these officers are not deprived of the service rendered by them before commencement of the rules, it was proposed to incorporate retrospectively a provision for initial constitution of these posts. Therefore, though the rules were amended by a notification issued on April 22, 1984 published in the Gazette of India and it was given retrospective effect but the purpose of giving retrospective effect to the provision relating to the initial constitution of these posts would not prejudicially affect the interests of any person already in service. It is in this background, it is contended before us, that the cases of the appellants could not be considered to the post of Superintendent Engineers although they were functioning as the Executive Engineers without determining their position in the initially constituted cadre and that could be done with reference to the rules, as amended in 1984 which came into effect from April 5, 1975. Though there may have been some delay and complications arising thereto there is another factor which needs to be considered in these cases. The case of the 1st appellant was considered by the Departmental Promotion Committee in which Air Marshal T.S.Virk was present on behalf of the UPSC and who presided over that meeting for selection of officers for officiating promotion to the grade of Executive Engineer (Electrical) and it was noticed that out of four vacancies, two vacancies are to be filled by promotion of direct recruit Assistant Engineer (Electrical) and the remaining two vacancies were kept reserved for the promotion of Assistant Engineer (Electrical). As no officer was available for consideration at present and the Committee accordingly considered the 4 eligible officers and assessed them. While K.Subramanian, T.Mohan Rao and B.V.Ramnamurthi were found to be `very good', the 1st appellant was assessed to be only `good'. This was recorded in the minutes of the meeting of the Departmental Promotion Committee held on June 2, 1978 in the office of the UPSC. Thereafter, in the minutes of the meeting of the meeting of the Departmental Promotion Committee held on May 13, 1988, the 1st appellant was found to be `very good' for the year 1977 as an Executive Engineer (Electrical)

Group A. It is in these circumstances, it is to be considered whether the case of the 1st appellant could have been considered earlier to the date he was found fit to be promoted. The initially constituted cadre is of the date April 5, 1975 and on that date the 1st appellant had not been considered for promotion to the post of Executive Engineer and he was found fit to be promoted as Executive Engineer only with effect from 1977, i.e., much later to the promulgation of these rules. Reliance has been placed on the decision of this Court in Direct Recruit Class II Engineering Officers' Association [supra]. That is a case where the quota rule between the direct recruits and the promotees had broken down and the appointments were made from one source in excess of the quota, but were made after following the procedure prescribed by the rules for the appointment; therefore, it was held that the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date. In that case the direct recruits were not available in adequate number for appointment and appropriate candidates in the subordinate rank capable of efficiently discharging the duties of Deputy Engineers were waiting in their queue. The development work of the State pre-emptorily required experienced and efficient hands and in that situation the State Government took a decision to fill up the vacancies by promotion in excess of the quota, but only after subjecting the officers to the test prescribed by the rules. Therefore, in those peculiar conditions certain directions had been given by this Court inasmuch as the rigours of the quota rule having been neutralised and the seniority being dependent on continuous officiation, the seniority so fixed would not be defeated by the ratio fixed by the rules. It is difficult to appreciate as to how the principle stated in that case could be extended to the case of 1st appellant in the present case as the quota rule had not broken down in any manner nor is there any material before the court to show that he has not been duly considered by the Departmental Promotion Committee before appointment to the higher grade. Again in the case of State of West Bengal & Ors. vs. Aghore Nath Dey [supra] the same question arose. In that case it was noticed that when reckoning seniority the length of the service may be a relevant factor. If the ad hoc selection is followed by regular selection, then the benefit of ad hoc service is not admissible if ad hoc appointment is in violation of the rules. If the ad hoc appointment has been made as the stop gap arrangement and where there was a procedural irregularity in making appointments according to rules and that irregularity was subsequently rectified, the principle to be applied in that case was stated once again. There is difficulty in the way of the appellants to fight out their case for seniority should be reckoned by reason of the length of the service whether ad hoc or otherwise inasmuch as they had not been recruited regularly. As stated earlier, the appellants were regularly found fit for promotion only in the year 1977 and if that period is reckoned their cases could not be considered as found by the Tribunal. The view expressed by this Court in these cases have been again considered in the decisions in Dr. Anuradha Bodi & Ors. v. Municipal Corporation of Delhi & Ors., 1998 (5) SCC 293; Keshav Deo & Anr. v. State of U.P. & Ors., 1999 (1) SCC 280; Major Yogendra Narain Yadav & Ors. v. Bindeshwar Prasad & Ors., 1997 (2) SCC 150; I.K. Sukhija & Ors. v. Union of India & Ors., 1997 (6) SCC 406; Government of A.P. & Anr. v. Y. Sagareshwara Rao, 1995 Supp. (1) SCC 16, but all these decisions do not point out that in case the promotions had been made ad hoc and they are subsequently

> regularised in the service in all the cases, ad hoc service should be reckoned for the purpose of seniority. It is only in those cases where initially they had been recruited even though they have been appointed ad hoc the recruitment was subject to the same process as it had been done in the case of regular appointment and that the same was not a stop gap arrangement. That is not the position in the present cases at all. Therefore, we are of the view that conclusions reached by the Tribunal appear to us to be correct and call for no interference. However, we make it clear, as noticed earlier, that while amending the rules of recruitment in the 1984 all those who are already in service will be borne in mind in adjusting the seniority amongst the promotees inter se and suitable adjustments could be made and so far as the direct recruits are concerned, their cases will go by their quota rule and the view taken by the Tribunal in this regard cannot be taken exception of."

7. Perused the decision cited by the learned Senior Counsel appearing for the petitioner in the case of ***T. Vijayan and ors.*** *Vrs.* ***Divisional Railway Manager and Ors.*** as reported in **JT 2000 (4) SC 196** decided on 5.04.2000 and for the difference in the facts, this Court finds this decision has no application to the case at hand.

Here this Court finds, for the support of the Law to the case of the respondent the question framed in para 4 is to be answered against the petitioners.

8. In the circumstance and for the direct application of the decision cited above to the case at hand, this Court finds no scope for entertaining this Writ Petition, which is hereby dismissed. However there is no order as to cost.

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S. K. PANIGRAHI, J.

BLAPL NO. 2464 OF 2020

BIKASH DURIA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

NARCOTIC DRUGS AND PSYCOSTROPIC SUBSTANCES ACT, 1985 – Section 37 – Provisions under – Offences punishable under Sections 21(C) AND 29(c) of the N.D.P.S. Act – Co-accused released on bail – Plea of benefit of parity pleaded – Whether can be granted? – Held, yes – Reasons indicated.

" However, on the basis of doctrine of parity, wherein a co-accused, who was charged under similar offences, has been granted bail by the Court, the other co-accused shall also be entitled to bail. The Allahabad Court in Yunis And Anr. vs State Of U.P. (1999 CriLJ 4094) while relying on Nanha v. State of U.P. (1993 Cri LJ 938) held that: "5. ..... where the case of co-accused is identically similar and another co-accused has been granted bail by the Court, the said co-accused is entitled to be released on bail on account of desirability of consistency and equity. As regards the principle of parity in matter of rejection of bail application, it may be observed that law of parity is a desirable rule." In the said case the bail was granted merely for the sake of judicial consistency and propriety. Nonetheless, this court wishes to clarify that the NDPS cases should always be dealt with stricter approach of 'No Tolerance'. In the instant case, this Court is painstakingly deviating from its "No-tolerance approach" because of the fact that the co-accused who was placed quite worse than the present Petitioner has been enlarged on bail. Thus, the present bail application is allowed solely on the basis of parity." (Para 9)

Case Laws Relied on and Referred to :-

1. AIR 2020 SC 721 : State of Kerala and Ors. Vs Rajesh & Ors.
2. 1999(9) SCC 429 : Union of India Vs. Ram Samujh & Ors.
3. (2007) 7 SCC 798 : Union of India Vs. Shri Shiv Shanker Kesari.
4. 2012 (10) SCALE 77 : Mohd. Sahabuddin & Anr. Vs. State of Assam.
5. Criminal Misc. Bail No. 3790 / 2017 : Gavranjeet Singh alias Gavrana Vs. State.
6. (1999 CriLJ 4094) : Yunis And Anr. Vs. State Of U.P.
7. (1993 Cri LJ 938) : Nanha Vs. State of U.P.

For Petitioner : M/s. Milan Kanungo, (Sr.Adv), Sitikanta Mishra, S.R. Mohanty, Sk. Meherulla.

For Opp. Party : Mr. P.C.Das, Addl. Standing Counsel.

ORDER Date of Order : 20.08.2020

S. K. PANIGRAHI, J.

In view of extraordinary situation arose out of COVID-19 lockdown, the matter is taken up through video conferencing.

1. ***Drug addiction is like a curse and until it is broken, its victim will perpetually remain in the shackles of bondage"*** aptly put by Oche Otorkpa while articulating the danger of the issue at hand and its ripple effect. The furtive smuggling and trafficking of drugs linked it to a host of social ills, including involvement in crime, destabilization and decline in family relationship, kinship, neighbourhoods etc. More importantly, it has resulted in

rampant substance abuse by the youth. The Parliament has passed the NDPS Act with an objective to arrest the menace by making the deterrent effect more stringent so that the guilty is appropriately punished. The said Act seeks to control both the demand and supply of drugs by criminalizing production, trafficking and use. It prohibits the manufacture, production, possession, consumption, sale, purchase, trade, use, import and export of narcotic drugs and psychotropic substances, except for medical or scientific purposes. The Judiciary also saddled with the responsibility of strictly adhering to the law so that the traffickers of drugs do not go unpunished and the growth boom of trafficking is checked. The trafficking and smuggling have flared sporadically in the recent years transcending the geographical boundaries. The case in hand typifies this alarming trend. The petitioner herein has filed the instant application under Section 439 of Cr.P.C seeking bail in connection with Bolangir Sadar P.S. Case No. 24 of 2020 corresponding to Special G.R. Case No. 10 of 2020 pending in the court of the learned Sessions Judge-cum-Special Judge, Bolangir. The petitioner herein is the accused in connection with alleged commission of offences punishable under Sections 21(c) and 29 of the N.D.P.S. Act.

2. The case of the prosecution presents a distinct case of transportation of drugs under the guise of medicinal products. In fact, the renewed focus on narcotics by the enforcement authorities has resulted in shifting of the focus by the traffickers towards Pharmaceutical drugs like the present one. On 17.01.2020, Jhasketan Bhoi, S.I. of Police, Sadar P.S., Bolangir detained two vehicles bearing Registration Nos.OD-03-P-2651 and OD-26-C9693 occupied by five persons loaded with huge quantity of cough syrup. Ashok Leyland Pick Up and Mahindra TUV 300 plus were carrying 3840 and 1120 bottles of sealed Eskuf Cough Syrup. A total of 5920 bottles containing 1kg 184gms of Codeine Phosphate which is more than the commercial quantity were recovered. The occupants of the vehicles failed to produce any invoice, license or authority in support of possession of Cough Syrup bottles. The police further submitted that the accused confessed of not carrying any drug license and the cough syrups were sold to different customers for the purpose of intoxication rather than for therapeutic use which leads to apparent fillip in the drug trade.

3. Heard Sri Milan Kanungo, Ld. Senior Counsel appearing for the petitioner, Sri P.C.Das, learned Additional Standing Counsel for the opposite party and perused the up-to-date case diary.

4. Drug addiction is a complex illness with far-reaching consequences for those who know, work with, and support the drug-addicted individual. Families suffer due to cultural and social factors of drug behavior, including their own understanding of the disease process and the addict's behavior due to drug abuse; draining of family resources, shrinking from responsibilities, sickness, and dysfunctional relationships, distortion of interpersonal family relationships, violence and death faced as a consequence of drug abuse. The cost of drug abuse is enormous and multifaceted which poses severe threat to the social fabric of the country. Ergo, instances of drug abuse is required to be dealt with a strict 'hard on Crime' attitude. Realising the danger of the present menace, the Apex Court has iterated that taking a liberal approach is uncalled for while exercising the power to grant bail in cases under the Narcotic Substances and Psychotropic Substances Act (NDPS Act). The plea for bail under section 439 of CrPC should be read with Section 37 of the NDPS Act. Section 37(1)(b)(ii) provides that where the Public Prosecutor opposes the application, the court should grant bail only when it is satisfied 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. As iterated in the recent case of ***State of Kerala and Ors. vs Rajesh and Ors.***[1]:

> *"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained Under Section 439 of the Code of Criminal Procedure, but is also subject to the 1AIR 2020 SC 721. limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said Section is in the negative form prescribing the enlargement of bail to any person Accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.*
>
> *21. 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. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Code of Criminal Procedure, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."*

1. *AIR 2020 SC 721*

5. The Supreme Court in the case of ***Union of India v. Ram Samujh and Ors.***[2] outlines some grave reasons while rejecting a bail application in connection to an offence committed under the NDPS Act:

> *"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved."*

The rigour of section 37(1)(b)(ii) of the NDPS Act in regards to the rejection of bail in the matters where the transportation of drugs was of commercial quantity has been provided in plethora of cases by the Supreme Court, especially, in ***Union of India Vs. Ram Samujh and others***[3] *and* ***Union of India Vs. Shri Shiv Shanker Kesari.***[4]

6. Adverting to the facts involved in the present case, Codeine as previously categorised under Schedule H of Drugs and Cosmetics Act which is considered to be extremely harmful and addictive to the human body. It is a derivative of opium and is considered less potent in term of analgesic and sedative effects than opium. However, over-the-counter (OTC) opioid abuse, including codeine, has been a growing problem across India. Although the majority of the abusers use it for recreational purposes, many become dependent on it after having used it as medication for pain or cough. Unfortunately, some people choose to misuse codeine to get feelings of elation and euphoria. Possible long-term consequences of codeine abuse include frequent over sedation, a risk of overdose, chronic constipation, sexual dysfunction, low sex drive, and disrupted menstrual cycles. When someone becomes addicted to the drug, it can have serious consequences on his health, finances and relationships. Codeine abuse has markedly on rise in the state and significantly large number of commercial quantity cases entering the criminal justice system.

2 & **3** *(1999) 9 SCC 429* **4.** (*2007) 7 SCC 798*

7. The law laid down by the Hon'ble Apex Court in ***Mohd. Sahabuddin & Anr. Vs. State of Assam***[5] (supra) has been very categorical about the stricter approach by the Court while granting bail in the cases of substance abuse, whereby recovery of cough syrup containing Codeine Phosphate in bail matter was found to be sufficient ground to reject the bail application:

> "13. As pointed out by us earlier, since the Appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the Appellants. Therefore, the Appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the Appellants' application for bail by the Courts below does not arise."

The said precedence has been followed by several High Courts including Rajasthan High Court in the case of ***Gavranjeet Singh alias Gavrana vs State***[6] wherein it was iterated that merely because the recovery is of small quantity, as defined in the Schedule, the benefit of bail cannot be granted to the present petitioners.

8. While strict liability provisions of the NDPS Act are considered deterrent, application of these provisions has not resulted in high punishment. Despite strict provisions, the recorded crime rate under the NDPS Act has increased in the country more during the last ten years. It is also equally disturbing to note that there is a disparate sentence in such kind of cases which is quite contrary to the notion of graded punishment prescribed under the law, as similar drug quantities witness varying degree of sentences. The lack of uniform sampling procedures adds to the overall inconsistency in sentencing for drug cases, more especially in pharmaceutical drugs like of cough syrup containing Codeine Phosphate. This kind of ambiguity in the application of the law with regards to most drug abuse cases in the country still persists. As a negatively-defined category, intermediate quantity cases receive disparate sentences, due to the wide range of punishments available

5. *2012 (10) SCALE 77* **6.** *Criminal Misc. Bail No. 3790 / 2017*

to a judge together with a lack of sentencing guidelines. This sort of inconsistencies problematises and affects the conviction rate in such crimes. But this case present a clear picture of recovery of commercial quantity.

9. However, on the basis of doctrine of parity, wherein a co-accused, who was charged under similar offences, has been granted bail by the Court, the other coaccused shall also be entitled to bail. The Allahabad Court ***in Yunis And Anr. vs State Of U.P.*** (1999 CriLJ 4094) while relying on ***Nanha v. State of U.P.*** (1993 Cri LJ 938) held that:

> "5. ..... where the case of co-accused is identically similar and another co-accused has been granted bail by the Court, the said co-accused is entitled to be released on bail on account of desirability of consistency and equity. As regards the principle of parity in matter of rejection of bail application, it may be observed that law of parity is a desirable rule."

In the said case the bail was granted merely for the sake of judicial consistency and propriety. Nonetheless, this court wishes to clarify that the NDPS cases should always be dealt with stricter approach of 'No Tolerance'. In the instant case, this Court is painstakingly deviating from its "No-tolerance approach" because of the fact that the co-accused who was placed quite worse than the present Petitioner has been enlarged on bail. Thus, the present bail application is allowed solely on the basis of parity.

The Bail Application is accordingly disposed of.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this 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 25.3.2020.

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2020 (III) ILR - CUT- 172

S. K. PANIGRAHI, J.

CRLMC NO. 985 OF 2020

RATNAKAR BEHERA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 451 & 457 – Release of vehicle – Offence U/s.52(a) & 62(1) of Odisha Excise Act – Pendency of confiscation proceeding – Bar U/s. 72 of the Excise Act – Question raised that, whether the magistrate has jurisdiction to release vehicle? – Held, the magistrate has jurisdiction to release the vehicle under section 451 of CR.P.C not withstanding the pendency of confiscation proceedings before the collector or authorised officer.

Case Laws Relied on and Referred to :-

1. 2019 (III)ILR-CUT160 : Kalpana Sahoo and Anr. Vs. State of Orissa.
2. 1986 UPCri 50 : Kamal Jeet Singh Vs. State.
3. 1983 UPCr 239 : Mohd. Hanif Vs. State of U.P.
4. 1992 AWC 1744 : Jai Prakash Sharma Vs. State of U.P.
5. 2002 (10) SCC 283 : Sunderbhai Ambalal Desai Vs. State of Gujarat.
6. 1997 (1) AWC 41 : Allahabad High Court in Nand Vs. State of U.P.
7. 2019 (III) ILR-CUT 386 : Dilip Das Vs. State of Odisha.

For Petitioner : M/s Anjan Kumar Biswal & R.K.Muduli.

For Opp. Party : Mr. Anupam Rath, Addl. Standing Counsel.

JUDGMENT Date of Hearing :13.07.2020:: Date of Judgment : 05.08.2020

S.K. PANIGRAHI, J.

1. The Present Application is filed U/s. 482 Cr.P.C to challenge the order dated 05.02.2020 passed by the learned District & Sessions Judge, Mayurbhanj, Baripada in Criminal Revision No. 11 of 2019 whereby the order dated 4.11.2019 in Criminal Misc. Case No. 132 of 2019 passed by the learned S.D.J.M., Baripada was affirmed. Learned S.D.J.M. had rejected the petition filed under Section 457 of the Cr.P.C. for delivery of the vehicle seized in connection with the offences under sections 52(a) and 62(1) of the Odisha Excise Act.

2. The petitioner is admittedly the registered owner of the TATA ACE Pick Up bearing Regd. No. OD-11M-9933, and the aforesaid vehicle has

been referred to as the 'vehicle'. The vehicle was seized by the Police as it was found to be illegally transporting 51.8 litres of IMFL near Tanki Sahi of Baripada town. In the P.R. report No. 49/2019-20 no allegation has been made against the petitioner. The Inspector of Excise has submitted his report vide D.B. No. 680 dated 28.01.2020 regarding initiation of confiscation proceeding of seized vehicle. The petitioner filed his statement on 04.10.2019 stating his ignorance of the illegal transportation of IMFL in his vehicle.

3. Mr. Anjan Kumar Biswal, learned counsel for the petitioner strenuously contended that the Petitioner has no role in the alleged commission of offence. He has cited the P.R. No. 49/2019-20 wherein no allegation has been made against the petitioner and he has not been arrayed as an accused. He has submitted that the petitioner had no knowledge about the illegal transportation of IMFL in his vehicle and that a person named Sanjeeb Behera had taken his vehicle on rent for transportation of cement and rod from Baripada. He has also contended that the Superintendent of Excise or the Authorised Officer is the competent authority to initiate the confiscation proceeding in respect of the seized vehicle but in the present case the former Inspector of Excise has unjustifiably initiated the proceedings. Further the vehicle should not be left exposed to sun, rain, and other external hazards which could irreversibly damage and decay the vehicle. Hence, the petition may be allowed, and direction may be issued for the release of the vehicle.

4. Per contra, Mr.Anupam Rath, learned Additional Standing Counsel vehemently opposed the release of the vehicle of the petitioner contending that the vehicle in question was used by the accused in committing offence under section 52(a) and 62(1) of the Odisha Excise Act, and therefore, is liable to be confiscated under section 72 of the Odisha Excise Act. Further, since confiscation proceedings have already been initiated, the order of rejection passed by learned lower court is correct. The Inspector of Excise through the report vide D.B. No.680 dated 28.01.2020 has submitted that the confiscation proceeding against the vehicle has been initiated by former Inspector of Excise Sri Ajay Kumar Behera, Sadar Range, Baripada. Thus, in view of the bar provided under proviso of Section 71(b)(7) of the Odisha Excise Act, the seized vehicle cannot be released during pendency of the confiscation proceedings even on the application of the owner of the seized vehicle for such release. Further, Section 72 of the Odisha Excise Act bars the jurisdiction of any other court from entertaining application in respect of the property.

5. Heard Sri Anjan Kumar Biswal, learned Counsel appearing for the petitioner, Sri Anupam Rath, learned Additional Standing Counsel for opposite party and perused the case records. It is a prima facie view that the vehicle in question has been seized on the ground of illegal transportation of IMFL and the confiscation proceeding of the vehicle has been initiated by the former Inspector of Excise. However, the former Inspector of Excise cannot be considered as the competent authority under Section 71 of the Odisha Excise Act and therefore, the contentions against the petitioner, are not sufficient to restrict the delivery of his vehicle under the Act.

6. The provision of Section 71 of the Odisha Excise Act provides that the Investigating Officer must produce the seized vehicle before the Superintendent of Excise, Collector (section 71(2)) or the Authorised Officer for the initiation of the confiscation proceedings. The Inspector of Excise is not empowered to initiate a confiscation proceeding as provided in the Act. This ratio has been iterated by this Court in paragraphs-4 and 5 of the judgment in the case of ***Kalpana Sahoo and Anr. v. State of Orissa[1]:***

> "4. In the cases at hand, the seizures have been made by the Excise Officer or Police Officer, as the case may be, and there is nothing on record to show that the seized vehicle have been produced before the Collector or the Authorized Officer as required under sub-section (1)(a) of Section 71 of the Act. In view of sub-section (3) of Section 71 of the Act, the Collector or the Authorized Officer, as the case may be, assumes power to proceed with confiscation of the seized property either where the seizure has been affected by him or where the seized properties are produced before him. That apart, a conjoint reading of sub-section (1)(a) and sub-section (3) of Section 71 of the Act would make it clear that although seizure can be made when there is reason to believe commission of any offence under the Act, the same reason ipso facto will not suffice an order of confiscation of the seized property. The Collector or the Authorized Officer, as the case may be, before passing an order for confiscation has to satisfy himself that an offence under the Act has been committed in respect of the property in question. The bar as contemplated under Section 72 of the Act will come into play only when the Collector or the Authorized Officer or the Appellate Authority is seized with the matter of confiscation of any property seized under Section 71 of the Act, but not merely because any seizure has taken place. Further, as per sub-section (5) of Section 71 of the Act, the owner of the vehicle or conveyance has a right to participate in the confiscation proceeding to prove his ignorance or bona fides to defend his property. If a particular officer or authority fails to discharge his duty as assigned to him under the statute, and if such failure on his part is not attributable to the party who on account of such failure is deprived of exercising his own right of defence, the statutory bar cannot be made operative to the prejudice of such party in condonation of the unexplained laches or negligence on the part of the public officer.

1. *2019 (III)ILR-CUT160*

> 5. In the present cases, there is no denial from the side of the learned Addl. Standing counsel appearing for the Government that no confiscation proceeding has been started in respect of the seized vehicles in question. There is also nothing on record to show that the concerned seizing officers have produced the respective vehicles before the concerned Collectors or the Authorized Officers in compliance with sub-section (2) of Section 71 of the Act. Hence, the Collectors or the Authorized Officers concerned cannot be said to have been seized with the matter of confiscation. Consequently, the bar under Section 72 of the Act cannot be said to have come into operation. The vehicles in question cannot be left in a state of damage and decay being exposed to sun, rain, and other external hazards."

7. In addition to this, several High Courts have held that mere initiation of confiscation proceeding cannot act as a bar for delivery of the vehicle to its owner when the owner of the registered vehicle has not been found guilty. Allahabad High Court in the cases of ***Kamal Jeet Singh v. State***[2]***,Mohd. Hanif v. State of U.P.***[3] ***and Jai Prakash Sharma vs. State of U.P.***[4] have iterated the same. The ratio decidendi as provided in ***Jai Prakash Sharma vs. State of U.P***. (supra) is as follows:

> **"5**. The revisionist had no knowledge or information of the liquor alleged to have been recovered from the truck. 2 1986 UPCri 50. 3 1983 UPCr 239. 4 1992 AWC 1744. 7 He is not a party to the aforesaid two cases pending before the District Magistrate, Etawah nor has any notice been issued to him the revisionist Jai Prakash Sharma, therein. The mere pendency of the confiscation proceedings is no bar to the release of the truck. The matter is still under investigation. The truck lying at the police station will, if not released, yet damaged, ruined and rusted, not only this, but it will also ultimately become un-useable and un-serviceable for various obvious reasons."

8. Further several jurisdictional High Courts have decided against keeping the vehicles in custody for a prolonged period. The general law relating to release of vehicles seized in connection with a crime pending investigation or trial by the Magistrate, in the most universal of its dimension has been laid down by the Hon'ble Supreme Court in ***Sunderbhai Ambalal Desai vs. State of Gujarat***[5]***:***

> "17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.
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> 18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then the insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take

2. *1986 UPCri 50*, **3**. *1983 UPCr 239*, **4**. *1992 AWC 1744* **5**. 2002 (10) SCC 283

> possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."

9. The issue where confiscation proceedings in relation to a vehicle are pending under Section 72 of the Excise Act on the basis of a crime registered under the said Act, the Magistrate has jurisdiction under Section 451 Cr.P.C. to release a seized vehicle pending investigation or trial notwithstanding the pendency of confiscation proceedings before the Collector was dealt with by ***Allahabad High Court in Nand vs. State of U.P.***[6], where it was held:

> "7. I think it is not proper to allow the truck to be damaged by remaining stationed at police station. Admittedly, the ownership of the truck is not disputed. The State of Uttar Pradesh does not claim its ownership. Therefore, I think it will be proper and in the larger interest of public as well as the revisionist that the revisionist gives a Bank guarantee of Rs. 2 lakhs before the C.J.M., Kanpur Dehat and files a bond that he shall be producing the truck as and when needed by the criminal courts or the District Magistrate, Kanpur Dehat, and he shall not make any changes nor any variation in the truck."

10. The above-mentioned ratio has also been iterated by this Court in the case of ***Dilip Das vs. State of Odisha,***[7] wherein this Hon'ble Court has held that since no confiscation proceeding has yet been initiated in accordance with the law, the vehicle in question cannot be left in a state of damage being exposed to sun, rain and without proper maintenance.

11. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, this Court sets aside the order dated 05.02.2020 passed by the learned District & Sessions Judge, Mayurbhanj, Baripada in Criminal Revision No.11 of 2019 and allows the prayer of the petitioner on the following conditions:

> 1. The petitioner is directed to make the vehicle available as and when required during investigation of the case and thereafter in the court concerned.
>
> 2. The petitioner is directed not to make any changes or any variation to the vehicle during the pendency of the trial in the court concerned.

12. However, it is made clear that any of the observation made hereinabove with respect to the fact of the case, shall not come in the way or prejudicially affect the fair trial of the present case. For the aforesaid reasons, the present application is allowed.

6. 1997 (1) AWC 41 **7**. *2019 (III) ILR-CUT 386*

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