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N.V. RAMANA, J., SURYA KANT, J & HRISHIKESH ROY, J.

CIVIL APPEAL NO. 14665 OF 2015

BHAVEN CONSTRUCTION ……...Appellant

.V.

EXE. ENGGR. SARDAR SAROVAR NARMADA NIGAM LTD. & ANR. ……Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction – Arbitration proceeding – The question arose as to whether the arbitral process can be interfered with under Article 226/227 of the Constitution, and under what circumstance? – law on the issue discussed – Held, it is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment – This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties – This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient. (Paras 11 to 18)

Case Laws Relied on and Referred to :-

1. (2011) 14 SCC 337 : Sharma Vs. Cellular Operators Association of India.
2. (2019) SCC Online SC 1602 : M/s. Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited.
3. (2019) 13 SCC 445P : Radha Bai Vs. P. Ashok Kumar.

For the Appellant : Purvish Jitendra Malkan
For the Respondents : Hemantika wahi

JUDGMENT Date of Judgment 06.01. 2021

N.V. RAMANA, J.

1. This Civil Appeal raises an important question of law concerning arbitration law in India and special enactments enacted by States concerning public works contract.

2. A brief reference to facts in this case is necessary for the disposal of the case. On 13.02.1991, Respondent No. 1 entered into a contract with the Appellant to manufacture and supply bricks. The aforesaid contract had an arbitration clause. As some dispute arose regarding payment in furtherance of

manufacturing and supplying of bricks, the Appellant issued a notice dated 13.11.1998, seeking appointment of sole arbitrator in terms of the agreement. Clause 38 of the agreement provide for arbitration as under:

> **Clause 38 – Arbitration**
>
> All disputes or differences in respect of which the decision has not been settled, shall be referred for arbitration to a sole arbitrator appointed as follows:
>
> Within thirty days of receipt of notice from the Contractor of his intention to refer the dispute to arbitration the Chief Engineer shall send to the Contractor a list of three officers from the list of arbitrator appointment by the Government. The Contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of the person from the list who shall then be appointed as the sole arbitrator. If Contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer, shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days, as stipulated, the contractor shall send a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select one officer from the list and appoint him as the sole arbitrator within fifteen days. **If the Chief Engineer fails to do so the contractor shall communicate to the Chief Engineer the name of one Officer from the list, who shall then be the sole arbitrator.**
>
> The arbitration shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the sole arbitrator shall be final and binding on the parties thereto. The Arbitrator shall determine the amount of costs of arbitration to be awarded to either parties.
>
> Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.
>
> All awards shall be in writing and in case of awards amounting to Rs. 1.00 lakh and above, such awards, shall state reasons for the amounts awards.
>
> Neither party is entitled to bring a claim to arbitration if the Arbitrator has not been appointed before the expiration of thirty days after defect liability period.
>
> **(emphasis supplied)**

3. Respondent No. 1, by replies dated 23.11.1998 and 04.01.1999, did not agree to the Appellant's request on two main grounds:

a. That the arbitration was agreed to be conducted in accordance with the provision of the Indian Arbitration Act and any statutory modification thereof. Accordingly, the State of Gujarat had passed the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (*hereinafter referred to as "**the Gujarat Act**"*).

Therefore, the disputes between the parties were to be adjudicated in accordance with the aforesaid statute.

b. That the arbitration was time barred, as Clause 38 mandated that neither party was entitled to claim if the arbitrator has not been appointed before the expiration of thirty days after the defect liability period.

4. In any case, the Appellant appointed Respondent No. 2 to act as a sole arbitrator for adjudication of the disputes. Respondent No.1 preferred an application under Section 16 of the Arbitration and Conciliation Act of 1996 (hereinafter referred to as **"the Arbitration Act"**) disputing the jurisdiction of the sole arbitrator. On 20.10.2001, the sole arbitrator rejected the application of the Respondent No. 1 and held that the sole arbitrator had jurisdiction to adjudicate the dispute.

5. Aggrieved by the order of the sole arbitrator, Respondent No. 1 preferred Special Civil Application No. 400 of 2002, under Articles 226 and 227 of the Constitution of India before the High Court of Gujarat. The Single Judge, while dismissing the Special Civil Application, held as under:

> "……At this stage, the judgment of the Hon'ble Supreme Court in the case of *Konkan Railway Corporation Limited v. Mehul Construction Company, (2000) 7 SCC 201* is also required to be considered along with the judgment of the Hon'ble Supreme Court in the case of *SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618*. Considering the aforesaid two judgments of the Hon'ble Supreme Court and the order passed by the learned sole arbitrator passed under Section 16(4) of the Act dismissing the application submitted by the petitioner challenging the jurisdiction of respondent no. 2 as a sole arbitrator and challenging his appointment as a sole arbitrator, it is to be held that the petition under Articles 226 and 227 of the Constitution of India against the said order is not maintainable and/or the same is not required to be entertained and the only remedy available to the petitioner is to wait till the award is passed by the learned Sole Arbitrator and to challenge the same under Section 34 of the Act…"

6. Aggrieved by the order of the Single Judge, Respondent No. 1 preferred Letters Patent Appeal No. 182 of 2006 in Special Civil Application No. 400 of 2002. The High Court of Gujarat, by the impugned order dated 17.09.2012, allowed the appeal and observed the following:

> "11. As discussed hereinabove, 'the contract' is a "works Contract" and a dispute is raised by the petitioner at the earliest available opportunity about the 'forum' in which the dispute be adjudicated. It was as early as on 23.11.1998, the appellant denied that in view of Clause-38, wherein it is provided that, 'provision of Indian

> Arbitration Act, 1940 and any statutory modification thereof will be applicable', the respondent cannot appoint a sole arbitrator and thereafter cannot contend that now that the Arbitrator is already appointed and he (the arbitrator) has already exercised power under the provisions of the Arbitration and Conciliation Act, 1996, the petitioner has to wait till the arbitration award is passed, to challenge the same under Section 34 and Section 37 of the 1996 Act."

7. Aggrieved, the Appellant filed this appeal by way of special leave petition.

8. Counsel for the Appellant argued that the Division Bench of the High Court erred in interfering with the order of the Single Judge under Articles 226 and 227 of the Constitution. The fact that the final award has been passed by the sole Arbitrator and is now challenged under Section 34 of the Arbitration Act clearly shows the attempt of Respondent No. 1 to bypass the framework laid down under the Arbitration Act. He points out that Section 16(2) of the Arbitration Act mandates that the sole arbitrator had the jurisdiction to adjudicate the preliminary issue of jurisdiction, which can only be challenged under Section 34 of the Arbitration Act.

9. On the other hand, learned counsel for Respondent No. 1 contended that since the enactment of the Gujarat Act, the Arbitration Act was substituted with respect to the disputes arising out of the works contract. It was contended that under Articles 226 and 227 of the Constitution, it was always open for Respondent No. 1 to invoke the writ jurisdiction of the High Court to set aside an arbitration which was a nullity as it was in conflict with the State enactment.

10. Having heard both parties and perusing the material available on record, the question which needs to be answered is whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstance?

11. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under "*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*" The *non-obstante* clause is provided to uphold the intention of the legislature as provided in the

Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

12. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

13. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7 of the Arbitration Act. Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.

14. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for court assistance under Section 8 or 11 of the Arbitration Act.

15. In this context, we may state that the Appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent No. 1 mounting a judicial challenge at that stage. Respondent No. 1 then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.

16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as '*Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)*'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In ***Nivedita***

Sharma* v. *Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:

> "11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261. **However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy**. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. **(emphasis supplied)**

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

18. In this context we may observe ***M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited***, (2019) SCC Online SC 1602, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:

> "**15.** Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)
>
> **16.** This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a

> constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the **High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.**"

19. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.

20. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modeled on the 'principle of unbreakability'. This Court in ***P. Radha Bai v. P. Ashok Kumar***, (2019) 13 SCC 445, observed:

> **36.3.** Third, Section 34(3) reflects the principle of unbreakability. Dr Peter Binder in *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 2nd Edn., observed:
>
> "An application for setting aside an award can only be made during the three months following the date on which the party making the application has received the award. Only if a party has made a request for correction or interpretation of the award under Article 33 does the time-limit of three months begin after the tribunal has disposed of the request. This exception from the three-month time-limit was subject to criticism in the working group due to fears that it could be used as a delaying tactics. However, although "an unbreakable time-limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of Article 33".
>
> **According to this "unbreakability" of time-limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three-month time-limit has expired cannot be raised.**
>
> **37.** Extending Section 17 of the Limitation Act would go contrary to the principle of "unbreakability" enshrined under Section 34(3) of the Arbitration Act.
>
> **(emphasis supplied)**

If the Courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished.

21. The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the Appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering the Respondent No. 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the Appellant herein had actually acted in accordance with the procedure laid down without any *mala fides*.

22. Respondent No. 1 did not take legal recourse against the appointment of the sole arbitrator, and rather submitted themselves before the tribunal to adjudicate on the jurisdiction issue as well as on the merits. In this situation, the Respondent No. 1 has to endure the natural consequences of submitting themselves to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34. It may be noted that in the present case, the award has already been passed during the pendency of this appeal, and the Respondent No. 1 has already preferred a challenge under Section 34 to the same. Respondent No. 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution.

23. The Division Bench further opined that the contract between the parties was in the nature of a works contract as it held that the manufacturing of bricks, as required under the contract, was only an ancillary obligation while the primary obligation on the Appellant was to supply the bricks. The Division Bench therefore held that the Gujarat Act holds the field, and not the Arbitration Act.

24. The Gujarat Act was enacted in 1992 with the object to provide for the constitution of a tribunal to arbitrate disputes particularly arising from works contract to which the State Government or a public undertaking is a party. A works contract is defined under Section 2(k) of the Gujarat Act. The definition includes within itself a contract for supply of goods relating to the execution of any of the works specified under the section. However, a plain reading of the contract between the parties indicates that it was for both manufacturing as well as supply of bricks. Importantly, a contract for manufacture *simpliciter* is not a works contract under the definition provided

under Section 2(k). The pertinent question therefore is whether the present contract, which is composite in nature, falls within the ambit of a works contract under Section 2(k) of the Gujarat Act. This is a question that requires contractual interpretation, and is a matter of evidence, especially when both parties have taken contradictory stands regarding this issue. It is a settled law that the interpretation of contracts in such cases shall generally not be done in the writ jurisdiction. Further, the mere fact that the Gujarat Act might apply may not be sufficient for the writ courts to entertain the plea of Respondent No. 1 to challenge the ruling of the arbitrator under Section 16 of the Arbitration Act.

25. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In ***Deep Industries*** **case** (*supra*), this Court observed as follows:

> **"22.** One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. **The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34.**"
>
> (**emphasis supplied**)

26. In view of the above reasoning, we are of the considered opinion that the High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned Order of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent No. 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings.

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DR. S. MURALIDHAR, C.J & DR. B. R. SARANGI, J.

WRIT PETITION (CIVIL) NO. 10537 OF 2006

M/S. NATIONAL ALUMINIUM COMPANY LTD. ……Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging demand notice towards interest on the delayed payment of differential royalty, failing which steps will be taken to realise the dues through certificate procedure under the Orissa Public Demands Recovery (OPDR) Act, 1962 – State Authorities were not sure as to how the royalty on Bauxite was to be calculated in terms of the amendment to the Second Schedule of the MMDR Act – On its part, NALCO, petitioner, had itself been reminding to raise the revised demand – But no demand made for long time – Delay if any was attributable to State authorities – Thus there was no default on the part of NALCO in making the payment of revised royalty and as such the demand of interest on the delayed payment of revised royalty is not legally justified. (Para 14)

(B) WORDS AND PHRASES – Interest – Meaning thereof – Held, the interest is compensatory in character and can be imposed on a person who has withheld the legitimate dues – Otherwise, the demand of interest is not justified. (Pratibha Processors v. Union of India, (1996) 11 SCC 101 followed.) (Paras 16 & 17)

Case Laws Relied on and Referred to :-

1. (1996) 11 SCC 101 : Pratibha Processors Vs. Union of India.
2. (2005) 4 SCC 779 : E.I.D. Parry (India) Ltd. Vs. Assistant Commissioner of Commercial Taxes, Chennai

For Petitioner : Ms. Pami Rath.

For Opp. Parties : Mr. P.K. Muduli, Addl. Govt.

JUDGMENT Date of Judgment : 05.01.2021

DR. S. MURALIDHAR, C.J.

1. The National Aluminium Company Ltd. (NALCO) has filed this writ petition challenging the notice dated 22nd August, 2005 under Annexure-8, issued by the Deputy Director of Mines (DDM), Koraput Circle (Opposite Party No. 3) calling upon it to pay a sum of Rs. 60,83,616/- towards interest

on the delayed payment of differential royalty for the period from September,2000 to February, 2003, as well as subsequent further reminder dated 5th April, 2006 for payment of the said sum, failing which steps were to be taken to realise the dues through certificate procedure under the Orissa Public Demands Recovery (OPDR) Act, 1962.

2. The background to the petition is that Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 ('the MMDR Act') provides for levy of royalties in respect of mining leases. In terms thereof, the holder of the mining lease has to pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area, at the rate specified under the Second Schedule to the MMDR Act.

3. Under Section 9(3) of the MMDR Act, the Central Government has been empowered to issue a notification in the Official Gazette for the purpose of amending the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date specified in the notification.

4. NALCO, a Government of India enterprise, set up its Alumina plant at Damanjodi for processing Bauxite to extract Alumina to be used in its smelter plant at Angul for final manufacturing of Alumina metal and allied products. It is stated that the Government of Odisha has granted NALCO a mining lease for extraction of Bauxite from the Panchpatmali Bauxite Mines for the above purpose. NALCO states that it was paying royalty for the Ore extracted from the said mines regularly at the rate of Rs. 41/- per MT of Bauxite.

5. On 12th September, 2000 the Central Government amended the Second Schedule to the MMDR Act and introduced a new rate in respect of Bauxite /Laterite as under:

> "Zero point three five percent of London Metal exchange, Alumina metal price chargeable on the contained Alumina metal in ore produced."

6. It is stated that the expression 'zero point three five percent of London Metal exchange, Alumina metal price' failed to indicate the methodology for calculating the rate, particularly since the London Metal Exchange price has variable components that are subject to frequent changes. Further ambiguity

was created by the expression 'on the contained Alumina metal in ore produced' since the Alumina metal found in the Bauxite ore also contained some moisture. The issue that was whether the aforementioned rates were for the mineral inclusive of the moisture content. NALCO states that as a result of the above ambiguities no intimation has been sent to it by the Opposite Parties raising a demand for the differential royalty pursuant to the amendment to Second Schedule to the MMDR Act.

7. It is further stated that on 23rd April 2001, the Government of India in the Ministry of Steel and Mines issued a clarification to the Government of Odisha as well as to NALCO indicating the methodology for calculating the royalty payable for Bauxite in terms of the amendment. Annexure-2 to the communication, which set out the formula for calculating the differential royalty payable, *inter alia*, gave a discretion to the State Government to choose daily, monthly, quarterly or annual settlement prices of World Metal Statistics which suits its periodicity of payment. It required the IBM circular dated 2nd November 1990 to be followed for determining the threshold values of Al2O3 and SiO2 to differentiate between mineral reject and mine waste. Further, the revised royalty calculation was to be based on the metal content in the ore produced. Thus the recovery percentage of Alumina during extraction as well as moisture contain was not relevant. Royalty was to be calculated on the Aluminium metal content in the ore and not on the average quality of ore considered in the mining plan. The clarification set out a complete formula for calculation of royalty.

8. NALCO contends that despite the above clarification, the Government of Odisha was uncertain as to the method of calculation and the exact quantum of demand. Accordingly a meeting was held on 7th June, 2002 where, *inter alia,* it was agreed that monthly returns would be submitted by NALCO on the 6th of every month. Thereupon, Opposite Party No.3 [Deputy Director of Mines (DDM, Koraput Circle)] shall serve upon NALCO the demand notice on the 9th of the succeeding month and payment would be released on or before the 15th of every month. This procedure was to commence from June, 2002. It was further decided that for the payment of arrears of the period September, 2000 to May, 2002, a separate meeting would be held. According to NALCO, the DDM, Koraput requested the Director of Mines, Odisha to provide a clear procedure for calculating royalty on Bauxite as per the revised rate. The changes required as a result of the clarification given to the DDM, Koraput was to be discussed at the end of

June, 2002. In the circumstances, no demand of the revised royalty was raised on NALCO by the DDM, Koraput. In the meanwhile, NALCO kept paying the royalty at the old rate.

9. On 5th December 2002 NALCO again sent a reminder to the Opposite Parties in terms of the discussion in the meeting dated 7th June 2002. *Inter alia*, it was pointed out that the Opposite Parties were suppose to sent the demand note to NALCO by 6th of every month, but it had not been done so till that date. On 4th March, 2003 the Director of Mines invited NALCO for a further discussion. This meeting was held on 13th March, 2003 in which a decision was taken that NALCO should pay royalty based on the report of the Government of India. On 25th March, 2003 NALCO paid the entire arrears of differential dues of Rs.7,68,22,885/- for the period from 12th September,2000 till February, 2003 along with an advance royalty of Rs. 1,60,00,000/- for the period of March, 2003.

10. According to NALCO, it was surprised to see the impugned notice dated 22nd August, 2005 from the Opposite Party No.3 demanding interest on the arrears on differential royalty for the period September, 2000 to February, 2003. NALCO replied to the said demand notice on 6th November, 2005. Nevertheless, on 15th April, 2006 a further demand of the said sum was made. NALCO replied to the said demand on 18th April, 2006. The demand was repeated by the DDM, Koraput again on 17th July, 2006, to which NALCO replied on 31st July, 2006. Thereafter, the present petition was filed by NALCO seeking the reliefs as noted hereinbefore.

11. On 16th August,2006 while directing notice to issue to the Opposite Parties 1 to 3, this Court directed that no coercive action be taken against NALCO for realization of the amount pursuant to the impugned notices. The said interim order continued till 23rd July, 2019. Thereafter on 29th October, 2019 this Court, after noticing that the interim order was not extended beyond 23rd July, 2019, directed the Opposite Parties to comply with the consequential order subject to the result of the writ petition. Subsequently on 17th December 2019, while directing the State of Odisha to place on record the calculation sheets pursuant to the impugned demand notices, this Court directed that no recovery shall be made from NALCO pursuant thereto.

12. In the reply filed by the Opposite Party Nos. 1 to 3, the stand taken, *inter alia,* is that the variation in the content of AI_2O_3 reported in the returns

filed by the NALCO could be reconciled only in the meeting held on 13th March, 2003. The Accountant General, Odisha in an inspection report No. 3/05-06 had pointed out that interest on the delayed payment of differential royalty had neither been paid by the lessee nor demanded by the Department. It was further indicated in the said report that the interest in the sum of Rs. 60,83,616/- was due on the delayed payment of differential royalty. The Opposite Parties state that pursuant to the said audit objection, the DDM, Koraput Circle raised the impugned demand. It is contended that the impugned demand is justified and that NALCO is liable to pay the demanded dues in terms of Rule 64A of the Mineral Concession Rules, 1960 and Rule 49 of the Mineral Concessions Rules, 2016.

13. This Court heard the submissions of Ms. Pami Rath, learned counsel for NALCO and Mr. P.K. Muduli, learned Additional Government Advocate for Opposite Parties 1 to 3.

14. The facts speak for themselves. It is clear that the Opposite Party Nos. 1 to 3 were themselves not sure as to how the royalty on Bauxite was to be calculated in terms of the amendment to the Second Schedule of the MMDR Act. It was only on 13th March, 2003 at the meeting held between the Opposite Parties 1 to 3 and NALCO, that clarity was arrived at on the modalities for computation of royalty. On its part, NALCO had itself been reminding Opposite Parties 1 to 3 to raise the revised demand in terms of the amendment to the Second Schedule of the MMDR Act. Therefore, it is evident that the delay in making payment of the differential royalty on the part of the NALCO was attributable to the delay, if any, on the part of the Opposite Parties 1 to 3 in raising the demand. The facts reveal that it was the DDM, Koraput was kept seeking further clarification from the Director of Mines on this aspect. The procedure for calculating the royalties in terms of the clarification issued by the Government of India was finalized only at the meeting held on 13th March, 2003. Immediately thereafter on 25th March, 2003 NALCO paid the entire differential royalty. Therefore, there was no default on the part of NALCO in making the payment of revised royalty. In the circumstances, it appears to the Court that the demand of interest on the delayed payment of revised royalty for the aforementioned period between September, 2000 and February, 2003 is not legally justified.

15. Ms. Pami Rath, learned counsel for NALCO has placed reliance on the decisions of the Supreme Court of India in ***Pratibha Processors v. Union***

of India, (1996) 11 SCC 101; and ***E.I.D. Parry (India) Ltd. v. Assistant Commissioner of Commercial Taxes, Chennai, (2005) 4 SCC 779***, in support of the plea that the impugned demand raised is arbitrary and contrary to law.

16. The Supreme Court in ***Pratibha Processors*** *(supra)* in paragraph 13 of the judgment clarified as under:

> "13. In fiscal Statutes, the import of the words -- "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty- which is penal in character."

17. The above decision makes it clear that the interest is compensatory in character and can be imposed on a person who has withheld the legitimate dues. Otherwise, the demand of interest is not justified. On the facts of the present case, it is plain that there was no attempt by NALCO to withhold the payment of royalty. On the contrary, NALCO itself was reminding Opposite Parties 1 to 3 to raise a demand in terms of the amendment to the Second Schedule to the MMDR Act.

18. In ***E.I.D. Parry (India) Ltd.*** *(supra)*, the Supreme Court held that the claim for interest under Section 24(3) of the Tamil Nadu General Sales Tax Act, 1959, in the absence of any assessment, even a provisional one, or a notice of demand, was not justified. On the same analogy, unless a demand is raised, the question of paying interest for the period prior thereto would not arise.

19. For the aforementioned reasons, this Court finds the impugned demand to be unsustainable in law. Accordingly, the impugned notice dated 22nd August, 2005 (Annexure-8) and subsequent reminder dated 5th April, 2006 (Annexure-10) are hereby quashed.

20. In the result the writ petition is allowed. However, there shall be no order as to costs.

21. As restrictions are continuing due to COVID-19 situation, 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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2021 (I) ILR - CUT- 256

DR. S. MURALIDHAR, C.J & C.R. DASH, J.

WRIT PETITION (CIVIL) NO. 9247 OF 2018

CHITTA RANJAN SAHU .....Petitioner

.V.

GOVERNMENT OF ODISHA, DEPARTMENT OF STEEL & MINES & ORS. .....Opp. Parties

MINES AND MINERALS (Development and Regulation) Act, 1957 read with Mineral (Auction) Rules, 2015 – Rule 6 – Auction of iron ore mines – Writ petition in the nature of PIL challenging the participation of some companies in the auction process on the ground that such companies were on the verge of bankruptcy and are being proceeded against the Insolvency and Bankruptcy Code 2016 – Question cropped of as to whether initiation of bankruptcy proceeding against the Companies can make them ineligible from participating in the auction process – Held, No. – Reasons indicated.

Court is unable to accept the submission for the simple reason that each of the three entities have met all the eligibility conditions. Initiation of any proceeding against them under the IBC was not specified as a condition of ineligibility. The three entities fully met the requirement of 'net worth', which is a well understood expression in the world of finance. Merely because an entity might have unpaid loans owing to financial institutions would not mean that it has lost its 'net worth'. In fact the very process of initiating the CIPR under the IBC is to see how a company, which otherwise has a high net worth, can be restored to its full operational potential through restructuring, notwithstanding that it might have defaulted on the loans borrowed from financial institutions. The Petitioner appears to have been under a misconception that merely because a proceeding under the IBC was initiated

against three entities around the time when they were issued with LOI, that by itself rendered them ineligible for issuance of the LOI. It must be noted here that there are two more stages to be crossed in the entire process, which includes the actual grant of the mining lease in favour of the entities. As a result of the interim order passed by this Court, those stages could not be completed. In fact, on account of the mining leases having not been executed and the iron ore not being extracted, the State of Odisha has lost valuable revenue, which it could have earned from royalties. Consequently, the continuance of the present writ petition does not, in any manner, advance public interest. *(Paras 21 & 22)*

Case Laws Relied on and Referred to :-

1. (2019) SCC Online 1478 : Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta.

For Petitioner : Mr. Gopal Sankaranarayanan,
Mr. Ashok Kumar Das.

For Opp. Parties: Mr. Harish Salve, Sr. Adv.
Ms. Ruby Singh Ahuja, and Mr. Bibhu Prasad Tripathy,
(for Opp. Party No.5-Essar Steel India Ltd.)

Mr. Bimbisar Dash, Central Govt. Counsel
(for Opposite Party No.3)
Mr. M.S. Sahoo, Addl. Govt.
(for State of Odisha-Opp. Party Nos. 1 and 2)

Mr. Sreejit Mohanty, (for Opp. Party No.4-SBI Capital Markets Ltd.)
Mr. S.P. Sarangi, (for Opposite Party No.6-Bhushan Steel Ltd.)

Mr. P.C. Mohapatra,(for Opp.Party No.7-Bhushan Power & Steel Ltd.)

JUDGMENT Date of Judgment : 21.01. 2021

DR. S. MURALIDHAR, C.J.

1. In this writ petition, styled as a Public Interest Litigation (PIL), the Petitioner has, *inter alia,* prayed for cancellation of the auction process initiated by the Department of Steel and Mines, Government of Odisha by Notices Inviting Tender (NIT) for grant of mining leases by auction in respect of three Iron Ore Blocks : (1) Ghoraburhani Sagasahi (NIT dated 23rd December, 2015), (2) Kalamanga West (NIT dated 7th March, 2017), and (3) Netrabandha Pahar (NIT dated 7th March, 2017).

2. The Petitioner also prayed for quashing of Letters of Intent (LOI) issued in favour of the preferred Bidders for the aforementioned Iron Ore

Blocks (IOBs), those are : LOI dated 28th March, 2016 in favour of Essar Steel Limited (ESL) (Opposite Party No.5) for Ghoraburhani Sagashi; LOI dated 24th June, 2017 in favour of Bhushan Steel Limited (BSL) (Opposite Party No.6) for Kalamanga West, and (3) LOI dated 24th June, 2017 in favour of Bhushan Power and Steel Limited (BPSL) (Opposite Party No.7) for Netrabandha Pahar.

3. The case of the Petitioner is that said three entities, to which the LOI in respect of three Iron Ore Blocks were issued, were on the verge of bankruptcy and/or are being proceeded against the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) and despite that they were permitted to continue to participate in the bidding process and have been declared preferred bidders. According to the Petitioner, the very fact that all the three auctioned mines went to companies "who were just thereafter declared insolvent, creates a suspicion towards a larger malice as the mines are now being treated as part and parcel of the assets of the insolvent companies and the same will stand transferred to the subsequent purchaser/acquirer of the insolvent companies."

4. The allegation is that the allocation of said three Iron Ore mines being conducted in a manner *de hors* the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act) as well as the Mineral (Auction) Rules, 2015 ('MAR').

5. Reference has also been made in the petition to a common order dated 2nd August, 2017 passed by the National Company Law Tribunal (NCLT), Ahmedabad Bench. The said cases were filed under the IBC, 2016 by the State Bank of India (SBI) and Standard Chartered Bank (SCB), London respectively against the ESL, which showed that the latter either by itself or by through its subsidiary took huge sums from two financial institutions. They also showed that a Corporate Insolvency Resolution Process (CIRP) was initiated by the NCLT against the ESL, and according to the Petitioner the ESL could not have participated in the bidding process in view of this development.

6. As far as BSL is concerned again reference is made to the application filed against it and BPSL by the SBI and Punjab National Bank (PNB) in the NCLT in July, 2017 under the IBC, 2016 on account of failure of repayment of loan by those companies. The Petitioner appears to have made a detailed

representation dated 13th April, 2018 to the State Government to investigate into the above facts and take necessary action, since the mines in question are valuable resources of the State of Odisha. When no response was forthcoming, the present petition was filed.

7. The Petitioner also notes that when the BSL was undergoing CIRP process, M/s. Bamnipal Steel Ltd. (Bamnipal), a wholly owned subsidiary of M/s. Tata Steel Ltd. (TSL), won the bid to successfully acquire the controlling stake of 72.65% of BSL in accordance with the approved resolution plan under the CIRP of the IBC, 2016.

8. It appears that when the petition initially was listed on 30th May, 2018, time was sought by the Additional Government Advocate appearing for the State of Odisha to obtain instructions. Later on 18th July, 2018 the application filed by the State Government seeking time to file reply was allowed. On 27th August, 2018, while issuing notice to the Opposite Party Nos. 5, 6 and 7, an interim order was passed directing the State Government to restrain Opposite Party Nos. 5, 6 and 7 from carrying out any mining activities within the State of Odisha.

9. Pursuant to the notice issued, counter affidavits have been filed by each of the Opposite Parties. As far as Opposite Party Nos. 1 and 2 are concerned, i.e. the Government of Odisha, the chronological sequence of events leading to the auction of the three Iron Ore blocks has been set out in detail. This affidavit filed on 19th August, 2019 explains that the auction of major minerals is done as per the provisions contained in the MAR notified by the Central government under the provisions of the MMDR Act. The eligibility of the applicants for participation in such auction is prescribed under Rule 6 of the MAR, which reads as thus:

> "Rule-6 – Eligibility for mining lease –(1) For the purpose of participating in the auction of mining lease, an applicant shall meet the requirements as specified in Section 5 and the terms and conditions of eligibility as specified in Schedule I."

10. The Schedule-I appended to the MAR provides terms and conditions of eligibility relating to financial net worth of the applicant(s), which reads thus:

> "Schedule-I : The following net worth requirements shall be applicable for an auction of mining lease depending on the Value of Estimated Resources,-

(a) If the value of Estimated Resources is more than Rupees 25 Crores, the applicant, including an individual, shall have a net worth more than 4% of Value of Estimated Resources."

11. Further, Explanation-2 under Schedule-I of the MAR reads as under:

"In case of a Company, the Net worth shall be the sum of paid up share capital and the free Reserves as per the audited Balance Sheet of the immediately preceding financial year."

12. Sub-Rule 5 of Rule 6 of the MAR further provides as follows:

"6(5) the eligibility for participating in the auction shall be determined as per the terms and conditions of eligibility for participating in the auction and the Successful Bidder shall be decided solely on the basis of financial bids submitted by the eligible bidders."

13. It is stated by Opposite Party Nos. 1 and 2 that each of the successful bidders was the higher bidder and possessed the requisite net worth as per the audited balance sheet of the immediately preceding financial year as on the date of publication of the NIT, and the same have been certified by the Charted Accountant of the respective Companies. It is pointed out that Opposite Party Nos. 1 and 2 have meticulously adhered to every step in the auction process as prescribed under the MAR. In a tabular column the compliance to the eligibility conditions by the three preferred bidders has been explained as under:

Details	Ghoraburhani	Kalamanga	Netrabandha Pahar
Networth needed for	Rs.741 crore	Rs. 358 crore	Rs. 262 crore
Preferred Bidder	Essar	BSL	BPSL
Nationality of the entity	Indian Company*	Indian Company*	Indian Company*
End use	Production/ Manufacturing of Iron & steel	Production of Iron & steel	No such condition.
% of value of mineral dispatched offered by Preferred Bidder	44.35%	100.05%	87.15%

** formed under the Indian Companies Act, 1956.*

14. The affidavit of Opposite Party Nos. 1 and 2 notes that in case of ESL, the CIRP was initiated more than a year after the LOI was issued to it. In case of BSL and BPSL, the CIRP was initiated more than a month after the respective LOI was issued. While the case of BSL has been resolved, the bids

of ESL and BPSL are being evaluated and in both the cases CIRP was expected to be resolved in due course. As it transpires, in fact the CIRP in respect of other two entities has since been resolved and this position has not even been disputed by the Petitioner.

15. As far as ESL is concerned, an additional affidavit has been filed by the Authorised Signatory of Arcelor Mittal Nippon Steel India Limited, explaining that the CIRP under the IBC is culminated into ArcelorMittal Indian Private Limited since taking over the business of the ESL on 16th December, 2019 after making an investment in excess of Rs.50,000 Crores and resolving the financial affairs of the ESL and this has been approved by the Supreme Court of India by its judgment dated 15th November, 2019 in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2019) SCC Online 1478***. ArcelorMittal India Private Limited has taken over 100% ownership of the ESL and as on 8th January, 2020, the name of the ESL was changed from Essar Steel India Limited to ArcelorMittal Nippon Steel Limited.

16. As far as BSL is concerned, the resolution plan submitted by the TSL was approved by CoC in the best interest of the Company and later the same was upheld by NCLT and NCLAT. It is mentioned that the upfront payment of Rs.4.47 crores was paid under Rule 10(2) of the MAR and BSL was awarded the LOI. Against the net worth needed for participating in the auction of Rs. 358 crores, the net worth of BSL at the time of auction was Rs.1,190 crores.

17. As far as BPSL is concerned, an affidavit has been filed on 7th December, 2018 at which time the CIRP was still underway. However, that CIRP admittedly has since been successfully concluded. The net worth of the BPSL on the relevant date was Rs.4418.58 Crores, which was far in excess of the required net worth in terms of the NIT itself. BPSL also submitted the upfront first instalment of Rs.3.43 Crores on 1st June, 2017 and the LOI was thereafter issued to it.

18. What is significant is that the major premise on which the Petitioner filed the present petition viz., that 'three companies, to whom the LOIs were issued were declared insolvent' is contrary to the factual position. The initiation of the process under the IBC is not to be equated with insolvency. This is not even disputed by Mr. Gopal Sankaranarayanan, learned Senior Counsel appearing for the Petitioner.

19. The IBC process involves appointing a resolution professional and it is only if the CIPR is unsuccessful that the question whether the entity should be declared insolvent arises. In the cases of Opposite Party Nos. 5, 6 and 7, the CIPR was successful and this is not even disputed by the Petitioner.

20. The altered reality makes the very basis of filing of the present petition non-existent. Each of the three entities, i.e. Opposite Party Nos. 5, 6 and 7 are back to functioning as fully solvent companies with all the creditors dues being satisfied. The apprehension, therefore, that their alleged bankruptcy rendered them ineligible and incapable of operating the mining lease, if granted in their favour, is not factually or legally tenable.

21. Mr. Sankaranarayanan, however, submitted that the question that still arises is whether the past illegalities should be 'condoned'? The Court is unable to accept the submission for the simple reason that each of the three entities have met all the eligibility conditions. Initiation of any proceeding against them under the IBC was not specified as a condition of ineligibility. The three entities fully met the requirement of 'net worth', which is a well understood expression in the world of finance. Merely because an entity might have unpaid loans owing to financial institutions would not mean that it has lost its 'net worth'. In fact the very process of initiating the CIPR under the IBC is to see how a company, which otherwise has a high net worth, can be restored to its full operational potential through restructuring, notwithstanding that it might have defaulted on the loans borrowed from financial institutions.

22. The Petitioner appears to have been under a misconception that merely because a proceeding under the IBC was initiated against three entities around the time when they were issued with LOI, that by itself rendered them ineligible for issuance of the LOI. It must be noted here that there are two more stages to be crossed in the entire process, which includes the actual grant of the mining lease in favour of the entities. As a result of the interim order passed by this Court, those stages could not be completed. In fact, on account of the mining leases having not been executed and the iron ore not being extracted, the State of Odisha has lost valuable revenue, which it could have earned from royalties. Consequently, the continuance of the present writ petition does not, in any manner, advance public interest.

23. For all the aforementioned reasons, the Court vacates the interim stay granted by it and disposes of the present writ petition with the above observations. However, there shall be no order as to costs.

24. As restrictions are continuing due to COVID-19 situation, learned counsel for the parties 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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2021 (I) ILR - CUT- 263

DR. S. MURALIDHAR, C.J & C.R. DASH, J.

W.P.(C) NO. 21375 OF 2020

M/S. NITIRAJ ENGINEERS LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender for supply of Electronic Weighing Scale – Allegation of placing of order only with one agency – Plea that the fundamental principle of transparency and inviting bids from different agencies/manufacturer has been flouted/deviated, and therefore, the tender is not valid in the eye of law – Explanation by Tender Inviting authority – It is explained that the concept of Proprietary Article Certificate (PAC) Buying under Clause 2.3.3.1 of the Government e Marketplace (GeM) Handbook involves a process different from the regular tendering process – It is further explained that PAC Buying is one of the procurement processes to buy any specific model/make product that is available on the GeM platform – Held, the Court is not satisfied that by restricting the tender to supply of the LUNIA make of EWS, any illegality has been committed or undue favour has been shown to anyone – If after comparing the products available in the market, Opposite Party No.3 has chosen what it considers to be most suitable for its requirements and proposed to invite quotations from suppliers of that particular product, no fault can be found with the process.

For Petitioner : Mr. S.K. Sarangi
For Opp. Parties : M/s. D.P.Nanda (Sr. Adv.), R. K.Kanungo, B.P.Panda, S.Moharana & S.Panda.

JUDGMENT Date of Order : 21.01.2021

DR. S. MURALIDHAR, C.J.

This matter is taken up by video conferencing mode.

2. Heard Mr. S.K. Sarangi, learned counsel for the Petitioner; Mr. M.S. Sahoo, learned Additional Government Advocate for the State-Opposite Party Nos.1 to 3 and Mr. D.P. Nanda, learned Senior Advocate for Opposite Party No.4.

3. The Petitioner, who is a manufacturer of Electronic Weighing Scale (EWS) under the brand name 'Phoenix' and is registered with the Bureau of Indian Standard (BIS), has filed this writ petition questioning the Notice Inviting Tender (NIT) dated 15th July, 2020 published on the web portal of the Women and Child Development Department, Government of Odisha inviting bids for supply of EWS of 'Lunia' make only.

4. Mr. S.K. Sarangi, learned counsel appearing for the Petitioner contends that the Petitioner had made a representation on 22nd July, 2020 to the District Social Welfare Office (DSWO), Sundargarh, Odisha (Opposite Party No.3) seeking the bid to be opened for all the manufacturers stating therein that confining the make of EWS to 'Lunia' frustrated the purpose of the public tender. Later, the Petitioner made another separate representation on 13th August, 2020 to the Collector, Sundargarh (Opposite Party No.2) ventilating its grievance. On 21st August, 2020, the Petitioner gathered that Opposite Party No.3 was trying to place the work order in favour of M/s Bharat Enterprises (Opposite Party No.4).

5. Learned counsel appearing for the Petitioner points out that the tender is for 7618 units of EWS of the total value of Rs.3,54,57,981/-Of these, 3809 EWSs are for infants and 3809 for adults. It is pointed out that Opposite Party No.3 has quoted Rs.4,654.50 and Rs.3500/- per unit respectively whereas the Petitioner has been supplying the same EWSs at Rs.3,500/- to 4,000/- and Rs.1,500/- to 1700/- respectively. By attempting to place the work order with Opposite Party No.4, the State is ending up paying more than Rs.1,06,65,200/-, which according to the Petitioner, a substantial difference

in the price. It is alleged that the fundamental principle of transparency and inviting bids from different agencies/manufacturer has been flouted/deviated, and therefore, the tender is not valid in the eye of law.

6. It is further contended that the agencies of the State Government are inviting bids from manufactures in conformity with IS specification and ICDS standard. However, as far as the present tender is concerned, Opposite Party Nos.2 and 3 have excluded BIS certified manufactures. Learned counsel appearing for the Petitioner further contends that Opposite Party No.4 lacks requisite certificate for manufacture of EWS and therefore, no work order could have been placed on it.

7. On 2nd September 2020, this Court directed as an interim measure that "Opposite Party No.3 shall not issue work order till the next date, if already not issued pursuant to Annexure-1". However, it appears that even before the above interim order could be passed, the work order was placed on Opposite Party No.4 on 6th August, 2020.

8. In response to the notice issued in the present petition, counter affidavit has been filed on behalf of Opposite Party Nos.1, 2 and 3 dated 8th October, 2020. It is explained therein that the concept of Proprietary Article Certificate (PAC) Buying under Clause 2.3.3.1 of the Government e Marketplace (GeM) Handbook involves a process different from the regular tendering process. This has been further explained in an additional affidavit filed on behalf of Opposite Party No.3 on 28th December, 2020. It is explained that PAC Buying is one of the procurement processes to buy any specific model/make product that is available on the GeM platform. Paragraph 2.3.3.1 of the GeM Handbook reads thus:

> "***Proprietary Article Certificate (PAC) Buying***
>
> *The GeM portal shall allow buyers to procure on a proprietary basis by using the PAC filter provided on the GeM platform, which allows the selection of a specific model/make from a particular seller that is available on the platform.*
>
> *For PAC procurement, direct purchase buying mode and bidding/RA buying mode (above threshold value) shall be allowed."*

9. It is explained that GeM platform was launched by the Government of India on 9th August, 2016 as an online, end to end solution for procurement of commonly used goods and services for all Central Government and State

Government Ministries, Departments, Public Sector Units (PSUs) and affiliated bodies. As far as choice of 'Lunia' is concerned, the process is explained as thus:

> *"Further, it is submitted that the intention of choosing the option Proprietary Article Certificate (PAC) in respect of "LUNIA" brand is as per requirement and is to select the best product with all specifications with the cost efficiency. The Opp. Party No.3 i.e. the District Social Welfare Officer, Sundargarh selected the said brand after comparing all the products available in the GeM portal. The selected company proved its standard better than the other companies which is required by the Opp. Party No.3. The selected company gives maximum warranty of 2 years, having large sized pan/platform than other companies, the product runs both on electric power as well as battery, having long battery back-up, rechargeable battery, cost efficient in comparison with other products, with large baby tray, easy to use and maintenance free with service at site etc. That's why the Opp. Party No.3 were specific about PAC buying and selected the said brand/company and also at the time of the COVID-19 pandemic situation, Opp. Party No.3 did not want to create any endangered situation/panic situation for the infants."*

10. Enclosed with the affidavit there is a chart of comparison of four products which included Apple, Lunia, Aczet and Phoenix. Apart from comparison of price, the other parameters including pan/platform shape, material platform, weight and dimensions of weighing machine have been compared. There is a specific comparison on whether the product is 'BIS Marked' and 'CE Certified'.

12. It appears that LUNIA is manufactured by Jayanta Traders which is not even made as a party to the present petition. For some reason, the Petitioner has chosen only to implead Opposite Party No.4 which does not itself a manufacturer of PHOENIX EWS. The reference to the BIS standard in this regard is to no avail. While it might be mandatory for the manufacturer to possess the necessary certification, that is not meant to apply to a retailer. In any event, the comparative chart that shows that the manufacturer of Lunia EWS did possess a BIS certification.

13. The Court is not satisfied, therefore, that by restricting the tender to supply of the LUNIA make of EWS, any illegality has been committed or undue favour has been shown to anyone. If after comparing the products available in the market, Opposite Party No.3 has chosen what it considers to be most suitable for its requirements and proposed to invite quotations from suppliers of that particular product, no fault can be found with the process.

14. The Court is accordingly unable to find any ground for interference. The writ petition is accordingly dismissed. The interim order is vacated.

15. As the restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize a soft copy of this order available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587, dated 25th March, 2020.

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2021 (I) ILR - CUT- 267

DR. S. MURALIDHAR, C.J & C.R. DASH, J.

W.P.(C) NO. 17613 OF 2020

SANTOSHI INFOTECH COMPUTER CENTRE ….....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order rejecting the bid of the Petitioner for providing Data Entry Operators, Assistants and Assistant Computer Programmer – Rejection of bid on the ground that the petitioner has not complied the requirements stipulated in a circular of the Finance Department – No mention of the Circular of the Finance Dept. in the Tender document – In other tenders the said circular has not been made applicable – Effect of – Held, the said circular cannot be relied upon to reject the Petitioner's bid unless it was mentioned in the tender document itself. (Para 25)

Case Laws Relied on and Referred to :-

1. (2003) 1 SCC 95 : Govt. of A.P. Vs. Mhaharishi Publishers Pvt. Ltd.

For the Petitioner : Anupam Das
Goutam Mishra (Sr.Adv.)

For the Opp.Parties : Sanjib Khandayatray, G.C. Das & C.K.Ray.

ORDER Date of Order : 22.01.2021

DR. S. MURALIDHAR, C.J.

1. This matter is taken up by video conferencing mode.

2. Heard Mr. Gautam Mishra, learned Senior Counsel for the Petitioner and Mr. M.S. Sahoo, learned Additional Government Advocate for the State-Opposite Parties.

3. This writ petition has been filed by Santoshi Infotech Computer Centre, a sole proprietary concern represented by its sole Proprietor Smt. Bharati Choudhury, questioning the rejection of the technical bid of the Petitioner by the Opposite Party Nos.1 to 3 for providing Data Entry Operators for MGNREGS, MGNREGS Assistant, Assistant Computer Programmer and Data Entry Operator for OLM. The Petitioner challenges the award of the said tender to the Opposite Party No.4 despite the Petitioner being the lowest tenderer.

4. The background facts are that on 26th June, 2020, the Project Director, District Rural Development Agency, Nabarangpur (DRDA) issued an advertisement inviting tenders for the above purpose. The Petitioner states that within the due date and time, i.e., 5 pm on 30th July 2020, the Petitioner submitted all the requisite documents, which included the Registration Certificate (RC) were issued under the Odisha Shops & Commercial Establishment Act, 1956 (OSCE Act) issued by the District Labour Commissioner, Nabarangpur, a GST Registration Certificate, document relating to the Provident Fund issued by the Sub-Regional Office, Berhampur, Certificate issued by the Employees' State Insurance Corporation, Regional Office, Bhubaneswar. Also included among these documents was the license issued by the Licensing Officer and District Labour Officer, Nabarangpur dated 21st November, 2009 containing endorsements of renewal up to 21st November, 2020.

5. It appears that there were 18 bidders, whose technical bids were opened on 14th July, 2020. 9 out of the 18 bidders qualified in the technical bid. The Petitioner's technical bid was not accepted. According to the Petitioner, the Opposite Parties 1 to 3 verbally communicated to the Petitioner that the technical bid had been rejected because the Petitioner was not registered with the IGR, Cuttack and no documents with regard thereto was submitted along with the tender documents.

6. On 15th July 2020, the Petitioner wrote to the Project Director, DRDA (Opposite Party No.3) to disclose the reasons for non-acceptance of its technical bid. On 16th July 2020, the Petitioner filed an application under the

Right to Information Act (RTI Act) seeking the reasons for rejection of the technical bid. But no reply was forthcoming. Meanwhile the Petitioner learnt that the contract was to be awarded to Opposite Party No.4. Hence, the present writ petition was filed.

7. When the petition was listed on 24th September 2020, learned Additional Government Advocate sought time to file a reply. Thereafter on 5th October 2020, the Court, while directing the writ petition to be listed along with W.P.(C) No.17709/2020 (*M/s. Famous Security Service v. State of Odisha*) required the copy of the counter affidavit filed by the Opposite Parties 1 to 3 in the present petition to be served on the Petitioner. The Court granted time to the Opposite Party No.4 to file its counter affidavit.

8. At this stage, it must be noted that, W.P.(C) No.17709/2020 had been filed in the context of the Project Director, DRDA, Nabarangpur not conducting a transparent lottery among the bidders, who had quoted more than Rs.7/- in the tender process. The Petitioner in the said petition questioned the manner in which Opposite Party No.3 had desired to award the tender in favour of the persons, who had quoted abnormally low service charges contrary to the directives of the Finance Department issued on 22nd May 2018.

9. Initially in W.P.(C) No.17709/2020, an interim order was passed by this Court on 6th August, 2020 directing that the Opposite Parties will not finalise the tender till the next date. It may be noted here that ultimately W.P.(C) No.17709/2020 was dismissed as withdrawn on 24th September, 2020 by this Court.

10. Reverting to the present writ petition, in the counter affidavit filed by the Opposite Parties 2 and 3, the reasons for rejecting the technical bid of the Petitioner as stated in para 5 are that the Tender Evaluation Committee (TEC) had learnt that the Petitioner was not authorized by the competent authority to carry out the business of providing manpower services to different government offices and organizations. It is mentioned in para 5 that the Petitioner had only submitted the RC issued under the OSCE Act, which was relevant only for the purposes of the Petitioner running a computer center by engaging some employees in the office.

11. In para 7, it is stated that, three bidders had quoted Rs.1/- per person as service charge for providing manpower and were declared as L-1 bidders.

To finalise one of the three L-1 bidders, the TEC adopted a lottery system and that is how the work was finally awarded to Opposite Party No.4.

12. It may be also stated that on 18th August 2020, the Petitioner filed an additional affidavit placing on record, the information obtained through the RTI Act. The proceedings of the TEC reveal the reason for rejection of the petitioner's technical bid as under:-

> "The firm is not registered under appropriate authorities i.e. Society Registration Act/Partnership Act/Company Act, Registered under shop and Commercial Act by District Labour Officer is not acceptable."

13. The Petitioner has in a rejoinder to the counter affidavit filed, pointed out that there was an obvious non-application of mind since it was overlooked by the TEC that the Petitioner was a proprietary concern and not a partenrship firm. Therefore, the question of having a registration under the Partnership Act/ Companies Act/Societies Registration Act did not arise at all.

14. In fact, the reason stated in the counter affidavit that the Petitioner was not authorized to carry out the business of providing manpower was not the reason stated by the TEC. The Petitioner has drawn attention to the fact that the question of non-submission of an IGR registration certificate did not arise, as IGR deals with registration of partnership firms and societies whereas the Petitioner is a proprietory concern. The Petitioner has pointed out how it has been providing DEOs under other contracts for a long period of time.

15. On this issue, Mr. Gautam Mishra, learned Senior Counsel appearing for the Petitioner on 6th January, 2021 drew the attention of the Court to the license dated 21st November, 2009 issued in favour of the Petitioner by the Licensing Officer and District Labour Officer, Nabarangpur, authorizing the Petitioner to supply manpower like Data Entry Operators, Security Personnel, Clerks, Watchman/Peons etc. to the principal of the employer i.e. Project Director, DRDA, Nabarangpur. The said licence license was extended till 21st November, 2020.

16. This Court on 6th January, 2021 has passed the following order:

> "06.01.2021– This matter is taken up through video conferencing.

> One of the grounds of rejection of Petitioner's technical bid is that, there is no document to show that it is authorized to supply manpower.
>
> Mr. Mishra, learned Senior Counsel for the Petitioner draws the attention of the Court to the document at page-42 of the paper book purporting to be the license issued by the Government of Odisha authorizing the Petitioner to supply manpower with endorsement thereon to indicate that the license has been renewed up to 21st November, 2020.
>
> Mr. Sahoo, learned Additional Government Advocate seeks time to verify whether in fact the aforementioned document was submitted by the Petitioner along with its bid. He states that he will examine the original record.
>
> At the request of Mr. Sahoo, list on 22nd January, 2021."

17. Today, Mr. Sahoo, learned Additional Government Advocate for the Opposite Parties, confirms that the above license copy was part of the bid document and was not accounted for by either the TEC or even the Opposite Parties 1 to 3, while rejecting the technical bid of the Petitioner.

18. On this aspect, learned counsel for the Opposite Party No.4 sought to take an exception to the fact that license was issued in the name of Smt. Bharati Choudhury and not the bidder which was M/s. Santoshi Infotech Computer Centre. The submission is misconceived for the simple reason that the license reads as under:

> "License is hereby granted to SMT. BHARATI CHOUDHURY, S/O. SUBRAT CHOUDHURY, M/S. SANTOSHI INFOTECH COMPUTER CENTRE, MAIN ROAD, NABARANGPUR DIST: NABARANGPUR under Sec-12(1) of the Contract Labour (R&A) Act, 1970, subject to the conditions specified in annexure overleaf to supply of manpower like, data Entry Operators, Security Personnel, Clerks, watchman/Peon etc. to the Principal Employer "PROJECT DIRECTOR, D.R.D.A., NABARANGPUR."

19. Since it is a sole proprietary concern, the name of the sole proprietor is mentioned and immediately thereafter, the name of the proprietary concern is mentioned in the license. It is, therefore, erroneous on the part of the Respondent No.4 to contend that the licence is not in the name of the proprietary concern, which submitted the bid.

20. The further reason given by the TEC for rejecting the technical bid, viz., that there was no RC of the IGR is also not tenable because such registration admittedly is only for partnership firm and not proprietary

concerns like the Petitioner. Consequently, neither of the reasons given by the TEC or by the Opposite Parties for rejecting the technical bid of the Petitioner is sustainable in law.

21. Mr. Sahoo submitted that the Petitioner had quoted an absorbedly low price of Re. 0.01, which is contrary to the Finance Department Circular dated 22nd May, 2018, referred to earlier. In the first place, it has been noticed that the notice inviting tender did not refer to the aforementioned Circular of the Finance Department at all. Therefore, that could not be used to be a ground to reject the bid of the Petitioner. Even in the counter affidavit, this has not been raised as an issue because it would have arisen only in the event the financial bid of the Petitioner was to be considered.

22. In I.A. No.14629 of 2020 filed by the Petitioner, instances where price was quoted below Rs.1/- for certain other contracts by bidders and have been accepted, have been set out. The Petitioner has cited the following instances:

> "1) Puri District Headquarters Hospital – Agency Name (Care Security);
>
> 2) Puri Municipality – Agency Name (Jagruti Security);
>
> 3) Sarva Sikshya Abhiyan, Nabarangpur – Agency Name (Mind Mart, Bhubaneswar)
>
> 4) Industrial Training Institute, Puri – concerned Agency has also made bids below Re.1/-
>
> 5) Mid Day Meal Programme by District Education Office, Nabarangpur – concerned Agency has also made bids below Re.1/-.
>
> 6) District Headquarters Hospital, Bhawanipatna, District Kalahandi – Agency name (Anil Security Service)
>
> 7) Government College of Engineering, Bhawanipatna, District Kalahandi – Agency Name (M/s. Sai Security Service, Bhubaneswar)."

23. There is no denial of the above facts by the Opposite Parties 1 to 3. If indeed the Finance Department Circular was being acted upon, there was no reason to accept the above bids. There is merit in the contention of Mr. Mishra that the Circular of the Finance Department dated 22nd May, 2018 cannot be relied upon to reject the Petitioner's price bid unless it was mentioned in the tender document itself, in which case the Petitioner and other bidders may have been put on notice that they could not quote below a certain minimum amount.

24.1 Mr. Mishra refers to the decision of the Supreme Court in ***Govt. of A.P. v. Mhaharishi Publishers Pvt. Ltd. (2003) 1 SCC 95*** in support of the contention that a different treatment cannot be meted out to the Petitioner in such instance. In that case, pursuant to the Policy of the Government of Andhra Pradesh and a Scheme for encouraging newspaper concerns and educational institutions, lands were allotted at affordable prices. Two acres of such lands was assigned to the Respondent. Despite complying with all conditions and depositing the amount demanded, possession was not given of the land to the Respondent, which was in contrast with the treatment meted out to three other publishers/institutions, which were similarly situated. When this was challenged in a writ petition by three such entities including the Petitioner, the learned Single Judge allowed the petition and directed the State Government to hand over possession of the respective lands to the three Petitioners.

24.2 When the appeal filed by the State was still pending, fresh GOs were issued by the State Government purporting to cancel the allotments with a direction to the Collector to repay the amount deposited to the Respondent. The States' writ appeal was dismissed by the Division Bench and the fresh GOs cancelled.

24.3 Dismissing the further appeal filed by the State Government, the Supreme Court, *inter alia*, observed that, there was hostile discrimination against the Petitioners in the High Court, by being subjected to a treatment different than other similarly situated newspaper concerns and other institutions. It was held that there was a violation of the fundamental rights of the writ petitioners under Article 14 of the Constitution of India.

25. In the present case, when similarly situated entities have been allowed to quote Rs.1/- and their bids have been accepted in other contracts without enforcing the Circular dated 22nd May, 2018 of the Finance Department, there is no reason why the Petitioner's bid alone was liable to be rejected because of the Petitioner quoted Rs.0.01 paise in the price bid. This again would not be a valid ground for rejection of the Petitioner's bid.

26. For the aforementioned reasons, the writ petition is allowed and the decision of the TEC to award the tender for the "Selection of the Manpower Service Provider to provide The Service of Data Entry Operators for MGNREGS, MGNREGS Assistant, Assistant Computer Programmer and

Data Entry Operator for OLM" in favour of the Opposite Party No.4 is hereby quashed. A direction is issued to the Opposite Parties 1 to 3 to award the aforementioned work in favour of the Petitioner and issue necessary orders in this regard not later than two weeks from today.

27. The writ petition is allowed in the above terms. No orders as to costs.

28. As the restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize a soft copy of this order/judgment available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587 dated 25th March, 2020.

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2021 (I) ILR - CUT- 274

DR. S. MURALIDHAR, C.J & S.K. MISHRA, J.

WRIT PETITION (CIVIL) NO. 7548 OF 2019

GIRIDHARILAL AGRAWAL .....Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the rejection of bids on the ground that the petitioner did not fulfill the essential conditions of Clause 4.4(A) read with (B) regarding past experience of doing similar nature of work – Plea of the petitioner is that Nuapada district should be included as Naxal/LWE affected district as it is included in the MHA circulars issued in 2016 but not included in the DTCN and the work done in that district should be taken into account for calculating the value towards past experience – Whether can be accepted? – Held, No. – Reasons indicated.

"In Naxal/LWE affected districts, the figures of 60% and 75% would be replaced by 50%. The fact of the matter is that DTCN clearly mentioned which districts were LWE affected districts. Five districts were mentioned and it did not include Nuapada. The fact that certain MHA circulars issued in 2016 may have included Nuapada in the list of LWE affected districts is to

no avail. As far as the present tender was concerned one had to go by what was included in the list of LWE affected districts as mentioned therein. Having participated in the tender by offering the bid knowing clearly that the DTCN itself did not mention Nuapada district as LWE affected, the Petitioner could have been under no mistaken notion in that regard. It is too late in the day, having participated in the bid and not succeeding in getting the contract awarded in his favour, for the Petitioner to turn around and now contend that Nuapada district should be considered as LWE affected district. This is crucial because the Petitioner is unable to dispute the fact that he has not satisfied the essential conditions of Clause 4.4(A) read with (B). In other words, the experience certificate submitted by the Petitioner regarding similar nature of work did not fulfill the minimum required amount of Rs.52.99 lakh as far as Package No. OR-24-203(A) is concerned." (Para 16)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Correction of any error in tender – Scope – Held, if the authority which approved the tender initially, discovered a mistake, it was within its rights to correct that error.

"The legal position explained in the decisions relied upon by both the Petitioner as well as the Opposite Parties is fairly well settled. While it is true that in the area of contracts, all State action has to conform to Article 14 of the Constitution, whether in fact the action is arbitrary or not would have to depend, obviously, on the facts and circumstances of every case. The reasons that weighed with the Opposite Parties to disqualify the Petitioner in the present case appear to be fully justified. Indeed, the Opposite Parties had at the initial stage overlooked the fact that the work experience certificate produced by the Petitioner including the works for the Nuapada district, which is not a LWE affected district. In the circumstances, disqualifying the Petitioner for the award of tender cannot be held to be arbitrary and illegal requiring any interference." (Paras 17 & 18)

Case Laws Relied on and Referred to :-

1. 2016 (II) OLR 558 : M/s. D.K. Engineering and Construction Vs. State of Odisha.
2. (2018) 13 SCC 219 : Union of India Vs. Hanil Era Textiles Ltd.
3. (2016) 8 SCC 622 : Central Coalfields Limited Vs. SLL-SML (Joint Venture Consortium)
4. (1993) 1 SCC 71 : Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries.
5. 2020 SCC Online SC 847 : State of U.P. Vs. Sudhir Kumar Singh.
6. (2019) 14 SCC 81 : Caretel Infotech Limited Vs. Hindustan Petroleum Corpp. Ltd.
7. (2018) 5 SCC 462 : Municipal Corporation, Ujjain Vs. BVG India Ltd.
8. (2016) 4 SCC 716 : State of Uttar Pradesh Vs. Al Faheem Meetex Private Ltd.
9. (2015) 13 SCC 233 : Rishi Kiran Logistics Private Limited Vs. Board of Trustees of Kandla Port Trust.

10. 2016 (II) OLR 819 : Pramod Kumar Sahu Vs. State of Orissa.
11. (2008) 2 SCC 439 : Deva Metal Powders v. Commissioner of Trade Tax.

For Petitioner : Mr. P.C. Nayak.
For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 20.01.2021

DR. S. MURALIDHAR, C.J.

1. Claiming to be the lowest bidder for the tender for the work "Construction of Road under Pradhan Mantri Gramya Sadak Yojana vide Package No.OR-24-203-A Hatibandha to Dhungiamunda via Charpali", the Petitioner, who is a registered 'A' Class contractor has filed this writ petition for a mandamus to be issued to the Opposite Parties comprising the State of Odisha (Opposite Party No.1), the Engineer-in-Chief, Rural Works (Opposite Party No.2), the Chief Engineer (PMGSY) (Opposite Party No.3), the Superintending Engineer, Rural Works Circle, Bhawanipatana (Opposite Party No.4) and Executive Engineer, Rural Works Division, Khariar, Nuapada (Opposite Party No.5) to execute the agreement in his favour for the said contract. Further prayer of the Petitioner is for quashing the proceeding dated 12th March, 2019, communicated to the tender authority on 15th March, 2019, disqualifying his bid.

2. Among the tender conditions, Clause 4.4 reads as under:

"**Clause - 4.4 (A).** To qualify for award of the contract, each bidder should have in the last five years:-

a) Achieved in any one year, a minimum financial turnover as certified by Chartered Accountant, and at least 50% of which is from Civil Engineering Construction works) equivalent to amount given below.

(i) 60% of amount put to bid, in case the amount put to bid is Rs.200 lakhs and less.

(ii) 75% of amount put to bid, in case the amount put to bid is more than Rs.200 lakhs.

The amount put to bid above would not include maintenance cost for 5 years and the turnover will be indexed at the rate of 8% per year.

If the bidder has executed road works under Pradhan Mantri Gram Sadak Yojana in originally stipulated completion period, the financial turnover achieved on account of execution of road works under PMGSY shall be counted as 120% for the purpose of this sub-clause.

> In Naxal/Left Wing Extremist Affected Districts, the figures of 60% and 75% in (i) and (ii) above would be replaced by 50%.
>
> (b) Satisfactorily completed, as prime contractor or sub-contractor, at least one similar road work/long span bridge work equal in value to one third (one fourth in case of Naxal/LWE affected Gajapati, Malkangiri, Rayagada, Deogarh and Sambalpur districts) of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited, or such higher amount as may be specified in the Appendix to ITB. The value of road work/bridge work completed by the bidder under Pradhan Mantri Gram Sadak Yojana in originally stipulated period of completion shall be counted as 120% for the purpose of this sub clause."
>
> The other relevant clause is Clause 27, which reads thus:
>
> "**Clause 27** : - Award Criteria
>
> 27.1 Subject to clause 30 of ITB, the Employer will award the contact to the Bidder whose Bid has been determined.
>
> (i) to be substantially responsive to the bidding documents and who has offered the lowest evaluated Bid price, provided that such bidder has been determined to be (a) eligible in accordance with the provisions of clause 4 of ITB; and
>
> (ii) to be within the available bid capacity adjusted to account for his bid price which is evaluated the lowest in any of the packages opened earlier than the one under consideration."

3. It appears that four bidders including the present Petitioner had participated pursuant to the tender call notice. According to the Petitioner, the technical bids of all four of them were found to be in order. It is further stated that on 4th March, 2019, the price bid was opened and the Petitioner was found to have quoted the lowest amount and was declared L-1. The Petitioner states that he learnt of a complaint against him by unknown persons that the tender authority had counted one fourth of the value of the similar nature of past work of the Petitioner instead of executed one third of similar nature of work. The Petitioner states that he met the Opposite Party Nos.2 and 3 and submitted a representation dated 28th February, 2019 stating that the work was to be executed under Nuapada district and that as per the guidelines of the Ministry of Home Affairs (MHA), Government of India as well as the guidelines of the Reserve Bank of India (RBI) and the Ministry of Rural Development (MRD), Nuapada district is a left wing extremism (LWE)s affected (Naxal Affected District) and that as such it counted towards one fourth of similar nature of work in terms of the tender notice.

4. In support of the above plea, the Petitioner relies on the list of LWE Districts published by the MRD on 31st December, 2013, where Nuapada figures at Sl.No.24 of the 106 LWE affected districts. He also relies on the subsequent circular dated 24th February, 2016 of the MHA and circular dated 14th June, 2018 of the RBI.

5. The Petitioner further refers to the proceeding of the Committee constituted to scrutinize the documents in relation to his bids for three works under experience of similar nature of work i.e. Rs.40.77 lakhs (SL.No.a), Rs.27.77 lakhs (SL.No.b) and Rs.16.82 lakhs (Sl.No.c). The Committee decided that all the Petitioner's bids should be rejected. It is decided that Package No.OR-24-202 (B) and Package No.OR-24-203(A) the L2 bidder may be considered for award of the contract. As far as Package No.OR-24-202(A) since only two bidders had participated and after rejection of the Petitioner's bid, the remaining bid would become the first and single bid and therefore, it was decided to cancel the tender and re-invite the bid.

6. In the above circumstances that the present petition has been filed seeking reliefs as noted hereinbefore.

7. When the petition was listed on 9th April, 2019, notice was directed to be issued to the Opposite Parties. On 16th December, 2019 an application seeking amendment of the writ petition was allowed.

8. A preliminary counter affidavit was filed by the Opposite Party No.5 where *inter alia* it is pointed out that the Orissa State Rural Road Agency (OSRRA) was competent to take a decision regarding award of the particular tender. It is further stated that in the Detailed Tender Call Notice (DTCN) itself, the names of the LWE districts were clearly mentioned; Nuapada district was not included therein. It is stated that indeed a complaint was made against the Petitioner's bid, which was placed before the Tender Grievance Redressal Committee. After scrutinizing of the records, the complaint was found to be genuine. The Committee on 12th March 2019 declared the Petitioner disqualified due to inadequate experience in similar nature of work. The OSRRA accepted this and issued a similar declaration on 13th March, 2019.

9. In the rejoinder affidavit, the Petitioner has not been able to dispute the fact that Nuapada was not among the LWE districts. All that is stated that the disqualification has taken place behind the back of the Petitioner.

10. An additional affidavit has been filed by Opposite Party No.5 on 11th December, 2020. After reiterating that only Gajapati, Malkangiri, Rayagada, Deogarh and Sambalpur have been considered as LWE affected districts and that Nuapada district is not an LWE affected district, it is pointed out as under:

> "In support of Clause – 4.4A (b) of the DTCN, the Petitioner was required to submit documents like satisfactorily completion of at least one similar nature of work. The civil construction work excluding maintenance work in question is to be satisfactorily completion of at least one similar nature of work for package No.OR-24-203(A) is Rs.158.98/3 = Rs.52.99 lakhs as the work to be executed in the district of Nuapada which is not a Left Wing Extremist affected district as per Clause – F.4A(b) of the DTCN. Whereas the Petitioner submitted the similar nature of work experience certificate of Rs.40.77 lakhs, Rs.27.77 lakhs and Rs.16.82 lakhs out of which none of the experience certificate fulfills the required amount i.e. Rs.52.99 lakhs."

11. It is pointed out that the reasons for rejection of all the three bids of the Petitioner in respect of Packages No.OR-24-202(A), OR-24-202 (B) and OR-24-203(A) is the same. It is further contended that the Petitioner having accepted the rejection of two of his three bids is estopped the question and rejection of the third bid i.e. Package No.OR-24-203(A). It may also be mentioned that the Opposite Parties have also filed I.A. No.10980 of 2020 seeking modification of the interim order dated 9th April, 2019 in which the Court stated that any decision with regard to tender in question shall be subject to result of the writ petition.

12. This Court is heard the submissions of Mr. P.C. Nayak, learned counsel for the Petitioner and Mr. P.K. Muduli, learned Additional Government Advocate for the State-Opposite Parties.

13. Mr. Nayak places considerable reliance on the decision in ***M/s. D.K. Engineering and Construction v. State of Odisha 2016 (II) OLR 558; Union of India v. Hanil Era Textiles Limited (2018) 13 SCC 219; Central Coalfields Limited v. SLL-SML (Joint Venture Consortium) (2016) 8 SCC 622*** and ***Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71.*** It is contended that there was no occasion to call for a report after the financial bid was opened and the Petitioner was declared to be the lowest i.e. L1. The calling for a report behind the back of the Petitioner was arbitrary, illegal and violative of Article 14 of the Constitution. It is further contended that the Opposite Party No.3 has erred in rejecting the

bid on the ground of non-fulfillment of the conditions regarding the work of similar experience by excluding Nuapada district from the list of LWE districts.

14. On the other hand, Mr. P.K. Muduli, learned Additional Government Advocate for the State, places reliance on a series of judgments including ***State of U.P. v. Sudhir Kumar Singh 2020 SCC Online SC 847; Caretel Infotech Limited v. Hindustan Petroleum Corporation Limited (2019) 14 SCC 81; Municipal Corporation, Ujjain v. BVG India Limited (2018) 5 SCC 462; State of Uttar Pradesh v. Al Faheem Meetex Private Limited (2016) 4 SCC 716; Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust (2015) 13 SCC 233;*** and ***Pramod Kumar Sahu v. State of Orissa 2016 (II) OLR 819***.

15. In the present case, the tender conditions made it absolutely clear what the eligibility criteria was. It is made clear that to qualify for the award of contract, each bidder would have to show that in the past five years he had achieved in any one year, a minimum financial turnover as certified by the Chartered Accountant, and at least 50% of which is from Civil Engineering construction works equivalent to the following:

(i) 60% of amount put to bid, in case the amount put to bid is Rs.200 lakhs and less; and

(ii) 75% of amount put to bid, in case the amount put to bid is more than Rs.200 lakhs.

16. In Naxal/LWE affected districts, the figures of 60% and 75% would be replaced by 50%. The fact of the matter is that DTCN clearly mentioned which districts were LWE affected districts. Five districts were mentioned and it did not include Nuapada. The fact that certain MHA circulars issued in 2016 may have included Nuapada in the list of LWE affected districts is to no avail. As far as the present tender was concerned one had to go by what was included in the list of LWE affected districts as mentioned therein. Having participated in the tender by offering the bid knowing clearly that the DTCN itself did not mention Nuapada district as LWE affected, the Petitioner could have been under no mistaken notion in that regard. It is too late in the day, having participated in the bid and not succeeding in getting the contract awarded in his favour, for the Petitioner to turn around and now contend that Nuapada district should be considered as LWE affected district. This is

crucial because the Petitioner is unable to dispute the fact that he has not satisfied the essential conditions of Clause 4.4(A) read with (B). In other words, the experience certificate submitted by the Petitioner regarding similar nature of work did not fulfill the minimum required amount of Rs.52.99 lakh as far as Package No. OR-24-203(A) is concerned.

17. In ***Deva Metal Powders v. Commissioner of Trade Tax, (2008) 2 SCC 439***, the Supreme Court recognized the principle that if the authority which approved the tender initially, discovered a mistake, it was within its rights to correct that error. It cannot also be said that the decision taken was behind the back of the Petitioner. As mentioned by the Petitioner himself, the Petitioner was aware of the complaint having been made against him and he made a representation to the Opposite Parties in that regard on 28th February, 2019. He was fully aware that the issue was regarding the Petitioner considering Nuapada district to be LWE affected district whereas in fact it was not. In the circumstances, the question of decision being taken behind the back of the Petitioner or being violation of the principles of natural justice, does not arise.

18. The legal position explained in the decisions relied upon by both the Petitioner as well as the Opposite Parties is fairly well settled. While it is true that in the area of contracts, all State action has to conform to Article 14 of the Constitution, whether in fact the action is arbitrary or not would have to depend, obviously, on the facts and circumstances of every case. The reasons that weighed with the Opposite Parties to disqualify the Petitioner in the present case appear to be fully justified. Indeed, the Opposite Parties had at the initial stage overlooked the fact that the work experience certificate produced by the Petitioner including the works for the Nuapada district, which is not a LWE affected district. In the circumstances, disqualifying the Petitioner for the award of tender cannot be held to be arbitrary and illegal requiring any interference.

19. For the aforementioned reasons, the Court finds no merit in the writ petition and it is accordingly dismissed. The interim order stands vacated.

20. As the restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize a soft copy of this order/judgment available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587 dated 25th March, 2020.

2021 (I) ILR - CUT- 282

DR. S. MURALIDHAR, C.J & BISWANATH RATH, J.

W.P.(C) NO. 3488 OF 2021

DR. PRADEEP KUMAR PANIGRAHI ……..Petitioner

.V.

OFFICE OF THE HONOURABLE LOKAYUKTA, ODISHA & ORS. ……..Opp. Parties.

ODISHA LOKAYUKTA ACT, 2014 – Section 20 – Provisions under – Complaint against a public servant by the DSP, Vigilance – Lokayukta directing enquiry by the Directorate of Vigilance and observes availability of prima facie case against the petitioner in the order – Pleas that (i) Complainant and enquiry authority are same and (ii) Lokayukta cannot observe about prima facie material without the enquiry report – Pleas considered – Held, it is fairly submitted that in the present case with the complainant being the Vigilance Cell Unit itself, it is justified on the part of the Petitioner to apprehend that the preliminary enquiry conducted by the Directorate of Vigilance cannot be expected to be fair – Indeed the first paragraph of the impugned order of the Lokayukta pertinently points out the fact that "the complaint is based on a secret verification of the Vigilance Cell" – It is reasonable to expect that the Vigilance Cell would have made the complaint against the Petitioner before the Lokayukta with the approval or at least the knowledge of the Director of Vigilance – It is, therefore, entirely possible that the spirit of Section 20 (1) (a) of ensuring an objective PE would be defeated if it is ordered to be conducted, in the present case, by the Director of Vigilance – This is particularly, to repeat, since the complainant is the Vigilance Cell Unit itself – Further, it is not as if the Lokayukta did not have a choice of agencies to whom the PE should be entrusted – As is evident from a plain reading of Section 20 (1) the first choice is the Inquiry Wing of the Lokayukta itself – As regards prima facie view, the same could not have been expressed by the Lokayukta at this stage i.e. even before a report of PE is submitted to it – Consequently, this Court has no hesitation in setting aside the entire paragraph 2 of the impugned order, which expresses the prima facie view of the Lokayukta.

For Petitioner : Mr. Pitambar Acharya, Sr. Adv.

For Opp. Parties : Mr. A.K. Parija, Adv. General
Mr. M.S. Sahoo, Addl. Govt. Adv.

ORDER Date of Order : 03.02.2021

DR. S. MURALIDHAR, C.J.

1. This matter is taken up by video conferencing mode.

2. Heard Mr. Pitambar Acharya, learned Senior Advocate for the Petitioner and Mr. A.K. Parija, learned Advocate General assisted by Mr. M.S. Sahoo, learned Additional Government Advocate for the State-Opposite Parties.

3. The challenge in the present writ petition is the order dated 11th December, 2020 passed by the Odisha Lokayukta ('Lokayukta') in LY Case No. 1348 of 2020, which reads as under:

> "This complaint dated 09.12.2020 is received from Ranjan Kumar Das, Deputy Superintendent of Police, Vigilance Cell Unit, Bhubaneswar wherein serious allegation of corruption is made against Dr. Pradeep Kumar Panigrahi, Member of Odisha Legislative Assembly of Gopalpur Constituency. The complaint is based on a secret verification of the Vigilance Cell. It is also supported by number of documents.
>
> The complaint prima facie reveals that Dr.Pradeep Kumar Panigrahi by resorting to corrupt practice has amassed assets disproportionate to his known source of income.
>
> We therefore by exercising powers conferred under section 20(1) of the Odisha Lokayukta Act, 2014 direct the Directorate of Vigilance, Odisha, Cuttack to conduct a preliminary inquiry against Dr. Pradeep Kumar Panigrahi and submit the report within two months. We also direct the Director of Vigilance to ensure that during the preliminary inquiry provisions of section 20(2) of the same Act are duly complied with. The Office shall immediately supply the relevant record to the Director of Vigilance for information and compliance.
>
> List the matter on 12.02.2021 for submission of preliminary inquiry report."

4. Mr. Pitambar Acharya, learned Senior Advocate appearing for the Petitioner points out that there are two major difficulties as far as the above order is concerned. He refers to Section 20 of the Odisha Lokayukta Act, 2014 ('Act'), which reads as under:

> "20. (1) The Lokayukta, on receipt of a complaint, if it decides to proceed further, may order
>
> (a) preliminary inquiry against any public servant by its Inquiry Wing or any agency to ascertain whether there exists a prima facie case for proceeding in the matter; or

(b) investigation by any agency or authority empowered under any law to investigate, where there exists a prima facie case.

Provided that any investigation under this clause shall be ordered only if in the opinion of the Lokayukta there is substantial material relating to the existence of a prima facie case or any earlier statutory investigation or enquiry regarding the same complaint reveals that a prima facie case exists.

Provided further that before ordering an investigation under this clause, the Lokayukta shall call for the explanation of the public servant and views of the competent authority, so as to determine whether there exists a prima facie case for investigation.

Provided also that a decision to order investigation under this clause shall be taken by a bench constituted by the Chairperson under section 16.

(2) During the preliminary inquiry referred to in sub-section (1), the Inquiry Wing or any agency shall conduct a preliminary inquiry and on the basis of material, information and documents collected, seek the comments on the allegations made in the complaint from the public servant and competent authority and after obtaining the comments of the concerned public servant and competent authority, submit, within sixty days from the date of receipt of the reference, a report to the Lokayukta.

(3) A bench consisting of not less than three Members of the Lokayukta shall consider every report received under sub-section (2) from the Inquiry Wing or any agency and after giving an opportunity of being heard to the public servant, decide as to whether there exists a prima facie case, and make recommendations to proceed with one or more of the following actions, namely:—

(a) investigation by any agency (including any special investigation agency);

(b) initiation of the departmental proceedings or any other appropriate action against the concerned public servant by the competent authority;

(c) closure of the proceedings against the public servant and take action to proceed against the complainant under section 46.

(4) The promotion and other service benefits of a public servant mentioned in clauses (e) to (h) of sub-section (1) of section 14 shall not be affected until the public servant is put under suspension on recommendation of the Lokayukta under section 32 or charge sheet is filed after completion of investigation under clause (a) of sub-section (3) or a charge memo is issued against the said public servant in a disciplinary proceeding initiated on the recommendation of the Lokayukta under clause (b) of sub-section (3).

(5) Every preliminary inquiry referred to in sub-section (1) shall ordinarily be completed within a period of ninety days and for reasons to be recorded in writing, within a further period of ninety days from the date of receipt of the complaint.

(6) In case the Lokayukta decides to proceed to investigate into the complaint, it shall, by order in writing, direct any investigating agency (including any special agency) to carry out the investigation as expeditiously as possible and complete the investigation within a period of six months from the date of its order:

Provided that the Lokayukta, for the reasons to be recorded in writing, may extend the said period by a further period not exceeding six months at a time and for the maximum period of two years.

(7) Notwithstanding anything contained in section 173 of the Code of Criminal Procedure, 1973, any investigating agency (including any special agency) shall, in respect of cases referred to it by the Lokayukta, submit the investigation report to the Lokayukta.

(8) A bench consisting of not less than three Members of the Lokayukta shall consider every report received by it under sub-section (7) from any investigating agency (including any special agency) and may, decide as to—

(a) filing of charge-sheet or closure report before the Special Court against the public servant;

(b) initiating the departmental proceedings or any other appropriate action against the concerned public servant by the competent authority.

(9) The Lokayukta may, after taking a decision under sub-section (8) on the filing of the charge sheet, direct its Prosecution Wing to initiate prosecution in a Special Court in respect of cases investigated by any investigating agency (including any special agency).

(10) The Lokayukta may, during the preliminary inquiry or the investigation, as the case may be, pass appropriate orders for the safe custody of the documents relevant to the preliminary inquiry or, as the case may be, investigation, as it deems fit.

(11) The website of the Lokayukta shall, from time to time and in such manner as may be specified by regulations, display to the public, the status of number of complaints pending before it or disposed of by it.

(12) The Lokayukta may retain the original records and evidences, which are likely to be required in the process of preliminary inquiry or investigation or conduct of a case by it or by the Special Court.

(13) Save as otherwise provided, the manner and procedure of conducting a preliminary inquiry or investigation (including such material and documents to be made available to the public servant) under this Act, shall be such as may be specified by regulations."

5. Mr. Acharya submits that the scheme of Section 20 of the Act envisages that the Lokayukta first, on the receipt of a complaint, has the discretion to decide whether it should order a Preliminary Inquiry ('PE') against any public servant. Secondly, if it decides to so order, it has to further take a call whether that PE either should be conducted by its 'Inquiry Wing' or by any other agency. Thirdly, the purpose of the PE in terms of Section 20(1)(a) is to 'ascertain whether there exists a prima facie case for proceeding in the matter'.

6. Mr. Acharya points out that the two difficulties in the impugned order are that first, having decided to entertain the complaint received from the Deputy Superintendent of Police (DSP), Vigilance Cell Unit, Bhubaneswar alleging that the Petitioner had resorted to the corrupt practice of amassing assets disproportionate to his known sources of income, the PE has been ordered to be conducted by the Director of Vigilance. In this sense, therefore, the complainant and the inquiring authority are one and the same. The second difficulty, he points out, is that in the second paragraph of the impugned order, the Lokayukta has expressed its prima facie view about what the complaint reveals. Mr. Acharya, submits out that such prima facie view could not have been arrived at by the Lokayukta at this stage. The question of arriving at such a view would arise, in terms of Section 20(2) read with Section 20 (3) of the Act, after a report has been submitted on the PE and secondly after the entire Bench of the Lokayukta has considered the said report after giving an opportunity of being heard to the public servant. In other words without crossing the stage of Section 20(2) of the Act, the Lokayukta, according to Mr. Acharya, could not have expressed any such prima facie view on what the complaint is about.

7. This Court has heard the submissions of Mr. A.K. Parija, learned Advocate General and Mr. M.S. Sahoo, learned AGA. While they point out that under Section 28 of the Act, the Lokayukta has the power to utilize the services of any other officer or organization or investigation agency of the Government for conducting the PE, it is fairly submitted that in the present case with the complainant being the Vigilance Cell Unit itself, it is justified on the part of the Petitioner to apprehend that the PE conducted by the Directorate of Vigilance cannot be expected to be fair.

8. Indeed the first paragraph of the impugned order of the Lokayukta pertinently points out the fact that 'the complaint is based on a secret

verification of the Vigilance Cell'. It is reasonable to expect that the Vigilance Cell would have made the complaint against the Petitioner before the Lokayukta with the approval or at least the knowledge of the Director of Vigilance. It is, therefore, entirely possible that the spirit of Section 20 (1) (a) of ensuring an objective PE would be defeated if it is ordered to be conducted, in the present case, by the Director of Vigilance. This is particularly, to repeat, since the complainant is the Vigilance Cell Unit itself. Further, it is not as if the Lokayukta did not have a choice of agencies to whom the PE should be entrusted. As is evident from a plain reading of Section 20 (1) the first choice is the Inquiry Wing of the Lokayukta itself.

9. Mr. Acharya says that there is in fact an Inquiry Wing of Lokayukta in position.

10. Consequently, this Court sets aside the direction issued in the impugned order by the Lokayukta to the Director of Vigilance to conduct the PE against the Petitioner. Instead, it is directed that the PE against the Petitioner will be conducted by the Inquiry Wing of the Lokayukta.

11. The other direction in the impugned order that such PE shall be strictly in conformity with the requirement of Section 20 (2) of the Act is left undisturbed. Needless to say, the Lokayukta will further proceed in the matter, after it receives the report of PE from its Inquiry Wing, strictly in accordance with Section 20 (3) of the Act.

12. As regards the second paragraph of the impugned order, there was no serious dispute even by Mr. Parija that such a prima facie view could not have been expressed by the Lokayukta at this stage i.e. even before a report of PE is submitted to it. Consequently, this Court has no hesitation in setting aside the entire paragraph 2 of the impugned order, which expresses the prima facie view of the Lokayukta. It is specifically directed that the Inquiry Wing of the Lokayukta shall proceed to hold the PE uninfluenced in any manner by the above observation made by the Lokayukta in paragraph 2 of the impugned order.

13. At the same time, we hasten to add that this order of ours should not be construed as expression of any view on the merits of the complaint against the Petitioner one way or the other.

14. The writ petition is disposed of in the above terms.

15. As the restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize a soft copy of this order available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587, dated 25th March, 2020.

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2021 (I) ILR - CUT- 288

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

W.P.(C) NO.15927 OF 2020

SUSANTA KUMAR SATAPATHY ……..Petitioner

.V.

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

(A) SERVICE LAW – Disciplinary proceeding – Duties of the authorities – Indicated.

"Appointing Authority/Disciplinary Authority/Government is entitled to exercise the control and maintain the master-servant relationship but it has to on the touchstone of reasonableness especially while awarding the major punishment like one Black Mark. Whenever there is a violation of the principle of natural justice or unreasonableness of punishment or punishment awarded with mala-fide or oblique motive, it is the duty of the court to examine the same. This Court constantly follow the principle of non-interference with the autonomy of the Disciplinary Authority, however, any action taken by the Disciplinary Authority is contrary to maintain clean and honest administration need not be interfered with. But in the instant case, there is clear deflection of such a thought process and the Disciplinary Authority has been very casual about impact of its order on the career of the petitioner.At the same vein, if the action taken by the Disciplinary Authority is unreasonable and arbitrary, it is likely to demoralise and deleterious effect of the efficiency of the employee and warrants interference from this Court. We cannot ignore the well accepted principles while examining such punishment in the appellate jurisdiction, without clarity on the nature of allegation, violation of rules etc. is nothing but it is a case of arbitrary exercise of power. In this context, it is pertinent to extract the observations

*of Lord Denning as found in Wade on Administrative Law, "**the discretion of statutory body is never unfettered**". It is a discretion which is to be exercised according to law. That means at least the authority must be guided by relevant consideration and not by irrelevant motive. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter, the authority may have acted in good faith, nevertheless the decision will be set aside."*

(Paras 19 & 20)

(B) SERVICE LAW – Disciplinary proceeding – The only charge against the delinquent officer is that he neglected his duty without indicating which rules he violated – Major punishment imposed on the delinquent dehors sufficient reasons and smacks arbitrariness and mala-fide – The punishment is shockingly disproportionate to the alleged misconduct committed by the petitioner – Scope of interference by the High Court in a disciplinary enquiry – Held, in the present case, the punishment is handed out in a casual manner without application of mind or indicating which rules, instruction or standing order purported to have been violated by the petitioner herein – In our considered opinion, the act of imposition of major penalty on the delinquent/petitioner vitiates the proceedings and the punishment imposed, dehors sufficient reasons smacks arbitrariness and mala-fide – Order set aside – Direction to give all benefits. (Paras 21 & 22)

Case Laws Relied on and Referred to :-

1. (2015) 2 SCC 610 : Union of India & Ors. Vs. P. Gunasekaran.

For Petitioner : Shri Manoj Kumar Mishra, Sr. Adv.
M/s. Tanmay Mishra, S.Senapati, Anoop Mishra & S. Das.

Opp. Parties : Shri M. K. Khuntia, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 07.12.2020 : Date of Judgment: 17.12.2020

S.K. PANIGRAHI, J.

1. The petitioner by way of this writ petition, assails the judgment and order dated 30.10.2018 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.2330 (C) of 2017 in holding that there is substantial compliance to Rule-29 of the OCS (C.C.& A) Rules, 1962 in the instant case and held that the punishment of one Black Mark cannot be treated as excessive to the delinquency committed by the applicant.

2. The factual conspectus of the present petition hovers around the order of punishment imposed by the Disciplinary Authority/Opposite Party No.4 which is alleged to have been passed in a mechanical manner without application of mind. The petitioner while posted as Officer-in-Charge (OIC), Naugaon Police Station in the District of Jagatsinghpur, was served with an Office Order vide Memo No.381 dated 26.06.2012 issued by the Superintendent of Excise, Jagatsinghpur (Sub-Collector, Jagatsingpur), wherein it was mentioned that the Collector & District Magistrate, Jagatsinghpur has been pleased to allow shifting of the left stock of the IMFL & Beer from Mundal IMFL "OFF" Shop to Jagatsinghpur IMFL "OFF" Shop within a period of seven days due to a situation of exigencies. During such exercise, the petitioner was directed to remain present at the time of shifting, which is quite evident from the Office Order dated 26.06.2012. In fact, the Police Manual does not mandate through Rules or standing instructions prescribing a Police Officer need to seek prior permission of the highest authority to remain present at the spot for providing necessary security. Curiously, in the instant case, the petitioner remained present at the spot of shifting the shop in compliance with the order passed by the District Magistrate. Since the order was only to give security to the E.P. Holder and the OIC of the Police Station was only to accompany the Excise Authorities when they asked for such security.

3. Learned Counsel for the petitioner submits that on receiving information from the concerned Excise Inspector and in compliance with the Office Order dated 26.06.2012issued by the Collector & District Magistrate and the Sub-Collector (Superintendent of Excise), Jagatsinghpur, the petitioner had to move to the spot of shifting of Foreign Liquor shop. It is also clear from the record that the petitioner was not involved in shifting process but the E.P. holder and the Excise Staff were engaged in the shifting process. During the said shifting process, due to some old dispute between the villagers and the E.P. holder, the villagers obstructed the shifting process, even though the excise staff and the petitioner tried to convince the villagers by way of showing the order of the Collector and Excise Superintendent (Sub-Collector). They did not get pacified and sat in front of the loaded truck which forced the excise staff and the petitioner to leave the place.

4. It is stated that the local MLA complained against the petitioner before the Superintendent of Police/Opposite Party No.4. On the aforesaid complaint, the Superintendent of Police (Opposite Party No.4) directed the

SDPO, Jagatsinghpur to make an inquiry. It is further stated that the local MLA was the person behind the entire agitation, who actively instigated the local people to lodge an FIR against the petitioner to create problem at the spot. On the next day morning, one Abhiram Sethi, who lodged an FIR against the petitioner's alleged misbehaviour and outraging the modesty of the woman, belonging to SC & ST community, during shifting of the Foreign Liquor shop. The entire episode was orchestrated by the people at the behest of the local MLA.

5. On the direction of the Superintendent of Police (Opposite Party No.4), the SDPO, Jagatsinghpur conducted a detailed inquiry and submitted inquiry report on 30.07.2012 before the said authority returning a finding that the petitioner has not shown any adamant attitude towards the villagers and the villagers made an imaginary and fabricated story against the petitioner including lodgement of the FIR alleging the abusive language and caste aspersion. But the said Inquiry Officer did mention about the petitioner's alleged disobeying of the direction of the superior.

6. In spite of detailed inquiry report by the SDPO, Jagatsinghpur, which clearly reflects that the petitioner has not shown adamant attitude towards the villagers, hence the entire FIR is imaginary and fabricated. Even after a positive report in favour of the petitioner, the Opposite Party No.4 initiated a Departmental Proceeding against the petitioner issuing Charge Memo dated 14.08.2012 on the ground of gross misconduct, negligence of duty and involvement in criminal case. The focus of the allegation was stated to be the petitioner's movement to Mundal Bazar to maintain law and order situation in the mid night at the time of shifting of liquor without prior permission from the higher authority.

7. In fact, in the instant case, the petitioner had not gone there to maintain law and order situation but he had gone there to provide necessary security to the E.P. Holder in compliance of the order of the Collector & District Magistrate and the Sub-Collector (Superintendent of Excise), Jagatsinghpur. Hence, the petitioner's act of proceeding to that shifting spot was not automatic.

8. It is further contended that the petitioner moved to the spot of shifting of Foreign Liquor "OFF Shop" on the direction of the superior authority i.e., Collector and the Superintendent of Excise (Sub-Collector) and he was

present at the spot at the time of shifting of the Foreign Liquor for necessary protection of E.P. Holder. There was total absence of any direction from the Collector to maintain law and order situation in that order, hence, prior permission of the higher authority was not at all required before leaving to the spot of shifting. The Disciplinary Proceedings against the petitioner smacks mala-fide because the petitioner had gone to the spot of shifting in order to accompany the excise authority for the necessary protection of E.P. Holder. Hence, prior permission is not necessary.

9. The petitioner has not violated any Rule nor there was any misconduct or negligence on his part, hence the charges made in the charge memo is totally vague. Though the Inquiry Officer stated that the charge relating to the involvement of criminal case could not be proved but the petitioner has been alleged to have been negligent of his duty. The entire conclusion in the Inquiry Report is based on a concocted story without mentioning the Rules and Regulations or standing order which alleged to have been violated by the petitioner. Thus, this clearly reflects a personal bias at the behest of Disciplinary Authority.

10. Mr. Mishra strenuously persuaded that pursuant to the show-cause notice dated 20.12.2012 handed out to the petitioner asking for explanation on the inquiry report, the petitioner filed explanation on 12.01.2013 stating therein that he has not violated any Rules and Regulations nor is he negligent on his duty. The Disciplinary Authority also never handed out the documents which were relied on while framing the charges against him. Thus, the golden thread of the principle of natural justice is missing in the entire episode. The Orissa Government Servant Conduct Rules has categorically defined the word 'negligence'. But in the instant case, the authority has not specified as to what kind of negligence he has shown to his duty. The Disciplinary Authority has given a deaf ear to the submission of the petitioner and without discussing anything about the Government Servant Conduct Rules which imposed major punishment of one Black Mark on the petitioner stating that the Inquiring Officer has found him guilty on the charge against the petitioner beyond reasonable doubt.

11. It is stated that the entire proceeding reflects a clear non-application of mind by the Disciplinary Authority while imposing a major penalty on the alleged delinquent officer. He further submits that the so-called criminal case initiated against him does not have any basis, which reveals from the

CRLMC No.948 of 2013 for quashing the criminal case against the petitioner vide order dated 22.04.2013 which ultimately quashed the same.

12. The petitioner in the present case, preferred Departmental Appeal on 05.06.2013 before Appellate Authority assailing the order of punishment passed by the Disciplinary Authority. The Appellate Authority has also passed the order in a mechanical manner and rejected the appeal of the petitioner vide order dated 20.08.2013. The said order is completely not based on the appreciation of proper facts, hence a cryptic order. Being aggrieved by the order passed by the Appellate Authority, the petitioner filed revision of the said order before the Opposite Party No.2. It reveals from the order dated 08.08.2014 passed in the said order of revision that it has been passed without discussing and considering the matter in its proper perspective.

13. After having heard the parties, the learned Tribunal remitted the matter back to the Appellate Authority to record his findings strictly adhering to the provisions under OCS (C.C.& A) Rules, 1962. The petitioner once again approached the learned Tribunal vide O.A. No.2330 (C) of 2017 challenging the order dated 22.12.2016 passed by the Appellate Authority/Opposite Party No.3, which suffered a dismissal vide judgment and order dated 30.10.2018.

14. Learned Counsel for the State, Shri Khuntia strenuously contended that the learned Tribunal has reached to the conclusion based on material on record and keeping in mind the Rules and various decisions on the subject. Hence, the order passed by the learned Tribunal cannot be faulted with. He further refuted the charges of mala fide in the Disciplinary Proceeding and reaffirmed his submissions and submitted that the charge memo is not at all vague. The principle of natural justice has also been complied with. He further submitted that if any documents which were not supplied to him at the time of conducting the Disciplinary Proceeding, he could have raised that issue before the Disciplinary Authority. Instead, he has raised such plea at the appellate stage, which is not in accordance with law. He further submitted that the Appellate Authority have examined the entire records, Rules and compliance of natural justice upholding the order of Disciplinary Authority. Hence, the allegation of cryptic order being passed in this case, is not at all correct.

15. In the above background, we heard the learned counsel for the parties, perused the records and found that the statement of imputation reflects three charges framed against the petitioner without specifying the allegations or the Rule, which he has violated. The said charges against the petitioner include a criminal case, allegation of misbehaviour to lady protestors and negligence of his duty on 26.06.2012 night. However, the Inquiry Officer stated that the first two charges could not be proved but the negligence of duty is of serious one. The entire submission of the learned counsel for the State, revolves around the parrot like statement of the Disciplinary Authority alleging the fact that the petitioner did not take prior permission while moving to the spot. It is apparent from the charges which are vague and contrary to the provision laid down in Rule-4 of the Police Manual, Appendix-49. It is also clear from the fact as narrated above that the Appellate Authority has not considered the facts in proper perspective in compliance with the provision made in Police Manual, Appendix-49 and without discussing the matter which is illegal, improper and unjust.

16. The learned Tribunal passed order dated 28.09.2016 in O.A. No. 3379(C) of 2014, which states that the order of the Appellate Authority is in accordance with the provision of Rule-29 of the OCS (C.C. & A) Rules, 1962 and accordingly the matter was remitted back to the Appellate Authority to record his findings. However, the Appellate Authority has failed to understand the implication of the learned Tribunal's order and once again passed order in a mechanical manner. The said order passed as follows:-

> *"It is worthwhile to mention that as per Govt. of Odisha, Home Department Resolution No.33610/ BBSR, dtd. The 31st May, 2003, Para-3, special provisions have been made in the Odisha Police Rules (commonly termed as Police Manual Rules or PMR) with regard to appointment and disciplinary matters for the Police Personnel. Therefore, the O.C.S. (C.C. & A) Rules shall not be applicable to Police personnel appointed under the Police Act, 1861 in view of Rule-3(1)(c) of the O.C.S. (C.C.&A) Rules, 1962. As set of penalties have been prescribed in Police Manual Rule-824 and the detailed provisions have been laid down in Chapter-XX and Appendix-49 of PMR relating to procedure to be followed for disciplinary proceedings. In view of this, the Govt. has been pleased to decide further that the disciplinary proceedings against the sub-ordinate ranks of Police personnel shall be initiated, processed and concluded under the provisions of the Police Manual Rules only and not under the O.C.S. (C.C.& A), Rules, 1962.*
>
> *The proceeding has been enquired following the Rules prescribed under P.M. Appendix-49, allowing natural justice to the Charged S.I. (appellant). The findings of the E.O. holding the appellant guilty of the charge has been duly accepted by the Disciplinary Authority who has awarded the impugned punishment i.e. 'One Black Mark' after due application of mind.*

> *In view of this, there is no cogent reason to interfere in the orders of the Disciplinary Authority. Therefore, after further careful scrutiny of records in the light of order of Hon'ble OAT, the appeal petition is rejected being devoid of merit."*

17. Learned Counsel for the petitioner submits that as per Odisha Police Manual (Vol.-II) Appendix-49, Para-5(b) (i.e. Rules for proceedings for departmental punishment)

> "*The Govt. Servant shall, for the purpose of preparing his defence, be supplied with all the records on which the allegations are based. He shall be permitted to inspect and take extracts of such other official records as he may specify, provided that such permission may be refused if, for reasons to be recorded in writing in the opinion of the disciplinary authority, such records are not relevant for the purpose or it is against public interest to allow him access thereto."*

In the present case, the above Rules have not been complied with in letter and spirit. There is absence of any disobedience nay any wilful disobedience to attract the vice of violation of any Standing Order or instruction. In the light of this, the charge itself is baseless.

18. Discipline is essential in every government service, nay every walk of life. If the Government servants are undisciplined, the governance will be in rough weather. It is also equally true, without any specific charges, the employees should not be harassed unnecessarily which leads to demoralisation of the employees. Learned Appellate Tribunal without considering all these aspects, dismissed the appeal of the petitioner. The learned Tribunal also rejected the order of the Appellate Authority simply quoting the same, which is illegal, improper because of non-application of mind.

19. Appointing Authority/Disciplinary Authority/Government is entitled to exercise the control and maintain the master-servant relationship but it has to on the touchstone of reasonableness especially while awarding the major punishment like one Black Mark. Whenever there is a violation of the principle of natural justice or unreasonableness of punishment or punishment awarded with mala-fide or oblique motive, it is the duty of the court to examine the same. This Court constantly follow the principle of non-interference with the autonomy of the Disciplinary Authority, however, any action taken by the Disciplinary Authority is contrary to maintain clean and honest administration need not be interfered with. But in the instant case, there is clear deflection of such a thought process and the Disciplinary

Authority has been very casual about impact of its order on the career of the petitioner.

20. At the same vein, if the action taken by the Disciplinary Authority is unreasonable and arbitrary, it is likely to demoralise and deleterious effect of the efficiency of the employee and warrants interference from this Court. We cannot ignore the well accepted principles while examining such punishment in the appellate jurisdiction, without clarity on the nature of allegation, violation of rules etc. is nothing but it is a case of arbitrary exercise of power. In this context, it is pertinent to extract the observations of *Lord Denning as found in Wade on Administrative Law, "**the discretion of statutory body is never unfettered**"*. It is a discretion which is to be exercised according to law. That means at least the authority must be guided by relevant consideration and not by irrelevant motive. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter, the authority may have acted in good faith, nevertheless the decision will be set aside.

21. The case, in hand, portrays a negative shade of the power exercised by the Disciplinary Authority because it is dehors legitimate reasons and reasonableness. The Court being custodian of law should interfere with such kind of unjust punishment awarded to the delinquent employee. Hence, this Court is of the view that the order passed by the Disciplinary Authority has been too harsh on the delinquent officer because the charges framed against him do not reveal any tangible reasons for attracting such a major punishment. We also feel to say, the only charge against the delinquent officer is that he neglected his duty on 26.06.2012 night, without indicating which rules he violated, the authority-imposed punishment which is erroneous. The punishment is shockingly disproportionate to the alleged misconduct committed by the petitioner.

In the case of ***Union of India and others v. P. Gunasekaran, (2015) 2 SCC 610,*** the Hon'ble Supreme Court has delineated the scope of interference by the High Court in a disciplinary enquiry. The High Court in exercise of its power under Articles 226 & 227 of the Constitution of India cannot venture into re-appreciation of evidence, or interfere with the conclusions of the enquiry proceeding if the same are conducted in accordance with law, or go into the legality/adequacy of evidence, or reliability of the evidence, or interfere, if there be some legal evidence on

which findings can be based, or correct the error of fact, however grave it may appear to be, and go into the proportionality of punishment unless it shocks its conscience. But in the present case, the punishment is handed out in a casual manner without application of mind or indicating which rules, instruction or standing order purported to have been violated by the petitioner herein.

22. In our considered opinion, the act of imposition of major penalty on the delinquent/petitioner vitiates the proceedings and the punishment imposed, dehors sufficient reasons smacks arbitrariness and mala-fide. Hence, the order dated 30.10.2018 passed by the State Administrative Tribunal in O.A. No.2330(C) of 2017 is set aside. The present Writ Petition is allowed and all consequential benefits including promotions be granted to the petitioner forthwith preferably within a period of one month. Accordingly, the Writ Petition is disposed of.

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2021 (I) ILR - CUT- 297

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

W.P.(CRL.) NO. 53 OF 2020

PRADEEP KUMAR SETHY .....Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 20 read with Section 300 and Sections 218, 219 and 220 of the Code of Criminal Procedure, 1973 – Provisions under – Writ petition seeking safeguard of the fundamental rights of the Petitioner in the matter of criminal trial for commission of offences of similar nature – Petitioner was the Chairman/Managing Director of Group of Companies – The Companies of the petitioner by way of inducement, allurement and cheating of large number of investors/depositors in a criminal conspiracy accepted money deposits – The principal issue is with regard to the applicability of Section 220 of the Cr.P.C. as well as the protection provided under Article 20 (3) of the Constitution to such cases – The issue posed is

whether the offence of cheating by acceptance of deposits made by individual investors and there would be multiple such investors, would all constitute the "same transaction" because the conspiracy or design may be the same or, whether, the act of cheating by acceptance of deposits made by different investors, would constitute separate transactions – Held, because each act of inducement, allurement and consequential cheating would be unique – The question is whether such transactions could be amalgamated and clubbed together into a single FIR, by showing one investor as the complainant, and the others as the witnesses – Issue considered with reference to several decisions – Held, petitioner is not entitled for the benefits as separate convictions in separate similar offences cannot be termed as double jeopardy.

"We are of the opinion that separate trials which are being made, are in accordance with the provisions of law, otherwise it would have prejudiced the accused persons. Each instance of cheating would constitute an independent offence. Thus, by no stretch, it can be held to be in violation of Article 20(2) of the Constitution or Section 300 Cr.PC. Separate trials in such cases is the very intendment of law. There is no room to raise such a grievance. Though evidence of general conspiracy has been adduced in cases it may be common to all the cases but at the same time offences are different at different places, by different accused persons and complainants. As and when a separate offence is committed, it becomes punishable and the substantive charge which has to be taken is that of the offence under the PC Act, etc. There was conspiracy hatched which was a continuing one and has resulted into various offences. It was joined from time to time by different accused persons, so whenever an offence is committed in continuation of the conspiracy, it would be punishable separately for different periods as envisaged in Section 212(2), obviously, there have to be separate trials. Thus, it cannot be said to be a case of double jeopardy at all. It cannot be said that for the same offence the accused persons are being tried again. Each trial has to be separately held and the accused to be punished separately for the offence committed in furtherance of conspiracy. In case there is only one trial for such conspiracy for separate offences, it would enable the accused person to go scot-free and commit a number of offences which is not the intendment of law. The concept is of "same offence" under Article 20(2) and Section 300 CrPC. In case distinct offences are being committed there has to be independent trial for each of such offence based on such conspiracy and in the case of misappropriation as statutorily mandated, there should not be joinder of charges in one trial for more than one year except as provided in Section 219. One general conspiracy over a period of time has led to various offences as such there have to be different trials for each of such offence based upon conspiracy in which different persons are involved." *(Paras 22 and 34)*

(B) WORDS AND PHRASES – 'Same transaction' – Definition and meaning thereof – Held, in order to treat a series of acts to be "same transaction", those acts must be connected together in some way – The Courts have indicated various tests to be applied to decide whether different acts are part of the same transaction or not; namely, proximity of time, unity of place, unity or community of purpose or design and continuity of action. (Para 27)

Case Laws Relied on and Referred to :-

1. AIR 1953 SC 325 : Maqbool Hussain Vs. State of Bombay.
2. AIR 1954 SC 375 : S.A.Venkataraman Vs. Union of India.
3. AIR 1961 SC 578 : State of Bomay Vs. S.L. Apte and Anr.
4. (2013) 1 SCC 314 : Manubhai Ratilal Patel Vs. State of Gujarat.
5. (2017) 8 SCC 1 : State of Jharkhand through SP CBI Vs. Lalu Prasad Yadav.
6. (2013) 16 SCC 574 : State of Rajasthan Vs. Bhagwan Das Agrawal & ors
7. AIR 1936 Bom.154 : Shapurji Sorabji Vs. Emperor.
8. (2002) 2 SCC 210 : AIR 2001 SC 3810 : Narinderjit Singh Sahni.
9. AIR 1931 PC 52 : Prasad Vs. Emperor.
10. AIR 1963 SC 1850 : State of A.P. Vs. . Cheemalapati Ganeswara Rao.
11. (1969) 3 SCC 429 : Mohd. Husain Umar Kochra Vs. K.S. Dalipsinghji & Anr.
12. (1924) 49 Mad. 74 : Mallayya Vs. King-Emperor.
13. (1930) 53 Mad. 937 : Ramaraja Tevan, Inre.
14. (1910) 33 Mad.502 : Choragudi Venkatadri Vs. Emperor.
15. (1924) 49 Mad. 74 : Mallayya Vs. King-Emperor.
16. (1902) 27 Bom. 135 : Emperor Vs. Sherufalli.
17. AIR 1957 SC 340 : S. Swamirathnam Vs. State of Madras
18. 1964 Mah LJ 1 : 1961 SCC OnLine SC 1 : Natwarlal Sakarlal Mody Vs. State of Bombay.
19. (2010) 9 SCC 567 : C. Muniappan Vs. State of T.N.

For Petitioner : Mr. Milan Kanungo, Sr. Adv.
M/s. C.Mishra & S.R. Mohanty

For Opp. Party : Mr. Janmejaya Katikia, Additional Govt. Adv.
Mr. Sarthak Nayak (for C.B.I.)

JUDGMENT Date of Hearing : 27.11.2020: Date of Judgment : 23.12.2020

S.K. PANIGRAHI, J.

1. The present Writ Petition preferred under Article 226, 227 read with Article 20(2) of the Constitution of India and Section 300 of the Cr P.C. seeking safeguard of the fundamental rights of the Petitioner. This Writ Petition has been filed challenging the conviction order dated 15.11.2017 passed by the CJM-cum-ASJ, Sambalpur in G.R. Case No.1014 of 2013 in

which the petitioner has been convicted under Sections 120-B, 406, 426, 506/34 of the Indian Penal Code and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and other cases arising out of the same transaction at different places in Odisha.

2. Other cases arising out of the same transaction have been lodged at different places in Odisha vide (a) G.R. Case Nos.- Phulbani Town P.S. Case No.19(8) of 2013 corresponding to G.R. Case No.45/2013, Kandhamal; (b) Baripada Town P.S. Case No.52(18) of 2013, Mayurbhanj; (c) Udit Nagar P.S. Case No.78 of 2013, Sundargarh; (d) Keonjhar Town P.S. Case No.125 of 2013 corresponding to G.R. Case No.569 of 2013 Keonjhar; (e) G.R. Case No.129 of 2013, Ganjam; (f) G.R. Case No.732 of 2013, Ganjam; (g) G.R. Case No.982 of 2013, Ganjam, (h) G.R. Case No.867 of 2013, Ganjam; (i) G.R. No.183/2013, Ganjam; (j) C.T. Case No.2056 of 2013, Bhubaneswar; (k) C.T. Case No.1041 of 2013, Balasore; (l) G.R. Case No. 427 of 2013, Nayagarh respectively .

3. The background germane to better appreciate the instant challenge are that the petitioner herein was the Chairman/Managing Director of one "Artha Tatwa Consultancy Pvt. Ltd" having its registered office at Bhubaneswar as well as the President of Artha Tatwa Multipurpose Co-operative Society Ltd. and Artha Tatwa Multi-State Credit Co-operative Society Ltd.

4. The Special CJM, CBI, Bhubaneswar in SPE No.42(A) of 2014 has convicted the Petitioner for committing offences u/s. 120-B, 294, 341, 406, 409, 420, 471, 506/34 of IPC read with Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 vide its order dated 06.04.2017. The petitioner has been in judicial custody since 13.5.2013 and has served a jail term of seven years and has paid a fine of Rs.30,000. The selfsame court has also ordered that M/s. Artha Tatwa Multi-Purpose Co-operative Societies Ltd., M/s. Artha Tatwa Infra India Ltd. and all other associated artificial juristic persons shall pay compensation amount of Rs.250 Crores.

5. Based on the selfsame facts and circumstances, another complaint was registered against the Petitioner at Kharavela Nagar P.S. The CJM-cum-ASJ, Khurda without considering the facts and circumstances as well as the prior conviction of the petitioner for the same offence, took cognizance of above Criminal Case No.145 of 2013 corresponding to C.T. Case No.2056 of

2013 and vide judgment dated 31.07.2017 the petitioner was convicted and sentenced for the same set of offences for seven years and fine up to □75,000 under same provisions as above i.e., Section 120-B, 406, 420 read with Section 34 of the IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

6. The Artha Tatwa Group of Companies which were primarily registered under the Companies Act and the Multi-State Co-operative Societies Act, 2002 were engaged in the business of collecting funds from public through various schemes with promise of high returns. The funds were also collected through other companies like Artha Tatwa Enterprises Pvt. Ltd. (ATEPL), Artha Tatwa Infra India Ltd. (ATHL) and Systematix Developers and Builder Pvt. Ltd. (SDBPL). The depositors were promised better returns compared to banks and other financial institutions and being allured money for such bodacious schemes. Subsequently, an income tax raid was conducted which unearthed some irregularities such information got out and spread like wildfire making the depositors panic-stricken.

7. The aforesaid incident brought a grinding halt to the operations of the companies. Subsequently, the Artha Tatwa Group of Companies were accused of cheating the investors and complaints were filed across different Police Stations throughout the State. The substance of the complaints of the depositors is that they had deposited huge sums with Artha Tatwa group of Companies in the hope of getting higher returns as promised under its various schemes as well as cheap flats/plots etc.

8. The Petitioner and his companies/societies in question began to default in payments owed to the depositors, after a point, which caused a huge public outcry across the State. The wrath of the masses precipitated a complete cessation in the activities of the companies/societies. In February 2013 the investigation was conducted by the State Police and apropos the order of the State Government. Realizing the gravity of the issue and on the allegation of the cheating the common investors, the matter was handed over to the E.O.W. (Economic Offences Wing) and charge-sheets were submitted before the Ld. CJM-ASJ, Bhubaneswar corresponding to various FIRs lodged against the petitioner and the Artha Tatwa Group of Companies.

9. Meanwhile, a PIL was filed by one Alok Jena before the Supreme Court of India wherein directions were issued by the apex Court in W.P. (C)

No.413 of 2013 tagged with W.P. (C) No. 401 of 2013. The apex Court vide order dated 9.05.2014 directed to transfer the cases registered in different Police Stations in the State of West Bengal and Odisha from the State Police agency to the Central Bureau of Investigation (CBI). The said order mandated to transfer all the cases registered against 44 companies mentioned in the order dated 26th March, 2014 passed in Writ Petition (C) No.413 of 2013. The CBI was also permitted to conduct further investigation into all such cases in which charge sheet had already been filed. Accordingly, the investigation of the Artha Tatwa Group of Companies pertaining eight FIRs lodged in different Police Stations was handed over to Central Bureau of Investigation (CBI) and accordingly R. C. Case No.47/C/2014/KOL dated 5.06.2014 was registered by the Superintendent of Police, CBI, SPE, SCH, Kolkata against the petitioner and 48 other accused for the commission of offences under sections 120-B, 406, 411, 420, 468, 471 of IPC and Sections 4, 5, and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

10. The eight cases as mentioned hereinabove were Badambadi P.S. Case No.5 of 2013 dated 05.01.2013, Kharavel Nagar P.S. Case No. 44(4) of 2013 dated 07.02.2013, Bhanjanagar P.S. Case No.95 of 2013 dated 02.05.2013, Angul P.S. Case No.282 of 2013 dated 03.05.2013, Bargarh Town P.S. Case No.149 of 2013 dated 08.05.2013, Paralakhemundi P.S. No.93 of 2013 dated 25.06.2013, Kujanga P.S. Case No.262 of 2013 dated 19.08.2013 and Cantonment Road P.S. Case No.76 of 2013 dated 24.09.2013. The CBI went ahead by treating the FIRs in the above mentioned eight cases as original FIR vide R.C. No.47/S/2014/Kol. After the completion of the investigation of the case, the CBI filed the charge-sheet No.9 of 2014 dated 11.12.2014 in the court of the Ld. Special CJM, CBI, Bhubaneswar. The matter was heard by the Ld. Special CJM, CBI, Bhubaneswar, Odisha and vide its judgment dated 6.04.2017 held that the charges under Sections 120-B, 406, 411, 420, 468, 471 of IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 stand proved against the petitioner. Consequently, the Petitioner was directed to undergo a sentence of rigorous imprisonment for a period of seven years after he pleaded guilty to the crime and an appeal against the said conviction is pending before this Court. Since May 2013, the Petitioner has remained lodged in Jharpada Special Jail, Jharpada, Bhubaneswar.

11. The principal contention of the Ld. Senior Counsel for the Petitioner, Mr. Milan Kanungo, is that in spite of being convicted of the offences u/s. 120-B, 406, 411, 420, 468, 471 of IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 other proceedings were initiated against the petitioner under different FIRs registered in Bhubaneswar, Khordha, Sambalpur, Nayagarh, Balasore, Kandhamal, Jagatsinghpur, Berhampur and Keonjhar for the same offences which are violative of Section 300 of the Cr.P.C. as well as Article 20(2) of the Constitution of India. His submission is that during the pendency of the aforesaid trial, it was found that another FIR No.145 dated 27.05.2013 had been filed by one Priyabrata Mallick at Kharavela Nagar P.S., Bhubaneswar, Odisha against the petitioner and others connected with the Artha Tatwa Group of Companies. The charge-sheet No.84 dated 29.07.2013 filed in the case reveals the same charges as in the charge-sheet filed in FIR RC No.47/S/2014/Kol. The CJM-cum-ASJ, Khurda took cognizance of the above Criminal Case No.145 of 2013 corresponding to C.T. No.2056 of 2013 and the petitioner was convicted and sentenced for seven years and fine up to □50,000 under the sections of 120-B, 406, 411, 420, 468, 471 of IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. Thus, the contention of the petitioner is that he has been prosecuted and punished thrice for the same offences and the same is contrary to the Fundamental rights guaranteed to the petitioner under Article 20(2) of the Constitution of India. It was further submitted that the Petitioner then approached the Hon'ble Supreme Court of India by way of W.P.(Crl.) No.131 of 2017 challenging the second conviction vide order dated 31.07.2017 passed by the CJM-cum-ASJ, Khurda in case No.145 dated 27.05.2013 and also prayed for the quashing of the FIR in FIR No.172(3) of 2013 at Khurda, FIR No.93(20) of 2013 at Sambalpur, FIR No.136 (24) of 2013 at Nayagarh and FIR No.144 of 2013 at Balasore and other above named G.R. numbers which was dismissed by the Hon'ble Supreme Court.

12. Ld. Counsel for the Petitioner further submitted that the petitioner having spent five years in judicial custody since his arrest in May 2013, he was again convicted by the CJM, Sambalpur in FIR No.93 (20) of 2013 vide order dated 15.11.2017 which sentenced him to five years rigorous imprisonment in a separate complaint lodged at Sambalpur P.S. The Hon'ble Court directed that as per Sec. 427 (1) of Cr.PC sentence shall commence after expiry of the sentence in the previous case. The CJM further directed that the petitioner is liable to pay Rs.2,00,000 to the complainant as

compensation and in default petitioner would undergo a further rigorous imprisonment for one year. It is with this backdrop that the Petitioner has approached this court seeking relief and protection of the fundamental rights of the petitioner granted to him under the Constitution of India under Article 20(2). The relief sought is the quashing of the aforesaid proceedings pursuant to the conviction in the earlier cases on the premise that they relate to the self-same transaction or same offence in view of the provisions of Article 20(2) of the Constitution and Section 300 of the Cr.P.C.

13. The Ld. Counsel for the Petitioner further contended that under Article 20(2) of the Constitution when a person has been convicted for an offence by a competent Court, the conviction serves a bar to any further criminal proceedings against him for the same offence. The intention of the law makers was that no one ought to be punished more than once for the same offence. To operate as a bar, basic requirement to be satisfied is that the consequential punishment must be for the 'same offence'. In the present petition, all the cases, complaints and charges against the Petitioner are similar and are based on the same factual matrix which form part of the "same ransaction". Section 300(1) of Cr.PC states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. He further relied upon Section 220(1) of the Cr.PC which provides that if one series of acts are so connected together so as to form a part of the same transaction, more offence than one is committed by the same person, he may be charged with and tried at one trial for, every such offence. The word transaction" means a group of facts so connected together as to involve certain ideas viz unity, continuity and connection in the present case, same offence committed by the petitioner shows a unity of purpose or design that irrevocably points towards the fact that those acts/offences form a part of the same transaction. To buttress his above submissions he heavily relied upon the case of ***Maqbool Hussain v. State of Bombay***[1]; ***S.A.Venkataraman v. Union of India***[2] and ***State of Bomay v. S.L. Apte and Anr***[3].

14. The Ld. Counsel for the petitioner also heavily relied on Section 26 of the General Clauses Act, which lays down that" *where an act or mission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence"*

1. *AIR 1953 SC 325*, **2**. *AIR 1954 SC 375*, **3**. *AIR 1961 SC 578*

and submitted that the petitioner would be entitled not only for protection under Article 20(2) of the Constitution, but also to the protection of Section 26 of the General Clauses Act. He submitted that the Hon'ble Supreme Court in the case of ***Venkataraman V. Union of India*** (supra) held that in order to enable a citizen to invoke the protection of clause (2) of Article 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. Both the factor must coexist in order that the operation of the clause may be attracted. In other words, if a person has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in subsequent proceedings. The Apex Court has held that "while dealing with the issue of double jeopardy under Article 20(2), to operate as a bar the second prosecution and the consequential punishment there under, must be for the 'same offence'. "The crucial requirement therefore for attracting the Article is that the offences are the same i.e., they should be identical. It is, therefore, necessary to mention that in the present case, the same ingredients of the offences in all the matters against the petitioner are identical.

15. The Ld. Counsel for the State, Mr. J. Katikia, AGA, has vehemently opposed the said contentions raised by the Petitioner on the ground that the offences are not forming same offence/transaction but are in fact distinct offences and hence were in no way violative of either Article 20(2) of the Constitution or Section 300 of Cr. P.C. He further submitted that the cases are related to a large scale defalcation of money throughout the state whereby innocent public from different strata of the society including the poor farmers, artisan, pensioners etc. The prayer to quash all the proceedings before the trial and without allowing the victims as well as the complainants to put their sides by way of active participation in the trial process is thoroughly misconceived and against the tenets of Criminal law.

16. He further submitted that the instant Writ petition is not maintainable since there is no illegal confinement. The petitioner has been in judicial custody and it is not a case of illegal detention of an individual. He cited a Supreme Court Judgment "***Manubhai Ratilal Patel vs. State of Gujarat***[4] to buttress his view point. He also relied on ***State of Jharkhand through SP CBI vs. Lalu Prasad Yadav***[5] ***and State of Rajasthan vs. Bhagwan Das Agrawal & ors***[6] wherein it has been held that "same kind of offences" is

4. *(2013) 1 SCC 314*, **5.** *(2017) 8 SCC 1*, **6.** *(2013) 16 SCC 574*

different from the "same offence". In fact, the pending cases against the petitioner are of similar nature but not the same offence.

17. Before proceeding further, we consider it appropriate to take note of the relevant constitutional and statutory provisions at play. Article 20 (2) of the Constitution provides the expression "*(2) No person shall be prosecuted and punished for the same offence more than once"*. Similarly, Section 300 of the Cr.P.C. provides that *"a person once convicted or acquitted not to be tried for same offence"*. Thus, from a bare perusal of the aforesaid it is a clear as a bell that both the provision talks of and will apply in the case of "same offence" and the argument raised by the Counsel for the Petitioner though attractive is sans merit from even an elementary perusal of the provisions relied upon. However, since the question of the liberty of an individual is concerned, this court finds it expedient to examine that issue from all possible quarters to see if the Petitioner can be extended the benefit from any quarter possible.

18. The relevant provisions under the Cr.P.C are Sections 218 to 220 which fall under Chapter XVII titled "The Charge" and "sub-chapter "B", which deals with "Joinder of Charges". They read as follows:

> *"**218. Separate charges for distinct offences.-**(1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately:*
>
> *Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.*
>
> *(2) Nothing in sub- section (1) shall affect the operation of the provisions of section 219, 220, 221 and 223.*
>
> ***219. Three offences of same kind within year may be charged together**.-(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three. (2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local law:*
>
> *Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1860) shall be deemed to be an offence of the*

same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

220. Trial for more than one offence.-*(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.*

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub- section (2) of section 212 or in sub- section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, or such acts.

(5) Nothing contained in this section shall affect Section 71 of the Indian Penal Code (45 of 1860)."

19. On bare perusal of Section 218 of the Cr.P.C., the legislative mandate that emerges, for every distinct offence of which a single person is accused, there shall be a separate charge, and every such charge shall be tried separately. This Section embodies the fundamental principle of Criminal Law that the accused person must have notice of the charge which he has to meet. The proviso to Sub-Section (1) seeks to carve out an exception to this general rule. This proviso states that the accused may make an application to the Magistrate that the Magistrate may try all or any number of charges framed against the person together, provided the Magistrate is of the opinion that such person is not likely to be prejudiced thereby. Thus, this exceptional course of action may be adopted only upon the accused making an application therefor, and upon the Magistrate forming the opinion that trial of all or some of the charges together would not prejudice the accused. Sub-Section (2) makes it clear that sub-Section (1) shall not affect the operation of

Sections 219, 220, 221 & 223, meaning thereby, that the said sections would apply irrespective of: (a) the mandate of sub-Section (1) - that for every distinct offence, of which any person is accused, there shall be a separate charge and every such charge shall be tried separately, and; (b) the order that the Magistrate may pass under proviso to sub-Section (1) of Section 218 of the Cr.P.C.

20. Sections 219 and 220 deal with different aspects of the matter. For attracting Section 219, the necessary circumstance is that the same person is accused of more offences than one; the offences of which the person is accused are of the same kind; they are committed within a time frame of 12 months from the first and the last of such offences, and; the said offences may, or may not, be in respect of the same person. The offences need not have any causal link between them for Section 219 to be invoked. They may be completely independent; may have taken place at different points of time within the space of 12 months, and; may involve different and unrelated victims. However, when the accused is the same person and the offences are of the same kind - as defined in Sub-Section (2). Sub-Section (2) explains that offences are of the same kind when they are punishable with the same amount of punishment under the same Section of the IPC, or of any special or local law. In such a situation, the person may be charged with and tried at one trial for any number of them, not exceeding three. For the present, we are not concerned with the proviso to sub-Section (2) of Section 219 and, therefore, we need not dwell upon the same.

21. Section 220, on the other hand, deals with a situation where one series of acts is so connected together to form the same transaction, and in that series of acts which are connected together, more offences than one are committed by the same person. In that situation, he may be charged with and tried at one trial for every such offence. Sub-Section (2) of Section 220 makes it clear that if a person charged with one or more offences of criminal breach of trust, or dishonest misappropriation of property is also accused of committing for the purpose of facilitating or concealing the commission of the offences aforesaid, the offence of falsification of accounts, he may be charged with and tried at one trial for every such offence. Thus, at the same trial, apart from the offence of criminal breach of trust or dishonest misappropriation of property, he may be tried for the offence of falsification of accounts for the purpose of facilitating or concealing the commission of

the primary offence of criminal breach of trust, or dishonest misappropriation of property.

22. The principal issue herein is with regard to the applicability of Section 220 of the Cr.P.C. as well as the protection provided under Article 20 (3) of the Constitution to a case of inducement, allurement and cheating of a large number of investors/depositors in a criminal conspiracy. The issue posed is whether the offence of cheating - by acceptance of deposits made by individual investors - and there would be multiple such investors, would all constitute the "same transaction" - because the conspiracy or design may be the same or, whether, the act of cheating - by acceptance of deposits made by different investors, would constitute separate transactions - because each act of inducement, allurement and consequential cheating would be unique. The question is whether such transactions could be amalgamated and clubbed together into a single FIR, by showing one investor as the complainant, and the others as the witnesses. Consequently, convicted under one such case would pre-empt prosecution under the other pending cases.

23. A contention has been raised by the Ld. Counsel for the State that each case of inducement, allurement and cheating of an investor constitutes a separate transaction, mandating registration of a separate FIR for each such transaction. On the aspect as to what forms the "same transaction", or a "separate transaction", it will be profitable analyse of the law contained in ***Shapurji Sorabji vs. Emperor***.[7]. The Supreme Court's decision in ***Narinderjit Singh Sahni***[8] has conclusively settled the legal position, that each transaction of an individual investor, which has been brought about by the allurement of the financial companies, must be treated as a separate transactions, for the reason that the investors/ depositors are different; the amount of deposit is different, and; the period and place when which the deposit was effected is also different. He submits that amalgamation and clubbing of all transactions into one would vitiate the trial. The same would be contrary to Section 218 of Cr.P.C., and to the decision in ***Narinderjit Singh Sahni*** (supra).

24. Per contra the Ld. Counsel for the Petitioner submits that every case of cheating and inducement of an investor constitutes the "same transaction," when such transactions are a sub-species of a single species of transaction –

7. *AIR 1936 Bom.154*, **8.** *(2002) 2 SCC 210 : AIR 2001 SC 3810*

i.e. of a single conspiracy. In this regard, he places reliance upon ***Ganesh Prasad v. Emperor***[9], ***State of A.P. v. Cheemalapati Ganeswara Rao***[10] and ***Mohd. Husain Umar Kochra v. K.S. Dalipsinghji and Another***[11]. He further submits that every act of cheating a large number of investors is covered under the umbrella of a single transaction, arising out of a single conspiracy. Resultantly, his submission is that he having been convicted in one case and undergone the punishment thereunder, the other FIRs have no meaning in law and stand vitiated. He also submits that the continuance of the same would be violative of his right under Article 20(3) of the Constitution.

25. To appreciate the aforesaid submission, one has to first understand the meaning of the expression "same transaction" and what does or does not constitute "same transaction", i.e. it constitutes "separate transactions." The expression "same transaction" finds mention in Sections 220 and 223 of the Cr.P.C.

26. We may first refer to the decision of the Division Bench of the Bombay High Court in ***Shapurji Sorabji (supra***), wherein the issue arose whether the acts of the accused formed part of the "same transaction" to justify the framing of a common charge and conduct of one trial (by resort to Section 235 of the Code of 1898, which is akin to Section 220 of the Cr.P.C.) or, a "separate transaction". The Court held therein relied upon the views expressed in ***Mallayya v. King-Emperor***[12] and also ***Ramaraja Tevan, Inre***.[13] to hold that in such a situation, as is at hand, the same would necessarily have to be taken to be not a part of the "same" but of a "similar transaction".

27. Tritely, the section itself says, in order to treat a series of acts to be "same transaction", those acts must be connected together in some way. The Courts have indicated various tests to be applied to decide whether different acts are part of the same transaction or not; namely, proximity of time, unity of place, unity or community of purpose or design and continuity of action. The said principle has echoed in the case of ***Choragudi Venkatadri v. Emperor***[14] ***Mallayya v. King-Emperor***[15] and ***Emperor v. Sherufalli***[16].

28. There may be unity of purpose in respect of a series of transactions or several different transactions, and therefore the mere existence of a common purpose cannot by itself be enough to convert a series of acts into one

9. *AIR 1931 PC 52*, **10.** *AIR 1963 SC 1850*, **11**. *(1969) 3 SCC 429*, **12.** *(1924) 49 Mad. 74,* **13.** *(1930) 53 Mad. 937*
14. *(1910) 33 Mad.502*, **15.** (*1924) 49 Mad.* 74, **16.** (*1902) 27 Bom*. 135

transaction. The observations of Abdur Rahim, J. in ***Choragudi Venkatadri v. Emperor (supra)*** has succinctly observed that:

> *"As regards community of purpose I think it would be going too far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that object in view part of the same transaction. If that were so, the results would be startling; for instance, supposing it is alleged that A for the sake of gain has for the last ten years been committing a particular form of depredation on the public, viz., house-breaking and theft,in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all the burglaries which he committed within the ten years. The purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain amount falsifies bocks of account or forges a number of documents. In the present case not only is the common purpose alleged too general and vague but there cannot be said to be any continuity of action between one act of misappropriation and another. Each act of misappropriation was a completed act in itself and the original design to make money was accomplished so far as the particular sum of money was concerned, when the misappropriation took place."*

The aforesaid observation too was a case where it was alleged that a company was formed with the devious object of defrauding the public in a particular manner and the promoters of the company were charged with several distinct acts of embezzlement committed over the years. It was held nevertheless that acts in question were not parts of the same transaction and could not be joined in the same charge. It is amazing that the aforesaid case which more than a century old has a striking resemblance to the case at hand.

29. Thus, "Continuity of action" must mean that some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end and the whole process is begun over again, it is not the same transaction but a new one, in spite of the fact that the same general purpose may continue. Accordingly, for a series of acts to be regarded as forming the "same transaction," they must be connected together in some way, and there should be continuity of action. Though (i) proximity of time; (ii) unity of place and (iii) unity or community of purpose or design have been taken into account to test whether the series of acts constitute the "same transaction", or not, neither of them is an essential ingredient, and the presence or absence of one or more of them, would not be determinative of the issue, which has to be decided by adoption of a common-sense approach in the facts of a given case. In ***Shapurji Sorabji*** (supra), the expression

"continuity of action" has been explained as *"the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again, it is not the same transaction but a new one, in spite of the fact that the same general purpose may continue."*

30. In ***Narinderjit Singh Sahni (supra)*** the Supreme Court was dealing with a batch of Writ Petitions preferred under Article 32 of the Constitution of India alleging impingement of Article 21. The accused Narinderjit Singh Sahni was the Managing Director of M/s. Okara Group of Companies against whom an FIR under sections 420/406/409/120B IPC had been lodged for accepting deposits from large number of people in different schemes and for failure to make repayment in spite of requests. In all, about ***250 FIRs*** were registered throughout the country against the accused. It was contended by the accused that the offence of conspiracy being in the nature of continuing offence, its inclusion would be sufficient to establish the connection of one offence with the other for the purpose of converting all the offences into a single offence, or in the alternative, into the kind of offence which could only have been committed in the course of the "same transaction" within the meaning of Section 220 of the Code. It was argued that all the cases initiated against the petitioner were basically under Sections 420 read with 120-B IPC and as such the question was whether there are numerous cases of cheating or there is only one offence and one case. It was contended that many persons may have been induced but since the act of deception was one i.e., the issuance of the advertisement by the petitioner and his group of Companies even if several persons stood cheated, it was a single offence. Per contra on behalf of the State it was contended that each act of cheating constitutes a separate offence and the attempt on behalf of the accused to say that only one advertisement had resulted into multitude of consequential deprivation of property to the thousands of investors was an endeavour to mislead the court. The Hon'ble Apex Court held as under: -

> *".....In a country like ours, if an accused is alleged to have deceived millions of countrymen, who have invested their entire life's saving in such fictitious and frivolous companies promoted by the accused and when thousands of cases are pending against an accused in different parts of the country, can an accused at all complain of infraction of Article 21, on the ground that he is not being able to be released out of jail custody in view of different production warrants issued by different courts. Issuance of production warrants by the court and the production of*

accused in the court, in cases where he is involved is a procedure established by law and consequently, the accused cannot be permitted to make a complaint of infraction of his rights under Article 21. In our considered opinion, it would be a misplaced sympathy of the court on such white-collared accused persons whose acts of commission and omission has ruined a vast majority of poor citizens of this country....."

It was further held that-

"60. As regards the issue of a single offence, we are afraid that the fact situation of the matters under consideration would not permit to lend any credence to such a submission. Each individual deposit agreement shall have to be treated as separate and individual transaction brought about by the allurement of the financial companies, since the parties are different, the amount of deposit is different as also the period for which the deposit was affected. It has all the characteristics of independent transactions and we do not see any compelling reason to hold it otherwise. The plea as raised also cannot have our concurrence."

(emphasis supplied).

31. Thus even Section 220 does not help the Petitioner as will apply where any one series of acts are so connected together as to form the same transaction and where more than one offence is committed, there can be a joint trial. In the present case, as is borne out from the record, different people have been alleged to have been defrauded by the Petitioner and the Company and therefore each offence is a distinct one and cannot be regarded as constituting a single series of facts/ transaction.

32. A similar view has been expressed by the Supreme Court in the case of ***S. Swamirathnam* v. *State of Madras***[17] that where there was a single conspiracy spread over several years with the object to cheat members of the public, the fact that during the course of implementation of the conspiracy several incidents of cheating took place in pursuance thereof, the several acts of cheating constituted part of the same transaction.

33. A three Judge bench of the Supreme Court in the case *of* ***Natwarlal Sakarlal Mody Vs. State of Bombay***[18], has held that it would tantamount to irregular exercise of discretion, if the Court were to allow an innumerable number of offences, spread over a long period of time and committed by a large number of persons, under the protective wing of all embracing conspiracy, to be put to joint trial, if different offences are committed, or

17. *AIR 1957 SC 340* **18.** *1964 Mah LJ 1 : 1961 SCC OnLine SC 1*

some of the offences can legitimately and properly form a subject matter of separate trial. Although this court has noticed that there have been some cases where a slightly different view has been taken, the same are not being gone into as there, the question of double jeopardy under Article 20 of the Constitution or Section 300 Cr.PC did not arise for consideration.

Section 218 deals with separate charges for distinct offences. Section 219 quoted above, provides that three offences of the same kind can be clubbed in one trial committed within one year. Section 220 speaks of trial for more than one offence if it is the same transaction. In the instant case it cannot be said that cheating is same transaction as the transactions are in different places for different years, different amounts, different allotment letters, Thus, the provision of Section 221 is not attracted in the instant case.

34. We are of the opinion that separate trials which are being made, are in accordance with the provisions of law, otherwise it would have prejudiced the accused persons. Each instance of cheating would constitute an independent offence. Thus, by no stretch, it can be held to be in violation of Article 20(2) of the Constitution or Section 300 Cr.PC. Separate trials in such cases is the very intendment of law. There is no room to raise such a grievance. Though evidence of general conspiracy has been adduced in cases it may be common to all the cases but at the same time offences are different at different places, by different accused persons and complainants. As and when a separate offence is committed, it becomes punishable and the substantive charge which has to be taken is that of the offence under the PC Act, etc. There was conspiracy hatched which was a continuing one and has resulted into various offences. It was joined from time to time by different accused persons, so whenever an offence is committed in continuation of the conspiracy, it would be punishable separately for different periods as envisaged in Section 212(2), obviously, there have to be separate trials. Thus, it cannot be said to be a case of double jeopardy at all. It cannot be said that for the same offence the accused persons are being tried again. Each trial has to be separately held and the accused to be punished separately for the offence committed in furtherance of conspiracy. In case there is only one trial for such conspiracy for separate offences, it would enable the accused person to go scot-free and commit a number of offences which is not the intendment of law. The concept is of "same offence" under Article 20(2) and Section 300 CrPC. In case distinct offences are being committed there has to be independent trial for each of such offence based on such conspiracy and in

the case of misappropriation as statutorily mandated, there should not be joinder of charges in one trial for more than one year except as provided in Section 219. One general conspiracy over a period of time has led to various offences as such there have to be different trials for each of such offence based upon conspiracy in which different persons are involved. The view also draws from the decision of the Apex Court in the case of ***Lalu Prasad Vs. State through CBI (A.H.D.) Ranchi, Jharkhand (supra)***.

35. In the case of ***Amitbhai Anilchandra Shah v. CBI (supra)*** the Supreme Court referred to its earlier decision in ***C. Muniappan v. State of T.N.***[19]**,** which explains what has been called a "consequence test" i.e. if an offence which forms part of the second FIR arises as a consequence of the first FIR, then the offences covered by both the FIRs are the same and, accordingly, it will be impermissible in law to register the second FIR. The same shall form part of the first FIR itself. In the present context, it cannot be said that the cheating of the successive complainants/victims undertaken under the same conspiracy is a "consequence" of the offence alleged in the complaint on the basis of which, the sole FIR was registered. It was open to the accused not to proceed to commit the subsequent offence(s), even after committing the offence of hatching a conspiracy to cheat the people and even after cheating one or more persons. Thus, it is held that the subsequent offences have also been rightly registered and proceeded with. The grievance of the Petitioner on that count is also misplaced.

36. There is no continuity in action in respect of the act of cheating of another complainant/victim and as seen hereinabove the real test is to determine whether multiple offences form the "same transaction", or not. By no stretch of imagination can it be said that recurring series of similar transactions are the "same transaction".

37. In view of the aforesaid, it is held that the present Petition filed on behalf of the petitioner is *sans* merits and thus fails. The Writ Petition accordingly stands dismissed. There shall be no order as to costs.

19. (*2010) 9 SCC 567*

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2021 (I) ILR - CUT- 316

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

WRIT PETITION NO. 6068 OF 2009

M/S. JINDAL STEEL & POWER LTD. & ANR. .....Petitioners

.V.

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

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 6 Rule 4 read with order 29 Rule 1 and Section 179 of the Companies Act – Provisions under – Pleadings in the various types of petitions – Held, needs to be signed by competent persons, however, in certain situation in public interest a strict adherence to the Rules of filing of proceeding, a suit or a writ petition can be relaxed, especially when the public interest is involved. (Paras 20 to 22)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order directing payment of royalty and penalty on surface rent & dead rent etc. for using minor minerals from the lease hold land within the lease hold land – The question, thus arose as to whether in such a situation royalty and other levies can be charged from the lessee? – Plea of the lessee that there is no provision under the Mines and Minerals (Development and Regulation) Act, 1857 and Orissa Minor Minerals Concession Rules, 1990 to levy penalty on a lessee for removal and extracting earth and other minerals from the land in question for its own use – State's plea that the petitioners Company, would be covered under Rule 2(o) of the Orissa Minor Minerals Concession Rules, 1990 and it would be a bona fide domestic consumption and hence, it will be liable for royalty – Held, the petitioner is liable to pay the royalty and other levies – Reasons indicated.

In view of the judgment rendered in the reported case of ***State of Orissa & Ors., vs, Union of India*** *(supra), we are of the opinion that this is a case, whether the case of the petitioners being a lessee under the IDCO falls within the ambit and scope of person / corporation is liable to pay royalty and penalty. In view of the judgment passed in the aforesaid case, view taken by this Court in* ***Nalini Kumar Das vs. State of Orissa & Ors*** *(supra) can be held to be in proper proposition of law. If the Railways, who become the owner of the property, is held liable to pay royalty under the Orissa Minor Minerals Concession Rules, 2004, we cannot come to the conclusion that a lessee of the original owner shall not be liable to pay*

royalty and penalty. Hence, contentions raised by the learned counsel for the petitioners are also not tenable. We are of the opinion that even if a lessee of a quarry lease or mining lease is liable to pay royalty, even for minor minerals, then the land occupier, being a lessee under a lease agreement either with the Government of Odisha or any of its corporation, where the lessor has reserved the right to the minerals including minor minerals, then such use of minor for the purpose of the developing the land and for labeling the land, is also liable to pay royalty and in default to pay penalty. *(Paras 22 to 28)*

Case Laws Relied on and Referred to :-

1. AIR 1991 DELHI 25 : M/s. Nibro Limited Vs. National Insurance Co. Ltd.
2. AIR 1997 SC : United Bank of India Vs. Naresh Kumar & Ors.
3. (2015) 12 SCC 736 : Promotors and Builders Association of Pune Vs. State of Maharashtra & Ors.
4. AIR 2006 Orissa 154 : Kumar Das Vs. State of Orissa and Ors.
5. (2001) 1 SCC 429 : State of Orissa & Ors. Vs. Union of India & Anr.
6. AIR 1987 SC 88 (1987 SCR (1) 200): Sarguja Transport Service Vs. State Transport Appellate Tribunal.

For Petitioners : M/s. Sanjit Mohanty, Mr. Patitapaban Panda, R.R.Swain, S. Mohanty & S. Patnaik.

For opp. Parties : Mr. Jagannath Patnaik, Sr. Adv., B. Mohanty, T.K. Patnaik, A. Patnaik, R. P. Roy, N. Panda, Mr. D.K. Nayak, S.K. Nayak, S.K. Sahoo & Mr. Subir Palit, A.G.A.

JUDGMENT Date of Judgment: 02.11.2020

S.K.MISHRA, J.

By this writ petition, the petitioner- M/s Jindal Steel & Power Limited has prayed for issuance of a writ of mandamus to quash the notice dated 03.03.2009, Annexure-4 issued by the Asst. Collector-in-Charge-Cum-Tahasildar, Banarpal directing the petitioner no.1-Company to pay an amount Rs.1,23,57,883.00/- towards Royalty, Penalty Surface Rent and Dead Rent by 13.03.2009 in terms of Rule 68(1)(i) of the Orissa Minor Minerals Concession Rules, 2004. The Jindal Steel & Power Limited is a Company incorporated under the provisions of the Companies Act, 1956, having its Registered Officer at Delhi Road, Hissar, Haryan. The petitioner no.1-Company is setting up an Integrated Steel Plant at Similipada, district Angul in the State of Orissa. The petitioner no.2 is the Head of the Department (F & A) of the petitioner no.1-Company and is a citizen of India.

2. The petitioner no.1-company entered into a Memorandum of Understanding (MOU) with the Government of Orissa on 03.11.2005 for setting up of a Beneficiation Plant at Deojhar, Keonjhar & Integrated Steel Plant at Angul having production capacity of 6 MTPA and 1100 MW Captive Power Plant with a total investment of Rs.22,420 Crores. In the said MoU, the State Government had promised to extend various facilities in respect of land, water, electricity, coal and Iron Ore for setting up the proposed 6 MTPA Steel Complex.

3. In pursuant to the MoU dated 03.11.2005, the Orissa Industrial Infrastructure Development Corporation Limited (IDCO) executed lease deed dated 30.07.2007 for outright payment for industrial plots with the petitioner no.1 company for lease of land comprising of Ac.346.46 dec. at a total consideration of Rs.8,18,46,941/- subject to the terms and condition mentioned in the lease deed.

4. It is further pleaded that the petitioner no.1 company requires approximately 5750 acres of land for setting up the Steel Plant, out of which IDCO has already leased out a total area of 2900 Acres of land including Government and Private Lands by executing lease deeds (including Lease Deed dated 30.07.2007) with the petitioner no.1 Company for setting up of the proposed steel plant. After the possession of the lands, the same were handed over to the petitioner no.1 Company. The petitioner no.1 Company started construction of raising boundary wall of the Steel Plant in terms of the MoU dated 03.11.2005.

5. It is submitted that as the leased out land in terms of lease deed dated 30.7.2007 for Ac.346.47 dec. (including Ac.112.75 dec. of land in village Basudevpur) comprised of both low lying area as well as rocky and uneven surface, the petitioner no.1 Company, in order to set up the integrated steel plant, had to make the filling, leveling and grading of land by cutting uneven surface by removing earth, stone and moorum from the said uneven surface of the leased out area and utilizing the same for filling up/leveling/grading the low lands of the lease out area. It is pleaded that the petitioner no.1 Company has never dug out/excavated anything from the leased out land for winning of any minor mineral excepting cutting uneven surface as well as removing earth, stone and moorum from the said uneven surface of the leased out area and utilizing the same for filling up/leveling/grading the low lands within the leased out area.

6. It is relevant to mention that the sand, earth, stone and moorum generated during cutting of uneven surface of land have never been utilized for any construction purpose nor have been transported and/or removed out of the leased hold area granted by IDCO for setting up of the steel plant. The said sand, earth, stone and moorum generated from cutting of uneven surface of land were used only for filling, leveling and grading of low lying land within the lease hold area of the petitioner no.1 Company.

7. Since the work of leveling and grading of earth by giving even size does not amount to either extraction or removal of minor mineral, such as earth, stone and moorum nor involves any quarry operation for extraction or removal of any minor mineral, in fact the petitioner no.1 Company is leveling and grading the surface of the land so that the same would be a plain level field, upon which the civil construction can be carried out for setting up of the Steel Plant. Such leveling and grading work is neither a quarry nor a mining operation.

8. It is submitted that said work of leveling/grading of earth would not amount to excavation of minor minerals, rather the said work tantamount to bona fide leveling/grading of the site as permitted by IDCO under Clause 12 of the Lease Deed dated 30.7.2007. Further such leveling/grading work is only to make the leased out land feasible for setting up of the steel plant.

9. It is further submitted that neither any excavation or collection or removal has been done for winning of minor minerals nor the same has been disposed of by the petitioner no.1 Company. Rather the earth, stone and moorum from the uneven surface of the leased out area are being utilized for bona fide domestic consumption i.e. for filing up/leveling/grading the low lands for construction/setting up of the Steel Plant in terms of MoU dated 3.11.2005 as well as Clause 54 of the Lease Deed dated 30.7.2007.

10. It is submitted that the petitioner no.1 Company has obtained the lease of Ac.346.47 dec. vide Lease Deed dated 30.7.2007 (Anenxure-1) from IDCO for the purpose of setting up of its Steel Plant. Petitioner no.1 Company has never obtained either any Prospecting Licence under Chapter-II or Mining Lease under Chapter-II or Quarry Lease under Chapter-IV or Quarry Permit under Chapter-V nor participated in any auction under Chapter-VI of the Rules 2004 for winning i.e. extraction and/or removal of any Minor Minerals.

11. As the matter stood, thus, the Tahasildar, Banarpal (opposite party no.3) issued notice dated 16.2.2009 to the Executive Director of petitioner no.1 Company alleging therein that the petitioner no.1 Company has unauthorizly extracted and removed 870029 Cum of Earth in village Basudevpur (over Ac.112.75 dec. of land in village Basudevpur) and has used in constructions/maintenance of different civil work, without obtaining prior permission from the Competent Authority, which is illegal extraction & removal or minor minerals as per Rule 68(1)(i) of the Rules, 2004 and directed the petitioner no.1 Company to show cause as to why Royalty and Penalty amounting to Rs.1,23,57,883.00/- will not be realized for such illegal activity.

12. Thereafter, the petitioner no.1 Company filed a show-cause before the opposite party no.3. Its grievance is that without giving adequate opportunity of hearing to the petitioners and without giving any reasons including provisions of law, the opposite party no.3 rejected their show cause and directed the petitioner no.1 Company to pay the aforesaid amount towards Royalty and Penalty by 13.3.2009. Hence, this writ petition,

13. The opposite party no.1 has filed counter affidavit. The opposite party no.1 contended that the writ petition is not maintainable as it devoids of merit and liable to be rejected. The opposite party no.1 further claims that the similar issue arose before the Hon'ble Supreme Court in Civil Appeal No.2235 of 1996, wherein the Hon'ble Supreme Court has held that the use of minor minerals on the railway track, after being excavated from the land, not coming under the expression "bona-fide domestic consumption", the said operation would be a quarrying operation under Rule 2(o) of Orissa Minor Minerals Concession Rules, 1990 and consequently the embargo contained in Rule 3 of the Orissa Minor Minerals Concession Rules, 1990 makes it crystal clear that the Railway Administration can not undertake the quarrying operation unless a permit is granted in its favour and consequently if the Railway Administration utilizes the minor minerals from the land for the railway track, it would be bound to pay the royalty chargeable under the Orissa Minor Minerals Concession Rules. The liability for payment of royalty accrues under Rule 13 of the Orissa Minor Minerals Concession Rules, 1990 and no doubt speaks of a lease deed. If the Railway Administration though not a lessee and at the same time is not authorized under Rule 3 to undertake any quarrying operation for the purpose of extraction of minor minerals, then for such unauthorized action, the Railway

Administration would be liable for penalties, as contained in Rule 24 of the Orissa Minor Minerals Concessions Rules 1990. This being the position and in view of the prohibition contained in sub rule 2 of Rule 10 of the Orissa Minor Minerals Concessions Rules, 1990 and taking into account the fact that such minor minerals would be absolutely necessary for laying down the railway track and maintenance of the same, the Hon'ble Supreme Court held that the Railway Administration would be bound to pay royalty for the minerals extracted and used by it in laying down the railway track.

14. The specific case of the opposite party no.1 is that in reply to averments made in para 8, it is submitted that although the petitioner no.1 Company has been leased out certain amount of land in village Basudevpur in Angul district for the purpose of setting up of the steel plant, the petitioner has neither been permitted to extract/remove the minor minerals such as earth, stone, moorum from the said site nor the petitioner has sought for any permission from the Government for the same. It is further pleaded by the opposite party no.1 that the sand, earth, stone and moorum generated from the cutting of uneven surface of leased out land and utilization of the same for filling, leveling and grading of low lying land within the lease hold area of the petitioner is certainly not a 'bona-fide domestic consumption, rather it is commercial activity. Hence, the petitioner no.1 Company is liable for royalty and penalty for utilization of the earth, stone, sand and moorum in leveling/grading the lease hold area in terms of the provisions of the Act and the Rules governing the Minor Minerals. Such leveling and grading work do not coming under the expression of 'bona-fide domestic consumption. It is a quarrying operation for the purpose of extraction of minor minerals.

15. The opposite party nos.2 and 3 have filed their counter affidavit stating that the alternative forum available under Rule 64 of the Orissa Minor Minerals Concessions Rule has not been exhausted, hence, the writ petition is not maintainable.

The opposite parties claim that the present petitioner not the owner of the lease in question, he has only the lease hold rights over the same and cannot use generated minor minerals for bona-fide domestic consumption The judgment relied upon by the petitioner in the show-cause reported in AIR 2006 ORISSA 154 is not applicable to its case. The petitioners also claim that since the lease have only the surface right as per the lease deed and has received the land in as is where is condition, he cannot utilize the

Minor Minerals such as sand, moorum, earth, stone etc. for the commercial use for erection of the Industrial unit and the petitioner is liable to pay a ground rent and other statutory dues to the concerned authorities including Royalty as leviable as in the present case.

16. The learned Senior Advocate Shri Sanjit Mohanty appearing on behalf of the petitioner-company assailed the annexure-4 stating that the question in this writ petition is, whether royalty and penalty are liable to be paid by the petitioner under the 2004 rules for utilizing earth, stone, moorum which has been generated in process to leveling and grading low lying land uneven land lease of the petitioner company by IDCO for setting of the steel plant. He argued that the petitioner company entered into a Memorandum of Understanding (MoU) with the Government of Odisha on 3.11.2005 for setting up integrated Steel Plant at Angul having production capacity of 6 MTPA and 1100 MV Captive Power Plant. In the said MoU, the State Government has promised to extend various facilities in respect of land, water, electricity, coal and iron ore for setting up of the said plant.

17. Pursuant to the MoU dated 3.11.2005 Odisha Industrial Infrastructure Development Corporation Ltd., (IDCO) executed lease deed on outright payment for industrial plots with the petitioner for lease of land comprising of area 346.47 dec. (including Ac.112.75 village Basudevpur) at a consideration of Rs.8,18,46.941/- for 99 years in village Basudevpur under Banarpal Tahasildar, respectively, subject to the terms and conditions mentioned in the lease deed. Both the aforesaid land are low laying area as well as rocky and uneven surface. The petitioner company in order to set up the integrated Steel Plant had to make the filling, leveling and grading of the land by cutting uneven surface by removing earth, sand, moorum from the said uneven surface of the leased out area and utilizing the same for filling, leveling and grading the low lands in the leased out land area.

18. It is further submitted that the petitioner no.1 Company has never dug out/excavated anything from the leased out land for winning of any minor mineral excepting cutting uneven surface as well as removing earth, stone, moorum from the said uneven surface of the leased out area and further the said sand earth, stone and moorum generated during cutting of uneven surface have never utilized for any constructions purpose nor have been transported or removed from the leased hold area granted by IDCO for setting up the Steel Plant and as such the same does not amount to quarry

operation for winning of any minor minerals. Hence, it does not attract payment of royalty and interest and more so, the petitioner company is having the surface rights over the leased out area and paid the cost of the land and paying rent and cess to the State Government for the self-same purpose, whereas the lessee who holds the mining lease stood in a different footing as per the 2004 Rules. Therefore, the petitioner is not liable to pay any amount towards royalty and interest as demanded by the Tahasildar under Annexure-4 and inasmuch as the Tahasildar has no jurisdiction to issue such notice under Rule 68(1) of the Orissa Minor Minerals Concessions Rules, 2004.

19. He relied on the reported case of ***Nalini Kumar Das v. State of Orissa & Ors.*** AIR 2006 ORISSA 154 and submitted that the petitioner cannot be held liable for payment of royalty for extracting minerals from his own land. Further, he relied upon the case of ***State of Rajasthan v. Hindustan Zinc Ltd***., 2013 Volume 2 Supreme Court Today, 129 and submits that if the minerals removed from the lease hold area, royalty is chargeable but if minerals remain in the lease area which are dump or return to the mother earth cannot be chargeable for payment of royalty. He also relied upon the reported case of ***State of Orissa and Others v. Union of India and Another***, (2001) 1 Supreme Court Cases 429 and argued that the petitioner is not liable to pay the penalty and royalty as claimed by the opposite party. He also relied upon the case of ***Promoters and Builders Association of Pune v. State of Moharastra and Others***, (2015) 12 Supreme Court Cases 736.

Mr. Subir Palit, learned Additional Government Advocate submits that the judgment of the Hon'ble Supreme Court in the case of ***State of Orissa and Others v. Union of India and Another*** (supra) in fact supports the case of the opposite party and goes against the stand taken by the petitioner. He also argues that the minor minerals having used by commercial purpose not for domestic purpose cannot be said to be exempted from royalty and penalty. It is also argued by Mr. Subir Palit, learned Additional Government Advocate that the writ petition may not be maintainable as there is no averments in the writ application that the appeal has been preferred by the company through one of its principal officer nor there any mention that the Board of Director Authorized Shri Murali Dhar Sinha, Head of the Department (F & A) of the present writ petition on its

behalf. We have also heard learned Senior Advocate Shri Jagannath Patnaik on this account.

20. In order to consider the case, we have to take note of various provisions of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") as well as the Companies Act, 2013. Order 6, Rule-14 of the Code provides pleading to be signed by party which is quoted below:

> "Every pleading shall be signed by the party and his pleader (if any):
>
> Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf."

Order 29, Rule-(1) of the Code provides for subscription and verification of pleading on behalf of a Company which is quoted below:

> "In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case."

Section 179 of the Companies Act, 2013 provides for the powers of Board which quoted as below:

> " (1) The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:
>
> Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:
>
> Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting".
>
> (2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.
>
> (3) The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—

(a) to make calls on shareholders in respect of money unpaid on their shares;

(b) to authorise buy-back of securities under Section 68;

(c) to issue securities, including debentures, whether in or outside India;

(d) to borrow monies;

(e) to invest the funds of the company;

(f) to grant loans or give guarantee or provide security in respect of loans;

(g) to approve financial statement and the Board's report;

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

(j) to take over a company or acquire a controlling or substantial stake in another company;

(k) any other matter which may be prescribed:

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify:

Provided further that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

Explanation I.—Nothing in clause (d) shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.

Explanation II.—In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (d) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(4) Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section."

21. In the case of **M/s. Nibro Limited –vrs.- National Insurance Co. Ltd**.: reported in AIR 1991 DELHI 25; it has been held:

> "Order 29, Rule 1 of the C.P.C. does not authorize persons mentioned therein to institute suits on behalf of the Corporation. It only authorizes them to sign and verify the pleadings on behalf of the corporation. It is well settled that under Section 291 of the Companies Act except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting- in all other cases the Board of Directors are entitled to exercise all its powers. Individual directors have such powers only as are vested in them by the Memorandum and Articles.
>
> Thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of Directors only by passing a resolution in that regard.
>
> The question of authority to institute a suit on behalf of a company is not a technical matter. It has far reaching effects. xx xx xx xx xx xx xx. The authorization, in the case of a company can be given only after a decision to institute a suit is taken by the Board of Directors may in turn authorize a particular director, principal officer or the secretary to institute a suit."

In the case of **United Bank of India –vrs.- Naresh Kumar and others**: reported in AIR 1997 SC 3, dealing with the similar question with respect to a suit filed by a public sector bank, the Hon'ble Supreme Court has held as follows:

> "In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.
>
> It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by against a corporation the Secretary or any Director or other Principal officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a

> person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and de hors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of it's officers a Corporation can ratify the said action of it's officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer."

In a matter arising out of an order of this Court, the Hon'ble Supreme Court in the case of **EIMCO ELECON(I) Ltd. –vrs.- Mahanadi Coal Fields Ltd. & Ors.** (in Special Leave to Appeal (Civil) No.21619 of 2010) considering the merit of such submissions, passed an order on 16.07.2020 as follows:

> "This Special Leave Petition has been filed against an order dated 16th July, 2010, passed by the Orissa High Court, in Writ Petition (C) No.2334 of 2010, dismissing the petitioner's writ petition on the technical ground that the Sales Manager, Debarshi Mitra, was not competent to represent the Company. The matter was not heard on merits.
>
> Having regard to the fact that the respondents are duly represented, without disturbing the order of the High Court, we grant leave to the Company to file a fresh writ petition on the same case of action, through its proper or duly authorized representative."

22. Hence, in certain situation in public interest a strict adherence to the Rules of filing of proceeding, a suit or a writ petition can be relaxed, especially when the public interest is involved.

23. Learned counsel for the petitioner relied upon a judgment of the Hon'ble Supreme Court passed in the case of **Promotors and Builders Association of Pune –vrs.- State of Maharashtra and Others**: (2015) 12 SCC 736 and a reported judgment of this Court passed in the case of **Nalini Kumar Das –vrs.- State of Orissa and Ors**.: AIR 2006 Orissa 154 and argued that there is no provision under the Mines and Minerals

(Development and Regulation) Act, 1857 and Orissa Minor Minerals Concession Rules, 1990 to levy penalty on a lessee for removal and extracting earth and other minerals from the land in question for its own use.

24. Relying on the case of **State of Orissa and others -vrs.- Union of India and another**: reported in (2001) 1 SCC 429, learned counsel for the State argued that operation being quarrying operation by the petitioners Company, the same would be covered under Rule 2(o) of the Orissa Minor Minerals Concession Rules, 1990 and it would be a bona fide domestic consumption and hence, it will be liable for royalty.

25. In view of the judgment rendered in the reported case of ***State of Orissa & Ors., vs, Union of India*** (supra), we are of the opinion that this is a case, whether the case of the petitioners being a lessee under the IDCO falls within the ambit and scope of person / corporation is liable to pay royalty and penalty. In view of the judgment passed in the aforesaid case, view taken by this Court in ***Nalini Kumar Das vs. State of Orissa & Ors*** (supra) can be held to be in proper proposition of law. If the Railways, who become the owner of the property, is held liable to pay royalty under the Orissa Minor Minerals Concession Rules, 2004, we cannot come to the conclusion that a lessee of the original owner shall not be liable to pay royalty and penalty. Hence, contentions raised by the learned counsel for the petitioners are also not tenable.

26. It is argued by the learned Senior Counsel for the petitioners Company that the order passed by Tahasildar, Banarpal hits by non-compliance of the principle of natural justice. He relied upon the reported case of ***Sarguja Transport Service vs. State Transport Appellate Tribunal***, AIR 1987 SC 88 (…1987 SCR (1) 200). This reported judgment speaks about the principles of *invito beneficium non datur* which means the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right would loose it. The said ratio has no application to the present case. In this case, there is no violation of principle of natural justice, as we are of the opinion that the Tahasildar, Banarpal-opposite party no.3 issued a notice to the petitioners Company to pay royalty and penalty and to show-cause. If the petitioners Company has any issue, it could have raised before the Tahasildar, Banarpal. However, they have not filed any show-cause and have come to the Court directly. The principle of natural justice is not violated in this case, as the petitioner had option to file

show-cause before the Tahasildar, Banarpal, *inter-alia,* raising all such issues, law and fact regarding their non-payment of royalty and penalty. So, we are of the opinion that there is no violation of the principle of natural justice.

27. Another aspect of the case is that a notice was issued to the Executive Director of the petitioners Company on 16.2.2009. The reply was given by the petitioners Company on 25.2.2009 and after considering the same, the Asst. Collector-In-Charge-Cum-Tahasildar, Banarpal has passed the order vide Annexure-4 on 03.03.2009. The lease agreement has also been entered into on 30.07.2007. It is also apparent from the records that the notice dated 16.2.2009 has been filed by the petitioners Company, wherein show-cause was called from the petitioners Company. Thus, in view of the aforesaid fact, the Orissa Minor Minerals Concession Rules, 2004 will be applicable to the present case. Rule-68 of the said Rules provides for penalties. Sub-rule (4) of Rule 68 of the said Rules provides for recovery of rent, royalty or tax from such person the mineral so raised. The Orissa Minor Minerals Concession Rules, 2004 recognizes two types of mineral leases i.e. (i) mining lease and (ii) quarry lease. It is argued on behalf of the petitioners Company that in this case, the Orissa Industrial Infrastructure Development Corporation, IDCO Towers, Janpath, Bhubaneswar has made an agreement with the petitioners Company for grant of lease comprising of Ac.346.47 of land for establishment of 6.00 MTPA Integrated Steel Plant and 900 MW Captive Power Plant Project. Hence, it is argued that this is not a lease which is leviable with royalty for extraction of minor minerals. The lesser is required to take possession of property on "as it is" condition and no further demand for any development such as earth filling raising and leveling etc. shall be entertained. Any other improvement or development is purely the responsibility of the lessee. Clause 14 of the lease agreement, (a Xerox copy of the same has been filed), relied upon by the Petitioners Company under Annexure-1 to the writ petition provides that the lessor's reserved right will be waived including the minor minerals or if any area covered by the lease and the lessee will have the surface rights over the land. Thus, if the petitioners Company uses minor minerals in any way, it is violation of the conditions of lease agreement.

28. We are unable to accept the contentions of Mr. Sanjit Mohanty, learned Senior Counsel for the petitioners Company that since the petitioners Company is the lessee of the land, there being no provision for levying

royalty on a lessee, this writ petition should be allowed. However, we are of the opinion that even if a lessee of a quarry lease or mining lease is liable to pay royalty, even for minor minerals, then the land occupier, being a lessee under a lease agreement either with the Government of Odisha or any of its corporation, where the lessor has reserved the right to the minerals including minor minerals, then such use of minor for the purpose of the developing the land and for labeling the land, is also liable to pay royalty and in default to pay penalty.

Hence, we do not see any reason to allow the writ application. The writ petition is dismissed being devoid of merit.

Interim order passed earlier stands vacated.

There shall be no orders as to costs.

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

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2021 (I) ILR - CUT- 330

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

CRLLP NO.103 OF 2015

STATE OF ORISSA ……..Appellant

.V.

URMILA NAYAK & ORS. ……...Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 (4) – Application seeking leave to appeal by State against an order of acquittal – Offence of murder – Scope and ambit for grant of leave – Principles to be followed – Indicated.

"While considering the desirability or otherwise of granting leave to appeal against acquittal, the appellate Court, at the first instance, is required to, prima facie, be satisfied about the existence of conditions that are required for

overturning a judgment of acquittal to one of conviction While deciding a matter regarding grant of leave to appeal against acquittal, the Court must be satisfied, prima facie, that at the final hearing of the appeal 'very substantial and compelling reasons' can be shown, on the basis of which it will be most reasonable to overturn a judgment of acquittal. Only then the appellate court should grant the leave to appeal against acquittal." (Paras 6 & 7)

Case Laws Relied on and Referred to :-

1. (2008) 10 SCC 450 : Ghurey Lal Vs. State of U.P.
2. AIR 1934 Privy Council page 230 : Sheo Swarup Vs. King Emperor.
3. AIR 1963 SC 200 : M.G. Agrawal Vs. State of Maharashtra.

For the Appellant : Addl. Standing Counsel
For the Respondents: M/s.Basanta Ku.Das & Ors.

ORDER Date of Order : 16.12.2020

S.K. MISHRA, J.

This is an application under Section 378 (4) of the Code of Criminal Procedure, 1973, hereinafter referred as 'the Code', for brevity, for grant of leave to appeal against the acquittal rendered by the learned Addl. Sessions Judge, Balasore in S.T. Case No.143/369 of 2013-2009 arising out of C.T. Case No.822 of 2009 of the court of learned S.D.J.M., Balasore corresponding to Singla P.S. Case No.72/2009. The judgment was delivered on 26.11.2014.

2. The learned Addl. Standing Counsel for the State argued that the learned 2nd Addl. Sessions Judge committed error of record in not holding that the case of the prosecution has been proved beyond all reasonable doubts. The learned Addl. Standing Counsel also argued on the different aspects of appreciation of evidence by the learned Sessions Judge and submitted that this is a case where leave to appeal against acquittal should be granted.

3. On the other hand, Mr. Basanta Kumar Das, learned counsel, on behalf of respondents nos.1 and 2 submits that the considerations that guide the appellate court in an appeal against acquittal are not the same as the considerations that guide the judicial course in case of appeal against conviction. It is the submission of the learned counsel for the respondents that this case does not fit within the parameters that the Court should look into in a case of appeal against acquittal, hence he urges the Court to dismiss the leave application.

4. At the outset, we take note of the reported case of ***Ghurey Lal Vs. State of U.P***.; (2008) 10 SCC 450, wherein the Hon'ble Supreme Court has taken into consideration the very earliest case of appeal against acquittal in the reported case of ***Sheo Swarup V. King Emperor***; AIR 1934 Privy Council page 230. The scope and ambit of the appellate court in dealing with an appeal against acquittal has been elucidated by Lord Russel. Writing the judgment, Lord Russel has observed as follows:-

> "..the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witness.."

5. In the reported case of ***Ghurey Lal Vs. State of U.P***.(supra), the constitution Bench Judgment rendered by the Hon'ble Supreme Court in the case of ***M.G. Agrawal V. State of Maharashtra***; AIR 1963 SC 200 was taken into consideration. In that case, the Hon'ble Supreme Court has laid down the following principles. We find it appropriate to quote the same;

> "There is no doubt that the power conferred by clause (a) which deals with an appeal against an order of acquittal is as wide as the power conferred by clause (b) which deals with an appeal against an order of conviction, and so, it is obvious that the High Court's powers in dealing with criminal appeals are equally wide whether the appeal in question is one against acquittal or against conviction. That is one aspect of the question. The other aspect of the question centers round the approach which the High Court adopts in dealing with appeals against orders of acquittal. In dealing with such appeals, the High Court naturally bears in mind the presumption of innocence in favour of an accused persons and cannot lose sight of the fact that the said presumption is strengthened by the order of acquittal passed in his favour by the trial Court and so, the fact that the accused person is entitled for the benefit of a reasonable doubt will always be present in the mind of the High Court when it deals with the merits of the case. As an appellate court the High Court is generally slow in disturbing the finding of fact recorded by the trial Court, particularly when the said finding is based on an appreciation of oral evidence because the trial Court has the advantage of watching the demeanour of the witnesses who have given evidence. Thus, though the powers of the High Court in dealing with an appeal against acquittal are as wide as those which it has in dealing with an appeal against conviction, in dealing with the former class of appeals, its approach is governed by the overriding consideration flowing from the presumption of innocence….

> The test suggested by the expression "substantial and compelling reasons" should not be construed as a formula which has to be rigidly applied in every case, and so, it is not necessary that before reversing a judgment of acquittal, the High Court must necessarily characterize the findings recorded therein as perverse.
>
> The question which the Supreme Court has to ask itself, in appeals against conviction by the High Court in such a case, is whether on the material produced by the prosecution, the High Court was justified in reaching the conclusion that the prosecution case against the appellants had been proved beyond a reasonable doubt, and that the contrary view taken by the trial court was erroneous. In answering this question, the Supreme Court would, no doubt, consider the salient and broad features of the evidence in order to appreciate the grievance made by the appellants against the conclusions of the High Court."

6. After taking into consideration the aforesaid two cases and several other authoritative pronouncements made by the Hon'ble Supreme Court, the Division Bench of the Hon'ble Supreme Court in the case of ***Ghurey Lal Vs. State of U.P.***, (supra) has summarized the principles that emerged from the referred cases. They are:-

> "(1) The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.
>
> (2) The accused is presumed innocent until proven guilty.
>
> The accused possessed his presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.
>
> (3) Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.
>
> In the light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:
>
> (1) The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.
>
> A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

(2) The Appellate Court must always give proper weight and consideration to the findings of the trial court.

(3) If two reasonable views can be reached, one that leads to acquittal, the other to conviction-the High courts/appellate courts must rule in favour of the accused."

7. No doubt the judgment rendered by the Hon'ble Supreme Court in ***Ghurey Lal Vs. State of U.P***., (supra)'s case relates to final judgment of the appeal against acquittal, but we are of the opinion that those Considerations also should weigh in the mind of the Court while granting the leave to file appeal against acquittal. However, while considering the desirability or otherwise of granting leave to appeal against acquittal, the appellate Court, at the first instance, is required to, *prima facie,* be satisfied about the existence of conditions that are required for overturning a judgment of acquittal to one of conviction While deciding a matter regarding grant of leave to appeal against acquittal, the Court must be satisfied, *prima facie*, that at the final hearing of the appeal 'very substantial and compelling reasons' can be shown, on the basis of which it will be most reasonable to overturn a judgment of acquittal. Only then the appellate court should grant the leave to appeal against acquittal.

8. In this case, we carefully examined the judgment rendered by the learned 2nd Addl. Sessions Judge. He has enumerated the following circumstances, in addition to the homicidal nature of death of the deceased, to have been relied upon by the prosecution to prove its case;

(i) There was inimical term between the accused Urmila Nayak and the family members of P.W.7 Akhaya Kumar Nayak and as such the accused persons had a motive to kill the deceased Sonu,

(ii) The accused Urmila Nayak had threatened P.W.7 Akhaya Kumar Nayak and his wife P.W.12 Binati Nayak to wipe out their entire family,

(iii) At about 4 P.M. of the occurrence day i.e. at about 4 P.M. of 24.4.2009 the accused Urmila Nayak had offered some palm kernel to the deceased Sonu and had asked him to come to her house in the evening hour,

(iv) Again in the evening hour of that day i.e. in the evening hour of 24.4.2009 the deceased Sonu went to the house of one of his friends P.W.10 Rudranarayan Das, called him to go to the house of the accused Urmila Nayak to bring palm kernel further and without waiting for him proceeded to the house of the accused Urmila Nayak and found missing thereafter; and

(v) The conduct of the accused persons after the death of the deceased Sonu.

9. The learned 2nd Sessions Judge has come to the conclusion that the circumstance no.1 i.e. prior enmity between the opposite parties and the father of the deceased appears to be substantiated beyond reasonable doubt by the prosecution.

As far as the second circumstance is concerned, the learned 2nd Addl. Sessions Judge has not given any specific finding, but the nature of the language used by him appears that he had accepted that there was some kind of inimical relationship between the two opposite parties-Urmila Nayak and Ajaya Nayak.

As far as the 3rd circumstance is concerned, the circumstance has been accepted by the learned 2nd Addl. Sessions Judge to be established beyond reasonable doubt by the prosecution.

As far as the 4th circumstance is concerned, the same has also been accepted by the learned 2nd Addl. Sessions Judge to have been proved by the prosecution. The prosecution has established that the conduct the opposite parties-accused in not going to see the dead body of the deceased can be considered as incriminating circumstance against them and that the same has been clearly proved by the prosecution.

10. The learned 2nd Addl. Sessions Judge after taking into consideration all the circumstances established by the prosecution at the stage of trial came

to the conclusion that all these circumstances highlighted and proved by the prosecution do not form a complete chain of circumstances which ruled out the possibility of any other persons being the assailant or unerringly points to the accused persons as being guilty of the murder of the deceased Sonu. The learned 2nd Addl. Sessions Judge further held that at best the same may raise a suspicion that in all probabilities the accused persons are guilty of the offence. But such suspicion cannot take the place of legal proof and the benefit of doubt will definitely go to the accused persons.

11. Thus, it is apparent from the record that there appears to be no perversion in the recording of the findings. So it cannot be said that the conclusion with regard to the facts by the learned 2nd Addl. Sessions Judge is palpably wrong. It cannot also be said that the trial court's decision was based on erroneous view of the law. We are not persuaded to come to the conclusion that the trial court's judgment is likely to result in "grave miscarriage of justice."

The entire approach of the trial court in dealing with the evidence was not patently illegal. The judgment is not manifestly unjust and unreasonable and the trial court has not ignored the evidence or misread the material evidence or have ignored the material documents available in this case. It may be noted that there is no dying declaration or report of the ballistic expert, in this case. Moreover, the appellate court must always give proper weight and consideration to the findings of the trial court. If two reasonable views are possible, one that leads to acquittal and the other to conviction, the appellate court must rule in favour of the accused.

12. Keeping in view the aforesaid considerations, we are of the considered opinion that there is no *prima facie,* 'substantial and compelling reasons', to come to the conclusion that the mater should be heard, the impugned judgment should be re-examined or examined by the appellate court in appeal against acquittal. In that view of the matter, we are of the opinion that there is no merit in the application for leave to appeal against acquittal.

Hence, the leave is not granted and the CRLLP is dismissed.

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2021 (I) ILR - CUT- 337

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

DSREF NO.1 OF 2019, CRLA NO. 595 OF 2019 AND JCRLA NO. 54 OF 2019.

DSREF No.1 of 2019

STATE OF ODISHA ……...Complainant

.V.

SHRINIBASH @ ANAMA DEHURY …….Accused

CRLA No.595 of 2019
SHRINIBASH @ ANAMA DEHURY ……Appellant

.V.

STATE OF ODISHA ……Respondent.

JCRLA No.54 of 2019
SHRINIBASH @ ANAMA DEHURY …….Appellant

.V.

STATE OF ODISHA …….Respondent.

(A) THE INDIAN EVIDENCE ACT, 1872 – Section 65 and 65B – Scope of the law relating to production of certificate under Section 65B of the Indian Evidence Act in respect to an electronic record – Held, in a case where the electronic record in terms of technical surveillance has been relied upon by the learned trial judge, the provisions of Section 65B of the Indian Evidence Act has to be complied with even if there is a document to that effect – In this case, there is no documentary evidence – So, oral testimony of the I.O. is a piece of secondary evidence based on no document and no certificate – Therefore, in our considered view, that is not admissible in evidence. (Para 10)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 366 – Death reference – Conviction Sections 302, 376(3) and 201 of the Indian Penal Code, 1860 read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 – Glaring defects in conducting the trial – Appreciation of evidence not in proper manner – Conviction set aside – Matter remanded for re-trial from the stage of recording of accused statement.

> *"In that view of the matter, we find it appropriate to set aside the impugned judgment of conviction and order of sentence and to remit the matter back to the court of original jurisdiction for re-trial from the stage of recording of statement of the accused by putting such additional questions to the accused under Section 313 of the Code as deemed just and proper*

by the Presiding Judge, in view of the observations made by this Court. Upon remand, it shall also be appropriate on the part of the learned trial judge to give adequate opportunity of hearing to the condemned prisoner on the question of sentence, in the light of observations given by us in the preceding paragraphs."

DSREF No.1 of 2019
For Complainant : Mr. B.P. Pradhan & J. Katikia, Addl. Govt Adv.
For Accused : M/s. Amit Kumar Nath, S.K. Rout, H.P. Mohanty & P.K. Sahoo.

CRLA No.595 of 2019
For Appellant : Mr. B.K. Ragada, L.N. Patel, N.K. Das and H.K. Muduli.
For Respondent : Mr. B.P. Pradhan & J.Katikia, Addl. Govt. Adv.

JCRLA No.54 of 2019
For Appellant : Mr. A.K. Nath
For Respondent : Mr. B.P. Pradhan & J. Katikia, Addl. Govt. Adv.

Case Laws Relied on and Referred to :-

1. (2011) 11 SCC 754 : Pakala Narayana Swami (supra), Sk.Ysua. .Vs. State of West Bengal.
2. (2011) 3 SCC 306 : Wakker .Vs. State of U.P.
3. AIR 1954 SC 15 : Zwinglee Ariel .Vs. State of Madhya Pradesh.
4. 2008 Cri.L.J. 1276 : State of Assam .Vs. Anupam Das.
5. (1994) 2 SCC 467 : Bheru Singh .Vs. State of Rajasthan.
6. AIR 2013 SC 3817 : Sujit Biswas .Vs. State of Assam.
7. (2010) 9 SCC 608 : Dharam Pal Singh .Vs. State of Punjab.
8. (2004) 7 SCC 502 : Naval Kishore Singh .Vs. State of Bihar.
9. AIR 1947 PC 67 : Pulukuri Kottaya and Ors .Vs. Emperor.
10. (1989) 3 SCC 5 : Allauddin Mian and Ors .Vs. Sharif Mian and Anr.
11. (1980) 2 SCC 684 : Bachan Singh .Vs. State of Punjab.
12. (1976) 4 SCC 190 : Santa Singh .Vs. State of Punjab.
13. (1977) 3 SCC 68 : Dagdu and others .Vs. State of Maharashtra.
14. (2017) 3 SCC 717 : Mukesh .Vs. State (NCT of Delhi).
15. (2019) 12 SCC 438 : Chhannu Lal Verma .Vs. State of Chhattisgarh.
16. (2009) 6 SCC 498 : Santosh Kumar Satishbhushan Bariyar .Vs. State of Maharashtra.
17. (2019) 12 SCC 460 : Rajendra Prahladrao Wasnik .Vs. State of Maharashtra.
18. (2019) 7 SCC 1 : Accused 'X' .Vs. State of Maharashtra.
19. (1991) 4 SCC 341 : Malkiat Singh .Vs. State of Punjab.
20. (1989) 3 SCC 33 : Anguswamy .Vs. State of T.N.

JUDGMENT Date of Hearing: 21.12.2020 : Date of Judgment: 23.12.2020

S. K. MISHRA, J.

The death reference under Section 366 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for brevity) was taken up for hearing on different dates. The death reference was submitted by the learned Additional Sessions Judge-cum-Special Judge (P), Angul in Special (POCSO) Case No.08 of 2019 arising out of Angul P.S. Case No.52 dated 20.01.2019 under Sections 302, 376(3) and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the Act" for brevity). The reference made by the learned Additional Sessions Judge-cum-Special Judge (P), Angul has been registered as DSREF No.1 of 2019 and the criminal appeal preferred by the appellant by engaging private counsel has been registered as CRLA No.595 of 2019. A separate jail criminal appeal has been preferred bearing JCRLA No.54 of 2019.

By virtue of this judgment, we proposed to dispose of all the aforesaid three cases.

02. Learned Additional Sessions Judge-cum-Special Judge (P), Angul as per the judgment dated 26.07.2019 passed in Special (POCSO) Case No.08 of 2019 convicted the appellant, namely, Shrinibash @ Anama Dehury under Sections 302, 376(3) and 201 of the Penal Code read with Section 6 of the Act. He proceeded to sentence the convict/ appellant with capital punishment for the offence under Section 302 of the Penal Code; and to undergo rigorous imprisonment for life i.e. the remaining period of the natural life and to pay a fine of Rs.10,000/- (rupees ten thousand), and in default to suffer further rigorous imprisonment for one year for the offence under Section 376 (3) of the Penal Code; and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- (rupees five thousand), and in default to undergo further rigorous imprisonment for six months for the offence under Section 201 of the I.P.C.; and also to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (rupees ten thousand), and in default to suffer further rigorous imprisonment for one year for the offence under Section 6 of the Act. Learned Additional Sessions Judge-cum-Special Judge (P), Angul, further directed the sentences of substantive imprisonment to run concurrently and submitted the records to this Court under Section 366 of the Code.

03. Bereft of unnecessary details, the prosecution case is as follows:

That on 20.01.2019 on Sunday at about 3.00 P.M the younger daughter of Saroj Moharana namely Geeta (assumed name), aged about 13 years, of village Kangula, had gone to her father's grocery shop situated at Majhi Sahi by taking food for her father. After sometimes one Jaladhara Moharana of village Kangula came to their village chhak and stated that he has seen Tiffin, Chappal, Stone, bag and some blood patches lying on the way. Hearing the above, some of the villagers went through that road to enquire about the fact. At that time, the wife of Saroj Moharana was returning by that road to her house. She also heard about the matter and then reached her house and asked her mother-in-law about her younger daughter (victim-deceased). Then the mother of Saroj Moharana told that she has taken Tiffin for her father. Hearing this, suspicion arose in the mind of the wife of Saroj Moharana, for which she along with some villagers went to the spot where Jaladhar Moharana had seen the blood stains, tiffin, chappal, bag and stone. After arriving at the spot, they could not find the above mentioned articles except blood stains. When the news spread in the village, some other villagers ran to the spot.

The informant Saroj Mohararana also reached at the spot. All of them started searching for the daughter of the informant. As per the version of Jaladhara Moharana, he had seen that someone has kept a motorcycle near the 'Jora'. A winter jacket and a gamuchha was kept on the motorcycle. While Saroj Moharana and the villagers were searching near the spot, the condemned prisoner Anama @ Shrinibash Dehury, of their village, was taking a bath in the 'Jora' and Jaladhara Moharana raised hulla on seeing Shrinibash Dehury, but no one was around to hear the loud voice of Jaladhara Moharana. At that time Anama Dehury went away through that road at a high speed on his motorcycle. When the villagers searched, they got the dead body of the deceased and at first Deba Katar discovered the dead body of the deceased, the daughter of the complainant Saroj Moharana. Then one Jitendra Moharana reached there and thereafter Saroj Moharana saw the dead body of his daughter and covered her naked dead body with the gamuchha of Jitendra Moharana.

At that time the news spread everywhere and the villagers of Kangula arrived at the spot. When Jaladhara Moharana described about Anama Dehury before others, Mihir Moharana and Dillip Moharana immediately

rushed to the house of Anama Dehury and found the winter Jacket and gamuchha of Anama hanging in a wet condition, on the thatched roof of his house, which was worn by him and they also noticed grass and mud on the jacket and gamuchha of Anama and then took photograph of the same. When they searched for Anama, they got information from the house of Anama that he has gone away by his motorcycle and some of the young men of village Kangula have seen Anama going by his motorcycle on the road with a bag.

Hearing the above, the informant and his family members harboured strong belief that Anama Dehury has committed murder of their daughter after committing rape on her. Hence, Saroja Moharana lodged a written report at the Police Station. Basing on the report of the informant, Angul P.S Case No. 52 dated 20.01.2019 was registered under Sections 376(3), 302 and 201 of the Penal Code read with Section 6 of the Act by the Inspector-In-Charge (hereinafter referred to as "the I.O." for brevity). He took up investigation of this case.

03.1. During course of investigation the I.O. examined the complainant and other witnesses, issued command certificate to the Havildar Bijaya Kumar Das and OAPF-99 Rebati Kissan to assist him during investigation and to guard the dead body of the deceased and then sent intimation to the Superintendent of Police, Angul with a request to direct the Reserve Inspector to make arrangement for illuminating the spot for conducting inquest over the dead body and he also sent message to D.S.P, Angul for deputation of detective dog squad and Scientific Team to remain present at the time of spot visit. The I.I.C- cum- I.O also sent requisition to the Sub-Collector, Angul for deputation of one Executive Magistrate to remain present at the spot during inquest.

He then, proceeded to the spot and made arrangements for illumination by two numbers of Aska Lights and sufficient numbers of torch lights being brought by the staff deputed by the Reserve Inspector. At that time, Sri Bichitrananda Naik, Tahasildar-cum- Executive Magistrate, Angul arrived at the spot and in his presence and witnesses, the I.O. conducted inquest over the dead body of the deceased and photographs of the deceased were taken at the spot from different angles and then the I.O. sent the dead body to D.H.H, Angul through relatives of the deceased and escort party for post-mortem.

The post-mortem examination could not be conducted that night as it was past mid night. So the I.O. directed the escort party to guard the dead body in the mortuary. The I.O. then sent requisition for C.D.R. of the mobile number of the accused bearing No.9938979661 for his location through Cyber Cell, Angul and learnt that the location of the mobile of the accused was found at different places from time to time and lastly the mobile was switched off. Thereafter, the I.O. verified the house of the accused and found his wearing apparels having some grass particles hanging outside of his house and then seized one red-white check gamuchha with grass and grass seeds along with one brown winter jacket having some grass particles in presence of the witnesses and the mother of the accused.

On 21.01.2019 the scientific team visited the spot in presence of the I.O. and he seized the physical clue materials collected from the spot by the Scientific Officer, D.F.S.L, Dhenkanal. The I.O. received the wearing apparels of the deceased and biological objects collected by the team of doctors during autopsy of the deceased, seized one white-violet check gamuchha, one white-sky colour bra(semij), one white-black-yellow colour printed shalwar of the deceased, one white-red colour plastic bangle, one black thread, one plastic container containing 16 numbers of small vials said to have contained gauge soaked in blood of wound area, three blood samples, two numbers of vaginal swabs, two numbers of anal swabs, two numbers of vulvae swab, one oral swab, one urethral swab, one scalp hair, two numbers of nail clippings, one pubic hair of the deceased and prepared seizure list.

On 22.01.2019 on getting reliable information regarding the location of the accused, the I.O. examined one Mantu @ Rudramani Dehury of Khandualamunda, cousin of Anama Dehury after technical surveillance regarding his location on the date of occurrence and came to know that on 20.01.2019 the accused had visited village Khandualamunda and kept his Bajaj Platina Motorcycle and R.C. Book of the bike wth one Chittaranjan Dehury and with his assistance fled away from the locality by boarding a Truck at Ballahara Chhaka, Talcher. The I.O. also examined the Auto driver Aditya Behera, who had dropped the accused in his Auto at Ballahara Chhaka and he examined Chittaranjan Dehury and seized the Bajaj Platina Motorcycle along with the R.C smart card of the vehicle of Anama, bearing Regn., No.OD-19-8017 from the house of Chittaranjan Dehury in presence of the witnesses. The I.O. then contacted Cyber Cell, Angul and learnt from technical surveillance that the location of the accused is at New Market area,

Kolkata and hence, he prayed to the Deputy Inspector General of Police Angul through the Superintendent of Police, Angul to proceed to Kolkata. He went to Kolkata and apprehended the accused with the help of Kolkata police in New Market area, Kolkata and took the accused to his custody. He requested the local police to remain present during his examination, but nobody agreed to become witnesses. So the I.O. returned to Angul with the accused and reached at Angul P.S and on interrogation the accused confessed his guilt. So, he arrested the accused and took personal search of the accused and seized one black colour Samsung Duos mobile without SIM card from the possession of the accused in presence of the witnesses.

He called two independent witnesses of village Kangula namely, Chandan Moharana and Ajit @ Aditya Kumar Sahu, to remain present at the time of recording of confessional statement of the accused. The I.O also prayed to the Sub-Collector, Angul to depute an Executive Magistrate to remain present at the time of recording of confessional statement of the accused and leading to discovery of weapon of offence and other physical clue materials. Then the I.O recorded the confessional statement of the accused on 24.01.2019 in presence of the independent witnesses and Executive Magistrate.

Thereafter, the Scientific team arrived at the Police Station and the accused confessed his guilt and led the police party, Executive Magistrate, independent witnesses and Scientific team to the place of occurrence and the I.O seized a blood stained stone of weight 1Kg and 60 grams used as weapon of offence, sample earth, blood stained earth from the spot and one red-black and white colour half baniyan with blood stains from the possession of the accused.

They then proceeded to Lingara Nala where the accused had thrown the wearing apparels of the deceased and requested some local boys namely, Sudam Behera, Subharanta Moharana and Bishnu Nahak to recover the wearing apparels of the deceased and the above persons in presence of the witnesses dived into the water and found one brown colour chappal with violet tape paragon made, Size 7(left side), duly identified by the accused belonging to the deceased, one white-black-yellow colour printed shawler pant of the deceased, one black colour panty of the deceased being identified by the accused. The I.O seized the same in presence of the accused, the witnesses and the Executive Magistrate. They signed the seizure list.

As per the version of the accused he led the I.O and the other witnesses and the Executive Magistrate to Balaramprasad, where the accused had thrown his wearing apparels for causing disappearance of the evidence. On arrival of the witnesses, the I.O. and the Executive Magistrate at the spot the accused gave recovery of one ghee colour full shirt, having blood patches, one blue colour jean pant, with blood stains, a belt having waist size 28 inch and one maroon colour shawl. The I.O seized the same in presence of the witnesses and the accused and prepared the seizure list.

The I.O during investigation seized the Admission Register of Kangula Nodal U.P. School for the age proof of the deceased on production by the Headmaster and thereafter, sent the accused for medical examination with F.T.A Card issued from S.F.S.L, Rasulgarh, Bhubaneswar for D.N.A profiling and sent the biological objects of the accused to the S.F.S.L, Ragulgarh, Bhubaneswar. He sent a query to the medical officer regarding the weapon of offence. After receiving the chemical examination report from the S.F.S.L, Rasulgarh, Bhubaneswar, the C.D.R and S.D.R of SIM number-9938979661 from the Nodal Officer, Airtel, Bhubaneswar and on completion of investigation, submitted charge sheet against the accused under Sections 376(3), 302 and 201 of the Penal Code read with Section 6 of the Act.

03.2. In this case, cognizance of the offences under Sections 302, 376(3) and 201 of the Penal Code read with Section 6 of the Act was taken on 20.02.2019 and charges under the above sections were framed on 06.03.2019, as the accused denied the charges and claimed for trial.

04. In order to prove its case the prosecution has examined as many as 36 witnesses, out of 55 numbers of witnesses relied in the charge sheet. PW.18-Saroj Moharana is the father of the deceased and the informant in this case. PW.1-Jaladhara Moharana, PW.35-Mihir Moharana and P.W.36-Dillip Moharana had gone to the house of the accused to search for him, immediately after the occurrence. PW.2- Deba @ Debananda Katar had discovered the dead body of the deceased at first. PW.3- Ajit @ Aditya Kumar Sahu, PW.4-Chandan Kumar Moharana and PW.32-Sisira Kumar Moharana are witnesses to the inquest.

PW.5-Bichitrananda Naik, Tahasildar, Angul, was performing the duty of Executive Magistrate at the time of inquest. PW.6-Patitapabana Debta, the Assistant Collector of the office of Sub-Collector, Angul, was

present as Executive Magistrate at the time of recording of confessional statement of the accused. PW.7-Debaraj Sahu and PW.8-Dillip Kumar Sahu are the police constables and the seizure witnesses.

PW.9-Subhadra Moharana has seen the victim, last, going in front of her house before her death. PW.10- Anita Sahu @ Manika has seen the accused hurriedly going in front of her by his motorcycle immediately after the occurrence and she had a brief conversation with the accused. PW.11-Dr. Kalpana Jena and PW.12-Dr. Manas Ranjan Biswal, (the medical officers of D.H.H, Angul) have jointly conducted autopsy on the dead body of the deceased. PW.13-Shyamamani Sahu, the Scientific Officer, D.F.S.L, Dhenkanal has visited the spot and collected the samples from the spot. PW.15- Jitendra Kumar Pradhan and PW.16-Aswinikanta Sahu, are the police constables of Angul P.S and the seizure witnesses.

PW.14-Pranati Moharana, is the mother of the deceased. PW.17-Sangita Moharana first noticed the incriminating materials such as Chappal, stone, bag and blood stain lying at the spot. PW.19-Sudam Behera, PW.20-Subhranta @ Sukuta Moharana and PW.21-Bishnu Nahaka are the witnesses, who had entered inside the jora water and had recovered one ladies chappal and other wearing apparels of the deceased in front of the witnesses and the accused and the accused had identified the articles to be of the deceased. PW.22-Jitendra Moharana, is another independent seizure witness and post occurrence witness. P.W.23-Dullabha Setha and PW.27-Khandi @ Mantu Bhukta, are the witnesses, who had joined the accused on the alleged date in a feast prior to the occurrence.

PW.24-Dr. Shyam Prakash Das, (medical officer, D.H.H., Angul), has examined the accused Anama Dehury. P.W.25-Giridhari Gadnaik, is the headmaster of Kangula Nodal U.P. School, from whom police seized the School Admission Register to ascertain the date of birth of the deceased. PW.26-Ajaya Kumar Sahu, (photographer of D.F.S.L, Dhenkanal), took still photographs and made video C.D. on the spot of occurrence during his visit to the spot with the Scientific Officer and the I.O. PW.28-Tapan Kumar Pradhan, (the Assistant Scientific Officer, D.F.S.L, Dhenkanal), collected the clue materials after the arrest of the accused and being led by him to different places.

PW.29-Chittaranjan Dehury, is the seizure witness, from whose house police seized the motorcycle of the accused. PW.30-Subala Mallik, is the independent witness to the seizure of motorcycle. PW.31-Hrudaya Kumar Das, is the Havildar of police, Angul, from whom the I.O has seized the biological samples of the accused. PW.33-Sakuntala Priyadarshani Sahu, is the R.I, who had visited the spot and prepared the trace map and PW.34-Ramesh Chandra Bisoi is the I.O of this case.

Additionally, the prosecution has relied upon 39 documents marked as Exts.1 to 39 and 15 material objects marked as M.Os.I to XV.

04.1. On the other hand, the defence did not lead any evidence either oral or documentary.

05. The learned Additional Sessions Judge-cum-Special Judge (P), Angul, while rendering the judgment impugned, was alive to the fact that there was no direct evidence in this case. The prosecution has solely relied upon the circumstances available on records. A careful examination of the impugned judgment delivered by the learned Additional Sessions Judge-cum-Special Judge (P), Angul reveals that the following circumstances, though such circumstances are not enumerated separately in the impugned judgement, are forthcoming in this case and have been accepted as established by the learned Additional Sessions Judge-cum-Special Judge (P), Angul,:

> (i). From the evidence of P.W.1-Jaladhara Moharana, it is established by the prosecution that he saw Anama Dehury was coming towards the bike after taking a bath at Lingara Jora; he was wearing a napkin (gamuchha) only and when he asked about the girl, the accused replied that someone had killed her and her dead body was lying under a Tamarind Tree and then he fled away from the spot by his motorcycle in a hurry;
>
> (ii). One Deba Katar found the dead body of the deceased in a naked and bleeding condition near a bush under a Tamarind Tree and called others to that place;
>
> (iii). P.W.17- Sangita Moharana, the daughter-in-law of P.W.1-Jaladhara Moharana was the first person who saw some blood patches, a stone, chappal, Tiffin box and a bag lying near the footpath way at Kaunsidhipa near the cremation ground while she was coming towards Mangala Sahi with her son;
>
> (iv). P.W.17- Sangita Moharana learnt from her mother-in-law that the deceased had gone to the shop of her grand-father along with the Tiffin box;
>
> (v). When P.W.17- Sangita Moharana returned to the spot, she could not find the chappal and the bag;

(vi). At that time, P.W.17- Sangita Moharana saw Anama Dehury was going through that way in his motorcycle by wearing a gamuchha and he had hung his jacket on the handle of his motorcycle;

(vii). P.W.17- Sangita Mohara also stated that she had seen the motorcycle of Anama Dehury near the Jora side at the time of her return from Majhi Sahi;

(viii). P.W.-Subhadra Moharana had seen the daughter of the informant was going by that way, carrying Tiffin box, to the shop of her grand-father situated at Majhi Sahi and after sometimes there was discussion amongst villagers that someone had committed rape and murder of the daughter of the informant and the dead body was thrown under the Tamarind Tree near Kaunsidhipa;

(ix). From the evidence of P.W.1-Jaladhara Moharana and P.W.10-Anita Sahu @ Manika, it is clear that they saw the accused Anama Dehury was coming from Kaunsidhipa side in his motorcycle wearing a napkin (gamuchha) by keeping a winter jacket on the handle of his motorcycle;

(ix)(a). When the accused was asked about the girl, he replied that the girl had been thrown near the bush under a Tamarind Tree at Kaunsidhipa and someone had committed rape and killed her and that she was struggling for her life;

(ix)(b). The accused also replied that as he had gone to attend the call of nature towards the spot, the people could have seen him and suspected him and then he proceeded towards his house on his motorcycle;

(x). From the evidence of the prosecution witnesses, it was held by the learned Additional Sessions Judge-cum-Special Judge (P), Angul that the presence of the accused Anama at the spot on the alleged date and time of the occurrence is well established;

(xi). It is established by the evidence of P.W.1- Jaladhara Moharana, P.W.35- Mihir Moharana and P.W.36- Dillip Moharana that immediately after the occurrence on hearing about the presence of the accused at the spot they went to his house, but they did not find him in his house. They saw the napkin and winter jacket hanging from the thatched roof of the room. The mother of the accused informed that he had gone outside for some urgent work for two to three days;

(xii). P.W.1- Jaladhara Moharana, P.W.35- Mihir Moharana and P.W.36- Dillip Moharana also saw that the jacket was stained with mud and grass;

(xii)(a). The Investigating Officer seized the winter jacket and the napkin on production by the mother of the accused after separating the grass and grass seeds;

(xiii). P.W.34, the Investigating Officer having examined one Mantu @ Rudramani Dehury of Khandualamunda, cousin brother of Anama Dehury and after technical surveillance regarding location at Khandualamunda on the date of occurrence, got the clue that on 20.01.2019 at night the accused had visited the aforesaid village and

kept his Bajaj Platina motorcycle and R.C. Book of the bike near one Chittaranjan Dehury and with his assistance he fled away from the locality by boarding a truck at Balahar Chhaka, Talcher;

(xiii)(a). P.W.34, the Investigating Officer further on examining the Auto driver, namely, Aditya Behera learnt that he had dropped the accused by his Auto-rickshaw at Balahar Chhaka on 20.01.2019 night;

(xiii)(b). P.W.34, the Investigating Officer, seized the Bajaj Platina Motorcycle without having any number plate along with the R.C. smart card of Bajaj Platina Motorcycle bearing Regd. No.OD-19-8017;

(xiii)(c). The Investing Officer learnt from the technical surveillance that the accused was moving near New Market area of Kolkata. Accordingly, he proceeded to Kolkata on 23.01.2019 and with the help of the local police apprehended the accused Anama Dehury at 11.00 P.M. in New Market area;

(xiv). Immediately after the occurrence, the accused fled away from the spot with an intention to leave the State;

(xv). The Investigating Officer recorded the discovery statement of the convict under Section 27 of the Indian Evidence Act, 1872 and discovered (i) a blood stained stone and blood patches and (ii) the chappal, black chadi, black-white yellow print shalwar;

(xvi). P.W.4-Chandan Kumar Moharana, P.Ws.5 and 6- the Executive Magistrates and P.W.3-Ajit @ Aditya Kumar Sahu stated about the voluntary confession of the guilt by the convict in their presence. The confessional statement has been marked as Ext.5;

(xvi)(a). The prosecution witnesses have identified the chappal, chadi and shalwar pant belonging to the deceased in the court which have been marked as M.O.-VII, M.O.-VIII and M.O.-IX;

(xvii). P.Ws.11 and 12 stated that there was 12 injuries on the dead body of the deceased including the injuries found in the genitalia and anus of the deceased;

(xvii)(a). P.Ws.11 and 12 further stated that haemorrhage and shock due to injuries to brain caused the death of the deceased and the time since death was within 24 to 36 hours of post-mortem examination;

(xvii)(b). P.Ws.11 and 12 also stated that the age of the deceased was 13 to 15 years as per the ossification test report and;

(xvii)(c). that the deceased sustained forceful sexual intercourse within 24 to 36 hours of post-mortem examination;

(xvii)(d). The medical officers opined that the seized weapon of offence i.e. blood stained stone seized at the instance of the condemned prisoner-appellant of weight 1.00 Kg. and 60 grams (round in shape) can cause death of human life;

(xvii)(d)(i). The injuries found on the body of the deceased as mentioned in the inquest and post-mortem report can be possible by the seized weapon;

(xvii)(d)(ii). Such injuries are sufficient to cause death of a person in ordinary course of nature;

(xviii). P.W.24- Dr. Shyamprakash Das examined the accused and found that the accused was capable of sexual intercourse and he sustained 13 abrasion on his body which could have been sustained within 72 hours to 96 hours prior to the time and date of examination. He has also stated that the injuries can be possible during tussle by two persons on hard and stony surface;

(xix). The chemical examination report and the D.N.A. profiling marked as Ext.39 reveals that the stain present in the exhibits marked as A, B, C, D, F, f-1, G, H, L, M, O, P, Q, R, S, T, T-9, T-10 and U-6 are of human origin;

(xix)(a). Those stain present on the exhibits marked as C, H, L, M, O, P and Q belong to 'B' group; and

(xix)(b). The D.N.A. profile report marked Ext.P (cut portion of the blood stained area of a white colour semiji of the deceased);

(xix)(b)(i). Ext.Q (cut portion of the blood stained area of a black and and yellow colour printed shalwar top of the deceased;

(xix)(b)(ii). Ext.S (cut portion of a black colour thread of the deceased);

(xix)(b)(iii). Ext.T-8 (scalp hair of the deceased containing blood);

(xix)(b)(iv). Ext.T-9 (nail clippings of the deceased containing blood);

(xix)(b)(v). Ext.T-10 (public hair of the deceased containing blood) are matching with each other as per Table-A of Ext.39;

(xx). The D.N.A. profile generated from Ext.H (cut portion of the blood stained area of a red, black and white colour half baniyan of the accused);

(xx)(a). Ext.L (cut portion of the blood stained area of a ghee and black colour full shirt of the accused);

(xx)(b). Ext.M (cut portion of the blood stained area of a blue colour jean pant of the accused);

(xx)(c). Ext.O (cut portion of the blood stained area of a while and violet colour check gamuchha) are matching with each other and also with the D.N.A. profile generated from Ext.T-8 (scalp hair of the deceased containing blood) as per Table-II and the D.N.A. profile generated from Ext.A (saline extract from the blood stained plant twig), Ext.B (bloodstained grass), Ext.C (bloodstained leaves) and Ext.G (bloodstained twigs) are matching with each other and also with Ext.T-8 (scalp hair

of the deceased containing blood) as per Table-III and D.N.A. profiles generated from Ext.F (saline extract from the stone on gauge cloth) is matching with the D.N.A. profiles generated from Ext.T-8 (bloodstained scalp hair of the deceased) as per Table-IV and the D.N.A. profiles generated from exhibits marked as Ext.T-8 (scalp hair of deceased containing blood) and Ext.V (sample blood of accused Srinibash Dehury on F.T.A. Card) are consistently available in the mixed D.N.A. profiles generated from the exhibit marked as Ext.D (cut portion of the bloodstained area of red, black and white colour gamuchha) as per Table-V.

06. The learned Additional Sessions Judge-cum-Special Judge (P), Angul taking into consideration the aforesaid circumstances which are decipherable from the judgment impugned came to the conclusion that the prosecution has proved its case beyond all reasonable doubt and, therefore, he proceeded to convict the condemned prisoner-appellant under Section 302, 376(3) and 201 of the Penal Code read with Section 6 of the Act and proceeded to pass the sentence of death and further sentences as described above.

07. Mr. B.P. Pradhan, learned Additional Government Advocate supporting the findings recorded by the learned Additional Sessions Judge-cum-Special Judge (P), Angul argued that substantial evidence as enumerated in the impugned judgment forms an unbroken chain of circumstances unerringly pointing at the guilt of the accused. Hence, he supported the sentences awarded in this case submitting that this case falls under the category of "rarest of rare case" where the alternative option is unquestionably foreclosed.

08. Learned counsel for the condemned prisoner, namely, Shrinibash @ Anama Dehury in the death reference and Mr. B.K. Ragada, learned counsel for the appellant appearing in the criminal appeal, on the other hand, criticised the impugned judgment on various legal as well as factual aspects.

09. However, keeping in view the materials available on records, the approach adopted by the learned Additional Sessions Judge-cum-Special Judge (P), Angul, we are of the opinion that three important aspects of the case can be taken into consideration for disposal of the aforesaid cases. Those are:

(i) Some inadmissible evidences have been taken into consideration by the learned Trial Judge.

(ii) The questions regarding the chemical examination and the D.N.A. profiling as available from Ext.39 have not been put to the accused while recording his statement under Section 313 of the Code; and

(iii) There is violation of principles of natural justice by not giving to the accused an opportunity of leading evidence and being heard on the question of sentence. On the date of delivery of the impugned judgment, the death sentence has been awarded.

10. Learned Additional Sessions Judge-cum-Special Judge (P), Angul has relied upon the testimony of P.W.34 who stated that on getting reliable information regarding the location of convict, he examined one Mantu @ Rudramani Dehury of Khandualmunda, cousin brother of Anama Dehury, after technical surveillance regarding his location at Khandualmunda on the date of occurrence and learnt that on 20.01.2019 at night the condemned prisoner had visited village Khandualmunda and kept his Bajaj Platina Motorcycle and R.C. Book of the bike with one Chittaranjan Dehury and with his assistance of the condemned prisoner fled away from the locality by boarding a truck at Balhar Chhak. The I.O. also examined the Auto Driver Aditya Behera who dropped the condemned prisoner by his Auto Rickshaw at Balhar Chhak on 20.01.2019 night. However, in this case, Mantu @ Rudramani Dehury and Auto Driver Aditya Behera have not been examined. Chittaranjan Dehury has been examined as P.W.29. A reference to the evidence of P.W.29- Chittaranjan Dehury reveals that on 20.01.2019 at about 9.00 P.M. while he was in his chicken shop, Anama Dehury- the condemned prisoner and this witness's uncle's son Pintu came and told that Anama will go outside to do some work and they told this witness to keep his motorcycle and R.C. Smart Card and they kept those in the thatched house of this witness. On the next day he heard about the rape and murder of a minor girl. On 22.01.2019 the motorcycle and the R.C. Book were seized. He has not stated that with his assistance the convict fled away from the locality by boarding a Truck at Balhar Chhak. So, this piece of evidence is not admissible as evidence and the learned trial judge erred in placing reliance on the same.

It is also borne out from the records that the learned trial judge has placed much reliance on the technical surveillance of the I.O. P.W.34 though no specific mention has been made either in the impugned judgment or in the evidence of P.W.34. This is, in essence, a piece of electronic evidence.

In a latest judgment of the Hon'ble Supreme Court in the case of **Arjun Panditrao Khotkar –vrs. Kailash Kushanrao Gorantyal and ors.** decided on 14th July, 2020, it has been laid down as follows:

> "The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

The judgment of the Hon'ble Supreme Court passed in the case of **Arjun Panditrao Khotkar** (supra) is an asseveration of the Hon'ble Supreme Court on the scope of Section 65 of the Indian Evidence Act setting at rest all the controversies in law relating to production of certificate under Section 65B of the Indian Evidence Act in respect to an electronic record. Thus, in a case where the electronic record in terms of technical surveillance has been relied upon by the learned trial judge, the provisions of Section 65B of the Indian Evidence Act has to be complied with even if there is a document to that effect. In this case, there is no documentary evidence. So, oral testimony of the I.O. is a piece of secondary evidence based on no document and no certificate. Therefore, in our considered view, that is not admissible in evidence.

10.1. A careful examination of the impugned judgment reveals that at paragraph 18 which starts from page 33 and continues till page 36 of the impugned judgment, at page 35 in a sub-paragraph learned Additional Sessions Judge-cum-Special Judge (P), Angul has held as follows:

> "Learned Special P.P. argued that the voluntary statement given by the accused before the witnesses in the immediate presence of the Magistrate while in police custody amounts to confession and basing on the confessional statement of the accused, the incriminating materials which were used by the victim at the alleged time of accident and the discovery of the weapon of offence used by the accused in committing the crime and the wearing apparels worn by the accused at the time of the incident and its discovery on the statement of the accused is confession and it is relevant. To that effect, learned Special P.P. cited the decision of "***Pakala Narayana Swami. Vrs. King. Emporer" (AIR 1939 Privy Council, P.47)*** ."

We have carefully examined the *locus classicus* judgment of the Privy Council passed in the case of ***Pakala Narayana Swami*** (supra). Nowhere in the body of the said judgment of the Privy Council has it been laid down that voluntary statement given by the accused before the witnesses in the immediate presence of Magistrate while in police custody amounts to confession. Moreover, we have carefully examined the impugned judgment and found that the learned Additional Sessions Judge-cum-Special Judge (P), Angul has mentioned about the submissions made by the learned Special P.P. wherein he placed reliance on the cases of ***Pakala Narayana Swami*** (supra), **Sk.Ysua. –Vrs.- State of West Bengal**: (2011) 11 SCC 754, **Wakker –vrs.- State of U.P.**: (2011) 3 SCC 306.

We found errors in the findings of the learned Additional Sessions Judge-cum-Special Judge (P), Angul in the entire judgment. Even he has not mentioned in the impugned judgment that he has agreed to the suggestions made by the learned Special P.P. and has come to the conclusion. This is in our considered opinion is a serious lapse on the part of the Additional Sessions Judge-cum-Special Judge (P), Angul who has been conferred power to send a man to prison for the rest of his life or send him to gallows.

10.2. A careful examination of the impugned judgment reveals that at page 36 in paragraph- 19 of the same, learned Additional Sessions Judge-cum-Special Judge (P), Angul has observed that "on consideration of the above facts and mitigating factors and the circumstantial evidence coupled with the confession of the accused and the chemical examination report and the D.N.A. test report, it is clear that the prosecution has rightly brought home the charges. xx xx xx xx xx xx".

10.3. Further examination of the statement under Section 313 of the Code reveals that question nos.18, 19, 20, 21, 22, 23, 32, 33, 34, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 57 put to the condemned prisoner relate to alleged confession made by him before P.Ws.3, 4, 5 and 6 in the presence of the I.O.

10.4. It is noted by us that the learned Additional Sessions Judge-cum-Special Judge (P), Angul has relied upon the confessional statement recorded by the Investigating Officer in presence of P.W.5, the Executive Magistrate, and P.W.6, the Asst. Collector at Sub-Collector Office, Angul as well as in presence of P.W.3- Ajit @ Aditya Kumar Sahu and P.W.4- Chandan Kumar Moharana, two independent witnesses. In fact, the entire statement has been

marked as Ext.5 and heavily relied upon by the learned Additional Sessions Judge-cum-Special Judge (P), Angul to record the conviction of the accused.

10.5. The confessional statement made before the Magistrate who recorded it according to the procedures laid down under Section 164 of the Code can be taken into consideration and be accepted as evidence in a criminal trial. But such statement should be made before a Judicial Magistrate not before an Executive Magistrate. In the case of **Zwinglee Ariel –vrs.- State of Madhya Pradesh**, reported in AIR 1954 SC 15, at paragraph 13, the Hon'ble Supreme Court has held that the Magistrate who recorded the statement under Section 164 of the Code should be a Judicial Magistrate and not be an Executive Magistrate. Additionally, in this case, the confessional statement is not recorded by the Executive Magistrate. It was recorded by the Investigating Officer in presence of the Executive Magistrate and two independent witnesses. It does not fulfil the requirements laid down under Section 164 of the Code. So, the learned Additional Sessions Judge-cum-Special Judge (P), Angul committed gross error in accepting the confessional statement in its entirety to record the conviction.

10.6. A Full Bench of Gauhati High Court in the case of **State of Assam – vrs.- Anupam Das**, reported in 2008 Cri.L.J. 1276 while considering a reference led to answer whether the expression "Magistrate" occurring under Section 26 of the Indian Evidence Act, 1872 can be included both the "Judicial Magistrate" as well as the "Executive Magistrate" after discussing the entire schemes of the Indian Evidence Act, 1872 and the various provisions found in the Code and came to the conclusion that the expression "Magistrate" occurring under Section 26 of the Evidence Act can only mean a Judicial Magistrate as the functions of a Magistrate recording a confession of a person in police custody is likely to expose the person making the confession to a punishment. The Full Bench of the Gauhati High Court further held that this conclusion of theirs gains further support from the very scheme of the provisions of Sections 25 to 27 of the Evidence Act. Section 25 of the Evidence Act makes a declaration in no uncertain terms that a confession made to a police officer shall not be proved against the accused. The rationale behind this declaration is too well settled by a catena of judgments to the effect that in the absence of such provisions the police are likely to extract confession from the accused by unwholesome methods. Section 26 of the Act is a great distinction to Section 25. While Section 25 prohibits the proof of a confession made to a police officer, Section

26 prohibits the proof of a confession made to any person while the accused is in the custody of police. Obviously, the provision is made in order to prevent the police from extracting confession from the accused while he is under custody and ingeniously circumventing the prohibition of law contained under Section 25 by making it appear that the confession was not in fact made to a police officer but somebody else. The scheme of the provisions of Sections 25 and 27 was examined by the Supreme Court in the case of **Bheru Singh –vrs.- State of Rajasthan**: reported in (1994) 2 SCC 467 wherein at pargraph 16, the Hon'ble Supreme Court has held:

> "16. Xx xx xx xx. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not. Inadmissibility of a confessional statement made to a police officer under Section 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case. Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody. Under Section 164 CrPC a statement or confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial."

Having noted the aforesaid observations of the Hon'ble Supreme Court, the Full Bench of the Gauhati High Court in **State of Assam –vrs.- Anupam Das(supra)** at paragraph 28 further held:

> "The Legislature was obviously of the view that any kind of confession by an accused while he is under the custody of police is not to be used as evidence against the accused at the time of the trial of any offence of which the accused is charged. A principle based on the experience of the lawmakers and the history of mankind. However, the Legislature recognized an exception to the rule contained under Section 26, i.e. a confession made by an accused, who is in the custody of the

> police, to some person other than a police officer, if such a confession is made in the immediate presence of a Magistrate. The only reason we can imagine is that having regard to the separation of powers between the Executive and the Judiciary and the requirement, belief and expectation that the Judiciary functions absolutely independent and uninfluenced by the authority of the Executives and, therefore, the presence of a Judicial Magistrate eliminates the possibility of confession being extracted from the accused by a police officer by methods which are not permissible in law. The presence of an independent Magistrate by itself is an assurance against the extraction of confession by legally impermissible methods. Even if any such impermissible influences are exercised on the accused before producing the accused before the Magistrate for recording the confession, the Legislature expected that the accused would have the advantage to complain to the Magistrate that he was being compelled to make a confession and on such a complaint the Magistrate is expected to protect the accused from the tyranny of police. A very sacred duty cast on the Magistrates, which must always be kept in mind by the Judicial Magistrates who are required to record or to be present at the time of recording the confessional statement by an accused while he was in the custody of the police. In the final analysis, any kind of compelled testimony by an accused person would be squarely violative of Article 20, Sub Article 3 of the Constitution. It is precisely for the above mentioned reasons the Parliament expressly stipulated certain duties under Section 164(2) of Cr.P.C. on the Judicial Magistrate recording statement under Section 164 Cr.P.C. Xx xx xx xx xx xx."

From the aforesaid discussions, the Full Bench of the Gauhati High Court came to the conclusion that there is no alternative but to reach an irresistible conclusion that the expression "Magistrate" occurring in Section 26 of the Evidence Act can only mean a "Judicial Magistrate" but not an "Executive Magistrate".

10.7. Thus, reliance on the entire confessional statement made before two Executive Magistrates, one being the Tahasildar and another being the Asst. Collector, relevant by the accused while under the police custody under Section 26 of the Evidence Act and leading to discovery of relevant facts under Section 27 of the Evidence Act cannot be held to be correct. The learned trial judge taking into consideration the entire statement marked as Ext.5 to record the conviction is definitely illegal. However, so far as the recovery and the facts relating to the crime are admissible under Section 27 of the Evidence Act and there is no illegality with respect to such appreciation and acceptance of evidence.

10.8. Hence, the approach adopted by the learned trial judge in accepting the entire confessional statement marked as Ext.5 allegedly made before P.Ws.3, 4, 5 and 6 cannot be read into evidence in its entirety. However,

those information that leads to discovery of facts in the entire Ext.5 can be and should be accepted and legally binding against the condemned prisoner.

11. In the case of **Sujit Biswas –vrs.- State of Assam**: reported in AIR 2013 SC 3817, the Hon'ble Supreme Court has held that in a criminal trial, the purpose of examining the accused person under Section 313 of the Code, is to meet the requirement of the principles of natural justice, i.e. a*udi alteram partem.* Hence, we opt to quote the exact languages used by the Hon'ble Supreme Court which appear at paragraphs-12 and 13 of the judgment passed in the case of **Sujit Biswas** (supra).

> "12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313, Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313, Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.
>
> 13. In **Hate Singh Bhagat Singh v. State of Madhya Pradesh**, AIR 1953 SC 468, this Court held, that any circumstance in respect of which an accused has not been examined under Section 342 of the Code of Criminal Procedure, 1898 (corresponding to Section 313 Cr.P.C.), cannot be used against him. The said judgment has subsequently been followed in catena of judgments of this court uniformly, taking the view that unless a circumstance against an accused is put to him in his examination, the same cannot be used against him. (See also: **Shamu Balu Chaugule v. State of Maharashtra**, AIR 1976 SC 557; **Harijan Megha Jesha v. State of Gujarat**, AIR 1979 SC 1566; and **Sharad Birdhichand Sarda** (Supra)."

12. In the case of **Dharam Pal Singh –vrs.- State of Punjab**: reported in (2010) 9 SCC 608, at paragraph-21, the Hon'ble Supreme Court has held that as part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The Hon'ble Supreme Court has further held that the purpose

behind it is to enable the accused to explain those circumstances. It is not necessary to put the entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the Court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. The Hon'ble Supreme Court has also very emphatically held that it is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial could be vitiated on this score only when on fact it is found that it had occasioned a failure of justice.

13. The Hon'ble Supreme Court in a recently decided case i.e. in the case of **MAHESHWAR TIGGA –VRS.- THE STATE OF JHARKHAND** passed in CRIMINAL APPEAL NO.635 OF 2020 arising out of SLP (Crl.) No.393 of 2020 on 28th September, 2020 observed that any circumstances not put to an accused under Section 313 of the Code cannot be used against him and must be excluded for consideration. The Hon'ble Supreme Court taking note of the judgment passed in the case of **Naval Kishore Singh –vrs.- State of Bihar**: reported in (2004) 7 SCC 502 laid down as follows;

> "It stands well settled that circumstances not to put to an accused under Section 313 of the Cr.P.C. cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirements of proof beyond reasonable doubt. This Court, time and again, has emphasized the importance of putting all relevant questions to an accused under Section 313 of the Cr.P.C."

14. In this case, we carefully examined the statement of the accused recorded under Section 313 of the Code by the learned Additional Sessions Judge-cum-Special Judge (P), Angul. In total, 113 questions have been put to the accused. The question with regard to the conclusion arrived at by the Scientific Officer which is evident from the chemical examination report and D.N.A. profiling marked as Ext.39 has not been put to the condemned prisoner-appellant. However, while considering the case of the prosecution, the learned Additional Sessions Judge-cum-Special Judge (P), Angul at page 29 of his judgment has taken into consideration the result of the chemical examination and the D.N.A. profiling which has been discussed by us in this judgment. In fact, those circumstances of matching D.N.A. profiling and the

material objects recovered from the spot, at the instance of the accused under Section 27 of the Evidence Act, and the wearing apparels of the deceased as well as the accused, are the most important facet of the prosecution case and failure on the part of the learned Additional Sessions Judge-cum-Special Judge (P), Angul in not putting appropriate questions to the accused definitely causes prejudice to him. But, on that score alone and in view of heinous and gruesome nature of crime, we are of the opinion that, the trial cannot be held to be vitiated entailing acquittal of the condemned prisoner-appellant. Rather, the matter should be remitted back to the court of the learned Additional Sessions Judge-cum-Special Judge (P), Angul for re-trial from the stage of recording of statement of the accused under Section 313 of the Code.

15. Therefore, while remanding the matter to the court having original jurisdiction, we are of the considered opinion that only the admissible portion of the confessional statement, as admissible under Section 27 of the Evidence Act, should be taken into consideration by the learned Additional Sessions Judge-cum-Special Judge (P), Angul. In this connection, we have relied upon a *locus classicus* judgment of the Privy Council passed in the case of **Pulukuri Kottaya and others –vrs.- Emperor**: reported in AIR 1947 PC 67. In the said judgment, at paragraph 10, the Hon'ble Supreme Court has held:

> "10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity

> would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. **It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant**."

16. We, therefore, direct that while considering the matter afresh upon remand, the learned Additional Sessions Judge-cum-Special Judge (P), Angul shall keep in mind the principles regarding admissibility of that portion of the confessional statement which leads to discovery of the fact connected to the commission of crime.

17. The third contention, as raised by the learned counsel for the appellant, also merit consideration in this case. The Hon'ble Supreme Court in the case of **Allauddin Mian and Ors –vrs. Sharif Mian and Anr**.: reported in (1989) 3 SCC 5 has examined the need of hearing of condemned prisoner or the convict before awarding the sentence especially that of a capital in nature. At paragraph 10 of the case of the **Allauddin Mian** (supra), the Hon'ble Supreme Court has held as follows:

> "Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is

prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:

> "If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

"The requirement of hearing the accused is intended to satisfy the rule of natural' justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr. Garg was, therefore, justified in making a grievance that the Trial Court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31st March, 1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high degree of concern for the statutory tight of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the Court, the Court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the

> mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned Trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty."

18. Section 235 of the Code provides for judgment of acquittal or conviction. Sub-Section (2) of the aforesaid Section of the Code for the first time introduced the provisions that once the judgment of conviction is pronounced, the Court has obligation to hear the accused on the question of sentence and at that stage, it is open to the accused to produce such material on record as is available to show the mitigating circumstances in his favour. In different words, the accused at this stage pleads for imposition of lesser sentence based on such mitigating circumstances, as brought to the notice of the Court by him. The aforesaid Sub-Section mandates Pre-Sentence Hearing for the accused and imbibes a cardinal principle that the sentence should be based on reliable, comprehensive information relevant to what the Court seeks to do.

18.1. This aspect has been highlighted by the Constitution Bench of the Hon'ble Supreme Court in **Bachan Singh -v.- State of Punjab**: reported in (1980) 2 SCC 684, wherein it was also held that at the stage of Pre–Sentence Hearing, the accused can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, may have a bearing on the choice of sentence.

18.2. In the case of **Santa Singh –vrs.- State Of Punjab:** reported in (1976) 4 SCC 190, **Bhagwati, J.** (as His Lordship then was) along with **Fazl Ali, J.**, dealing with a case of double murder wherein the accused was sentenced to death without providing an opportunity of "hearing" under Section 235 (2) of the Code, which was the only ground of appeal before the Hon'ble Supreme Court, by taking two concurrent opinions, remanded the case back to the trial court for fresh consideration on sentencing after giving an opportunity of hearing to the accused. **Bhagwati, J.** highlighting the Section 235 (2) of the Code observed that "the hearing of the question of sentence, would be rendered devoid of all meaning and content and it would

become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the Court". However, the Hon'ble Judge has further observed that while dealing with the hearing on the question of sentence, care should be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. Similar view has been taken by the Hon'ble Supreme Court in the case of **Dagdu and others –vrs.- State of Maharashtra**: reported in (1977) 3 SCC 68.

18.3. In the case of **Mukesh –vrs.- State (NCT of Delhi)**: reported in (2017) 3 SCC 717, the Hon'ble Supreme Court held that in the event the procedural requirements under Section 235 (2) of the Code are not met, the appellate court can either remit the case back to the trial court or adjourn the matter before the appellate forum for hearing on sentence after giving an opportunity to adduce evidence.

18.4. In the case of **Chhannu Lal Verma -vrs.- State of Chhattisgarh**: reported in (2019) 12 SCC 438, the Hon'ble Supreme Court observed that not having a separate hearing at the stage of trial was a procedural impropriety. It was also noted by the Hon'ble Supreme Court that a bifurcated hearing for conviction and sentencing was a necessary condition as laid down in the case of **Santosh Kumar Satishbhushan Bariyar –vrs.- State of Maharashtra**: reported in (2009) 6 SCC 498 and held that by conducting the hearing for sentencing on the same day, the Trial Court failed to provide necessary time to the appellant therein to furnish evidence relevant to sentencing and mitigation.

18.4(i). However, in our opinion such a ruling cannot be taken to mean that the Supreme Court intended to lay down, as a proposition of law, that hearing the accused for sentencing on the same day as for conviction would vitiate the trial. On the contrary, such procedural impropriety can be remedied by giving a chance of hearing on the question of sentence at the appellate stage or by remanding the case to the court of original jurisdiction.

18.5. In a very recently decided case, i.e., in the case of **Rajendra Prahladrao Wasnik v. State of Maharashtra**: reported in (2019) 12 SCC

460, the Hon'ble Supreme Court observed that in the cases where the death penalty may be awarded, the Trial Court should give an opportunity to the accused after conviction which is adequate for production of relevant material on the question of the propriety of the death sentence. This is evidently at best directory in nature and cannot be taken to mean that a Pre-Sentence Hearing on a separate date is mandatory.

19. Another judgment on the question is rendered by three-Judge Bench of the Hon'ble Supreme Court in the case of **Accused 'X' –vrs.- State of Maharashtra**: reported in (2019) 7 SCC 1. In the said case, the Hon'ble Supreme Court took note of the earlier three-Judge Bench decision of the Hon'ble Supreme Court in the case of **Malkiat Singh –vrs.- State of Punjab**: reported in (1991) 4 SCC 341 keeping in mind the two Judge Bench decisions in the cases of **Allauddin Mian** (supra) and **Anguswamy –vrs.- State of T.N.** : reported in (1989) 3 SCC 33. The Hon'ble Supreme Court in the case of **Accused 'X'** (supra) held that the import of judgments passed in the cases of **Allauddin Mian** (supra) and **Anguswamy** (supra) has not been correctly appreciated in the case of **Malkiat Singh** (supra), as the observations in the cases of **Allauddin Mian** (supra) and **Anguswamy** (supra), regarding conduct of hearings on separate dates, were only directory. Thus, relying on the aforesaid judgments, the Hon'ble Supreme Court in the case of **Accused 'X'** (supra) held that there cannot be any doubt that at the stage of hearing on sentence, generally, the accused argues based on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State/the complainant would argue based on the aggravating circumstances against the accused to support the contention relating to imposition of higher sentence. The object of Section 235 (2) of the Code is to provide an opportunity for accused to adduce mitigating circumstances. It does not mean, however, that the Trial Court can fulfill the requirements of Sub-Section (2) of Section 235 of the Code only by adjourning the matter for one or two days to hear the parties on the question of sentence. If the accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on the question of sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well.

19.1. Thus, in the aforesaid view of the discussions, the Hon'ble Supreme Court were of the view that as long as the spirit and purpose of Section 235(2) of the Code is met, inasmuch as the accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the Pre-Sentencing Hearing taking place on the same day, as the Pre-Conviction Hearing. Depending on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so.

19.2. Dwelling upon the impact of non-compliance of procedures provided under Section 235(2) of the Code, the Hon'ble Supreme Court further held that even assuming that a procedural irregularity is committed by the trial court to a certain extent on the question of hearing on sentence, the violation can be remedied by the appellate Court by providing sufficient opportunity of being heard on sentence. Taking note of Section 465 of the Code, the Hon'ble Supreme Court reiterated that no finding, sentence or order passed by the Court of competent jurisdiction would be reversed or altered by the Court of appeal on account of any error, omission or irregularity in the order, judgment and other proceedings before or during trial unless such error, omission or irregularity results in a failure of justice. Such non-compliance can be remedied by the appellate Court by either remanding the matter in appropriate cases or by itself giving an effective opportunity to the accused.

20. Coming to the case in hand, we see from the order-sheet maintained by the learned Additional Sessions Judge-cum-Special Judge (P), Angul that on 26.07.2019 in open court the learned Additional Sessions Judge-cum-Special Judge (P), Angul pronounced the judgment of conviction and immediately put the matter on the later point of time on the same day for hearing on the question of sentence. The order-sheet does not reflect if the learned Additional Sessions Judge-cum-Special Judge (P), Angul had asked the accused or the defence counsel about their willingness to place the material on record or to only advance oral submission on the question of sentence.

21. It is further evident from the order-sheet that the learned Additional Sessions Judge-cum-Special Judge (P), Angul on the later point of time reflected that he has heard on the question of sentence. Again, there is no mention whether the defence wanted to rely only on oral submission or

wanted to lead any material on record. From the sentencing part of the impugned judgment, it is further clear that the learned counsel for the convict submitted that the convict was only 23 years old and he had no criminal antecedent and hence, considering his young age and social status, the convict may be dealt leniently on the question of sentence. On the contrary, the learned Special Public Prosecutor argued to award the punishment in accordance with law considering the nature and gravity of the offences. The learned Additional Sessions Judge-cum-Special Judge (P), Angul though noted the submissions of defence counsel for lenient punishment has not discussed how such mitigating circumstances even if given its maximum weightage, do not outweigh the aggravating circumstances.

22. In that view of the matter, we find it appropriate to set aside the impugned judgment of conviction and order of sentence and to remit the matter back to the court of original jurisdiction for re-trial from the stage of recording of statement of the accused by putting such additional questions to the accused under Section 313 of the Code as deemed just and proper by the Presiding Judge, in view of the observations made by this Court. Upon remand, it shall also be appropriate on the part of the learned trial judge to give adequate opportunity of hearing to the condemned prisoner on the question of sentence, in the light of observations given by us in the preceding paragraphs. Accordingly, the Death Reference is answered and both the Criminal Appeal and Jail Criminal Appeal are allowed in part.

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2021 (I) ILR - CUT- 366

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

JAIL CRIMINAL APPEAL NO. 64 OF 2005

JAGABANDHU JUANGA ……...Appellant

.V.

STATE OF ODISHA ……Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 32 – Provisions under – Admissibility of statements – Criminal trial – Offence under section 302 – Doctor conducting post mortem examination not examined by prosecution – Admissibility of such report – Duty of the trial court – Indicated.

"An Assistant Surgeon attached to a Government establishment like the Community Health Centre is definitely a professional and any statement made by him 6 while conducting a post mortem examination thereby recording his opinion as to the injuries sustained by the deceased and the cause of death of deceased are definitely statements. Such statements are relevant and admissible. But, in order to bring such statement into record, the learned trial Judge has to give an observation to that effect. A factual finding that the professional, who has conducted post mortem examination is either dead or he cannot be found or his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the trial Judge unreasonable, is to be recorded. Then, the learned trial Judge should proceed to examine any witness, who is acquainted with the hand writing and signature of the doctor. He should have ensured that the document like the post mortem examination or injury report was put to such witness. Once the document is proved, then the statement made by the doctor either immediately after post mortem examination or in the course of it shall be relevant and admissible. In this case, such a course of action has not been adopted by the learned Adhoc Addl. Sessions Judge. Hence, the document has to be held that have not been proved in this case." *(Para 8)*

(B) CRIMINAL TRIAL – Offence under section 302 – Conviction – Procedural error – No question was put to the accused about the contents of the post mortem report – Post mortem and the injury report prepared by the doctor has not been proved – No admissible and relevant evidence – Held, it cannot be relied upon by the prosecution to come to a conclusion that the prosecution has established the homicidal nature of death of the deceased – Conviction set aside.

(Para 9)

For Appellant : Miss. Satabdi Samantaray, (Amicus Curiae)

For Opp. Party : Mr. G.N. Rout, (Addl. Standing Counsel)

JUDGMENT Date of Judgment: 08.01.2021

S.K. MISHRA, J.

The sole appellant-Jagabandhu Juanga called in question his conviction under Sections 302 and 323 of the Indian Penal Code, 1860, hereinafter referred to as the 'Penal Code' for brevity, for committing murder of his elder brother on 13.12.2003 and causing simple hurt to Narad Juanga, by the learned Adhoc Addl. Sessions Judge (FT), Keonjhar in S.T. Case No.48/39 of 2004 (G.R. Case No.1007 of 2003, arising out of Telkoi P.S. Case No.97 of 2003). He has been sentenced to undergo rigorous imprisonment for life for the offence under Section 302 of the Penal Code and further sentenced to undergo rigorous imprisonment for six months for the offence under Section 323 of the Penal Code.

2. The case of the prosecution in short is that at about 9.30 a.m. on 13.12.2003, the appellant assaulted his brother Bhima Juanga by means of a wooden plank, "Sal Baton", on his head and hand. Due to such assault, the deceased fell losing his consciousness. Narad Juanga tried to intervene in the matter. The appellant further assaulted Narad Juanga by the said Baton and thereafter, fled from the spot. Narad Juanga noticed that blood was oozing out of the ear of the deceased. He had sustained injury due to such assault. He raised alarm. Then, he informed Sukadev Juanga, son of the deceased, who has lodged F.I.R. in the case. Thereafter, Sukadev Juanga (P.W.1) lodged an FIR, which was scribed by Prasanna Kumar Juanga before the OIC, Telkoi Police Station, who registered the criminal case and took up investigation.

The Investigating Officer took all necessary steps like examination of witnesses, dispatching the dead body for post-mortem examination after conducting inquest over the same, seizure of material objects etc. and then upon completion of investigation submitted charge-sheet against the appellant.

3. The defence took the plea of complete denial and false implication by Narad Juanga because of some land dispute.

4. The prosecution, in order to establish its case, examined as many as seven witnesses. P.W. 2-Narad Juanga is the solitary eye-witness examined on behalf of the prosecution to prove the case. P.W.1-Sukadev Juanga happens to be the son of the deceased, nephew of the appellant and informant of the case. P.W.3-Nilambar Juanga, P.W.4-Sujan Juanga, P.W.5-Desa Juanga, the witnesses who arrived at the spot after hue and cry of P.W.2 and they found the deceased struggling for his life having sustained injuries. P.W.6-constable no.176 of Telkoi Police Station escorted the dead body of the deceased to Telkoi Community Health Centre for post mortem examination. After post mortem examination, he produced the wearing apparels and command certificate before the OIC, Telkoi Police Station, who seized the same under Ext. 5. Basing on such material available on record, the learned Amicus Curiae Miss. Satabdi Samantaray argued that the case of murder cannot be established in this case as the Dr. C. R. Nayak, Assistant Surgeon of Telkoi CHC was not examined on behalf of the prosecution and the post mortem examination report has not been exhibited. She also drew attention of the Court to the statement of the accused recorded under Section

313 of the Code of Criminal Procedure, 1973, hereinafter referred to as the 'Code' for brevity, and contended that not a single question has been asked to the appellant-convict about the homicidal nature of the death of the deceased or the injury sustained by the P.W.2. Mr. G.N. Rout, learned Addl. Standing Counsel, on the other hand, supported the findings recorded by the learned trial Judge and submitted that the contents of the post mortem examination report, even though not exhibited, by examining the doctor are admissible under Section 32 of the Indian Evidence Act, 1972, hereinafter referred to as the 'Evidence Act' for brevity. Therefore, the learned Addl. Standing Counsel submitted that the appeal should be dismissed.

5. An examination of the impugned judgment reveals that the learned Adhoc Addl. Sessions Judge, at paragraph-4 of the judgment, mentioned that whether the death of the deceased, in case is homicidal in nature is the first point to be determined by the Court in this case.

06. Undisputedly, the doctor conducting post mortem examination was not examined in this case. There is also no dispute that the post mortem examination report though available on record has not been exhibited on behalf of the prosecution. No question has been asked to the appellant-convict on this aspect of the contents of the post mortem examination report. The learned Adhoc Addl. Sessions Judge has examined the post mortem examination report and has taken into consideration the post mortem examination report in his judgment and has come to the conclusion, relying upon the evidence of P.W.2 and other circumstances that it is a case of homicide.

7. A careful examination of the record of the court of first instance reveals that summons were issued to Dr. C. R. Nayak, Assistant Surgeon of Telkoi CHC and the case was posted to 07.12.2004. On that day, the learned Adhoc Addl. Sessions Judge noted that service of summons is back without service. Therefore, he issued the summons through the Director of Health Services and the case was posted to 18.12.2004. But, the doctor was found absent on that day also. A V.H.F. message was also sent to the Director of Health Service and the case was then posted to 07.01.2004. On that day, the doctor was absent despite of V.H.F. message. The case was then posted to 24.01.2005. On that day, the doctor also remained absent and no report was received from the Director of Health Services, Orissa. The learned Adhoc Addl. Sessions Judge observed in his judgment as follows:-

> " The most unfortunate aspect of this exercise is that the Director of Health Services who happens to be a very responsible and controlling officer in the State did not respond to the V.H.F. message sent to him by this court. It was expected that being the controlling officer in the State he will assist the Court in a responsible manner by giving necessary instructions to the doctor who was to attend the Court in a murder trial."

On 24.01.2005, the learned Addl. Public Prosecutor filed a petition declining to examine the said doctor. Then, the learned Adhoc Addl. Sessions Judge has taken recourse of Section 32 of the Evidence Act perused the post mortem report and took note of the injuries mentioned therein and come to the conclusion regarding guilt of the appellant. The first and foremost approach adopted by the learned Adhoc Addl. Sessions Judge in this case is erroneous. He has come to a conclusion that when a person is dead or not found, the report prepared by him can be held to be admissible and relevant within the scope of Section 32 of the Indian Evidence Act. The relevant portion of Section 32 of the Indian Evidence Act reads as follows:-

> "32. **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant** - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—
>
> (1) xxx
>
> (2) **or is made in course of business**. —When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.
>
> (3) xxx "

8. An Assistant Surgeon attached to a Government establishment like the Community Health Centre is definitely a professional and any statement made by him while conducting a post mortem examination thereby recording his opinion as to the injuries sustained by the deceased and the cause of death of deceased are definitely statements. Such statements are relevant and admissible. But, in order to bring such statement into record, the learned trial Judge has to give an observation to that effect. A factual finding that the

professional, who has conducted post mortem examination is either dead or he cannot be found or his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the trial Judge unreasonable, is to be recorded. Then, the learned trial Judge should proceed to examine any witness, who is acquainted with the hand writing and signature of the doctor. He should have ensured that the document like the post mortem examination or injury report was put to such witness. Once the document is proved, then the statement made by the doctor either immediately after post mortem examination or in the course of it shall be relevant and admissible. In this case, such a course of action has not been adopted by the learned Adhoc Addl. Sessions Judge. Hence, the document has to be held that have not been proved in this case.

9. Another aspect is that in the examination of the accused under Section 313 of the Code, the learned trial Judge has not put any question to the accused about the contents of the post mortem report. Such evidence therefore cannot be taken into consideration. In this case, the post mortem examination report and the injury report prepared by Dr. C.R. Nayak, the then Assistant Surgeon, Telkoi Community Health Centre, having not been proved, it cannot be relied upon by the prosecution to come to a conclusion that the prosecution has established the homicidal nature of death of the deceased.

10. In this case, this Court is constrained to note that the court of first instance did not act in a proactive manner to secure the attendance of the doctor. It is not clear from the record that doctor, who has conducted post mortem examination, has died by the time of trial. In such situation, where the doctor upon service of summons does not appear or the summons of service are not served upon him, then the proper course of action should have been a request letter sent to the Chief Medical Officer. Very frequently, the trial of sessions case is being adjourned unnecessarily due to non-appearance of the Medical Officer. The most common reason for the same is that the doctors are transferred from the places of their posting when they have conducted post mortem examination or conducted examination of the injured, to a different place. In such case, the summons are returned without service. It is common knowledge that the administrative office of the Hospital, which is headed by the Chief Medical Officer, keeps records of the transfer of Medical Officer to different stations or different districts. In such case, the court can request the Chief District Medical Officer to provide

information regarding the transfer of the doctor, so that the subsequent summons can be sent to the concerned doctor in the address of his new posting. A slight bit of application of mind and a proactive role could solve this problem.

11. Another matter of concern has been noticed by this Court in this case is that on 24.01.2005, the Additional Public Prosecutor filed a petition declining to examine the doctor and on such petition, the case of the prosecution is closed. The Public Prosecutor can decline a witness, who is in attendance in the court. The Public Prosecutor or the Addl. Public Prosecutor does not have the discretion to decline to examine a witness, who is not present in the court. In such case, the court has jurisdiction to dispense with the attendance of the witness, if it thinks that it will not cause prejudice either to the defence or to the prosecution.

12. So, in this case, as there are so many glaring errors not only in relation to procedure but also in relation to substance of the case, this Court comes to the conclusion that there is no admissible and relevant evidence on record to come to a conclusion that the prosecution has established that the death of the deceased was homicidal. Hence, the appellant is entitled to an acquittal. There is also no evidence on record that P.W.2 did sustain injury in course of such an incident, as a result of the assault made by the appellant on him. Mr. G. N. Rout, learned Addl. Standing Counsel has very emphatically submitted that in this case the defect in prosecution evidence can be removed by remanding the matter to the trial court. However, this Court is of the opinion that as the appellant has already undergone incarceration for more than 10 years i.e. from 13.12.2003 to 24.07.2013, no useful purpose will be served by remanding the matter to the trial court. Moreover, from the very nature of the allegation in the case, it appears that in ultimate analysis, this case may end in a conviction under Section 304 Part-I or Part-II of the Penal Code. Hence, as the appellant has already undergone incarceration for more than 10 years, it shall not be expedient or in the interest of justice to remand the matter to the court of first instance.

Hence, the Jail Criminal Appeal is allowed. The judgment of conviction and order of sentence passed against the appellant under Sections 302 and 323 of the Penal Code are hereby quashed. He is acquitted of the aforesaid offences. He is on bail. He be set at liberty forthwith by cancelling the bail bond executed at the time of his bail, if his detention is not required in any other criminal case.

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

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2021 (I) ILR - CUT- 373

BISWAJIT MOHANTY, J.

W.P.(C) NO. 29742 OF 2020

DILLIP KUMAR NAYAK & ANR. .....Petitioners

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Question of law raised as to whether the ADM has jurisdiction to pass an order directing conduct of election of office bearers of an Association of Bus owners – Specific provision exist in bye-laws of the Association prescribing the mode of conducting the election of office bearers – No legal authority of ADM to pass such an order – Held, the order passed by the ADM illegal and without jurisdiction Election can only be held as per the bye-laws of the Association.

For Petitioners : M/s. D.D.Nayak, Sr.Adv. Akash Bhuyan, N.K. Mohanty.
For Opp. Parties : M/s. H.M. Dhal Addl. Govt. Adv.
: M/s. P.K. Rath, A.Behera, S.K. Behera, P.Nayak, S.Das and S.Rath.

JUDGMENT Date of Judgment : 08.01.2021

BISWAJIT MOHANTY, J.

The petitioners have filed the present writ petition questioning the order of Additional District Magistrate, Bhadrak (opposite party no.3) giving various directions for holding election to various posts of office bearers of opposite party no.6 and consequential order of the Sub-Collector, Bhadrak (opposite party no.4) on the same subject under Annexure-5 on the ground that the above noted orders/directions have been issued without jurisdiction and by ignoring the relevant provisions of the bye-law of opposite party no.6 governing the field. Their further case is that holding of election prior to outcome of audit of financial status of opposite party no.6 should not be permitted.

2. Mr. Dharanidhar Nayak, learned Senior Advocate submitted that the amended bye-law of Bhadrak Bus Syndicate under Annexure-2 lays down detailed guidelines relating to election of office bearers of opposite party no.6. In this connection, he relied on Clause-10 (Kha) of the byelaws, which makes it clear that in a general body meeting if more than half of the permanent members desire that the election be held to elect the office bearers of the association only then, an election can be held. Further for the purpose of conduct of such election, three persons are required to be nominated by the majority in a general body meeting, who will act as a Committee for conducting the election. Such committee is mandated to complete the process of election within one month. Further, it makes it clear that the election should be conducted by following the procedure of secret ballot. In such background, he submitted that in the process of conduct of election as contained in amended bye-law under Annexure-2, which has been duly approved by the Addl. District Magistrate-cum-Registering Authority, no role has been assigned to the A.D.M., Bhadrak (opposite party no.3) or Sub-Collector, Bhadrak (opposite party no.4). He also submitted that none of these officers has been authorized either under the bye-law of opposite party no.6 or under the Societies Registration Act, 1860 to play any role in the matter of conduct of election to the office bearers of a society like opposite party no.6. Therefore, he submitted that the slew of directions issued by the Addl. District Magistrate, Bhadrak (opposite party no.3) under Annexure-4 with regard to holding of election to various posts of office bearers of opposite party no.6 and consequential orders in the same matter under Annexure-5 by opposite party no.4 are all without jurisdiction and are liable to be quashed. Further according to him, election should be held after the process of audit is complete.

3. Mr. Dhal, learned Addl. Government Advocate submitted that the Bhadrak Bus Syndicate suffers from intense group rivalries and both the parties had approached the Collector and District Magistrate, Bhadrak (opposite party no.2) and Additional District Magistrate, Bhadrak (opposite party no.3) requesting them to ensure financial discipline in opposite party no.6 and to help them in holding free and fair election as the tenure of earlier body expired on 31.3.2020. Accordingly, on 11.6.2020 an interim committee was constituted which included the petitioner no.1 to manage the day to day affairs of opposite party no.6. Further, on 1.7.2020 vide Annexure-E/4, the Collector and District Magistrate, Bhadrak was requested by Commerce and Transport Department of Government to facilitate holding of a free and fair

election of office bearers of the association under the supervision of a Senior Officer of the district administration by 31.7.2020. Copy of the same was also forwarded to the Superintendent of Police, Bhadrak with a request to take suitable actions against the unsocial elements, who were putting hindrances in holding the election. He, however, submitted that as per the said direction, election could not be held by 31.7.2020 on account of spread of COVID-19 pandemic. Sometime after, W.P.(C) No.23628 of 2020 was filed by certain persons with a prayer to direct the Addl. District Magistrate, Bhadrak to hold election to the posts of office bearers of opposite party no.6. The said writ petition was disposed of on 15.9.2020 with a direction to the Addl. District Magistrate, Bhadrak to consider and dispose of the representation of the petitioners therein by passing a reasoned order in accordance with law within a period of four weeks from the date of production of an authenticated copy of that order, if the same was still pending. In such background, directions were issued under Annexure-4 by the Addl. District Magistrate, Bhadrak (opposite party no.3) with regard to holding of elections. Accordingly, vide Annexure-5, the Sub-Collector, Bhadrak (opposite party no.4) also prepared the schedule for the election and issued other ancillary directions pertaining to the election. Therefore, in the facts and circumstances, Mr. Dhal contended that the directions contained in Annexures-4 & 5 with regard to holding of election cannot be faulted. He also submitted that there exists no prayer for quashing the directions relating to holding of election as contained under Annexure-4. Accordingly, he prayed for dismissal of the writ petition.

4. Mr. Rath, learned counsel appearing for opposite party no.6 submitted that the election should take place as quickly as possible as per law.

5. Heard Mr. Dharanidhar Nayak, learned Senior Advocate for the petitioners, Mr. Dhal, learned Addl. Government Advocate and Mr. Rath, learned counsel representing opposite party no.6.

6. The dispute in the present case mainly revolves around the question of jurisdiction of opposite party nos.3 & 4 in giving detailed directions with regard to holding of election to different posts of office bearers of Bhadrak Bus Syndicate. A perusal of the order under Annexure-4 issued by the Addl. District Magistrate, Bhadrak (opposite party no.3) inter alia shows that he directed for holding of election to various posts of office bearers within four weeks. The Sub-Divisional Magistrate-cum-Sub-Collector was directed to act as observer for smooth conduct of election. The Deputy Collector, Emergency was nominated as Election Officer, who was required to conduct the election under the guidance of Sub-Divisional Magistrate-cum-Sub-Collector.

Further, the opposite party no.3 directed that a detail procedure and schedule in consultation with Sub-Divisional Magistrate-cum-Sub-Collector be laid down so as to complete the election within the stipulated time. The interim committee members constituted in the meeting on 11.6.2020 were directed to assist the Election Officer for smooth and successful completion of the election and expenditure so incurred for conducting the election should be met from the account of Bhadrak Bus Syndicate (opposite party no.6). Though in the prayer portion, the petitioners have not prayed for quashing of the above noted directions of the Addl. District Magistrate, Bhadrak (opposite party no.3), however, a perusal of Paras-1, 10, 14, 15 and 20 of the writ petition clearly indicate that the petitioners are also questioning the order of Addl. District Magistrate, Bhadrak (opposite party no.3) with regard to his directions for conduct of election obviously under Annexure-4. Further, it is well settled that this Court has the power to modulate the reliefs considering the nature of lis pending before it. It may also be noted here that the petitioners have also invited this Court in their prayer to issue any other writ/writs as would be deemed fit and proper in the facts and circumstances of this case. In such background, this Court is of the opinion that it can examine whether the above noted directions of the Addl. District Magistrate, Bhadrak as contained under Annexure-4 with regard to holding of election of a registered society like opposite party no.6 were issued validly. To a query put by this Court, Mr. Dhal could not bring to the notice of this Court any legal provisions, which authorize the Addl. District Magistrate, Bhadrak (opposite party no.3) to issue the above noted directions for conducting election. It may be seen that the matter relating to conduct of election is clearly covered by Clause-10 (Kha) of the approved amended bye-law of opposite party no.6 under Annexure-2. A perusal of the same makes it clear that it is the general body in its meeting can decide to go for election and for conducting the same, majority of the members present in the general body have to nominate a Committee for conducting election consisting of three members and this committee is required to conduct the election to the various posts within one month. Therefore, the election to various posts of office bearers of opposite party no.6 has to be held in tune with the procedure prescribed by the approved bye-law and the said bye-law does not envisage any role to be played either by opposite party no.3 or by opposite party no.4 in the matter of conduct of such election. In this context, it may be noted here that it is well settled that when a particular procedure has been prescribed for doing a particular thing, the same has to be done as per that procedure and not in any other manner. In such background, this Court has no hesitation in

coming to a conclusion that all the directions issued by the opposite party no.3 under Annexure-4 on conduct of election and the consequential directions issued by the Sub-Collector, Bhadrak (opposite party no.4) under Annexure-5 on the same issue are clearly illegal. These have been issued without any authority of law. It may be noted here that even in the order under Annexure-E/4, which could not be implemented, the Collector and District Magistrate, Bhadrak (opposite party no.2) was never requested to facilitate free and fair election of office bearers of the association by ignoring the approved bye-law under Annexure-2. It may also be noted here that though in W.P.(C) No.23628 of 2020, a prayer was made to direct the Addl. District Magistrate, Bhadrak to hold election, however, this Court without expressing any opinion on the merits, only directed the Addl. District Magistrate, Bhadrak to consider and dispose of the representation of the petitioners therein by passing a reasoned order "in accordance with law". In the present case, by issuing a slew of directions under Annexure-4 with regard to holding of election to the various posts of office bearers of Bhadrak Bus Syndicate, while disposing of the representation, it cannot be said that the opposite party no.3 acted in accordance with law as he has no jurisdiction to issue such directions. In such background, directions with regard to holding of election by the Addl. District Magistrate, Bhadrak under Annexure-4 and the consequential directions on the same issue by the Sub-Collector, Bhadrak (opposite party no.4) under Annexure-5 are held to be of no legal consequence and are hereby set aside.

7. With regard to the prayer for holding of election after completion of the audit is concerned, no legal provision has been brought to the notice of this Court in support of such prayer. Accordingly, this Court is not inclined to accept such prayer of the petitioners.

8. Before saying omega, it is made clear that election, if any, to various posts of office bearers of Bhadrak Bus Syndicate can only be held following the procedure laid down in the amended bye-law under Annexure-2 and in the event, such an election is held, the Collector and District Magistrate, Bhadrak (opposite party no.2) is directed to see to it that the law and order is strictly maintained during the course of such election.

9. With such observations and directions, the writ petition is disposed of.

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2021 (I) ILR - CUT- 378

DR. B.R.SARANGI, J.

W.P.(C) NO. 2953 OF 2013

NABAGHANA NAYAK .....Petitioner

.V.

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

(A) WORDS AND PHRASES – 'COMPENSATION' – Meaning of – Explained.

"Even though it is a very onerous job to quantity the exact amount of compensation for loss of eyesight, but before entering into the arena of such a question, this Court deems it proper to explain what "compensation" means. As per Oxford Dictionary, the word "compensation" signifies that which is given recompense, an equivalent rendered damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, or something loss or withheld. The expression "compensation" ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damage in an action for the breach."

(Paras 9 & 10)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Claim of compensation due to loss of eyesight following a cataract operation held in an eye camp organized by an NGO with approval of Govt. – The question arose as to whether writ court can grant compensation? – Held, Yes.

"The apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same principle has been reiterated in various judgments of the different High Courts including this Court and also the apex Court observed that under Articles 226 and 227 of the Constitution, the High Court can issue a direction for payment of compensation if there is deliberate act of negligence on the part of the railway administration. This Court, while considering the grant of compensation in respect of a victim lost her life in an accident due to negligence on the part of the railway administration, have decided in Pranabandhu Pradhan & Ors. V. Union of India & Anr. 2019 (II) ILR-CUT-770." *(Para 17)*

Case Laws Relied on and Referred to :-

1. 2011 (I) OLR 443 : The Registrar (Judicial), Orissa High Court, Cuttack Vs. State of Orissa.

2. 2012 (II) OLR 81 : Sri Prabir Kumar Das, Advocate & Human Rights Activist Vs. Commissioner-cum-Secretary, Health Deptt., Govt. of Orissa, Bhubaneswar & Ors.
3. (1956) 3 All ER 300 : Houghton Main Colliery Co. Ltd. In Re.
4. AIR 1994 SC 787 : Lucknow Development Authroity Vs. M.K. Gupta.
5. AIR 1998 Ori 159 : Kiranabala Dandapat Vs. Secy. Grid Corporation of Orissa Ltd.
6. 2004 ACJ 1109 : K. Narasimha Murthy Vs. Manager, Oriental Insurance Co. Ltd.
7. (1922) 2 AC 242 : Admiralty Comrs. Vs. S.S. Valeria.
8. (1880) 5 AC 25 : Livingstone Vs. Rawyards Coal Co.
9. 1958-65 ACJ 504 (HL, England) : H. West & Son Ltd.Vs. Shephard,
10. (1965) 1 AII ER 563 : Ward Vs. James.
11. 1987 ACJ 1022 (Karnataka) : Basavaraj Vs. Shekhar.
12. 1969 ACJ 363 (HL, England) : Perry Vs. Cleaver.
13. (1874) 4 QBD 406 : Phgillips Vs. South Western Railway Co.
14. (1970) 114 Sol Jo 193 : : (1969) 3 AII ER 1528 : Fowler Vs. Grace.
15. AIR 1983 SC 1086 : Rudul Sah Vs. State of Bihar.
16. 1992 ACJ 283(SC) : Kumari Vs. State of Tamilnadu.
17. 2019 (II) ILR-CUT-770 : Pranabandhu Pradhan & Ors. Vs. Union of India & Anr.

For Petitioner : M/s. S. Mohanty, A.P. Rath, S.K. Barik, S.S. Mohapatra & P.K. Das.

For Opp.Parties : Mr. A.K. Mishra, Addl. Govt. Adv. (O.Ps. No.1 to 2)

M/s. B.P. Tripathy, D.Pradhan & G.S. Das, (O.P. No.3)

Mr. Ramakanta Mohanty (Sr. Adv.) M/s. D.Mohanty, S.Mohanty, D.Varadwaj, S.Mohanty and A.Mohanty, (O.P. NO.4)

JUDGMENT Date of Hearing : 21.01.2021 : Date of Judgment: 28.01.2021

DR. B.R.SARANGI, J.

The petitioner, who is a farmer living below the poverty line, has invoked the writ jurisdiction of this Court seeking compensation for the loss of his eyesight due to defective surgery conducted in the eye camp organized by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara.

2. The factual matrix of the case, in hand, is that the petitioner, having faced some problem in his eye, contacted opposite party no.3, who detected that the petitioner was suffering from cataract which was to be operated. The petitioner, being canvassed by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara, was selected to undergo cataract

surgery at their eye camp, which was scheduled to be held at Gopabandhu Club, Marshaghai on 25.09.2011. As per their advice, the petitioner remained present on the date fixed (25.09.2011) and undergone surgery for cataract and he also took certain medicines and injections. On the next day, the post operation check up was undertaken by the doctor, before whom the petitioner complained loss of his eyesight and he was advised for further check up on 02.10.2011. On that date, though the complaint was persisting, but the same was not taken care of by the doctor concerned and the petitioner was advised to have a follow up check up to be done on 13.10.2011. On the said date, no doctor came for check up, but only nursing staff of the hospital concluded check up and they could not solve the problem of the petitioner with regard to loss of eyesight, in spite of repeated report by him. As a result, he sustained a severe post operative pain in his right eye.

2.1 Finding no other alternative, the petitioner rushed to JPM Rotary Eye Hospital & Research Institute on 14.10.2011 for check up. As per their advice, the petitioner again visited the said hospital on 20.10.2011 and was admitted as an indoor patient for his eye treatment. He was undergone surgery on 28.10.2011 and discharged on 29.10.2011. The discharge summery report would indicate that the petitioner sustained retinal detachment vitreous haemorrhage and the said operation was costly one. The review check up was made on different dates by JPM Rotary Eye Hospital, but despite the best efforts of the doctor the eyesight of the petitioner could not develop and finally the same was lost due to negligent and defective operation done by opposite party no.3.

2.2 Consequentially, the petitioner approached the Chief District Medical Officer, Kendrapara for disability certificate and after thorough scrutiny and maintaining the formalities; he was issued with a disability certificate granted by the medical board on 01.06.2012 showing the disability as 60% and the category of visual handicapped. The Sarapanch of Marshaghai Gram Panchayat has also issued a certificate to the petitioner with regard to his poor financial condition and BPL category, as well as loss of his eyesight due to defective operation undertaken by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara. The petitioner though issued a lawyer's notice to the Chief Organizer of Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara for defective operation undertaken by him, but received no reply. Therefore, claiming for compensation, the petitioner has approached this Court by filing the present writ petition.

3. Mr. Millan Kumar, learned counsel appearing on behalf of Mr. Satyabrata Mohanty, learned counsel for the petitioner vehemently contended that loss of eyesight of the petitioner was due to defective surgery undertaken by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara, which has caused grave hardship to him, as the same has not only changed his lifestyle but also severely affected his livelihood. Therefore, the petitioner is entitled to get compensation for the damages caused to him due to defective surgery undertaken by opposite party no.3. In support of his contention, he has relied upon judgments of this Court in ***The Registrar (Judicial), Orissa High Court, Cuttack v. State of Orissa***, 2011 (I) OLR 443 and ***Sri Prabir Kumar Das, Advocate & Human Rights Activist v. Commissioner-cum-Secretary, Health Deptt., Govt. of Orissa, Bhubaneswar and others***, 2012 (II) OLR 81.

4. Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State opposite parties no.1 and 2, referring to the counter affidavit filed on their behalf on 18.09.2014, contended that Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara is a registered organization under Odisha Clinical Establishment (Control & Regulation) Rules, 2017 and the said organization is authorized to perform cataract surgery in Kendrapara district fulfilling all the criteria as laid down by the Government. Accordingly, opposite party no.3 has entered into a Memorandum of Understanding (MoU) with the CDMO, Kendrapara-opposite party no.2 on 19.05.2011 for the activities of prevention of blindness control programme. As per the terms and conditions laid down in clause-4(e) & (f) of that MoU, the NGO Hospital, namely, Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara agreed to be responsible for post operative care including management of complications, if any, and post-operative counseling regarding use of glasses and also follow up services care including refraction & provision of glasses, if required, providing best possible correction. It is also further stated, as per the guidelines issued by the Government of India, in clause-12(b) it is clearly mentioned that the NGO Hospital is solely responsible for guarantying quality & efficient services based on programme's technical & operational norms. As the cataract operation in the eye of the petitioner was undertaken by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara on 25.09.2011, thereby opposite party no.3 is only responsible for post-operative care. It is also further contended that the petitioner has not reported before the Eye Specialist of District Headquarters Hospital,

Kendrapara nor to opposite party no.2 for his post-operative complications, if any. Thereby, it is contended that neither opposite party no.1 nor opposite party no.2 is liable for payment of any compensation for the loss of eyesight of the petitioner due to surgery done by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara.

5. Mr. Ramakanta Mohanty, learned Senior Counsel appearing along with Mr. D. Varadwaj, learned counsel for opposite party no.4 contended that the petitioner having undergone surgery for cataract on 25.09.2011 in the camp of opposite party no.3, on the next day he complained loss of eyesight and sustained severe post-operative pain in his right eye and after 19 days of surgery the petitioner came to JPM Rotary Eye Hospital-opposite party no.4 for check up complaining of pain and low vision. On examination it was detected that the petitioner had a very low vision with very low intraocular pressure (4mm of Hg.). On indirect ophthalmoscopy he had a total retiral detachment with vitreous haemorrhage with large retinal tear which might have occurred during injection for local anesthesia for cataract surgery. Therefore, the petitioner was advised by opposite party no.4-hospital for vitreoretinal surgery under very poor visual prognosis and the same was also explained to him. Opposite party no.4 also explained the petitioner that the doctors are just trying to revive the vision which may not be successful as eye is grossly injured. After understanding the same, the petitioner agreed for vitreoretinal surgery, for which he underwent surgery on 28.10.2011 and was discharged on 29.10.2011. The petitioner's vision could not be revived in spite of best efforts of the doctors. It is only the misfortune of the petitioner, for which the operation undertaken by opposite party no.4 could not be successful. In any case, the damages already caused to the petitioner could not be retrieved even by conducting the second operation and, as such, no negligence having been committed by opposite party no.4, the petitioner is not entitled to get any compensation from the said opposite party.

6. Though learned counsel Mr. B.P. Tripathy and associates have entered appearance for opposite party no.3 by filing vakalatnama on 02.09.2013 and in the meantime more than seven years have passed, but no counter affidavit has been filed rebutting the allegations made by the petitioner in the writ application against the said opposite party nor anybody is present from the side of the said opposite party at the time of hearing. Thereby, applying the doctrine of non-traverse, this Court proceeded with the hearing of the matter.

7. This Court heard Mr. Millan Kumar, learned counsel appearing on behalf of Mr. S. Mohanty, learned counsel for the petitioner; Mr. A.K. Mishra, learned Addl. Government Advocate appearing for opposite parties no.1 and 2; and Mr. Ramakanta Mohanty, learned Senior Counsel appearing along with Mr. D. Varadwaj, learned counsel for opposite party no.4 through virtual mode. On the basis of the pleadings available on record, since it is an old case of the year 2013, this Court heard the matter and disposed of the same at the stage of admission without granting any further adjournment.

8. The facts delineated above are not in dispute. The petitioner, who is a farmer and a BPL card holder, faced with eye problem and being persuaded by opposite party no.3 undergone surgery in the eye camp organized by Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara on 25.09.2011. On the next day, as per advice of the doctor, he had gone for routine checkup, where he complained loss of his eyesight. On the basis of advice given by the doctor, though he was administered certain medicine, but he could not get any relief nor subsequently was he attended by the doctor who had conducted surgery on his eye. As his pain was increased day by day, finding no other alternative he proceeded to JPM, Rotary Eye Hospital, CDA, Cuttack, where he underwent second surgery with an anticipation that his vision would revive. But as damage had already caused to the eyesight of the petitioner to a higher extent, even on corrective surgery made for second time by JPM, Rotary Eye Hospital, the defect in his eye could not be recovered. Consequentially, the petitioner lost his eyesight and on being examined by opposite party no.2, the medical board issued a disability certificate of 60% of loss of eyesight in the category of visual impaired. Loss of eyesight has a significant impact on the lives of those who experience it as well as on their families, their friends, and society. Such a loss has been caused to the petitioner for the remaining part of his life, which cannot be appropriately assessed or compensated in any form whatsoever. But interest of justice would apparently be served if an endeavour is made at this stage to award some compensation, as a solace to the petitioner that a wrongdoer has been penalized.

9. Even though it is a very onerous job to quantity the exact amount of compensation for loss of eyesight, but before entering into the arena of such a question, this Court deems it proper to explain what “compensation” means. As per Oxford Dictionary, the word “compensation” signifies that which is given recompense, an equivalent rendered damages, on the other

hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, or something loss or withheld.

10. The expression "compensation" ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damage in an action for the breach.

11. In ***Houghton Main Colliery Co. Ltd. In Re,*** (1956) 3 All ER 300, the apex Court held that the word "compensation" signifies that which is given in recompense an equivalent rendered-damages, on the other hand, constitute the sum of money claimed, or adjudged to be paid as compensation for loss or injury sustained, the value estimated in money of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another; as, where there is loss of pension rights, allowance for income-tax respectively payable in respect of pension has to be deducted.

12. In ***State of Gujarat v. Shantilal Mangaldas,*** AIR 1969 SC 634, the apex court held that the expression "compensation" is not defined in the Constitution. In ordinary parlance the expression: "Compensation" means anything given to make things equivalent; a thing given to or to make amends for loss recompense, remuneration or pay, it need not therefore necessarily be in terms of money. The phraseology of the constitutional provision also indicates that compensation need not necessarily be in terms of money because it expressly provides that the law may specify the principles on which, and the manner in which, compensation is to be determined and "given". If it were to be in terms of money along, the expression "paid" would have been more appropriate.

13. In ***Lucknow Development Authroity v. M.K. Gupta,*** AIR 1994 SC 787, the apex Court held that according to dictionary it means, "compensating or being compensated; thing given as recompense". In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss.

14. In ***Kiranabala Dandapat v. Secy. Grid Corporation of Orissa Ltd.*** AIR 1998 Ori 159, this Court held as follows:

> *"'Compensation' means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and manner in which compensation is to be determined as given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damified may receive equal value for his loss or be made whole in respect of his injury; something given or obtained as equivalent; rendering of equivalent in value or amount an equivalent given for property taken or for an injury done to another; a recompense in value; a recompense given for a thing received recompense for whole injury suffered, remuneration or satisfaction for injury or damage or every description. The expression 'compensation' is not ordinarily used as an equivalent to 'damage' although compensation may often have to be measured by the same rule as damages in an action for a breach."*

15. ***K. Narasimha Murthy v. Manager, Oriental Insurance Co. Ltd***., 2004 ACJ 1109 (Karnataka), wherein the Division Bench in an appeal preferred by the claimant under Section 173 of Motor Vehicles Act, 1988 succinctly laid down the legal principle after extracting the relevant paras from the decision of the cases in ***Admiralty Comrs. V. S.S. Valeria***, (1922) 2 AC 242; ***Livingstone v. Rawyards Coal Co***., (1880) 5 AC 25; ***H. West & Son Ltd. V. Shephard***, 1958-65 ACJ 504 (HL, England); ***Ward v. James***, (1965) 1 AII ER 563; ***Basavaraj v. Shekhar***, 1987 ACJ 1022 (Karnataka); ***Perry v. Cleaver***, 1969 ACJ 363 (HL, England); ***Phgillips v. South Western Railway Co***., (1874) 4 QBD 406; ***Fowler v. Grace***, (1970) 114 Sol Jo 193; and (1969) 3 AII ER 1528; and referring to ***McGregor on Damages***, 14th Edn. in support of the conclusion for determination of the compensation for personal injury both for pecuniary and non-pecuniary losses in favour of the injured petitioners, which reads as under:

> *"(18) **Viscount Dunedin in Admiralty Comrs v. S.S. Valeria**, (1922) 2 AC 242, has observed thus:*
>
> *'The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him.'*
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> *(19) **Lord Blackburn in Livingstone v. Rawyards Coal Co**., (1880) 5 AC 25, has observed thus:*
>
> *'Where any injury is to be compensated by damages, in settling the sum of money to be given … you should as nearly as possible get at that sum of money which will put the person who has been injured…in the same position as he would have been in if he had not sustained the wrong.'*

(21) Lord Morris in his memorable speech in ***H. West & Son Ltd. V. Shephard****, 1958-65 ACJ 504 (HL, England), pointed out this aspect in the following words:*

'Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But the money cannot renew a physical frame that has been battered and shattered. All the Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.'

(22) In the above case, their Lordships of the House of Lords observed that the bodily injury is to be treated as a deprivation which entitles plaintiff to the damage and that the amount of damages varies according to the gravity of the injury. Their Lordships emphasized that in personal injury cases the courts should not award merely token damages but they should grant substantial amount which could be regarded as adequate compensation.

(23) In ***Wards v. James****, (1965) 1 AII ER 563, speaking for the Court of Appeal in England, Lord Denning while dealing with the question of awarding compensation for personal injury laid down three basic principles:*

'Firstly, assessability: In cases of grave injury, where the body is wrecked or brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity: There should be some measure of uniformity in awards so that similar decisions may be given in similar cases, otherwise, there will be great dissatisfaction in the community and much criticism of the administration of justice. Thirdly, predictability: Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the pubic good.'

(25) In ***Basavaraj v. Shekhar****, 1987 ACJ 1022 (Karnataka), a Division Bench of this Court held:*

'If the original position cannot be restored-as indeed in personal injury or fatal accident cases it cannot obviously be-the law must endeavour to give a fair equivalent in money, so far as money can be an equivalent and so 'make good' the damage.'

(26) Therefore, the general principle which should govern the assessment of damages in personal injury cases is that the court should award to injured person such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame.

(27) ***Lord Morris of Borth-y-Gest*** *in* ***Perry v. Cleaver****, 1969 ACJ 363 (HL, England), said:*

'To compensate in money for pain and for physical consequences is invariably difficult but … no other process can be devised than that of making a monetary assessment.'

(28) The necessity that the damages should be full and adequate was stressed by the Court of Queen's Bench in ***Fair v. London and North Western Rly. Co****., (1869 21 LT 326. In* ***Ruston v. National Coal Board****, (1953) 1 AII ER 314, Singleton, L.J. said;*

'Every member of this court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as there can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure.'

(29) Field, J. in ***Phillips v. South Western Railway Co****., (1874) 4 QBD 406, held:*

'You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered."

16. In ***Rudul Sah v. State of Bihar***, AIR 1983 SC 1086, the apex Court observed that in appropriate cases, the Court discharging constitutional duties can pass orders for payment of money in the nature of compensation. Consequent upon deprivation of the fundamental right to life and liberty of a petitioner the State must repair the damage done by its officers to the petitioner's right.

17. In ***Kumari v. State of Tamilnadu***, 1992 ACJ 283(SC), the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same principle has been reiterated in various judgments of the different High Courts including this Court and also the apex Court observed that under Articles 226 and 227 of the Constitution, the High Court can issue a direction for payment of compensation if there is deliberate act of negligence on the part of the railway administration.

This Court, while considering the grant of compensation in respect of a victim lost her life in an accident due to negligence on the part of the railway administration, have decided in ***Pranabandhu Pradhan & Ors. V. Union of India & Anr.*** 2019 (II) ILR-CUT-770.

18. Taking into consideration the aforesaid principles laid down by the apex Court, various High Courts including this Court in the matter of

awarding compensation to the victim in a similar nature of case like that of this writ petition, this Court, entertaining a suo motu PIL registered as W.P.(C) No. 8228 of 2010 (***The Registrar (Judicial), Orissa High Court, Cuttack v. State of Orissa***) issued following directions:

> ***"5.*** *In the light of the circumstances as recorded hereinabove and based on the enquiry conducted by the Secretary, District Legal Services Authority, Koraput-Jeypore, we dispose of the suo-motu writ petition with the following directions :-*
>
> *(i) The Government of Orissa in Health and Family Welfare Department is directed to grant compensation a sum of Rs.25,000/- (Rupees Twenty Five thousand) each in favour of Smt. Nagali Amiamma, Smt.S Gunnamma and Sri Mrutyunjaya Panda for their pain and suffering.*
>
> *(ii) All the Government hospitals of the State should ensure proper pre-operative assessment of all patients prior to recommending surgery, especially when "Health Camps" are organized to ensure proper evaluation of patients.*
>
> *(iii) Whenever a health camp is conducted, the doctors of such Government Hospital should ensure that adequate medical personnel are available to conduct such surgery, so that each individual patient is given adequate care. Attempt for achieving huge targets or records should be discouraged and the authorities must ensure that such number of surgeries take place, as is practically possible and permissible. In the present case we find that only one surgeon has carried out on an average 43 cataract operations per day over a period of seven days. Obviously, adequate care could not have been given to each patient as is required and each patient deserves.*
>
> *(iv) The Journalists/Press Reporters must ensure proper verification of facts, prior to sending the same for publication to their respective news papers/magazines. In the present case, it is found that Mr. Satyanarayan Pattnaik, Press Reporter of the Times of India had sent his report merely based on oral statements made by a few patients, without any manner attempting to cross check or verify such facts. Further, resorting to headlines, as used in the present case should be avoided and the same be duly toned down keeping in view the public duty it owes to its readers and not to create panic in circumstances which are not warranted."*

As per the above directions, all the Government hospitals of the State were to ensure proper pre-operative assessment of all patients prior to recommending surgery, especially when "Health Camps" are organized to ensure proper evaluation of patients. Whenever a health camp is conducted, the doctors of such Government Hospital should ensure that adequate medical personnel are available to conduct such surgery, so that each individual patient is given adequate care. Attempt for achieving huge targets

or records should be discouraged and the authorities must ensure that such number of surgeries take place, as is practically possible and permissible. In view of such direction given by this Court, being a welfare State the opposite parties no.1 and 2 owe a responsibility to carry out the direction given by this Court in its letter and spirit. Meaning thereby, when Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara arranged an eye camp, the State Government hospitals owe a responsibility to ensure proper pre-operative assessment of all patients prior to recommending surgery, especially when camps are organized to ensure proper evaluation of patients. In addition to that, the doctors of such Government Hospital should ensure that the adequate medical personnel are available to conduct such surgery. Nothing has been placed on record by way of counter affidavit filed by opposite parties no.1 and 2 to show that they had adhered to the directions given by this Court, as mentioned above.

19. In ***Sri Prabir Kumar Das*** mentioned supra, this Court, taking note of the judgment of this Court in ***The Registrar (Judicial), Orissa High Court, Cuttack*** (supra), has given a specific direction in paragraph-18 thereof, which reads as under:-

> *"18. Before parting with the matter, we make the following observations and directions:*
>
> *(i) After granting permission to any NGO to hold eye camp for cataract operation, the Government must monitor and supervise the entire work of the concerned NGO.*
>
> *(ii) Necessary guidelines in detail may be issued by the Government for taking up pre-operation and post-operation care.*
>
> *(iii) Before granting permission to an NGO, the said NGO must ensure that operation in camps must be undertaken by qualified/efficient doctors.*
>
> *(iv) The patients must not be allowed to leave the camp immediately after operation, wherever the situations so demand.*
>
> *(v) Before the granting permission, the District Administration must be satisfied that the NGO has adequate infrastructure facilities, equipment and required number of qualified doctors and Assistants to undertake the operation work in the camp keeping in view the number of persons to be operated.*
>
> *(vi) After operation in the eye camps, good quality sun glass, power glass and required medicines should be provided to the patients.*

(vii) In case of failure of the operation because of laches on the part of any NGO and/or Government authority, the suffering patients must be adequately compensated immediately.

These are all necessary to achieve the avowed object enshrined in the Scheme of the Central Government on the basis of which the NGOs are functioning and provided with financial assistance."

20. As it reveals from the pleadings available on record, Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara has not followed the guidelines and principles set out in the judgment mentioned supra. But in para-17 of the judgment in ***Sri Prabir Kumar Das*** mentioned supra, this Court directed the State Government to pay compensation of Rs.2,50,000/- (rupees two lakhs and fifty thousand) to each of the persons, who had lost their eyesight fully, and Rs.1,75,000/- (rupees one lakh and seventy five thousand) to each of the persons who had lost their eyesight partially, and further directed the State Government to cause necessary enquiry through an officer not below the rank of Secretary of any department of the Government of Odisha to find out as to who is responsible for loss of eyesight. If it is found that the NGO is responsible for this unfortunate incident, Government is at liberty to recover the entire amount of compensation directed to be paid by it from the aforesaid NGO (Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara).

21. Keeping in view the parameters laid down by this Court, since the petitioner already lost 60% of his eyesight as per the disability certificate issued by the medical board, a compensation of Rs.1,75,000/- be paid by opposite parties no.1 and 2 to the petitioner, which shall be recovered from the NGO (Basanta Kumari Rural Eye Hospital & Research Centre, Ostapur, Kendrapara) by the opposite party-State. Needless to mention, the entire compensation amount shall be paid as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment.

22. In the result, the writ petition is allowed. No order as to costs.

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2021 (I) ILR - CUT- 391

DR. B.R.SARANGI, J.

W.P.(C) NO. 26951 OF 2019

BISWANATH SETHI ……..Petitioner

.V.

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

ORISSA CIVIL SERVICES (CLASSIFICATION CONTROL AND APPEAL) RULES, 1962 – Rule -15 – Proceeding under – Procedure to be followed – Petitioner's service was terminated on the ground of production of fake C.T. pass certificate – Materials show that the prescribed procedure and the principles of natural justice has not been followed – Effect and scope of interference with the order of punishment – Held, it is the basic principles of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all – Order of termination not sustainable.

Case Laws Relied on and Referred to :-

1. (1875) 1 Ch D 426 : Taylor Vs. Taylor.
2. 63 Ind App 372 : AIR 1936 PC 253 : Nazir Ahmad Vs. King Emperor.
3. AIR 1999 SC 1281 : Babu Verghese and others Vs. Bar Council of Kerala & Ors.
4. (1964) AC 40 : (1963) 2 All ER 66 (HL) : Lord Reid in Ridge Vs. Baldwin.
5. AIR 1970 SC 150 : A.K. Kraipak Vs. Union of India.
6. AIR 1976 SC 2428 : Dr. G. Sarana Vs. University of Lucknow.
7. AIR 1996 SC 1669 : State Bank of Patiala Vs. S.K. Sharma.
8. (1991) 3 SCC 38 : Union of India Vs. E.G. Nambudiri.
9. (2006) 7 SCC 800 : Suresh Chandra Nanhorya Vs. Rajendra Rajak.
10. (1969) 2 SCC 262 : A.K. Kraipat Vs. Union of India.
11. (2008) 14 SCC 151 : Sahara India (Firm) Vs. CIT.

For Petitioner : M/s. Bimbisar Dash, Nayak and A.K. Behera.

For Opp.Parties : Mr. B. Satpathy, Standing Counsel, S&ME.

JUDGMENT Date of Hearing and Judgment : 28.01.2021

DR. B.R.SARANGI, J.

The petitioner, who was working as an Assistant Teacher (Level-V, Elementary Cadre) in Aptira UGME School, has filed this writ petition challenging the office order dated 16.12.2019 under Annexure-12 terminating his service with immediate effect under Rule-15 of OCS (CCA) Rules, 1962 on the ground of submission of fake C.T. pass certificate.

2. The factual matrix of the case, in hand, is that after completion of H.S.C. examination conducted by the Board of Secondary Education, the petitioner took admission in Secondary Teachers Training School, Agarpada for prosecuting C.T. course in the year 1999. In July, 2001, he appeared in all the subjects but could not clear some papers. In 2002, the petitioner again appeared and cleared all but eight papers. In October, 2003, the petitioner appeared in those eight papers and having not come out successful, he appeared in the compartmental examination and cleared all the papers. After clearing the Secondary Teachers' Training Certificate examination, Board of Secondary Education, Odisha issued necessary certificate in favour of the petitioner on 30.12.2003. The Secretary, Board of Secondary Education, Odisha vide letter no.3142 (4781) dated 17.09.2004 sent the provisional certificate-cum-memorandum of marks of the petitioner to the Headmaster, S.T. School, Agarpada, Bhadrak. Though there were some wrong recording of marks by the Board of Secondary Education, Odisha, after scrutiny, Board of Secondary Education, Odisha issued revised mark sheet in favour of the petitioner.

2.1 Thereafter, the petitioner joined as an Asst. Teacher (Level-V of Elementary Education Cadre) in Aptira UGME School, Agarpada. While the petitioner continuing as such, the Block Education Officer, Bonth vide letter dated 05.11.2019 called upon the petitioner to produce all the testimonials regarding educational qualification by 06.11.2019. In response to the same, the petitioner submitted all the documents before the Block Education Officer, Bonth for verification. On 11.11.2019, Block Education Officer, Bonth requested the Secretary, Board of Secondary Education, Odisha to verify copy of the C.T. certificate produced by the petitioner and to confirm about its genuineness.

2.2 At that point of time, one Bikash Kumar Dhal alleged that the petitioner submitted fraudulent and forged C.T. certificate and, as such, the petitioner never passed C.T. examination from the Board of Secondary Education, Odisha. Basing upon such allegations, the District Project Coordinator, SSA, Bhadrak vide letter dated 26.11.2019 requested the Block Education Officer, Bonth to conduct an enquiry into the aforesaid allegations and to take appropriate action and submit compliance report thereof. On 27.11.2019, Block Education Officer, Bonth claimed that the certificate submitted by the petitioner is forged one and sought explanation from the petitioner to be submitted within a period of seven days, failing which the

higher authority will be requested to initiate disciplinary action against him. The Principal, District Institute of Education and Training, Agarpara, Bhadrak vide memo dated 28.11.2019 clarified the position that the petitioner has passed C.T. examination in the year 2003 as a compartmental candidate and the serial number of such certificate was 030858. As such, the revised mark sheet issued by Board of Secondary Education, Odisha and other relevant documents were also forwarded by the District Institute of Education and Training, Agarpara, Bhadrak. Accordingly, on 02.12.2019 the petitioner submitted his explanation before the Block Education Officer, Bonth clarifying that the C.T. certificate received from District Institute of Education and Training, Agarpada, Bhadrak is genuine and original. Though the petitioner submitted such explanation and clarification was given by the Principal, District Institute of Education and Training, but without considering the same, the Block Education Officer, Bonth proceeded with the matter by initiating proceeding against the petitioner.

2.3 Challenging the above action of the opposite parties, the petitioner approached this Court by filing W.P.(C) No.24972 of 2019, which was disposed of vide order dated 10.12.2019 directing the Block Education Officer, Bonth to consider the documents submitted by the petitioner and pass appropriate orders in presence of the petitioner within a period of four months from the date of communication/production of the order. In compliance thereof, the petitioner submitted representation on 16.12.2019 before the District Education, Officer, Bhadrak and Block Education Officer, Bonth enclosing the order dated 10.12.2019 passed in W.P.(C) No.24972 of 2019. But, without considering the documents submitted by the petitioner and without giving any opportunity of hearing to him, the Block Education Officer, Bonth vide office order dated 16.12.2019 terminated the services of the petitioner with immediate effect under Rule-15 of the OCS (CCA) Rules, 1962 on the ground of production of fake C.T. pass certificate. Hence this application.

3. Mr. Bimbisar Dash, learned counsel for the petitioner contended that while imposing harsh penalty of termination of service, the procedure as envisaged under OCS (CCA) Rules, 1962 has not been complied with nor the petitioner has been given opportunity of hearing while passing the order of punishment and, more so, no inquiry has been conducted on the allegations, thereby, the order so passed in Annexure-12 dated 16.12.2019 terminating the services of the petitioner cannot sustain in the eye of law.

4. Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department referring to the counter affidavit filed by opposite party no.6 vehemently contended that since the petitioner has produced fake C.T. pass certificate to get an employment as an Asst. Teacher and on verification of documents the same was found to be forged, action as deemed fit has been taken against the petitioner. Thereby, the authorities have not committed any illegality or irregularity in passing the order impugned. It is further contended that once the petitioner has got employment by producing fake certificate, if it is detected that the same is forged one, the authority has got every right to take action against the petitioner. Therefore, it is contended that this Court should not interfere with the same at this stage and, as such, he seeks for dismissal of the writ petition.

5. This Court heard Mr. Bimbisar Dash, learned counsel for the petitioner and Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department by virtual mode, and perused the records. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. There is no dispute with regard to the fact that the petitioner was continuing as an Asst. Teacher by producing a C.T. pass certificate. But, the Block Education Officer, Bonth, pursuant to letter dated 05.11.2019 called upon the petitioner to produce relevant documents on 06.11.2019 and on that basis the Block Education Officer requested the Secretary, Board of Secondary Education, Odisha to verify the genuineness of the C.T. certificate produced by the petitioner. When such process was continuing, on the basis of the allegations made by one Bikash Kumar Dhal, the District Project Coordinator, SSA, Bhadrak, vide letter dated 26.11.2019, requested the Block Education Officer, Bonth to conduct an enquiry into the aforesaid allegation and to take appropriate action. But the Principal, District Institute of Education and Training, Agarpara, Bhadrak vide memo dated 28.11.2019 clarified the position that the petitioner has passed the C.T. examination 2003 as a compartmental candidate and serial number of such certificate is 030858 and, as such, the revised mark sheet issued by Board of Secondary Education, Odisha and other relevant documents were also forwarded by the District Institute of Education and Training, Agarpara, Bhadrak.

7. The impugned order indicates that the service of the petitioner has been terminated with immediate effect as per Rule-15 of OCS (CCA) Rules,

1962. On perusal of the provisions contained in Rule-15 of the OCS (CCA) Rules, 1962, it appears that elaborate procedure has been prescribed for imposing penalties of termination from service. As per sub-rule (2) of Rule-15 of Rules, 1962, the disciplinary authority shall frame definite charges on the basis of the allegations on which the inquiry is to be held. Such charges together with a statement of the allegations on which they are based, shall be communicated in writing to the government servant and he shall be required to submit, within such time as may be specified by the disciplinary authority but not ordinarily exceeding one month, a written statement of his defence and also to state whether he desires to be heard in person. Sub-rule(3) of Rule-15 of Rules, 1962 prescribes that the government servant shall, for the purpose of preparing his defence, be supplied with all the records on which the allegations are based. He shall also be permitted to inspect and take extracts from such other official records as he may specify, provided that such permission may be refused if, for reasons to be recorded in writing in the opinion of the disciplinary authority such records are not relevant for the purpose or it is against interest of the public to allow him access thereto. Similarly, for causing inquiry, presenting officer and inquiry officer are to be appointed by the disciplinary authority as per sub-rule(5) of Rule-15. Rule-15(6) and (7) provides examination of witnesses. As per sub-rule 10(b) of the Rule-15, the disciplinary authority is to impose any of the penalties as specified in clauses (vi) to (ix) of Rule-13 of OCS (CCA) Rules, 1962. If such elaborate procedure has been prescribed under law, while imposing major penalty of termination from service vide order impugned in Annexure-12 dated 16.12.2019, the aforesaid procedures have not been followed and more so there is non-compliance of principles of natural justice. Nothing has been placed on record to elucidate that due procedure has been followed to award the punishment of termination from service.

8. Furthermore, when report was called for from the Board of Secondary Education, Odisha on 11.11.2019 under Annexure-6, whether such report has been received from the Board or not, that has not been placed on record. Therefore, on the basis of mere allegation of an outsider, the action so taken for termination of service of the petitioner without following due procedure, cannot sustain in the eye of law.

9. It is the basic principles of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in

Taylor v. Taylor, (1875) 1 Ch D 426, which was followed by **Lord Roche** in ***Nazir Ahmad v. King Emperor***, 63 Ind App 372 : AIR 1936 PC 253 who stated as under:-

> *"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."*

The same view has also been taken by the apex Court in ***Babu Verghese and others v. Bar Council of Kerala & Ors.,*** AIR 1999 SC 1281 at page 1288.

In view of detailed procedure envisaged under Rule-15 of the OCS (CCA) Rules, 1962, if the same has not been followed in letter and spirit as to the law discussed above, any action taken in violation of such rules cannot sustain in the eye of law.

10. Apart from the above, the Principal, District Institute of Education and Training, Agarpara, Bhadrak vide memo dated 28.11.2019 addressed to the Block Education Officer, Bonth with regard to genuineness of the secondary teachers training certificate issued to the petitioner, has specifically clarified that the petitioner having Roll No.02CP002 has passed the C.T. examination, 2003 (Compartmental) and serial no. of certificate is 030858. Consequentially, a revised mark sheet was also issued by the Board of Secondary Education, Odisha. Therefore, there should not have been any doubt about the certificate produced by the petitioner to get into the job as an Asst. Teacher. In such view of the matter, this Court is of the considered opinion that without making any proper inquiry and without ascertaining the correctness of the certificate and also without giving opportunity of hearing to the petitioner, the order so passed in Annexure-12 dated 16.12.2019, is contrary to the provisions of law and violates the principles of natural justice.

11. ***Lord Reid in Ridge v. Baldwin***, (1964) AC 40 : (1963) 2 All ER 66 (HL) very succinctly described it as not being capable of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances.

12. In ***A.K. Kraipak v. Union of India***, AIR 1970 SC 150, the apex Court held that the principles of natural justice which are meant to prevent miscarriage of justice are also applicable to domestic enquiries and administrative proceedings.

The same view has also been taken by the apex Court in ***Dr. G. Sarana v. University of Lucknow***, AIR 1976 SC 2428.

13. In ***State Bank of Patiala v. S.K. Sharma***, AIR 1996 SC 1669, the apex Court held that 'Natural Justice' means 'fair play in action'.

14. In ***Union of India v. E.G. Nambudiri***, (1991) 3 SCC 38, the apex Court held as follows:

> *"The purpose of the rules of 'natural justice' is to prevent miscarriage of justice and it is no more in doubt that the principles of natural justice are applicable to administrative orders if such orders affect the rights of a citizen. Arriving at the just decision in the aim of both quasi-judicial as well as administrative enquiry; an unjust decision in administrative enquiry may have more far reaching effect than decision in a quasi-judicial enquiry. Now, there is no doubt that the principles of natural justice are applicable even to administrative enquiries. The question is whether principles of natural justice require an administrative authority to record reasons. Generally, principles of natural justice require that opportunity of hearing should be given to the person against whom an administrative order is passed. The application of principles of natural justice, and its sweep depend upon the nature of the rights involved, having regard to the setting and context of the statutory provisions. Where a vested right is adversely affected by an administrative order, or where civil consequences ensue, principles of natural justice apply even if the statutory provisions to do not make any express provision for the same, and the person concerned must be afforded opportunity of hearing before the order is passed. But principles of natural justice do not require the administrative authority to record reasons for the decision, as there is no general rule that reasons must be given for administrative decision. Order of an administrative authority, which has no statutory or implied duty to state reasons of the grounds of its decision, is not rendered illegal merely on account of absence of reasons. It has never been a principle of natural justice that reason should be given for decision. Though the principles o natural justice do not require reasons for decision, there is necessity for giving reasons in view to enable the citizens to discover the reasonings behind the decision. Right to reasons is an indispensable part of a sound system of judicial review. Under our Constitution an administrative decision is subject to the right of a citizen, it is therefore desirable that reasons should be stated."*

15. In ***Suresh Chandra Nanhorya v. Rajendra Rajak***, (2006) 7 SCC 800, the apex Court held that 'Natural justice' is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

16. In ***Sahara India (Firm) v. CIT***, (2008) 14 SCC 151 relying upon ***A.K. Kraipat v. Union of India***, (1969) 2 SCC 262, the apex Court held as follows:

> *"Rules of 'natural justice' are not embodied rules. The phrase 'natural juice' is also not capable of a precise definition. The underlying principle of 'natural justice', evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries, it implies a duty to act fairly i.e. fair play in action. The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice."*

In view of the law laid down by the apex Court, as discussed above, while passing the order impugned, there is non-compliance of the principles of natural justice and the entire action has been taken in gross violation of the provisions of law and, thereby, the order impugned cannot sustain.

17. In the counter affidavit filed by opposite party no.6, the contention raised in paragraph-17(b) of the writ petition has remained uncontroverted, inasmuch as, no specific reply has been given with regard to conduct of inquiry. Rather, reply has been given in paragraph-11 of the counter affidavit that when the C.T. certificate produced by the petitioner was proved as fake one, opposite party no.6 took immediate steps by lodging FIR against the petitioner and at the same time terminated him from service with immediate effect vide office order no.2290 dated 16.12.2019. Thereby, it is specifically admitted that the provisions contained under Rule-15 of OCS (CCA) Rules, 1962 with regard to conduct of inquiry have not been followed in the present case. More so, compliance of the order dated 10.12.2019 passed by this Court in W.P.(C) No.24972 of 2019 has not been done in letter and spirit.

18. In view of the facts and circumstances, as well as proposition of law, as discussed above, since the impugned order dated 16.12.2019 in Annexure-12 has been passed without following due procedure of law, i.e. Rule-15 of OCS (CCA) Rules, 1962 and without complying the principles of natural justice, inasmuch as no opportunity of hearing was given to the petitioner, the same cannot sustain in the eye of law and is hereby quashed. The opposite parties are directed to reinstate the petitioner in service with immediate effect.

19. The writ petition is thus allowed. There shall be no order as to costs.

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2021 (I) ILR - CUT- 399

DR. B.R. SARANGI, J.

W.P.(C) NO. 17962 OF 2009

THOMAS KERKETTA .....Petitioner

.V.

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

PENSION – Claim thereof – Petitioner, a retired teacher of a Christian Minority fully aided educational institution – Applicability of Orissa Aided Educational Institution Employees Retirement Benefits Rules, 1981 and Orissa Education (Minority Managed Aided Educational Institution Employees "Method of Recruitment and Conditions of Service") Order, 2003 read with 9(1) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 and after its amendment in 1976 – The contention raised by State that since the petitioner retired from service on 28.02.1995, in view of the provisions contained in the Order, 2003, he is not entitled to get retiral benefit as the cut off date has been fixed as 01.04.1997 entitling the employees of the minority institution to get their retirement benefit – The said Rule shall be applicable to the persons those who retired after 01.04.1997 and, as such, the Order, 2003 has come to force in 2003 after the retirement of the petitioner, i.e., on 28.02.1995 and, therefore, by the time the petitioner retired from service on 28.02.1995, the Rules which were governing the field are applicable to him – Whether can be accepted? – Held, in view of such position, Rule-3 of the Rules, 1981 and Rule-9 of Rules, 1974, as amended in 1976, the members of the staff of an aided educational institution receiving salary directly from the Government are to be regarded as one under the direct payment system – Thereby, the resolution dated 13.07.1978 stating that Christian minority schools are not coming under the direct payment system cannot override the Rules, 1974, as amended in 1976 and in view of the judgment passed by this Court in Patras Soreng and Benedict Xalxo, the petitioner is entitled for pension. (Paras 18 & 19)

Case Laws Relied on and Referred to :-

1. 1993 (II) OLR 272 : Patras Soreng Vs. State of Orissa.
2. OJC No. 5556 of 1993 : Benedict Xalxo Vs. State of Orissa & Ors.
3. (2002) 8 SCC 481 : T.M.A. Pai Foundation Vs. State of Karnatak.
4. AIR 2005 SC 3226 : P.A. Inamdar Vs. State of Maharashtra.
5. (2008) 5 SCC 241 : Government of A.P. Vs. K. Brahmanandam.
6. AIR 2005 SC 3226 : AIR 2005 SC 3226 : P.A. Inamdar Vs. State of Maharashtra.
7. (OJC No. 5556 of 1993 : Benedict Xalxo Vs. State of Orissa & Ors.

For Petitioner : M/s. A.K. Mishra-2 & M.K. Mallick.
For Opp. Parties: Mr. B. Satpathy, Standing Counsel S&ME

JUDGMENT Date of Judgment : 28.01.2021

DR. B.R. SARANGI, J.

The petitioner, who was appointed as an Assistant Teacher in the Mission Minority Primary School and on attaining the age of superannuation retired from service w.e.f. 28.02.1995, has filed this writ petition seeking to quash Annexure-2 dated 12.12.2005 rejecting his claim for getting pension and other retirement benefits as deemed and admissible to the post w.e.f. 01.03.1995 along with interest.

2. The factual matrix of the case, in hand, is that in order to improve and create a literacy atmosphere within the children of backward class of Sundargarh district, more than 200 educational institutions were established by the Christian Community which were managed by Catholic Board of Education, a registered society, having its Head Office at 'Bishop's House, Hamirpur, Rourkela. Mission Minority Primary Schools established by the Christian Community are protected under Article 30 of the Constitution of India and the primary schools, which were established and recognized at different points of time having been eligible, were brought under the grant-in-aid fold and became fully aided educational institutions. The petitioner, having got requisite qualification and being selected, was appointed as Assistant Teacher in Mission Minority Primary School. Consequentially, he joined in such post on 01.10.1962. On attaining the age of superannuation, he was issued with notice of superannuation and consequentially he was relived from his duty on 28.02.1995, while serving at Kutunia Primary School, Kutunia, Sundargarh.

2.1 The petitioner, being an employee of aided educational institution, having not been extended with the retiral benefit, had approached this Court by filing W.P.(C) No. 10915 of 2003. This Court, vide order dated 12.03.2004, disposed of the writ petition with an observation that Inspector of Schools, Sundargarh Circle, Sundargarh shall scrutinize the pension papers of the petitioner in consonance with the ratio decided in the case of "Patras and Benedict" and on scrutiny if it is found that the petitioner is entitled to pension, pass necessary orders for disbursement of the same within six months from the date of communication of the order. On submission of such pension papers, along with copy of the order passed by this Court, opposite

party no.3-Inspector of Schools, Sundargarh Circle, Sundargarh, vide order dated 12.12.2005, rejected the claim of the petitioner for grant of pension on the ground that his case is neither coming under the Orissa Aided Educational Institution Employees Retirement Benefits Rules, 1981 (for short "Rules, 1981) nor O.E. (Minority Managed Aided Educational Institution Employees "Method of Recruitment and Conditions of Service") Order, 2003 (for short "O.E. Order, 2003") and, as such, the petitioner having retired from service with effect from 28.02.1995 is not entitled to get pensionary benefits as prayed for. Hence, this writ petition.

3. Mr. A.K. Mishra-2, learned counsel for the petitioner contended that admittedly the petitioner was serving in Mission Minority Primary School, which is a fully aided educational institution, and as per the resolution dated 11.07.1984 passed by the Government of Odisha in Education & Youth Services Department, the provisions of the Rules, 1981 are applicable to the institutions established and administered by minorities for extension of retirement benefits and that O.E. Order, 2003 is a beneficial one for payment of pension to the retirees. It is further contended that eligibility to grant retirement benefits to the employees of minority institutions no more remains res integra in view of the decisions of this Court in ***Patras Soreng v. State of Orissa***, 1993 (II) OLR 272, as well as in ***Benedict Xalxo v. State of Orissa & others***, OJC No. 5556 of 1993 disposed of on 17.01.1997. The petitioners in both the above noted writ petitions were retired prior to 01.04.1997 and were allowed to receive pension. Thereby, contended that the rejection order passed by the Inspector of Schools is an outcome of non-application of mind and as such hits by Articles 14, 21, 30(2) and 39(d) of the Constitution of India.

4. Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department contended that since the institution itself is a minority institution, Orissa Education Act is not applicable and more so referring to the impugned order contended that the Order, 2003, which was given effect to from 01.04.2003 wherein Rule 29(1) provides retirement benefits under the said Order, 2003 to the employees of aided educational institution under minority managed institution retiring on or after 01.04.1997 and accordingly employees retiring on or after 01.04.1997 shall be eligible to get the pensionary benefits. Since the petitioner retired from service prior to 01.04.1997, i.e. to say on 28.02.1995, even under the revised rules the pensionary benefits are not admissible to him. Thereby, opposite party no.3 is

well justified in passing the order impugned dated 12.12.2005 in compliance of order dated 12.03.2004 passed by this Court in W.P.(C) No. 10915 of 2003 and accordingly the writ petition is liable to be dismissed.

5. This Court heard Mr. A.K. Mishra-2, learned counsel for the petitioner and Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department by virtual mode, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The facts, as delineated above, are not in dispute. The institution having been established by the Christian Minority is a fully aided educational institution, as has been pleaded in the writ petition, which fact has not been disputed by way of filing counter affidavit. Therefore, employees of aided educational institution are entitled to retirement benefits, as provided in the Rules, 1981. Rule-3 of the Rules, 1981, however, states that the same shall apply, inter alia to the teaching staff, as was the petitioner, of such schools which come under the direct payment system. The proviso to that rule permits the Government to apply the Rules to any other educational institution or category of institutions as may be specified by general or special order. It is the requirement of the school to be under the "direct payment system" which has stood in the way of the petitioner in getting the benefit under the Rules, inasmuch as no pleadings have been made to that extent by opposite party no.4 in its counter affidavit that the school in question is not coming under the direct payment system.

7. The school in question admittedly is a fully aided minority educational institution. Before proceeding further, this Court is to examine the nature and character of the institution from which the petitioner has retired from service. There is no dispute that the petitioner is continuing in an institution belonging to a minority community. The word 'minority' has not been defined in the Constitution.

8. In 1928, the Motilal Nehru Report showed a prominent desire to afford protection to minorities, but did not define the expression.

9. In 1945, the Sapru Report also proposed, inter alia, a Minorities Commission but did not define minority.

But the Union Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined 'minority' by an inclusive definition which reads as follows:-

> *"(i) The term 'minority' includes only those non-document groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.*
>
> *(ii) Such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics; and*
>
> *(iii) Such minorities must be loyal to the State of which they are nationals."*

10. Section 2(c) of the National Commission for Minorities Act, 1992 defines the word 'minority' which reads as under:-

> *"Minority, for the purpose of the Act, means a community notified as such by the Central Government."*
>
> *The Government notified Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) as minority communities on October 23, 1993. However, explanation (ii) to Art.25(2)(b) of the Constitution still provides that in sub-clause (b) of Cl.(2) the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly."*

11. In ***T.M.A. Pai Foundation v. State of Karnatak***, (2002) 8 SCC 481, considering Article 30 of the Constitution of India, the apex Court held as follows:-

> *"The word 'minority' occurring in Article 30 is not defined in the Constitution, but literally it means 'a non-dominant' group. It is a relative term and is referred to represent the smaller two numbers, sections or group called 'majority'. In that sense, there may be political minority, religious minority, linguistic minority, etc."*

12. In ***P.A. Inamdar v. State of Maharashtra***, AIR 2005 SC 3226, the apex Court observed that the word 'minority' literally means 'a non-dominant' group.

13. Now, taking into consideration the above aspect, the "minority educational institution" has been defined under Rule-2(1)(f) of A.P. Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993, which has been

taken into consideration in ***Government of A.P. v. K. Brahmanandam***, (2008) 5 SCC 241, to mean any educational agency of which at least 2/3rd members belong to a religious/linguistic minority.

14. In ***P.A. Inamdar v. State of Maharashtra***, AIR 2005 SC 3226 : AIR 2005 SC 3226, the apex Court held as follows:-

> *"So long as an institution retains its minority character by achieving and continuing to achieve its twin objectives, i.e., (i) to enable such minority to conserve its religion and language and (ii) to give a thorough, good, general education to children belonging to such community, the institution would remain a 'minority institution' under Article 30(1) of the Constitution."*

15. The Mission Minority Primary School having satisfied the requirement, as mentioned above, is considered to be a minority educational institution, which was running with full aid received from the Government. Therefore, Rule 9(1) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (in short "Rules, 1974") has stated, after its amendment in 1976, that every employee of an aided educational institution shall ordinarily be paid in the month following the month to which the claim relates directly by the Government or by any Officer or by any agency authorized by Government. The position, therefore, is that after the aforesaid 1974 Rules were amended in 1976, a member of the staff of an aided educational institution receives his salary directly from the Government, and, as such, such a school has to be regarded as under the direct payment system of which Rule 3 of the Rules speaks of.

16. It may be that before the aforesaid 1974 Rules were amended in 1976, there used to be a distinction between schools receiving aid under the direct payment system and otherwise, which would appear to be so, inter alia, from what has been stated in Government Resolution No. 250011/EYS dated 13.07.1978 which has said something about the direct payment system being not applicable to educational institutions run by the Christian minority community. The 1976 amendment, to which reference has been made, however, leaves no manner of doubt that a school which is fully aided, as is the one at hand, has to be regarded as one under the direct payment system, of which mention has been made in Rule-3 of the Rules.

17. As to the aforesaid Government resolution, a distinction can be made between minority institutions and non-minority institutions as regards the

direct payment system, the same cannot override the statutory rules of 1974 as amended in 1976, because of which that resolution and for that matter such other resolutions could not and did not hold the field.

18. In view of such position, Rule-3 of the Rules, 1981 and Rule-9 of Rules, 1974, as amended in 1976, the members of the staff of an aided educational institution receiving salary directly from the Government are to be regarded as one under the direct payment system. Thereby, the resolution dated 13.07.1978 stating that Christian minority schools are not coming under the direct payment system cannot override the Rules, 1974, as amended in 1976.

19. The contention raised that since the petitioner retired from service on 28.02.1995, in view of the provisions contained in the Order, 2003, he is not entitled to get retiral benefit as the cutoff date has been fixed as 01.04.1997 entitling the employees of the minority institution to get their retirement benefit. The said Rule shall be applicable to the persons those who retired after 01.04.1997 and, as such, the Order, 2003 has come to force in 2003 after the retirement of the petitioner, i.e., on 28.02.1995 and, therefore, by the time the petitioner retired from service on 28.02.1995, the Rules which were governing the field are applicable to him. This question has no more remained res integra, in view of the judgment passed by this Court in ***Patras Soreng*** (supra) and the said judgment was challenged before the apex Court by the State by preferring SLP No. 14506 of 1994 (***State of Orissa v. Patras Soreng***), which was dismissed by the apex Court. Thereby, the judgment passed by this Court in ***Patras Soreng*** (supra) has reached its finality.

Similarly, in the case of ***Benedict Xalxo v. State of Orissa & others*** (OJC No. 5556 of 1993 disposed of on 17.01.1997), this Court has taken similar view that of ***Patras Soreng*** (supra) and in both the cases the petitioners were employees of minority institution. Thereby, the ratios decided in those cases are squarely applicable to the present case and the petitioner cannot be discriminated on any count.

20. In that view of the matter, the order dated 12.12.2005 passed by the Inspector of Schools, Sundargarh Circle, Sundargarh in Annexure-2 rejecting the claim of the petitioner to grant retirement benefits cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. The opposite party no.3 is directed to pay pension and other retirement benefits as due and admissible to the petitioner w.e.f. 01.03.1995, as he retired from

service on attaining the age of superannuation w.e.f. 28.02.1995, by making proper calculation. The entire exercise shall be completed within a period of four months from the date of communication of this judgment.

21. In the result, the writ petition is allowed. No order as to costs.

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2021 (I) ILR - CUT- 406

S. PUJAHARI, J.

CRLA NO. 809 OF 2018

M/S. KATLOON MANAGEMENT & FINANCIAL SERVICES PVT. LTD., BHANJANAGAR & ORS. .....Appellants

.V.

STATE OF ODISHA .....Respondent

AND

CRLA NO.810 OF 2018

KANAK LATA NAYAK & ORS. .....Appellants

.V.

STATE OF ODISHA .....Respondent

ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (In Financial Establishments) ACT, 2011 – Section 9 – Provisions under – Power of the Designated court – Allegation of misappropriation of the money of the depositors – Order of attachment of the property of the accused Company passed by the Designated Court – Impugned order challenged in appeal on the ground that, proceeding in question has to be initiated on the complaint of group of depositors not by single depositor – Further plea that the impugned order was unsustainable for the reason that neither the Competent authority nor the court below has identified the number of persons allegedly affected and the total money required to be refunded – Legality of the order questioned – Held, the provisions do not require the Designated Court to indentify the name or number of persons (depositors) allegedly affected or to quantify the money required for equitable distribution among the depositors – Appeal dismissed.

CRLA NOS. 809 & 810 OF 2018

For Appellants : M/s. Suresh Tripathy, B.P. Tripathy, K.K. Pradhan.
For respondent : Mr. Bibekananda Bhuyan, Special Counsel (OPID)

JUDGMENT Date of Judgment: 02.02.2021

S. PUJAHARI, J.

In both these appeals, challenge having been made to the common judgment, i.e., the judgment dated 06.05.2017 passed by the learned Designated Court under the OPID Act, Berhampur in I.A. No.2 of 2016, corresponding to EOW P.S. Case No.18 dated 22.07.2015, both these appeals have been heard together and the impugned order to follow will dispose of both of them.

2. Buguda P.S. Case No.151 of 2015 registered under Sections 4, 5 and 6 of the Prize Chits & Money Circulation Schemes (Banning) Act, 1978 and Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (for short "the OPID Act") on the basis of the F.I.R. lodged by one Ramakrushna Pani, was taken over by the Crime Branch for the purpose of investigation and the appellants in Criminal Appeal No.809 of 2018 have been arraigned as accused persons therein. It is alleged that accused-company, namely, M/s. Katloon Management & Financial Services Pvt. Limited incorporated as a Private Company under the provisions of Companies Act, 1956 and the Accused-Society, namely, M/s. Katloon Credit Cooperative Limited through their Directors / Managing Director or Promoter, as the case may be, during the period from November, 2010 to March, 2013 collected huge amount of money from the public unauthorizedly with assurance of refunding the same with interest, and instead of honoring the commitment made by them to the depositors / Investors, closed their offices in August, 2013. After completion of investigation, charge-sheet has already been filed against them. As per the investigation, various properties were purchased by the Company and its sister concerned through their Directors at different places with the money collected by them from the depositors in course of running illegal money circulating scheme. It further appears from the record that in terms of Section 3 of the OPID Act, 2011 the State Government passed order of provisional attachment of the movable and immovable properties of the appellants in CRLA No.809 of 2018 and thereafter the Addl. District Magistrate-cum-Competent Authority under the OPID Act moved an application under Section 4(3) of the OPID Act registered as I.A. No.2 of 2016 before the Designated Court under the OPID Act, Berhampur seeking to make the aforesaid ad-interim order of attachment absolute and for a direction to sell the attached properties by public auction and realize the sale proceeds. The

present appellant nos.5 and 6 (opposite party nos.5 and 6 in the Interim Application) though contested the said Interim Application, did not choose to adduce any evidence during the hearing. The learned Designated Court basing upon the oral evidence of two witnesses and documentary evidence produced by the applicant-competent authority, passed the impugned judgment directing the competent authority to sell the attached properties by public auction and realize the sale proceed for the purpose of equitable distribution of the same amongst the depositors.

3. The accused persons, who were arraigned as opposite parties in I.A. No.2 of 2016 before the Court below, have preferred Criminal Appeal No.809 of 2018 to set-aside the impugned judgment dated 06.05.2017, whereas Criminal Appeal No.810 of 2018 has been filed by the purchasers of different parcels of land from M/s.Katloon Management & Financial Services Pvt. Limited, seeking to quash the impugned judgment to the extent the same affected the property purchased by them under Ext.2 and more fully described in the CRLA.

4. I have heard the respective learned counsels appearing for the appellants in both the appeals as well as Shri Bibekananda Bhuyan, learned Special Counsel engaged on behalf of the respondent-State.

5. The appellants in CRLA No.809 of 2018 question the legality and propriety of the impugned judgment on the grounds, inter-alia, that the proceeding in question having been initiated on the complaint / F.I.R. of a lone individual said to be a depositor, the impugned judgment is not legally sustainable, inasmuch as the OPID Act contemplates a class action when a number of persons are affected by the alleged criminality calling for remedial or penal action under the OPID Act. In support of this contention, the accused-company and its Directors refer to Sections 4(4) and 9(7) of the OPID Act. According to them, without undertaking any exercise of identifying the number of persons affected and amount of total money required to be refunded, the order of attachment and/or sale of the total property of the appellants speaks of non-application of judicial mind by the learned Court below. It is also contended by them that M/s. Katloon Credit Cooperative Limited registered under the Self Help Cooperative Act, 2002, being not amenable to the OPID Act, the property of the said Cooperative Society cannot be brought within the order of attachment and sale under the OPID Act, and the properties of the Accused-company and Accused-Society

having not been bifurcated, the impugned judgment is not sustainable in law. It is further averred by them that the OPID Act being prospective in application and the prosecution launched under the said Act for the offences otherwise triable under the general penal statute, there is manifest illegality in the inception of the proceeding as well as the impugned judgment.

6. According to the appellants in CRLA No.810 of 2018, the appellants being bonafide purchasers of the property in question for consideration, the said property is not liable to be brought under the purview of the OPID Act.

7. Though the appellants have challenged the impugned order on the aforesaid grounds, but during the course of hearing, learned counsel for the appellants laid emphasis on the contention that the impugned order is unsustainable for the reason that neither the Competent Authority nor the Court below has identified the number of persons allegedly affected and the total money required to be refunded. According to him, the purpose of making the attachment absolute is to auction the property and make equitable distribution among the persons stated to have been duped and, therefore, it was incumbent upon the Court concerned to determine on the basis of the evidence adduced as to what was the amount the Company have received, from which of the depositors and thereafter, whether the property attached was sufficient enough to take care of the same before the attachment is made absolute. In this case, virtually the aforesaid having not been done, the impugned order of attachment is liable to be quashed and the matter is required to be remitted back for fresh adjudication.

8. Per contra, Mr. Bhuyan, the learned Special counsel engaged on behalf of the State would submit that the aforesaid is not the requirement of law and that it is only in the event someone comes forward indicating the fact that the property attached is not liable for attachment, the Court is required to make a determination before absolutizing an ad-interim order of attachment. In this case, admittedly, the appellants having never come forward showing cause that in the property attached neither the Financial Establishment has any interest nor the same has been acquired by the ill-gotten money of the Financial Establishment and they having not shown that the value of the property attached is much more than the value received by the Financial Establishments, the impugned order cannot be questioned.

9. In order to appreciate the contentions of the parties, it would be apposite to have a look to the provisions of Sections 3, 4, 6, 9, 10, 11 and 12 of the OPID Act which are quoted hereunder;

"3. **Attachment of properties on default of return of deposit –** Notwithstanding anything contained in any other law for the time being in force.-

(i) where, upon complaints received from a number of depositors that any Financial Establishment defaults the return of deposits after maturity or fails to pay interest on deposit or fails to provide the service for which deposit has been made, or

(ii) where the Government have reason to believe that any Financial Establishment is acting in a calculated manner with an intention to defraud the depositors, and if the Government are satisfied that such Financial Establishment is not likely to return the deposits or to make payment of interest or to provide the service, the Government may, in order to protect the interest of the depositors of such Financial Establishment, pass an ad-interim order attaching the money or other property alleged to have been procured either in the name of the Financial Establishment, pass an *ad-interim* order attaching the money or other property alleged to have been procured either in the name of the Financial Establishment or in the name of any other person from and out of the deposits collected by the Financial Establishment, or if it transpires that such money or other property not available for attachment or not sufficient for repayment of the deposits such other property of the said Financial Establishment or the Promoter, Director, Partner or Manager or Member of the said Financial Establishment to the extent of his default or such other properties of that person whose name properties were purchased from and out of the deposits collected by the Financial Establishment, as the Government may think fit and transfer the control over the said money or property to the Competent Authority.

4. Competent authority – (1) The Government may, by notification, appoint a District Magistrate or an Additional District Magistrate for such area or areas or for such case or cases as may be specified in the notification as the Competent Authority to exercise control over the properties attached by the Government under section 3.

6. Default in Repayment of deposits and interests honouring the commitment – Notwithstanding anything contained in section 3, where any Financial Establishment defaults the return of the deposit or defaults the payment of interest on the deposit or fails to return in any kind or fails to render service for which the deposit have been made, every person responsible for the management of the affairs of the Financial Establishment shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees and such Financial Establishment is also liable for a fine which may extend to two lakh rupees.

9. Powers of Designated Court regarding attachment, sale, etc. – (1) Upon receipt of an application under section 4, the Designated Court shall issue to the

Financial Establishment or to any other person whose property is attached by the Government under section 3, a notice accompanied by the application and affidavits and of the evidence, if any, recorded, calling upon the said Establishment or the said person to show cause on a date to be specified in the notice as to why the order of attachment should not be made absolute and the properties so attached be sold in public auction.

(2) The Designated Court shall also issue such notice to all other persons represented to it as having or being likely to claim any interest or title in the property of the Financial Establishment or the person to whom the notice is issued under sub-section (1), calling upon such person to appear on the same date as that specified in the notice and make objection if he so desires to the attachment of the property or any portion thereof on the ground that he has an interest in such property or portion thereof.

(3) Any person claiming an interest in the property attached or any portion thereof may, notwithstanding that no notice has been served upon him under this section, make an objection as aforesaid to the Designated Court at any time before an order is passed under sub-section (4) or sub-section (6).

(4) If no cause is shown and no objections are made on or before the specified date, the Designated Court shall forthwith pass an order making the ad-interim order of attachment absolute and direct the Competent authority to sell the property so attached by public auction and realize the sale proceeds.

(5) If cause is shown or any objection is made as aforesaid the Designated Court shall proceed to investigate the same and in so doing, as regards the examination of the parties and in all other respects, the Designated Court shall, subject to the provisions of this Act, follow the procedure and exercise all the powers of a court in hearing a suit under the Code of Civil Procedure, 1908 and any person making an objection shall be required to adduce evidence to show that on the date of the attachment he had some interest in the property attached.

(6) After investigation under sub-section (5), the Designated Court shall pass an order, within a period of one hundred and eighty days from the date of receipt of an application under sub-section (3) of section 4, either making the ad-interim order of attachment absolute or varying it by releasing a portion of the property from attachment or cancelling the ad-interim order of attachment and then direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds:

Provided that the Designated Court shall not release from attachment any interest, which it is satisfied that the Financial Establishment or the person referred to in sub-section (1) has in the property, unless it is also satisfied that there will remain under attachment an amount of property of a value not less than the value that is required for repayment to the depositors of such Financial Establishment.

(7) The Designated Court shall, on an application by the Competent Authority, pass such order or issue such direction as may be necessary for the equitable distribution among the depositors of the money attached or realized out of the sale.

10. Attachment of property of malafide transferees – (1) Where the assets available for attachment of a Financial Establishment or other person referred to in section 3 are found to be less than the amount or value which such Financial Establishment is required to repay to the depositors and where the Designated Court is satisfied by affidavit or otherwise, that there is reasonable cause for believing that the said Financial Establishment has transferred, whether before or after the commencement of this Act, any of the property otherwise than in good faith and for consideration, the Designated Court may, by notice, require any transferee of such property, whether or not he received the property directly from the said Financial Establishment, to appear on a date to be specified in the notice and show cause why so much of the transferee's property as is equivalent to the proper value of the property transferred should not be attached.

(2) Where the said transferee does not appear and show cause on the specified date or where after investigation in the manner provided in sub-section (5) of section 9, the Designated Court is satisfied that the transfer of the property to the said transferee was not in good faith and for consideration, the Designated Court shall order the attachment of so much of the said transferee's property as in the opinion of the Designated Court equivalent to the proper value of the property transferred.

11. Security in lieu of attachment – Any Financial Establishment or person whose property has been or is about to be attached under this Act may, at any time, apply to the Designated Court for permission to give security in lieu of such attachment and where the security offered and given is, in the opinion of the Designated Court, satisfactory and sufficient, it may cancel the ad-interim order of attachment or, as the case may be, refrain from passing the order under sub-section (6) of section 9.

12. Administration of property attached – The Designated Court may, on the application of any person interested in any property attached under this Act, and after giving the Competent Authority an opportunity of being heard, make such order as the Designated Court considers just and reasonable for,-

(a) providing from such of the property attached as the applicant claims an interest in, such sum as may be reasonably necessary for the maintenance of the applicant and of his family and for expenses connected with the defence of the applicant where criminal proceedings have been instituted against him in the Designated Court under section 6;

(b) safeguarding so far as may be practicable, the interest of any business affected by the attachment and in particular, the interest of any partners in such business."

10. The aforesaid provisions thus go to show that under Section 3 of the OPID Act, on default being made by the Financial Establishments, when a complaint is received from a number of depositors, the State Government on being satisfied that the Financial Establishment is not likely to return the deposits for the protection of the interest of the depositors may order for ad-interim attachment of the money and other property alleged to have been procured either in the name of the Financial Establishment or in the name of other persons from and out of the amount collected by the Financial Establishment. So also, if the Government are convinced that such property is not available for attachment or not sufficient for repayment of the deposits, control over such other property of the said Financial Establishment or the Promoter, Director, Partner or Manager or Member of the said Financial Establishment or a person who has borrowed money from the Financial Establishment, may be transferred to the Competent Authority appointed under Section 4 of the OPID Act. Thereafter, it becomes competent on the part of the competent authority under Section 4 of the OPID Act to apply to the Designated Court for making ad-interim order of attachment absolute and for a direction to sell the property so attached by public auction and realize the sale proceeds. Section 9 of the OPID Act contemplates that on receipt of such an application, the Designated Court shall issue notice to the Financial Establishments or to any other person whose property is attached by the State Government. Sub-section (1) of Section 9 of the OPID Act provides that the Designated Court shall issue notice to show cause to the Financial Establishment or the person whose property has been attached, before making the attachment absolute. So also, sub-section (2) of Section 9 of the OPID Act contemplates that not only the Financial Establishment or the person whose property is under attachment as per Section 3 of the OPID Act, but also such other persons as are shown to have any claim or being likely to claim any interest or title in the property of the Financial Establishment or the persons noticed under sub-section (1), shall be noticed to make objection to the attachment of the property or any portion thereof on the ground that he has an interest therein. Sub-section (3) of Section 9 of the OPID Act extends scope to any such person claiming an interest in the property attached or any portion thereof to make an objection as aforesaid at any time, but before an order is passed under sub-section (4) or sub-section (6), notwithstanding that no notice has been served on him. Sub-section (4) of Section 9 of the OPID Act contemplates that if no cause is shown and no objections are made on or before the specified date, the Designated Court shall forthwith pass an order making the ad-interim order of attachment absolute and direct the Competent

Authority to sell the property so attached by public auction and realize the sale proceeds. Sub-section (5) of Section 9 of the OPID Act speaks that if any cause is shown or any objection is made to proceed with the investigation giving opportunity to the person making such objection to adduce evidence to show that on the date of attachment he had some interest in the property attached and the property is not liable for attachment. Sub-section (6) of the Section 9 of the OPID Act speaks of the time the order to be passed basing on such objection either to make ad-interim attachment absolute or vary it by releasing a portion of the property from attachment or cancelling the ad-interim order of attachment. Sub-section (7) of Section 9 of the OPID Act speaks of the Designated Court on the application of the competent authority pass such order and issue such direction as may be necessary for the equitable distribution among the depositors of the money attached or realized out of the sale.

11. A perusal of the impugned order would reveal that it was only Aswini Kumar Nayak (Appellant No.5 in CRLA No.809 of 2018) who had filed show cause in the proceeding before the learned Designated Court, and although Kailash Chandra Sethy (Appellant No.6 in CRLA No.809 of 2018) entered appearance in the said proceeding by engaging his advocate, no show cause had been filed by him. Neither of them adduced any rebuttal evidence as against the evidence, both oral and documentary, adduced by the State. The Competent Authority was examined as P.W.1 and the Investigating Officer as P.W.2, and a good number of documents were also admitted into evidence by the State through those two witnesses.

12. It would further reveal from the lower Court record that in course of the proceeding in compliance with the provisions under sub-sections (1) and (2) of Section 9 of the OPID Act, the learned Designated Court issued notice to the company office and its Directors / Promoters (Appellants in CRLA No.809 of 2018) followed by the notice under Order-5, Rule-20 of C.P.C. which was also got published in "The Samaja", an Odiya daily newspaper, inviting objection from third parties having claim, if any, in the properties attached. Needless to mention that neither any of the appellants in CRLA No.809 of 2018 filed any objection in the proceeding before the learned Designated Court nor participated in the hearing therein. To put in other words, despite being afforded opportunity they refrained from contesting the proceeding before the Court below, and the contention that is now raised on their behalf was not raised at the appropriate stage of the proceeding before the Court below under Section 9 of the OPID Act.

13. To reiterate, the appellant No.5 in CRLA No.809 of 2018 alone had filed show cause / objection in the proceeding under Section 9 of the OPID Act, and a perusal of the same would reveal that he had shown his intention and inclination to clear the dues of the customers/depositors by disposing of the Real Estate of the accused-company by making proper negotiation with prospective buyers/customers, and sought the proposed sale to be kept in abeyance. To put in other words, the contention now raised on his behalf was alien to his objection / show cause that had been filed before the learned Designated Court in the proceeding under Section 9 of the OPID Act.

14. This Court has also considered the case of the appellant no.6 (in CRLA No.809 of 2018) in isolation, inasmuch as he had participated in the hearing before the OPID Court, albeit without filing any written show cause or objection. He is one of the Directors/Promoters of the Financial Establishment and claims to have purchased the property vide Ext.22 with his own fund. But, while assailing the impugned order he has not produced any material to show that if his property/interest is released from attachment, there will remain property of a value not less than the value that would take repayment to the affected depositors. In the context, a reference may be made to the proviso to sub-section (6) of Section 9 of the OPID Act. In absence of any such material on record much less at the instance of the appellant no.6, there remained no scope for the Designated Court to record the requisite satisfaction as contemplated under the proviso to sub-section (6) of Section 9 of the OPID Act.

15. Further, sub-sections (6) and (7) of Section 9 of the OPID Act obligate and empower the Designated Court to pass order for sale of the attached property and such other order as may be necessary for the equitable distribution of the money attached, or the sale proceeds of the attached property among the depositors. These provisions do not require the Designated Court to identify the name or number of persons (depositors) allegedly affected or to quantify the money required for equitable distribution among the depositors.

16. For the discussions made herein above, this Court finds no merit in either of these two Criminal Appeals. Hence, both the Criminal Appeals stand dismissed.

L.C.R. received along with a copy of this judgment be sent back forthwith.

The parties may utilize the copy of this judgment as per the High Court's Notice No.4587 dated 25.03.2020.

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2021 (I) ILR - CUT- 416

BISWANATH RATH, J.

W.P.(C) NO. 9623 OF 2003

BHOLANATH SAHOO, EX-PROPRIETOR OF M/S. BANAMALI STONE WORKS,ROURKELA. .....Petitioner

.V.

ASST. PROVIDENT FUND COMMISSIONER(C), ROURKELA. .....Opp. Party

EMPLOYEES PROVIDENT FUNDS & MISCELLANEOUS PROVISIONS ACT, 1952 – Section 7-A and 7-Q read with section 17-B – Proceeding under – Order determining the provident fund dues and the interest – Plea that the petitioner's establishment had not the required number of employee so as to make applicable of the provisions of the Act and that the establishment had been transferred to another person – Thus the questions arose (i) as to whether the proceeding under Section 7-A of the Act, 1952 suffers on account of limitation? and (ii) For the transfer of the establishment to new proprietor, whether the proceeding is maintainable against the petitioner-ex-proprietor? – Held, section 17-B of the Act, 1952 has been inserted in the act since 1.11.1973 – Reading the aforesaid provision, it becomes clear that the E.P.F. Organization has the right either to saddle the liability jointly on the transferor and the transferee or either from the transferor or the transferee – Therefore, there was no wrong in initiation of the proceeding under Section 7-A of the Act, 1952 as against the ex-Proprietor, which is squarely covered by the legal position – Further the initiation of the proceeding under Section 7-A of the Ac, 1952 was not hit by limitation.

Case Laws Relied on and Referred to :-

1. 1995 (I) OLR 116 : M/s. Orissa Forest Development Corporation Ltd. & Anr.Vs. Regional Provident Fund Commissioner, Orissa SubRegional Office, Rourkela.
2. AIR 1979 SC 1803 : Organo Chemical Industries .Vs. Union of India.
3. AIR 1983 SC 1239 : Mansoram .Vs. B.P.Pathan & Ors.

4. 2002(I) OLR 558 : M/s. Suburban Ply and Panel Pvt. Ltd. Vs. Assistant Commissioner, Central Excise and Customs, Bhubaneswar Division and Ors.
5. AIR 1998 SC 688 : M/s. Hindustan Times Ltd..Vs. Union of India & Ors.
6. 2012(I) OLR 792 : M/s. Hanuman Oxygen (P) Ltd..Vs. Regional Provident Fund Commissioner, Orissa, Bhubaneswar and two Ors.
7. 2012 (I) OLR 792 : M/s. Suburban Ply and Panel Pvt. Ltd.Vs. Assistant Commissioner, Central Excise and Customs. Bhubaneswar Division.
8. 2004 (I) OLR 284 : M/s. Suburban Ply and Panels (P) Ltd.Vs. Regional Provident Fund Commissioner, Orissa & Ors.
9. AIR 1998 SC 688 : Hindustan Times Ltd. Vs. Union of India & Ors.
10. AIR 1983 SC 1239 : Mansoram Vs. B.P.Pathak & Ors.

For Petitioner : Sri S.K.Rath, B.R.Barik, S.D.Sahoo, & N.P.Ray.
For Opp.Party : S.K.Das, B.C.Pradhan & M.K.Das.

JUDGMENT Date of Hearing: 25.01.2021: Date of Judgment: 09.02.2021

BISWANATH RATH, J.

This is a writ petition at the instance of the Ex-Proprietor of M/s. Banamali Stone Works challenging the impugned order at Annexure-2 passed by the competent authority in exercise of their power under Section 7-A and Section 7-Q of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter for short called as "the Act,1952").

2. Factual background involved in the case is that originally the petitioner was the Proprietor of M/s. Banamali Stone Works (quarry). In the year 1988 the Inspector of the Employees Provident Funds Department inspected the establishment of the petitioner. It is averred that the petitioner had engaged only 9 workers in the stone quarry but at the time of inspection, 2 trucks with their drivers, helpers and labourers, who were loading the broken stone in the trucks involved though not employees of petitioner establishment, were shown to be the employees of the establishment. The Inspector on visit collected their names and illegally included in the list of employees of the establishment. Petitioner all through claimed before the Commissioner that it had only 9 employees as the staffs of M/s. Banamali Stone Works (quarry) and there has been wrong inclusion of names of persons completely outsiders engaged in the truck at the time of inspection. It is further pleaded that as the petitioner's stone quarry could not run properly, the petitioner could not be able to pay back the loan it had taken from Orissa State Financial Corporation for running of the establishment. Finding

impossibility to run the establishment, petitioner transferred the establishment to Sri Aditya Narauan Senapati by way of an agreement dated 21.11.1991. It is claimed that the transfer agreement between the parties was also endorsed and approved by the Orissa State Financial Corporation, the financer. It is further alleged that without serving notice to the petitioner, the opposite party establishment conducted hearing of the case. However, after coming to know about the proceeding being taken up by the Department, petitioner appeared on 02.05.2002 and requested for some time to produce documents. It is claimed that in order to establish his case, petitioner produced the letter of the Orissa State Financial Corporation and the agreement. It is alleged that petitioner was not allowed to file his show cause regarding applicability of the act to the establishment, though it has been specifically brought to the notice of the authority that in the meantime petitioner's establishment has been taken over with assets and liabilities by a third party, namely, Sri Aditya Narayan Senapati. It is also alleged that the proceeding has been concluded illegally fixing the liability on the petitioner vide order of the establishment passed in exercise of power under Section 7-A and Section 7-Q of the Act, 1952 thereby determining the provident fund dues as Rs.1,41,865/- and in computing the interest aspect under Section 7-Q of the Act, 1952 interest has been determined to be at Rs.1,00,277/-.For the above background of the case Sri Rath, learned counsel for the petitioner contended that while the establishment was inspected, there were only 9 employees working in the establishment. It is contended that looking to the provision at Section-1, Sub-Section 3 of the Act, 1952, an establishment cannot be brought under the purview of the act unless it has 20 or more employees in engagement. It is in this situation, learned counsel for the petitioner claimed that the provisions of the act had no application to the petitioner's establishment. It is next contended that though the inspection of establishment was conducted in the year 1988 but for the establishment being transferred in the year 1991 and for the provision under Section 7-A of the Act, 1952 being instituted in the year 2001, the proceeding is not only barred by limitation but also suffers on account of involving the Ex-Proprietor of the establishment and not undertaking the exercise against the new Proprietor taken over the establishment in the meantime with assets and liabilities. Sri Rath, learned counsel for the petitioner also urged that the determination under Annexure-2 is also exparte. It is in the above circumstance, Sri Rath, learned counsel in his attempt to establish on the question of limitation as well as the proceeding not maintainable against the Ex-Proprietor for a transfer taking all the assets and liabilities taken place in the meantime, referred to 4 decisions in the

matter of ***M/s. Orissa Forest Development Corporation Ltd. and another-Vrs.- Regional Provident Fund Commissioner, Orissa SubRegional Office, Rourkela***, reported in 1995 (I) OLR 116, **Organo Chemical Industries v. Union of India,** AIR 1979 SC 1803 and in the case of **Mansoram v. B.P.Pathan and others,** AIR 1983 SC 1239 on the question of limitation and in the case of ***M/s. Suburban Ply and Panel Pvt. Ltd.-Vrs.- Assistant Commissioner, Central Excise and Customs, Bhubaneswar Division and others,*** reported in 2002(I) OLR 558 on the question of wrong involvement of the Proprietor.

3. Sri S.K.Das, learned counsel appearing for the Provident Fund Organization on the other hand while strongly made an attempt taking this Court to the decision of the Hon'ble Apex Court to establish that the question of limitation involving initiation of such proceeding has already been settled through the decision of the Hon'ble Apex Court in the case of ***M/s. Hindustan Times Ltd.-Vrs.- Union of India & others,*** reported in AIR 1998 SC 688 and also a judgment specifically on limitation on initiation of proceeding under Section 7-A of the Act, 1952 of the Calcutta High Court for Appellate side in the case of ***Hindustan Steel Works Construction Ltd. -Vrs.-Regional Provident Fund Commissioner-I & Anr***, 21.12.2018. Similarly on the question of liability involving the establishment, Sri Das, learned counsel attempted to establish the case through a decision involving the case of ***M/s. Hanuman Oxygen (P) Ltd.-Vrs.-Regional Provident Fund Commissioner, Orissa,*** Bhubaneswar and two others, reported in 2012(I) OLR 792. Sri Das, learned counsel strongly refuted the claim of Sri Rath that the impugned order remain ex-parte and that it suffers for 6 non-joinder of new establishment came into existence on mutual transfer being taken place in the meantime. Taking through the provision in Act, 1952 and the proceeding, Sri Das, learned counsel attempted to demonstrate his such contention.

4. Considering the rival contentions of the parties this Court finds the following questions are required to be determined i.e. (i) As to whether the proceeding under Section 7-A of the Act, 1952 suffers on account of limitation? and (ii) For the transfer of the establishment to new proprietor, Sri Aditya Narauan Senapati whether the proceeding is maintainable against the petitioner-ex-proprietor?. (iii) Further, if the proceeding remain ex-parte?

5. Undisputed fact is that petitioner was the original owner of the establishment M/s. Banamali Stone Works. When the inquiry under Section

7-A of the Act, 1952 was initiated in the year 1988 and there was a visit by the Inspector of the E.P.F. Organization, this petitioner was the owner of the establishment. From Annexure-1, a document dated 3.6.1992 appearing to be a correspondence at the instance of Branch Manager to one Bholanath Sahoo being the Proprietor of M/s. Banamali Stone Works under the subject of mutual transfer of ownership of M/s.Banamali Stone Works. The document while appearing to be an endorsement of mutual transfer of M/s. Banamali Stone Works between the petitioner-the erstwhile owner to the subsequent owner, namely, Sri Aditya Narauan Senapati, this document discloses the following conditions:

1. The transferee shall take over the total liabilities on account of OSFC term loan and food loan and assets.

2. Down payment of Rs.1,00 lac (One lac only) shall be deposited prior to documentation in shape of Cash/Demand Draft.

3. The transferee will take over the liabilities of the existing unit on account of Bank loan & other statutory dues of OSFC & Sales-tax etc. A no-objection certificate from the Bank for transfer of their loan in favour of Sri Senapati should be obtained & produced before execution of transfer documents.

4. The land where the Stone Crusher has been installed should be legally transferred in favour of the transferee. 5. The balance loan shall be repaid within a period of 5 years by 10 half yearly instalments.

6. Current rate of interest shall be charged on outstanding amount.

7. The Land & Building, Plant & Machineries will be mortgaged/ hypothecated by the transferee in favour of OSFC.

8. The fixed assets will be adequately insured in the joint names of transferee and the Corpn.

9. Registration with DIC should be amended incorporating the change in the management.

10. Addl. Collateral Security in terms of improvable assets to the extent of 50% of the outstanding amount shall be furnished.

11. Necessary processing charge shall be deposited by the transferee.

12. The transferee should deposit minimum amount of Rs.20,000/-(Rupees twenty thousand only) on account of his loan availed from Balasore Branch, before execution of transfer documents

13. The transferee shall give his personal guarantee for repayment of the loan and repayment of other dues."

6. Reading of the entire document refereed to hereinabove and taking care of the pleading of the parties, this Court has no hesitation to record that there is a mutual transfer of ownership of M/s. Banamali Stone Works between the petitioner at one hand and Sri Aditya Narauan Senapati on the other hand and Corporation has only given its consent for such transfer. This Court makes it clear that there is no involvement of transfer through Section 29 of the Orissa State Financial Corporation Act. At this stage, looking to the legal provision available for the purpose, this Court examines the provision at Section 17(B) of the Act, 1952 which reads as follows:

> **"17-B. Liability in case of transfer of establishment**. Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the [Pension] Scheme or the Insurance Scheme], as the case may be, in respect of the period up to the date of such transfer,
>
> Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer]"

7. Section 17-B. of the Act,1952 has been inserted in the act since 1.11.1973. Reading the aforesaid provision, it becomes clear that the E.P.F. Organization has the right either to saddle the liability jointly on the transferor and the transferee or either from the transferor or the transferee. Therefore, there is no wrong in initiation of the proceeding under Section 7-A of the Act, 1952 as against the ex-Proprietor, which is squarely covered by the above legal position. It is at this stage, this Court finds both the parties have relied on the decision reported in 2002(I) OLR 558 involving the case of ***M/s. Suburban Ply and Panel Pvt. Ltd.-Vrs.- Assistant Commissioner, Central Excise and Customs, Bhubaneswar Division and others*** being relied by the petitioner and the decision reported in 2012 (I) OLR 792 involving the case of ***M/s Hanuman Oxygen (P) Ltd. Vrs. Regional Provident Fund Commissioner, Orissa, Bhubaneswar and two others,*** being relied by the E.P.F. Organization. Reading the judgment relied by the petitioner reported in 2002(I) OLR 558 (supra), this is a case involving a transfer on application of provision of section 29(1) of the State Financial Corporations Act, 1951 which is not the case involved herein. So, this decision has no application to the case at hand. Now, so far as the decision relied by the E.P.F. Organization reported in 2012 (I) OLR 792 (supra), fact involving this case is that petitioner M/s Hanuman Oxygen (P) Ltd. purchased the industrial unit in question in a public auction held by the O.S.F.C. after its cessation from the original owner under Section 29 of the State Financial Corporation Act. The question determined in the case was

whether the petitioner is liable to pay the contribution to the E.P.F. Organization during the period prior to its purchase of the same from Orissa State Financial Corporation. This Court in the aforesaid judgment relying on a case involving ***M/s. Suburban Ply and Panels (P) Ltd.-Vrs.- Regional Provident Fund Commissioner, Orissa and others, 2004 (I***) OLR 284 in clear term held the liability of the previous owner cannot be saddled on the subsequent purchaser. For the legal provision at Section 17(B) of the Act, 1952 giving a handle to the E.P.F. Organization to saddle liability on either of the party. Looking to the support of the judgment involving M/s Hanuman Oxygen (P) Ltd. Vrs. Regional Provident Fund Commissioner, Orissa, Bhubaneswar and two others (supra) to the case of the E.P.F. Organization, this Court finds the judgment cited at the instance of the petitioner clearly distinguishable. Thus, the issue no.2 is answered in favour of the E.P.F. Organization. Now coming to decide the question whether the proceeding is hit by limitation? This Court here taking into consideration the provisions of the Act, 1952 finds there is no limitation prescribed in initiating the proceedings under Section 7-A or 14-B. There has been litigations involving maintainability of such proceedings earlier and in deciding such issues in the case of ***Hindustan Times Ltd. -Vrs.- Union of India &others,*** reported in AIR 1998 SC 688, this Court finds the question involved therein was whether the proceeding initiated under Section 14(B) of the Act, 1952 was hit by limitation. Dealing with such issue through Paragraphs–18, 19, 21, 23, 24, 28 and 29, the Hon'ble Apex Court held as follows:

> 18. Now the Act does not contain any provision prescribing a period of limitation for assessment or recovery of damages. The monies payable into the Fund are for the ultimate benefit of the employees but there is no provision by which the employees can directly recover these amounts. The power of computation and recovery are both vested in the Regional Provident Fund Commissioner or other officer as provided in Section 14-B. Recovery is not by way of suit. Initially, it was provided that the arrears could be recovered in the same manner as arrears of land revenue. But by Act 37 of 1953 Section 14-B was amended providing for a special procedure under Sections 8-B to 8-G. By Act 40 of 1973 Section 11 was amended by making the amount a first charge on the assets of the establishment if the arrears of employee's contribution were for a period of more than 6 months. By Act 33 of 1988, the charge was extended to the employee's share of contribution as well.
>
> 19. In spite of all these amendments, over a period of more than thirty years, the legislature did not think fit to make any provision prescribing a period of limitation. This in our opinion is significant and it is clear that it is not the legislative intention to prescribe any period of limitation for computing and recovering the arrears. As the amounts are due to the Trust Fund and the recovery is not by suit, the provisions of the Indian Limitation Act, 1963 are not attracted. In Nityananda M. Joshi v. LIC

of India [(1969) 2 SCC 199 : (1970) 1 SCR 396] , it has been held that the Limitation Act, 1963 has no application to Labour Courts and, in our view, that principle is equally applicable to recovery by the authority concerned under Section 14-B. Further in Bombay Gas Co. Ltd. v. Gopal Bhiva [AIR 1964 SC 752 : (1964) 3 SCR 709 : (1963) 2 LLJ 608] it has been held that in respect of an application under Section 33(c)(2) of the Industrial Disputes Act, 1947, there is no period of limitation. In that context, it was stated that the courts could not imply a period of limitation. It was observed (at p.757 of AIR):

"It seems to us that where the legislature has made no provision for limitation, it would not be open to the courts to introduce any such limitation on the grounds of fairness or justice." (emphasis supplied)

The above decisions have been recently accepted in Mukri Gopalan v. Cheppilat Puthanpurayil Aboobackar [(1995) 5 SCC 5] (SCC at pp. 20-22) to which one of us (Majmudar, J.) was a party while dealing with the applicability of Section 29(2) of the Limitation Act, 1963 to Courts or Tribunals. We may also point out in this connection that several High Courts have rightly taken the view that there is no period of limitation for exercise of the power under Section 14-B of the Act.

21. The reason is that while in the above cases decided by this Court the exercise of powers by the authority at a very belated stage was likely to result in the deprivation of property which rightly and lawfully belonged to the person concerned, the position under Section 14-B of the Act of an employer is totally different. The employer who has defaulted in making over the contributions to the Trust Fund had, on the other hand, the use of monies which did not belong to him at all. Such a situation cannot be compared to the above line of cases which involve prolonged suspense in regard to deprivation of property. In fact, in cases under Section 14-B if the Regional Provident Fund Commissioner had made computations earlier and sent a demand immediately after the amounts fell due, the defaulter would not have been able to use these monies for his own purposes or for his business. In our opinion, it does not lie in the mouth of such a person to say that by reason of delay in the exercise of powers under Section 14-B, he has suffered loss. On the other hand, the defaulter has obviously had the benefit of the "boon of delay" which "is so dear to debtors", as pointed out by the Privy Council in Nagendranath De v. Sureshchandra De [ILR (1932) 60 Cal 1 : AIR 1932 PC 165] . In that case, it was observed that equitable considerations were out of place in matters of limitation and the strict grammatical construction alone was the guide. Sir Dinshaw Mulla stated:

"Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into court." (emphasis supplied)

The position of the employer in case of default under Section 14-B is no different.

23. We shall now refer to the judgments of some of the High Courts to cull out some broad guidelines. The Orissa High Court in Orissa Forest Development Corpn. Ltd. v. R.P.F. Commr. [(1995) 71 FLR 388 (Ori)] and a Single Judge of the

Punjab & Haryana High Court in Amin Chand & Sons v. State of Punjab [AIR 1965 Punj 441] have held like the Single Judge of the Bombay High Court in K.T. Rolling Mills case [(1994) 1 LLJ 66 (Bom)], that if there was undue delay in initiating action under Section 14-B which the Court thought was unreasonable, on that sole ground the demand could be struck down. With great respect, this view is, as already stated, clearly wrong. The judgment of this Court in K.T. Rolling Mills case [(1995) 1 SCC 181 : 1995 SCC (L&S) 272] having been reversed by this Court, the above view is no longer good law. In fact, the Punjab judgment was rightly reversed in appeal in State of Punjab v. Amin Chand & Sons [(1970) 37 FJR 92 (P&H)] . The view taken by the learned Single Judge of the Punjab & Haryana High Court in 1965 has also been rightly dissented by the Delhi High Court in Birla Cotton Spg. & Wvg. Mills Ltd. v. Union of India [CWP 390 of 1978 dated 29-7-1983 (Del)] ; by the Gujarat High Court in Gandhidham case [Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F. Commr., 1987 Lab IC 659 : (1987) 1 LLN 813 (Guj)] ; the Patna High Court in M/s.Inter State Transport Agency v. R.P.F. Commr. [1983 Lab IC 940 : 1983 Pat LJR 170] and the Allahabad High Court in Northern India Press Works v. R.P.F. Commr. 1983 Lab IC 1314.

24. The Gujarat High Court in Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F. Commr. [Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F. Commr., 1987 Lab IC 659 : (1987) 1 LLN 813 (Guj)] (to which one of us Majmudar,J. was a party), laid down a principle that "prejudice" on account of delay could arise if it was proved that it was "irretrievable". There it was observed that for purposes of Section 14-B, there is no period of limitation prescribed and that for any negligence on the part of the Department in taking proceedings the employees, who are third parties, cannot suffer. It was further observed (at p.662 of Lab IC):

"The only question that would really survive is the one whether on the facts and circumstances of a given case, the show-cause notice issued after lapse of time can be said to be issued beyond reasonable time. The test whether lapse of time is reasonable or not will depend upon the further fact whether the employer in the meantime has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance of such a show-cause notice."

It was also stated that such a defence of irretrievable prejudice on account of delay, was to be pleaded and proved in the reply to the show-cause notice. We may add that if such a plea is rejected by the Department, it cannot be raised in the High Court unless specifically pleaded. The above principle of prejudice laid down by the Gujarat High Court in Gandhidham Spg. & Mfg. Co. Ltd. [Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F. Commr., 1987 Lab IC 659 : (1987) 1 LLN 813 (Guj)] (Guj) has been followed by the Bombay High Court in Saoner Taluka Ginning, Pressing and Dal Mill Prakriya v. R.P.F. Commr. [(1996) 72 FLR 823 (Bom)]; Super Processors v. Union of India, 1992 Lab IC 808 (Bombay).

28. From the aforesaid decisions, the following principles can be summarized. The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following principles

> of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14-B would be taken; mere delay in initiating action under Section 14-B cannot amount to prejudice inasmuch as the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show-cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect.
>
> 29. In the present case before us, no doubt there is delay of 14 years in initiating action and the damages are levied because of the delay in realisation of the amounts paid by cheque where the amounts were credited into the account of the Department beyond the grace period of 5 days. The plea of strike, even assuming it to be relevant, was not proved. The plea of the appellant that the Department must be deemed to have dropped the proceedings in 1971 did not also have any legs to stand. There is no plea of any irretrievable prejudice either in the reply to the show cause or in the writ petition.

8. Similarly, taking into consideration the other decision cited on behalf of the E.P.F. Organization, through the case of ***Hindustan Steel Works Construction Ltd. –Vrs.- Regional Provident Fund Commissioner-I & Anr***. decided by Calcutta High Court in its Appellate Side in W.P.No.26881(W) of 2015 decided on 21.12.2018. The Calcutta High Court dealing with a question if the proceeding under Section 7-A of the Act, 1952 is hit by limitation, in paragraphs-36(a), 37(a), 39, 40 , 42, and 43 the Calcutta High Court held as follows:

36. From the rival contentions of the parties, the following questions emerge:—

a) Is there a time period within which an enquiry under Section 7A is to be initiated under the EPF Act of 1990?

37. Answer to question (a).

Is there a time period within which an enquiry under Section 7A is to be initiated under the EPF Act of 1990?

39. It is clear from the provisions of Section 7A of the Act that there is no period of limitation within which an enquiry has to be undertaken thereunder. However, it is now wellsettled that whenever the statute does not provide for any period of limitation, it must be understood that the action by the authorities must be taken within a reasonable period of time.

40. In the case of Bhagirath Kanoria v. State of M.P. reported in (1984) 4 SCC 222, it was held that every default by an establishment in making payments under the EPF Act gives rise to a fresh cause of action. Hence, a default under the Paragraph 38 of the Scheme of 1952 or under Section 17 of the Act is a continuing offence. Paragraph 11 is set out hereunder-

"11. This passage shows that apart from saying that a continuing offence is one which continues and a noncontinuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar.

19. The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence. Turning to the matters before us, the offence of which the appellants are charged is the failure to pay the employer's contribution before the due date. Considering the object and purpose of this provision, which is to ensure the welfare of workers, we find it impossible to hold that the offence is not of a continuing nature. The appellants were unquestionably liable to pay their contribution to the Provident Fund before the due date and it was within their power to pay it, as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the Fund, they committed a fresh offence. It is putting an incredible premium on lack of concern for the welfare of workers to hold that the employer who has not paid his contribution or the contribution of the employees to Provident Fund can successfully evade the penal consequences of his act by pleading the law of limitation. Such offences must be regarded as continuing offences, to which the law of limitation cannot apply.

> 42. In the facts of the instant case, however, the principal employer has in fact set apart sums of money out of every payment made to the contractors in question towards PF and allied dues of the employees under contractors. The contractors being about 190 in numbers and the workers being around 15000, for the period between 1994 to 2005. The delay on the part of the PF Authorities, in initiating and completing the enquiry cannot be faulted, for delay.
>
> 43. Admittedly the writ petitioner was an exempted organisation since the year 1974. An exempted organisation under Section 17 of the said Act is entitled and obliged, to maintain its own Trust Fund for holding Provident fund and allied dues. The petitioner being a principal employer is also required and obliged to maintain an identified list of all beneficiaries in whose favour the deductions are made and kept aside for being paid at the time of the retirement or claim. Any default by the petitioner in this regard is per se actionable. The petitioner cannot be allowed to raise delay by the authorities to escape liability and cover up its own failures. Hence, the decision in the meetings of the ZAPFCS dt. 16th & 17th April, 2015 cannot be deemed to cover or address the instant case or apply to the petitioners.

9. This Court here finds, both the judgments discussed hereinabove support the case of opposite party and thus, this Court concludes issue no.1 framed hereinabove in favour of the opposite party by holding that the proceeding involved here does not suffer on the premises of limitation. This Court here finds the petitioner has taken support of the decisions in the case of M/s. Orissa Forest Development Corporation Ltd. and another Vrs. Regional Provident Fund Commissioner, Orissa Sub Regional Office, Rourkela, 1995 (i) OLR 116, ***Mansoram Vrs. B.P.Pathak & other***s, AIR 1983 SC 1239 and in the case of ***Organo Chemical Industries and another V. Union of India and others,*** AIR 1979 SC 1803 to support his contention on suffering of the proceeding on account of limitation. For the difference in the fact, this Court not only finds all the three decisions are not applicable to the case at hand. It is at the same time, this Court observes there is clear support to the claim of the E.P.F. Organization through the judgment of the Hon'ble Apex Court in the case of ***Hindustan Times Ltd.-Vrs.- Union of India and others,*** reported in AIR 1998 SC 688, and also Calcutta High Court judgment in its appellate side referred to supra. It is in this view of the matter and for the support of the judgment to the case of the E.P.F. Organization, this Court here holds the initiation of the proceeding under Section 7-A of the Ac, 1952 is not hit by limitation. Issue No.1 is answered accordingly.

10. It is next taking into consideration the challenge of the petitioner on the question of impugned order remain ex-parte, this Court going through the

impugned order does not find strength in the submission of Sri Rath, learned counsel for the petitioner and this issue is answered accordingly.

11. In the above circumstance, this Court finds no sustainable ground to interfere in the impugned order.

12. In the result the writ petition fails. No cost.

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2021 (I) ILR - CUT- 428

S.K. SAHOO, J.

CRA NO. 201 OF 1990

ANANDA NATH .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence under section 307 of Indian Penal Code, 1860 – Conviction – Essentials to justify the conviction – Held, it is not essential that bodily injury capable of causing death should be inflicted – The nature of injury actually caused very often gives considerable assistance in coming to a finding relating to the intention of the accused – However, such intention can also be deduced from other circumstances without even any reference to the actual wounds – It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted – The court has to see as to whether the act, irrespective of its result, was done with the intention or knowledge and under the circumstances mentioned in the section.

Case Laws Relied on and Referred to :-

1. A.I.R. 1983 S.C. 305 : State of Maharashtra .Vs. Balaram Bama Patil.
2. 1968 (Vol.8) Supreme Court Decisions 208 : Rekha Mandal .Vs. State of Bihar.

For Appellant : Mr. V. Narasingh (Amicus curiae)
For Respondent : Mr. P.K. Mohanty Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 11.02.2021

S.K. SAHOO, J.

The matter is taken up through Video Conferencing.

2. The appellant Ananda Nath faced trial in the Court of learned Additional Sessions Judge, Sambalpur in S.T. No.50/19 of 1990 for offence punishable under section 307 of the Indian Penal Code on the accusation that he attempted to commit murder of Ambika Nath (P.W.1) on 02.11.1989 at about 5.00 p.m. in village Paramanpur under Sason police station in the district of Sambalpur. The learned trial Court vide impugned judgment and order dated 01.08.1990 found the appellant guilty of the offence charged and sentenced him to undergo R.I. for a period of four years.

3. The prosecution case, as per the first information report (Ext.1) lodged by P.W.3 Mitu Nath, the husband of the injured (P.W.1) is that on 02.11.1989 in the evening hours when he returned from the paddy field, he found his wife was lying in a senseless condition sustaining injuries over her head and he came to know from his two daughters, namely, Babita Nath (P.W.5) and Bharati Nath that about half an hour prior to his time of arrival, while P.W.1 was sitting in the front doorstep, she found at that point of time that some unknown persons had put some faeces on the lock of the gate. Since previously this type of incident had been committed on two occasions, P.W.1 started abusing without naming anybody. The appellant came there with a lathi and challenged P.W.1 but P.W.1 told him that she was not taking any name. The appellant dealt two to three blows on the head of P.W.1 with the lathi he was holding for which P.W.1 sustained bleeding injuries and became senseless. When the two daughters of P.W.1 raised hullah, some of the co-villagers arrived at the spot for which the appellant left the spot with the lathi. Then P.W.1 was shifted to the village hospital, where the doctors advised the informant to take her to Sambalpur Sadar Hospital for treatment. It is further mentioned in the F.I.R. that P.W.1 had not yet got back her sense.

4. On the basis of such first information report, Sason P.S. Case No.54 of 1989 was registered on 03.11.1989 under section 307 of the Indian Penal Code against the appellant. P.W.10 was the officer in-charge of Sason police station, who took up investigation of the case and during course of investigation, he examined the witnesses, visited the spot, seized blood stained earth from the spot and on search of the house of the appellant, he seized one blood stained lathi and then issued requisition to the Medical Officer, Paramanpur dispensary, who attended the injured. He also produced the seized weapon of offence before the Medical Officer, Paramanpur dispensary for his examination and opinion and the queries were also made to the Medical Officer, District Headquarters Hospital, Sambalpur.The appellant surrendered in Court on 28.11.1989. P.W.10 prepared the spot map and sent

the seized soaked soil and seized lathi to the Deputy Director, Chemical Examiner, R.F.S.L., Sambalpur for examination and opinion and on completion of investigation, charge sheet was submitted against the appellant.

5. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court charged the appellant under section 307 of the Indian Penal Code on 19.06.1990 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

6. During course of trial, the prosecution examined ten witnesses.

P.W.1 Smt. Ambika Nath is the injured in the case and she stated that the appellant assaulted her with lathi (M.O.I) on her head while she was sitting in front of her house for which she fell down and lost her sense.

P.W.2 Smt. Patra Nath is the neighbour of the informant and an eye witness to the occurrence. She narrated the incident and the manner in which the appellant dealt lathi blows on the head of P.W.1.

P.W.3 Mitu Nath is the husband of the injured P.W.1, who is the informant in the case. He stated to have heard about the incident of assault on his wife from his daughters and other neighbours. He along with others took P.W.1 to Paramanpur dispensary and then as per the advice of the doctor, he shifted his wife to District Headquarters Hospital, Sambalpur and thereafter, he came to the police station and lodged the first information report.

P.W.4 Bihari Nath is a seizure witness in respect of lathi (M.O.I) and some blood stained earth under seizure list Ext.2 and Ext.3 respectively.

P.W.5 Babita Nath is the daughter of the informant and she is also an eye witness to the occurrence.

P.W.6 Dr. Mohan Pradhan attached to D.H.H., Sambalpur examined P.W.1 on being referred by the doctor of Paramanpur dispensary and stated that as per the X-ray report, the patient had no bony injury and all the injuries were simple in nature.

P.W.7 Suresh Kumar Sahoo was the Revenue Inspector who prepared the spot map (Ext.5) as per the police requisition.

P.W.8 Dr. Dinakrushna Panda was the Medical Officer of Paramanpur Dispensary who examined P.W.1 on police requisition and found three injuries on her person. He found the patient in a semi conscious state and referred her to the District Headquarters Hospital, Sambalpur. He also stated that all the injuries might have been caused by a blunt weapon like lathi (M.O.I) and proved his report Ext.6.

P.W.9 Brundaban Choudhury was the A.S.I. of Police, Sason Police Station who received the written report of the informant through the Gramarakhi and in the absence of the O.I.C., he treated the report as F.I.R. and registered the same.

P.W.10 Kunja Bihari Pani was the officer in-charge of Sason Police Station who is the investigating officer in the case.

The prosecution proved seven documents. Ext.1 is the F.I.R., Ext. 2 and Ext.3 are the seizure lists, Ext.4 is the Xray report of P.W.1, Ext.5 is the spot map, Ext.6 injury report of examination of P.W.1 and Ext.7 is the chemical examination report.

The prosecution also proved one material object. M.O.I is the lathi.

7. The defence plea of the appellant was that on the date of occurrence, P.W.1 abused him in filthy language and when he came and asked P.W.1 about such abuse, she came running towards him to assault him and in that process, she fell down on a stone and sustained injuries.

8. The learned trial Court after assessing the evidence on record has been pleased to disbelieve the defence plea that P.W.1 fell down on the ground and sustained injuries, rather it was held that the medical evidence is quite consistent with the evidence of P.W.1, P.W.2 and P.W.5. Learned trial Court further held that the appellant might not have the intention to cause the death of P.W.1 but he had reason to believe that by giving successive blows with a lathi on the head of P.W.1, it might cause injuries which would be fatal in nature and in ordinary course she might die. Accordingly, the learned trial Court found the appellant guilty under section 307 of the Indian Penal Code.

9. Since nobody appeared on behalf of the appellant to argue the matter and it is a thirty one years old appeal, Mr. V. Narasingh, was appointed as Amicus Curiae. He was supplied with the paper book and given time to

prepare the case. He placed the evidence of the witnesses and also the impugned judgment. While assailing the impugned judgment and order of conviction, he argued that the witnesses are interested and the doctor's evidence indicates that the injuries are simple in nature and in view of the nature of evidence adduced by the prosecution and the medical evidence, it cannot be said that the ingredients of the offence under section 307 of the Indian Penal Code are attracted and it might at best be a case under section 324 of the Indian Penal Code. He further submitted that since the appellant has remained in custody for sometime while the case was under investigation as well as after conviction and the total period of incarceration was for a period more than one month, therefore, while altering the conviction to one under section 324 of the Indian Penal Code, the sentence be reduced to the period already undergone.

Mr. P.K. Mohanty, learned Additional Standing Counsel for the State, on the other hand, submitted that the injured (P.W.1) has stated in detail as to how the occurrence had taken place and her evidence has not at all been shaken in the cross-examination and the ocular testimony of eye witnesses so also the injured gets corroboration from the medical evidence given by the doctors P.W.6 and P.W.8 and since the blows were given with a lathi on a vital part of the body like head, it cannot be said that the learned trial Court has committed any illegality in convicting the appellant under section 307 of the Indian Penal Code.

10. Adverting to the contentions raised by the learned counsel, it appears that the star witness on behalf of the prosecution is none else than P.W.1 Ambika Nath. She stated in her evidence that on the date of occurrence, she found somebody had committed mischief in putting faeces in the lock for which she started abusing and at that time, the appellant came and challenged her and dealt strokes on her head with a lathi for which she lost her sense and she regained her sense in the hospital. In the cross-examination, she stated that P.W.2 and P.W.5 were present when she was talking with the appellant and she put her hands on the back of her head and tried to escape and the appellant gave successive blows with the lathi on her head. She further stated that the appellant gave strokes on her head with force with the lathi and that she did not sustain any injury on other portion of her body and that she regained her sense in the District Headquarters Hospital at Sambalpur. She admitted that she had lodged a report against the appellant in the police station six months prior to the occurrence alleging that the appellant gave

poison in the rice pot. Therefore, nothing has been brought out in her cross-examination to disbelieve her evidence. Her evidence gets corroboration from the evidence of P.W.2, P.W.4 and P.W.5 who have also stated that the appellant dealt lathi blows on the head of P.W.1. P.W.3 is the informant in the case who stated that when he returned from the paddy field, he found P.W.1 was lying in front of his house with bleeding 10 injuries on her head and the occurrence was reported to him by P.W.2 and others and then he along with others shifted the injured to the hospital at Paramanpur. The evidence of other eye witnesses i.e. P.W.2, P.W.4 and P.W.5 have also not been shaken in the cross-examination and therefore, the evidence of all the eye witnesses combined together clearly establish that on the date of occurrence the appellant assaulted P.W.1 with a lathi on her head for which she sustained injuries.

Coming to the evidence of the doctor (P.W.8), he stated to have examined P.W.1 on 02.11.1989 at Paramanpur Dispensary on police requisition and noticed the following injuries:-

> (i) One lacerated injury with bruise around it 2" long scalp deep, it was on the head (on the occipital region), simple in nature and the wound was bleeding.
>
> (ii) Lacerated injury with bruise around 1 1/2" long scalp deep above 2" below of injury no.1 on back of the head, simple in nature and the wound was bleeding.
>
> (iii) Lacerated injury ½" long, skin deep about ½" lateral to injury no.2, simple in nature and was bleeding.

P.W.8 stated that there was no fracture on the skull of P.W.1 and the patient was semi conscious and she was referred to the District Headquarters Hospital at Sambalpur. He further stated that all the injuries were possible by lathi (M.O.I). He proved his report Ext.6. In the cross-examination, P.W.8 stated that the injuries were possible if the injured fell on a rough surface with her face upward and in case the head is covered with hands particularly the occipital region, then injury no.1 is not possible whereas the injuries nos.2 and 3 are possible. This question was put to the doctor as P.W.1 stated that when the appellant dealt the blows with force, she put her hands on the back of her head and tried to escape but the appellant gave successive blows with the lathi on her head. The other doctor (P.W.6) stated that as per the X-ray report, the patient had no bony injury and all the injuries were simple in nature as per his report Ext.4. Therefore, on the basis of the evidence of the doctors i.e. P.W.8 and P.W.6, it is established that all the three injuries sustained by P.W.1 were simple in nature and there was no fracture of skull and there was no bony injury.

11. It is settled principles of law that to justify a conviction under section 307 of the Indian Penal Code, it is not essential that bodily injury capable of causing death should be inflicted. The nature of injury actually caused very often gives considerable assistance in coming to a finding relating to the intention of the accused. However, such intention can also be deduced from other circumstances without even any reference to the actual wounds. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. The Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. ***(Ref: A.I.R. 1983 S.C. 305, State of Maharashtra -Vrs.- Balaram Bama Patil).***

In case of ***Rekha Mandal -Vrs.- State of Bihar reported in 1968 (Vol.8) Supreme Court Decisions 208*** wherein seventeen injuries consisting of incised and punctured wounds were caused on the injured by different weapons such as farsa, spear and lathi and none of the injuries was grievous in nature and only two of them were located on the head and neck, it was held as follows:-

> "2. ..... Medical evidence did not disclose that any of the injuries was cumulatively dangerous to life and the question therefore is whether in these circumstances, it could be held that the offence disclosed was one under section 307 of the Indian Penal Code. That section requires that the act must be done with such intention or knowledge or under such circumstances that if death be caused by that act, the offence of murder will emerge."

The Hon'ble Supreme Court in that case altered the conviction from one under section 307 of the Indian Penal Code to section 324 of the Indian Penal Code.

In view of the nature of evidence available on record, the nature of injuries sustained by P.W.1, which were opined by the two doctors to be simple in nature and absence of any other medial document from any hospital or any material to show the after effects of such injuries, I am of the considered opinion that the conviction of the appellant under section 307 of the Indian Penal Code is not sustainable in the eye of law and in my humble opinion, the case squarely falls within the ambit of section 324 of the Indian Penal Code. Accordingly, the conviction of the appellant is altered from section 307 of the Indian Penal Code to one under section 324 of the Indian Penal Code.

It seems that the appellant surrendered in the Court below at the time of investigation of the case on 28.11.1989 and he was released on bail on 22.12.1989 and after the learned trial Court passed the impugned judgment, he was taken into custody on 01.08.1990 and he was granted bail by this Court on 08.08.1990 but after furnishing bail bond, he was released from custody on 14.08.1990 and therefore, he has remained in custody for more than a month. Since the appellant was a young boy at the time of occurrence and in the meantime more than thirty one years have elapsed, while altering the conviction to one under section 324 of the Indian Penal Code, I direct that the sentence be reduced to the period already undergone.

12. Accordingly, the Criminal Appeal is allowed in part.

Before parting with the case, I would like to put on record my appreciation to Mr. V. Narasingh, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand).

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2021 (I) ILR - CUT- 435

P. PATNAIK, J.

W.P.(C) NOS.20691, 20941, 20795, 26697, 26202, 25766, 25736, 24144, 22980, 22230, 22099, 22095, 22089, 20785, 22080, 22076, 21110, 20800, 20685, 29179 AND 21762 OF 2020

BIBHUDANANDA PRATAP HATI ……..Petitioner

.V.

SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. ……..Opp.Parties

W.P.(C) NO.20941 OF 2020

MANORANJAN NAYAK ……Petitioner

.V.

STATEOFODISHA & ANR. ……Opp.Parties

W.P.(C) NO.20795 OF 2020

SUCHISMITA NAYAK ……..Petitioner

.V.

SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. ……Opp.Parties

W.P.(C) NO.26697 OF 2020
SUJATA KUMARI BHUNYA .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.Parties

W.P.(C) NO.26202 OF 2020
ARPITA MANALISHA .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.Parties

W.P.(C) NO.25766 OF 2020
KEDAR SAHUKAR .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.Parties

W.P.(C) No.25736 of 2020
ALPHA MOHANTY .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.Parties

W.P.(C) NO.24144 OF 2020
JYOTIRMAYEE SAHOO .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ANR. .....Opp.Parties

W.P.(C) NO.22980 OF 2020
KRUSHNADAIPAYAN RAY & ORS. .....Petitioners.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.parties

W.P.(C) NO.22230 OF 2020
SUMIT KUMAR BISHI & ORS. .....Petitioners.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.parties

W.P.(C) NO.22099 OF 2020
CHANDRAKANTA BEHERA ……Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. ……Opp.parties

W.P.(C) NO.22095 OF 2020
SARITA NANDA ……Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. ……. Opp.parties

W.P.(C) NO.22089 OF 2020
RATIKANTA PANDA …….Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. …….Opp.parties

W.P.(C) NO.20785 OF 2020
REENA GIRI …….Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. …….Opp.Parties

W.P.(C) NO.22080 OF 2020
GAYATRI PATTNAIK ……Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. ……. Opp.Parties

W.P.(C) NO.22076 OF 2020
ANITA PANDA ……Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. ……Opp.Parties

W.P.(C) NO.21110 OF 2020
TOPHA TRIPATHY & ORS. ……Petitioners.
.V.
SECRETARY, BOARD OF SECONDARY
EDUCATION, ODISHA & ORS. ……Opp.Parties

W.P.(C) NO.20800 OF 2020
MANASMINI DAS .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.Parties

W.P.(C) NO.20685 OF 2020
JYOTI RANJAN BALABANTARAY
.....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. .....Opp.parties

W.P.(C) NO.29179 OF 2020
MADHUCHHANDA DAS .....Petitioner.
.V.
STATE OF ODISHA & ORS. .....Opp.Parties

W.P.(C) NO.21762 OF 2020
SWAPNA RANI ACHARYA .....Petitioner.
.V.
SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ANR. .....Opp.Parties

EXAMINATION – Re-evaluation of marks – When permissible – Held, in absence of any guideline, re-evaluation would lead to utter confusion – Circumstances and the law on the issue discussed.

Case Laws Relied on and Referred to :-

1. AIR 1984 S.C. 1543 : (State of Maharastra .Vs. State Board of Higher Secondary Education.
2. (2004) 6 SCC 714 : (Pramod Kumar Srivastav.Vs. Chairman, Bihar Public Service Commission, Patna and Ors.
3. (2010) 6 SCC 759 : Himachal Pradesh Public Service Commission.Vs. Mukesh Thakur and Anr.
4. 1996(II) OLR-592 : Manas Ranjan Dash & Ors..Vs. Council of Higher Education & Ors.
5. 1996(II) OLR-592 and (2008) 4 SCC-273 : Pankaj Sharma .Vs. State of Jammu and Kashmir & Ors.
6. AIR 1983 S.C. 1230 : Kanpur University, through Vice-Chancellor and Others . Vs. Samir Gupta & Ors.
7. (2020) 6 SCC 362 : Bihar Staff Selection Commission & Ors..Vs. Arun Kumar & Ors.

8. 2019(17) SCALE-73 : Pranab Verma .Vs. Registrar General of High Court of Punjab and Haryana.
9. (2013) 4 SCC 690 : Rajesh Kumar and Ors .Vs. State of Bihar and Ors.
10. (2018) 8 SCC 81 : Richal and Ors .Vs. Rajasthan Public Service Commission & Ors.
11. (2005) 13 SCC 744 : Manish Ujwal and Ors. Vs. Maharishi Dayananda Saraswati University & Ors.
12. (W.P. No.23006(W) of 2017 : Prativa Mondal .Vs. West Bengal & Ors.
13. (2004) 6 SCC 714 : Pramod Kumar Srivastava .Vs. Chairman, Bihar Public Service Commission, Patna & Ors.
14. (2018) 2 SCC 357 : Ranvijay Singh .Vs. State of Uttar Pradesh & Ors.
15. (2020) 7 SCC 693 : Ashwini Kumar Upadhyay .Vs. Union of India & Ors.
16. AIR 1984 S.C. 1543 : Maharashtra State Board of Secondary and Higher Secondary Education and another .Vs. Paritosh Bhupash Kumarsheth)
17. (2010) 6 SCC 759 : Mukesh Thakur and another .Vs. Himachal Pradesh Public Service Commission.
18. (2018) 8 SCC 81 : Richal and Ors .Vs. Rajasthan Public Service Commission & Ors.
19. (2018) 2 SCC 357 : (Ranvijay Singh and Others .Vs. State of Uttar Pradesh & Ors.
20. (2020) 6 SCC 362 : Bihar Staff Selection Commission and Ors. .Vs. Arun Kumar & Ors.

W.P.(C) NO.20691 OF 2020

For the Petitioner : M/s.Karunakar Rath, P. Panda & R. Pagal
For Opp. Party No. 1 : M/s. S.S. Rao.

W.P.(C) No.20941 of 2020

For the Petitioner : M/s.Md. G. Madani, P.S.Nayak, S.Hota & B.K.Ram.
For Opp. Party No.1 : M/s. S.S. Rao.

W.P.(C) NO.20795 OF 2020

For the Petitioner : M/s.Karunakar Rath, P. Panda & R. Pagal
For Opp. Party No. 1 : M/s. S.S. Rao.

W.P.(C) NO.26697 OF 2020

For the Petitioner : M/s.Kuresh Prasad Dash, P. C. Behera & N. Samal.
For Opp. Party No. 1 : M/s. S.S. Rao & B.K. Mohanty.

W.P.(C) NO.26202 OF 2020
For the Petitioner : M/s.Anjan Kumar Biswal, & R.K. Muduli.
For Opp. Party No. 1 : M/s. Bibhudhendra Dash, P.K. Mohanty & S. Dash.

W.P.(C) NO.25766 OF 2020
For the Petitioner : M/s.Karunakar Rath, P. Panda & R. Pagal.
For Opp. Party Nos.1 to 3 : M/s. S.S. Rao & B.K Nayak

W.P.(C) NO.25736 OF 2020
For the Petitioner : M/s.Karunakar Rath, P. Pal & R. Pagal.
For Opp. Parties: M/s. S.S. Rao & B.K. Nayak.

W.P.(C) NO.24144 OF 2020
For the Petitioner : M/s.Prajit Kumar Pradhan & B. Panda.
For Opp. Parties : M/s. S.S. Rao.

W.P.(C) NO.22980 OF 2020
For the Petitioners : M/s.Karunakar Rath, & G. Moharana.
For Opp. Party No. 1 : M/s. S.S. Rao

W.P.(C) NO.22230 OF 2020
For the Petitioners: M/s.Karunakar Rath, G. C. Moharana P. Panda & R. Pagal,
For Opp. Party No. 1 : M/s. S.S. Rao.

W.P.(C) NO.22099 OF 2020
For the Petitioner: M/s.Karunakar Rath,P. Panda, G.C. Moharana & R. Pagal.
For Opp. Party No. 1 : M/s. S.S. Rao.

W.P.(C) NO.22095 OF 2020
For the Petitioner : M/s.Karunakar Rath, P. Panda, G.C. Moharana & R. Pagal,
For Opp. Party No. 1 : M/s. S.S. Rao.

W.P.(C) NO.22089 OF 2020
For the Petitioner: M/s.Karunakar Rath, P. Panda, G.C. Moharana & R. Pagal.
For Opp. Party No. 1 : M/s. S.S. Rao.

W.P.(C) NO.20785 OF 2020
For the Petitioner: M/s.Karunakar Rath, P. Panda & R. Pagal.
For Opp. Party : M/s. S.S. Rao.
No. 1

W.P.(C) NO.22080 OF 2020
For the Petitioner: M/s.Karunakar Rath, P. Panda, G.C. Moharana & R. Pagal.
For Opp. Party : M/s. S.S. Rao.
No. 1

W.P.(C) NO.22076 OF 2020
For the Petitioner: M/s.Karunakar Rath, & G.C. Moharana.
For Opp. Party : M/s. S.S. Rao.
No. 1

W.P.(C) NO.21110 OF 2020
For the Petitioners: M/s.Karunakar Rath, P. Panda & R. Pagal.
For Opp. Party : M/s. S.S. Rao.
No. 1

W.P.(C) NO.20800 OF 2020
For the Petitioner : M/s.Karunakar Rath, P. Panda & R. Pagal.
For Opp. Party : M/s. S.S. Rao.
No. 1

W.P.(C) NO.20685 OF 2020
For the Petitioner: M/s.Karunakar Rath, P. Panda & R. Pagal.
For Opp. Party : M/s. S.S. Rao.
No. 1

W.P.(C) NO.20685 OF 2020
For the Petitioner : M/s.Biplaba P.B. Bahali, R.K. Routray & K.K. Mohapatra.
For Opp. Party : M/s. S.S. Rao.
No.2

W.P.(C) NO.21762 OF 2020
For the Petitioner : M/s.Gopinath Sethi, C.K. Pradhan & D.K. Rath,
For Opp. Party : M/s. S.S. Rao & B.K. Mohanty.
No.1

JUDGMENT Date of Hearing : 22.01.2021: Date of Judgment: 04.02.2021

P.PATNAIK, J.

The above mentioned writ applications are founded on similar facts and with the consent of the respective counsels, the matters have been heard

analogously and all the writ applications are disposed of by this common order/judgment.

2. The petitioners in different writ applications being aggrieved with the marks awarded in the Odisha Secondary Teachers Eligibility Test, hereinafter referred to in short as 'OSTET' filed the aforesaid writ applications contending common plea and praying inter alia for re-evaluation of answer sheets once again and for awarding of extra marks, solely on the ground that some of the key answers being wrong and the petitioners are entitled to grace marks which would result in all the petitioners being qualified in the said test because the petitioners have been prejudiced for being unsuccessful due to lack of 1 to 3 marks only.

WRIT PETITIONS

3. The petitioner in **W.P.(C) No.20691 of 2020** has challenged the action of the opposite parties in not awarding proper marks in the answer scripts for 'OSSTET' Examination, 2019 with regard to Paper-I Set-'C'. The petitioner being Science graduate appeared the 'OSSTET' examination on 22.01.2020. As per the result sheet, he was awarded 74 marks and he became unsuccessful for one mark only and the grounds stated in the writ application is that Question No.22 in Set-'C' although correct answer on the basis of Oxford Dictionary i.e., Leizy, there is no choice given in the Booklet. So, the petitioner is entitled to get one grace mark. Accordingly he would get 75 marks to be declared as pass in the aforesaid examination. Due to inaction of the opposite parties, the petitioner has approached this Court under Articles 226 and 227 of the Constitution of India for redressal of his grievance.

4. The petitioner in **W.P.(C) No.20941 of 2020** has challenged the action of the opposite parties in not awarding proper marks in Question No.37 in English Compulsory, Question No.57, Section-III in English Optional, Question No.120 Section C/IV. The grievance of the petitioner is that she became disqualified having secured 89 marks due to lack of one mark only. The petitioner is entitled to three grace mark in addition to the marks obtained as declared by the Board. The petitioner has prayed for a direction to the opposite parties to rectify the defect found in the question pattern and with regard to question Nos. 37, 57 and 120 in 'OSSTET' Examination, 2019 Paper I Set-'D' conducted by the Board of Secondary Education and direction be made to opposite party no.2 to declare the

petitioner as a qualified awarding three marks in addition to the marks objection i.e. 89+3= 92 marks.

5. In **W.P.(C) No.20795 of 2020,** the petitioner has been aggrieved by the award of marks in the answer scripts for 'OSSTET' Examination, 2019 with regard to Paper-I Set-'D'. The petitioner has been awarded 87 marks and she became unsuccessful due to want of three marks. The petitioner has averred in the writ petition that though she has given correct answer in Question Nos.119, 120, 123 and 13 in Odia whereas she has not been awarded marks. The petitioner has prayed for award of marks in Question Nos.119, 120, 123 and 13 in Odia and to declare the petitioner to have qualified in 'OSSTET' Examination, 2019.

6. In **W.P.(C) No.26697 of 2020** the petitioner has challenged the action of the opposite parties in not awarding proper marks in the 'OSSTET' Examination, 2019 with regard to Paper-I Set-'A', the petitioner became unsuccessful due to want of two marks only. It has been averred in the writ application that Question No.37 in Set-'A', Question No.8 in Odia, Question Nos.32 and 36 in English Compulsory and Question No.63 in English Optional, the petitioner has not been awarded marks. Had she been awarded marks properly she would have qualified in the said Examination. The grievance of the petitioner having not been redressed she has been constrained to approach this Court under Article 226 of the constitution of India for redressal of her grievance.

7. The petitioner in **W.P.(C) No.26202 of 2020** the petitioner having secured 73 marks became unsuccessful in the 'OSSTET' Examination, 2019. The petitioner has averred in the writ petition that though she has given correct answer in Question No.145 Section IV and No.8 Section-I but she has not been awarded marks. The petitioner has prayed for award of marks in Question Nos.8 and 145 in Set-3/C and to declare the petitioner to have qualified in 'OSSTET' Examination, 2019.

8. The petitioner in **W.P.(C) No.25766 of 2020** has been aggrieved by the improper award of marks in the answer scripts with regard to Paper-I Set-'C' which has resulted in her disqualification due to lack of three marks. The petitioner has averred in the writ petition that the Question Nos.3, 8, 22, 64, 66, 145 and 148 and Question No.22 in Set 'C' the petitioner has not been awarded marks for which he is entitled to grace marks. With the aforesaid

grievance the instant writ application has been filed for redressal of grievance of the petitioner.

9. The petitioner in **W.P.(C) No.25736 of 2020** has been aggrieved by the improper marks in the answer scripts with regard to Paper I Set-'A'. According to the petitioner, she is entitled to grace marks as she has given correct answer in Question Nos.13, 58, 105, 128, 135, but she has not been awarded any marks, as a result of which she has become unsuccessful due to lack of two marks only. Accordingly she has prayed for issuance of mandamus to opposite party No.2 to add more marks, at least two marks to declare the petitioner to have passed in 'OSSTET' Examination, 2019.

10. In **W.P.(C) No.24144 of 2020** the petitioner has challenged the action of the opposite parties in not evaluating the answer papers although the petitioner has given correct answer in Question Nos.103 and 115, but no mark has been awarded for which he was disqualified by just one mark. Accordingly, the petitioner has prayed for award of grace marks to declare him as qualified in 'OSSTET' Examination, 2019 I Paper-I CBZ. With the aforesaid grievance, the petitioner has approached this Court for redressal of his grievance.

11. The petitioners in **W.P.(C) No.22980 of 2020**, being aggrieved by the award of marks in the answer scripts with regard to Paper-I Sets 'A', 'B', 'C' & 'D' have challenged the action of the opposite parties in not awarding grace marks since they were disqualified due to lack of 1 to 3 marks only owing to wrong evaluation of answer sheets. The grievances of the petitioners having not been redressed, have been compelled to approach this Court under Article 226 of the Constitution of India for redressal of their grievances.

12. The petitioners in **W.P.(C) No.22230 of 2020** have challenged the action of the opposite parties in not awarding proper marks in the answer scripts for 'OSSTET' Examination, 2019 with regard to Paper-I Sets 'A', 'B', 'C'' and 'D'. The petitioners became disqualified due to want of 1 to 3 marks only basing on wrong evaluation of the answer sheets. The petitioners averred in the writ application that the question in answer scripts in Paper-I Sets 'A', 'B', 'C' and 'D' being wrong they are entitled to grace marks which would entitle them to be successful in the 'OSSTET' Examination, 2019. Left with no alternative, the petitioners have approached this Court under Article 226 of the Constitution of India.

13. The petitioner in **W.P.(C) No.22099 of 2020** has challenged the action of the opposite parties in not awarding proper marks in the answer scripts with regard to Paper-I Set-'B'. According to the petitioner, although he has given correct answer in Question Nos.13, 18 and 60, but he has not been awarded marks as a result of which he has become unsuccessful because of one less mark. With the aforesaid grievances, the instant writ application has been filed.

14. The petitioner in **W.P.(C) no.22095 of 2020** has challenged the action of the opposite parties in award of improper marks with regard to Paper-I Set-'B' in 'OSSTET' Examination, 2019. The petitioner having secured 89 marks became unsuccessful due to one less mark although there are wrong question and answer in the Booklet like Question Nos.13, 18 and 27. Therefore, the petitioner is entitled to grace mark. With the aforesaid grievances, the instant writ application has been filed.

15. In **W.P.(C) No.22089 of 2020** the petitioner has been aggrieved by the award of marks in the answer scripts for 'OSSTET' Examination, 2019 with regard to Paper-I Set-'D'. The petitioner has been awarded 89 marks and he became unsuccessful due to one less mark. The grievance of the petitioner is that due to wrong question and answer in the Booklet like Question Nos.18, 119 and 120 the petitioner is entitled to grace mark. Since the grievance of the petitioner has not been redressed, he has filed the aforesaid writ application.

16. The petitioner in **W.P.(C) no.20785 of 2020** has challenged the award of improper marks in 'OSTET' Examination, 2019 with regard to Paper-I Set-'C'. The petitioner has become unsuccessful because of one mark. The petitioner has averred in the writ application that she has given correct answers in Question Nos.139, 140, 148, No.3 in Odia and 57 in English etc. whereas the petitioner has not been awarded marks. The petitioner further has averred in the writ application that Question No.22 in Set-'C' though correct answer on the basis of Oxford Dictionary i.e., Leizy in place of laizy there is no choice in the Booklet. So, the petitioner is entitled to one grace mark. With the aforesaid grievance the instant writ petition has been filed.

17. The petitioner in **W.P.(C) No.22080 of 2020** has assailed the action of the opposite parties in not awarding proper marks in answer scripts of 'OSTET' Examination, 2019 with regard to Paper I Set-'C'. As per the

averments in the writ application, she is entitled to grace marks because of wrong question and answer in the Booklet like Question Nos.8, 22, 140 and 148 in Set-'C'. The petitioner was awarded 88 marks and due to lack of 2 marks, she has become unsuccessful. With the aforesaid grievances, the instant writ application has been filed by the petitioner.

18. The petitioner in **W.P.(C) No.22076 of 2020** being aggrieved by the award of improper marks in the answer scripts in 'OSTET' Examination, 2019 with regard to Paper-I Set-'B' . The petitioner has averred in the writ application that the petitioner has given correct answer in Question No.13, 18, 128, 129, 134, 135, but she has not been awarded marks and she has been given 88 marks. Had she secured 90 marks she would have been declared pass. With the aforesaid grievances, the instant writ application has been filed.

19. The petitioners in **W.P.(C) No.21110 of 2020** have challenged the action of the opposite parties in not awarding proper marks in the answer scripts of 'OSSTET' Examination, 2019 with regard to Paper-I Sets 'A', 'B', 'C' & 'D'. The petitioners have become unsuccessful due to 1 to 3 less marks. So far as the case of the petitioner No.1 is concerned, it has been contended that the Question No.3 and 18 in Odia, 17 and 115 in question Booklet are wrong. So, the petitioner is entitled to grace marks. So far as the case of the petitioner No.2 is concerned, some answers of multiple questions like Question Nos. 13, 18, 58 and 135 given in Question Booklet are wrong. So the petitioner No.2 is entitled to grace mark. So far as the case of the petitioner No.3 is concerned, he has also the similar grievance. So far as the case of the petitioner No.4 is concerned, he has given answer of multiple choice in some question vide Question Nos. 8, 22, 64 and 66 in Question Booklet are wrong. So, the petitioner no.4 is entitled to grace mark. So far as the case of the petitioner No.5 is concerned, Question Nos.8, 22, 64 and 139 in Question Booklet are wrong. So, the petitioner No.5 is entitled to grace marks. So far as the case of the petitioner No.6 is concerned Question Nos.18, 37, 57 and 119 of Question Booklet are wrong. So, the petitioner no.6 is entitled to get grace marks. With the aforesaid grievances, the petitioners have approached this Court under Article 226 of the Constitution of India.

20. The petitioner in **W.P.(C) No.20800 of 2020** being aggrieved with the award of marks in the answer scripts for 'OSSTET' Examination, 2019 with

regard to Paper-I Set-'B' has challenged the action of the opposite parties that she became unsuccessful as she secured 88 marks. Had she secured 90 marks, she would have become successful. The contention of the petitioner is that in Question No.27 she is entitled to get one grace mark in place of Set-'B'. The petitioner has averred in the writ application that she has given correct answer in Question Nos.18 and 27 in Odia whereas she has not been awarded marks. With the aforesaid grievances, the petitioner has knocked the doors of this Court under Article 226 of the Constitution of India.

21. The petitioner in **W.P.(C) No.20685 of 2020** has challenged the action of the opposite parties in not awarding proper marks in answer scripts for 'OSTET' Examination, 2019 with regard to Paper-I Set-'D'. As per the contention of the petitioner, the Question No.37 in Set-'D' although correct answer is on the basis of the Oxford Dictionary the word Leizy in place of Laizy, there is no choice given in the Booklet. So, the petitioner is entitled to one grace mark, but surprisingly when the result was published he was awarded only 74 marks instead of 75 marks which would have resulted in passing of the aforesaid examination. Apart from this, the petitioner has also contended that in Question Nos. 119,120, 123, 13 in Odia and 57 in English, the petitioner has not been awarded proper marks. With the aforesaid grievances, the petitioner has challenged the action of the opposite parties in the instant writ application.

22. In **W.P.(C) No.29179 of 2020,** the petitioner has been aggrieved by the improper award of marks with regard to Paper-I Set- 'B' which has resulted in her being disqualified due to lack of two marks. According to the petitioner, the Question Nos.13, 18 and 96 in the Booklet are wrong and the petitioner is entitled to grace marks. Accordingly, the petitioner has prayed for a direction to opposite party no.1 to award grace marks and to declare the petitioner to have passed in 'OSSTET' Examination, 2019.

23. The petitioner in **W.P.(C) No.21762 of 2020** prayed inter alia for a direction to opposite party No.2 for re-addition of the marks of the petitioner in Question Nos.32,83, 104, 128 in Category-I, Question Set I of 'OSSTET' Examination, 2019. Since the petitioner having secured 87 marks became not qualified due to lack of three marks. Accordingly, the petitioner has prayed for consideration of representation and for a direction to opposite party no.2 to re-check and re-add the marks properly in Question Nos.32, 83,104 and 128 and to supply the correct marks sheet to the petitioner within a stipulated period of time.

24. Passing of 'OSSTET' Examination is a condition precedent for being appointed or regularized as Secondary School Teacher. Guidelines have been framed by the Government of Odisha.

Board of Secondary Education is only an Examining Body to conduct the examination. Board has framed guidelines for conducting examination in which it has been stipulated that there is no restriction for a candidate to appear on any number of attempts for acquiring the pass certificate. This being an eligibility test minimum 60% for general candidate, 50% for S.C./S.T./SEBC/PH have been prescribed. Passing of the test would not confer a right on any person for recruitment or employment. As per the guidelines of OSSTET' examination, which has been annexed as Annexture-A to the counter affidavit filed in W.P.(C) No.20691 of 2020.

25. Section 3 of Right of Children to Free and Compulsory Education Act, 2009 envisages that a child has a right to get free and compulsory education. Under Section 8(g) thereof, it is the duty of the Government to provide good quality of education confirming to prescribed standards and norms. To achieve the objective behind the said provisions Government have laid down guidelines to ensure quality education by making teachers competent to impart quality education. Therefore, a test to a teacher has been made compulsory for appointment or regularization. In the process, Board of Secondary Education was chosen as a professional examining body with liberty to frame guidelines for conduct of examinations. The guidelines as mentioned in Annexure-A to the counter affidavit stipulates for conduct of 'OSSTET' examination.

STAND OF THE OPPOSITE PARTIES

26. Counter affidavit has been filed in the lead case, i.e., W.P.(C) No.20691 of 2020 by the Board of Secondary Education repelling the contentions made in different writ applications. The Board of Secondary Education has adopted the counter affidavit filed in W.P.(C) No.20691 of 2020 in all the aforesaid writ applications.

In the counter affidavit, it has been inter alia submitted that the grievances of the petitioners in different writ applications, are not sustainable. Such a prayer cannot be entertained in law more particularly, in absence of a provision for evaluation in the guidelines. Preliminary objection has been made to the maintainability of the writ application on various grounds that;

firstly, this Court cannot be called upon to assess the correctness of the answers given to questions nor can be called upon to compare and decide which of the answer is correct and the scope of jurisdiction cannot be extended to such prayers of the petitioners. Secondly, the object of teachers eligibility test is to uplift the standards of teachers and the questions are required to be so set that the examinee's ability to analyse, interpret and to apply if the subject matter is tested. The petitioners in the writ applications have not been able to make out a case that the answers given by the petitioners meet the required standard in furtherance of the object and purport of the scheme. For which such test is being conducted. Thirdly, the writ petitions are not maintainable in law in absence of Government of Odisha in School and Mass Education Department, who have framed guidelines and entrusted the jobs of conducting the examination to the professional body, Board of Secondary Education. Fourthly, no challenge should be allowed to be made to the correctness of the award of marks, as the Board has offered an effective alternative remedy to each of the candidate. It has been submitted that the Board soon after the examinations, published a scoring key, enabling the candidates to challenge in the event of any objection to the proposed answers to the questions. Upon publication of notification, several candidates have raised their objections to different suggestive answers published in the scoring key. All the challenges along with the materials supplied by the candidates were placed before the experts of the relevant subject and the experts have analysed the objections and gave their views indicating if the answer as suggested in the scoring key is correct or not. In cases where the challenge received is accepted, they have also suggested so. Upon receiving the reports from the experts, in all the subjects in which objections have been received, the Board finalized the answer keys and published the results in accordance with the same. Thus, several questions which are raised in different writ applications have already been placed before the experts and were tested before the results are published. Thus, the Board of Secondary Education has taken all possible steps to ensure proper award of marks. Fifthly, as per the scheme the answers given by the petitioners to each of the question cannot be judged like that of the answers given by the students appearing for regular courses. Rather, the petitioners herein are required to be fit teacher and therefore, the answers given must be perfectly correct. Otherwise the very object of eligibility test would get frustrated. Perfect teaching ability is a boon for healthy education system and future education system and nation building depends on the same. Strict consideration are required to be applied while evaluating the answer scripts of candidates, no

laxity is contemplated. Sixthly, the challenge to the evaluation of answer papers cannot be called in question in the writ jurisdiction of this Court even if some difference arises with regard to the answers by two different authors, the answer that has been chosen by the examiner which is unambiguously correct is to be accepted as the examiner considering relevance and correct of the answer accepts one. Seventhly, since there is no provision for re-valuation of answer books in the relevant Rules or Regulations, the examinees have no right to claim or demand re-valuation.

27. The petitioners have not been able to show that the answers given by the petitioners are correct and that the key answers are wrong. It is the position of law that the key answers should be assumed to be correct unless it is proved to be wrong more so in the present case, where the scoring key was further put to strict test. It is also the law that finality has to be attached to the result of the examination. It has further been averred in the counter affidavit that when no mala fide is attributed to the examiners who have evaluated the answer scripts and experts who were teachers with wide experience teaching ability in academic matters, who have reexamined the answers that were subjected to challenge by the some candidates and teaching having wide experience in academic matters. There is no further scope to invoke the jurisdiction under Article 226 of the Constitution of India.

28. The origin and reason for introducing the eligibility test for teachers, by virtue of Article-21-A of the Constitution of India, children are given a right to have free education up to elementary stage. To achieve the constitutional mandate, an Act namely, Right to Children Education in Elementary Schools, 2009, for short, RTE Act, 2009 has been promulgated by the Central Government which came into force from August, 2009. Section 13(1) of the 2009 Act stipulates teachers who teach the children should have the eligibility, qualification and ability to teach the children. In furtherance of the object of the Act and in accordance with the provisions in Section 23(1) of the RTE Act, 2009 National Council of Teachers Education in short, NCTE, a statutory body laid down educational qualification without which no candidate will be eligible to be appointed as Teacher at elementary level. As per NCTE Notification dated 23.08.2010, one of the essential qualification for any candidate for appointment as Teacher is that he/she should pass the Teachers Eligibility Test which has to be conducted by the Government. Several guidelines were also laid down for implementation of RTE Act, 2009.

29. In the backdrop of exhaustive guidelines of NCTE, the Government of Odisha in the School & Mass Education in furtherance of such Notification/guidelines have been conducting the OSSTET Examination by entrusting the job to Board of Secondary Education, which is conducting every year strictly following the guidelines. Guidelines formulated by the Board of Secondary Education pursuant to the guidelines of the Government of Odisha in School & Mass Education department has been annexed as Annexure-A to the counter affidavit.

30. In the counter affidavit, it has been submitted that in order to maintain transparency and to provide chance to the candidates, the proposed answer scoring key has been published in the internet inviting objections. In the process, all the objections received are re-examined and in cases where suggested questions are found inappropriate, steps are also taken to correct the same. Copy of the Notification calling upon objections to be raised bearing No.152 dated 07.02.2020 has been annexed as Annexure-B to the counter affidavit.

31. In response to the notice under Annexure-B several objections were received by the Board challenging the key answers as published. The objections were placed before the examining body. The objections pertain to Question Nos.3 and 16 in Set 'A', Question No.13 in Set 'B' in Odia Paper, Question No.46 in Set 'A' in Hindi Paper, Question No.67 in Set 'A' in Botany paper in Group III Question No.85 in Set 'A', Question No.80 in Set 'B', Question no.75 in Set 'C', Question No.81 in Set 'D' of History and Pol.Science Paper-I. Question Nos.110 and 128 in Set 'A', Question No.105 in Set 'B' given in Pedogogy, Question No.88 in Set 'D', Question No.98 in Set 'B', Question No. 93 in Set 'C' which are identical in Mathematics, Paper-I and Question Nos.32 and 70 in Set 'C', Question No.27,58 in Set 'B', Question Nos.22 and 64 in Set 'C' and Question Nos.37 and 59 in Set 'D' in English Paper C/1. All the questions were referred to the expert and based on their report the final key answers were prepared and results were published based on such final answer. Thus, the Board has absolutely maintained transparency in the matter of conduct of examination and evaluation.

32. It is submitted in the counter affidavit that there is no scope for reexamining the correctness of the expert. The opposite party further submited that the answers given by the petitioners are not correct and that answers given by the expert were taken into account. It may be relevant to

submit that expert have in some cases accepted the challenges made by the candidates also. In the counter affidavit, the decision of the Hon'ble Apex Court reported in AIR 1984 S.C. 1543 (**State of Maharastra-vrs-State Board of Higher Secondary Education** and (2004) 6 SCC 714 (**Pramod Kumar Srivastav-vrs.-Chairman, Bihar Public Service Commission, Patna and Ors and Himachal Pradesh Public Service Commission-vrs.-Mukesh Thakur and another**; (2010) 6 SCC 759 have been relied upon.

33. Rejoinder Affidavit filed by the petitioners to the counter affidavit filed by the opposite parties in W.P.(C) No.20685 of 2020. In the Rejoinder Affidavit, it has been submitted that the opposite parties have not filed the counter affidavit in proper perspective. They have resorted to misrepresentation of facts and materials in order to escape from the wrong committed.

> i. In Set-'A' category Sumit Kumar Bisi, Ramakrushna Pradhan, Chandrakanta Sahu, Jagan Parida, Jyotikanti Sahu (Hindi), Amruta Khuntia, Balaram Sahu & Ashok Bisi are in W.P.(C) No.22230 of 2020. Similarly in the same Set-'A' Manoswini Das, Raj Nandini Mishra, Chandrabati Das, Sanjaya Kumar Jena, Millon Krushna Dhal, Rasmita Senapati are all in W.P.(C) No.22980 of 2020. Topha Tripathy in W.P.(C) No.21110 of 2020 and Alpha Mohanty in W.P.(C) No.25736 of 2020 if their questions under challenge are consolidated in Set-'A', the question nos.3, 8, 13, 29, 32,39,58,63,68, 70, 91 100, 103, 105, 110, 114, 115, 119, 120, 123, 131, 147 and 150 are found to be committing some mistakes to the multiple answers and the proper verification/re-evaluation/rechecking should have been done. But in the counter opposite parties have never stated that they are verified, rechecked, re-evaluated for which the above petitioners have been declared disqualified owing to wrong marking and due to deficient of one or two or three marks only.
>
> ii. In Set-'B' category of Booklets Manas Ranjan Sahu, Deepak Kumar Sahu, Chinmaya Pradhan, Padmabati Soren, Basanti Gouda, Godhuli Lagna Nanda are the petitioners in W.P.(C) No.22230 of 2020. Similarly Sabitri Jena, Jayadev Lohar, Mahesh Ranjan Sahu, Snehapara Patra, Khista Majhi are all in W.P.(C) No.22980 of 2020, Manasmini Das in W.P.(C) No.20800 of 2020, Anita Panda in W.P.(C) No.22076 of 2020, Chandrakanta Behera in W.P.(C) No.22099 of 2020, Sarita Nanda in W.P.(C) No.22095 of 2020, Sibani Gurung and Sumitra Nayak in W.P.(C) No.21110 of 2020 if their questions under challenge are consolidated in Set-'B', the question Nos.6, 8, 13, 18, 27, 28, 58, 60, 67, 72, 96, 105, 128, 129, 132, 134 and 135 are found to be committing some mistakes to the multiple answers and the proper verification/re-evaluation/rechecking should have been done. But in the counter opposite party have never stated that they are verified, rechecked, re-evaluated for which the above petitioners have been declared disqualified owing to wrong marking and due to deficient of one or two or three marks only.

iii. In Set-'C' category of Booklets Sagarika Mohanty, Krupasindhu Das, Suchitra Mohanty, Banaja Nayak, Parijat Behera are the petitioner in W.P.(C) No.22230 of 2020. Similarly Krushna Daipayan Ray, Prativa Dash, Swagatika Swain, Bholanath Bishi, Sradhanjali Pradhan and Debadarsini Acharya are all in W.P.(C) No.22980 of 2020. Manisha Behera, Kumudini Swain in W.P.(C) No.21110 of 2020, Bibhudhendra Pratap Hati in W.P.(C) No.20691 of 2020, Reena Giri in W.P.(C) No.20785 of 2020, Gayatri Patnaik in W.P.(C) No.22080 of 2020 and Kedar Sahukar in W.P.(C) No.25766 of 2020 if their questions under challenge are consolidated in Set-'C', the question nos.3, 8, 11, 13, 22, 24, 57, 58, 64, 66, 86, 95, 139, 140, 145 and 148 are found to be committing some mistakes to the multiple answers and the proper verification/re-evaluation/rechecking should have been done. But in the counter opposite parties have never stated that they are verified, rechecked, re-evaluated for which the above petitioners have been declared disqualified owing to wrong marking and due to deficient of one or two or three marks only.

iv. In Set-'D' category of Booklets Sumit Kumar Bishi, Prakash Chandra Prusty, Amarnath Jena, Sukanta Kumar Behera (Hindi), Sujata Naik, Radhakanta Sahoo, Arjuna Gadangi, Tapaswini Sukla are the petitioners in W.P.(C) No.22230 of 2020. Similarly Baburam Hembram in W.P.(C) No.22980 of 2020. Tapas Kumar Barik in W.P.(C) No.31110 of 2020, Suchitra Nayak in W.P.(C) No.20795 of 2020 and Ratikanta Panda in W.P.(C) No.22089 of 2020 if their questions under challenge are consolidated in Set-'D', the question nos.13, 18, 23, 37, 57, 59, 60, 83, 95, 96, 119, 120, 123, 129 and 150 are found to be committing some mistakes to the multiple answers and the proper verification/re-evaluation/rechecking should have been done. But in the counter opposite parties have never stated that they are verified, rechecked, re-evaluated for which the above petitioners have been declared disqualified owing to wrong marking and due to deficient of one or two or three marks only.

34. In the rejoinder affidavit, it has been submitted that the eligibility test is a test by which examinee is to be declared eligible/qualified to be a teacher up to his maximum age limit of 32 years as prescribed by the Government of Odisha in School & Mass Education Department in consonance with the RTE Act, 2009, of the Government of India. This Court may interfere with the action/inaction of the opposite parties who have not properly awarded marks. Therefore, the petitioners are entitled to proper marks.

35. It has further been submitted that the judgment cited by the opposite parties in the counter affidavit are in different context which are not applicable so far as the petitioners' cases are concerned. The decision reported in 1996(II) OLR-592 (**Manas Ranjan Dash & Ors-vrs.-Council of Higher Education & Ors**) has been referred to. Similarly in the case of **Pankaj Sharma-vrs.-State of Jammu & Kashmir & Ors;** reported in (2008) 4 SCC 273 have been cited in the Rejoinder Affidavit.

I S S U E S

36 From the conspectus and constellation of facts the points for determination hinges on the following issues:

1. Whether in absence of any provision in the guidelines, reevaluation is permissible?

2. Whether the Court of law by invoking Article 226 of the Constitution of India can re-assess the question and re-appreciate the views of the Expert Committee?

3. Whether direction can be made for re-assessment of the question paper notwithstanding the fact that adequate precautions have been taken for rectification of the mistake by the expert body?

SUBMISSIONS OF LEARNED COUNSEL FOR THE PETITIONERS

37. Mr. K.K. Rath, learned counsel for the petitioner in W.P.(C) No.20691 of 2020 and batch of cases strenuously urged that in spite of series of defects in question and answer papers, the petitioners have been disqualified by a whisker due to lack of 1 to 3 marks. Learned counsel for the petitioners submitted that the petitioners have made out a case for interference and the opposite party Board has not controverted the assertions made in the writ application in any unequivocal manner. Therefore, the submission of the petitioner is to be accepted on the principle of the doctrine of non-traverse. Learned counsel for the petitioners further submitted that the opposite parties have not replied to the pertinent question raised in the writ application and have tried to evade the moot point. Learned counsel for the petitioner relied on the decisions reported in 1996(II) OLR-592 and (2008) 4 SCC-273; (**Pankaj Sharma vrs. State of Jammu and Kashmir and Others**).

38. Mr. Biplab P.B. Bahali, learned counsel for the petitioner in W.P.(C) No.29179 of 2020 submitted with vehemence that due to lack of two marks the petitioner being an examinee has been disqualified. Learned counsel for the petitioner further submitted that seeing the answer scripts the petitioner came to know that although she has performed well she has secured 73 marks and has been declared fail due to lack of very negligible two marks. After receiving the model/correct answer scripts in respect of Set-B/Set-2, she verified and matched with the answers in the test book, Grammar Book and Dictionary. Finally, she prepared an answer sheet which is very much correct so far as text book, grammar book and dictionary are concerned. True copies

of the result model/correct answer sheet and correct answer on the basis of the text book and dictionary have been annexed as Annexure-4, 5 series, 6 and 7 series to the writ application. Learned counsel for the petitioner further submitted that some answer of multiple choice in some questions like question nos.13, 18, 96 and some other questions given in the question booklet are wrong. Therefore, the petitioner is entitled to get grace marks. Learned counsel for the petitioner further submitted that in similar situation many examinees have allowed whereas the petitioner has been deprived of in violation of Article 14 of the Constitution of India. Learned counsel for the petitioner referred to the decisions of the Hon'ble Apex Court, i.e., in the case of **Kanpur University, through Vice-Chancellor and Others vrs. Samir Gupta and Others** reported in AIR 1983 S.C. 1230 paragraphs 15 and 16 of the said judgment are extracted herein below:-

> "Para-15. The findings of the High Court raise a question of great importance to the student community. Normally, one would be inclined to the view, especially if one has been a paper-setter and an examiner, that the key answer furnished by the paper-setter and accepted by the University as correct, should not be allowed to be challenged. One way of achieving it is not to publish the key answer at all. If the University had not published the key answer along with the result of the Test, no controversy would have arisen in this case. But that is not a correct way of looking at these matters which involve the future of hundreds of students who are aspirants for admission to professional courses. If the key answer were kept secret in this case, the remedy would have been worse than the disease because, so many students would have had to suffer the injustice in silence. The publication of the key answer has unraveled an unhappy state of affairs to which the University and the State Government must find a solution. Their sense of fairness in publishing the key answer has given them an opportunity to have a closer look at the system of examinations which they conduct. What has failed is not the computer but the human system."

> "Para-16 Shri Kacker, who appears on behalf of the University contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of retionalisation. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject should regard as correct. The contention of the University is falsified in this case by a large number of acknowledged textbooks, which are commonly read by students in U.P. Those textbooks leave no room for doubt that the answer given by the student is correct and the key answer is incorrect."

39. Learned counsel for the petitioners further relied upon the decisions rendered in the cases of **Bihar Staff Selection Commission and Ors. Vrs. Arun Kumar and others** (2020) 6 SCC 362. **Pranab Verma vrs. Registrar General of High Court of Punjab and Haryana** 2019(17) **SCALE-73, Rajesh Kumar and others vrs. State of Bihar and Ors.** (2013) 4 SCC 690. **Richal and Ors vrs. Rajasthan Public Service Commission and Ors** reported in (2018) 8 SCC 81, **Manish Ujwal and Ors. Vrs. Maharishi Dayananda Saraswati University and Ors**. reported in (2005) 13 SCC 744. Apart from the aforesaid decision, learned counsel for the petitioner submitted in the case of **Prativa Mondal vrs. West Bengal and Ors**. (W.P. No.23006(W) of 2017, the decision rendered on 27.07.2018 by the Hon'ble Calcutta High Court and the decision in the case of **Guruvinder Kaur and others vrs. State of Punjab and Others**, in similar issue, Teachers Eligibility Test allowed the writ application for granting grace marks for wrong answer which squarely cover in the present case.

40. Learned counsel for the petitioner prayed for issuance of writ of mandamus directing the opposite parties more particularly opposite party no.2 to award grace mark and more marks in question nos.13, 18 and 96 and to declare the petitioner as the pass in the OSSTET Examination, 2019.

41. Mr. Prajit Kumar Pradhan, Mr. Anjan Kumar Biswal, Mr. Kuresh Prasad Dash and Gopinath Sethi, learned counsel for the petitioners in W.P.(C) No.21762 of 2020 have more or less adopted the argument advanced by Mr. K.K. Rath and Mr. Biplab P.B. Bahali, learned counsel for the petitioners.

SUBMISSION OF LEARNED COUSNEL FOR THE SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA

42. As against the submission of learned counsel for the petitioner in respect of the writ petitions Mr. S.S. Rao, learned counsel for the Board of Secondary Education, Odisha relied upon the counter affidavit and vociferously raised preliminary objection on the maintainability of the writ applications on the ground that the State Government being author of the scheme has not been made as a party, secondly, the guideline framed by the State Government has not been challenged. Thirdly, no mala fide has been alleged against in the examiners in the writ applications. Apart from raising preliminary objection maintainability of the writ applications, learned counsel

further submitted that it is settled position of law that in absence of any provision in the guideline, no re-valuation is permissible. In order to advance his argument learned counsel referred to various decisions of the Hon'ble Apex Court which will be dealt with later on.

ISSUE NO.1 AND SCOPE OF JUDICIAL REVIEW

43. In order to deal with issue no.1, it is reiterated that on perusal of the guidelines (Annexure-A) to the counter affidavit there is absolutely no doubt or debate that there is no provision in the guideline for re-valuation of the answer sheets. The petitioners in different writ applications have pointed out various wrong questions and answer keys and the same have been dealt with in the counter affidavit filed by the Board of Secondary Education, Odisha wherein it has been specifically submitted that after publication of the answer keys, objections were invited from different candidates and after receipt of objections the same has been sent to the expert committee and the expert committee minutely scrutinized question papers and answer sheets and in case of any defects the same has been rectified and proper marks have been added. Therefore, all possible steps have been taken by the Board of Secondary Education, Odisha to rectify the defects, if any, in the question papers or in the answer sheets and averments of the petitioners have already been answered as disclosed in the counter affidavit.

44. It is no more *res integra* that in absence of any provision in the guideline no re-valuation is permissible. The Hon'ble Apex Court in (2004) 6 SCC 714 (**Pramod Kumar Srivastava vrs. Chairman, Bihar Public Service Commission, Patna & Ors**) has been pleased to hold and the relevant portion in paragraph-8 is extracted hereunder for ready reference:-

> **"**Para-8. Adopting such a course as was done by the learned Single Judge will give rise to practical problems. Many candidates may like to take a chance and pray for re-evaluation of their answer books. Naturally, the court will pass orders on different dates as and when writ petitions are filed. The commission will have to then send the copies of individual candidates to examiners for re-evaluation which is bound to take time. Xxxx xxx What will happen if a candidate secures lesser marks in re-evaluation? He may come forward with a plea that the marks as originally awarded to him may be taken into consideration. The absence of clear rules on the subject may throw many problems in the larger interest, they must be avoided.**"**

45. The Hon'ble Apex Court in (2018) 2 SCC 357(**Ranvijay Singh vrs. State of Uttar Pradesh and Ors**) at para-32 held that:-

> **"**Para-32. It is rather unfortunate that despite several decision of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination—whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

46. This Court having gone through the various decisions cited by learned counsel for the petitioner (supra) and learned counsel for the Board of Secondary Education, Odisha is of the considered view that the re-valuation in absence of any provision is not permissible. Accordingly, the issue no.1 is answered in favour of the opposite party-Board of Secondary Education, Odisha.

ISSUE Nos.2 and 3

47. Issue Nos.2 and 3 are taken up together for better appreciation and convince.

The Hon'ble Apex Court in the case of ***Ashwini Kumar Upadhyay vrs. Union of India and others;*** reported in (2020) 7 SCC 693 has been pleased to hold that the policy matters regarding primary education and matters which fall within the domain of experts. The decisions rendered on 07.12.2020 in Civil Appeal Nos.3649-3650 of 2020 wherein case at paragraphs-11 and 13 the Hon'ble Supreme Court ***Vikesh Kumar Gupta and Anr. Vrs. State of Rajasthan and Ors.*** held that though re-evaluation if re-appreciated, there scope of power in the matter of assessment of question

held that the same is not permissible. Therefore, decision of the Hon'ble Apex Court leaves no scope for interference by invoking extra ordinary jurisdiction under Article 226 and 227 of the Constitution of India for re-assessment of the answer scripts in absence of any provision in the guidelines.

48. In order to delve to the issue nos.2 and 3 as formulated (supra) , the Court having gone through the counter affidavit is of the considered view that adequate precautions have been taken before valuation of the answer scripts and when the expert committee has already taken the decision, this court will be at loath to substitute its own view in case of the view taken by the technical expert can evaluate the answer when there is mistake in question and answer scripts it is for all the candidates there will be no discrimination. Therefore, it would be profitable to refer to the decision in the case of **Maharashtra State Board of Secondary and Higher Secondary Education and another vrs. Paritosh Bhupash Kumarsheth**) reported in AIR 1984 S.C. 1543

The paragraphs-26 and 29 are extracted hereunder for ready reference:-

> "Para-26. We are unable to agree with the further reason stated by the High Court that since "every student has a right to receive fair play in examination and get appropriate marks matching his performance" it will be a denial of the right to such fair play if there is to be a prohibition on the right to demand revaluation and unless a right to revaluation is recognised and permitted there is an infringement of rules of fair play. What constitutes fair play depends upon the facts and circumstances relating to each particular given situation. If it is found that every possible precaution has been taken and all necessary safeguards provided to ensure that the answer books inclusive of supplements are kept in safe custody so as to eliminate the danger of their being tampered with and that the evaluation is done by the examiners applying uniform standards with checks and cross-checks at different stages and that measures for detection of malpractice, etc. have also been effectively adopted, in such cases it will not be correct on the part of the Courts to strike down the provision prohibiting revaluation on the ground that it violates the rules of fair play. It is unfortunate that the High Court has not set out in detail in either of its two judgments the elaborate procedure laid down and followed by the Board and the Divisional Boards relating to the conduct of the examinations, the evaluation of the answer books and the compilation and announcement of the results. From the affidavit filed on behalf of the Board in the High Court, it is seen that from the initial stage of the issuance of the hall tickets to the intending candidates right upto the announcement of the results, a well-organised system of verification, checks and counter-checks has been evolved by the Board and every step has been taken to eliminate the possibility of human error on the part of the examiners and malpractices on the part of examinees as well as the

examiners in an effective fashion. The examination centres of the Board are spread all over the length and breadth of each Division and arrangements are made for vigilant supervision under the overall supervision of a Deputy Chief Conductor in charge of every sub-centre and at the conclusion of the time set for examination in each paper including the main answer book all the answer books and the supplements have to be tied up by the candidate securely and returned to the Supervisor. But before they are returned to the Supervisor, each candidate has to write out the title page of main answer books in the pages provided for the said particulars, the number of supplements attached to the main answer book. The, Supervisor is enjoined to verify whether the number so written tallies with the actual number of supplements, handed over by the candidate together with his main answer book. After the return of all the answer books to the Deputy Chief Conductor, a tally is taken of the answer books including supplements used by the candidates by the Station Supervisor who is posted by the Board at each sub-centre. This enables the supervisory staff at a sub-centre to verify and ensure that all answer books and supplements issued to the candidates have been turned in and received by the supervisory staff. At this stage of checking and double-checking, if any seat number has been duplicated on the answer books by mistake or by way of deliberate malpractice it can be easily detected and corrective measures taken by the Deputy Chief Conductor or the Chief Conductor. The answer books are then sent by the Deputy Chief Conductor to the Chief Conductor in charge of the main centre. He sorts out the answer books according to the instructions issued by the Board and sends them to the examiners whose names had been furnished in advance except in the case of the science subjects, namely, "mathematics and statistics, physics, chemistry and biology". The answer books in the science subjects are forwarded by the Chief Conductor under proper guard to camps in Pune already notified to the Chief Conductors. The further procedure followed in relation to the valuation of the answer books has been explained in paragraphs 22 to 26 of the counter affidavit dated 10th July 1980 filed in the High Court by the Joint Secretary to the Pune Divisional Board of Secondary Education. We do not consider it necessary to burden this judgment with a recapitulation of all the details furnished in those paragraphs, and it would suffice to state that the procedure evolved by the Board for ensuring fairness and accuracy in evaluation of the answer books has made the system as fool proof as can be possible and it meets with our entire satisfaction and approval. Viewed against this background, we do not find it possible to agree with the views expressed by the High Court that the denial of the right to demand a revaluation constitutes a denial of fair play and is unreasonable. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in the Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against asking for revaluation.

Para-29. Far from advancing public interest and fair play to the other candidates in general, any such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational

> institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice. It is unfortunate that this principle has not been adequately kept in mind by the High Court while deciding the instant case."

49. In the case of Mukesh Thakur and another vrs. Himachal Pradesh Public Service Commission reported in (2010) 6 SCC 759.

The Paragraphs 20 and 26 are extracted hereunder for ready reference:-

> "Para-20. In view of the above, it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for Respondent no.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to Law. Had it been other subjects like Physics, Chemistry and Mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court. Therefore, we are of the considered opinion that such a course was not permissible to the High Court.
>
> Para-26. Thus, the law on the subject emerges to the effect that in absence of any provision under the statute or statutory rules/regulations, the Court should not generally direct revaluation."

50. In a similar situation when the key answers published and grievances were considered, the Hon'ble Supreme Court in the case of **Richal and Ors vrs. Rajasthan Public Service Commission and Ors** reported in (2018) 8 SCC 81 not only appreciated the attempt to achieve fairness and transparency did not interfere with the case. The relevant portion in paragraph-19 is extracted hereunder for ready reference:-

> "19. The key answers prepared by the paper setter or the examining body is presumed to have been prepared after due deliberations. To err is human. There are various factors which may lead to framing of the incorrect key answers. The publication of key answers is a step to achieve transparency and to give an opportunity to candidates to assess the correctness of their answers. An opportunity to file objections against the key answers uploaded by examining body is a step to achieve fairness and perfection in the process. xxxx"

51. Therefore, an effective and alternative remedy has been provided vide Annexure-B to the counter affidavit and those petitioners who have not availed the same cannot raise any objection now and cannot be allowed to raise objection in the writ application and in case of those who have raised objection, the same has been considered by the expert committee. So, the petitioners those who have lost the opportunity of raising the objection at the opportune time cannot invoke the jurisdiction under Articles 226 and 227 of the Constitution of India to ask for re-evaluation of the answer paper and for award of grace marks in absence of any provisions in the guidelines.

Accordingly, issue nos.2 and 3 are answered in favour of Board of Secondary Education, Odisha. Moreover, from the perusal of the pleading made in different writ applications, no mala fide has been alleged or corrupt practice has been attributed to the examiners but only bald pleadings have been made for wrong answers and on that basis prayer has been made for re-examination and re-evaluation which is not panacea for the malady of incorrect key answers.

52. In pursuance to queries and direction made by this Court, an affidavit has been filed by the Secretary, Board of Secondary Education, Odisha wherein it has been categorically stated that in the aforesaid writ petitions, there are about of 69 candidates. All the petitioners except Sri Jayadev Lohar, the petitioner in W.P.(C) No.22980 of 2020, have filed their challenges in response to Notification No.153 dated 07.02.2020, calling upon all the candidates to raise any challenge between dated 08.02.2020 to 14.02.2020 in case, they feel any ambiguity in any key answers within the stipulated time and before the final scoring key was published. Objections given by all the candidates, who have appeared in the OSSTET, 2019, were 363 in numbers. All the objections so received, the same were placed before the concerned subject experts when on re-examination of the challenges, eight of the challenges were accepted and rest 355 were not accepted.

53. Further, it has been submitted that challenges were placed before the expert and after the experts have examined, the scoring keys, final scoring key was uploaded in the website of the Board for information of the candidates vide Notification No.613 dated 01.08.2020.

54. It would be relevant to refer to decision reported in (2018) 2 SCC 357; (**Ranvijay Singh and Others vrs. State of Uttar Pradesh and Others**)

where at paragraph-31, the Hon'ble Apex Court has been pleased to inter alia hold that sympathy has no role to invoke extra-ordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Another point which cannot be lost sight that the Hon'ble Apex Court in the case of **Bihar Staff Selection Commission and Ors. vrs. Arun Kumar and others** (2020) 6 SCC 362 at paragraph-26 has been pleased to inter alia hold that re-evaluation undertaken by the High Court has not solved but contributed to chaos. Therefore, in absence of any guideline, re-evaluation would lead to utter confusion worst confounded.

55. After giving anxious consideration to the rivalized submissions of the respective parties and on perusal of the decisions cited at the Bar, this Court is not persuaded to accede to the prayer of the petitioners. Accordingly, the writ petitions sans merit are dismissed.

As restrictions are continuing due to COVID-19 pandemic, learned counsel for the parties may utilize the soft copy of this order available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No. 4587 dated 25.03.2020.

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2021 (I) ILR - CUT- 463

K.R. MOHAPATRA, J.

CMP NO. 544 OF 2020

KANGALI KHATEI & ORS. .....Petitioners

.V.

ALEKH KHATEI & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 39 Rule 07 – Application under – Prayer for appointment of pleader Commissioner – Principles – Held, the fundamental principles are:- (i) the discretion under the rule must be exercised sparingly and in exceptional circumstances and not in a routine manner on mere asking for it (ii) the party seeking assistance of the court under the provision must established that he is incapable of having the knowledge of the subject matter of dispute in view of the nature of the suit property or is prevented from it without any sufficient cause and (iii) the discretion is required to be exercised for just adjudication in the facts and circumstances of the case.

(Para 6)

For Petitioners : M/s Mr.Maheswar Mohanty, S.C.Pradhan, S.Behera & N.Behera.
For Opp. Parties : M/s A.K.Sahoo, A.C.Mohapatra, A.K.Panda & B.K.Panda.

ORDER Heard and Order on : 16.11.2020

K.R.MOHAPATRA, J.

Petitioners, in this writ petition, seek to assail the order dated 28.09.2020 (Annexure-7) passed by learned Senior Civil Judge, 2nd Court, Cuttack in I.A. No.01 of 2020 (arising out of C.S. No. 455 of 2020), whereby he allowed a petition under Order XXXIX Rule 7 C.P.C. filed by the defendants (Opp. Parties herein), by appointing a Pleader Commissioner to visit and ascertain as to whether there exists a canal over the suit plots with certain consequential directions.

2. In order to appreciate the contentions of learned counsel for the parties, relevant facts which are required for consideration, are stated hereunder:

2.1 Civil Suit No. 455 of 2020 has been filed by the plaintiffs-petitioners for a decree of permanent injunction in respect of suit land in Plot Nos. 2715, 2716, 2718, 2719, 2597, 2717 and 3438 restraining the defendants-opp. parties from digging a water channel thereon. The plaintiffs contended in the plaint that they along with other co-sharers are the recorded tenants in respect of the suit land. Adjacent to the suit land, there exists a canal from river Kandala. During heavy rain, the excess water passes through the canal as well as vacant land recorded in Government Khata. Thus, the villagers never faced any water logging. Since the defendants tried to dig a canal (water channel) over the sthitiban plots of the plaintiffs (suit land) for a free flow of rain water, the suit has been filed for the aforesaid relief. Along with the plaint, the plaintiffs-petitioners also filed an interim application (I.A. No.1 of 2020) under order XXXIX Rules 1 and 2 of C.P.C. and vide order dated 24.08.2020, learned Civil Judge granted ex parte ad interim injunction restraining the defendants from entering upon the suit land and digging water channel thereon. The defendants filed their objection to the petition for injunction denying the contention made therein. They specifically took a stand that;

> *"Since more than 40 years there exists a canal for discharge of rain water. The said canal passes over Plot no. 2630, 2642, 2652, 2760, 2763, 2790, 2779, 1988 and*

> *ultimately the rain water discharge through plot no. 2717, 2718 and 2719 to the river. Any kind of blockage over these plots will cause water logging over thousand acres of land."*

Thus, they prayed for vacation of the interim order of injunction. In course of hearing of the petition for injunction, the defendants filed a petition under order XXXIX Rule 7 C.P.C. on 14.09.2020 for appointment of a Pleader Commissioner to inspect the spot and answer the following questions for just adjudication of the petition for injunction;

> *"1. Is there any existence of canal since 40 years which passes through the suit land?*
>
> *2. Whether the petitioners obstructed the canal thereby blockage the free flow of rain water to discharge to the river?*
>
> *3. Whether the agricultural land of the suit village become over flooded?*
>
> *4. Any other party to be answer by the Commissioner*."

2.2 Taking into consideration the rival contentions of the parties, learned Civil Judge passed the impugned order under Annexure-7. Assailing the same, this CMP has been filed.

3. Mr. Mohanty, learned counsel for the petitioners submits that the petition filed for appointment of Pleader Commissioner does not satisfy the requirements of Order XXXIX Rule 7 C.P.C.. The defendants-opposite parties have specifically stated in their objection to the I.A. No. 01 of 2020 that the canal passes over Plot Nos. 2630, 2642, 2652, 2760, 2763, 2790, 2779 and 1988. The same do not include the suit plots. Thus, the Question No. 1 of the questionnaire attached to the petition under Order XXXIX Rule 7 C.P.C. is an irrelevant and misleading question. The defendants in that process made an endeavour to procure evidence through the Pleader Commissioner, which is not their case. When the question No.1 is irrelevant the rest of the questions, those are dependent upon the reply of the question No.1, are also equally irrelevant and misleading. Learned Civil Judge lost sight of the aforesaid material aspect while adjudicating the petition under Order XXXIX Rule 7 C.P.C. It is his submission that the Question No.1 of the questionnaire weighed in the mind of the court to pass the impugned order, which is clear from the observation made in the impugned order itself by the trial court as follows:

> *"On the other hand, it is the contention of the defendants/O.Ps. that a canal exists over several plots, which ultimately passes through the suit land and the excess water from the adjacent plots is being discharged through that canal. So, the main issue of contention between both the parties is whether there exists a canal through to the suit plots of the plaintiffs since 40 years which is being used for discharge of excess rain water."*

3.1 It is his submission that there is no material on record to suggest that the defendants-Opp. Parties have made any endeavour to lead any evidence in support of their case. Thus, it amounts to fishing out evidence through court, which is not permissible under law. In support of his contention, he also relied upon the decisions in the cases of ***Bijay Kumar Jena and another –v- Dussasan @ Surendra Khuntia and others***, reported in 62 (1986) CLT 201, ***Golekha Chandra Sahoo –v- Choudhury Kedarnath Mishra,*** reported in 2013 (I) CJD (HC) 255 & ***Abdul Naim Khan and another –v- Sk. Kefaittullah and others,*** reported in 2013 (I) CLR 606 and prays for setting aside the impugned order.

4. Mr. Mohapatra, learned counsel for the opposite parties, on the other hand, submits that the defendants-opposite parties in their objection to the petition under Order XXXIX Rules 1 and 2 C.P.C. have specifically averred that the rain water after passing through the canal running over several plots flows through the suit plot Nos. 2717, 2718 and 2719 to reach the river. Thus, a petition was filed to depute a Pleader Commissioner to see as to whether there is a blockage over the aforesaid plots and hence, learned Civil Judge has committed no error in passing the impugned order. In fact, they had filed the copy of the order passed under Section 133 Cr.P.C. along with their objection under Order XXXIX Rules 1 and 2 C.P.C., which discloses the public nuisance created by the plaintiffs-petitioners by stacking materials for raising construction over the aforesaid three plots. Taking into consideration the same, learned Civil Judge thought it proper to depute a Pleader Commissioner for spot visit and to submit a report with regard to the obstruction made over the aforesaid three plots. In support of his case, he also relied upon the decision of this Court in the case of ***Paradip Port Trust represented through its Secretary and another –v- Sankhanad Behera and others,*** reported in 2016 SCC Online Ori 753, in which it is held:

> *"10. In the instant case, the learned trial court came to hold that the dispute pertains to existence of structure over the suit land possession over the suit land by the plaintiffs and construction of dwelling house over the same. The local inspection of disputed land and its adjoining area will give a clear picture to the Court for considering the application for temporary injunction which is pending."*

4.1 Mr. Mohapatra further submits that the aforesaid observation was made by this Court while considering the correctness of an order passed in an application under Order XXXIX Rule 7 C.P.C. Thus, the ratio decided in the aforesaid case is squarely applicable to this case. Hence, he prays for dismissal of the CMP.

5. Taking into consideration the submissions of learned counsel for the parties, this Court finds that the Question No.1 of the questionnaire is with regard to the existence of canal over the suit plots. Admittedly, in the objection filed by the defendants-opposite parties to the petition under Order XXXIX Rules 1 and 2 C.P.C., it has been categorically averred that the canal passes through seven plots which do not include the suit plots. However, learned Senior Civil Judge keeping in mind the Question No.1 of the questionnaire proceeded to decide the petition for deputing a Pleader Commissioner. Since it is the admitted case of the defendants-opposite parties that the canal does not run through the aforesaid three suit plots, question No. 1 becomes redundant and irrelevant. However, it is also averred in the objection that the rain water flowing through the canal gets discharged over the aforesaid three suit plots. This aspect requires consideration by learned Civil Judge.

5.1 The Court in its discretion may make an order for inspection of the property which is the subject matter of the suit. But, the discretion should not be exercised on mere asking for the same. This Court in the case of ***Bijay Kumar Jena (supra)*** held as follows:-

> *"5. The object of inspection of the suit land is to find out its condition. Assistance of the Court would be necessary where the party requiring the assistance is incapable of having the knowledge in view of the nature of the suit land. There may be situation where the party seeking the assistance of the Court is not allowed to have the inspection himself or through his agents or where the evidence adduced by both sides is such that the Court feels that the report of local investigation would help in assessing the evidence properly. The wide discretion under Order 39, Rule 7, C.P.C., is not to be exercised on the mere asking of the same."*

5.2 In the case of ***Abdul Naim Khan (supra),*** this Court held as follows:-

> *"6. Learned Trial Court disallowed such a prayer on the ground that those facts can be proved by leading evidence and therefore deputation of Commissioner would amount to collection of evidence especially when hearing of the suit has not yet commenced. It is the trite law that the object of inspection is to give clear*

topography and the situation of the suit plot. In my humble view, assistance of the Court would be necessary where the party requiring such assistance is incapable of having the knowledge and cannot render evidence on the point. Furthermore, the Court has wide discretion in deputing advocate commissioner when it finds that in view of the evidence laid by both sides the report of the local inspection would assist the Court in assessing the evidence properly. Thus, when hearing of the suit has not yet commenced and when witnesses would be available to the plaintiffs to prove their assertions, the Trial Court is justified in arriving at a conclusion that direction for local inspection would amount to fishing out materials for the plaintiff. I do not find anything wrong in the approach of the learned Trial Court. When there is no failure of justice, in the instant case, by passing the impugned order in question and when there is nothing on record to show that the learned Trial Court exceeded its jurisdiction and passed the impugned order in flagrant disregard of law or the rules of procedure or acting in violation of the principles of natural justice, the Writ Court would refuse to exercise the certiorari jurisdiction as such powers are to be used sparingly."

5.3 Further, in the case of ***Krushna Behera vs Gitarani Nandy***, reported in 1990 (I) OLR 247 it is held as follows:-

"6. Under Order 39, Rule 7, Code of Civil Procedure, Court has discretion to make an order for inspection of the property in dispute. There can be no doubt that such discretion is to be judicially exercised and it would depend on the facts and circumstances of each case to consider whether such discretion is to be in favour of local inspection. It is to be remembered that such power is not to be exercised lightly on mere asking for the same. It is to be exercised by the Court when occasion so demands and when such inspection is necessary for proper appreciation and adjudication of the dispute for which local inspection is sought for."

5.4 ***In Sankhanad Behera (supra***) this Court held as follows:-

"9. The object of Order 39 Rule 7 is to find out the actual position and conditions of the property, which is the subject matter of dispute or as to which any question likely to arise in the suit. The assistance of the Court may be necessary where the parties having incapable of adequate knowledge in view of nature of property. The power conferred on the Court is discretionary in nature."

6. Thus, the fundamental principles, amongst other, to be kept in mind while exercising discretion under Order XXXIX Rule 7 C.P.C. are.

i) *The discretion under the rule must be exercised sparingly and in exceptional circumstances and not in a routine manner on mere asking for it;*

ii) The party seeking assistance of the Court under the provision must establish that he is incapable of having the knowledge of the subject matter of dispute in view of the nature of the suit property or is prevented from it without any sufficient cause, and

iii*) The discretion is required to be exercised for just adjudication in the facts and circumstances of the case.*

7. From the discussions made above, it appears that learned Civil Judge has not at all kept the aforesaid fundamental principles in mind while considering the petition under Order XXXIX Rule 7 C.P.C.

8. Mr. Mohapatra, however, relied upon the case of ***Municipal Corporation of Delhi vs. Sh. Jai Singh and others,*** reported in 2010 AIR SCW 5968 in which it is held as under:-

> *"Before we consider the factual and legal issues involved herein, we may notice certain well recognized principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It cannot be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. The High Court cannot lightly or liberally act as an appellate court and re-appreciate the evidence. Generally, it cannot substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi-judicial tribunals. The power to reappreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice."*
>
> (*emphasis laid*)

8.1 He, therefore, submits that the impugned order should not be interfered with in exercise of the power of superintendence under Article 227 of the Constitution of India as there is neither any grave dereliction of duty nor any flagrant abuse of fundamental principles. But, in view of the discussions made above, this Court is of the considered opinion that learned Senior Civil Judge, 2nd Court, Cuttack was required to follow the fundamental principles enumerated above, while passing the impugned order, which is conspicuously absent in this case. Hence, the matter requires further consideration.

9. Accordingly, the impugned order dated 28.09.2020 (Annexure-7) is set aside and the matter is remitted back to the learned Senior Civil Judge, 2nd Court, Cuttack for consideration of the petition under Order XXXIX Rule 7 C.P.C. afresh giving opportunity of hearing to the parties concerned and keeping in mind the discussions made above.

10. Mr. Mohapatra, learned counsel for the opposite parties submits that in the meantime, the Advocate Commissioner has visited the spot and is yet to submit his report pursuant to the impugned order. Hence, it is directed that report, if any, submitted by the Advocate Commissioner in the meantime shall be kept in abeyance till the petition under Order XXXIX Rule 7 C.P.C. is decided afresh, preferably within a period of eight weeks hence.

11. With the aforesaid observation and direction, the CMP is disposed of.

12. Authenticated copy of this order downloaded from the website of this Court shall be treated at par with certified copy in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

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2021 (I) ILR - CUT- 470

K.R. MOHAPATRA, J.

W.P.(C) NOS.13832 AND 13833 OF 2018

ASHOK KUMAR PATI & ANR. .....Petitioners

.V.

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

ORISSA SURVEY & SETTLEMENT ACT, 1958 – Section 15(B) – Revisional jurisdiction of the Board of Revenue – Whether by applying this provision the concerned authority can decide the disputed question of title? – Held, only the competent civil court has the authority to decide the disputed question of title.

Case Laws Relied on and Referred to :-

1. 1989 (II) OLR-135 : Alekh Chandra Rath .Vs. Commissioner of Land Records & Settlement, Orissa, Cuttack &Ors.
2. AIR 1998 SC 3067 : State of Orissa & Ors. .Vs. Commissioner of Land Records and Settlement, Cuttack & Ors.
3. 2007 (9) SCC 728 : Benga Behera & Anr. .Vs. Brajakishore Nanda & Ors.

For Petitioners : M/s. Prafulla Kumar Rath, A.K.Rout, S.K.Patnaik, A.Bhera, S.K.Behera, B.K.Dash, R.Nayak & P.K.Samantaray.

For Opp. Parties : Mr. Bhaktahari Mohanty, Sr. Adv., M/s. D.P.Mohanty, R.K.Nayak,T.K.Mohanty, P.K.Swain & M.Pal. (For O.P. No.3)
Mr.Swayambhu Mishra, Addl. Standing Counsel (For O.Ps. 1 & 2)

ORDER Heard and Disposed of on: 01.02.2021

K.R.MOHAPATRA, J.

Due to outbreak of COVID-19, this matter is taken up through Videoconferencing.

2. Heard Mr. P.K. Rath, learned counsel for the petitioners, Mr. S. Mishra, learned Additional Standing Counsel for the State-opposite party nos.1 and 2 and Mr. D.P.Mohanty, learned counsel for the opposite party no.3.

3. Since the issue involved in both the writ petitions is similar, those are taken up together and are disposed of by this common order.

4. W.P.(C) No.13832 has been filed assailing the common order dated 28.06.2018 (Annexure-1) passed by the Additional Commissioner, Consolidation & Settlement, Sambalpur on the petition filed for recall of order dated 20.06.2016 passed in R.P. No. 587 of 2016 and W.P.(C) No. 13833 of 2018 has been filed in respect of order passed in R.P. No.939 of 2017 respectively, wherein learned Addl. Commissioner while adjudicating the revision petition (R.P. No. 939 of 2017) together with an application for recall of the order dated 20.06.2016 (Annexure-5) passed in Revision Petition No.587 of 2016 recalled the order dated 20.06.2016 and allowed the R.P. No. 939 of 2017 directing the Tahasildar, Lathikata to make necessary correction of the R.O.R. in the name of opp. party no.3 after due verification of the relevant documents.

5. Mr. Rath, learned counsel for the petitioners submits that the land in question was recorded in the name of father of the petitioners, namely, Narendra Kumar Pati and R.O.R. in respect of the case land was published on 30th October, 2013 (Annexure-3). Said Narendra Kumar Pati breathed his last on 12.01.2012. However, Hal R.O.R. was published in his name on

30.10.2013. Accordingly, the petitioners in both the writ petitions filed R.P. No.587 of 2016 under Section 15(b) of the Orissa Survey & Settlement Act, 1958 (for short 'the Act') for correction of the R.O.R. in their name. Since the sisters of the petitioners filed affidavit stating that they have no objection to record the case land in favour of the petitioners, the revision was disposed of on 20.06.2016 (Annexure-5) by the Additional Commissioner, Consolidation & Settlement, Sambalpur with a direction to correct the R.O.R. in the name of the petitioners. Accordingly, R.O.R. was corrected and was finally published under Annexure-6. Subsequently, the opposite party no.3 filed a petition to recall the said order dated 20.06.2016 (Annexure-7) claiming his title over the land in question by virtue of a Registered Will stated to have been executed in his favour by the father of the petitioners, namely, late Narendra Kumar Pati on 30.09.2005. The opp. party no.3 also filed revision petition under Section 15(b) of the Act, which was registered as Revision Petition No.939 of 2017. Both the revision petition as well as the petition to recall the order dated 20.06.2016 were taken up together by the Additional Commissioner, Consolidation & Settlement, Sambalpur. The Addl. Commissioner taking into consideration the Registered Will stated to have been executed by Narendra Kumar Pati as well as the affidavits of attesting witnesses, namely, Satyanarayan Singh and Rama Chandra Kissan allowed R.P. No.939 of 2017 and recalled the order dated 20.06.2016 passed in R.P. No.587 of 2016 vide his common order dated 28.06.2018 under Annexure-1, which is under challenge in these writ petitions.

5.1 Mr. Rath, learned counsel for the petitioners further submits that the opposite party no.3 is a stranger to the family of the petitioners. The Will alleged to have been executed in favour of opposite party no.3 by their father had never seen the light of the day till the petition to recall the order dated 20.06.2016 was filed by the opposite party no.3. It is his submission that the Settlement Authority lacks jurisdiction to decide the contentious issue of title. In support of his case, he also relied upon the decision of this Court in the case of ***Alekh Chandra Rath –v- Commissioner of Land Records and Settlement, Orissa, Cuttack and others***, reported in 1989 (II) OLR-135, wherein this Court at paragraph-7 held as follows:

> *"7. The law is well settled that record of rights does not create or extinguish title and the settlement authorities lack the jurisdiction to adjudicate upon the disputed questions of title. But for the purpose of revenue records, the record of rights is prepared and the law attaches the presumption of correctness to the entries made therein……"*

5.2 He also relied upon the decision of the Hon'ble Supreme Court in the case of ***State of Orissa and others –v- Commissioner of Land Records and Settlement, Cuttack and others,*** reported in AIR 1998 SC 3067, wherein the Hon'ble Supreme Court at paragraph-38 held as follows:

> *"38. The Board of Revenue while reviewing earlier orders passed in exercise of the jurisdiction under Sections 6-D, 15, 25 and 32 is certainly not acting as an appellate authority but is acting only as a revisional authority. It is true that Section 7 of the 1951 Act which is the source of the power of review states that the Board may "review" its orders and "pass such orders in reference thereto as it thinks fit". We are aware that this Court has held, while explaining the words "as it thinks fit" that those words are to be given a wide meaning. But in the context of review jurisdiction, these words cannot, in our opinion, be treated as equal to an appellate or even revisional jurisdiction. Particularly when we are dealing with review of orders passed in revisional jurisdiction, it is obvious that the review power should be something less than the revisional jurisdiction. We have noticed that under Rule 43 of the Rules made under the 1958 Act, the "officers" who are conferred powers of review can exercise them only in case of "mistakes or errors apparent on the face of the record". In our considered opinion, the Board's review powers under the 1951 Act are also intended for correction of "mistakes or errors apparent on the face of the record". On that basis, the powers of the Board's delegate, namely the Commissioner, while exercising review powers of the Board under the 1951 Act, must be held to be equally circumscribed. We disagree in part with the decision of the Orissa High Court in Ramakanta [(1974) 40 Cut LT 917] when it stated that the power of revision under Section 7 of the 1951 Act is wider than Order 47 Rule 1 CPC."*

6. Mr. Rath, learned counsel for the petitioners relying upon the aforesaid decisions submits that the Revisional Court under the Act has the power to recall/review their own order, when it is proved that the order was an outcome of an error apparent on the face of the record. Reading out the petition for recall of the order dated 20.06.2016 as at Annexure-7, he submits that there is no allegation that there is any error apparent on the face of the record. The only grievance of the opposite party no.3 in the petition for recall of the said order was that the opp. party no.3 was not given any opportunity of hearing and the Will executed in his favour was not considered by the Settlement Authority while passing the order dated 20.06.2016. Thus, the petition for recall of the order dated 20.06.2016 is not maintainable in the eyes of law. He further submits that although the Revisional Authority has taken into consideration the affidavit filed by the so-called attesting witnesses, namely, Satyanarayan Singh and Rama Chandra Kissan, but the petitioners were not afforded with an opportunity to cross-examine them. As such, it cannot be considered as evidence in the eyes of law. He further relied upon the decision of the Hon'ble Supreme Court in the case of ***Benga***

Behera and another –v- Brajakishore Nanda and others, reported in 2007 (9) SCC 728, it has been held at paragraph-40 as follows:

> *"40. It is now well settled that requirement of the proof of execution of a will is the same as in case of certain other documents, for example gift or mortgage. The law requires that the proof of execution of a will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. (See Madhukar D. Shende v. Tarabai Aba Shedage [(2002) 2 SCC 85] ; Janki Narayan Bhoir v. Narayan Namdeo Kadam [(2003) 2 SCC 91] and Bhagat Ram v. Suresh [(2003) 12 SCC 35] .)"*

6.1 It is his contention that in order to prove that the title passed to the Opposite party No. 3 on the basis of a Will, the same has to be proved in terms of Section 68 of the Indian Evidence Act, 1872. That having not been done, the Revisional Authority has no jurisdiction to direct the concerned authority to record the case land in favour of opposite party no.3 on the basis of a Registered Will. Mr. Rath, also referred to the Will stated to have been executed in favour of opposite party no.3, which is annexed to the writ petition as Annexure-8. It is his contention that said Narendra Kumar Pati had signed the Will in Odia. But, there is no endorsement of the scribe of the Will to the effect that the testator had understood the contents of the said Will on being read over and explained to said Narendra Kumar Pati in Odia. It is his contention that said Narendra Kumar Pati had no knowledge of English and had no capacity to read and write in English. Thus, it appears that the Will, if any, has been obtained by practising fraud. All theses aspects were not taken into consideration by the Additional Commissioner for which the impugned order dated 28.06.2018 as at Annexure-1 is not sustainable in the eyes of law and is liable to be set aside.

7. Mr. Mohanty, learned counsel for the opposite party no.3 does not dispute the legal position raised by Mr.Rath, learned counsel for the petitioners. He, however, submits that since the opposite party no.3 claims to have derived title by virtue of a Registered Will, the presumption of its correctness is attached to it. It is not disputed that at the time of adjudication of R.P. No.587 of 2016 filed by the petitioners, opportunity of hearing was not given to the opposite party no.3. He was not even made a party to the said revision. It is his further contention that in view of the nature of dispute involved in these writ petitions, parties should be relegated to the civil court to work out their remedies. Till then, R.O.R. published in the name of the

petitioners should be kept in abeyance. He further submits that there is no quarrel over the fact that the Settlement Authorities have the power to recall/review their own order in view of the decision in the case of ***Alekh Chandra Rath*** (supra) and in the case of ***Commissioner of Land Records and Settlement, Cuttack (supra)***. He, therefore, prays for dismissal of these writ petitions.

8. Mr. Mishra, learned Additional Standing Counsel for the Sate, on the other hand, submits that he has nothing to submit on the facts of the case. But, the Revisional Authority has the power to recall its own order depending upon the facts and circumstances of the case. Since the Revisional Authority has exercised his discretion by recalling the said order, the petitioners, if feel aggrieved, may approach the civil court for redressal of their grievances. As such, these writ petitions are not maintainable.

9. Heard learned counsel for the parties. Perused the materials placed before this Court. The factual position as narrated by Mr. Rath, learned counsel for the petitioners is not much in dispute. Mr. Mohanty, learned counsel for the opposite party no.3 referring to the counter affidavit filed by the opposite party no.3 to the writ petitions however submits that the opposite party no.3 is not a stranger to the family, but he is the successor-in-interest of the common ancestor, namely, Gananath Pati. Be that as it may, law is well-settled that the Revenue Authority has the power to recall/review its own order and correct the errors apparent on the face of the record.

10. On perusal of the order dated 20.06.2016 under Annexure-5, it cannot be said that there is any error apparent on the face of the record. It is also not disputed that the petitioners are the sons of the recorded tenant, namely, Narendra Kumar Pati. Since the R.O.R. under Annexure-3 was published in the name of their father, who was dead by then, they filed revision under Section 15(b) of the Act for correction of the R.O.R. in their name. The Additional Commissioner taking into consideration the materials available on record directed to record the land in question in the name of the petitioners. Accordingly, the R.O.R. has already been corrected and published in the name of the petitioners under Annexure-6. Subsequently, the opposite party no.3 claiming title over the case land by virtue of a Registered Will stated to have been executed by said Narendra Kumar Pati, filed an application for recall of the order dated 20.06.2016 as well as the revision under Section 15 (b) of the Act in R.P. No. 939 of 2017 to correct the R.O.R. in his name. From the pleadings of the parties before the Revisional Authority it appears

that the petitioners seriously dispute the claim of the opp. party no.3 on the basis of the Will in question. The Additional Commissioner, while considering the matter, delved into the contentious issue of title claimed on the basis of the Will, which is not permissible under law while exercising the power under Section 15(b) of the Act. By execution of a Will by the recorded tenant, the natural line of succession is given a goby. The legatee claims to step into the shoes of the testator depriving the person(s) in the natural line of succession. Thus, the Court while relying upon a Will is required to be circumspective. The contentious issue of title can only be decided by the civil court. The Will in question is required to be proved by removing the suspicion shrouded in execution of the Will. The affidavits filed by the attesting witnesses cannot, at all, be considered as evidence in view of Section 3 of the Indian Evidence Act, 1872.

11. In that view of the matter, I am of the considered opinion that the Revisional Authority has exceeded his jurisdiction and committed error of law in recalling the order dated 20.06.2016 as well as directing to record the land in the name of opposite party no.3 on the basis of a Registered Will, more particularly when the petitioners, who are persons in the natural line of succession have seriously disputed the claim of the Opp. Party No. 3 on the basis of the Will in question. The petitioners are none other than the sons of the testator, namely Narendra Kumar Pati. As such, the claim of the Opp. Party No. 3 on the basis of the Will can only be decided by a competent civil court receiving evidence from the parties to the said suit.

11.1 As the validity of the order under Annexure-1 is in question in these writ petitions, I am not inclined to proceed further to keep the R.O.R. published in the name of the petitioners in abeyance. Thus, the submission of Mr. Mohanty, learned counsel for the opp. party no.3 cannot be accepted.

12. In that view of the matter, the impugned order under Annexure-1 being not sustainable in law is set aside.

12.1 It is open to the parties to work out their remedies in competent civil court.

13. Accordingly, these writ petitions are disposed of.

13.1. Authenticated copy of this order downloaded from the website of this Court shall be treated at par with certified copy in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

2021 (I) ILR - CUT- 477

B.P. ROUTRAY, J.

CRLMC NO.1451 OF 2020

PRIYABRATA SAHOO .....Petitioner

.V.

STATE OF ODISHA .....Opp. party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Offence Under sections 188/269/270/34 IPC r/w Sec.52 (a) of Odisha Excise Act – Exercise of Confiscation proceeding has not been initiated by the appropriate authority – Seizure of vehicle – Bar U/s.72 of the Odisha Excise Act Pleaded – Trial Court as well as revisional Court rejected the prayer of the petitioner to release the vehicle – Order of both the courts challenged – Held, (I) where the owner has not been implicated as an accused (II) where the properties seized have not been produced before the collector or the Authorized officer, as the case may be or (III) where the confiscation proceeding has not been initiated; the magistrate is empowered under the general provisions of the Cr.P.C including the jurisdiction and powers under chapter XXXIV for disposal of the seized property and consequently has also the power to deal with such seized property under Secs. 451 or 457 of the Cr.P.C.

For Petitioner : Mr. Arijeet Mishra.
For Opp. Party : Mr. D. Mund, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 27.11.2020 Date of Judgment : 07.01.2021

B.P. ROUTRAY, J.

By way of a petition under Sec.482 of Cr.P.C., the petitioner has challenged the order dated 01.10.2020 passed by the learned Sessions Judge, Kendrapara in Criminal Revision No.21 of 2020 wherein the prayer of the petitioner to release his vehicle under Sec.457 Cr.P.C. has been refused as involved in commission of offences under Secs.188/269/270/34, I.P.C. and Sec.52(a) of the Odisha Excise Act.

02. The facts reveal that on 16.07.2020, the S.I., Aul Police Station detected the vehicle, i.e., Hero Glamour motorcycle bearing Regd. No.OD-29-G-0819 transporting contraband liquor by the accused persons, namely, Rashmikanta Behera and Priyabrata Sahoo, the present petitioner. As such, the contraband was seized along with the vehicle and the accused persons were arrested. After the chargesheet was submitted for the aforesaid offences,

a petition under Sec.457 of the Cr.P.C. was moved with a prayer to release the vehicle. This was rejected by the learned J.M.F.C., Aul. Thereafter, the petitioner filed criminal revision petition before the learned Sessions Judge, Kendrapara, which was also rejected by the learned Sessions Judge. This is impugned in the present petition.

03. It is submitted by learned counsel for the petitioner that the petitioner is the owner of the vehicle in question and since no confiscation proceeding as contemplated under the Odisha Excise Act has been initiated yet, his vehicle should be released and the learned Sessions Judge has committed illegality on this aspect.

04. It is seen from the order impugned under Annexure-3 that the learned Sessions Judge while saying that, though no confiscation proceeding has been initiated yet the petitioner being an accused for offence under Sec.52(a) of the Odisha Excise Act, the seized motorcycle is liable for confiscation by the appropriate authority as per the provision of Sec.71(3) of the Odisha Excise Act. To support his reasoning to not release the vehicle, learned Sessions Judge has relied on a decision of this Court reported in ***2006 (Supp.-I) OLR—252*** (E. Ankuda Patro vs. State of Orissa).

05. Perusal of the said decision of this Court as relied on by the learned Sessions Judge, it is seen that the learned Single Judge in a case of release of vehicle concerning the offences under the Old Bihar and Orissa Excise Act, 1915, by relying on a decision of the Division Bench of this Court reported in ***(2003) 25 OCR—840*** (Soubhagya Kumar Panda vs. State of Orissa) has refused to release the vehicle by saying that, the Division Bench in the aforestated case have made a distinction as to in what type of cases the provision under Secs.66 and 68 of the Bihar and Orissa Excise Act, 1915 is invokable and where it is excluded, speaks in one category that where the Magistrate is found to be competent to consider such matter when the vehicle was used not by the owner of the vehicle and there is no allegation of connivance of the owner for such illegal use of the vehicle, and by applying the same analogy since the petitioner therein was the owner of the vehicle which was allegedly carrying the seized whisky bottles, therefore the Magistrate's jurisdiction is excluded because the Collector and the Excise Officer have the jurisdiction either to compound under Sec.66 of the Bihar and Orissa Excise Act, 1915 and the matter relating to interim custody is to be considered in such forum. It is further seen that the Division Bench of this

Court to which the learned Single Judge has relied on the case of E. Ankuda Patro (supra), have made an elaborate discussion of concerned provisions including Secs.66 and 68 of the erstwhile Bihar and Orissa Excise Act and observed that since the owner of the conveyance is not implicated in commission of the offence under the Bihar and Orissa Excise Act, 1915, the Collector will have no power to pass orders for release of such conveyance as the same is not liable to confiscation under Sec.66 of the Bihar and Orissa Excise Act, 1915.

The Division Bench of this Court after analyzing Secs.4 and 5 of the Criminal Procedure Code have further observed that, since the power of the Collector or the Excise Officer to release the property pending final orders by the Magistrate under Sec.67(1) of the erstwhile Bihar and Orissa Excise Act is confined to only property seized as liable to confiscation under Sec.66 and does not extend to the property which is not seized as liable to confiscation, the Magistrate will have the powers under Secs.451 and 457 of the Cr.P.C. to deal with such property not liable to confiscation in the manner indicated in the said provisions of Secs.451 and 457 of the Cr.P.C.

06. Further this Court in a recent decision reported in ***2019 (III) ILR-CUT-160*** (Kalpana Sahoo and another vs. State of Odisha) which is a case of release of vehicle concerning the offence under the present Odisha Excise Act, 2008 have observed that, the bar as contemplated under Sec.72 of the Odisha Excise Act, 2008 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 Sec.71 of the Act, but not merely because any seizure has taken place. It is further observed that, 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.

07. Therefore, upon a close perusal of the rulings aforementioned and upon analysis of the concerned provisions under the Odisha Excise Act, 2008 as well as the relevant provisions enshrined under the Cr.P.C., a safe opinion can be derived that; (i) Where the owner has not been implicated as an accused; or (ii) Where the properties seized have not been produced before

the Collector or the Authorised Officer, as the case may be; or (iii) Where the confiscation proceeding has not been initiated; the Magistrate is empowered under the general provisions of the Cr.P.C. including the jurisdiction and powers under Chapter XXXIV for disposal of the seized property and consequently has also the power to deal with such seized property under Secs.451 or 457 of the Cr.P.C.

08. In the instant case, the learned Sessions Judge in his order has stated that no confiscation proceeding has been initiated in respect of the seized vehicle and the learned counsel for the State also does not dispute the submission of learned counsel for the petitioner that no confiscation proceeding has been initiated yet. In such situation and in view of the discussions made above, the impugned order refusing to release the vehicle in favour of the petitioner is not found justified. As such, it is felt apposite to direct for release of the vehicle in favour of the petitioner pending trial.

09. Accordingly, the vehicle, i.e., Red colour Hero Glamour bearing Regd. No.OD-29-G-0819 be released in favour of the petitioner subject to the following conditions:

(i) the petitioner shall produce the original registration certificate, insurance paper before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the investigating officer/IIC of the police station;

(ii) the petitioner shall furnish property security worth of Rs.30,000/- (rupees thirty thousand) for the vehicle;

(iii) the petitioner shall keep the vehicle insured at all times till conclusion of the trial and produce the insurance certificate before the learned trial court as and when required;

(iv) the petitioner shall not change the colour or any part of the engine and chasis number of the vehicle;

(v) the petitioner shall furnish four photographs of the vehicle taken from different angles before taking delivery of the same;

(vi) the petitioner shall not transfer the ownership of the vehicle in favour of any other person;

(vii) the petitioner shall produce the vehicle before the court as and when called upon;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence. The CRLMC is disposed of with the aforesaid directions.

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