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cannot be taken as a solid piece of evidence – Thus, the prosecution has grossly failed to prove the charge against the accused beyond all reasonable doubts under Section 302 of IPC – In view of the temper of time, nature of accusation and unconvincing tactics of prosecution to build a powerful case, the entire conviction is rested on inferences and probabilities sans a credible evidence – Although the jurists hold the law to be always fixed and certain, yet the discovery of the facts, they say, may deceive the most skilful prosecutor which is not so in the present case – Conviction set aside.

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2020 (III) ILR - CUT- 177

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

WRIT PETITION (CIVIL) NO.12879 OF 2020
WRIT PETITION (CIVIL) NO.17640 OF 2020
AND
WRIT PETITION (CIVIL) NO.17766 OF 2020

DUSMANT MALLICK ……Petitioner
.V.
STATE OF ODISHA & ORS. ..……Opp. Parties

W.P.(C) NO. 17640 OF 2020
JANARDAN NATH ……..Petitioner
.V.
STATE OF ODISHA & ORS. ..……Opp. Parties

W.P.(C) NO. 17766 OF 2020
SANJAYA MISHRA ……..Petitioner
.V.
STATE OF ODISHA & ORS. ..……..Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Essential conditions of tender – Whether can be condoned? – Held, No.

> *"The sum total of the propositions of law laid down by the apex Court in the foregoing judgments clearly indicate that essential conditions required to be strictly complied with, if not complied with, the same cannot be condoned and, as such, the authority cannot act arbitrarily and unreasonably contrary to the conditions stipulated in the tender which is in gross violation of the provisions of law."* *(Paras 12 to 16)*

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Scope and power of the court to interfere in a contractual matter – Held, In view of the settled principles of law, as discussed above, this Court observed that the rights of citizens are in the nature of contractual rights – The manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing, as in the present case – Therefore, this Court has every justified reason to exercise the power of judicial review in the present context.

Case Laws Relied on and Referred to :-

1. (2000) 5 SCC 287 : Monarch Infrastructure (P) Limited Vs. Commissioner, Ulhasnagar Municipal corporation.
2. (2001) 2 SCC 451 : West Bengal State Electricity Board Vs. Patel Engg. Co. Ltd.
3. (2009) 11 SCC 9 : Sorath Builders Vs. Shrejikrupa Buildcon Limited.
4. (2019) SCC Online SC 89 : Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala.
5. (2007) 8 SCC 449 : Prestige Lights Ltd Vs. State Bank of India.
6. 2020 SCC Online SC 335 : Bharat Coking Coal Ltd Vs. AMR Dev Prabha.
7. (2000) 5 SCC 287 : Morach Infrastructure (P) Ltd Vs. Commissioner, Ulhasnagar Municipal Corporation.
8. (2001) 2 SCC 451 : West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd,
9. (2009) 11 SCC 9 : Sorath Builders Vs. Shreejikrupa Buildcon Ltd.
10. 2019 SCC OnLine Sc 89 : Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala.
11. AIR 1996 SC 11 : Tata Cellular Vs. Union of India.
12. (2005) 6 SCC 138 : Master Marine Service (P) Ltd. Vs. Metcafe & Hodgkinson (P) Ltd.
13. (1993) 1 SCC 445 : Sterling Computers Ltd. Vs. M & N Publications Ltd.
14. AIR 2007 SC 437 : M/s. B. S. N. Joshi and Sons Ltd v. Nair Coal Services Ltd.
15. (2006) 10 SCC 1 : Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India; Siemens Public Communication Networks Private Limited.
16. (1990) 3 SCC 280 : M/s Star Enterprises & Ors. Vs. City and Industrial Development Corporation of Maharashtra Ltd. & Ors.
17. AIR 1993 SC 1601 : Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries.
18. AIR 1990 SC 1031 : Mahabir Auto Stores & Ors. Vs. Indian Oil corporation & Ors.
19. 2016 (II) ILR CUT 515 : D.K. Engineering and Construction Vs. State of Odisha.
20. 2016 (II) ILR CUT 272 : BMP and Sons Private Limited Vs. State of Odisha.
21. (1999) 1 SCC 492 : Raunaq International Ltd. Vs. I.V.R. Construction Ltd.
22. (2014) 3 SCC 760 : Maa Binda Express Carrier and another Vs. North-East Frontier Railway & Ors.
23. (2014) 11 SCC 192 : State of Assam & Ors. Vs. Susrita Holdings Private Limited.
24. (2007) 1 SCC 477 : Rajasthan Housing Board and another Vs. G.S. Investments & Anr.

W.P.(C) NO. 12879 OF 2020

For Petitioner : Mr. Asok Mohanty, Sr. Counsel, M/s T.K. Mishra, S.C. Panda,P. Bastia and B. Sahoo.

For Opp.Parties: Mr. D.K. Mohanty, Addl. Govt. Adv.[O.P. Nos.1 to 4]

Mr. Manoj Kumar Mishra, Sr. Counsel
M/s D. Mishra and S.K. Satpathy, [O.P. No.5]

M/s. Sanatan Das, M.K. Sahu, S. Mohanty
and S.K. Swain, [for intervenor]

M/s. Dayananda Mohapatra, M.R. Pradhan, J.M. Barik &
P.K. Singhdeo, [for intervenors]

W.P.(C) NO. 17640 OF 2020

For Petitioner : M/s. Sanatan Das, M.K. Sahu, S. Mohanty, P.P. Mohanty and S.K. Swain.

For Opp.Parties : Mr. D.K. Mohanty, Addl. Govt. Adv.[O.P. Nos.1 to 4]
Mr. Manoj Kumar Mishra,Sr. Counsel
M/s D. Mishra, S.K. Satpathy and D. Hota, [O.P. No.5]

W.P.(C) NO. 17766 OF 2020

For Petitioner : M/s. Dayananda Mohapatra,M.R. Pradhan, J.M. Barik & P.K. Singhdeo,

For Opp.Parties : Mr. D.K. Mohanty,Addl. Govt. Adv. [O.P. Nos.1 to 4]

Mr. Manoj Kumar Mishra, Sr. Counsel
M/s D. Mishra, S.K. Satpathy & D. Hota, [O.P. No.7]

JUDGMENT Date of Hearing :19.08.2020 : Date of Judgment: 26.08.2020

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

Dusmant Mallick, the petitioner in W.P.(C) No.12879 of 2018 has approached this Court seeking following reliefs:-

"It is therefore most respectfully prayed that Your Lordships would be graciously pleased to issue a Rule Nisi calling upon the Opp. Parties to show cause as to:-

A) why the action of the opposite party no.4 in not settling the tender in favour of the petitioner shall not be declared as illegal and arbitrary in the eye of law.

B) why the opp.party no.4 shall not be directed to settle the source in favour of the petitioner as per Annexure-2, he being the highest bidder.

C) why the petitioner shall not be issued with the work order to operate the source.

D) Why the order no.1104/dated 20.03.2020, Annexure-3(Annexure-A/4 to the counter affidavit) shall not be quashed being illegal and arbitrary.

E) Why the issuance of Form-F in favour of the opp. Party no.5 on 26.05.2020 shall not be treated as illegal and void and contrary to the provisions contained in the OMMC Rules, 2016."

F) why such other order/orders, direction/directions shall not be passed to secure the ends of justice, equity and fair play;

If the opposite parties fail to show cause or show insufficient cause the Hon'ble Court may be pleased to make the rule absolute and issue writ in the nature of writ of mandamus by declaring the action of the opp.party no.4 as illegal and arbitrary with further prayer to direct the opp.party no.4 to settle the tender in favour of the petitioner with further prayer to direct for issuance of the work order in favour of the petitioner to operate the source as per Annexure-2 in the facts and circumstances of the case;

And/or pass any other order/orders as this Hon'ble Court may deem fit and proper to secure the ends of justice and equity.

And for this act of kindness, the petitioner shall as in duty bound ever pray."

Janardan Nath filed I.A. No.7316 of 2020 in W.P.(C) No.12879 of 2020 for impleadment of party and the said I.A. was disposed of vide order dated 13.07.2020 granting him liberty to file separate writ petition, which would be considered on its own merit. Accordingly, W.P.(C) No.17640 of 2020 has been filed by Janardan Nath seeking following reliefs:-

"It is therefore prayed that, this Hon'ble Court may graciously be pleased to issue RULE NISI directing the Opp. Parties to show cause as to why the auction sale notice No.815 dt.29.02.2020 (annexure-1) and all subsequent decisions/actions taken thereto or any act furtherance thereto shall not be quashed;

If the opposite parties fail to show cause or show insufficient cause the Rule NISI may be made absolute and the auction sale notice No.815 dt.29.2.2020 (annexure-1) & the entire auction process may be quashed;

AND

Further prays to pass any other order/orders as deemed fit and proper;

And for this act of kindness the petitioner as in duty bound shall ever pray;"

Similarly, one Sanjay Mishra filed I.A. No. 7429 of 2020 in W.P.(C) No.12879 of 2020 for impleadment of party in the writ petition and vide order dated 13.07.2020, the said I.A. was disposed of granting him liberty to file separate writ petition which would be considered and decided on its own merit in accordance with law. Accordingly, W.P.(C) No.17766 of 2020 has been filed by Sanjay Mishra seeking following reliefs:-

> *"The petitioner therefore most humbly prays that this Hon'ble Court be graciously pleased to admit the writ application, issue rule Nisi calling upon the Opposite parties to show cause as to why the tender process vide Annexure-1 conducted by Tahasildar, Opp. Party No.3 and the consequential settlement if any, in favour of the private Opp. Party and others if any shall not be quashed and as to why there shall not be a direction to initiate fresh tender process so as to enable the petitioner & others to participate in a fair tender process.*
>
> *And if the opposite parities fail to show cause or show insufficient cause to make the rule absolute by issuance of an appropriate writ(s), order(s), direction(s) as this Hon'ble Court deems fit and proper.*
>
> *And for this act of kindness the petitioner shall as in duty bound ever pray".*

All the above three writ petitions, having similar cause of action and arisen out of one tender call notice with regard to selfsame sairat source, were heard together and are disposed of by this common judgment.

2. The factual matrix of the case, in hand, is that Tahasildar, Gondia-opposite party no.4 published a tender notice on 29.02.2020 vide Annexure-1 inviting bids for auction sale of Gopalpur sand quarry, Kasipur sand quarry, Ambapada-I sand quarry, Ambapada-II sand quarry, Dallar sand quarry and Chhatia quarry on a long term lease basis for a period of five years from the year 2020-21 to 2024-25. The present writ petitions relate to 'Dallar sand quarry', which was published according to the provisions of Orissa Minor Minerals Concession Rules, 2016, fixing minimum charge of Rs.35/- per cm., additional charge of Rs.55/- per cm, total fixed price per cm. as Rs.90/-, minimum guaranteed quantity as 24,000 cum. per year, EMD as Rs.1,08,000/- and bank guarantee/IT return as Rs.21,60,000/-. The last date of submission of bid was 19.03.2020 and date of opening of bid was 20.03.2020. The date of publication of result of bid was 21.03.2020. In response to such notice, the petitioners along with three others, namely, Dusmant Mallick, Janardan Nath, H.K. Sahoo, N. Dhir, Jena Minerals and Tripurai Sahoo submitted their bids within the time specified. The bids were opened on 20.03.2020 by the Tahasildar, Gondia and a comparative chart was published vide Annexure-2 wherein Dusmant Mallick, the petitioner in W.P.(C) No.12879 of 2020 though shown as H-3, but his tender was allowed as highest bidder. So far as Jena Minerals is concerned, though shown as H-5, its tender was allowed as second highest bidder. Tripurari Sahoo-Opposite party no.5 in WP(C) Nos. 12879 and 17640 of 2020, though shown as H-1, his tender was rejected due to non-furnishing of required bank guarantee. Similarly, the tenders submitted by Janardan Nath and H.K. Sahoo were

rejected on the ground of non-submission of required bank guarantee, though they had been shown as H-2 and H-6 respectively. So far as N. Dhir is concerned, his tender was rejected on the ground of non-submission of relevant documents, though he was shown as H-4.

2.1 Dusmant Mallick, the petitioner in W.P.(C) No.12879 of 2020 asserts that by following due process his tender having been considered highest, necessary follow up action should have been taken by awarding the work order in his favour by executing the agreement for operation of the sand quarry, but the same having not been done, he has approached this court by filing the aforesaid writ petition.

2.2 Janardan Nath filed W.P.(C) No.17640 of 2020 against rejection of his H-2 bid due to non-submission of required bank guarantee and consideration of bid of opposite party no.5-Tripurari Sahoo, whose bid though was shown as H-1 but was rejected due to similar ground of non-furnishing of required bank guarantee.

2.3 So far as W.P.(C) No.17766 of 2020 is concerned, the same has been filed by Sanjay Mishra, whose bid was not taken into consideration and thereby his name was not found placed in the list of applicants published under Annexure-2. His case is that though he submitted documents by e-mail, but the same were not taken into consideration due to COVID-19 pandemic, as result of which he was not able to participate in the process of tender. Therefore, he seeks for quashing of the tender process initiated pursuant to Annexure-1 with further direction to the opposite parties to conduct fresh tender so as to enable him to participate in the tender process.

3. Mr. Asok Mohanty, learned Senior Counsel appearing along with Mr. T.K. Mishra, learned counsel for the petitioner in W.P.(C) No.12879 of 2020 strenuously urged that petitioner-Dusmant Mallick, who was shown as H-3 and whose tender was allowed treating to be highest bidder, as he had complied the requirements in Annexure-1, he should have been issued with work order in accordance with Odisha Minor Mineral Concessions Rules, 2016 to operate the sand quarry. But instead of issuing any work order in favour of the petitioner-Dusmant Mallick, opposite party no.4-Tahasildar, Gondia cancelled the tender vide notice no.1104 dated 20.03.2020 by affixing the same in the notice board of the Tahasil Office, Gondia which has been annexed as Annexure-4 to the writ petition and Annexure A/4 to the counter

affidavit filed by opposite party no.4. It is contended that after cancelling the tender on 20.03.2020, opposite party no.4 wrote letter dated 21.03.2020 to the Collector-cum-Controlling Authority, Dhenkanal for cancellation of the tender, as it was not done in order and therefore, sought permission for fresh auction as per law to avoid further litigation and legal complicacies in future. In response to same, the Collector, Dhenkanal vide letter dated 19.05.2020 called for an explanation as to why suitable action would not be taken against opposite party no.4 in accordance with law in the matter of negligence in duty, lack of revenue rules and regulations, carelessness in tender process for which there was controversial situation which resulted in loss of revenue. Thereafter, opposite party no.4 immediately accepted the deposit of bank guarantee filed by opposite party no.5-Tripurari Sahoo and selected him for awarding tender in his favour. Such action of opposite party no.4 to settle the auction in favour of opposite party no.5 is arbitrary, unreasonable and contrary to the provisions of law, therefore, the petitioner seeks interference of this Court. To substantiate his contentions, learned Senior Counsel appearing for the petitioner has relied upon ***Monarch Infrastructure (P) Limited v. Commissioner, Ulhasnagar Municipal corporation***, (2000) 5 SCC 287; ***West Bengal State Electricity Board v. Patel Engg. Co. Ltd***, (2001) 2 SCC 451; ***Sorath Builders v. Shrejikrupa Buildcon Limited***, (2009) 11 SCC 9; and ***Vidarbha Irrigation Development Corporation v. Anoj Kumar Garwala***, (2019) SCC Online SC 89.

4. Mr. Sanatan Das, learned counsel appearing for petitioner-Janardan Nath in W.P.(C) No.17640 of 2020 contended that when the bid of the petitioner was rejected on 20.03.2020, he raised objection on 21.03.2020 with regard to rejection of his bid and contended that due to some defects in the auction sale notice the Tahasildar, Gondia sought permission from the Collector-cum-Controlling Authority, Dhenkanal to go for fresh auction. When the petitioner was awaiting for fresh auction sale notice in respect of 'Dallar sand quarry', he came to know that auction had been finalized in favour of opposite party no.5-Tripurari Sahoo by issuing Form-F on 26.05.2020, though his tender was rejected on the ground of non-submission of bank guarantee. Therefore, the action of opposite party no.4 in finalizing the tender in favour of opposite party no.5 shows his mala fide intention. It is also contended that once the tender submitted by opposite party no.5 was rejected on the ground of non-submission of bank guarantee, subsequent acceptance of such tender cannot sustain in the eye of law, as it is contrary to the rules governing the field. It is contended that Clause-6 of the auction sale

notice is not in consonance with the provisions of Rule 27(4)(iv) of OMMC Rules, 2016 and without adhering to the same, the auction so finalized cannot sustain in the eye of law. It is further contended that no transparency has been adopted by opposite party no.4, while finalizing the auction in favour of opposite party no.5, as the same smacks mala fide. Thereby, the entire process of auction has to be quashed and direction should be given for fresh auction.

5. Mr. Dayananda Mohapatra, learned counsel appearing for the petitioner-Sanjaya Mishra in W.P.(C) No.17766 of 2020 contended that para-1 of the auction notice in Annexure-1 stipulates the bids should be sent through registered post/speed post on or before 19.03.2020. The tender was floated on 29.02.2020 and the bids pursuant thereto were opened on 20.03.2020 during COVID-19 Pandemic, particularly when there was promulgation of order under 144 Cr.P.C. in the district of Dhenkanal, for which the petitioner could not be able to participate in the proceeding. Accordingly, he filed representation under Annexure-3 with a request to extend the period of submission of tender, but he did not receive any response thereto. Subsequently, when the petitioner came to know about the settlement of tender in favour of opposite party no.5, he filed the aforesaid writ petition. It is further contended that even though the tender, which was opened on 20.03.2020, was cancelled on the very same day and such fact of cancellation was communicated, vide letter dated 21.03.2020, to the Collector-cum-Controlling Authority, Dhenkanal, but when the Collector-cum-Controlling Authority, Dhenkanal called for an explanation, vide letter dated 19.05.2020, opposite party no.4 subsequently settled the tender in favour of Tripurai Sahoo whose tender was rejected on the ground of non-submission of required bank guarantee. The tender process having stood cancelled, any settlement made subsequently in favour of a person whose tender was rejected cannot sustain in the eye of law. Thereby, in view of the arbitrary and unreasonable action taken by opposite party no.4, the settlement of tender so made has to be cancelled. It is further contended that according to the tender conditions stipulated in Annexure-1 tender should be filed through registered post/speed post, but in the counter affidavit filed by opposite party no.4 it has been categorically mentioned that tenders were received from the tender box, which is contrary to the specific conditions of tender. Thereby, there is gross violation of conditions of the tender notice, which touches the very root of the tender process, therefore seeks quashing of the same.

6. Mr. Debakant Mohanty, learned Additional Government Advocate appearing for the State opposite parties in all the three writ petitions relying upon the counter affidavit filed by opposite party no.4 dated 03.06.2020 and subsequent reply to the rejoinder affidavit of the petitioners filed by opposite party no.4 dated 03.07.2020 admitted the factum of issuance of notice of auction in Annexure-1 and contended that Annexure-2 dated 20.03.2020, the list of applicants applied for 'Dallar sand quarry' is not the final select list of the auction sale but is a data sheet of the auction sale held by opposite party no.4. However, on the same day, i.e. on 20.03.2020, opposite party no.4 cancelled the tender process which was published, vide office order no.1104 dated 20.03.2020. It is further contended that the petitioner in WP(C) No. 12879 of 2020 had quoted additional charge of Rs.116/- whereas opposite party no.5-Tripurari Sahoo had quoted additional charge of Rs.230/- i.e. Rs.114/- extra per cum which is in a very higher side. Therefore, opposite party no.5 was the highest bidder, he having quoted additional charge @ Rs.230/-. But, in Annexure-2 there is a remark that the bid submitted by opposite party no.5 was rejected because he did not submit the bank guarantee against the additional charges quoted by him although he had submitted the required bank guarantee as per the auction sale notice under Annexure-1 amounting to Rs.21,60,000/- only. Therefore, considering the bid of opposite party no.5 as highest, opposite party no.4 settled the auction in his favour so that the State would not lose any revenue. Accordingly, on 02.06.2020, opposite party no.5 submitted balance bank guarantee of Rs.42.00 lakhs, along with a forwarding letter to the Tahasildar, Gondia as per his undertaking. Consequentially, opposite party no.5 was issued Form-F as per OMMC Rules, 2016, as he had submitted balance bank guarantee as required. In view of such position, no illegality or irregularly has been committed by opposite party no.4 in settling the sources in favour of opposite party no.5, who is the actual highest bidder, though his bid was rejected due to non-furnishing of bank guarantee initially on 20.03.2020.

7. Mr. Manoj Kumar Mishra, learned Senior Counsel appearing along with Mr. D. Mishra, learned counsel for opposite party no.5 in W.P.(C) Nos.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 2020 contended that as per tender notice, the bids were to be submitted in statutory format Form-M as per OMMC Rules, 2016. According to clause-6 of the tender notice, the bidders were to submit bank guarantee equivalent to the annual MGQ royalty. In respect of 'Dallar sand quarry', the required bank guarantee of Rs. 21.60 lakhs was to be submitted. Opposite party no.5

deposited EMD as well as bank guarantee as specified in the notice of auction. When the bid was opened on 20.03.2020 at 11 am, opposite party no.4 pasted the notice Annexure-2 indicating list of applicants applied for 'Dallar sand quarry'. In the remark column thereof, it was indicated that the bid of opposite party no.5 was rejected due to non-submission of required bank guarantee. On the very same day, i.e., 20.03.2020 vide Annexure-4 the selected list of bidders (not final) as affixed on the notice board stood cancelled. Subsequently on 21.03.2020, opposite party no.4 submitted the auction proceeding to the Collector-cum-Controlling Authority for cancellation, but the Collector-cum-Controlling Authority did not accept the said proposal of opposite party no.4 nor cancelled the auction held on 20.03.2020 and the notice of auction under Annexure-1 was confirmed as legal, valid and operative. It is further contended that as per Rule-27(16) the Collector or the Conservator of Forest, as the case may be, shall have power to cancel the bid duly recording the reasons thereof, if he is not satisfied with the publicity, participation of bidders and amount of additional charge quoted. Keeping in view the above provision, the Collector-cum-Controlling Authority did not pass any order of cancellation of auction and as such the order dated 19.05.2020 under Annexure-E/4 is not at all the order of cancellation of auction. As per the provisions contained in Rule-27 (5) of the OMMC Rules, 2016, the quarry lease shall be granted in favour of the applicant who has quoted the highest rate of additional charge. It is contended that opposite party no.5 in W.P.(C) Nos.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 2020 even though had quoted highest charges and was mentioned as H-I bidder in the list prepared under Annexure-2, but his bid was rejected on the ground of non-furnishing of required bank guarantee. It is further contended that the petitioner in WP(C) No. 12879 of 2020 has no locus standi to file the same, as he was H3 bidder and the bid of Tripurari Sahoo was accepted having complied all the provisions of bid documents. It is further contended that Annexure-2 on which reliance has been placed having been superseded, as revealed from Annexure-A/4 of the counter affidavit filed by opposite party no.4, the writ petition suffers from suppression of material fact and is thus liable to be quashed. To substantiate his contentions, he has relied upon the judgments in ***Prestige Lights Ltd v. State Bank of India***, (2007) 8 SCC 449 and ***Bharat Coking Coal Ltd v. AMR Dev Prabha***, 2020 SCC Online SC 335.

8. This Court heard in extenso on virtual mode Mr. Asok Mohanty, learned Senior Counsel appearing along with Mr. T.K. Mishra, learned

counsel for the petitioner in W.P.(C) No.12879 of 2020, Mr. S. Das, learned counsel appearing for the petitioner in W.P.(C) No.17640 of 2020, Mr. D. Mohanty, learned counsel appearing for the petitioner in W.P.(C) No.17766 of 2020, Mr. D.K. Mohanty, learned Additional Government Advocate appearing for the State opposite parties in all the above three writ petitions and Mr. M. Mishra, learned Senior Counsel appearing for Tripurari Sahoo-opposite party no.5 in W.P.(C) No.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 2020. Pleadings having been exchanged between the parties, on the consent of learned counsel for the parties all the above three writ petitions are being disposed of at the stage of admission.

9. On the basis of undisputed facts mentioned above, it is to be considered whether opposite party no.4-Tahasildar is well justified in conducting the auction and settling 'Dallar sand quarry' in favour of Tripurari Sahoo-opposite party no.5 in W.P.(C) No.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 2020 by issuing Form-F and accepting him as highest bidder, although his tender was initially rejected due to non-furnishing of required bank guarantee.

10. In exercise of powers conferred by sub-section (1) of Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 and in supersession of the provisions contained in the Odisha Minor Mineral Concession Rules, 2004, except as respects things done or omitted to be done before such supersession, the State Government made a rule, for regulating the grant of mineral concessions in respect of minor minerals and for the purposes connected therewith, called "Odisha Minor Mineral Concession Rules, 2016" (hereinafter referred to the "Rules, 2016"). Chapter-IV of the Rules, 2016 deals with grant of quarry leases. Rule-27 of the OMCC Rules, 2016 reads as under:-

> *"**27. Grant of quarry lease:—** (1) The area of the quarry lease shall be delineated and notification inviting application(s)for grant of quarry lease(s) through auction shall be published in two daily newspapers, at least one of which shall be a State level and other having wide publicity in the area, where the lease is located and such notification shall be published at least fifteen days before the intended date of inviting applications and shall contain the date and time within which applications shall be received.*
>
> *(2) The notice inviting applications for grant of quarry lease shall be issued by the Competent Authority and shall specify the minimum guaranteed quantity of the minor mineral to be extracted in a year by the applicant and the minimum amount of additional charge payable for the same as determined under sub-rule (14).*

(3) In case the mining plan or Environment Clearance for the proposed lease has been obtained by the Competent Authority, this fact, along with the cost of obtaining thereof shall be recoverable from the selected bidder which shall also be mentioned in the notice.

(4) Subject to other provisions of these rules for settlement of quarry lease, the intending applicant may apply to the Competent Authority in a sealed cover for grant of quarry lease for such area or areas in Form-M in triplicate accompanied by the following documents and particulars, namely:—

(i) Treasury challan showing deposit of one thousand rupees (non-refundable) towards the application fee;

(ii) An affidavit stating that no mining due payable under the Act and the rules made thereunder, is outstanding against the applicant;

(iii) Proof of payment of earnest money equivalent to five percentum of the minimum amount of additional charges specified in the notice and the amount of royalty, both calculated on the basis of minimum guaranteed quantity for one whole year for the minimum guaranteed quantity of minor mineral to be extracted in one full year; and

(iv) a solvency Certificate or Bank guarantee valid for a period of eighteen months for an amount not less than the amount of additional charge offered and the royalty payable for the minimum guaranteed quantity for one whole year and a list of immovable properties from the Revenue Authority.

(5) Subject to the provisions of these rules, the quarry lease shall be granted in favour of the applicant who has quoted the highest rate of additional charge: 33 Provided that, if more than one applicant have quoted the highest rate of additional charge, then the applicant shall be selected by draw of lots.

(6) The selected bidder shall be intimated by the Competent Authority within seven days in Form-F about the selection and terms and conditions of the lease.

(7) Within fifteen days of such intimation, the selected bidder shall be required to convey his acceptance of the terms and conditions and to deposit an amount which shall be calculated in such a way that it shall be equivalent to one-fourth of the total amount of royalty and additional charge and the amount of contribution payable to the District Mineral Foundation on the annual minimum guaranteed quantity, taken together, reduced by the amount of earnest money, which, along with the earnest money, shall be held as interest-free security deposit.

(8) The selected bidder shall also deposit the costs of obtaining the mining plan and environmental clearance approvals, in case those have been obtained by the Competent Authority (non-refundable) before executing the lease deed.

(9) In the event of default by the selected bidder, the Competent Authority may issue intimation as specified in sub-rule (6) to the next highest bidder who shall

then be required to convey his acceptance and to make the security deposit calculated in the manner mentioned in subrule (7).

(10) If the second highest bidder has quoted unusually low price in comparison to the highest bidder of the same source or other sources in the vicinity, the competent authority may bring it to the notice of the Controlling Authority, who after proper verification and with due justification may cancel the bid and direct for fresh auction.

(11) If the second highest bidder does not convey the acceptance within the time stipulated for such acceptance, or if the Controlling Authority has cancelled the bid under sub-rule (10), fresh notice inviting application for grant of quarry lease shall be issued with the approval of the next higher authority.

(12) Immediately after compliance of the foregoing provisions by the selected bidder, the earnest money of the unsuccessful bidders shall be refunded and the bank guarantees, if any, furnished by them, shall stand discharged.

(13) The selected bidder shall be required to execute quarry lease in Form-N within three weeks from the date of intimation of his selection, if the approval of the mining plan and environment clearance has been obtained before auction, and in other cases, three months from the date of intimation, failing which, the intimation shall stand cancelled and the security deposit shall stand forfeited: 34 Provided that the Controlling Authority may, for genuine and sufficient reasons, extend the said period, if it is satisfied that the delay in execution of lease deed is not due to reasons attributable to the selected bidder.

(14) Security deposit shall be refunded after expiry of the lease period if the lessee has fulfilled all conditions of lease and in case of violation of any of the conditions of lease, the security deposit shall be forfeited in whole or in part by the Competent Authority.

(15) The minimum amount of additional charge to be quoted shall be such as the Competent Authority, in consultation with the Controlling Authority, decide and specify in the notice inviting applications for grant of quarry lease: Provided that the minimum amount of additional charge so fixed should not be less than 5% of the rate of royalty.

(16) The Collector or the Conservator of Forest, as the case may be, shall have power to cancel the bid duly recording the reasons thereof, if he is not satisfied with the publicity, participation of bidders and amount of additional charge quoted.

(17) Where the lessee, who has quoted the highest rate of additional charge, dies after deposit of the amount specified under rule 42 or after execution of lease deed by him, such deposit or deed shall be deemed to have been made or executed by the legal heir or legal representative, if they so like."

Adhering to the above Rule-27, which envisaged the procedure for grant of lease in f avour of a bidder, the competent authority, namely, Tahasildar,

Gondia issued an advertisement published in daily newspaper inviting tenders for settlement of different sairat sources including 'Dallar sand quarry' on long term lease basis for a period of five years for the year from 2020-21 to 2024-25. In the said advertisement, it was specifically mentioned that intending bidders would fill up the form–M incorporating all the information as per Rules, 2016 in triplicate and the same should reach in the office of the Tahasildar, Gondia on 19.03.2020 before 5 pm by registered post or speed post. All the closed envelopes to be received would be opened on 20.03.2020 at 11 am in presence of the applicants or their authorized representatives for their verification and the tender would be granted in favour of the applicants who quoted the highest price. It was made clear that after expiry of the date and time, no application would be accepted and as such incomplete application would be rejected. The application fee amounting to Rs.1000/- should be deposited in shape of treasury challan. The applicants should deposit royalty, additional charge and 5% of MGQ of a year in shape of demand draft in favour of Tahasildar, Gondia along with the application form and description of lease property. The applicants were to deposit the MGQ royalty and also bank guarantee along with IT return of that year along with other conditions stipulated in the advertisement itself.

11. As has already been stated, the petitioners along with three others had applied for 'Dallar sand quarry' by submitting their applications, which were opened on 20.03.2020, except the bids of the petitioner in WP(C) No. 12879 of 2020 and Jena Minerals, other four applicants' tenders were rejected on the ground mentioned in Annexure-2 itself. More particularly, Tripurari Sahoo-opposite party no.5 in W.P.(C) No.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 2020, who had quoted highest additional charge of Rs.210/- and shown as H-1 status, his bid was rejected due to non-furnishing of required bank guarantee. Therefore, even though the petitioner in W.P.(C) No.12879 of 2020 is shown as H-3 and his application was complete in all respect, the same was allowed and shown as highest bidder. So far as Jena Minerals is concerned, though its status was H-5 but its tender was allowed and taken as first highest bidder. However, on the very same day, i.e., 20.03.2020 vide Annexure-A/4, the tender process for 'Dallar sand quarry' which was opened at 11 am at Tahasil Office, was cancelled by the very same Tahasildar. But, however, reasons for such cancellation has not been indicated in Annexure-A/4 dated 20.03.2020. After cancelling such tender when opposite party no.4 communicated the same to the Collector-cum-Controlling Authority, vide letter no.1106 dated 21.03.2020 Annexure-

D/4, indicating the cancellation of tender, as the same was not in order, and sought permission for fresh auction as per the law. In response thereto, the Collector, vide letter dated 19.05.2020 Annexure-E/4, communicated the Tahasildar as to why suitable action shall not be taken against him in accordance with law for negligence in duty, lack of revenue rules and regulations, carelessness in tender process for which there was controversial situation and sources remained unsettled which resulted in loss of revenue. Immediately thereafter, the Tahasildar, taking into consideration the highest additional charge quoted by Tripurari Sahoo-opposite party no.5 in W.P.(C) No.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 20205, who was shown as H-1 in Annexure-2 dated 20.03.2020 and whose tender was rejected due to non-furnishing of required bank guarantee, issued with Form-F in his favour accepting his tender, which is contrary to the Rule-27 of Rules, 2016.

12. In ***Morach Infrastructure (P) Ltd v. Commissioner, Ulhasnagar Municipal Corporation***, (2000) 5 SCC 287, the apex Court in paragraph-12 held as under:-

> ***"12.*** *If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. in regard to the allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered."*

13. In ***West Bengal State Electricity Board v. Patel Engineering Co. Ltd***, (2001) 2 SCC 451, the apex Court in paragraphs-24 and 31 held as under:-

*"**24.** The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."*

xxx xxx xxx

*"**31.** The submission that remains to be considered is that as the price bid of Respondents 1 to 4 is lesser by 40 crores and 80 crores than that of Respondents 11 and 10 respectively, public interest demands that the bid of Respondents 1 to 4 should be considered. The Project undertaken by the appellant is undoubtedly for the benefit of the public. The mode of execution of the work of the Project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favoritism and discrimination in awarding public works to contractors. The contract, is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored. It is obvious that the bid of respondents 1 to 4 is the lowest of bids offered. As the bid documents of respondents 1 to 4 stand without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it (sic they) cannot be directed to be considered along with the other bids on the sole ground of being the lowest."*

14. In ***Sorath Builders v. Shreejikrupa Buildcon Limited***, (2009) 11 SCC 9, the apex Court in paragraphs-17, 26 and 27 held as under:-

> ***"17.*** *We also find on record that the tender submitted by the appellant was the lowest and the same was accepted as the same was found to be reasonable, tenable, plausible and valid. The High Court went beyond its jurisdiction in setting aside the decision of the University in accepting the bid of the appellant. We are of the opinion that there is no fault or arbitrariness in the decision-making process of the University. The said decision cannot be said to be in any manner arbitrary or unreasonable. Respondent 1 submitted his pre-qualification documents late for which only he is to be blamed.*
>
> *"**26**. In W.B. SEB v. Patel Engg. Co. Ltd., this Court while considering the issue with regard to the process of tender held:*
>
> > *"24. ……. where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favoritism which are totally opposed to the rule of law and our constitutional values."*
> >
> > *It was also held :*
> >
> > *"24. ……. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty."*
> > *It was further held;*
> >
> > *"31. ……. The contract is ….. awarded normally to the lowest tenderer which is in public interest and that it is equally in public interest to adhere to the rules and conditions subject to which bids are invited."*
>
> ***27.*** *Following the aforesaid legal principles laid down by this Court, we are of the considered opinion that Respondent 1 was negligent and was not sincere in submitting his pre-qualification documents within the time schedule laid down despite the fact that he had information that there is a time schedule attached to the notice inviting tenders. Despite being aware of the said stipulation he did not submit the required documents within the stipulated date. Pre-qualification documents were received by Respondent 2 University only after the time schedule was over. The terms and conditions of the tender as held by the Supreme Court are required to be adhered to strictly, and therefore, Respondent 2 University was justified in not opening the tender submitted by Respondent 1 on 1-12-2008, which was late by three days. According to us no grievance could also be made by Respondent 1 as lapse was due to his own fault."*

15. In ***Vidarbha Irrigation Development Corporation v. Anoj Kumar Garwala***, 2019 SCC OnLine Sc 89, the apex Court in paragraph-17 held as under:-

> ***"17.*** *It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."*

16. The sum total of the propositions of law laid down by the apex Court in the foregoing judgments clearly indicate that essential conditions required to be strictly complied with, if not complied with, the same cannot be condoned and, as such, the authority cannot act arbitrarily and unreasonably contrary to the conditions stipulated in the tender which is in gross violation of the provisions of law.

17. The scope and power of the Court to interfere with a contractual matter is well justified in various judgments of the apex Court, namely, ***Tata Cellular v. Union of India***, AIR 1996 SC 11; ***Master Marine Service (P) Ltd. v. Metcafe & Hodgkinson (P) Ltd***., (2005) 6 SCC 138; ***Sterling Computers Ltd. v. M & N Publications Ltd***., (1993) 1 SCC 445; ***M/s. B. S. N. Joshi and Sons Ltd*** *v.* ***Nair Coal Services Ltd.,*** AIR 2007 SC 437; ***Reliance Airport Developers (P) Ltd. v. Airports Authority of India***, (2006) 10 SCC 1; ***Siemens Public Communication Networks Private Limited***.

18. In ***M/s Star Enterprises and others v. City and Industrial Development Corporation of Maharashtra Ltd.*** and others, (1990) 3 SCC 280, the apex Court in paragraph 10 of the judgment held as follows:-

> ***"10.*** *In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr Dwivedi, therefore, commends itself to our acceptance, namely, that when highest offers of the type in question are rejected*

reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so."

19. In ***Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries,*** AIR 1993 SC 1601, the apex Court in paragraph 7 of the judgment ruled as follows:-

*"**7**. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art, 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."*

20. In ***Mahabir Auto Stores and others v. Indian Oil corporation and others,*** AIR 1990 SC 1031, the apex Court observed in paragraph 12 of the judgment as follows:

***"12**. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in M/ s. Radha Krishna Agarwal v. State of Bihar, (1977) 3 S.C. 457: (AIR 1977 SC 1496). It appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See M/s. Radha Krishna Agarwal v. State of Bihar at p. 462 (at SCC) : (at p. 1499-1500 of AIR) (supra), but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract*

has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even ,in the matters of entering or not entering into contracts, fails to satisfy the test of reasoned ableness, the same would be unreasonable. In this connection reference may be made to E. P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 : (AIR 1974 SC 555); Maneka Gandhi v. Union of India, (1978) 1 SCC 248: (AIR 1978 SC 597), Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722: (AIR 1981 SC 487); R. D. Shetty v. International Airport Authority of India, (1979) 3 SCC 489: (AIR 1979 SC 162) and also Dwarkadas Marfatia and Sons v. Board of Trustees .of the Port of Bombay, (1989) 3 SCC 293 : (AIR 1989 SC 1642). It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into. a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

Similar view has also been taken in ***D.K. Engineering and Construction v. State of Odisha,*** 2016 (II) ILR CUT 515 and ***BMP and Sons Private Limited v. State of Odisha***, 2016 (II) ILR CUT 272.

21. In view of the settled principles of law, as discussed above, this Court observed that the rights of citizens are in the nature of contractual rights. The manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing, as in the present case. Therefore, this Court has every justified reason to exercise the power of judicial review in the present context.

22. In ***Raunaq International Ltd. v. I.V.R. Construction Ltd.,*** (1999) 1 SCC 492, the apex Court had occasion to consider a case of paramount importance of government contract and in paragraphs-9, 10, 26 and 27 of the judgment held as under:-

> *"9. The award of a contract, whether it by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, and the same would be:*
>
> *(1) The price at which the other side is willing to do the work;*
>
> *(2) Whether the goods or services offered are of the requisite specifications;*
>
> *(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;*
>
> *(4) The ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;*
>
> *(5) Past experience of the tenderer and whether he has successfully completed similar work earlier;*
>
> *(6) Time which will be taken to deliver the goods or services; and often*
>
> *(7) The ability of the tenderer to take follow-up action, rectify defects or to give post-contract services".*
>
> *10. ……. The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer for poor quality of goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods……"*
>
> *"……. where rational non-discriminatory norms have been laid down for granting of tenders, a departure from such norms can only be made on valid principles. The award of contract cannot be by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units is held up on account of the dispute".*

23. In view of the settled position of law, as discussed above, and applying the same to the present context, this Court is of the considered opinion that Tahasildar, Gondia, having cancelled the tender on 20.03.2020 and communicated the same to the Collector-cum-Controlling Officer, because of the communication made by the Collector vide Annexure-E/4

dated 19.05.2020, could not and should not have reviewed the same suo motu and allowed the lease in favour of Tripurari Sahoo-opposite party no.5 in W.P.(C) No.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 20205, merely because he had quoted highest additional charge in his bid, though earlier his bid was rejected due to non-furnishing of bank guarantee. Thereby, the Tahasildar has acted in gross violation of conditions of tender, which is arbitrary and unreasonable exercise of power. While exercising power under judicial review, this Court is of the considered view that steps so taken by the Tahasildar in settling the sairat source in favour of Tripurari Sahoo-opposite party no.5 in W.P.(C) No.12879 & 17640 of 2020 and opposite party no.7 in W.P.(C) No.17766 of 2020 cannot sustain in the eye of law. Consequentially, issuance of Form-F in favour of Tripurari Sahoo on 26.05.2020, is also contrary to the provisions contained under the OMMC Rules, 2016. As per the law laid down by the apex Court, as discussed above, though highest price offered by the tenderer, which is paramount consideration of a tender, but in all cases the same cannot be adhered to, and, as such, in the present case, the same has been done in gross violation of provisions of law and contrary to the conditions stipulated in the tender documents. Therefore, even though Tripurari Sahoo has offered highest price, so far additional charge is concerned, that ipso facto cannot give rise to consider his tender which was already rejected due to non-furnishing of required bank guarantee.

24. Furthermore, the order of cancellation vide letter no.1104 dated 20.03.2020 in Annexure-A/4 so far as 'Dallar sand quarry' is concerned, no reason has been assigned in the letter itself nor any justification or cogent reason has been put forth before this Court.

25. In ***Maa Binda Express Carrier and another v. North-East Frontier Railway and others***, (2014) 3 SCC 760, the apex Court held that submission of a bid/tender in response to a notice inviting tenders is only an offer which State or its agencies are under no obligation to accept. Bidders participating in the tender process cannot insist that their bids/tenders should be accepted simply because a bid is the highest or lowest. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in evaluation of their bids/tenders. Therefore, the decision to cancel the tender process was in no way discriminatory or mala fide nor violated any fundamental right of appellants so as to warrant any interference by the Court.

26. In ***State of Assam and others v. Susrita Holdings Private Limited***, (2014) 11 SCC 192, the apex Court held that the validity of tender process has to be considered in the light of fairness and reasonableness and of being in the public interest.

Similar view has also been taken in ***Rajasthan Housing Board and another v. G.S. Investments and another***, (2007) 1 SCC 477.

27. Applying the above principles of law laid down by the apex Court, in the interest of justice the Tahasildar should have acted with all fairness and reasonableness in considering the tender submitted by the parties and, as such, when the tender was opened on 20.03.2020 the tenders which were rejected should not have been considered subsequently without any rhymes and reasons. More particularly, the tender of Tripurari Sahoo-opposite party no.5 which was initially rejected should not have been allowed subsequently and Form-F should not have been issued in his favour, which is de hors the OMMC Rules, 2016.

28. Mr. Manoj Kumar Mishra, learned Sr. Counsel appearing for Tripurari Sahoo-opposite party no.5 placed reliance on the judgment of the apex Court in ***Bharat Coking Coal Ltd.*** (supra), wherein maintainability of the writ petition has been dealt with. As such, the law discussed above clearly indicates that while dealing with the scope of judicial review, the constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. Therefore, it would only be the decision making process which would be the subject of the judicial enquiry and not the end result. Thereby, the judgment which has been relied upon by learned Sr. Counsel appearing for opposite party no.5 may not be of any assistance to him, rather applying the same to the present context, because of the illegal and irrational procedure adopted by the Tahasildar, in exercise of powers of judicial review, this Court has jurisdiction to interfere with the same.

29. In view of the aforesaid facts and circumstances and considering the law discussed above, this Court is of the considered view that issuance of

Form-F in favour of Tripurari Sahoo-opposite party no.5 on 26.05.2020, after cancellation of the tender vide letter no.4401 dated 20.03.2020, cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. Similarly, the entire tender process, so far as it relates to 'Dallar sand quarry', pursuant to notice under Annexure-1 also cannot sustain in the eye of law and accordingly the same is hereby quashed. This Court directs opposite party no.2 go for a fresh auction in respect of 'Dallar sand quarry' in consonance with the provisions contained in OMMC Rules, 2016 as expeditiously as possible.

30. In the result therefore, the writ petitions are allowed. However, there shall be no order as to costs.

As Lock-down period is continuing for COVID-19, 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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2020 (III) ILR - CUT- 200

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

WRIT APPEAL NO. 487 OF 2020
(Arising out of W.P.(C) No.27972 of 2019 disposed of on 06.05.2020)

AMRITA SAHU …….Appellant.

.V.

STATE OF ODISHA & ORS. …….Respondents.

(A) THE ODISHA PANCAHAYAT SAMITI ACT, 1959 – Section 46-B – Provisions under – Writ petition challenging the impugned notice allegedly issued in gross violation of the provision of sub-section (1) of Section 46-B of the Act – Grounds of challenge, (i) that prior to issuance of such notice the Sub-Collector ought to have verified the genuineness or otherwise of the signatures appended on the requisition and the proposed resolution; and (ii) that the proposed resolution was not signed by the required number of members of the Panchayat Samiti having the right to vote – Right to sign and vote –

Interpretation of the provisions – Held, The ratio of the aforesaid judgment of the Supreme Court in *Ganesh Sukhdeo Gurule (supra)* would squarely apply to the facts of the present case, while interpreting Sections 46-B(1) and 46-B(2)(g) of the Act, in both of which similar expression about a majority of two thirds of the total members having right to vote, has been used by the legislature – In a way these two provisions complement each other – If number of the members attending the meeting convened under Section 46-B(1) of the Act falls short of two third of the total members, the convening of the meeting would be an exercise in futility and passing of the no confidence motion in that case would be an impossibility – It is therefore that the legislature has purposefully provided in Section 46-B(2)(g) of the Act that "if the number of members present at the meeting is less than a majority of two-thirds of members having a right to vote the resolution shall stand annulled." (Para 18)

(B) INTERPRETATION OF STATUTE – Principles to be followed – Discussed.

> *"It is thus well settled that for the purpose of interpretation of statute, the same has to be read in its entirety. The primary principle of interpretation is that a constitutional or statutory provision should be construed according to the intent of legislature and such intent is gathered from the language of the provision itself. The intent of the legislature in engrafting the aforesaid provision of the statute in Section 46-B of the Act is very clear. While interpreting the same, it has to be read in entirety. Sections 46-B(1), 46-B(2)(a) & 46-B(2)(g) of the Act cannot be read in isolation, rather all sub-sections of Section 46-B of the Act have to be read together so as to make the scheme of the legislation workable. Thus read, it would appear that though Section 46-B(2)(g) of the Act operates in a different sphere altogether, but it has got a direct co-relation with Section 46-B(1) which also similarly mandates that the motion for no confidence can be passed only by "a majority of not less than two thirds of the total number of members having a right to vote." It is therefore that a majority of two-thirds of the total members having right to vote has been provided as a necessary condition for holding the meeting by the Sub-Collector or Presiding Officer, authorized on his behalf, to vote on the No Confidence Motion, on the basis of the requisition moved. In other words, the meeting to consider the No Confidence Motion against the Chairman or Vice-Chairman, on the basis of the requisition received by the Sub-Collector, must be attended by a majority of two-third members having right to vote. Section 46-B(2)(g) of the Act has therefore got nothing to do with the initiation of the process for convening the meeting to vote on the no confidence motion which is separately dealt by Section 46-B(2)(a) of the Act. On facts of the case, total*

number of members having right to vote in the aforesaid Panchayat Samiti being 26 (including two ex-officio members, i.e., Member of Parliament, and Member of Legislative Assembly), the minimum members, according to Section 46-B(2)(g), to be necessarily present at the meeting convened for passing a resolution of no confidence under Section 46-B(1), should be 18 i.e., a majority of two-third of the members. If the number of members attending such meeting falls short of 18, as per the mandate of the said provision, the resolution shall stand annulled. Since in the present case, total 23 members of the Panchayat Samiti having right to vote, including the appellant, attended the meeting dated 31.12.2019 and casted their votes, the argument of the learned counsel for the appellant that Section 46-B(2)(g) stood violated, cannot be countenanced." *(Para 22)*

Case Laws Relied on and Referred to :-

1. 2001(II) OLR 44 : Smt. Kanti Kumbhar Vs. State of Orissa.
2. 2016 (Supp.2)OLR 556 : Manikya Suna Vs. State of Odisha & Ors.
3. 64 (1987) C.L.T. 359 : Jagdish Pradhan & Ors. Vs. Kapileswar Pradhan & Ors,
4. (2019) 3 SCC 211 : Ganesh Sukhdeo Gurule Vs. Tahsildar, Sinnar & Ors.
5. AIR 1990 SC 123 : Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam & Ors.
6. (1987) 1 SCC 424 : Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Ors.
7. AIR 1973 SC 1461 : His Holiness Kesavananda Bharati Sripadagalvaru & Ors Vs. State of Kerala and Anr.
8. AIR 1979 SC 193 : Chief Justice of Andhra Pradesh & Anr Vs. L.V.A. Dikshitulu & Ors.

For Appellant : Mr. A.K. Behera.

For Respondents : Mr. J.P. Pattnayak, Addl. Govt. Adv. [for State-respondent Nos. 1 to 4].
Mr. S.R. Pati, (for respondent Nos. 5,6 & 14-caveator)
Mr. S.K. Nanda, (for respondent Nos.8 to 22, except 14)

JUDGMENT Date of Hearing :19.08.2020 :: Date of Judgment: 31.08.2020

PER: MOHAMMAD RAFIQ, C.J.

This appeal seeks to challenge the judgment dated 06.05.2020 passed by the learned Single Judge in W.P.(C) No. 27972 of 2019, by which the writ petition filed by the appellant (petitioner in the writ petition) has been dismissed.

2. The factual backdrop giving rise to this appeal in brief is that the appellant-writ petitioner is the elected Chairperson of Karlamunda Panchayat Samiti in the district of Kalahandi. The appellant received the notice dated 21.12.2019 issued by the respondent No.3-Sub-Collector, Bhawanipatna,

Kalahandi for convening a Special Meeting of the said Panchayat Samiti at 11.00 A.M. on 31.12.2019 to take up 'No Confidence Motion' against her (the appellant) for discussion on the basis of requisition dated 20.12.2019 under the signature of 15 members of the said Panchayat Samiti having right to vote. Karlamunda Panchayat Samiti consists of 26 members, including the present appellant, the Member of Parliament and the Member of Legislative Assembly of the area concerned.

3. The case of the appellant is that on 17.12.2019 a meeting of the Panchayat Samiti was convened by 15 members, who passed a resolution for initiation of No Confidence Motion against the appellant. After the resolution being passed, a requisition dated 20.12.2019 signed by 15 members of the Panchayat Samiti was submitted to the respondent No.3-Sub-Collector, Bhawanipatna, who issued the Notice dated 21.12.2019. It is this notice which the appellant assailed in the writ petition before this Court. Challenge to the said impugned notice was founded on the premise that the same was issued in gross violation of the provision of sub-section (1) of Section 46-B of the Odisha Panchayat Samiti Act, 1959 (hereinafter in short referred to as 'the Act'), mainly for two reasons, namely (i) that prior to issuance of such notice the Sub-Collector ought to have verified the genuineness or otherwise of the signatures appended on the requisition and the proposed resolution; and (ii) that the proposed resolution was not signed by the required number of members of the Panchayat Samiti having the right to vote. Learned Single Judge, while issuing notice of the Writ Petition on 24.12.2019, passed an interim order, directing that the Special Meeting of No Confidence Motion pursuant to the impugned notice may be held on 31.12.2019, but result thereof shall not be declared till the next date, which interim order continued till disposal of the writ petition.

4. The stand of the opposite parties before the learned Single Judge was that in fact 15 members, out of 26 members of the Panchayat Samiti having right to vote, passed the resolution and send the requisition under their signatures. This was in conformity with the provisions of Section 46-B(2)(a) of the Act, which provides that at least one-third members having right to vote should sign the resolution and move the requisition for convening the meeting to vote 'No Confidence Motion'. Further, the opposite party No.3-Sub-Collector, Bhawanipatna, after making due verification of the signatures of the requisitionist members having right to vote, arrived at the satisfaction that the signatures of the requisitionist members are genuine. He also

ascertained the personal presence of those members in the meeting. Thus the impugned notice to all the members of the Panchayat Samiti was issued fixing 31.12.2019 as the date of convening the special meeting only after compliance of procedures enumerated under Section 46-B(2) of the Act.

5. Learned Single Judge, after hearing rival submissions, came to the conclusion that law does not mandate that the requisition must be signed by two-third members of the Samiti having right to vote, and when 15 out of 26 members have signed the requisition, the notice fixing the date to convene special meeting for the purpose was in accordance with the provisions of law. No such complaint has come from any of the members having the right to vote that he was not served with notice to attend the meeting or that he has not received the copy of the requisition or the proposed resolution. Learned Single Judge has in the judgment also taken note of the fact that pursuant to the impugned notice, the special meeting of the Panchayat Samiti held on 31.12.2019 wherein 23 members of the Panchayat Samiti, including the appellant-petitioner, have casted their votes by secret ballot and the Presiding Offier i.e. Block Development Officer, M. Rampur Block, who was authorized by the opposite party No.3, has recorded the proceedings of the said meeting. Learned Single Judge, upon analyzing the provisions of law and facts of the case, dismissed the writ petition by judgment dated 06.05.2020 and directed the opposite parties to declare the result of the vote of No Confidence Motion against the petitioner. Hence the appeal.

6. We have heard Mr. A.K. Behera, learned counsel for the appellant, Mr. Santosh Kumar Nanda, learned counsel appearing for respondent Nos. 8 to 22, except respondent No.14, Mr. S.R. Pati, learned counsel for respondent Nos. 5,6 & 14-caveator and Mr. J.P. Pattnayak, learned Addl. Government Advocate for the State-respondent Nos. 1 to 4.

7. Mr. A.K. Behera, learned counsel for the appellant submitted that when the meeting of the Panchayat Samiti was held on 17.12.2019, only 15 members were present and the requisition was signed by only 14 members, out of total 26 members having right to vote. The number of signatories being less than two-third, as required by Section 46-B(1) of the Act, the resolution itself was not valid. Even then, the respondent no.3-Sub-Collector, Bhawanipatna issued notice dated 21.12.2019 to convene the meeting for discussing the No Confidence Motion as per the resolution dated 17.12.2019 and requisition dated 20.12.2019. It is argued that the learned Single Judge

has in the impugned judgment lost sight of Section 46-B(2)(g) of the Act which provides that if the number of members present at the meeting is less than a majority of two-thirds of members having a right to vote, the resolution shall stand annulled.

8. On the other hand Mr. J.P. Patnaik, learned Addl. Government Advocate appearing on behalf of State-respondent Nos. 1 to 4, supporting the impugned judgment, contended that Sections 46-B(2)(a) of the Act categorically provides that the meeting of No Confidence Motion under Section 46-B(1) shall be convened on the requisition singed by at least one-third members having right to vote, along with a copy of the resolution proposed to be moved at the meeting. Since the total number of members having right to vote in the said Panchayat Samiti are 26, number of 15 members, who had submitted requisition, is more than one-third of the total members. The opposite party No.3 upon receipt of such requisition was perfectly justified in issuing the notice dated 21.12.2019 for convening the meeting. When the special meeting was held on 31.12.2019, 23 out of 26 members, including the present appellant, attended the meeting and casted their vote by secret ballots. Hence, the learned Single Judge has rightly interpreted the provisions of law and passed the impugned judgment, which does not call for any interference.

9. Mr. S.K. Nanda, learned counsel appearing on behalf of respondent Nos. 8 to 22, except respondent No.14, submitted that Karlamunda Panchayat Samiti consists of 12 Gram Panchayats having 12 Sarpanchs and 12 Panchayat Samiti Members, from amongst whom the appellant was elected as Chairperson of the Panchayat Samiti as per Section 16(3) of the Act. Apart from 24 members constituting Panchayat Samiti, the Member of Parliament and the Member of Legislative Assembly of the said area were also ex-officio members of the Panchayat Samiti. Thus the Panchayat Samiti was constituted by 26 members having a right to vote in accordance with provisions contained in Section 16(1)(d) of the Act. It is submitted by Mr. S.K.Nanda, learned counsel that 15 members, who were having right to vote, submitted under their signatures the resolution dated 17.12.2019 as well as the requisition dated 20.12.2019, before the Sub-Collector, to convene the special meeting for No Confidence Motion against the Chairperson of the Panchayat Samiti-appellant herein as per Section 46-B(2)(a) of the Act. The appellant is not correct in interpreting Section 46-B(2)(g) of the Act, which applies to the resolution to be passed in the Specially convened meeting for No

Confidence Motion and not to the resolution for sending the requisition. It is submitted that the appellant has preferred this writ appeal only to frustrate the mandate of the Act and to linger the process as contemplated under the law, apprehending the outcome of the specially convened meeting dated 31.12.2019 in which 23 members, including the appellant herself, have casted their vote. Learned Single Judge was perfectly justified in holding that the number of requisitionist members required to sign the resolution for sending the requisition for no confidence motion is one-third of the members having right to vote, as provided under Section 46-B(2)(a) of the Act and not two-third, as argued by the learned counsel for the appellant. Mr. S.K. Nanda, learned counsel has in support of his argument placed reliance on the judgment of this Court in the case of ***Smt. Kanti Kumbhar Vs. State of Orissa,*** 2001(II) OLR 44.

10. Mr. S.R. Pati, learned counsel appearing on behalf of respondent Nos. 5,6 & 14, while adopting the arguments advanced by learned counsel Mr. S.K. Nanda and learned Addl. Government Advocate, submitted that there is no illegality and infirmity in the judgment dated 06.05.2020 passed by the learned Single Judge. Section 46-B(1) read with Section 46-B(2)(g) with regard to two-third majority of members having right to vote, will apply for the Special meeting convened on 31.12.2019 and not for the meeting dated 17.12.2019. He has also placed reliance upon judgments of this Court in ***Manikya Suna Vs. State of Odisha & Ors., 2016 (Supp.2)OLR 556; and Smt. Kanti Kumbhar (supra),*** and submitted that since the Notice dated 21.12.2019 issued by the respondent No.3 was perfectly legal, the learned Single Judge has rightly dismissed the writ petition on proper interpretation of Section 46-B of the Act. Hence the present writ appeal is liable to be rejected.

11. In order to meaningfully appreciate the rival contentions, it is deemed appropriate to re-produce the provisions of Section 46-B(1) & (2) of the Act, which read as under:

> "**46-B. Vote of no confidence against Chairman and Vice-Chairman of Samiti –**
>
> (1) Where at a meeting of the Samiti specially convened in that behalf a resolution is passed, supported by a majority of not less than two-thirds of the total number of members having a right to vote, recording want of confidence in the Chairman or Vice-Chairman of such Samiti the resolution shall forthwith be published by such authority and In such manner as may be prescribed and with effect from the date of

such publication the Chairman or Vice-Chairman, as the case may be, shall be deemed to have vacated office.

(2) In convening a meeting under Sub-section (1) and in the conduct of business at such meeting the procedure herein specified shall be followed, namely :

(a) no such meeting shall be convened except on a requisition signed by at least one-third of the members with a right to vote, along with a copy of the resolution proposed to be moved at the meeting;

(b) the requisition shall be address to the Sub-divisional Officer;

(c) the Sub-divisional Officer on receipt of such requisition shall fix the date, hour and place of such meetings and give notice of the same to all the members with a right to vote, along with a copy of the requisition and of the proposed resolution, at least seven clear days before the date so fixed;

(d) the Sub-divisional Officer or when he is unable to attend any other Gazetted officer not below the rank of a Class-II Officer of the State Civil Service, authorized by him, shall preside over and conduct the proceedings of the meeting;]

(e) the voting at all such meetings shall be by secret ballot;

(f) no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Chairman or the ViceChairman shall be taken up for consideration at the meeting;

(f-1) no such resolution shall be taken up for consideration unless it has been proposed by one member and has been seconded by another member at the meeting;

(f-2) after the resolution is taken up for consideration, the member proposing the resolution may open the discussion thereon and other members may speak on the resolution in the order in which they are called upon by the Presiding Officer;

Provided that no member shall, unless so permitted by the Presiding Officer, have the right to speak more then once and if any member who is called upon does not speak he shall not be entitled, except by the permission of the Presiding Officer, to speak at a later stage of the discussion;

(f-3) where the Chairman or as the case may be, the Vice-Chairman, against whom the resolution has been tabled, is present, he shall be given an opportunity to speak by way of reply to the resolution and the discussion made at the meeting;

(f-4) the Presiding Officer may fix the time within which each member, including the Chairman and Vice-Chairman, shall conclude his speech;

(g) if the number of members present at the meeting is less than [a majority of two-thirds] of members having a right to vote the resolution shall stand annulled ; and

(h) if the resolution is passed at the meeting supported by a majority of two-thirds of members having a right to vote, the Sub-Divisional Officer shall forward the resolution to the authority prescribed in pursuance of Sub-section (1).

12. In so far as the initiation of the process for convening the meeting to discuss the 'No Confidence Motion' against the Chairman or Vice-Chairman under Sub-section (1) of Section 46-B is concerned, Sub-section 2(a) of Section 46-B clearly stipulates that "no such meeting shall be convened except on a requisition signed by *at least one-third* of the members with a right to vote, along with a copy of the resolution proposed to be moved at the meeting. The argument of the appellant that the meeting of the Panchayat Samiti Members held on 17.12.2019 was attended by 15 members and only 14 of them, out of 26 members having right to vote, signed the resolution, which is not "a majority of not less than two-thirds of the total number of members" as per Section 46-B (1) of the Act, cannot be countenanced for the simple reason that the meeting dated 17.12.2019 held by 15 members was merely for submission of a requisition along with the resolution to the Sub-Collector giving a proposal to convene the meeting for No Confidence Motion against the appellant. Purpose of this meeting was to initiate the process for convening the meeting on vote of no confidence motion as envisaged under Section 46-B(1) of the Act. At that stage, the resolution was required to be supported and signed by only one-third of the members having right to vote as provided under Section 46-B (2)(a) of the Act. Even otherwise, that would be an insignificant factor because the impugned notice dated 21.12.2019 was issued by the Sub-Collector, on the basis of a separate requisition dated 20.12.2019 duly signed by 15 members having right to vote, after due verification of the signatures of the requisitionist-members, and served on all the members for convening the special meeting on 31.12.2019, to discuss the No Confidence Motion against the appellant. The said special meeting dated 31.12.2019 was attended by 23 members of the Panchayat Samiti including the appellant, all of whom casted their votes by secret ballot.

13. This Court after analyzing the provisions of Section 46-B of the Act, in **Smt. Kanti Kumbhar (supra)**, has categorically held that no formal meeting is necessary for submitting a requisition for holding a specially convened meeting for discussing the no confidence motion. Even if such meeting is held, it has no statutory backing. Following observations of the court are worth quoting:-

"**5**. ……

XXXX XXX XXXX

A perusal of the aforesaid provisions makes it clear that a requisition for convening a meeting to consider the no-confidence motion should be signed by at least one-third of the members of the Panchayat Samiti having a right to vote and along with the requisition a copy of the resolution proposed to be moved at the meeting should be there and the requisition should be addressed to the Sub-divisional Officer. On receipt of such requisition along with copy of the resolution proposed to be moved at the meeting, the Sub-divisional Officer is to fix the date, hour and place of such meeting and give notice of the same to all the members who have a right to vote along with a copy of the requisition and of the proposed resolution at least seven clear days before the date fixed for holding such meeting.

6. The petitioner in this case has asserted that the requisition along with the proposed resolution was adopted at a meeting on 3.9.2000 without observing the due procedure laid down Under Section 46-B of the Act. This contention is without any substance. For submitting a requisition for holding a specially convened meeting for discussing about no-confidence motion, no formal meeting of the Panchayat Samiti is necessary. Section 46-B (2) (a) only requires that a special meeting for discussing about the no-confidence motion can be convened only on the basis of a requisition signed by at least one-third of the members with a right to vote and along with such requisition, a copy of the resolution proposed to be moved at such meeting is required to be sent. There is no requirement in the Act that before sending such a requisition, there has to be a formal meeting of the Panchayat Samiti. It is, of course, true that in the present case, the proposed resolution relating to no-confidence was also purported to have been adopted in a meeting held on 3.9.2000. Such a meeting of some of the members of the Panchayat Samiti does not have any statutory force and is not required to be held in a particular manner. It can be considered to be a convenient method for preparing requisition along with proposed resolution (the no-confidence motion). Therefore, even assuming that such a meeting had been held without following any procedure contemplated Under Section 46-B, the requisition on the basis of so-called resolution adopted in such meeting does not become illegal and on the basis of such requisition the meeting contemplated Under Section 46-B (1) could be legally convened by the prescribed authority if other conditions are fulfilled. In this context, it is also contended that no reason had been given in the proposed resolution for moving the no-confidence motion against the Chairperson. The provisions contained in Section 46-B of the Act do not require any particular reason to be given for sending a requisition for the purpose of considering a no-confidence motion. It is also not necessary that in the proposed resolution, the reasons for moving the no-confidence motion against the Chairman or the Vice-Chairman, as the case may be, should be indicated."

14. A Division Bench of this Court, in **Jagdish Pradhan and others Vrs. Kapileswar Pradhan & others, 64 (1987) C.L.T. 359**, while considering a similar question under Section 46-B(2) of the Act where the requisition for No Confidence Motion was not accompanied by the proposed

resolution in a separate sheet, held that there is no form prescribed for such a resolution and the intention behind the resolution was well understood by the Sub-Divisional Officer. This Court, in paragraph-7 of the judgment, held as under :-

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

15. This Court in the case of ***Prahallad Dalei Vs. State of Odisha & Ors.,*** (W.P.(C) No. 17873 of 2014 decided on 09.10.2015), while dealing with an identical petition, in relation to No Confidence Motion against a Sarpanch, under the Orissa Gram Panchayat Act, observed that if the intention of the requisite number of members is clear from the resolution adopted in the meeting held to consider the requisition and the proposed resolution, then the said intention is to be accepted as indicative of the fact that requisite number of members want to move a No Confidence Motion and that resolution adopted in such meeting is to be abstractly accepted as the proposed resolution. This Court, made the following observations at paragraphs 10 and 11 of the judgment:

> **"10.** From the discussions supra, it is clear that –
>
> (i) no form or proforma has been prescribed either for the Notice to be issued by the Sub-Collector calling upon the members including the Sarpanch or Naib-Sarpanch to attend the meeting of No Confidence, or for the requisition to be sent by 1/3rd members of the Grama Panchayat or for the proposed resolution to be moved.
>
> (ii) If the intention of the requisite number of members is clear from the resolution adopted in the meeting held to prepare the requisition and the proposed resolution, then the said intention is to be accepted as indicatives of the fact that requisite

> number of members want to move a No Confidence Motion and that resolution adopted in such meeting is to be abstractly accepted as the proposed resolution.
>
> (iii) The so called proposed resolution to be moved need not be on a separate sheet or document.
>
> **11**. In the present case it is found from Annexure-3 that it starts with the heading "PRASTABITA SANKALPA (Proposed Resolution) NIMANTE SWATANTRA ADHIBESAN" - meaning, Special Meeting for Proposed Resolution. The meeting, vide Annexure-3 was held on 29.08.2014 under the Chairmanship of one Satya Ranjan Samantaray. Said meeting was held in the temple of Maa Ram Chandi Thakurani and 10 Ward Members had attended the meeting. The resolution further says that "BOLGADA GRAM PANCHAYATARA SARPANCH SRI PRAHALLAD DALAINKA BIRUDDHARE AAGATA HEBAKU THIBA ANASTHA PRASTABA NIMNAMATE PRASTABITA SANKALPA GRAHANA KARAGALA" - which means, "Following Proposed Resolutions adopted for the meeting of No Confidence to be convened against Sri Prahallad Dalai, Sarpanch of Bolgada Grama Panchayat." Resolution No.(1) of the meeting describes about some of the misdeeds and misdemeanour of the petitioner and it is further stated in Resolution No.(1) that, as the members have lost confidence over the petitioner, they intend to convene a meeting of No Confidence against him. If Annexure-3 is tested on the touch-stone of the settled law discussed supra, there is no escape from the conclusion that Annexure-3 is the proposed resolution or the relevant resolution as contemplated in Section 24 (2)(a) of the Act, and, understanding the intention of the signatory Ward Members in Annexure-3, the Sub-Collector has acted on the requisition vide Annexure-2. I, therefore, do not find any illegality in the meeting convened on the basis of Annexures 2 and 3."

16. Adverting now to the contention of the learned counsel for the appellant that the learned Single Judge did not examine the provision of Section 46-B(2)(g) of the Act, even this argument is also liable to be repelled for the reason to be stated presently. The learned Single Judge has analyzed the provisions under Section 46-B of the Act and clearly held that law does not mandate that the requisition and proposed resolution must be signed by at least two-third members having right to vote. It was held that decision to convene the special meeting for recording want of confidence in the Chairman of the Panchayat Samiti, could be taken upon receipt of a requisition addressed to the Sub-Collector signed by at least one-third of the total members of the Samiti with a right to vote. The appellant has now for the first time raised the argument with regard to violation of Section 46-B (2)(g) of the Act in the present Writ Appeal before the Division Bench. In fact, the legislative intent in having Section 46-B(2)(g) as an independent provision in the Act is to provide the quorum requisite for convening the meeting of the Panchayat Samiti to take up for discussion, the proposed

resolution envisaged under Section 46-B(2)(a), for recording want of confidence in the Chairman or the Vice-Chairman of the Samiti "by a majority of not less than two-thirds of the total number of members having a right to vote". Section 46-B of the Act in so far as the decision about the motion of confidence/no confidence is concerned, contains a complete scheme. While Section 46-B(2)(a) of the Act requires that the requisition for convening the special meeting for vote of motion of no confidence to be signed by its one-third members, who have right to vote, Section 46-B(1) of the Act requires the motion of no confidence to be carried out by a majority of not less than two-thirds of the total number of members having a right to vote. Section 46-B(2)(g) of the Act in this context ordains that if the number of members attending the meeting to vote of the no confidence motion "is less than a majority of two-thirds of members having a right to vote, the resolution shall stand annulled". All these three provisions are intended to apply to different situations.

17. It is significant to note that unlike many other enactments which provide for passing of the no confidence motion by a majority or two third of those present and voting, the legislature has in Section 46-B(1) deliberately insisted for a majority of two third of the total number of members "having right to vote" for passing the no confidence motion. We may in this connection, usefully refer to recent judgment in ***Ganesh Sukhdeo Gurule v. Tahsildar, Sinnar and others,*** reported in (2019) 3 SCC 211, in which the Supreme Court was dealing with a case where respondents moved a no confidence motion against the appellant-Sarpanch. The Tahsildar issued notice dated 07.09.2018 for convening special meeting of Gram Panchayat to consider the no confidence motion on 14.09.2018. On that date, out of nine members of the Gram Panchayats only eight members were present in the meeting. Six members voted in favour of the motion and two members opposed to it. One of the members, who voted in favour of no confidence motion was not qualified to vote. A dispute application under Rule 35(3-B) of the Maharashtra Gram Panchayat Rules, 1958 challenging the no-confidence motion passed was filed. The Addl. Collector, Nasik passed an order approving the resolution of the special meeting, holding that no confidence motion was validly passed. Against this order, a writ petition was filed by the appellant which was dismissed by the High Court and thereafter the matter was taken to the Supreme Court. Section 35 of the Maharashtra Village Panchayats Act, which deals with *"motion of no confidence"*, provided that "A motion of no confidence may be moved by not less than

one-third of the total number of the members who are for the time being entitled to sit and vote at any meeting of the Panchayat against the Sarpanch or the Upa-Sarpanch after giving such notice thereof to the Tahsildar as may be prescribed." Section 35 (3) provided that "if the motion is carried by a majority of not less than two-third of the total number of the members who are for the time being entitled to sit and vote at any meeting of the panchayat or the Upa-Sarpanch, as the case may be, shall forthwith stop exercising all the powers and perform all the functions and duties of the office....".

18. As the facts of the case show, what shall be two-third majority for holding the no confidence motion to be passed in the Panchayat was the question that arose before the Supreme Court in ***Ganesh Sukhdeo Gurule*** *(supra)*. Admittedly, there were nine members in the village panchayat. Out of nine members in the meeting held on 14.09.2018, eight members were present. Out of eight members present, one member was disqualified to sit and vote by virtue of she having not submitted her caste certificate after the election. She was one of those six members who voted in favour of no confidence motion. There were thus five valid votes in favour of no confidence motion as two against it. The statute provided for special majority for passing a motion. The argument of the respondent was that "the two-third majority has to be computed out of the members present and voting i.e. seven excluding one member who was unqualified to vote and five is more than two third of seven, the majority has been rightly passed." Repelling that argument, the Supreme Court held that "the interpretation put by the learned counsel for the respondent cannot be accepted in view of the clear language of statute. The crucial words in the statute are members *"who are for the time being entitled to sit and vote*". This expression cannot be treated to be expression *"members present and voting"*. The submission of the respondent that for computation of majority, number of seven members should be treated, cannot be accepted". The Supreme Court further held that "provision of Section 35(1) which provides for requirement for moving motion of no-confidence by not less than one-third of the total number of the members who are for the time being entitled to sit and vote at any meeting of the Panchayat, is the same expressing as used in sub-Section (3). Obviously, requirement of not less than one-third number for moving motion has to be computed from total number of the members who are entitled to sit and vote. Thus, the same expression having been used in sub-Section (3) of Section 35, both the expressions have to be given the same meaning. Thus, one-third of total number of members who are entitled to sit and vote have to be determined on

the strength of members entitled to vote at a particular time. The same meaning has also to be applied while computing two-third majority."

The ratio of the aforesaid judgment of the Supreme Court in ***Ganesh Sukhdeo Gurule*** *(supra)* would squarely apply to the facts of the present case while interpreting Sections 46-B(1) and 46-B(2)(g) of the Act, in both of which similar expression about a majority of two thirds of the total members having right to vote, has been used by the legislature. In a way these two provisions complement each other. If number of the members attending the meeting convened under Section 46-B(1) of the Act falls short of two third of the total members, the convening of the meeting would be an exercise in futility and passing of the no confidence motion in that case would be an impossibility. It is therefore that the legislature has purposefully provided in Section 46-B(2)(g) of the Act that "if the number of members present at the meeting is less than a majority of two-thirds of members having a right to vote the resolution shall stand annulled."

19. It is trite that the Courts while interpreting a particular provision of law have to construe it in the way the legislature intended it, so as to make the provision workable. We may on this proposition of law refer to the Constitution Bench decision of the Supreme Court in the case of ***Tinsukhia Electric Supply Co. Ltd. v. State of Assam & others,*** reported in AIR 1990 SC 123. The Supreme Court in that case held that the Courts strongly lean against any construction which tends to reduce a Statute to a futility. The provision of a Statute must be so construed as to make it effective and operative, on the principle *"ut res majis valeat quam periat"*. Their Lordships held that a Court in dealing with the language of a Statute, has to ascertain from, and accord to, the Statute the meaning and purpose which the legislature intended for it. It is the Court's duty to make what it can of the Statute, knowing that the statutes are meant to be operative and not inept and that nothing short of impossibility should allow a Court to declare a Statute unworkable. The Supreme Court in that case placed reliance upon judgment of the King's Bench in ***Whitney v. Inland Revenue Commissioner***, [1926] AC 37, wherein Lord Dunedin said: "A Statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable." (vide page 52)

20. Reference may also be made to judgment of the Supreme Court in ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others,*** (1987) 1 SCC 424, wherein it was held that interpretation of the Statute must depend on the text and the context. A statute is best interpreted when we know why it was enacted. The statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. The following observations of their Lordships of the Supreme Court in the said judgment are apt to quote:-

> *"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'Prize Chit' in* ***Srinivasa Enterprise v. Union of India,*** *reported in (1980) 4 SCC 507 and we find no reason to depart from the Court's construction."*

21. The Supreme Court in ***His Holiness Kesavananda Bharati Sripadagalvaru and others v. State of Kerala and another,*** reported in AIR 1973 SC 1461 held that "while interpreting words in a solemn document like the Constitution, one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in 'a single complex instrument in which one part may throw light on the others' so that the construction must hold a balance between all its parts". While following the aforesaid dictum of *Kesavananda Bharati*, the Supreme Court in a later judgment in ***Chief Justice of Andhra Pradesh and another***

vs. L.V.A. Dikshitulu & others, *reported in* AIR 1979 SC 193, held that "the primary principle of interpretation is that a constitutional or statutory provision should be construed "according to the intent of they that made it"(Coke). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself, proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow."

22. It is thus well settled that for the purpose of interpretation of statute, the same has to be read in its entirety. The primary principle of interpretation is that a constitutional or statutory provision should be construed according to the intent of legislature and such intent is gathered from the language of the provision itself. The intent of the legislature in engrafting the aforesaid provision of the statute in Section 46-B of the Act is very clear. While interpreting the same, it has to be read in entirety. Sections 46-B(1), 46-B(2)(a) & 46-B(2)(g) of the Act cannot be read in isolation, rather all sub-sections of Section 46-B of the Act have to be read together so as to make the scheme of the legislation workable. Thus read, it would appear that though Section 46-B(2)(g) of the Act operates in a different sphere altogether, but it has got a direct co-relation with Section 46-B(1) which also similarly mandates that the motion for no confidence can be passed only by “a majority of not less than two thirds of the total number of members having a right to vote.” It is therefore that a majority of two-thirds of the total members having right to vote has been provided as a necessary condition for holding the meeting by the Sub-Collector or Presiding Officer, authorized on his behalf, to vote on the No Confidence Motion, on the basis of the requisition moved. In other words, the meeting to consider the No Confidence Motion against the Chairman or Vice-Chairman, on the basis of the requisition received by the Sub-Collector, must be attended by a majority of two-third members having right to vote. Section 46-B(2)(g) of the Act has therefore got nothing to do with the initiation of the process for convening the meeting to vote on the no confidence motion which is separately dealt by Section 46-B(2)(a) of the Act. On facts of the case, total number of members having right to vote in the aforesaid Panchayat Samiti being 26 (including two ex-officio members, i.e., Member of Parliament, and Member of Legislative Assembly), the minimum members, according to Section 46-B(2)(g), to be necessarily present at the meeting convened for passing a resolution of no confidence under Section 46-B(1), should be 18 i.e., a majority of two-third

of the members. If the number of members attending such meeting falls short of 18, as per the mandate of the said provision, the resolution shall stand annulled. Since in the present case, total 23 members of the Panchayat Samiti having right to vote, including the appellant, attended the meeting dated 31.12.2019 and casted their votes, the argument of the learned counsel for the appellant that Section 46-B(2)(g) stood violated, cannot be countenanced.

23. In the instant case, upon a meticulous analysis of the provisions contained under Section 46-B, more particularly, Sections 46-B (1), 46-B(2)(a) and 46-B(2)(g) of the Act, and in view of the above discussions, we are inclined to hold that even if 15 members intending to move a requisition for No Confidence Motion against the appellant signed the resolution in the meeting dated 17.12.2019, that number being more than requisite one-third of the total number of members, could be taken as sufficient compliance of Section 46-B (2)(a) of the Act. It however is significant to note that for the purpose of convening special meeting envisaged in Section 46-B (1), it is not the requirement of law that the requisition of No Confidence Motion on Section 46-B(2)(a) should be preceded by a resolution of the Samiti. Even otherwise, the resolution passed on 17.12.2019 cannot be said to be final resolution as required under Section 46-B(1) of the Act. It was merely initiation of a process to move the competent authority to call for a special meeting for vote on No Confidence Motion. That resolution paled into insignificance because the requisition dated 20.12.2019 along with proposed resolution was later separately submitted to the Sub-Collector under the signature of 15 members having right to vote which constitutes more than one-third of the total members having right to vote on No Confidence Motion against the appellant. Their signatures were duly verified by the Sub-Collector, Bhawanipatna to satisfy himself that it was duly signed by 15 members. After being fully satisfied about the authenticity of the signature of those members, the Sub-Collector issued the impugned notice dated 21.12.2019 to the appellants and all other members of the Samiti fixing 31.12.2019 as the date for convening the Special meeting to consider the No Confidence Motion against the appellant. Total 23 members, out of 26, having right to vote, including the appellant attended the said meeting and have casted their votes by secret ballot. All the mandatory requirements of Section 46-B of the Act were thus fully satisfied.

24. In view of the above discussion, we do not find any infirmity in the impugned judgment. The Writ Appeal being devoid of any merit is liable to be dismissed and is accordingly dismissed.

There shall be no order as to costs.

The respondent Nos. 1 to 4 shall now proceed to forthwith declare the result of the voting on No Confidence Motion held on 31.12.2019.

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2020 (III) ILR - CUT- 218

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

W.P.(C) NO. 6543 OF 2002

DIVISIONAL MANAGER, ORISSA FOREST DEVELOPMENT CORP. LTD., BARIPADA .....Petitioner

.V.

UMAMANI NAYAK & ORS. .....Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – Section 33-C (2) – Jurisdiction of the Labour Court – Whether the Labour Court has the power to adjudicate any claim made under Section 33-C (2) of the Act? – Ans. No. – Held, Labour Court lacks jurisdiction to adjudicate upon the undetermined claim of workman U/s.33-C (2) of the Act, be it for back wages or other dues – It being in the nature of execution proceeding, the industrial adjudicator can only compute the same on the basis of previous determination/settlement. (Para 7)

Case Laws Relied on and Referred to :-

1. (2005) 8 SCC 58 : State of U.P. Vs. Brijpal Singh.

For Petitioner : Mr. S.K.Pattnaik, Sr. Adv., M/s. U.C.Mohnaty, M.K.Pati, S.K.Mohanty & N.Satapathy.

For Opp. Parties : M/s Dr.S.Dash & S.Pattnaik

JUDGMENT Date of Judgment : 01.09.2020

PER: K.R. MOHAPATRA, J.

The Divisional Manager, Odisha Forest Development Corporation, Baripada (for short, 'the Corporation') has filed this writ petition assailing order dated 16.07.2002 (Annexure-8) passed by the Presiding Officer, Labour Court, Bhubaneswar in ID Misc. Case No.292 of 1994 filed under Section 33-C(2) of the Industrial Disputes Act, 1947 (for short, 'the ID Act'), wherein the petitioner-Corporation is directed to pay a sum of Rs.39,000/- towards wages and Rs.1,000/- towards house rent to one Keshab Chandra Nayak (for short 'the workman') (since dead represented by his legal heirs OP No.1(a) to 1(c).

2. Mr.Pattnaik, learned Senior Advocate for the petitioner submitted that one Keshab Chandra Nayak, the workman, filed an application under Section 33-C(2) of the ID Act before learned Labour Court, Bhubaneswar in ID Misc. Case No.292 of 1994 for computation of his arrear salary, house rent and bonus etc. for the period from 1981 to 1993.

3. It is his submission that the Corporation is a Government of Odisha Undertaking, which along with other activities was undertaking seasonal collection of sal-seeds as and when Government of Odisha allots different areas to it for such collection. The Corporation, for that purpose used to engage its regular employees along with seasonal workers and agents during the collection season, which was almost about two months. Ordinarily the sal-seeds are collected in the month of May and June each year. Said Sri Nayak-workman belonged to Badgaon under Bangiriposi Police Station in the district of Mayurbhanj. He was engaged on commission basis under the erstwhile Similipahar Forest Development Corporation. He worked for the Corporation till 1992 as a commission agent during the collection season, when he expressed his unwillingness to continue further on the ground that the commission so received was insufficient. However, during the year 1993, said Sri Nayak was engaged for collection of sal-seeds from 18.05.1993 to till 16.06.1993 and was paid Rs.450/- and house rent of Rs.25/- for stacking of sal-seeds. The workman being dissatisfied with the same, filed a complaint before the District Labour Officer, Mayurbhanj on 28.04.1994 (Annexure-1) alleging that he was engaged for collection of sal-seeds vide office order dated 12.05.1993 and claimed arrear wages from 18.04.1993 to 28.05.1993. He also claimed house rent and travelling allowance for the said period. Subsequently, the workman abandoned the same and filed a petition under

Section 33-C(2) of the ID Act in ID Misc. Case No.292 of 1994 before the Labour Court, Bhubaneswar claiming salary for the year 1993 to the tune of Rs.12,000/- with house rent for the period from 1981 to 1994 @Rs.2,000/- per annum amounting Rs.26,000/- and bonus and cycle allowance etc. to the tune of Rs.26,000/-. In total, he claimed Rs.64,000/- in the claim petition filed under Section 33-C(2) (Annexure-4). The Corporation filed its counter disputing the entire claim stating the aforesaid facts.

4. In course of hearing, both the Workman as well as the Corporation examined one witness each and produced certain documents in support of their respective cases. Although the claim of the Workman was seriously disputed by the Corporation (opposite party before the learned Labour Court), learned Labour Court proceeded with the matter to adjudicate upon the same and passed impugned order under Annexure-8.

5. Mr. Pattnaik, learned Senior Advocate assailing the impugned order submitted that Section 33-C(2) of the ID Act does not empower the industrial adjudicator to adjudicate upon the disputed claim of the parties. He can only compute entitlement of the workman on the basis of the previous adjudication or settlement. In support of his case, Mr.Pattnaik relied upon the decision of the Hon'ble Supreme Court in the case of ***State of U.P. Vs. Brijpal Singh***, reported in (2005) 8 SCC 58. He argued that since there was a serious dispute with regard to the period, manner of engagement of the workman under the Corporation as well as the monetary claim made in the petition, learned Labour Court could not have adjudicated the same in exercise of power under Section 33-C (2) of the ID Act. The workman could have moved the appropriate Government to make a reference under Section 10(1) of the ID Act for adjudication of his claim, if any. In that view of the matter, he prayed for setting aside of the impugned order under Annexure-8.

6. During pendency of the writ petition, the workman- opposite party No.1 expired and his legal heirs were substituted as opposite party No.1(a) to 1(c). Notice issued to them was made sufficient as would reveal from orders dated 05.11.2019 and 16.12.2019 passed in the writ petition. However, none represented them at the time of hearing. Since notice on the legal heirs, namely O.P. 1(a) to 1(c) of the deceased workman is sufficient, this Court proceeded to adjudicate the writ petition.

7. We have heard Mr. Pattnaik, learned Senior Advocate for the Corporation-petitioner and perused the materials on record. On a bare reading

of Annexure-8, the impugned order, it appears that although the workman claimed salary, house rent and bonus as stated above, the Corporation (present petitioner) seriously disputed the same by filing written objection. Both the parties have examined witness in support of their respective cases and also produced documents. AW-1, the witness examined on behalf of the workman categorically stated that the workman was working as an agent for collection of sal-seeds under the opposite party (petitioner in the writ petition) during 1981 to 1993. The opposite party (therein) did not pay his house rent and bonus for 13 years and other dues amounting Rs.64,000/-. On cross-examination, he had stated that during 1993 the workman had received house rent for the godown under Ext-A. He had also received house rent for the year 1985-86. On the other hand OPW-1, the witness examined on behalf of Corporation deposed in his evidence that the workman working under it was initially engaged as Commission agent during May and June and was getting commission as per the collection. Accordingly, he received an amount of Rs.450/-. OPW-1 further deposed that the Corporation had its own regular staff engaged for collection and only when service of more persons was required persons like the workman were being engaged. On analysis of the evidence and materials on record, learned Labour Court came to the following findings:-

> *"6. On a reference to Ext.1 it appears that 186 persons who were employees of Baripada R & B Division were placed under the disposal of different sub-divisions and were relieved on 13.5.93 afternoon. Ext.2 indicates that the name of the present applicant was at Sl.No.39 was deployed to Badagaon purchase centre of Baripada Sub-Division. If at all the applicant was temporary or a casual worker who was engaged when the services of more persons were required there could not have been any reason to deploy the applicant considering him as an employee of Baripada R & B Division. Therefore I find that the opposite party with oblique motive just to debar the applicant from getting his legal dues have taken a wrong stand. I have also perused the exhibits A to M filed by the opposite party which are the vouchers showing payment of certain amount to the applicant."*

From the above, it transpires that the learned Labour Court has delved into the merit of the respective cases of the parties and proceeded to adjudicate upon the disputed claim while entertaining the application under Section 33-C(2) of the ID Act. The Hon'ble Supreme Court in the case of ***Brijpal Singh (supra)*** held as under:-

> *"13. Thus it is clear from the principle enunciated in the above decisions that the appropriate forum where question of back wages could be decided is only in a*

proceeding to whom a reference under Section 10 of the Act is made. Thereafter, the Labour Court, in the instant case, cannot arrogate to itself the functions of an Industrial Tribunal and entertain the claim made by the respondent herein which is not based on an existing right but which may appropriately be made the subject matter of an industrial dispute in a reference under Section 10 of the I.D. Act. Therefore, the Labour Court has no jurisdiction to adjudicate the claim made by the respondent herein under Section 33C(2) of the I.D. Act in an undetermined claim and until such adjudication is made by the appropriate forum, the respondent-workman cannot ask the Labour Court in an application under Section 33C(2) of the I.D. Act to disregard his dismissal as wrongful and on that basis to compute his wages. It is, therefore, impossible for us to accept the arguments of Mrs. Shymala Pappu that the respondent-workman can file application under Section 33C(2) for determination and payment of wages on the basis that he continues to be in service pursuant to the said order passed by the High Court in Writ Petition No. 15172 of 1987 dated 28.10.1987. The argument by the learned counsel for the workman has no force and is unacceptable. The Labour Court, in our opinion, has erred in allowing the application filed under Section 33C(2) of the I.D. Act and ordering payment of not only the salary but also bonus to the workman although he has not attended the office of the appellants after the stay order obtained by him. The Labour Court has committed a manifest error of law in passing the order in question which was rightly impugned before the High Court and erroneously dismissed by the High Court. The High Court has also equally committed a manifest error in not considering the scope of Section 33C(2) of the I.D. Act. We, therefore, have no hesitation in setting aside the order passed by the Labour Court in Misc. Case No. 11 of 1993 dated 23.8.1995 and the order dated 9.1.2002 passed by the High Court in C.M.W.P. No. 36406 of 1995 as illegal and uncalled for. We do so accordingly.

Thus, it is clear from the principles enunciated above that the Labour Court/ Industrial Tribunal has no jurisdiction to adjudicate an undetermined claim made by the workman in an application under Section 33C (2) of the I.D. Act until such adjudication is made by the appropriate forum.

8. In view of the settled law we have no hesitation to hold that the learned Labour Court lacks jurisdiction to adjudicate upon the undetermined claim of the workman, under Section 33C(2) of the ID Act, be it for back wages or other dues. It being in the nature of execution proceeding, the Industrial Adjudicator can only compute the same on the basis of previous determination/settlement. As such, the learned Labour Court has exceeded its jurisdiction in adjudicating the claim of the workman. Accordingly, the impugned order under Annexure-8 passed by the learned Labour Court, Bhubaneswar in ID Misc. Case No.292 of 1994 is not sustainable and is accordingly set aside. The writ application is, accordingly, allowed. But, in the circumstances there shall be no order as to cost. Misc. Cases are also disposed of accordingly.

2020 (III) ILR - CUT- 223

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

W.P.(C) NO. 8724 OF 2009

KAILASH NATH PATNAIK .....Petitioner

.V.

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

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 3-B – Proceeding under for resumption of leasehold land – Allegation of violation of lease conditions as the land allegedly used other than the purpose as in the lease conditions – At the time of inspection land was laying fallow – No material with regard to misuse of the land – No notice either to the petitioner or to the original lessee at the time of inspection – Further, the proceeding was initiated after 27 years of lease – Action of the Authority challenged – Held, the impugned order of resumption is not sustainable in view of the fact that there was no specific finding to the effect that the lease hold land was being used for a particular purpose other than agriculture – The proceeding having been initiated mechanically, the impugned orders are set aside.

(Para 8)

Case Laws Relied on and Referred to :-

1. 81 (1996) CLT 513 : Sarat Kumar Sahoo Vs. A.D.M., Khurda & Ors.
2. 2006 (II) OLR 544 : Loknath Mishra & Ors Vs. State of Orissa and Ors.
3. 2008 (II) OLR 806 : Narana Nayak Vs. State of Orissa and three Ors.

For Petitioner : M/s. Ashok Mohapatra-I

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

JUDGMENT Date of Judgment : 01.09.2020

PER: K.R.MOHAPATRA, J.

The petitioner, in this writ petition, calls in question the order dated 17.01.2009 (Annexure-5) passed by the Sub-Collector, Bhubaneswar (OP No.2) in Waste Land Appeal Case No.08 of 2008 thereby confirming the order dated 30.06.2003 (Annexure-4) passed by Additional Tahasildar, Bhubaneswar in WL Case No.850 of 1974 initiated under Section 3-B of Odisha Government Land Settlement Act, 1962 (for short, 'the Act').

2. Facts in nutshell relevant for proper adjudication of this case are that one Debara Badara-opposite party No.3 being a landless person, applied for

settlement of a piece of Government land. On the basis of his application, WL Case No.850 of 1974 was initiated by the Tahasildar, Bhubaneswar and observing formalities and due procedure of law, an area of Ac.1.000 decimal was settled in his favour. Accordingly, Record of Right (Annexure-1) in respect of Plot No.590/970/985 under Khata No.176/4 in Mouza Sundarpur under Chandaka Police Station in the district of Khordha (for short, 'the case land') was issued in favour of opposite party No.5.

Due to his legal necessity, the opposite party No.5 sold an area of Ac.0.500 decimal in favour of the petitioner vide RSD No.11244 dated 30.12.1988 (Annexure-2), after obtaining permission of the Revenue Officer, Bhubaneswar in Revenue Misc. Case No.288 of 1987 and delivered possession thereof. While the matter stood thus and the petitioner was in peaceful possession over the case land, the Tahasildar, Bhubaneswar (OP No.3) initiated a proceeding under Section 3-B of the Act on the ground that the opposite party No.5 was not using the land for agriculture purpose, for which it was leased out. As such, pursuant to the direction of this Court, vide order dated 29.01.1996 in OJC No.9449 of 1993 and in obedience to the direction of the Government of Odisha in the Department of Revenue as well as direction of Collector, Khordha, resumption proceeding in respect of the case land was initiated under Section 3-B of the Act in WL Case No.850 of 1974. Ultimately, vide order dated 30.06.2003 (Annexure-4) passed in WL Case No.850 of 1974, the Additional Tahasildar, Bhubaneswar (OP No.4), cancelled the lease granted in favour of opposite party No.5 in respect of the case land and resumed the same. Since the order under Annexure-4 was passed by the Additional Tahasildar, Bhubanesar in WL Case No.850 of 1974 neither issuing notice nor providing any opportunity to the petitioner, he moved this Court in W.P.(C) No.9281 of 2007 assailing the said order, which was disposed of on 09.10.2007 granting liberty to the petitioner to file appeal against the order dated 30.06.2003 (Annexure-4). Accordingly, the petitioner filed WL Appeal Case No.850 of 1974, before opposite party No.2-Sub-Collector, Bhubaneswar, who by his order dated 17.01.2009 (Annexure-5) dismissed the appeal and thereby confirmed the order passed by the Tahasildar, Bhubaneswar under Annexure-4. He further directed to delete the name of opposite party No.5 from ROR and to record the case land in Government Khata. Hence, this writ petition is filed for the aforesaid relief.

3. Mr. Mohapatra, learned counsel for the petitioner reiterating the aforesaid factual position of the case, submitted that initiation of the proceeding under

Section 3-B of the Act is illegal. The proceeding for resumption can be initiated only when the land is used for a purpose other than for which it was leased out. The proceeding under Section 3-B of the Act was initiated pursuant to the direction of this Court dated 29.01.1996 passed in OJC No.9449 of 1993 (***Sarat Kumar Sahoo Vs. A.D.M., Khurda and others***) reported in **81 (1996) CLT 513**. It was observed therein that the land adjoining the State Capital had been settled by Tahasildar, Bhubaneswar for agricultural purpose by exercising power under Odisha Government Land Settlement Act, 1962. Since irregularities in large number of such Settlement was observed by this Court, the State Government was directed therein to enquire into the matter through a Senior Officer in the rank of Secretary and on enquiry if it comes to the light that the Tahasildars by misuse of power had settled the land, necessary legal and administrative action should be taken against them and further if the land so settled are used otherwise for the purpose for which it was leased out the Government should proceed against the lessee in accordance with law. Accordingly, Government of Odisha in the Revenue and Excise Department decided to deal with the cases under Section 7-A(3) of the Act. However, in those cases where a proceeding under Section 7-A(3) of the Act could not be initiated due to lapse of 14 years from the date of such settlement, it was decided to initiate proceeding under Section 3-B of the Act by the Tahasildar, Bhubaneswar to deal with such cases. In the instant case, no enquiry by an Officer in the rank of Secretary was conducted. The Tahasildar, Bhubaneswar on presumption that the land was being used for a purpose other than agriculture, initiated the proceeding for resumption. As such, the initiation of the proceeding under Section 3-B of the Act is *per se* illegal. He further submitted that neither the petitioner nor the original lessee was ever noticed at the time of so-called enquiry conducted by the Revenue Inspector along with the Tahasildar. It is his submission that the land is still being used for agriculture purpose.

4. He further submitted that the proceeding under Section 3-B of the Act was initiated beyond 27 years of the Settlement in favour of opposite party No.5. Although no limitation is provided under Section 3-B of the Act, the proceeding ought to have been initiated within a reasonable period and lapse of more than 27 years, can by no stretch of imagination be considered to be a reasonable period for initiation of the proceeding for resumption. The Tahasildar in his order under Annexure-4 has observed that the record of WL Case No.850 of 1974 was not traced out. Thus, there was no material before him to come to a conclusion that the lease was granted misusing power. In support of his submission, he relied upon a decision of this Court in the case of ***Loknath Mishra and others Vs. State of Orissa and others***, reported in **2 006 (II) OLR 544**. It is apparent that

from orders passed under Annexures-4 and 5 both the Courts below have categorically observed that the case land was lying vacant at the time of spot inspection by the Revenue Inspector. There is no other material to come to a conclusion that the land is being used for a purpose other than agriculture. In absence of any material, the finding of learned Courts below to the effect that the land is not being used for agriculture purpose, appears to be without any basis. As such, a proceeding under Section 3-B of the Act is not maintainable. In support of his case, Mr. Mohapatra, learned counsel relied upon another decision of this Court in the case of ***Sri Narana Nayak Vs. State of Orissa and three others***, reported in **2008 (II) OLR 806**.

5. The petitioner had purchased the case land with due permission of the competent authority, namely, the Revenue Officer, Bhubaneswar. As such, he ought to have been noticed by the Tahasildar, Bhubaneswar at the time of adjudication in the resumption proceeding. Further, one of the grounds for resumption of the case land, as observed by Sub-Collector, Bhubaneswar in the impugned order under Annexure-5 is that the lessee was not in possession over the case land. The same is fallacious inasmuch as when the case land was sold to the petitioner by virtue of a registered sale deed and possession of the same was delivered to the petitioner, the lessee is not expected to be in possession. The Tahasildar ought to have made an enquiry as to who was in possession of the case land and proceeded with the matter in accordance with law issuing notice to the person in possession, namely the petitioner. As such, the observation of the Sub-Collector, Bhubaneswar is an outcome of sheer non-application of mind. In that view of the matter, the impugned orders under Annexures-4 and 5 are not sustainable and are liable to be quashed.

6. Mr. Sahoo, learned AGA, on the other hand, refuting the submissions of Mr. Mohapatra, submitted that the writ petition is not maintainable in view of availability of alternate remedy under Section 7-A (1) of the Act. Since the case land was settled with the lessee, namely, opposite party No.5 for agriculture purpose, he could not have sold the land to the petitioner without the knowledge of the authorities under the Act. Further, the alienation of the case land would amount to use of the land other than the purpose of agriculture. Further with reference to the Record of Right at Annexure-1, he submitted that at the time of initiation of proceeding under Section 3-B of the Act the land was recorded in the name of opposite party No.5, the original lessee. Although the case land was sold to the petitioner the same was not mutated in his name till 2002 when the proceeding under Section 3-B of the

Act was initiated. As such, the Tahasildar, Bhubaneswar had no occasion to know about the aforesaid alienation of opposite party No.5 in favour of the petitioner. He further submitted that although the petitioner was not given any opportunity of hearing before Tahasildar, Bhubaneswar, he himself had filed the appeal assailing the said order and was given ample opportunity to put forth his case. As he could not establish that the land was being used for agriculture purpose, the Sub-Collector, Bhubaneswar has rightly dismissed the appeal by his order under Annexure-5 confirming the order of the Additional Tahasildar, Bhubaneswar passed under Annexure-4. He, therefore, submitted that the writ petition being devoid of any merit is liable to be dismissed.

7. We have heard the learned counsel for the parties at length and perused the materials placed before us. Admittedly, the case land was settled in favour of opposite party No.5 in WL Case No.850 of 1974 following due procedure of law. There is no finding either in the order under Annexure-4 passed by Additional Tahasildar, Bhubaneswar or in the order under Annexure-5 passed by the Sub-Collector, Bhubaneswar to the effect that the Tahasildar has misused the power under the Act to settle the case land in favour of opposite party No.5. Now the question arises as to whether the case land was being used for a purpose other than agriculture for which it was leased out in favour of opposite party No.5. It is the categorical observation of the Sub-Collector, Bhubaneswar (OP No.2) that the case land was lying fallow at the time of local inspection by the Revenue Inspector along with Tahasildar, Bhubaneswar. Only because the case land was lying fallow at the time of local inspection, it cannot be a ground for reasonable presumption that the case land was being used for a purpose other than agriculture. There is no material on record to come to a conclusion that the case land was being used for any specific purpose other than agriculture. Neither the petitioner nor the Opp. Party No.5-lessee was noticed at the time of local inspection, if any. As such, the findings of the Courts below to the effect that the case land was used for a purpose other than agriculture, is without any basis. In absence of any specific finding to the effect that the case land was, in fact, being used for a particular purpose other than agriculture, the provision of Section 3-B of the Act has no application to the facts of the case. In the case of ***Sri Narana Nayak (supra)***, this Court observed as follows:-

> *"On perusal of the impugned order, we also find that the land had been settled in favour of the petitioner for agricultural purpose e and at the time of enquiry it was*

found that the land is not being used. Section 3-B of the Act provides that if the land settled is being used for any purpose other than the purpose for which it had been settled, the Tahasildar may resume the same. There is no evidence on record or finding to the effect that the land settled in favour of the petitioner is being used for any purpose other than the purpose for which it had been settled. If any agricultural activity is not carried on the land and it is not used for any purpose, it will not amount to use of the land for some other purpose. We are therefore of the view that the matter is required to be reconsidered in the light of the above observation and the Tahasildar is required to find out as to whether Section 3-B has any application to the facts of this case."

As such, the finding of the Sub-Collector, Bhubaneswar (OP No.2) to the effect that the land was being used for a purpose other than agriculture is without any basis and material on record. Hence, the same is not sustainable.

8. It is revealed from record, the impugned orders under Annexures-4 and 5 that the proceeding under Section 3-B of the Act was initiated on 29.06.2002 pursuant to the direction in OJC No.9449 of 1993, wherein this Court while disposing of the said writ petition by order dated 29.01.1996 called upon the State Government to enquire into the large number of irregularities in settlement of the Government land for agricultural purpose in favour of individuals by Tahasildars by misusing power under the Act. As such, the State Government was directed to enquire into the matter through a Senior Officer in the rank of Secretary to find out truth. It was further directed that on enquiry, if it comes to the light that the Tahasildars by misusing the power have settled land, then necessary legal and administrative action should be taken against them. It was further directed that on enquiry if it is found that the land so settled is being used for a purpose other than for which it was so settled then Government should proceed against the lessee in accordance with law. No material could be placed by Mr. Sahoo, learned AGA to the effect that the instant resumption proceeding under Section 3-B of the Act was initiated pursuant to enquiry conducted by a Senior Officer in the rank of Secretary. Further, proceeding under Section 3-B of the Act was initiated more than 27 years after the Settlement of the case land in favour of opposite party No.5. As such, it appears that the proceeding was initiated mechanically without following the direction of this Court in OJC No.9449 of 1993 and a valuable civil right accrued in favour of opposite party No.5 as well as the petitioner is taken away in the garb of compliance of orders of this Court without following due procedure of law.

Mr.Sahoo, learned AGA in course of argument vehemently argued that the land could not have been sold by the lessee, namely, opposite party No.5 in favour of the petitioner as it was leased out for a specific purpose, i.e., agriculture. He, however, could not produce any material to show that there was any condition in the lease deed itself or otherwise prohibiting the opp. Party no.5 from transferring the case land. Alienation of the property with prior permission of the Revenue Officer, Bhubaneswar cannot be considered to be violation of any condition of the lease much less the use of land, i.e., for agriculture. In that view of the matter, we find no force in the submissions of Mr. Sahoo, learned AGA.

9. In view of the discussions made above, the impugned order under Annexure-5 passed by the Sub-Collector, Bhubaneswar as well as the order passed by the Additional Tahasildar under Annexure-4 are not sustainable and accordingly the same are set aside. In view of passage of time and non-availability case record of W.L. Case No. 850 of 1974, as observed in the order under Annexure-4, no fruitful purpose will be served by remitting the matter for reconsideration. Consequently, the writ petition is allowed; but in the circumstance there shall be no order as to costs.

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2020 (III) ILR - CUT- 229

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

CRIMINAL APPEAL NO. 248 OF 1999

RASANANDA JENA & ORS. .....Appellants

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – Appreciation of evidence – Enmity between the parties – Evidence of witnesses who have inimical relationship with the accused – Effect of such evidence – Held, enmity is a double edged sword – It could be a ground for false implication and it could also be a ground of assault – The requirement of Law is that the testimony of inimical witness has to be considered with caution – If otherwise the witness is true and reliable, his testimony cannot be thrown out on the threshold. (Para 10)

(B) CRIMINAL TRIAL – Offence under section 302 of the Indian penal Code – Appreciation of evidence – Relations like sons and brother are not coming forward to attribute fault to the appellants as real culprits of the murder of the deceased – The evidence of prosecution supports the defence version – Effect of – Held, it is unsafe to accept the testimony tainted with enmity and political rivalry whose credibility could not be tested for non-examination of investigating officer and non-production of the seized weapon – Conviction set aside. (Para 10)

(C) CRIMINAL TRIAL – Offence under section 302 of the Indian penal Code – Appreciation of evidence of defence witnesses – Principles to be followed – Indicated.

> *"There is no ground to discard the weight of the evidence of defence witnesses. Those witnesses were cited in the charge-sheet. In absence of any evidence that their wisdom was sullied by extraneous interference, the Court cannot discriminate them to brand "Out of Box" in comparison to prosecution witness. In Uchhab Sahoo case (supra) it is held that the defence witnesses are entitled to equal treatment with those of the prosecution and that the Courts must overcome their traditional and instinctive disbelief of the defence witnesses and that if it is true that the defence witnesses often tell lies, it must be appreciated that the prosecution witnesses are no exceptions."* *(Para 11)*

Case Laws Relied on and Referred to :-

1. (2020) 78 OCR - 206 : Bhaskar Bariha Vs. State of Orissa
2. (2020) 78 OCR - 190 : Dusmanta Sethi Vs. State of Orissa,
3. (2020) 78 OCR - 29 : Kamarami Rama & Ors. Vs. State of Orissa.

For Appellants : Mr. S. K. Padhi, Sr. Adv.
M/s. B. Panda, S. R. Mohapatra, A. Das, G. P. Panda, B. R. Mohanty, S. C. Mishra and Miss. M. Sahoo & Mr. S. Palit.

For Respondent : Mr. J. Katikia, Addl. Govt.

JUDGMENT Date of Hearing : 31.08.2020: Date of Judgment : 10.09.2020

DR. A.K.MISHRA, J.

Appellants have preferred this appeal challenging their conviction U/s.302 read with section 149 of Indian Penal Code (in short the I.P.C.) and sentence to undergo life imprisonment passed by learned Addl. Sessions Judge, Kendrapara vide judgment dtd.11.10.1999 in S.T. No.41/433 of 1996.

2. Adumbrated in brief, prosecution case is that on 21.5.1995 at about 1.30 P.M. at Ketuapala Irrigation Embankment, deceased Rusi Sethi was attacked by accused persons and succumbed to injuries on way to hospital. In this regard, his son, informant (P.W.1), lodged an F.I.R. (Ext.1) in written on the next day at 8:30 A.M. It is alleged therein that the accused persons including the appellants, seventeen in numbers, on the occurrence day at morning approached their villagers violently and destroyed the building of one Ananta Kishore Das (D.W.2). Thereafter at about 9 A.M., deceased went to ascertain fact from Sarapancha Baidhar Naik. His son, informant, was following him. Near Panchayat office appellant – accused Rasananda Jena accosted others to kill the deceased. Accused Duryodhan dragged the deceased towards embankment. Accused Gugula dealt a Farsha blow to the right leg. Accused Baidhara dealt Bhujali blow to the left hand, accused persons Rajat and Ashok dealt kick blows putting him on the ground. The informant could not react as he was threatened by accused Naba. Thereafter he along with Rajendra, Niranjana and others took the deceased to Kantipur Government Hospital. Doctor referred the deceased to Jajpur Hospital, but on the way, near Binjharpur, he succumbed to his injuries. After returning, at 3 P.M. the F.I.R. was lodged at spot which was registered at Aul Police Station vide P.S. Case No.70 of 1995, corresponding to G.R. Case No.518 of 1995. In course of investigation the post mortem was conducted by doctor P.W.10 referring Binjharpur U.D. P.S. Case No.12 of 1995. The seized articles including one Farsha were dispatched for chemical examination. After completion of investigation charge-sheet was submitted by O.I.C. Sumanta Swain. The S.D.J.M., Kendrapara took cognizance. As one accused namely Mantua Naik had absconded, the case against him was split up. The case was committed to the Court of Addl. Sessions Judge, Kendrapara against eighteen accused persons who faced charge U/s.302 and 506 read with section 149 of I.P.C. On being asked, the accused persons pleaded not guilty and claimed trial.

3. The plea of defence is denial simplicitor.

Prosecution examined 12 witnesses in all. Defence examined three. P.W.1 is the informant and son of deceased. P.W.2 is also a son of deceased. P.W.10 is the doctor who conducted P.M. vide Ext.2. P.W.11 is a doctor who examined D.W.3 an injured. P.W.12 is the A.S.I. of police who proved the S.D. entry (Ext.4) as to the information received first at police station and formal F.I.R. Ext.1/4. The Investigating Officer Sumanta Kumar Swain is not

examined for having expired. P.Ws.3, 4, 5, 6, 7, 8 and 9 are witnesses to the occurrence. P.Ws.3, 6, 7 & 9 have not stated anything about incident. P.Ws.1, 2, 6, 7 and 9 are declared hostile. The contradictions with regard to their statements recorded U/s.161 Cr.P.C. marked X, Y, Z and Z/1 could not be proved due to non-availability of the Investigating Officer. P.Ws.4, 5 and 8 are co-villagers and stated to have seen the occurrence.

F.I.R., P.M. report, injury report of D.W.3 and the Station Diary Entry (earliest report by O.I.C.) are the four documents exhibited on behalf of prosecution.

No material object is produced in the court during trial.

Three witnesses are examined on behalf of defence out of whom D.W.1 is the tea stall owner near the spot. D.W.2 is the owner of the house which was destroyed in the morning for which incident the deceased was going to make query from Sarapanch. D.W.3 is the injured whose injury report is proved vide Ext.3. From the side of defence six documents, i.e., certified copy of the complaint petition and F.I.R. vide Ext.A to Ext.F are marked to prove prior enmity between the parties and with investigating officer-cum-O.I.C., Aul.

4. Learned Addl. Sessions Judge, relying upon the medical evidence, i.e, post mortem report and P.W.10, held that the death of deceased was homicidal in nature.

Discarding the evidence of defence and denial by the informant and other witnesses, learned Addl. Sessions Judge held that the attack on deceased was due to political rivalry, and inimical relationship with three witnesses, i.e. P.W.4, 5 and 8 cannot be a ground to throw away their evidence. Instead, he accepted the evidence of three witnesses i.e., P.W.4, 5 and 8 and held the six accused persons who are appellants guilty U/s.302, read with section 149 of I.P.C. and acquitted other twelve accused persons of all the charges. With regards to charge U/s.506 of I.P.C., learned Addl. Sessions Judge has mentioned that no separate sentence is passed but has failed to mention specifically as to conviction under it as mandated U/s.354(1)(c) of Cr.P.C. Because of this, for the purpose of this Appeal, all the accused persons are deemed to have been acquitted of the charge U/s.506 read with section 149 of I.P.C.

4-A. During pendency of appeal, on 31.8.2020 appellant Mantua Jena has filed an affidavit (also vide para 7 of the written argument) stating that appellant Rasananda Jena had expired in the year 2015. The fact is not disputed. Resultantly, appeal against appellant Rasananda Jena stands abated U/s.394(2) Cr.P.C.

5. Mr. S. K. Padhi, learned Sr. Counsel for appellants buttressed his argument raising the following points:-

(i) The sons of deceased i.e. P.Ws.1 and 2 and brother of deceased P.W.7 are not expected to leave the real assailants and they having not whispered anything against the appellants, prosecution cannot be said to have proved through P.Ws.4, 5 and 8 who had inimical relationship for political rivalry.

(ii) The informant son (P.W.1) having admitted to have lodged F.I.R. at the instance of police and Ext.F, certified copy of the complaint petition 1.CC Case No.69 of 1995, having unfolded the filing of a case by appellant Rasananda Jena against O.I.C. Sumanta Swain, the Investigating Officer, framing up of this case against the accused persons should not be disbelieved and the witnesses who are inimical to accused persons have come forward to advance the evil design of the investigating officer.

(iii) For non-examination of Investigating Officer, the appellants are seriously prejudiced as the material contradictions are not proved. When the weapon of offence is not produced in the court and chemical examination report is not proved, such prejudice has been augmented out of proportion and learned Lower court has committed error in not considering the same. In support of his contention, he relied on the decisions reported in ***(2020) 78 OCR – 206, Bhaskar Bariha Vrs. State of Orissa and (2020) 78 OCR – 190, Dusmanta Sethi Vrs. State of Orissa,***

(iv) Defence witnesses are not strangers. D.W.1 is the tea stall owner and D.Ws.2 and 3 were the charge sheet witnesses examined U/s.161 Cr.P.C. D.W.3 is the injured whose injury report is proved by prosecution vide Ext.3. Their evidence denying the occurrence should not have been discarded because defence witnesses are entitled

to have equal treatment with those of prosecution. In support of this connection he relied upon a decision reported in VIII-1988(2) CRIMES 938, Uchhab Sahoo Vrs. State.

(v) P.Ws.4, 8 and 5 of this case are subsequently examined as P.Ws.1, 2 and 3 respectively in the split up case S.T. Case No.3/39 of 2000 and they having retracted from their earlier statement admitting to have done so at the instance of the political party resulting acquittal of accused Mantu Naik vide judgment dtd.26.4.2002, it is unsafe to rely upon these three witnesses to convict the appellants.

(vi) The presence of accused persons at the spot cannot be fastened with unlawful assembly as they had no common object. In support of this contention he relied upon a decision reported in (***2020) 78 OCR - 29 , Kamarami Rama and Ors. Vrs. State of Orissa.***

6. Per Contra, learned Addl. Government Advocate Mr. J. Katikia supported the judgment stating that when three eye witnesses have implicated the accused persons, learned Trial Court cannot be said to have mis-appreciated the evidence on record. It is contended that for the prior enmity and political rivalry the evidence cannot be thrown out and learned Trial Court after scrutiny, has rightly accepted the evidence of P.Ws.4, 5 and 8. He further argued that when the presence of Investigating Officer could not be procured due to his death, the accused persons cannot claim prejudice and defence witnesses who were gained over, cannot be considered reliable to disprove the case established by three eye witnesses. It is also contended that non-production of weapon of offence which was seized, cannot be a ground to discard the eye witness version.

7. On survey of evidence of doctor P.W.10 and P.M. report Ext.2, it is clearly proved that deceased Rusi Sethi had met homicidal death on 21.5.1995 and he had sustained two anti-mortem injuries on left arm, one incised wound on the middle of right leg and one compound fracture of right tibia. As per doctor the death was resulted due to the incised wound on the middle of the right leg involving posterior tibial atery.

The autopsy was conducted with reference to Binjharpur U.D. P.S. Case No.12 of 1995. No evidence in this connection is adduced by the prosecution. Further doctor found stitched wound in course of post mortem

examination and prosecution has not explained as to where the deceased was given stitch on his wound. Fact remains proved that the death of deceased was homicidal in nature.

8. All the independent witnesses including the informant have not supported the prosecution except P.Ws.4, 5 and 8. Their reliability is challenged on the ground of enmity and political rivalry.

Credibility of testimony depends upon the evaluation of the totality, not isolated scrutiny. Testimonies may suffer from some infirmity because of the projection through human memory.

9. In the case at hand the evidence of P.Ws.4, 5 and 8 are pitted against the evidence of near relatives of deceased like P.Ws.1, 2 and 7 and defence witnesses D.W.1, 2 & 3. While delving deep in to the totality of the prosecution arena, the prior enmity between the parties and litigation between appellant and Investigating Officer as well as non-production of weapon of offence in the trial are found influential factors to entrench the oral testimonies. F.I.R. (Ext.1) depicts a prior incident in the morning regarding damage to the house of D.W.2 which had prompted the deceased to ascertain facts from Sarapanch accused Baidhar Naik. Informant, P.W.1, has also mentioned therein to have seen the occurrence. But turning around, he testified to have lodged F.I.R. at the instance of investigating officer lending his signature. The result is that the F.I.R. is disowned, so also the prosecution story of incident preceding the attack. At this juncture it may be seen that by Ext.F the defence has shown that the appellant Rasananda Jena had filed one case against O.I.C., Sumanta Swain on 27.4.1995 vide I.CC Case No.69 of 1995. For that it is contended by defence that police, in order to frame them up in this case, had got the F.I.R. lodged through P.W.1, the son of deceased. Had it not been so, the son would not have left the real culprit to escape. The prosecution has not clarified this stating non-availability of Investigating Officer. The very foundation of prosecution case is found to have been crumbled down for the son of the deceased who was none other than the informant.

10. Prior enmity and political rivalry between the parties are proved by P.Ws.4, 5 and 8. It is stated by P.W.4 that deceased Rusi belonged to Janata Party while he belonged to Congress Party and prior to the incident, there was a quarrel relating to M.L.A. Election. Further he has stated that accused

Rasananda had threatened him for casting of vote for which he had lodged an F.I.R. P.W.5 has also stated that incident took place out of a dispute relating to Election. P.W.8 has admitted that both parties were not pulling well prior to the date of occurrence. So there is no dispute that parties were at logger heads and the three witnesses i.e., P.Ws.4, 5 and 8 were rival party members of accused persons. In this regard defence has filed certified copies of record in G.R. Case No.384 of 1998, 344 of 1995, 926 of 1991, 1.CC Case No.19 of 1996 and 1.CC Case No.20 of 1996 (Ext.A to Ext.E).

Enmity is a double edged sword. It could be a ground for false implication and it could also be a ground of assault. The requirement of Law is that the testimony of inimical witness has to be considered with caution. If otherwise the witness is true and reliable, his testimony cannot be thrown out on the threshold.

On this path, with abundant caution, the evidence of three witnesses i.e., P.Ws.4, 5 and 8 are read. They have all stated that more than 50 persons were present at the spot. P.W.4 stated that he was present near the tea stall and 40 to 50 persons had surrounded the deceased and the opposite side of River Kharashrota was situated at the distance of 60 cubits away from the place of occurrence. He had earlier stated in the examination-in-chief that accused Duryodhana had dragged the deceased towards opposite side of River Kharashrota.

P.W.5 has stated that he was present at a distance of 20 cubits away from the gatherings of 100 persons and he was standing behind them. P.W.8 stated that at the time of incident he was standing at the top of river embankment and the boundary of Panchayata office and river embankment situated at a close distance. The incident took place inside the boundary of Panchayat office.

The spot is magnified. It was in front of the Panchayat office, surrounded by a boundary. The deceased was dragged to the side of river embankment, about 50 persons had surrounded, the tea stall of D.W.1 was situated there. P.Ws.4 and 5 were behind the gathering. All the three witnesses have stated that Mantua Naik threw an arrow which hit the hand of Susanta Naik D.W.3. Now D.W.3 does not corroborate the same. With regard to injury on D.W.3 the doctor P.W.11 states that he found a penetrating wound which could be possible on fall on sharp edged metal. D.W.3 has

stated that he sustained injury by fall from his bicycle. Thus the defence gets support from prosecution evidence.

The situational fact persuades us to take a reasonable view that the fact initially projected about incident does not get support from the injured and relations of the deceased. The evidence of prosecution supports the defence version. The possibility of presence of three witnesses at the spot filled with a gathering of 50 more persons and to see the incident in picturesque manner is doubtful. When the relations like sons and brother are not coming forward to attribute fault to the appellants as real culprits of the murder of the deceased, it is unsafe to accept the testimony tainted with enmity and political rivalry whose credibility could not be tested for non-examination of investigating officer and non-production of the seized weapon.

11. There is no ground to discard the weight of the evidence of defence witnesses. Those witnesses were cited in the charge-sheet. In absence of any evidence that their wisdom was sullied by extraneous interference, the Court cannot discriminate them to brand "Out of Box" in comparison to prosecution witness. In **Uchhab Sahoo** case (supra) it is held that the defence witnesses are entitled to equal treatment with those of the prosecution and that the Courts must overcome their traditional and instinctive disbelief of the defence witnesses and that if it is true that the defence witnesses often tell lies, it must be appreciated that the prosecution witnesses are no exceptions.

12. It is true that I.O. could not be examined but as stated above he had litigating terms with one of the accused Rasananda Jena in 1.CC Case No.69 of 1995 filed earlier vide Ext.F. Informant P.W.1 stated that at the instance of police he signed in the F.I.R. The contradiction of P.Ws.6, 7 and 9 could not be proved for non-availability of the investigating officer. The defence can genuinely claim prejudice as lodging of F.I.R. at the instance of police is not clarified from the mouth of investigating officer.

In the case of ***Bhaskar Bariha*** (supra) the effect of non-examination of Investigating Officer is dealt with at paragraph 12 as follows:-

> "12. Xxxxxxxx

> The examination of investigating officer in a criminal trial is not just a formality but very relevant and it is not just to prove the omissions and contradictions in the statements of witnesses examined by that officer but many important aspect of the prosecution case could be unearthed by examining such a witness. The investigating officer is the principal architect and executor of the entire investigation. He is a crucial witness for the defence to question the honesty and caliber of the entire process of investigation. It will not only be beneficial to the prosecution but also to the defence and moreover it is very much necessary for the Court to arrive at a just decision of the case. However, non-examination of the investigating officer in every criminal case ipso facto does not discredit the prosecution version. Where there are material contradictions in the statements of the witnesses made in Court vis-à-vis before the investigating officer and on some vital aspect the investigating officer's examination would throw light on the acceptability or otherwise of the prosecution version, a very valuable right accrues in favour of the accused to show that, the witnesses have made improvements or have given evidence that contradicts their earlier statements so that he would be able to satisfy the Court that the witnesses are not reliable. The non-examination of the investigating officer thus deprives the accused of the opportunity to bring before the Court the question of credibility of witnesses, by proving contradictions in the earlier statements and also on many other aspects.
>
> xxxx xxxxx xxxxx"

13. The testimony of three witnesses i.e., P.Ws.4, 5 and 8 fails the test of reliability after severe scrutiny. Their evidence is intrinsically unreliable and the core of prosecution case is mechanically advanced only to crumble in the midst. The infirmities are sufficient to show that three witnesses P.Ws.4, 5 and 8 who had axe to grind against the appellants had availed this opportunity to rope the accused persons. Suffice to say that in absence of corroboration from situational facts it is hazardous to accept their testimonies.

If the prosecution story as stated in F.I.R. is kept in view, the presence of accused persons at Panchayat office is natural and there being no material to infer common object, their presence in a gathering of more than 50 persons cannot render them liable U/s.149 of I.P.C. In this regard Hon'ble Apex Court in the decision reported in **AIR 2019 SC 1831**, ***Amrika Bai Vrs. State of Chhattisgarh*** has observed as follows:-

> "12…… The law is well-settled on the aspect that mere presence in an unlawful assembly cannot render a person liable unless there was a common object, being one of those set out in Section 141 of I.P.C. and she was actuated by that common object. [See: **Dani Singh Vrs. State of Bihar, (2004) 13 SCC 203**]"

14. Now descending to the facts, it is apparent that defence witnesses on being given equal treatment gets support from the relation of the deceased including the informant and defence is highly prejudiced for non-availability of investigating officer and non-production of seized weapon and chemical examination report. The testimonies of P.Ws.4, 5 and 8 fall short to overcome the firewall of defence witnesses and near relations of deceased. The infirmity together with enmity and political rivalry creates a doubt. That doubt is not dispelled by the prosecution. Reliability is relegated to a tainted version to rope the accused persons. The appreciation made by learned Addl. Sessions Judge in respect of P.Ws.4, 5 and 8 is not acceptable and on independent analysis, which the appellate court is duty bound to consider, the same is found faulty. As a result the evidence of P.Ws.4, 5 and 8 cannot be the basis for conviction of the appellants.

15. At this juncture we may address the contention of learned Sr. counsel as to the subsequent testimony of P.Ws.4, 5 and 8 in a split up proceeding which was sought to be an additional evidence. By a detail reasoned order, the said prayer has been disallowed in Misc. Case No.348 of 2002.

16. Before parting, one procedural infirmity in recording evidence is felt to notice. The wrong use of the statement U/s.161 Cr.P.C. is found to have been adopted while recording testimony of D.Ws.2 and 3. The learned Trial Court has failed to kept the Law enunciated U/s.162 Cr.P.C. The statement recorded by police officer in course of investigation U/s.161 Cr.P.C. cannot be used in respect of defence witnesses. The oft quoted judgment of Hon'ble Supreme Court on this point is **Tahsildar Singh and Anr. Vrs. The State of Uttar Pradesh, 1959 AIR 1012** wherein it is enunciated that:-

> "At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a policeofficer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by s.145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar."

17. In the wake of above, it is not safe to base conviction on the version of P.Ws.4, 5 and 8 and for that the conviction of appellants cannot be sustained. The conviction is to be set aside and the appellants are to be acquitted.

18. In the result the appeal is allowed. The conviction and sentence of appellants vide judgment dtd.11.10.1999 by learned Addl. Sessions judge, Kendrapara in S.T. Case No.41/433 of 1996 is hereby set aside and appellants are acquitted therefrom. The appeal against appellant Rasananda being abated and other appellants being on bail, the bail bonds be discharged. Send back the L.C.Rs. forthwith.

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2020 (III) ILR - CUT- 240

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

WRIT APPEAL NO. 22 & 41 OF 2020 AND
WRIT APPEAL NO.641,642 & 643 OF 2019

SASMITA PATTNAIK & ANR. .....Appellants
.V.
STATE OF ODISHA & ORS. .....Respondents

IN W.A NO.41 OF 2020
PRASANTA KUMAR SWAIN & ORS. .....Appellants
.V.
STATE OF ODISHA & ORS. .....Respondents

IN W.A NO.641 OF 2019
ARABINDA BOSE .....Appellant
.V.
STATE OF ODISHA & ORS. .....Respondents

IN W.A NO.642 OF 2019
SRINIBASH MOHANTY .....Appellant
.V.
STATE OF ODISHA & ORS. .....Respondents

IN W.A NO.643 OF 2019
RAJATA KANTA DASH .....Appellant
.V.
STATE OF ODISHA & ORS. .....Respondents

ACADEMIC MATTER – Recruitment for the posts of Lecturer in different streams – Flaws in the recruitment process including wrong and out of syllabus questions – Review Committee suggested that credit shall be given to the candidates for the wrong questions and the modified and corrected answer keys for all the questions in subject of History was also issued by the Committee – Writ petitions challenging the entire recruitment process – Single judge set aside the recruitment process and directed for re-examination – Whether can be sustainable – Held, No – Reasons indicated.

> *"It has consistently been held by the Hon'ble Supreme Court that in academic matters, Courts have to be highly circumspect in substituting the well-considered views of a Committee of Experts, against whom no bias or mala fides are alleged with its own views. The courts should be extremely reluctant in deciding what is wise, prudent and proper in relation to academic matters when the Review Committee set up by SSB compromising of academics possessing technical expertise and rich experience has formulated the best possible solution. The Court is of the opinion that, in the present facts and circumstances, the re-examination is an unnecessary exercise that will cause major inconvenience to all applicants without much gain. Furthermore, the SSB will face immense hardship in conducting the examination afresh. This is more so in view of the fact that the SSB has demonstrated that even awarding full marks to all the candidates, for the ambiguous/erroneous questions, did not give any additional benefit to the applicants. We are conscious of the fact that the SSB is already burdened with the onerous task of conducting the exams scheduled yearly, especially, in the light of the challenges thrown by the ongoing pandemic. In the present circumstances, we do not intend to overburden the SSB, when it has already taken sufficient steps to alleviate the concerns of the applicants based on the advice by experts in the field. We are of the opinion that no prejudice will be caused to any candidates who have participated in the process of selection. We re-iterate, such a view will also save the State Exchequer from incurring huge financial loss in holding another recruitment test for the same candidates; a situation which could be ameliorated with equally rational and effective alternatives as has been exercised in the present case."* *(Paras 14 & 18)*

Case Laws Relied on and Referred to :-

1. W.P.(MD) No.13267 of 2013 and batch decided on 1st Oct, 2013 by the Hon'ble High Court of Madras. : J. Antony Clara Vs. The State of Tamilnadu.

2. (2009), 156 PLR 161: Gourav Jain and Ors. Vs. Haryana Public Service Commission and Ors.
3. (2008) 4 SCC 273 : Pankaj Sharma Vs. State of Jammu and Kashmir & Ors.
4. (2018) 8 SCC 81 : Richal Vs. R.P.S.C.
5. (2007) 8 SCC 242 : West Bengal Council of Higher

Education Vs. Ayan Das & Ors.
6. (2013) 10 SCC 519 :UGC Vs. Neha Anil Bobde.
7. AIR 1965 SC 491 :University of Mysore Vs. C.D. Govinda Rao.
8. (2001) 8 SCC 546 :Tariq Islam Vs. Aligarh Muslim University.
9. (2008) 9 SCC 284 : Rajbir Singh Dalal Vs. Chaudhary Devi Lal University.
10. (2007) 1 SCC 603 : President, Board of Secondary Education Vs. D. Suvankar.
11. (1984) 4 SCC 27 : Maharashtra State Board of Secondary and Higher Secondary Education Vs.Paritosh Bhupesh kumar Sheth.
12. (1990) 2 SCC 746 : Neelima Mishra Vs. Harinder Kaur Paintal.
13. (2010) 8 SCC 372 : Basavaiah Vs. H.L Ramesh
14. (1984) 4 SCC 27 : Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupesh Kumar Sheth and Ors.

IN W.A NO.22 OF 2020

For Appellants : M/s. Gautam Misra, Sr. Adv.
Dinesh Kuamr Patra A.Dash, J.R. Deo & A.K.Dash

For Respondents : Addl. Government Advocate (For Respondent No.1)

M/s. Sameer Ku.Das, P. K. Behera & N. Jena
(For Respondent Nos.2 & 3)

M/s. M.R.Muduli, N.Sarkar, S. Priyadarshini, S.S. Dash, A. Mohanty & K. Swain (For Respondent Nos.4 to 23)

IN W.A NO.41 OF 2020

For Appellants : M/s. Samir Kumar Misra, J. Pradhan, S. Rout, Miss P.S. Mohanty & Miss S.L. Pattnaik

For Respondents : Addl. Govt. Adv. (For Respondent No.1)
M/s. Sameer Ku. Das, P. K. Behera & N. Jena
(For Respondent Nos.2 & 3)

IN W.A NO.641 OF 2019

For Appellant : M/s. Budhadev Routray (Sr. Adv.),Saswat Das & A. Mohanty

For Respondents : Addl. Govt. Adv. (For Respondent No.1)

M/s. Sameer Ku. Das, P. K. Behera & N. Jena
(For Respondent Nos.2 & 3)

M/s. M.R. Muduli, N. Sarkar, S. Priyadarshini, S.S. Dash, & A. Mohanty
(For Respondent Nos.4 to 8,10, 11, 13 to 18, 21, 22 and 23)

M/s. K.P. Mishra, L.P. Dwivedy, S Rath, A. Mishra and K. Hussain (For Intervenors)

IN W.A NO.642 OF 2019

For Appellant : Mr. Sourya Sundar Das (Sr. Adv.)
M/s. Saswat Das & A. Mohanty

For Respondents : Addl. Govt. Adv. (For Respondent No.1)
M/s. Sameer Ku. Das, P. K. Behera & N. Jena
(For Respondent Nos.2 & 3)

M/s. M.R. Muduli, N. Sarkar, S. Priyadarshini,
S.S. Dash & A. Mohanty
(For Respondent Nos.4 to 8, 10, 11, 13 to 18, 21, 22 & 23)

IN W.A NO.643 OF 2019

For Appellant : M/s. Saswat Das & A Mohanty

For Respondents : Addl. Govt. Adv. (For Respondent No.1)

M/s. Sameer Ku. Das, P. K. Behera & N. Jena
(For Respondent Nos.2 & 3)

M/s. M.R. Muduli, N. Sarkar, S. Priyadarshini,
S.S. Dash & A. Mohanty
(For Respondent Nos.4 to 8, 10, 11, 13 to 18, 21, 22 & 23)

JUDGMENT Date of Hearing: 28.09.2020 : Date of Judgment: 14.10.2020

S. K. PANIGRAHI, J.

> ***"If I had an hour to solve a problem, and my life depended on the solution, I would spend the first 55 minutes determining the proper question to ask… for once I know the proper question, I could solve the problem in less than five minutes."***
>
> ***- Albert Einstein***

1. The contextual underpinning of the quote heavily influences the subject matter of the instant case. The present batch of Writ Appeals assails the judgement dated 03.12.2019 passed by the Ld. Single Bench in W.P.(C) No.11094 of 2019 and pray for proceeding with the selection by publishing the final merit list for the post of lecturer in the stream of History in terms of advertisement issued by the State Selection Board, Department of Higher Education, Government of Odisha vide Advertisement No.003 of 2018.

2. The present batch of cases exemplifies an inherent flaw in the recruitment process which is devoted to finding the right candidates for the posts of Lecturer in different streams. A successful recruitment process

attracts a deep well of talent for selection. The unenviable task of the selectors includes everything from a processing of applications, written test and conduct of an efficient and engaging interview process to the ultimate job offer. At the same time, the defects, if any, in the recruitment process could render a jobseeker frustrated. The factual conspectus herein revolves around the written examination conducted by State Selection Board, wherein the respondents have alleged that some defective questions found their way onto the question papers, which consisted a myriad categories of errors like spelling mistakes, printing errors, wrong questions and so on.

3. As stated above, the State Selection Board had issued an advertisement bearing No.003/2018 which was published in the website of State Selection Board (www.ssbodisha.nic.in) inviting application from eligible candidates in order to fill up 833 vacancies in 25 disciplines. Present controversy is with respect to subject History, wherein out of that 81 posts, 27 were reserved for women, 18 for S.T. including 6 for women, 13 for S.C. including 4 for women, 9 for SEBC including 3 for women and 41 for U.R. including 14 for women. The said advertisement provided that the selection shall be made on the basis of three aspects i.e., career 25 marks (Ph. D- 25 and M. Phil &/or NET -10), Written-165 marks (Objective Type), Viva voce-10 marks and in total 200 marks.

4. The quandary in the present matter has arisen out of the framing of question paper and corresponding answer key in the written examination. It was provided in the website that Written Examination in the concerned subject shall be conducted as per the syllabus prescribed in the website (which may be considered as a model syllabus at par with the curriculum recommended by different Universities and leading colleges of the State) carrying 165 marks and questions for this 165 marks shall be of objective type (Multiple Choice), which are to be answered in OMR sheet and the examination will be of three hours duration. In compliance with conditions stipulated in the advertisement, the respondents and other candidates applied for the advertised posts. After due scrutiny, admit cards were issued to the respondents. Pursuant to the notice issued on 08.02.2019, they appeared for the written examination on 10.03.2019, conducted by State Selection Board. Objective type Multiple Choice Questions (MCQs) were provided to the respondents which were to be answered in OMR sheet. However, some of the questions in different subjects including History found to be erroneous, faulty and defective.

5. Even inadvertent errors in framing of questions, one cannot deny, does cloud the very integrity of recruitment process. Such aspects induce a high anxiety in the candidates and result in erosion of self-efficacy and confidence among them. The anomalies aforestated caused serious grievances among the candidates. For the purpose of examining the serious objections in the form of multiple petitions received from different candidates, especially in the subject of History, the Selection Board decided to setup a Review Committee, consisting of four subject experts. The experts in History had the mandate to scrutinize the questions as well as answer key. After detailed scrutiny, the Review Committee opined that:

a) Three nos. of questions are out of syllabus– Question No. 56, 68 and 71.

b) Wrong Questions-

- Three questions are irrelevant – Qns. No.– 13, 122, & 125
- Five questions for which no correct/appropriate answers given- Question No. – 2, 27, 77, 126 & 129.
- For thirty questions the answers are modified. Q Nos.1,5,6,20,21,24,39,40,48,52,53,61,66,68,69,74,79,81,84, 85,92,95,96,104,106,108,123,132,133,141.

6. The Review Committee further suggested that credit shall be given to the candidates by applying P/Q method for the above-mentioned 11 questions. Furthermore, the modified and corrected answer keys for all the questions in subject History was also issued by the Committee. In view of the report of the Review Committee, the State Selection Board (SSB) decided that full credit shall be given in the case of the abovementioned 11 questions in subject History, in favour of all the candidates who appeared in the written examination. Accordingly, instructions were issued to the processor for valuation. The modified and corrected answer keys furnished by the Review Committee in respect of subject History was accepted by the SSB for necessary follow up action. Consequently, steps were taken for reevaluation based on the modification as stated above. The SSB contended that in view of these steps; this Court should refrain from interfering with the examinations.

7. Many of the candidates whose grievances remained unaddressed invoked the writ jurisdiction of this Court including one Writ Petition filed in

relation to the History subject alleging the questions designed for the said Recruitment test were dotted with mistakes either in the form of wrongful framing of questions or defective construction of answer key. As many as 31 questions had mistakes, out of which as many as 6 questions were wrong (Q. Nos.2, 39, 81, 116, 129 and 154) and similarly in 25 questions (Q. Nos.1, 5, 6, 18, 20, 24, 40, 52, 61, 66, 68, 69, 71, 74, 79, 84, 96, 104, 108, 126, 132, 133, 139 and 153) there was error in construction of the answer key and furthermore no answer was provided for the same. After appearing for the examination, the respondents filed their representation enumerating their grievances stemming from a spate of wrong questions impacting their future career but their fragile emotion and apprehension went unheard by SSB. Consequently, Writ Jurisdiction of this Court was invoked with the contention that a large number of questions were demonstrably and palpably wrong, ambiguous, out of course, or options were not provided in proper manner. Further, considering the aspect of negative marking, the result of examination, it was submitted, should be cancelled and the respondents should be allowed to sit in the fresh examination to be conducted for determination of their merits and eligibility.

8. Having heard the parties, Ld. Single Judge in his order dated 03.12.2019 returned a finding that the allegations levelled by the respondents were more or less found to be correct. It was observed that the SSB had not acted in consonance with the recommendation made by the expert committee. He further held that even though in respect of 11 questions, the SSB has decided to give full credit to all the candidates, that itself will not suffice to cover up all other defects pointed out by the expert committee, more particularly, when answer key, as notified, was not correct in respect of 30 questions.

9. The Ld. Single Judge placed reliance on ***J. Antony Clara vs. The State of Tamilnadu***[1] ***and Gourav Jain and Ors. Vs. Haryana Public Service Commission and others***[2] to hold that re-examination should be conducted in the subject History even though it would cause hardship to the Board as the SSB has neither acted on the basis of the suggestions given by the Review Committee nor the principle laid down in ***Pankaj Sharma v. State of Jammu and Kashmir & others***[3]**.** It was held that when the candidates are facing

1. *W.P.(MD) No.13267 of 2013 and batch decided on 1st Oct, 2013 by the Hon'ble High Court of Madras.,*
2. *(2009), 156 PLR 161* **3.** *(2008) 4 SCC 273.*

negative marks with various counts and large chunk of questions are defective, it would be equitable if the fresh written examination would be conducted in subject History only. The Ld. Judge was of the considered view that as opposed to awarding marks in all 23 questions to all the candidates, ignoring the objections made in various counts by the petitioners and admitting that there are certain errors in questions, as has been dealt with in this manner, if fresh written examination is conducted for recruitment of Lecturer in History, it would be in the interest of justice, equity and fair-play.

10. Learned Counsel for the State submits that the Ld. Single Judge while passing the impugned judgment ought to have appreciated that despite award of full marks to Respondent Nos.-04 to 23, in respect of the ambiguous/wrong/defective questions, they could not qualify in the written examination which therefore means that their performance in the questions other than ambiguous/wrong/defective questions was not good and they could not secure mark in comparison to the candidates who have performed well. Further, it was submitted that Ld. Single Judge has erred in not appreciating the fact that the merit of the successful candidates has been compromised by setting aside the entire examination. He further contended that the respondents have only questioned the validity and propriety of the questions set in the examination only on the basis of "inferential process of reasoning or by a process of rationalization" and had failed to demonstrate the same with sufficient degree of clarity. He further submits that the Ld. Single Judge, while passing the impugned order has adopted an erroneous legal approach in setting aside the entire examination in the subject of History and further directing the SSB to conduct a fresh examination. It is contended that the judgment is in the teeth of the ratio decided in case of ***Richal Vs. R.P.S.C.***[4]**.** In the said case, the Hon'ble Apex Court has only directed to revise the result of all the candidates except the candidates whose names have been included in the select list and to further publish last selected candidates in the respective categories who were included in the select list. In view thereof, the impugned judgment, it is contended, is illegal, arbitrary and not sustainable in the eye of law.

11. Learned Counsel for Respondent Nos.2 and 3 through their Counter Affidavit submits that the Opposite Parties maintained high degree of probity and fairness by revising the Answer Keys. Such a conscious decision was taken by the SSB to protect the interests of all the candidates, for the subject

4. *(2018) 8 SCC 81*

of History, including that of the Writ Petitioners. The SSB, it is stated, adopted the Principle of Uniformity in awarding full marks to all the candidates who appeared in the Written Examination including the appellants. Therefore, the allegation that P/Q process for awarding marks against these 11 questions to all the candidates in the subject History, including the writ petitioners, irrespective of their performance in rest of the question of the Test Booklet is not fallacious. He has further submitted that the Opposite Party Nos.2 and 3 will face immense hardship in conducting the examination afresh for the same candidates. More importantly, conducting re-examination, it is stated that, will not give any benefit to any candidates and defies a justifiable reasoning. Further that, besides these wrong questions and answer keys, the merit of those candidates can be judged as per the modality fixed by the Opposite Party Nos.2 and 3 in the matter of awarding modified marks to them. It is vehemently contended that no prejudice will be caused to any candidates who have participated in the process of selection. Furthermore, undertaking the whole exercise again will lead to huge financial loss to the State exchequer. In these circumstances, it is submitted, this Court should allow the Opposite Parties Nos.2 and 3 to declare the result by preparing a fresh merit list of candidates indicating the marks secured by them after requisite modification based on the same examination.

12. Learned Counsel for Respondent Nos.4 to 23 through the counter affidavit submits that there is no error or mistake in the impugned judgment and the Ld. Single Judge has not committed any error in directing fresh written examination. The advertisement for recruitment of lecturers was published in respect of several disciplines. In Oriya discipline this Court found that some questions were incorrect and ambiguous. Thereafter, examining the report of Expert Committee, this Court was pleased to set-aside the entire written examination. The Opposite parties No.1 to 3 have also conducted the fresh examination and the results are awaited. He further submits that in the higher-level recruitment process such type of gross wrong question should not be entertained, which may shake the faith of aspiring candidates in the recruitment process. The Hon'ble Court should not rely on the Apex Court decision of ***Richal Vs. R.P.S.C.*** (supra) as in that particular case the expert committee report had taken care of all the allegations and grievances and the grievances of the appellants had been substantially redressed. However, in the present case, proper steps have not been taken in respect of the 30 questions where the answers provided in the answer key were wrong and ambiguous.

13. In the absence of any statutory provisions, this Court cannot direct the Board to conduct re-examination and, therefore, the result of public examination attains finality. This ratio has been substantiated by several judgements of the Apex Court including ***West Bengal Council of Higher Education v. Ayan Das & Ors.***[5] In the case of ***UGC v. Neha Anil Bobde***[6]), the Hon'ble Supreme Court observed that:

> *"29. We are of the view that, in academic matters, unless there is a clear violation of statutory provisions, the Regulations or the Notification issued, the Courts shall keep their hands off since those issues fall within the domain of the experts. This Court in* ***University of Mysore v. C.D. Govinda Rao***[7]***, Tariq Islam v. Aligarh Muslim University***[8] *and* ***Rajbir Singh Dalal v. Chaudhary Devi Lal University***[9]*, has taken the view that the Court shall not generally sit in appeal over the opinion expressed by expert academic bodies and normally it is wise and safe for the Courts to leave the decision of academic experts who are more familiar with the problem they face, than the Courts generally are. UGC as an expert body has been entrusted with the duty to take steps as it may think fit for the determination and maintenance of standards of teaching, examination and research in the University. For attaining the said standards, it is open to the UGC to lay down any "qualifying criteria", which has a rational nexus to the object to be achieved, that is for maintenance of standards of teaching, examination and research. Candidates declared eligible for lectureship may be considered for appointment as Assistant Professors in Universities and colleges and the standard of such a teaching faculty has a direct nexus with the maintenance of standards of education to be imparted to the students of the universities and colleges. UGC has only implemented the opinion of the Experts by laying down the qualifying criteria, which cannot be considered as arbitrary, illegal or discriminatory or violative of Article 14 of the Constitution of India."*

The issue is found in disguise in the impugned judgment but the Ld. Single Judge has taken a contrary view by directing the Board to conduct re-examination in the absence of any statutory provision for the same.

14. In ***President, Board of Secondary Education v. D. Suvankar***[10], the Hon'ble Supreme Court, among others, held that:

> *"5. The Board is in appeal against the cost imposed. As observed by this Court in Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh kumar Sheth*[11]*, it is in the public interest that the results of public examinations when published should have some finality attached to them. If inspection, verification in the presence of the candidates and re-evaluation are to be*

5. *(2007) 8 SCC 242* ***6.*** *(2013) 10 SCC 519* ***7.*** *AIR 1965 SC 491.* ***8.*** *(2001) 8 SCC 546* ***9*** *(2008) 9 SCC 284.*
10. *(2007)4 SCC 27*

allowed as of right, it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking, etc. of the candidates, besides leading to utter confusion on account of the enormity of the labour and time involved in the process. 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 would 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 pragmatic one was to be propounded. In the above premises, it is to be considered how far the Board has assured a zero-defect system of evaluation, or a system which is almost foolproof." (emphasis supplied).

It has consistently been held by the Hon'ble Supreme Court that in academic matters, Courts have to be highly circumspect in substituting the well-considered views of a Committee of Experts, against whom no bias or mala fides are alleged with its own views. The courts should be extremely reluctant in deciding what is wise, prudent and proper in relation to academic matters when the Review Committee set up by SSB compromising of academics possessing technical expertise and rich experience has formulated the best possible solution. This ratio has also been substantiated by the Hon'ble Supreme Court in ***Neelima Mishra v. Harinder Kaur Paintal.***[12]***. In the case of Basavaiah v. H.L Ramesh***[13](supra), the Supreme Court, among others, held that:

"26. It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinized the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinized the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.

27. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the

11. *(1984) 4 SCC 27 12(1990) 2 SCC 746.* ***13.*** *(2010) 8 SCC 372*

High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture.

32. According to the experts of the Selection Board, both the appellants had requisite qualification and were eligible for appointment. If they were selected by the Commission and appointed by the Government, no fault can be found in the same. The High Court interfered and set aside the selections made by the experts committee. This Court while setting aside the judgment of the High Court reminded the High Court that it would normally be prudent and safe for the courts to leave the decision of academic matters to experts. The Court observed as under:

7. ...When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegations of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally can"

In ***Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupesh Kumar Sheth and Ors.***[14], the court observed thus:

"29. ...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...."

15. In the matter at hand, a Review Committee was set up by the SSB consisting of four subject experts in History to scrutinize the questions as well as answer key. After detailed and minute scrutiny, the Review Committee opined that:

i) Three nos. of questions are out of syllabus– Question No. 56, 68 and 71.

ii) Wrong Questions-

- Three questions are irrelevant – Question Nos.– 13,122, & 125.
- Five questions for which no correct/appropriate answers given- Question Nos. –2, 27, 77, 126 and 129.

14. *(1984) 4 SCC 27*

- For thirty questions the answers are modified-Q Nos.1, 5,6,20,21,24,39,40,48,52,53,61,66,68,69,74,79,81,84, 85,92,95,96,104,106,108,123,132,133,141.

The Review Committee further suggested that credit shall be given to the candidates by applying P/Q method for the above-mentioned 11 questions. Furthermore, the modified & corrected answer keys for all the questions in subject History was also issued by the Committee. In view of the said report of the Review Committee, the SSB decided that full credit shall be given in case of 11 questions in subject History for all the candidates who appeared in the written examination. The modified and corrected answer keys furnished by the Review Committee in respect of subject History was accepted by the SSB for necessary follow up action, consequentially evaluation was undertaken. The SSB fervently contended that in view of all these steps undertaken; the examination so conducted should not be cancelled. The records reveal that Review Committee had properly scrutinized the question paper and answer key and opined the necessary requirements. Therefore, a direction to the SSB to strictly follow the guidelines provided by the Review Committee, instead of a direction to conduct a re-examination, may be more prudent and appropriate in the present case.

16. Furthermore, this Court is of the opinion that impugned judgment should have placed reliance on ***Richal Vs. R.P.S.C.*** (supra), while deciding on the case, wherein the Hon'ble Apex Court at **Para 18** has categorically held that the answer key 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 incorrect key answers. The publication of answer key is a step to achieve transparency in the selection process and to give an opportunity to the candidates to assess the correctness of their answer. An opportunity to file objections against the answer key uploaded by the examining body is a step to achieve fairness and perfection in the process. The objections to the key answers are to be examined by the experts and thereafter corrective measures if any should be taken by the examining body.

17. In the present case, in order to maintain transparency, the SSB published the key answers inviting objections from all the candidates and after receiving the objections with respect to the alleged ambiguous and defective questions and answer key, the same were put to the scrutiny of

subject expert committee. After examining the report submitted by the subject expert committee, SSB instructed for award of full credit in respect of 11 questions to all the candidates. The revised answer key was then placed in public domain to ensure fairness and transparency in the process of selection.

18. The Court is of the opinion that, in the present facts and circumstances, the re-examination is an unnecessary exercise that will cause major inconvenience to all applicants without much gain. Furthermore, the SSB will face immense hardship in conducting the examination afresh. This is more so in view of the fact that the SSB has demonstrated that even awarding full marks to all the candidates, for the ambiguous/erroneous questions, did not give any additional benefit to the applicants. We are conscious of the fact that the SSB is already burdened with the onerous task of conducting the exams scheduled yearly, especially, in the light of the challenges thrown by the ongoing pandemic. In the present circumstances, we do not intend to overburden the SSB, when it has already taken sufficient steps to alleviate the concerns of the applicants based on the advice by experts in the field. We are of the opinion that no prejudice will be caused to any candidates who have participated in the process of selection. We re-iterate, such a view will also save the State Exchequer from incurring huge financial loss in holding another recruitment test for the same candidates; a situation which could be ameliorated with equally rational and effective alternatives as has been exercised in the present case.

19. However, before parting with the present case, we hasten to add that Written Examination is the most widely used tool in evaluation and assessment of the competency of the candidates. The questions have to be prepared with utmost care to avoid any embarrassment while preparing the answer keys. Lack of proper care could lead to causing unwarranted confusion or wrong understanding of the 26 questions. Framing of well-studied guidelines and following scientific methods could facilitate in formulating appropriate questions which are essential to maintain the requisite standard of evaluation and assessment. It is the bounden duty of the recruitment agency to adopt a zero tolerance approach to pre-empt any doubts or confusion with respect to the question posed to evaluate a candidate. In the present case, much of the confusion has been created by the Question-setters and the Board should not stand on hollow esteem in protecting the erring Question setters but it must take exemplary action against the erring Question-setters to preserve the sanctity of the recruitment process. The

Board is duty bound to send a strong message to the Question setters by imposing an exemplary punitive action demonstrating that such callous approach is absolutely intolerable.

20. In view of the above discussion, we are inclined to set aside the impugned judgment dated 03.12.2019 passed by the learned Single Judge in W.P.(C) No.11094 of 2019 and allow the present Writ Appeals.

However, the SSB is at liberty to declare the results by preparing a fresh merit list of candidates in accordance with the report of the Expert Committee and recast the merit list on the basis of marks secured by them as per the modified process and procedure. The Writ Appeals are accordingly disposed of.

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2020 (III) ILR - CUT- 254

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

CRA NO.76 OF 2001

TUMULU KRISHNA RAO PATRO ……..Appellant

.V

STATE OF ORISSA ……..Respondent

(A) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Prosecution case based on circumstantial evidence – Principles to be followed – Indicated.

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." *(Para 11)*

(B) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Prosecution case based on circumstantial evidence – Circumstances as available show that the element of mens rea has not been cogently brought forward anywhere by the prosecution – Highest high of hostile witnesses and lowest low of the inability of prosecution to properly build a case – The Investigating Officer has grossly failed to corroborate the prosecution story and only seizing the weapon, used in the crime and other articles at the instance of the accused, does not indicate that the accused is the author of the crime – The entire circumstantial evidence has failed to ferret out the truth in so far as the involvement of the accused is concerned – Effect of – Held, the submission of the prosecution being dotted with probabilities and based on circumstantial evidence, which cannot be taken as a solid piece of evidence – Thus, the prosecution has grossly failed to prove the charge against the accused beyond all reasonable doubts under Section 302 of IPC – In view of the temper of time, nature of accusation and unconvincing tactics of prosecution to build a powerful case, the entire conviction is rested on inferences and probabilities sans a credible evidence – Although the jurists hold the law to be always fixed and certain, yet the discovery of the facts, they say, may deceive the most skilful prosecutor which is not so in the present case – Conviction set aside. (Paras 16 & 17)

Case Laws Relied on and Referred to :-

1. AIR 1947 PC 119 : Pulukuri Kottaya Vs. Emperor.
2. AIR 1999 SC 1293 (1297) : State of Himachal Pradesh Vs. Jeet Singh
3. (2003) 3 SCC 106 : Bharat Vs. State of M.P.
4. (1984) 4 SCC 116 : Sharad Birdhi Chand Sarda Vs. State of Maharashtra.
5. AIR2018SC2027 : Navaneethakrishnan Vs. The State.
6. RLW 2005 (3) Raj 198 : Jaleb Khan and Ors. Vs.The State of Rajasthan.
7. AIR 1970 All 51 : Rishi Kesh Singh And Ors. Vs. The State.
8. AIR 1962 SC 605 : K.M. Nanavati Vs. State of Maharashtra.
9. (2015) 9 SCC 588 : V.K. Mishra Vs. State of Uttarakhand.

For Appellant : Shri Manoj Mishra (Sr. Adv.) M/s. P.K. Das, A.K. Nayak and P.K. Nanda, Adv

For Respondent: Shri S. Kanungo, Addl. Govt. Adv

JUDGMENT Date of Hearing : 06.10.2020 : Date of Judgment :21.10.2020

S. K. PANIGRAHI, J.

1. This specifics of the instant case pose both a traumatic as well as unresolved facets of criminal jurisprudence. The present criminal appeal is directed against the impugned judgment and order dated 17.03.2001 passed by the learned Additional Sessions Judge, Bhanjanagar-Aska, Bhanjanagar in Sessions Case No.48 of 1999 arising out of G.R. Case No.472 of 1998 of the Court of the learned S.D.J.M, Bhanjanagar. The present appellant has been convicted under Sections 302 and 449 IPC and has been sentenced to undergo R.I. for life and to pay fine of Rs.5,000/- in default to undergo R.I. for one-year u/s 302 IPC and to undergo R.I. for five years and to pay fine of Rs.500/- in default to undergo R.I. for six months u/s 449 IPC.

2. Brief facts of the case are stated hereunder to appreciate the rival contentions urged on behalf of the parties:

a. The case of the prosecution traces back to 14.12.1998 at 3 P.M., the informant who is the father of the appellant and deposed as PW 2 lodged a written complaint before the IIC, Bhanjanagar P.S., wherein he reported about his tear-jerking tale which he experienced during the last four years as his married wife and sons repeatedly ill-treated him, due to which he along with his mother lived separately in a separate house. Along with his narratives about his son and wife, he also narrated about the present case. About 20-25 days prior to the incident, the informant had brought the deceased Suryamani Senapati with the consent of his family members from Puri to look after his old mother and to cook food for them, which was consented by his family members. However, on 14.12.1998 at 1 P.M., when the informant was just about to reach home, he saw the appellant running away holding a knife in his hand and wearing a ganjee stained with blood. As the informant passed through the gate of his house, he was aghast to find the deceased in a pool of blood on the veranda of the house. The deceased while she was alive and the informant's mother (PW-3) informed that the appellant had stabbed the deceased and blood was oozing out from the head, back and other parts of the body of the deceased. The informant took her in a rickshaw to Bhanjanagar Government Hospital where she died soon after arrival. These facts are also appropriately reflected in the statement recorded under Section 161 of Cr. P.C.

b. Combing through the pages of the case records, the stand of the defence in the present case is of complete denial of the alleged occurrence and perfidious implication on account of family dispute and prior grudge. The appellant version of the story is that all of his family members including his father and grandmother were staying together and the deceased was brought to cook food for them. Bhaskar Senapati (PW-6), the brother of the deceased proposed to get his daughter married to the appellant and sister of the appellant with his son. The appellant declined to marry P.W.6's daughter due to a patch on her back. Following the death of the

deceased, police threatened his father (informant, PW 2) to falsely implicate him in the death of the deceased and the false report was filed by his father out of fear. Further, the appellant provided an alibi that he had gone to Berhampur to buy merchandise for his shop on the date of the incident and returned from Berhampur on the next day at about 6.30 P.M. However, despite strenuous attempt by the prosecution, the presumption about the status of the deceased was not definitely of maid servant which could not muster any aid from any quarter in terms of depositional statements.

c. The prosecution has examined nine witnesses while three witnesses were examined by the defence. It is pertinent to note here that PW 2 (father of the appellant), PW 3 (grandmother of the appellant), PW 4 (seizure witness) and PW 5 (seizure witness) turned hostile and changed their statements during cross-examination before the learned Additional Sessions Judge. Additionally, PW 2 and PW 3 have corroborated appellant's stand that the latter was not in Bhanjanagar at the time of the incident and had gone to Berhampur for purchasing merchandise for his shop and returned only on the next day. Their corroboration of the story line by PW 2 and PW 3 went haywire while recounting the incident at the time of cross-examination. They have also corroborated the defence allegation that S.I. forced PW 2 to write a false report. PW 4 and PW 5, the seizure witnesses have clearly denied their presence when the appellant led to the place where he located the blood-stained knife and one blood-stained baniyan under the culvert of Siva Mandir at Lalsingi. These witnesses were star prosecution witnesses, but turned hostile due to some extraordinary circumstance, hence, indictment to the appellant which got zeroed in on a thin indictment story.

3. Learned Counsel for the appellant submits that firstly there are no eye-witnesses of the alleged occurrence. The only eye-witness PW 3 turned hostile during cross-examination and did not support the prosecution case. Even though PW 6 and PW 7 claimed to be eye-witnesses of the occurrence, however, before the Court of the learned Additional Sessions Judge, PW 9 has completely denied their presence at the time of the incident. Additionally, PW 2, the informant himself is not supporting the prosecution case and has already disowned the FIR alleging coercion from the side of S.I. PW 2 has further reported that PWs.4, 6 and 7 were present at Police Station and at their instance, PW 9 forced him to lodge the FIR as dictated by the I.O. The appellant has already provided the reference of an alibi which has been corroborated by PW 2 and PW 3. Therefore, in the instant case there is absolutely no direct evidence against the appellant and the prosecution's case is completely based on circumstantial evidence. Further, there are no chain of circumstances linked to the crime vis a vis the present appellant. Many a aspect has not gone into the investigative thinking of the Investigating Officer in proper perspective except some presumptions with lesser potentialities.

4. Secondly, PW 6 adduced certain documentary evidence which were neither present in course of investigation nor were they a part of charge sheet. The additional documentary evidence adduced are inadmissible since neither the authentication of the letters nor the contents of the letters are proved. Therefore, those documents are irrelevant and have no link with the crime except making the case highly prejudicial against the present appellant.

5. Thirdly, he has submitted that the statement u/s 27 of the Evidence Act, which is a confession of the accused while in Police custody is admissible to the extent the information given by him leading to discovery of a fact, i.e. recovery of weapon of offence. In the instant case, archaic attempt of PW 9, I.O has turned out to be highly suspicious, suppression ridden truth and deposed without mentioning the name of the witnesses. Further, no witness has supported the prosecution story to prove that the appellant had given the information leading to discovery. PW 9, I.O has also not exhibited the signatures of the witnesses who were present while the appellant confessed in the Police Station. Since the evidence of PW 9, I.O does not show about the witnesses, therefore, discovery of fact u/s 27 of the Evidence Act would vitiate. The condition necessary to bring the Section 27 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 which has been succinctly articulated in ***Pulukuri Kottaya v. Emperor***[1]. Therefore, there is no evidence to implicate the appellant and hence the impugned judgement passed by the learned Addl. Sessions Judge is illegal and liable to be quashed.

6. Learned Counsel for the State has submitted that he is inconsonance with the learned Counsel for the appellant on the fact that the prosecution case rests entirely on circumstantial evidence. However, the Trial Court after examining the circumstances and taking into consideration the contents of the FIR which was scribed by PW 2 indicating himself to be an eyewitness, the serological report, the motive of the present appellant and the disclosure made by the appellant u/s 27 of the Evidence Act leading to the recovery of weapon of offence was of the view that the circumstances formed a complete chain which conclusively established the guilt of the appellant beyond reasonable doubt.

1. AIR 1947 PC 119

7. He further submitted that the submission of the defence is based on a fallacious notion that when recovery of any incriminating articles was made from a place, which is open or accessible to others, it would vitiate evidence u/s 27 of the Evidence Act. Learned Counsel while relying on the case of ***State of Himachal Pradesh Vs. Jeet Singh***[2] has submitted that any object can be concealed in places which are open or accessible to others. Further, in regard to recovery of object is ordinarily visible to others or not than whether the place is open and accessible to others. There is no doubt that the present appellant had a motive to eliminate the deceased and he is the author of the crime can be well established beyond any doubt by linking recovery of blood-stained knife, the blood-stained ganji and therefore the judgement of the learned court below need not be interfered with.

8. Heard Shri Manoj Mishra, learned Senior Counsel appearing for the appellant and Shri Kanungo, learned Additional Government Advocate for respondent and perused the case records.

9. It is apparent from the facts of the present case that there are no witnesses to the occurrence of the incident and PW 3 (grandmother of the appellant), the only eye witness has turned hostile and has stated that the appellant was not present in the house when the incident occurred.

10. At the time of occurrence, the deceased was alive till she was taken to Bhanjanagar Hospital. After the death of the deceased, the body was sent to PW 1, the Medical Officer for post mortem. Several stab wounds were found on the plural cavity, left lung, right lung, posero-interior aspect of left ventricle. The post-mortem interval was 24 hours. The cause of death was due to haemorrhage, shock and injuries to vital organs such as heart and lungs.

11. The entire story is based on circumstantial evidence, suspicion without substantiating by cogent evidence, though the law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case as the Court finds them to be. The well-known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly

2. AIR 1999 SC 1293 (1297)

established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. Further, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court, as held in the case of ***Bharat vs. State of M.P***[3]. In the case of ***Sharad Birdhi Chand Sarda v. State of Maharashtra***[4], the Supreme Court opined that before arriving at the finding as regards the guilt of the appellant, the following circumstances must be established:

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

Further in the case of ***Navaneethakrishnan vs The State***[5], the Supreme Court while allowing the appeal of the accused opined that:

> **23.** *The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the Accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to Rule out a reasonable likelihood of the innocence of the Accused.*

3 (*2003) 3 SCC 106* **4.** (*1984) 4 SCC 116* **5.** *AIR2018SC2027.*

> *When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the Accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions.* ***The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the Accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.***

In the instant case, the Investigating Officer has grossly failed to corroborate the prosecution story and escaped from his investigative mindset. Only seizing the weapon, used in the crime and other articles at the instance of the accused, does not indicate that the accused is the brain behind the crime. The circumstances governing the instant case does breed presumptions but they are quite repugnant since the entire circumstantial evidence fails to show the involvement of the accused beyond reasonable doubt.

12. According to Section 3 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It will be seen that a fact may be said to be proved under one of the two possible situations. Either the Court believes that the fact exists, or the Court considers existence of the fact probable. There is no indication in Section 3 of the Evidence Act that a fact can be said to be proved, even when the Court entertains a reasonable doubt as to whether the fact exists or not. The Rajasthan High Court in the case of ***Jaleb Khan and Ors. Vs. The State of Rajasthan***[6] while discussing regarding the element of probability in relation to conviction of the accused opined that:

> ***"23.*** *It may be mentioned that while appreciating the evidence in a criminal case, the Court should keep in view the two cardinal principles that the guilt against the accused must be proved beyond the reasonable doubt and that the burden on the accused is not so heavy to prove the plea taken by them as it lays on the prosecution. The burden can be discharged by the accused merely by showing the preponderance of the probability."*

The doctrine of preponderance of the probability was discussed in the case of ***Rishi Kesh Singh And Ors. vs The State***[7]:

6. RLW 2005 (3) Raj 1986 **7.** AIR 1970 All 51

> *62. On the basis of the definition of the words "proved", "disproved" and "not proved", as contained in Section 3 of the Evidence Act, a similar inference can be drawn. The term "proved" is defined as below: --*
>
> *"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."When the evidence is of an overwhelming nature and is conclusive, there shall exist no dispute, nor shall there be any doubt and the Court can say that the fact does exist, but in criminal trials, where the accused claims the benefit of the Exception, there cannot be any evidence of such a nature. Very often there is oral evidence which may be equally balanced. In the circumstances, the case of the prosecution or of the defence has to be accepted or rejected on the basis of probabilities. Section 3 of the Evidence Act by itself lays down that a fact is said to be proved when, after considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is what is meant by the "test of probabilities" or the "preponderance of probabilities." The decision is taken as in a civil proceeding.*
>
> *63. To avoid repetition it can here be mentioned that the law with regard to the discharge of burden of proof by the prosecution, or by the defence against whom a presumption can be drawn under Section 105 of the Evidence Act, is as detailed in* ***K.M. Nanavati vs. State of Maharashtra***[8]*, and whether the accused has been able to discharge the burden of proof is to be judged on the basis of the "test oil probabilities" or the "preponderance of probabilities" in the same manner as the Court records a finding in a civil proceeding. This rule applies to the accused. A more rigorous proof is called for from the prosecution which must establish its case beyond reasonable doubt.*

The prosecution in the present case has failed to corroborate the evidences of the witnesses specifically PW 9 and due to the lack of cogent evidence, the prosecution has not been able to establish the case beyond reasonable doubt and the accused has thereby succeeded in showcasing the preponderance of probability by stating that there is a possibility that he may have been present in Berhampur for purchasing merchandise for his shop.

13. In the instant case, witnesses disputably stand at the pinnacle of the justice delivery sequence. The prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. The testimony should be such as clarifies the situation while maintaining a favourable attitude towards the side for whom the statement is being given. When the witnesses are not able to

8. *AIR 1962 SC 605*

depose correctly or turn 'hostile' in the court of law, it shakes public confidence in the criminal justice delivery system. Accentuating this view, Bentham said: "***witnesses are the eyes and ears of justice***". However, it seems the 'eyes and ears' have defied the prosecution in this case, the prosecution has failed to prove the guilt of the appellant beyond reasonable doubt as the prosecution witnesses Nos.2, 3, 4 and 5 have turned hostile. Their alleged statements made to the Police under Section 161 of the Code of Criminal Procedure were not confronted to them and marked as exhibits and further the I.O. has not spoken in his evidence anything about the alleged statements of the above hostile witnesses recorded. Under Section 161 of Cr.P.C. as held by the Apex Court in three Judge Bench in the case of ***V.K. Mishra v. State of Uttarakhand:***[9]

> "*15. Section 162 Code of Criminal Procedure bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police Under Section 161(1) Code of Criminal Procedure can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 161(1) Code of Criminal Procedure. The statements Under Section 161 Code of Criminal Procedure recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused Under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court and (iii) the re-examination of the witness if necessary.*
>
> *16. Court cannot suo moto make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 Code of Criminal Procedure "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. Statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction."*
>
> *Nonetheless, even at the advent of hostility, the court expects the prosecution to endeavour in corroborating the 'hostile' testimonies as a last-ditch effort into buttressing its side of the story. However, the 'defeatism' of the prosecution is uninspiring as no such effort seems to be have been made. Consequentially, the testimonies of the witnesses lacked passion or prejudice rendering them inadmissible in entirety.*

9. *(2015) 9 SCC 588*

14. The attempt of the prosecution has failed to excite the emotion of the court in extracting the substance required from the witnesses. It has failed to even prove that the evidences M.O. 1 (blood-stained knife) and M.O. 2 (blood-stained ganjee) were located after admission from accused as the same could not be corroborated by seizure witnesses. The seizure witnesses PW 4 and PW 5 turned hostile during cross-examination and clearly denied the location of the evidences admitted under Section 27 of the Evidence Act.

15. Thus, placing reliance upon their statements under Section 161 by the Trial Court to record the finding of conviction is erroneous and smacks a presumptive bias against the appellant. The learned Additional Sessions Judge has failed to appreciate the same in proper prospective in arriving at the conclusion objectively. What is doubtful must be proved with reference to "what is true", but in the present case even the principle of "in the mouth of two or three shall the truth be established" is not applicable since none has indicted the appellant. This is a case faced with the hazards of inconsistent statement, hostile statements making it a proverbially probabilistic baggage with unusual confusion, nevertheless, the criminal jurisprudence is in favour of the appellant.

16. In the present case the element of mens rea has also not been cogently brought forward anywhere by the prosecution, even though courts have abandoned the historical presumption that mens rea is always required for a criminal conviction. The common law criminal law jurisprudence traditionally has marked a person as a criminal only if he or she committed a morally blameworthy act, known as the actus reus, along with an "evil" frame of mind, known as mens rea or scienter. Justice Holmes, Jr, has rightly put even a dog knows the difference between "being stumbled over and being kicked".

17. The present case has witnessed the highest high of hostile witnesses and lowest low of the inability of prosecution to properly build a case. It is an undenying fact that criminal trials in India suffer largely on account of witness retracting statements made to the Police in the early stages of investigations. Money power and threats are often seen to be the influential factors to turn a witness hostile even to the extent of them variegating evidence. This malady is afflicting our criminal justice system in an accomplished fashion and gradually getting deep-rooted. Cosmetic changes in law just won't do much to deliver justice. The system requires a

comprehensive revamp. The V.S Malimath Committee on reforms of the criminal justice system prepared an outline for such a wide-ranging correction in 2003 but the said recommendations are gathering dust. Criminal justice administration needs to fill the credibility gap and is required to get rejuvenated for better and quicker justice in terms of the rights of victims are recognized by law. The cases of witnesses turning hostile will be less if they are insular from extraneous factors as seen in the present case.

18. The Investigating Officer has grossly failed to corroborate the prosecution story. Only seizing the weapon, used in the crime and other articles at the instance of the accused, does not indicate that the accused is the author of the crime. The entire circumstantial evidence has failed to ferret out the truth in so far as the involvement of the accused is concerned. The submission of the prosecution has also dotted with probabilities and based on circumstantial evidence, which cannot be taken as a solid piece of evidence. Thus, the prosecution has grossly failed to prove the charge against the accused beyond all reasonable doubts under Section 302 of IPC. In view of the temper of time, nature of accusation and unconvincing tactics of prosecution to build a powerful case, the entire conviction is rested on inferences and probabilities sans a credible evidence. Although the jurists hold the law to be always fixed and certain, yet the discovery of the facts, they say, may deceive the most skilful prosecutor which is not so in the present case.

19. In view of the above, this Court cannot close its eyes to injustice on account of masqueraded shoddy evidences which has rendered a conviction on probabilistic assumption and on the basis of circumstantial evidence.

20. In the result, the Criminal Appeal filed by the appellant stands allowed. The judgment of conviction and order of sentence dated 17.03.2001 passed by the learned Additional Sessions Judge, Bhanjanagar-Aska, Bhanjanagar in Sessions Case No.48 of 1999 (237/99 GDC) against the appellant is hereby set aside. Accordingly, the bail bond of the appellant stands discharged. The LCR be returned forthwith to the Court from which it was received.

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2020 (III) ILR - CUT- 266

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

MATA NO. 167 OF 2015

SWAPNA RANI SAHOO …….Appellant

.V.

NIRANJAN SAHOO ……..Respondent

HINDU MARRIAGE ACT, 1955 – Section 25 – Permanent alimony – Determination thereof – Principles to be followed – Discussed – *Ruby @ Pritipadma Pradhan v. Debasish Pradhan*, reported in 2014(II) ILR CUT- 709 followed.

Thus, after considering the above position of law, it is evident that the following principles emerge from the judgments available in the field:-

(a) Maintenance depends upon the summation of all the facts of the situation involved in the particular case.

(b) For granting maintenance, the scale and mode of living, the age, habits, wants and class of the life of the parties has to be regarded.

(c) Maintenance being such that the wife could live in a reasonable comfort; considering her status and mode of life which she was used to while living with her husband.

(d) During the pendency of the suit for maintenance, which may take a considerable time to attain finality, the wife cannot be forced to face starvation till she is subsequently granted maintenance from the date of the filing of the suit.

(e) Maintenance must necessarily encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed.

(f) Maintenance, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head.

(g) Maintenance must vary according to the position and status of a person. It does not only mean food and raiment.

(h) It is to be seen that the amount fixed cannot be excessive of affecting the living condition of the other party." *(Para 12)*

Case Laws Relied on and Referred to :-

1. A.I.R. 2011 SC 2748 : Vinny Paramvir Parmar Vs. Paramvir Parmar.
2. A.I.R. 2013 SC 415 : U. Sree Vs. U. Srinivas.
3. 2014(II) ILR CUT 709 : Ruby @ Pritipadma Pradhan Vs. Debasish Pradhan.
4. (2017) 14 SCC 200 : Kalyan Dey Chowdhury Vs. Rita Dey Chowdhury Nee Nanday.

For Appellant : Mr.Santosh Kumar Swain.

For Respondent : Mr.Shiv Sankar Mohanty.

JUDGMENT Date of Judgment: 23.09.2020

B.P.ROUTRAY, J.

Aggrieved upon the judgment and decree dated 1.5.2015 passed by the learned Judge, Family Court, Bhubaneswar in C.P.No.363 of 2010, the present appeal has been filed.

2. Appellant is the wife and respondent is the husband. Respondent raised the matrimonial dispute before the learned Judge, Family Court in the aforementioned civil proceeding under Section 13 of the Hindu Marriage Act praying for dissolution of his marriage with the appellant on the ground of cruelty.

3. The factual aspects, as narrated by the respondent before the Family Court are that, the marriage was solemnized on 22.2.2002 as per the Hindu rites and customs and out of their wedlock, one female child born on 20.3.2005. It is alleged that the appellant-wife after some days of marriage showed her indifferent attitude towards the family members of the respondent and used to visit frequently to her parental house for different intervals and was reluctant to take care of the old ailing parents of the respondent. She also used filthy languages to her in-laws members and assaulted the old parents in-laws physically on two to three occasions. Lastly, on 7.6.2009 the appellant without informing the respondent and his family members went to her parental house along with the minor child and did not return for a long time. When the respondent attempted to bring her back, he was misbehaved by the parents of the appellant and there was a meeting on 15.11.2009 to settle the dispute by the local gentries, which ultimately failed. Thus, it was alleged that the appellant without any rhyme or reason voluntarily deserted the respondent and subjected cruelty to him.

4. The appellant in her reply denied all such allegations of the respondent by stating that the respondent with an ulterior motive filed the case for divorce. She also brought in course of her evidence that, the respondent having extramarital relationship with one of his bank staffs has made all sort of false allegations against her to get the divorce.

5. The learned Judge, Family Court, Bhubaneswar in the impugned judgment and decree allowed the prayer for divorce by passing a decree thereof dissolving the marriage from the date of decree, but no permanent alimony was granted and direction for making provision for residence, maintenance and medical expenses of the appellant and the minor child was passed.

6. It is argued on behalf of the appellant that the impugned judgment is illegal and completely erroneous as there was no finding by the learned Judge to the effect that marriage has been irretrievably broken down or any established cruelty is there against the husband. But the learned Judge, Family Court on a flimsy ground whimsically concluded that there was mental cruelty on the husband as the wife has made allegations in her evidence about extra-marital relationship of the husband and stated that there was no sexual relationship between them since the year 2009. It is contended that the learned Judge has travelled beyond the pleadings of the parties to make out a case in favour of the respondent to grant decree of divorce. It is further contended that the learned Judge, Family Court was misconceived not to grant any permanent alimony in favour of the appellant and her minor daughter.

7. Pending appeal, an attempt was made by this Court for settlement through mediation, but the same failed. However, a peculiar development took place as admitted by the respondent-husband that he performed the second marriage to one Jagat Kalyani Mahapatra and out of said wedlock, a female child has been born on 27.6.2017. It is submitted by the respondent that after passing of the impugned decree, he remarried on 3.11.2015, which is beyond the appeal period and before presentation of the appeal by the wife-appellant. In support of the same, birth certificate of the female child and marriage photograph have been filed along with an additional affidavit dated 28.3.2019 of the respondent. But the wife-appellant submits that marriage with Jagat Kalyani Mahapatra by the respondent did not take place on 3.11.2015 but much prior to that in the vehicle registration certificate dated

2.7.2014 issued by the R.T.O., Bhubaneswar, Jagat Kalyani Mahapatra stated herself to be the wife of Niranjan Sahoo (present respondent). It is further submitted that since the respondent suppressed his second marriage before this Court as well as before the learned Judge, Family Court, the same cannot be an impediment to the prayer of the appellant to set aside the decree of divorce.

However, in course of argument, it is submitted by both the learned counsels that the appellant is suffering from breast cancer and still staying in her in-laws house till date, though the respondent is staying separately at another house with his second wife.

8. However, upon examination of the contentions of both the counsels and the documents brought on record, it can safely be concluded that that the respondent has performed his second marriage, but the actual date of the said marriage is a matter to be decided by the competent court of law.

9. Be that as it may, a close scrutiny of the impugned judgment reveals the same is filled with infirmities. It is for the reason that the court below has come to the conclusion of mental cruelty to the respondent on a whimsical ground that, the appellant has made irresponsible allegations touching the character of the respondent about adultery. Furthermore, the learned Judge, Family Court has erred in not granting permanent alimony specifically. Such infirmities and errors do though make the decree of divorce liable to set aside, but we are not inclined to set aside the decree of divorce in view of the fact that the respondent has remarried. Under the circumstances, we are certainly inclined to grant permanent alimony in favour of the appellant which in our view would solve the purpose substantially.

10. Now for determining the adequate quantum of permanent alimony, Section 25 of the Hindu Marriage Act is required to be resorted to. The principles in this regard have been propounded by the Hon'ble Supreme Court in several decisions. In the case of ***Vinny Paramvir Parmar v. Paramvir Parmar***, reported in A.I.R. 2011 SC 2748, it is held :

> "12) As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the husband's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and

determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

11. In the case of ***U. Sree v. U. Srinivas,*** reported in A.I.R. 2013 SC 415, it is held:

"32. xx xx xx

…….Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In Vinny Parmvir Parmar v. Parmvir Parmar, while dealing with the concept of permanent alimony, this Court has observed that while granting permanent alimony, the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.

34. Keeping in mind the aforesaid broad principles, we may proceed to address the issue. The respondent himself has asserted that he has earned name and fame in the world of music and has been performing concerts in various parts of India and abroad. He had agreed to buy a flat in Hyderabad though it did not materialize because of the demand of the wife to have a flat in a different locality where the price of the flat is extremely high. Be that as it may, it is the duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune. Regard being had to the status of the husband, the social strata to which the parties belong and further taking note of the orders of this Court on earlier occasions, we think it appropriate to fix the permanent alimony at Rs 50 lacs which shall be deposited before the learned Family Judge within a period of four months out of which Rs.20 lacs shall be kept in a fixed deposit in the name of the son in a nationalized bank which would be utilized for his benefit. The deposit shall be made in such a manner so that the respondent wife would be in a position to draw maximum quarterly interest. We may want to clarify that any amount deposited earlier shall stand excluded."

12. This Court in the case of ***Ruby @ Pritipadma Pradhan v. Debasish Pradhan***, reported in 2014(II) ILR CUT 709 after taking note of various decisions of the Hon'ble Supreme Court, have held :

> "xx xx xx
>
> 17. Thus, after considering the above position of law, it is evident that the following principles emerge from the judgments available in the field:-
>
> (a) Maintenance depends upon the summation of all the facts of the situation involved in the particular case.
>
> (b) For granting maintenance, the scale and mode of living, the age, habits, wants and class of the life of the parties has to be regarded.
>
> (c) Maintenance being such that the wife could live in a reasonable comfort; considering her status and mode of life which she was used to while living with her husband.
>
> (d) During the pendency of the suit for maintenance, which may take a considerable time to attain finality, the wife cannot be forced to face starvation till she is subsequently granted maintenance from the date of the filing of the suit.
>
> (e) Maintenance must necessarily encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed.
>
> (f) Maintenance, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head.
>
> (g) Maintenance must vary according to the position and status of a person. It does not only mean food and raiment.
>
> (h) It is to be seen that the amount fixed cannot be excessive of affecting the living condition of the other party."

13. The Hon'ble Supreme Court in the case of ***Kalyan Dey Chowdhury v. Rita Dey Chowdhury Nee Nanday,*** reported in (2017) 14 SCC 200 have observed that wife is entitled to 25% of the net salary of the husband towards her maintenance.

14. In view of the principles laid down in the aforesaid decisions, the quantum of permanent alimony is to be computed by considering the factual

aspects in the present case. It is admitted by the respondent in course of argument as well as in the note filed by him dated 20.11.2019 that, he is getting Rs.41,000/- being an employee of the insurance sector in a private Insurance Company. It is also admitted by the parties that the appellant is staying in her in-laws house sharing the common roof with the family members of the respondent. It is also not disputed that respondent is bearing the educational expenses of the minor daughter, who was reading in Swarswati Sishu Bidya Mandir. The age of the appellant was 29 years and respondent was 35 years in the year 2010 as mentioned in the impugned judgment which means presently they would be 39 years and 45 years respectively. The appellant is also suffering from breast cancer and is under treatment.

15. Considering the income of the husband and age of the parties, it is felt appropriate to fix the monthly permanent alimony at Rs.10,000/- and taking multiplier 12, the total amount comes to Rs.14,40,000/-. But considering the other relevant factors that the appellant is staying in her in-laws house and respondent is bearing the educational expenses of the minor daughter, and other circumstances of the case, in our opinion, it would be appropriate to fix an amount of Rs.7,00,000/-. Apart from this, the respondent is also liable to provide shelter to the appellant during her life time so also the educational and marriage expenses and other expenses of the daughter till her marriage.

16. Accordingly, it is ordered that the decree of divorce between the parties is confirmed and the respondent is directed to pay a sum of Rs.7,00,000/-(seven lakhs) to the appellant towards permanent alimony. The respondent is further directed to continue to provide residential accommodation to the wife during her life time and he shall bear all the expenses of the minor daughter-Singdha Rani Sahoo including her educational and marriage expenses and other expenses.

17. The appeal is disposed of with aforesaid modification in the impugned judgment and decree.

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2020 (III) ILR - CUT- 273

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

CRA NO. 228 OF 1998

NARESH BHOI @ PADHU ……....Appellant.

.V.

STATE OF ORISSA …….Respondent.

CRIMINAL TRIAL – Offence under section 302 of the Indian penal Code, 1860 – Conviction – Appreciation of evidence – Contradictions between the evidence of the eye-witnesses and the medical evidence – Effect of – Held, Where the eyewitnesse's account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive – The eyewitnesse's account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

"In this case, for resolving the issue between the contradictory evidence of eye-witnesses and the doctor to come to a just and proper conclusion, we examined the inquest report prepared by the Investigating Officer (P.W.7). In column No.3 of the inquest report, he has mentioned about three wounds i.e. one on the middle of the head, one on the left side of neck and one on the chest which appear to be incised injuries. So, taking into consideration all the materials available on record regarding the injuries sustained by the deceased, three separate versions are clearly forthcoming. The Investigating Officer (P.W.7), the first official who examined the dead body of the deceased during inquest, in course of investigation, and prepared the documents to that effect, has noted three major injuries on the body of the deceased. However, the doctor (P.W.1) has found two injuries on the chest of the deceased. The report prepared by him as well as his evidence given in oath in court do not state about the injuries on the back side of the neck of the deceased. On the other hand, the eye-witnesses have consistently stated that there is only one injury on the back side neck of the deceased. So, in view of the aforesaid considerations, it is very emphatically argued that the benefit of doubt should be extended to the appellant, in view of the inability on the part of the prosecution to explain this kind of contradiction. Keeping in view this important aspects of the case and relying upon the judgments of the Hon'ble Supreme Court passed in the cases of D. Sailu – vrs.- State of Andhra Pradesh: reported in (2007) 14 SCC 397 and Sekar Alias Raja Sekharan –vrs.- State Represented By Inspector of Police, T.N.:

reported in (2002) 8 SCC 354, we are inclined to hold that this is not a case of culpable homicide amounting to murder, rather, it is a case of culpable homicide not amounting to murder punishable under Section 304, Part-II of the I.P.C." *(Paras 14 to 15)*

Case Laws Relied on and Referred to :-

1. 2013) 15 SCC 298 : Gangabhavani Vs. Rayapati Venkat Reddy & Ors.
2. (2010) 10 SCC 259 : Abdul Sayeed Vs. State of M.P.
3. (1975) 4 SCC 497 : Ram Narain Singh Vs. State of Punjab.
4. (1999) 5 SCC 96 : State of Haryana Vs. Bhagirath & Ors.
5. (2007) 14 SCC 397 : D. Sailu Vs. State of Andhra Pradesh.
6. (2002) 8 SCC 354 : Sekar Alias Raja Sekharan Vs. State Represented By Inspector of Police, T.N.

For Appellant : Mr. V. Narasingh, Amicus Curiae.

For Respondent : Mr. A.K. Nanda, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 20.10.2020

S. K. MISHRA, J.

The sole appellant-Naresh Bhoi @ Padhu assails his conviction for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) and to undergo imprisonment for life recorded by the learned District and Sessions Judge, Kandhamal-Boudh, Phulbani in S.T. No.30 of 1997, vide the judgment of conviction and order of sentence dated 19.06.1998.

02. The case of the prosecution in brief is as follows:

In this case, the occurrence took place on 14.10.1996 at about 4.0 P.M. in front of the house of the accused in village Badadunguripalli under Manamunda Police Station in the district of Boudh. On the date of occurrence, the accused damaged the paddy crops of Chitrasen Karmi and Deba Karmi as a result of which a quarrel ensued between them. In order to subside the dispute, it was decided to hold a Panchayati at the Bhagabat Tungi of the village on the intervention of the deceased. It is alleged that while the deceased was going to attend the Panchayati; all on a sudden the accused came being armed with Tabulia (M.O.I) and mercilessly assaulted him. The deceased succumbed to the injuries. Dharamu Jala (P.W.2), the nephew of the deceased, having lodged F.I.R. (Ext.7), the present case was registered and the Investigating Officer (P.W.7) took up investigation. After

completion of investigation, P.W.7 submitted charge-sheet against the accused.

03. The plea of the accused is of a complete denial. He also submitted that he has been falsely implicated in this case.

04. In order to substantiate the charge, seven witnesses were examined, by the prosecution, apart from placing reliance upon the documents marked Exts. 1 to 11 and material objects marked as M.Os.I to V. P.Ws. 2 and 7 have already been mentioned. P.W.1 is the doctor who conducted post-mortem examination on the dead body of the deceased- Sambhu Jala. P.Ws. 2, 3, 4, 5 and 6 claim to be the eye-witnesses to the occurrence. P.W.6 deposed about the seizure of Tabulia (M.O.I) and the wearing apparels of the deceased M.Os.II and II (Lungi and Gamuchha).

Two defence witnesses D.Ws. 1 and 2 were examined on behalf of the appellant.

05. Keeping in view the materials on record, learned District and Sessions Judge, Kandhamal-Boudh, Phulbani came to the conclusion that:

(i) the death of the deceased was homicidal as deposed to by P.W.1, the doctor, who conducted post-mortem examination over the dead body of the deceased:

(ii) the evidence of eye-witnesses P.Ws.2, 3, 4, 5 and 6 established that the appellant has given fatal blow on the body of the deceased resulting in his death;

(iii) there was motive for the same and there was dispute between them regarding landed property belonging to them; and

(iv) blood stain found on the weapon of offence and the wearing apparels i.e. Lungi (M.O.I) and Gamuchha (M.O.II) of the deceased supports the case of the prosecution.

Coming to the aforesaid conclusion, learned trial court convicted and sentenced the appellant, as stated supra.

06. In assailing the impugned judgment, it is submitted by Mr. V. Narasingh, learned Amicus Curiae appearing for the appellant that there are

major contradictions in the evidence of the eye-witnesses P.Ws.2 to 6 and the medical evidence led in this case in shape of oral testimony of P.W.1 (Dr. Padma Hansa Dora) and the post-mortem examination report. Learned Amicus Curiae further argues that the prosecution witnesses examined as eye-witnesses in this case have consistently stated that the accused/appellant gave one blow on the back side neck of the deceased as a result of which he fell down on the ground with severe bleeding injuries and died, and such information has also been reflected in the FIR also. But, the medical evidence shows that the deceased has not sustained any injury on the back side of the neck and he has been found to have sustained two incised wounds on the left side of the chest.

06.1. He also submits that such discrepancy appearing in the prosecution evidence has not been explained by the prosecution.

06.2. It is also submitted by the learned Amicus Curiae appearing for the appellant that though the learned Sessions Judge, Phulbani has heavily relied upon the findings recorded by the Serologist and Chemical Examiner, State Forensic Science Laboratory, Rasulgarh, Bhubaneswar (hereinafter referred to as "the S.F.S.L." for brevity), he has not put any question to the sole appellant in his examination under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for brevity). Alternatively, it is argued that even if the prosecution case is taken to have been established then also it is a case of culpable homicide not amounting to murder. It is argued that the conviction recorded against the appellant should be suitably modified accordingly.

07. Mr. A.K. Nanda, learned Additional Government Advocate for the State, on the other hand, argues that in view of the consistent testimony of the prosecution witnesses P.Ws.2 to 6, the medical evidence, which is in the nature of opinion of an expert should not be given much weightage to and keeping in view the weapon of offence used in this case, the conviction under Section 302 of the I.P.C. recorded against the appellant should be upheld.

08. Since the medical evidence is of great importance in this case, it is apposite on our part to take note all the evidence available on records. P.W.1 (Padma Hansa Dora), the then Assistant Surgeon, District Head Quarters Hospital, Sonepur has stated on oath that on 15.10.1996 he conducted post-mortem examination on the dead body of Sambhu Jala who was identified by

Constable 84, N. Bisoi and Constable No.130, K.S. Pradhan and others. In course of examination he found the following external injuries on the dead body of the deceased:

> (1) Incised wound with gapping on the left part of the chest extending from middle of left clavicle directed obliquely downwards and medially towards sternum of size $6^{1/2}$" x 2" x 6". The margin of the wounds were clean, it was deeply stained with presence of blood clots underneath.
>
> (2) Incised wound with clean cut margin and blood clotting situated underneath, of size 2" x 1" x 5" situated on the left part of the chest $1^{1/2}$" medial to left nipple. It was situated obliquely with gapping.
>
> (3) Abrasion on left cheek of size 1" x ½" situated one inch below the left molar eminence.

On further dissection, he found there was fracture of left clavicle and fracture of left first, second, third and fourth ribs. There was damage to the pleura on left side containing hemorrhagic fluid. There was trauma (cut injury) of size 1" x 1/2" to left lung. There was a rapture of Pericardium of size 1" x 1/4". There was rapture of anterior wall of right ventricle of heart of size 1/2" x 1/4". The other parts of the body were intact. He further stated that the injuries sustained by him were ante-mortem in nature and were sufficient to cause death of a person in ordinary course of nature. The death was probably caused due to shock and hemorrhage resulting from the injuries described above about 24 hours prior to the post-mortem examination.

08.1. On 17.10.1996 one triangular shaped iron weapon with wooden handle was produced before him by the police. He examined the same and answered the queries of the Investigating Officer that all the injuries of the deceased could be caused by the said weapon. In cross-examination, he further stated that injury no.(3) i.e. abrasion on left cheek of the deceased could be caused by any blunt weapon. He further specified that injury nos.(1) and (2) were the cause of death.

09. From the aforesaid evidence, it is quite clear that death of the deceased was due to grievous and serious injuries on his person which could be caused by sharp cutting weapon like M.O.I. So, we are not persuaded that the findings recorded by the learned Sessions Judge, Phulbani that the death of the deceased was homicidal should be set aside.

10. However, coming to the contentions raised by the learned Amicus Curiae, we have to examine the evidence of P.Ws.2 to 6. P.W.2 (Dharamu Jala) has stated in his examination-in-chief that while his deceased uncle was proceeding towards the Bhagabat Tungi of village Badadunguripali, this witness was behind him at a distance of 10 cubits. He saw the accused Naresh all on a sudden being armed with a Tabilia came out of his house and dealt a stroke over the left side neck of his deceased uncle namely Sambhu Jala. The deceased crying 'MARIGALI…… MARIGALI…. MARIGALI…' fell down on the ground with severe bleeding injuries. Accused Naresh having dealt a blow by means of a Tabilia on the left side neck of his deceased uncle, went inside his house and thereafter went towards his bari side. He has been extensively cross-examined.

10.1. P.W.3 (Chitrasen Karmi) has stated on oath that on a Monday at about 4.00 P.M. the occurrence took place and on that date and time, the accused Naresh gave a fatal blow by means of Tabilia on the left side neck of the deceased in front of his house as a result of which the deceased fell down with bleeding injury. On the date of occurrence, there was 'gandagol' between the accused and his elder brother Deba Karmi (P.W.5), as the said accused was damaging their paddy crops. His elder brother told him to go and call the Ward Member i.e. Sambhu Jala to come and look into the matter. He went to the house of the deceased and called him. While the deceased was walking, this witness was walking behind him at a distance of 5 cubits. The deceased, namely, Sambhu Jala and he were also accompanying him to the Bhagabat Mandir to convene a meeting (Panchayati) relating to the affairs between the accused and his brother Deba Karmi. No sooner the deceased Sambhu Jala reached near the spot, the accused came out of his house with a Tabilia and assaulted therein the deceased resulting in his instantaneous death. The Tabilia blow struck to the left side neck of the deceased resulting in the injury and death of the deceased. Besides him Deba Karmi (P.W.5), Narasingha Kheti (P.W.6), one Akrura Behera and many others had seen the occurrence.

10.2. P.W.2 (Dharamu Jala) happens to be the informant in this case. His statement under Section 161 of the Cr.P.C. has been recorded separately. The Investigating Officer, P.W.7 (Pravat Chandra Panigrahi) admitted in his cross-examination that he has mentioned in the case diary that he (P.W.2) had corroborated the F.I.R. version. In the F.I.R. a mention has been made regarding the dispute between P.W.3 (Chitrasen Karmi), P.W.5 (Deba Karmi)

and the appellant (Naresh Bhoi @ Padhu). He has referred about the dispute regarding the irrigation of land (Panidhara Ku Kendra Kari). P.W.3 (Chitrasen Karmi) had not stated before the Investigating Officer that on the date of occurrence there was gandagol between his elder brother Deba Karmi and the accused, as the accused had damaged the paddy crops and that his elder brother Deba Karmi went to the deceased; and requested him to call Sambhu Jala to look into the matter; and that when Sambhu Jala proceeded, he was at his back at a distance of 10 to 15 cubits; and that Deba Karmi accompanied him to Bhagabat Mandir.

10.3. P.W.4 has stated on oath that the occurrence took place in the month of Aswin on a Monday at about 4.00 P.M. He stated that on the date of occurrence, Chitrasen Karmi- P.W.3 went to call the deceased Sambhu Jala to look into the affairs of the accused and Deba Karmi in the Panchayat to be held at Bhagabat Mandir of their village. Accordingly, deceased Sambhu Jala proceeded towards the Bhagabat Mandir to preside over the Panchayat as a Bhadralok. This witness was behind the deceased Sambhu Jala at a little distance. No sooner the deceased reached near the house of accused Naresh, accused Naresh came out of his house being armed with a Tabilia(M.O.I). Accused Naresh dealt a stroke by means of the said Tablia (M.O.I) on the left side below the neck as a result of which the deceased raising a cry 'Marigali' fell down on the ground sustaining severe bleeding injury. The deceased Sambhu Jala died instantaneously at the spot. He has denied the defence suggestions that he has stated before the Investigating Officer that Chitrasen went to call the deceased Sambhu Jala for presiding as a Bhadralok in the meeting (Panchayat); and that he was following the deceased Sambhu Jala at a little distance. In a cross reference to the evidence of P.W.7, the Investigating Officer, it is clear that P.W.4 has not stated about this aspect before the Investigating Officer. Thus, the defence has brought out contradictions of this witness with reference to his previous statement recorded under Section 161 of the Cr.P.C.

10.4. Similarly, P.W.5 (Deba Karmi) has stated on oath that the occurrence took place about more than one and half years back in the month of Aswin on a Monday at about 4.00 P.M. On the day of occurrence, accused Naresh Bhoi damaged the paddy crops in his land as a result of which there was gandagol. So, he sent his brother Chitrasen Karmi-P.W.3 to go and call Sambhu Jala (deceased) to look into the matter. Accordingly, Chitrasen-P.W.3 went to call Sambhu Jala for the purpose of holding a Panchayat in the Bhagabat

Mandir of their village wherein the deceased presided as a Bhadralok. The deceased on getting information was coming to the Bhagabat Tungi of their village. No sooner the deceased Sambhu reached near the house of the accused Naresh Bhoi, accused Naresh all on a sudden came out of his house being armed with Tabilia (M.O.I) and dealt a stroke therein over the left side below the neck of the deceased as a result of which he fell down on the ground raising a cry 'Marigali….. Marigali….' and sustained injury. He was present at the scene of the occurrence and had seen the assault.

10.5. P.W.6 (Narasingha Kheti) has stated on oath that he had been to his land to cut grass in the afternoon. Having cut the grass from his field when he was returning to his house, he saw accused Naresh Bhoi standing in front of his house. Seeing this witness, the accused entered inside his house. This witness went inside his house. Again he came outside his house. On coming outside his house, this witness saw the deceased was going towards Bhagabat Mandir of their village by the side of the house of accused Naresh Bhoi. No sooner the deceased reached in front of the house of accused Naresh, he (accused) came out of his house being armed with a Tabilia and dealt a blow by means of that Tabilia on the left side below the neck of deceased Sambhu Jala, as a result of which, he fell down on the ground by raising a cry 'Marigali… Marigali…' and the accused went inside his house leaving the Tabilia (M.O.I) at the spot.

11. It is, thus, seen from the aforesaid analysis of the evidence of material witnesses in this case that all the witnesses examined as eye-witnesses in this case have consistently stated before the court on oath that the appellant dealt a blow by means of a Tabilia on the left side of the neck of the deceased. Moreover, in the F.I.R. lodged and exhibited on behalf of the prosecution in this case, it has been specifically mentioned that the appellant Naresh Bhoi all on a sudden came near the deceased and gave one forcible blow by means of a Tabilia on the left side neck of the deceased, as a result of which, the deceased fell down on the ground raising a cry 'Marigali…. Marigali….' At that time, the other witnesses came to the spot and saw the occurrence. When they tried to pick up the deceased, they found the deceased dead. He has also stated that after the occurrence the accused went to the house and escaped by taking road by his bike. It is thus apparent that from the date of lodging of the F.I.R. it is the case of the prosecution that the appellant dealt one blow on the left side neck of the deceased.

However, upon examination of the evidence of P.W.1, the doctor, who conducted post-mortem examination, we find that he has not noticed injury on the back side neck of the deceased. Rather, he found two injuries on the front side of the chest and left cheek. So, apparently, there is a clear cut contradiction between the evidence of the eye-witnesses and the medical officer.

12. It is argued by Mr. A.K. Nanda, learned Additional Government Advocate relying upon a judgment of the Hon'ble Supreme Court passed in the case of **Gangadhar Behera and Ors. –vrs.- State of Orissa** passed in Appeal (Crl.) 1282 of 2001 on 10.10.2002 that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the variable keeping the medical evidence as the constant. Some other judgments of the Hon'ble Supreme Court were also cited by the learned Additional Government Advocate.

13. We find it appropriate to take note of the judgment of the Hon'ble Supreme Court passed in the case of **Gangabhavani –vrs.- Rayapati Venkat Reddy and others**: reported in (2013) 15 SCC 298 wherein the question of contradiction in depositions of medical evidence and ocular evidence was considered, and after taking into consideration a number of judgments in this case, the Hon'ble Supreme Court has held as under:

> "**Contradiction in medical evidence and ocular evidence**
>
> 11. It is a settled legal proposition that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless it is reasonably explained may discredit the entire case of the prosecution. However, the opinion given by a medical witness need not be the last word on the subject. Such an opinion is required to be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all an opinion is what is formed in the mind of a person regarding a particular fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts, it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent or probable, the court has no liability to go by that opinion merely because it is given by the doctor."

In the case **Gangabhavani (supra),** the Hon'ble Supreme Court has taken note of the judgment passed in the case of **Abdul Sayeed –vrs.- State of M.P.:** reported in (2010) 10 SCC 259 wherein it has been held as follows:

> "34……. 'it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant "'.
>
> 35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility."

In the case **Gangabhavani** (supra), the Hon'ble Supreme Court has further held:

> "12. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence stands crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

The Hon'ble Supreme Court has also taken note of the judgments passed in the cases of **Ram Narain Singh –vrs.- State of Punjab**: reported in (1975) 4 SCC 497, **State of Haryana –vrs.- Bhagirath and Others**: reported in (1999) 5 SCC 96.

14. In this case, for resolving the issue between the contradictory evidence of eye-witnesses and the doctor to come to a just and proper conclusion, we examined the inquest report prepared by the Investigating Officer (P.W.7). In column No.3 of the inquest report, he has mentioned about three wounds i.e. one on the middle of the head, one on the left side of neck and one on the chest which appear to be incised injuries.

14.1. So, taking into consideration all the materials available on record regarding the injuries sustained by the deceased, three separate versions are clearly forthcoming. The Investigating Officer (P.W.7), the first official who examined the dead body of the deceased during inquest, in course of investigation, and prepared the documents to that effect, has noted three major injuries on the body of the deceased. However, the doctor (P.W.1) has found two injuries on the chest of the deceased. The report prepared by him as well as his evidence given in oath in court do not state about the injuries

on the back side of the neck of the deceased. On the other hand, the eye-witnesses have consistently stated that there is only one injury on the back side neck of the deceased.

14.2. So, in view of the aforesaid considerations, it is very emphatically argued that the benefit of doubt should be extended to the appellant, in view of the inability on the part of the prosecution to explain this kind of contradiction.

15. Keeping in view this important aspects of the case and relying upon the judgments of the Hon'ble Supreme Court passed in the cases of **D. Sailu –vrs.- State of Andhra Pradesh**: reported in (2007) 14 SCC 397 and **Sekar Alias Raja Sekharan –vrs.- State Represented By Inspector of Police, T.N**.: reported in (2002) 8 SCC 354, we are inclined to hold that this is not a case of culpable homicide amounting to murder, rather, it is a case of culpable homicide not amounting to murder punishable under Section 304, Part-II of the I.P.C.

15.1. Therefore, we allow the appeal in part. Accordingly, we set aside the conviction and sentence to undergo imprisonment for life under Section 302 of the I.P.C. recorded by the learned District and Sessions Judge, Kandhamal-Boudh, Phulbani in S.T. No.30 of 1997, vide the judgment of conviction and order of sentence dated 19.06.1998 and convert it to an offence under Section 304, Part-II of the I.P.C.

15.2. It is also borne out from the records that the appellant is on bail. He was in custody for about eleven years. So, we are inclined to hold that this is not a fit case to remand the appellant for further incarceration.

15.3. Accordingly, we are of the opinion that the period already undergone by the appellant during investigation, the trial as an U.T.P. and during the pendency of the appeal be set off under Section 428 of the Cr.P.C.

With such observations, the appeal is disposed of.

The L.C.R. be sent back to the concerned court below forthwith.

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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2020 (III) ILR - CUT- 284

D. DASH, J.

S.A. NO. 79 AND 80 OF 1997

DUKHANA BEHERA (DEAD) ……Appellant.

.V.

PRABALA KHATUA & ORS. ……Respondents.

INDIAN EVIDENCE ACT, 1872 – Section 92 – Provisions under for appreciation of documentary evidence – Suit for right, title, interest and for recovery of possession – Plaintiff's claim based on a registered sale deed through which he purchased the suit land – Defendant's plea was that the deed was executed as a mortgage deed but not as a sale deed – Recitals in the deed Vis-a-vis oral evidence – Appreciation thereof with reference to the scope of the provisions of section 92 of the Indian Evidence Act – Indicated.

"The well settled principles of law are that the provisions of section 92 of the Evidence Act does not prohibit to say or restrict an attempt by a party to prove that the actual transaction was different from what it is apparently seen with the document itself especially the nomenclature. But in order to derive support for the said stand, some indication must come from the recitals of the documents that those do not make out a clear case on either side. The clauses which are important as to passing of right, title, interest and possession as also consideration are somewhat involved and dwell upon ambiguity. In that case, the role of the parole evidence emerges to see the surrounding circumstances and specifies relating to the document to show the true nature of the document which the parties had intended and act upon which they accordingly, acted upon. The party asserting the plea then shoulders the burden of proof on the score that the transaction as apparently viewed on just a cursor reading and looked at the document was never so acted upon from the beginning and for that the contemporaneous happenings/events bear significance and are of definite importance. That exercise would bring within its fold for examination of evidence in culling out the conduct of the parties as well as their dealing with the property in question to take an overall view in returning the final finding. The mere form in which the deed is clothed is not decisive. The language of the document if is plain and not ambiguous clearly act as a pointer to the nature of transaction and then it must be given effect to as a document of that particular nature. The difficulty is posed only when the recitals are ambiguous and unclear. In that case, the intention of the parties have to be gathered which includes their dealing with the property and for that the parties may lead the evidence for their proper examination and appreciation." *(Paras 12 & 13)*

Case Laws Relied on and Referred to :-

1. (2004) 10 SCC 779 : Karnataka Board of Wakf Vs. Government of India & Ors.
2. AIR 1969 SC 20 : Smt. Ganga Bai Vs. Smt. Chhabu Bai.

For Appellant : Mr. S.P.Mishra, Sr. Adv.
A.K.Mishra-2, K.C.Kuntia, P.K.Ghose and M.R.Mohanty

For Respondents : Mr. D.Mohapatra & Mr. K.K.Mishra.

JUDGMENT Date of Hearing: 04.09.2020 : Date of Judgment: 22.10.2020

D. DASH, J.

The appellant in these appeals under section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the common judgment dated 08.11.1996 passed by the learned District Judge, Balasore-Bhadrak followed by decrees in S.J. Appeal Nos.80 and 81 of 1993.

The respondent, as the plaintiff, had filed Title Suit No.318 of 1988 in the court of learned Munsif, Balasore (as it was then) and Title Suit No.137 of 1988 in the Court of the learned Sub-Ordinate Judge, Balasore (as then was). Both the suits being tried analogously in the court of learned Sub-Ordinate Judge, those have been disposed of by common judgment dated 07.10.1993 followed by decrees.

Title Suit No.318 of 1988 re-numbered as Title Suit No.252 of 1990 after its transfer to the Court of Sub-Ordinate Judge stood decreed confirming the possession of the respondent-plaintiff over the suit land described under schedule-'Ka' of the plaint therein and the appellant-defendant was restrained from interfering with the same.

The other title suit, i.e, Title Suit No.137 of 1988 was decreed in part declaring the plaintiff-respondent's right, title and interest over the land described in schedule-'Kha' of the plaint therein, restraining the appellant-defendant from changing its nature and character and directing him to deliver the possession of the same to the respondent-plaintiff within a time frame and on failure for recovery through process of court by removing the standing house and structure over the land.

The defendant thus having suffered from the above judgment and decrees and aggrieved by the same filed two appeals under section 96 of the Code, i.e., S.J Appeal No.80 of 1993 and S.J. Appeal No.81 of 1993 in

challenging the judgment and decrees passed in the above noted suits. Those appeals have also been dismissed. The judgment and decrees passed by the trial court thus have been confirmed.

Both these appeals before this Court having arisen out of common judgment followed by decrees passed by the lower appellate court as well as the trial court; accepting the submission of the learned counsel for the parties, those have been heard together for their disposal by this common judgment.

2. For the purpose of convenience and clarity; the parties hereinafter have been referred to in the same rank as assigned to them in the original suit, namely, the appellant as the defendant whereas the respondent as the plaintiff.

3. The plaintiff's case is that the defendant was the original owner of the schedule-'Ka' property as per the description given in the plaint of T.S. No.137 of 1988 in total measuring Ac.0.70 decimals which he had inherited. He on 22.02.1955 sold the said land in schedule-'Ka' by a registered sale deed. It is stated that after execution of the said sale deed and its registration, the plaintiff was put in possession over the suit land. One part of the land was of Tala kisam which the plaintiff after purchase began to cultivate as it was being earlier so done by the defendant and also enjoyed the benefits from the small pond over it. It is further stated that in course of time, she made a part of it fit for homestead and started growing vegetables.

Further case of the plaintiff is that when the Major Settlement Operation began, she having fallen ill could not look after the matter relating to the recording of the land and, therefore, entrusted the defendant to do the needful in the matter on her behalf. The defendant, however, practiced fraud and cheated her. It is alleged that by influencing the Settlement Authority, the defendant got part of the schedule-'Ka' land measuring Ac.0.14 decimals of Tala kisam as specifically described in schedule-'Kha' of the plaint of T.S. No.137 of 1988, recorded in his name. The plaintiff claims that it was without her knowledge. Having heard from some other persons about such manipulation in the record of right in the Major Settlement with regard to Ac.0.14 decimals of land under schedule-'Ka', she on 10.03.1988 obtained the certified copy of the record of right which had been finally published in Major Settlement and then only, she was confirmed about said mischievous activities of the defendant in creating record of right of the land in his name

in a fraudulent manner by gaining over the Settlement Authority, when he himself had sold the land to the plaintiff and delivered possession of the same to her.

The above suit having been filed on 11.05.1988, by an amendment on 08.02.1993, it had been introduced in the plaint that in the year 1990, the plaintiff having fallen ill, had gone to her in-laws house at Salagadia in the district of Midnapur in the State of West Bengal and remained there for better care and treatment. During that period, within a month from 25.05.1990 onwards, taking advantage of the absence of the plaintiff, the defendant in order to create evidence in support of his false claim, put up one mud walled house consisting of three rooms over that portion of Tala land which had been developed by the plaintiff measuring Ac.0.14 decimals. According to the plaintiff's case, there was no house over the said land at any time before and defendant has his permanent house on the land which situates to the south of the said land under schedule-'Kha' and that is under hal khasara 397 measuring Ac.0.05 decimals.

It is pertinent for clarification to state that the prayer for declaration of right, title and possession etc in this suit is in respect of schedule-'Kha' property measuring Ac.0.14 decimals was under khata no.102 under plot no.300 (threshing floor) as per previous settlement and that is presently under Hal khata no.115 and plot no.396 (Bari). The suit filed in the court of Munsif which later came to the court of Sub-Ordinate Judge is one for permanent injunction and there, the prayer is with respect to the land measuring Ac.0.56 decimals which is the land in schedule-'Ka' minus the land under schedule-'Kha' and in exclusion of the same, as per the description given in the plaint of T.S. No.137 of 1988 as at schedule-'Ka'.

4. The defendant's case is that he never intended to execute any sale deed in favour of the plaintiff in respect of the land in the suit. It is his case that in order to meet his own marriage expenses, he had to take a loan of a sum of Rs.300/- from the husband of the plaintiff and as insisted upon by the husband of the plaintiff, finding no other alternative, he had to execute one deed, later on to his utter surprise found to have been nomenclatured as sale deed in favour of the plaintiff which for all purposes was intended as evidence of mortgage of the land and not sale. It is said that the deed having been discovered to have been styled as sale deed, when told the husband of the plaintiff said that it be treated as evidence of mortgage to ensure

repayment of the borrowings and that deed in original would be returned on payment of the money lent.

The defendant's further claim is that for the above reason, he has never parted with the possession of the suit land and was continuing with the same as before as its owner ignoring the deed and as agreed upon. It is also stated that on 22.02.1957, the defendant had cleared the loan taken from the husband of the plaintiff with interest in total amounting to Rs.450/- in presence of villagers. At that time, although the plaintiff's husband was to return the said deed, he avoided to hand it back on the pretext that it had been somewhere misplaced. He, however, assured that he would return the same when it would be traced out.

As per the defendant's case, the house standing over the land under plot no.300 corresponding to MS plot no.396 measuring Ac.0.14 decimals is his paternal residential house and has been standing over years where he with his family members have been residing all along. With the above projected case in countering the case of the plaintiff; the defendant has also advanced a claim in the alternative as to acquisition of title over that part of the land where his house with the space around by adverse possession.

5. On the above rival case, the trial court has framed as many as seven issues. Upon appreciation of the evidence on record at its level in the touchstone of the facts set forth in the rival pleadings of the parties forming foundation for their respective case; the plaintiff's claim of title and entitlement to the possession have been found favour with. Accordingly, the suits have been decreed as stated in the foregoing paragraphs.

The defendant having carried first appeals has failed in his attempt in obtaining any reversal/change in the ultimate result of the suits.

6. By order dated 13.11.1997, both the appeals have been admitted. The following substantial questions of law have been noted for their determination:-

> **a)** whether the learned courts below are justified in discarding the oral evidence from its consideration in proof of the specific case of the defendant holding as not maintainable under section 92 of the evidence Act?;
>
> **b)** whether the learned courts below are justified in recording a finding that the Ext.1 is a deed of sale and accordingly title passed thereunder?;

c) whether the learned courts below are justified in disbelieving the case of the defendant without even considering the oral evidence and other material available on record?;

d) whether the learned courts below are justified in approaching the case on the assumption that the plaintiffs' allegation as to the nature of transaction under the Ext.1 is true?; and

e) whether the learned courts below are justified in rejecting the defence plea of perfection of title by adverse possession without considering the weight of Hal ROR, rent receipts and report of the C.C. Commissioner from proper and lawful angle?

7. Given a careful reading to the above noted substantial questions of law, it is well gatherable that the questions as at (a), (b), (c) and (d) concern with the nature of the document, i.e., Ext.1 which the plaintiff has projected as sale deed as to have passed title with respect to the land covered thereunder from the hands of defendant unto her and that is asserted by the defendant as to have not been a sale deed but a document that he had to execute just to stand for security for the money that he had taken from the husband of the plaintiff to meet his urgent need during his marriage. The last question as at (e) relates to the acquisition of title over the land, a part measuring Ac.0.14 decimals by the defendant being in possession even after that sale deed in residing in that house which was standing all along by adverse possession.

8. At this stage, it may also be stated that plaintiff being successful before the trial court as also in the appeal, having levied the execution proceeding for recovery of possession of the land under schedule-'Kha' of the plaint in T.S. No.137 of 1988 from the defendant, further proceeding therein has been stayed by the order passed by this Court on 13.11.1997 in Misc. Case No.114 of 1997.

9. Mr. S.P.Mishra, learned Senior Counsel for the appellant (defendant), in attacking the concurrent findings rendered by the courts below that Ext.1 is a sale deed and by execution of the same, the defendant has transferred the title over the land in question unto the plaintiff, submitted that such finding is wholly erroneous both on fact and law. He submitted that the courts below have fallen in error by not properly considering the parole evidence with other documentary evidence on record as also the surrounding circumstances vis-à-vis the conduct of the parties. It was submitted that the defendant being a illiterate person, the principle of burden of proof of execution of the deed

by illiterate woman ought to be applied and accordingly, in the present case, the plaintiff since has failed to discharge that burden of proof of piloting the required standard evidence, she ought to have been non-suited.

He submitted that in the alternative, when the defendant has been in possession with the house standing thereon despite execution of the said sale deed (Ext.1), as the possession of the plaintiff after sale deed is not acceptable, the possession of the defendant in respect of that land has to be taken to be adverse to the plaintiff and in denial of his title asserting that as of right which stood fortified by the record of right. He, therefore, submitted that the courts below in acceptance of the alternative plea set up by the defendant ought to have returned the finding that the defendant has perfected title over that land measuring Ac.0.14 decimals by adverse possession over which the plaintiff's right, title and interest have been extinguished since long.

10. Mr.D.Mohapatra, learned Counsel for the defendant (plaintiff) submitted that the courts below have rightly answered all the issues holding that the plaintiff has the right, title and interest over the suit land having purchased the same from the defendant by the sale deed (Ext.1) for due consideration and delivery of possession. It was submitted that merely because an executant is illiterate, that principles of discharging of the burden of proof of the execution by the executant to have been so made after properly understanding the nature and character of the document as also all other attending facts do not get automatically attracted and come into play and that is first to be tested on case to case basis. He submitted that here the defendant having put his LTI on the document, Ext.1, cannot for that sole ground claim the benefit as to the cloak of protection under the law as all other important factors stand against his case especially, here he is an man having earlier experience in the field. According to him, the later conduct of the defendant squarely runs against him for availing the benefit.

He submitted that the courts below have committed no mistake by negating the defence claim that the deed (Ext.1) is not a sale deed but a document which had been executed for the purpose of security and said findings are based on proper appreciation of the settled principles of law as also in tune with the evidence on record. He further submitted that the defendant has failed to prove the required ingredients so as to establish a case of acquisition of title over that patch of land measuring Ac.0.14 decimals by

adverse possession. He, therefore, submitted that the appeals are liable to be dismissed. In this connection, he placed reliance upon the decision of the Hon'ble Apex Court in case of ***Karnataka Board of Wakf –V- Government of India and others; (2004) 10 SCC 779***.

The learned Counsels having submitted their respective written notes of submission, those being placed on record have also been perused and gone through.

11. On the above rival submission, let us first of all go through the findings of the courts below and the reasons for recording said findings.

The trial court in answering the first important issue as to the nature of the document, i.e., Ext.1 as sale deed or mortgage has found the recitals of the document, i.e., the certified copy of the said so called sale deed to be quite clear, unambiguous and specific on the point. In that view of the matter, the trial court felt it to be no more the need to look into the surroundings or attending circumstances so as to cull out the intention behind the document coming into being. The deed being of the year 1955 placed for examination as to its nature in the suit filed in the year 1988. The trial court on the face of the recitals finding those to be in no way ambiguous or involved is of the view that the case is not one which justify or warrant of viewing the surrounding circumstances and specifies relating to the document to show that the deed was executed as mortgage for security towards the borrowings made by the defendant from the husband of the plaintiff.

12. The well settled principles of law are that the provisions of section 92 of the Evidence Act does not prohibit to say or restrict an attempt by a party to prove that the actual transaction was different from what it is apparently seen with the document itself especially the nomenclature. But in order to derive support for the said stand, some indication must come from the recitals of the documents that those do not make out a clear case on either side. The clauses which are important as to passing of right, title, interest and possession as also consideration are somewhat involved and dwell upon ambiguity. In that case, the role of the parole evidence emerges to see the surrounding circumstances and specifies relating to the document to show the true nature of the document which the parties had intended to so execute and act upon which they accordingly, acted upon. The party asserting the plea then shoulders the burden of proof on the score that the transaction as

apparently viewed on just a cursor reading and looked at the document was never so acted upon from the beginning and for that the contemporaneous happenings/events bear significance and are of definite importance. That exercise would bring within its fold for examination of evidence in culling out the conduct of the parties as well as their dealing with the property in question to take an overall view in returning the final finding.

13. The mere form in which the deed is clothed is not decisive. The language of the document if is plain and not ambiguous clearly act as a pointer to the nature of transaction and then it must be given effect to as a document of that particular nature. The difficulty is posed only when the recitals are ambiguous and unclear. In that case, the intention of the parties have to be gathered which includes their dealing with the property and for that the parties may lead the evidence for their proper examination and appreciation.

14. It has been held in case of ***Smt. Ganga Bai –V- Smt. Chhabu Bai; AIR 1969 SC 20*** that:

> "It is clear to us that the bar imposed by sub-s. (1) of section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties."

15. The original document in the case has not been proved and the plaintiff has proved the certified copy of that deed marked as Ext.1. The plaintiff being examined as P.W.1 has stated in detail as to the scribing of the deed, its execution by the defendant having understood the contents to have been correctly written and admitting its execution before the Sub-Registrar as also the receipt of consideration. She has stated about the loss of the original and thus laying down the foundation for production and proof of the

secondary evidence for its due admission. This Ext.1 has been titled as sale deed. The courts below having gone through the recitals have found those to have no such ambiguity and the intention of the parties as reflected therein to be clear that the defendant was selling the land which the plaintiff purchased on payment of agreed consideration. There is absolutely no such indication in said recitals being read as a whole so as to even infer that title over the land in question was thereunder and thereby not intended to pass on to the hands of the plaintiff.

In addition to the above, although the defendant claims that he was not given the original sale deed upon payment of the loan dues way back in the year 1957, yet no such receipt evidencing said payment is filed and proved. The defendant at any time thereafter has not asked the plaintiff or her husband to give it in writing that such being the arrangement, no right, title or interest in respect of the land remains with them. The defendant has also not given any notice demanding the return of the document in question. Moreover, having not got the record of right with respect to Ac.0.56 decimals of land out of the land covered under that deed, no further action against the plaintiff has been initiated by this defendant which here is important as in the facts and circumstances, the question of defendant feigning his ignorance as to said recording does not at all arise. There is also no such acceptable evidence on record to suggest that the consideration for said land during the time was much higher than what has been quoted in the said deed, Ext.1. The plaintiff has proved some other sale deeds executed by the defendant which shows that he is not new/stranger to such type of dealing of transactions as to the immovable properties. The defendant no.2, on the other hand, has also deposed to have given the registration receipt to the plaintiff after the registration was done and that again goes without any sort of explanation whatsoever.

The defendant although has not put his signature and his LTI appears on the document in question, Ext.1 yet that factor itself is not enough to get the cloak of protections of law as are provided to the pardanashin/illiterate woman. In this case, the beneficiary of the transaction is a lady and has also put her LTI on the plaint. It has been proved through acceptable evidence that the defendant has executed such type of documents and is not a stranger to such acts etc. Moreover, here the very stand of the defendant is that he knew the deed to have been taken from him was a sale deed and that he had intended to have been taken as mortgage in securing the repayment of the

amount borrowed. Thus, there arises quite distinguishing factual settings standing against the court in leaning to provide the protection of law to the executants. The submissions of learned Senior Counsel on the score are thus cannot be countenanced with.

16. The trial court, upon detail analysis of oral evidence, has concluded that the evidence let in by the defendant on the score that a mortgage was intended to be created as security for the loan are not consistent. It has also marked some doubtful features in the evidence of all the DWs so as to infer in the light of the case set up by the defendant.

The lower appellate court, on examining the evidence on record at its level in the backdrop of the settled position of law, has returned the same finding on that issue that Ext.1 was executed by the defendant selling the suit land to the plaintiff way back in the year 1955 and thereby she had acquired right, title and interest over the said land.

This Court, in the backdrop of the rival projected case; further keeping in view the settled principles of law holding the field, having gone through the evidence both oral and documentary on record, is of the considered view that the courts below have rightly answered the issue no.5 in favour of the plaintiff and against the defendant.

In the net result, the substantial questions of law as at (a) to (d) thus receive the answers running against the defendant.

17. Now, thus comes the exercise of answering the substantial question of law as at (e).

Undeniably, as on the date of field inspection by the Civil Court Commissioner, i.e, in 13.05.1991, the defendant has been found to be in possession of the land under Hal plot no.396. He has seen the mud walled dwelling house with thatched roof as also cowshed made of bamboo sticks, mud and plastered wall with thatched roof over there in occupation of the defendant. The report of the Civil Court Commissioner has been admitted in evidence without objection from any quarter and those have been marked as Ext.B.

The plaintiff in both the suits had initially pleaded to be in possession of the whole of the suit land measuring Ac.0.70 decimals. The pleading was specific that the defendant has never been in possession of the land that he

sold and he had simply managed to obtain the record of right in the Settlement Operation finally published in the year 1985. It is quite disingenuous on the part of the plaintiff to come up with the prayer for amendment of the plaint on 22.02.1992, i.e, long after spot visit of the Civil Court Commissioner on 13.05.1991 and submission of report on 01.07.1991 for inserting the fact that in between 25.05.1990 to 25.09.1990, the defendant has trespassed over the land measuring Ac.0.14 decimals and put up some temporary structures by force. It is interesting to note that for at last three years or more, the plaintiff was silent and had been claiming to be in possession of the entire suit property despite the recording of Ac.0.14 decimals of land in favour of the defendant way back in the year 1985 and it had been said that the recording of that part of the land has nothing to do with her title and possession. As the prayer for mutation made by the plaintiff was rejected, a cloud being cast on her right, title, interest and possession, she filed the suit.

18. The situation is really peculiar. The plaintiff filing the suit in the year 1988 pleads to be in possession of whole of the property in suit. The defendant from the beginning asserts the claim in all respect including his possession. The record of right of the land described in schedule-'Kha' of the plaint of T.S. No.137 of 1988 under Hal Khata No.115 plot no.396 measuring Ac.0.14 decimals has been finally published on 01.04.1985. The suit having been filed in the year 1988, the plaintiff has come up later alleging her dispossession in between 25.05.1990 to 25.06.1990 during her absence and that is during the suit. This is being stated for the first time in the amendment petition filed on 22.02.1992 and not at the time when Civil Court Commissioner had visited nor thereafter. The plaintiff has not filed any objection to the report of the Commissioner and rather as it appears has chosen to indicate the date of dispossession or forcible entry into possession over that part of the land prior to the date of visit of the Civil Court Commissioner. Moreover, the settlement record of right of the entire suit land has not been published in the name of the plaintiff. On 01.04.1985, for part of the land covered under the sale deed (Ext.1) has been issued in the name of the plaintiff marked as Ext.2 under khata no.326 plot no.283, 284 and 291 measuring Ac.0.04, Ac.0.45 and Ac.0.07 decimals in total Ac.0.56 decimals which are all the agricultural land. The rest land under khata no.115 under plot no.396 measuring Ac.0.14 decimals has been recorded in the name of the defendant (Ext.3). With said land, some other gharabari land of the defendant measuring Ac.0.05 decimals has also been recorded when no other cultivable land is included therein.

Interestingly, when it is stated that being so entrusted by the plaintiff to do the needful in the Settlement Operation, the defendant made the manipulations in getting a part of the sold land, i.e, gharabari land recorded in his name, the plaintiff has proved the settlement Parcha in respect of the land which has been recorded in her name and that being filed by her has been marked as Ext.6. It thus appears to be falsehood to say that she did not know anything about the ROR making till she obtained the certified copies being so told about said erroneous publication of record of right by some persons of the village and thus feigning ignorance about recording till then. The parcha (Ext.6) is in respect of Ac.0.56 decimals of land and then again it is seen that this plaintiff thereafter has been going on paying the land revenue in respect of her recorded land, i.e, Ac.0.56 decimals (Ext.2) in the year 1986, 1987 and 1988. All these clearly go to show that the claim of the plaintiff that she had no knowledge of the development in the Major Settlement operation which in different stages goes for a fairly long period and publication of record of right an afterthought.

The report of the Civil Court Commissioner (Ext.B) and the map appended to it shows that the house and cowshed are standing on plot no.396 and over the other gharabari land under plot no.397 which is in that very khata (Ext.3), no house is situated. Moreso, there is no independent access to that land under plot no.397, belonging to the defendant although the plaintiff asserts that over it the house of the defendant stands and he resides with family therein.

19. The courts below have completely overlooked the above important features emerging from the evidence which stand against the claim of the plaintiff as to her possession of Ac.0.14 decimals of land. Those aspects being not kept in view, the courts below have not directed the examination in proper angle. Said approach of the courts below thus in my considered view is perverse which has impacted the finding on that score.

The evidence of plaintiff (P.W.1) is that in 1992, when she returned from her husband's house where she continuously stayed since 1990, she saw the house to have been made by the defendant on that Ac.0.14 decimals of land. P.W.2 and 3 have stated about possession of the land recorded in the name of the plaintiff under Ext.2, i.e. Ac.0.56 decimals. The defendant (D.W.1) has stated to have never parted with possession of that homestead land recorded in his name under Ext.3.

In such state of affair in the evidence, the plaintiff is found to have failed to prove that she had taken possession of the land under Ext.3 from the defendant. The sale deed being of the year 1955, the plaintiff's right to possess the land was with effect from 22.02.1955. If she had not possessed that part of the land at any time since then when also no such document as to mutation of the land etc is shown, the inevitable conclusion stands to be drawn that the right, title and interest of the defendant having been extinguished with effect from 22.02.1955 by virtue of that sale deed, his possession of the land in question thereafter in the absence of any such other arrangement being pleaded and proved by the plaintiff cannot be said to be for and on behalf of the plaintiff but it has to be as that of an independent possessor having no right, title and interest as also the right to possess. The possession of the homestead land by residing in the house standing over it under the facts and circumstances has to be presumed to be as like owner in exercising the right as such stretching over a long period for more than 30 years in denial of the title of the true owner, here it is the plaintiff, fulfilling all the required classical ingredients, i.e, nec vi, nec clam, nec precario. The plea in the alternative on the ascertained facts and circumstances cannot be said to be wholly in consistent with the main one. The decision (supra) cited by the learned counsel for the respondent (plaintiff) having been carefully gone through is found to be distinguishable in the facts and circumstances as discussed and thus does not come to the aid of the plaintiff in respect of the land covered under the record of right marked, Ext.3. The plaintiff having been conveyed with absolute right, title and interest as also the right to possess the said land in part, i.e, under Ext.3, since has remained out of possession which continued with the defendant since 1955 onwards; her right, title and interest as also the right to claim possession has to be said to have been exgtinguished.

Thus, it is bound to be held that the defendant has perfected his title over the land khata no.115 plot no.396 measuring Ac.0.14 decimals in mouza-Balia under Baleswar Sadar P.S. by adverse possession and the plaintiff's right, title and interest over the same having been extinguished, she is to be non-suited to that extent.

The above discussion and reasons provide the answer to the substantial question of law as indicated at (e) of paragraph-6 in favour of the defendant and against the plaintiff in respect of the land in mouza-Balia under Major Settlement Khata No.115, plot no.396 measuring Ac.0.14 decimals with the house and other structures standing thereon.

20. In the wake of the aforesaid, the judgment and decree passed in T.S. No.137 of 1988 declaring plaintiff's right, title and interest over the land

described in schedule-'Kha' of the plaint therein as also the decree restraining the defendant from changing the nature and character of that suit land and the direction to give vacant possession of 'Kha' schedule land to the plaintiff within the time frame or otherwise to be so delivered to the plaintiff through the process of the court stand set-aside.

The judgment and decree passed in T.S. No.252 of 1990 (T.S. No.318 of 1988) declaring possession of the plaintiff over 'Ka' schedule of land as described in the plaint therein are however confirmed.

21. The appeals are accordingly disposed of and in the circumstances, without cost throughout.

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2020 (III) ILR - CUT- 298

D. DASH, J.

CRLREV NO. 281 OF 2020

JITENDRA KUMAR DIGAL ……..Petitioner

.V.

STATE OF ODISHA ……Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 457 – Provisions under – Vehicle seized in connection with an offence under the NDPS Act – Prayer for interim release of vehicle – Rejected by Special Judge – Revision – The question regarding release of the vehicle allegedly involved in NDPS case whether can be permitted to be released? – Law on the issue discussed – Held, as follows:

"Undeniably, the NDPS Act makes no provision creating a bar for interim release of the vehicle etc. pending trial by expressly prohibiting or excluding the application of section 451 and of the Code of Criminal Procedure. The provision as to order of confiscation as envisaged in sub-section (3) of section 60 of the NDPS Act would spring into action at the end of trial and not before. In that state of affair in the statutory provision, the principle laid down in the cited cases that the courts have the power to order for interim release of the vehicle seized in connection with the commission of offence under NDPS Act has to hold the field. It is trite law that every judgment must be read as applicable to the facts and circumstances of the particular case. The generality of the expression which

may be found there are not intended to be the expositions of the whole law but governed and qualified by particular facts of the case in which such expressions are to be found out. The case is only an authority for what it actually decides. The ratio decided in the cited cases was to the effect that the court has the power to direct interim release of the vehicle seized for commission of offence under NDPS Act pending trial but not as to when and under what facts and circumstances, its to be so ordered or not with any such peculiarity of facts as also the role of the owner holding exception, if any."

Case Laws Relied on and Referred to :-

1. (2009) 44 OCR 859 : Subash Chandra Panda Vs. State of Orissa.
2. (2013) 54 OCR 876 : Basanta Kumar Behera Vs. State of Orissa.
3. (2013) 54 OCR 893 : Balabhadra Nayak Vs. State of Orissa.
4. 203 24 OCR(SC) 444 : Sunderbhai Ambala Desai Vs. State of Gujarat.
5. (2013) 54 OCR 876 : Balabhadra Nayak Vs. State of Orissa.
6. 2002 CRIL. J 2605 : B.S. Mandanlal Vs. State of NCT of Delhi.
7. 2001 CRLLJ 4431 : Sujeet Kumar Biswas Vs. State of U.P.

For Petitioner : M/s. Parsuram Panda, A. Panda, A.Tirpathy, P.K. Satapathy.

For Opp. Parties : Mr. Saubhagya Nayak, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 01.09.2020 : Date of Judgment :22.10.2020

D. DASH, J.

The petitioner, by filing this revision, has called in question the legality and propriety of an order dated 18.03.2020 passed by the learned Special Judge, Phulbani in Crl. Misc. Case No. 01 of 2020 in rejecting his application under section 457 of the Cr.P.C. with the prayer to release the seized vehicle i.e. TATA Indigo eCS-LS bearing registration No. OR-02BZ-2386 in his favour.

2. Brief facts necessary for disposal of the matter at hand are noted as under:-

The petitioner being an accused in Phiringia P.S. Case No. 37 of 2019, registered for commission of offence under section 20(b)(ii)(C),25 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') is now facing trial in C.T. Case No. 19 of 2019 in the court of learned Special Judge, Phulbani.

The allegations against the petitioner are that on 25.04.2019 at 7.15 pm when the above stated vehicle was detained on the road at a short distance

from Nuapadar Chhak, the petitioner was found inside the vehicle. On search of the vehicle, a bag containing 30 kgs. 100 grams of contraband ganja coming under the commercial quantity as specified by the Central Government by the notification in the Official Gazette which was being so transported was recovered. It is said that the petitioner after interception somehow managed to escape from the place and despite efforts could not then be apprehended.

3. The petitioner claims to be the registered owner of the vehicle. It is stated the vehicle being seized in connection with the alleged transportation of ganja by the petitioner has been lying unused being exposed to sun and rain without any care, for about one and half year, by now. It is further stated that the vehicle if remains like this, its value would be reduced next to nil and in that event, besides causation of irreparable loss to the petitioner, it would be of no benefit even to the State in case of its confiscation after trial, rendering the whole exercise to be one in futility. It is also stated that when the vehicle is no more required for the purpose of investigation; its detention till conclusion of the trial would not serve the ends of justice as only at the end of trial, it would be decided as to whether the vehicle would be confiscated to the State or not. So, till that order is passed, the Court has the power to pass an order for interim release of the seized vehicle. Under the situation, the court below having declined to release the vehicle in favour of the petitioner imposing conditions as to ensure its maintenance and custody by the petitioner in proper state as also its production as and when required, pending trial has committed gross illegality and that has led to failure of justice.

4. Learned counsel for the petitioner in reiterating the averments taken in the revision application submitted that when the trial court would finally answer the question of confiscation of the seized vehicle after trial which is not expected to be over so soon; the seized vehicle ought to have been released in favour of the petitioner who is none other than its registered owner.

In furthering the contention that in case of seizure of the vehicle in connection of alleged commission of offence under the NDPS Act, the learned Special Judge has the power to pass an order of interim release of the vehicle pending trial; notwithstanding the arraignment of the owner in the alleged commission of offence; he placed reliance upon the decisions of this

Court reported in *Subash Chandra Panda Vrs. State of Orissa*; (2009) 44 OCR 859, *Basanta Kumar Behera Vrs. State of Orissa*; (2013) 54 OCR 876 and *Balabhadra Nayak Vrs. State of Orissa*; (2013) 54 OCR 893.

In that view of the matter, it was submitted that keeping in view the position enumerated by the Hon'ble Apex Court in case of *Sunderbhai Ambala Desai Vs. State of Gujarat*; 203 24 OCR(SC) 444, the vehicle of the petitioner ought to have been released in his favour, pending trial and that may be so directed.

5. Learned counsel for the State in refuting the above submissions strenuously contended that here since the petitioner who is the owner of the vehicle is none other than the accused and it is the case of the prosecution that he himself was transporting 30 kgs. 100 grams of ganja in his own vehicle, his knowledge as to keeping of ganja and its transportation thereof stands presumed. He submitted that the confiscation of the vehicle can be avoided in the trial and if the petitioner would successfully discharge the burden in rebutting the said presumption through acceptable evidence in satisfactorily explaining as to his lack of knowledge and connivance and that despite all reasonable precautions being taken, the given situation was unavoidable. He therefore, submitted that this petitioner being the owner of the registered vehicle when as per the prosecution version was very much there in the vehicle at the time of its seizure wherein the bag containing the contraband ganja of commercial quantity was being carried and had managed to avoid arrest then and there; it is not permissible for the court to direct interim release of the said vehicle pending trial, as at this stage with the above presumption, since it is not permissible to take even a view on the face of the available material that said carriage/transportation was not within the knowledge of the petitioner and that he had taken all reasonable precautions against such use. According to him, in the peculiar facts and circumstances projected by the prosecution, the court cannot direct for interim release of the vehicle of the petitioner without taking a prima facie view as to rebuttal of the presumption that there are reasonable grounds of believing that the petitioner-owner who is arraigned as an accused as to have personally transporting contraband ganja in the seized vehicle owned by him, is not involved in commission of such offence and in the light of what has been said in sub-section-3 of section-60 of the NDPS Act. He submitted that the cited cases are of no help of the petitioner's case as no such discussion as to all these peculiar and special factual aspects and their examination in the

backdrop of the statutory provisions keeping in view the legislative intent behind the enactment have been made therein while passing the order and the only ratio that can be culled out therefrom being that the court is not bereft of the power to direct interim release of the vehicle pending trial, is of no assistance in the facts and circumstances of the case on hand, for the prayer as advanced.

Learned counsel for the petitioner having submitted the written note on his submission, the same has been taken on record and carefully perused.

6. On the above rival submissions, this Court is first led to give a careful reading to section-60 of the NDPS Act which stands under the heading "Liability of Illicit Drugs, Substances, Plants, Articles and Conveyances to Confiscation."

Sub-section (1) of said section provides that whenever an offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance etc. as also the materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation. The next sub-section (2) relates to the confiscation of narcotic drug or psychotropic substance lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance or controlled substance which is liable to confiscations under sub-section (1) and the receptacles, packages and coverings in which any narcotic drug or psychotropic substance or controlled substance, materials, apparatus or utensils liable to confiscation under sub-section (1) is found and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

Sub-section (3) of said section be now reproduced:-

> "(3)Any animal or conveyance used in carrying any narcotic drug or psychotropic substance [or controlled substance] or any article liable to confiscations under sub-section (1) or sub-section (2) shall be liable to confiscations, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

7.(a) In the cited case of *Basanta Kumar Behera* (supra), a view has been taken that as provided in the NDPS Act, the vehicle used in commission of offence(s) is liable for confiscation only when it is proved that the offence(s) has/have been committed by using the vehicle in other words, the vehicle has been used in commission of the offence(s). In view of that, finding no such express provision in the NDPS Act to be standing / creating a bar for release of the vehicle pending trial i.e. for interim release of the vehicle in excluding the operation of the relevant provisions in section 451 of the Code of Criminal Procedure, an order of interim release of the vehicle has been favoured with, mainly, leaning upon the general view that the detention of the vehicle without any run would not only be of great loss to its owner in the long run if he is favoured with an order against the confiscation but also in case an order of confiscation is passed after trial, the State would not stand to benefit much as practically the value of the vehicle by then must have been reduced to 'zero'.

Given a careful reading to the above order although it is seen that the petitioner-owner had been arraigned as an accused in the case in connection of which the vehicle had been seized, yet its not ascertainable therefrom, whether as per the prosecution case the petitioner-owner therein was found to be present at the relevant date, time and place of seizure of the vehicle with the contraband ganja. It is however just indicated that petitioner-owner of said seized vehicle was allegedly involved in commission of offence under section 20(b)(ii)(C) of the NDPS Act.

In case of *Balabhadra Nayak Vrs. State of Orissa*; (2013) 54 OCR 876; the view has been that there being no provision in the NDPS Act excluding operation of section 451 of the Code of Criminal procedure for interim release of the vehicle, pending trial, the detention of the vehicle seized in connection with commission of offence under the NDPS Act till conclusion of the trial and a decision on confiscation is neither warranted nor justified.

(b) The same view has been taken in case of *Kishore Kumar Choudhury Vrs. State of Orissa* in CRLREV No. 71 of 2017 decided on 20.03.2017. It is pertinent to state that as gatherable from the facts and circumstances of the case, the petitioner-owner was not present at the time of detention of the vehicle followed by recovery and seizure of contraband ganja as well as the vehicle for alleged commission of offence under section 20(b)(ii)(C) of the

NDPS Act. The petitioner-owner therein had been implicated as an abettor or being a party to the criminal conspiracy to commit the said offence under section 29 of the NDPS Act which of course is punishable with the same punishment as provided for the offence that has been abetted or conspired to commit.

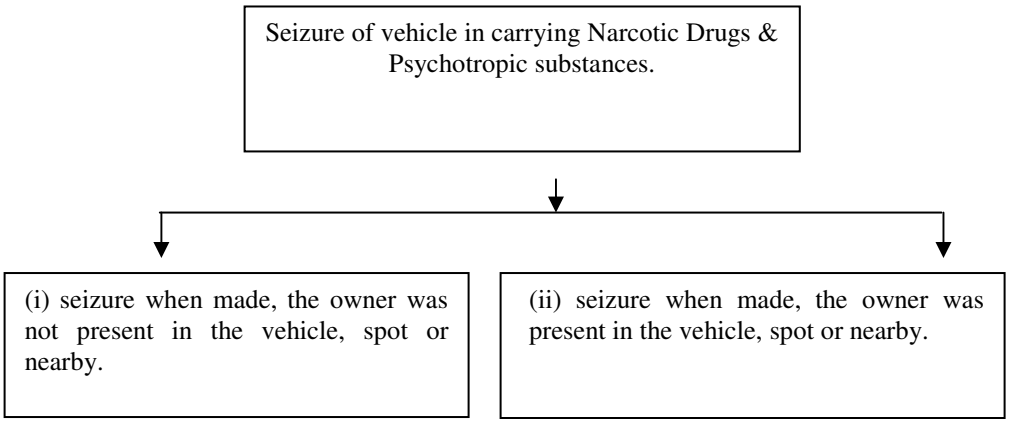
(c) In case of *Subash Chandra Panda* (supra) the question posed for answer was as to whether an innocent owner of a vehicle or conveyance would be made to suffer till an order in the matter of confiscation is passed on conclusion of the trial. There the said petitioner-owner was not facing the trial as an accused either for committing the offence or as an abettor or party to the conspiracy in committing the said offence. This was also the factual setting in case of *B.S. Mandanlal Vrs. State of NCT of Delhi*; 2002 CRIL. J 2605 and *Sujeet Kumar Biswas Vrs. State of U.P.*; 2001 CRLLJ 4431 which have been discussed therein and taken note of. In said factual background, the court has taken a view that sub-section(3) of section 60 of the NDPS Act cannot be read giving expanded operation as to bar the interim release of the vehicle pending trial causing sufferance to innocent owners, leaving their interest unprotected and at larch till conclusion of trial.

8. The NDPS Act was introduced by the Parliament with the objective of tackling the drug menace. For our purpose, glance at the provisions of section 8(C) and section 20(b) is important as the same express the anxiety of the legislature as against transportation and possession of narcotic drugs and psychotropic substances as to their prohibition and punishment which is certainly severe. The punishment part in drug trafficking undoubtedly is an important one but its preventive part is much more important. We cannot overlook the menace of substance of abuse which is in rise throughout. It brings a lot of problems related to health like mortality and psychiatric disorder as well as economic issues like finances spent on development services, drain of natural resources, loss of production and more importantly polluting the minds and health of vast section of youth of this nation which all boast that as one of the key factor in projecting the reason to be the leader of the world in future in asserting that our country is comparatively young in that way than may others. The war of drugs has resulted in more sensitive issues that in any other phenomenon in our history. It has its role in all types of crimes and in recent time, its spread is phenomenon and the transportation of the drugs of psychotropic substances is an important facet.

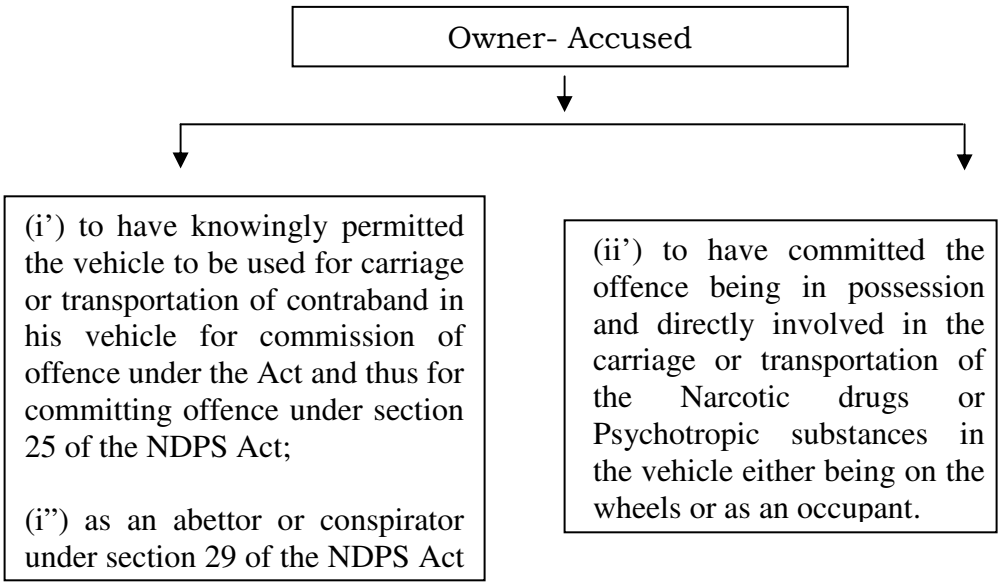
9. Section 35 of the NDPS Act therefore permits drawal of presumption in a prosecution under the Act as to absence of culpable mental state of the accused leaving it upon the accused to take it in defence through proof of such fact(s) that he had no such mental state with respect to the act charged as an offence in that prosecution. The 'Mental State' as per the explanation embraces 'intention', 'motive', 'knowledge of a fact' and 'belief in or reason to believe a fact' within its fold. More significantly, as a departure from the normal approach in the matter of standard of proof of facts in defence in the criminal trial, here sub-section (2) of said section mandates upon the court to hold the proof of any said fact(s) in defence beyond a reasonable doubt and not preponderance of probability flying in the face of the criminal jurisprudence.

10. Coming to section 54 of the NDPS Act, it is seen that in the trial for commission of offence under the Act unless and until the contrary is proved; presumption arises from possession of the illicit article as to commission of offence and said presumption can only be rebutted by the accused in the trial so as to escape from the criminal liability and punishment thereunder.

11. In cases of seizure of vehicles used in carrying the narcotic drugs or psychotropic substances, factual situations which ordinarily stand, for better appreciation are shown in the table given herein below:-



12. Pursuant to the seizure, owner is arraigned as an accused as described below:-



13. Undeniably, the NDPS Act makes no provision creating a bar for interim release of the vehicle etc. pending trial by expressly prohibiting or excluding the application of section 451 and of the Code of Criminal Procedure. The provision as to order of confiscation as envisaged in sub-section (3) of section 60 of the NDPS Act would spring into action at the end of trial and not before. In that state of affair in the statutory provision, the principle laid down in the cited cases that the courts have the power to order for interim release of the vehicle seized in connection with the commission of offence under NDPS Act has to hold the field.

It is trite law that every judgment must be read as applicable to the facts and circumstances of the particular case. The generality of the expression which may be found there are not intended to be the expositions of the whole law but governed and qualified by particular facts of the case in which such expressions are to be found out.

The case is only an authority for what it actually decides. The ratio decided in the cited cases was to the effect that the court has the power to direct interim release of the vehicle seized for commission of offence under NDPS Act pending trial but not as to when and under what facts and

circumstances, its to be so ordered or not with any such peculiarity of facts as also the role of the owner holding exception, if any.

14. This now takes us to pause for a moment and think as to whether the above principle would be made universally applicable notwithstanding and irrespective of and being oblivious of the alleged role of the petitioner-owner of the vehicle in the commission of offence which stands presumed until rebutted, by merely taking into account the guidelines set out in case of *Sunderbhai Ambala Desai* (supra) that it would not only cause loss to the owner but also to the State in the long run in the event of its detention till trial and then search out the answer that would that view not defeat and frustrate the very object and purpose of the enactment of NDPS Act which has the provision as to confiscation with the intent of prohibiting the owners from using their vehicles against such carriage and transportation standing as an important facet behind commission of the offences under the NDPS Act and its wild spreading throughout.

It must be borne in mind that the enactment of the provision as to confiscation of the vehicle under the NDPS Act is not merely aimed as an aid to the revenue generation but its basic objective is to prevent commission and spreading of the offences by visiting the owner with the heavy penalty for being extremely cautions/careful in allowing the user of the vehicle either himself or by his agent or driver.

15(a). Where the owner of the vehicle is not arraigned as an accused directly for commission of the offence under the NDPS Act as at (i)=(i') of the table given at para-11 and 12, the provision of section 54 of the NDPS Act as to presumption *prima facie* may not come into play. In such cases when the prosecution proves the required elements of section-25 & 29 of the NDPS Act, the question of confiscation would arise. So, till such proof of the basic facts; on the face of the facts laid, there may not be the presumption as to permitting the vehicle's user for the commission of offence or as to abatement or party to the conspiracy by the owner of the vehicle although notwithstanding the provision of section 116 of the Penal Code, the punishment for said offences remain the same as the principal offences.

(b) When the owner of the vehicle is not arraigned as an accused, only upon conviction of the offenders for commission of the offence using the vehicle, the owner would be called upon to show that they had so used the vehicle without his knowledge and having taken all reasonable precautions against such user as his end, the situation could not have been avoided. Till completion of said exercise on the fact of the aforesaid given case, the owner the owner may not be made to suffer by detention of his vehicle detriment to his interest.

(c) In the case where owner of the vehicle is arraigned as an accused directly for commission of the offence under the NDPS Act as at (ii)=(ii') of para-11 and 12, on the face of the facts laid, both the statutory provision contained in section 35 and 54 of the NDPS Act come into play in their full vigour from the very beginning subject to the proof in reversal by the owner-accused.

16. On the anvil of the above discussion and distinction of the cases as stated in the foregoing para-14 (c), passing an order of interim release of the vehicle pending trial simply in adherence to the guidelines given in *Sunderbhai Ambala Desai* (supra) case in my considered opinion would not only frustrate the object and purpose of the enactment of NDPS Act but also act in opposition to the great goal set forth for achievement. Interim release of the vehicle in such cases cannot be made in a routine manner merely viewing the fact that detention of the vehicle till end of trial would benefit none and sheer wastage of the property. It may be repeated and kept in mind that in providing the provision as to confiscation, the intent is not to earn revenue but to see that owner of the vehicle is thus put to scrupulous courteousness in view of the fatal consequences so that he would not only be discouraged but also take all such precautions and measures within his reach to prevent the transportation and commission of the offences under the NDPS Act; further keeping in view that in certain cases that detention may come to the aid of the investigation in tracing out the kingpin behind the smokes screen in operating the evil scheme in paralysing the progress of the nation as a whole. It is for these that the legislature has taken due care as to the interest of the owner of the articles or thing other than the narcotic drugs and psychotropic substance by providing second provision to subsection-2 of section 63 of the NDPS Act.

17. For the aforesaid, in my considered view by not placing any express provision either as to bar or exclusion of operation of the Chapter-XXXIV especially the provision of section 451 and 457 of the Code of Criminal Procedure, the legislature cannot be said to have thereby or thereunder intended that the owner of the vehicle at the time of detention being directly found carrying / transporting commercial quantity of contraband in his own vehicle by using it for the purpose, be at the same time allowed to utilise the service of the very same vehicle for his own use or for any commercial use, earn and enjoy all the benefits thereof till conclusion of the trial as a measure to safeguard and protect the interest of the said owner who under the given factual situations is presumed to have committed the offence under the NDPS Act with the culpable mental state till a finding is rendered in the trial to the contrary in accordance with law, when also the scope and possibility of its subsequent user in the same manner is not totally overruled. Thus in my considered view, in the obtained factual situations, there stands the partial bar as to interim release of the vehicle seizure in connection with the commission/transportation of the narcotic drugs or psychotropic substances.

18. Having said so and with that view, in the particular category of case (s) as stated in the forgoing paragraph 14(c), the interim release of the vehicle in my humble opinion is permissible only when the petitioner-owner of the vehicle *prima facie* satisfies the court as to the fulfilment of the requirements of becoming successful in discharging the reverse burden of proof as placed on him by virtue of section 35 and 54 of the NDPS Act and thus show that there is reasonable ground for believing that the petitioner-owner is not guilty of said offence of carrying / transporting the narcotic drugs and psychotropic substances himself.

19. Adverting to the case at hand, the petitioner-owner as per the prosecution case being present inside as well as his conduct post detention; the vehicle especially, keeping in view the recovery and seizure of commercial quantity of ganja from the said vehicle when none else was also present there inside, prima facie knowledge of the petitioner-owner as to keeping, possession and transportation of ganja in his vehicle stands presumed till a finding to the contrary is rendered by the trial. In that view of the matter when the petitioner-owner here has failed to show from the

facts and circumstances as those emanate from the materials on record in arriving at a prima facie satisfaction as to fulfilment of the requirements for the discharge of the reverse burden as obligated upon him under section 35 and 54 of the NDPS Act surfacing reasonable ground for believing that he is not guilty of said offence, this Court holds that the prayer for interim release of the vehicle sans merit.

20. Having said as above, in passing, this Court however records its dissatisfaction as to the cavalier fashion in which the learned Special Judge has disposed of the application under the impugned order. Given a simple reading to the impugned order, the adoption of casual and mechanical approach as well as non-application of judicial mind are quite apparent.

21. Outcome of all the aforesaid discussion is the inevitable consequence that I am not persuaded to interfere with the final result recorded under the impugned order in refusing to release the vehicle in question in favour of the petitioner-owner pending trial in exercise of revisional jurisdiction.

It is needless to point out that nothing stated/discussed hereinabove shall be taken as the expression/opinion on the merit of the case so as to impact the trial in any way.

22. Accordingly, the revision stands dismissed. Liberty is however given to the petitioner to move the learned Special Judge in seisin of the case for passing appropriate order in consequence with the second proviso to Section-63 of the NDPS Act.

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2020 (III) ILR - CUT-310

BISWANATH RATH, J.

W.P.(C) NO.18293 OF 2020

M/S. FUTURE TECHNOLOGIES .....Petitioner

.V.

THE CHIEF MANAGER,
PUNJAB NATIONAL BANK. .....Opp. Party

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ Petition seeking direction to the Bank to sanction and release the Additional Working Capital Term Loan under Emergency Credit Line Guarantee Scheme (ECLGS) as per NCGTC Circular dtd.23.05.2020 – Bank's plea that since the loan account of petitioner has been declared as NPA, no benefit under the scheme can be granted – No written order declaring the loan account of petitioner as NPA – Reasons, trying to justify the action for not granting the benefit stated in the counter affidavit, whether can be accepted? – Held, No – Reasons indicated.

(Para 15)

(B) SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 13 – Enforcement of security interest – Declaration of a loan account as NPA through telephonic conversation – Whether can be accepted to be legal? – Held, No – Practice unknown to law.

Now coming to deal with the claim of the petitioner that the stand of opposite party that petitioner already stood in NPA status on 28.02.2020 i.e. much prior to the cutoff date prescribed in the scheme, is just a creation to oppose applicability of the scheme to the petitioner establishment and runs contrary to their own case, this Court from the materials available on record and the observations made hereinabove finds, admittedly, there is no document establishing any communication to the petitioner-establishment that it has already been declared in NPA status. Except such a stand, for the first time it surfaces only through the stand of opposite party in para 4 of its counter affidavit and surprisingly to establish such stand, the Bank is taking help of some telephonic conversations in between the parties. This practice is unknown to law."

(Para 17)

Case Laws Relied on and Referred to :-

1. (1978) I SCC 405 : Manohar Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.
2. (2010) 7 SCC 678 : East Coast Railway & Anr. Vrs. Mahadev Appa Rao and Ors.
3. Writ petition (s) (Civil) No.825/2020 : Gajendra Sharma Vs. Union of India & Anr.
4. AIR 2004 SC 2371 : Mardia Chemicals Ltd. Etc. Vs. U.O.I. & Ors. Etc.

For Petitioner : M/s. M.K. Mishra, (Sr. Adv.)
T. Mishra, S. Senapati, J. Sahoo, S.S. Parida.

For Opp. Party : M/s.M.K. Mohapatra,C.B. Mohapatra.

JUDGMENT Date of Hearing : 20.10.2020 : Date of Judgment : 21.10.2020

BISWANATH RATH, J.

This Writ Petition is filed seeking a direction to the opposite party to sanction and release the Additional Working Capital Term Loan in favour of the petitioner under Emergency Credit Line Guarantee Scheme (ECLGS) as

per NCGTC Circular dtd.23.05.2020 under Annexure-1 and Reserve Bank of India (RBI) Guidelines / Circular dtd.21.06.2020 under Annexure-2 within a stipulated time and to declare the letter dtd.18.07.2020 under Annexure-4 as illegal in view of the "NCGTC" Circular dtd.23.05.2020 and RBI Circular dtd.21.06.2020 and to make the said rule absolute.

2. Short fact involving the case is that the petitioner M/s. Future Technologies is a proprietorship unit. In order to cater its need, about 13 years back petitioner establishment entered into loan through the opposite party-Bank Authority by the Loan Account bearing No.0553008700002392. Faced with Covid-19 pandemic and continuance of Nationwide lockdown the business and economic condition of the Small Business Enterprises / MSMEs in the Country including that of petitioner-establishment in the small Business Enterprise category got seriously affected. Considering the grave situation faced by Small Business Enterprises / MSMEs, Government of India with an intention to provide credit facilities to the Business Enterprises / MSMEs to at least to meet their operational liabilities, to restart their business announced and introduced several packages / schemes in the month of May, 2020 to aid all such small Business Enterprises / MSMEs in the Country through the scheduled commercial Banks, Financial Institutions and non Banking Finance Companies. One of such scheme introduced at this point of time is "Emergency Credit Line Guarantee Scheme" in short hereinafter (ECLGS) and the credit product under the scheme is named as "Guaranteed Emergency Credit Line" in short hereinafter (GECL) and the facility given under the said "Emergency Credit Line Guarantee Scheme" is fund based - Working Capital Term Loan, but fully guaranteed by Government of India. The fund and the Scheme, appears to be managed and operationalized by the "National Credit Guarantee Trustee Company Limited" (NCGTC), which is a wholly owned trustee company of Government of India. To facilitate the scheme Government of India announced twenty trillion rupees of financial package only to help the Small Business Enterprises / MSMEs with a view to tide over the crisis followed by Covid-19 pandemic and nationwide lockdown for a long time. Petitioner claimed that looking to the purpose behind such scheme is to provide assistance to all the small entrepreneurs to meet with salary of employees, rent and also to help restocking expenses, which have almost suffered during pandemic situation, while the matter stood thus the National Credit Guarantee Trustee Company Ltd. a wholly owned trustee company of Government of India issued the circular Ref. No.2842/NCGTC/ ECLGS dated May 23, 2020

to the Chairman and Managing Directors, Chief Executive Officers of all scheduled commercial Banks, Financial Institutions and non-banking Financial Companies informing all of them that the Government of India through the Ministry of Finance, Department of Financial services has introduced the "Emergency Credit Line Guarantee Scheme (ECLGS) for providing 100% guarantee coverage of Additional Working Capital Term Loans upto 20% of their entire outstanding credit upto Rs.25 crores i.e. upto Rs.5 crores as on February 29, 2020 subject to the account being less than or equal to 60 days past due as on that date. Following issuance of above circular the Reserve Bank of India issued circular dated 21.06.2020 to all Scheduled Commercial Bank, Financial Institutions and all other lending institutions on the subject "Assignment of Risk Weights on Credit Facilities (Guaranteed Emergency Credit Line) under the "Emergency Credit Line Guarantee Scheme (ECLGS)" stating that as credit facilities extended under the scheme guaranteed by NCGTC are backed by an unconditional and irrevocable guarantee provided by Government of India, it has been decided that Member Lending Institutions shall assign zero percent risk weight on the credit facilities extended under this scheme to the extent of guarantee coverage.

3. It is the further case of the petitioner that as the business of the petitioner got badly affected for Covid-19 pandemic and continuous lockdown in the entire country, it became difficult on the part of the petitioner to run the business of the establishment without further assistance. Accordingly the petitioner establishment on 28.06.2020 made a representation to the Opposite party Financial Institution requesting extension of benefit of the "Guaranteed Emergency Credit Line" under the Emergency Credit Line Guarantee Scheme (ECLGS) for revival of the business. It is alleged that Opposite party instead of extending the benefit vide letter dated 18.07.2020 directed the petitioner to provide alternate security acceptable to the Bank to secure the loan facility availed by it. Copy of representation of the petitioner and the response of the Opposite party are filed at Annexures-3 & 4 to the Writ Petition respectively. In the meantime vide letter dated 24.07.2020 (Annexure-5) petitioner submitted an explanation clarifying point wise and attempted to establish that there is no requirement of any further guarantee to avail the benefit of scheme and claimed that the irregularities claimed by Opposite party are baseless. Thus by filing the Writ Petition, the petitioner prayed for grant of relief mentioned in the prayer portion of the Writ Petition.

4. Pursuant to notice in the Writ Petition the sole opposite party while flatly opposing the claim of the petitioner, in filing counter affidavit in paragraph nos.4 & 6 contended as follows:

> "4. That, it is respectfully submitted that the averments made in Para-1 of the Writ Petition, the petitioner stated that the Sole-Opp. Party delaying, not sanctioning and not releasing the Covid Loan i.e. the Additional Working Capital Term Loan as per Govt. Policy under "Emergency Credit Line Guarantee Scheme (ECLGS)" as per NCGTC Guideline/Circular dtd.23.05.2020 and RBI Circular dtd.21.06.2020. Here it is stated that as per the guidelines of ECLGS & PNB-CECF the petitioner is not eligible for both the schemes, due to the loan account of the petitioner has already been declared as NPA before the cutoff date & also some irregularities in the secured mortgaged properties of the loan account of the petitioner.
>
> 6. That it is respectfully submitted that the averments made by the petitioner in para – 8 of the Writ Petition is false & baseless. Here it is stated that the eligible borrowers in Para -7 of the guidelines / circular of "Emergency Credit Line Guarantee Scheme (ECLGS)" dtd.23.05.2020 clearly stated that **"The Scheme is valid for existing customers on the books of MLIs. Borrower accounts should be less than or equal to 60 days past due as on 29th February 2020 in order to be eligible under the Scheme i.e. All borrowers which have not been classified as SMA 2 or NPA by any of the MLIs as on 29th February 2020 will be eligible for the scheme" Business Enterprises / MSME borrower accounts which had NPA or SMA-2 business status as on 29.02.2020 shall not be eligible under the Scheme.** & Para-5 of the PNB COVID-19 EMERGENCY CREDIT FACILITY (PNB CECF) clearly stated that **"All SMA-2 accounts and NPA accounts as on date of sanction are not eligible"**. In this case the petitioner's loan account has already been declared as NPA on dated 28th February, 2020 prior to the date fixed in the guideline of both the schemes. Hence the petitioner not at all eligible / entitled to get the Additional Working Capital Term Loan under ECLGS & PNB CECF Scheme & Statement of Loan Account are annexed herewith as **Annexure – 1, 2 & 3 respectively."**

From the counter affidavit it appears, though the sole opposite party did not dispute the introduction of Emergency Credit Line Guarantee Scheme (ECLGS) on 23rd May, 2020, but however, submitted that petitioner has already got into NPA status on 28th February, 2020 i.e. much prior to the cutoff date 29.02.2020 as mentioned under the Emergency Credit Line Guarantee Scheme (ECLGS) referred to by both the parties and thus is not entitled to the benefit under the Scheme referred to herein.

5. After filing of the counter affidavit the petitioner filed rejoinder affidavit claiming that the submission of the opposite party that the petitioner has been declared as NPA on 28th February, 2020 i.e. much prior to the cutoff

date 29.02.2020, is false and baseless. In paragraph no.4 of the rejoinder affidavit the petitioner averred as follows:

> "4. That the averments made in the counter affidavit that the Account of the petitioner became NPA on dtd.28.02.2020 prior to cut off date dtd.29.02.2020 for which he is not eligible for the "Additional Working Capital" under the Scheme "ECLGS" is completely false, afterthought, incorrect and misleading which fact is apparent on the Bank's communications/letters so also the Statement of the Account of the petitioner's Loan Account No.0553008700002392.
>
> The averments made in the counter affidavit regarding NPA and non-eligibility of the petitioner is afterthought and false because of the following points.
>
> (i) On dtd.28.06.2020, the petitioner made the application/representation to the Opp. Party-Bank requesting to extend the benefit of "Additional Working Capital" under the Scheme "ECLGS" FOR Revival of the business.
>
> (ii) On dtd. 24.07.2020, the Bank credited Rs.5,00,000/- in the Account of the petitioner ANNEXURE-6. It is humbly submitted here that in a NPA Account, no amount is ever credited by the Bank from its source.
>
> (iii) On dd.19.08.2020, the Bank allowed the petitioner to withdraw Rs.1,65,000/- from the Account (ANNEXURE-6). Thus, in other words, the petitioner's loan account is active not NPA.
>
> (iv) On dtd.18.07.2020, the Opp. Party-Bank asked/directed the petitioner to provide alternate security acceptable to Bank to secure the loan facility availed by him (ANNEXURE-4). Nowhere in the said letter, it is stated that the Account of the petitioner became NPA on dtd.28.02.2020 and he is not eligible for the "Additional Working Capital" under the Scheme "ECLGS".
>
> (v) On dtd.07.08.2020, this Hon'ble Court issued Notice in this writ petition and the counsel for the Opp. Party-Bank appeared in Court on instruction and copy of writ petition was served on him by Mail on the same day.
>
> (vi) On dtd.12.08.2020, the Bank through its Mail instructed/directed the petitioner to swear an affidavit (in attaching the Draft Affidavit drafted by Bank Advocate Sukant Mallick) for availing Additional Working Capital under "ECLGS". It has not been stated in the said "EMAIL Letter dtd.12.08.2020" or in Draft Affidavit that the Account of the petitioner became NPA on dtd.28.02.2020 and he is not eligible for the benefit under the scheme "ECLGS". Thus, the NPA strategy of the Bank is an afterthought by manipulating the documents.
>
> Had the petitioner not eligible to get the Additional Working Capital under "ECLGS", the Bank would not have asked for affidavit for sanction of loan under "ECLGS".

> Copies of the Account Statement of the account of the petitioner and the "EMAIL Letter dtd.12.08.2020" along with attached Draft affidavit are annexed hereto as **ANNEXURE-6 AND 7 Series respectively."**

6. Further pleading of the parties as it appears, in filing a memo along with affidavit the petitioner filed copy of the letters dated 15.06.2020, 22.06.2020 & 9.07.2020 issued by some other Branch of the Principal Bank to one M/s.Vishnu Enterprises and in the process attempted to challenge the action of the opposite party Bank for being discriminatory and selective. The opposite party also filed a memo accompanying therein the latest Master Circular of the Reserve Bank of India in the matter of declaration of NPA and the call history details involving the petitioner in order to counter the claim of petitioner on the manner of declaration of NPA vide earlier Master Circular and that there is no communication of NPA status involving petitioner at any point of time.

Relating to latest Master Circular of RBI and call history to counter the claim of the petitioner on the basis of an old circular involving the mode of declaration of NPA claimed to be not in existence and further through the call history details the opposite party attempted to establish its case that even though there has been no written communication on the declaration of the NPA status involving the petitioner, it has been claimed by the opposite party that the petitioner has been intimated regarding its NPA status since 28th February, 2020 during telephonic conversation and is established though call history details.

7. Based on the pleadings Mr. Mishra, learned Senior Advocate appearing on behalf of the petitioner taking this Court to the pleadings raised by the petitioner, advanced a multifaceted fold of argument. In the first instance Mr. Mishra, learned Senior Advocate taking this Court to the pleadings of both the parties submitted that there is no dispute that the petitioner establishment belongs to small Business Enterprises category and it has the application of Emergency Credit Line Guarantee Scheme (ECLGS). The second limb of argument in opposition to the claim of opposite party that the petitioner-establishment has already been declared under NPA status Mr. Mishra, learned Senior Advocate taking this Court to the documents on record through Annexures-4&7 the correspondences at the instance of the opposite party dated 18.07.2020 and 12.08.2020 respectively, contended that from their own record particularly through the above documents, it appears,

at least till issuing letters dated 12.08.2020 at page 69 of the brief and the draft affidavit-cum-undertaking accompanied therein at running page 70 of the brief, the Bank remained absolutely silent on the aspect of the petitioner becoming NPA. Mr. Mishra, learned Senior Advocate therefore contended that it is for the first time after receipt of copy of the Writ Petition and the documents enclosed therein, the opposite party has created the story that the petitioner is already in NPA status since 28.02.2020 and thus it could not be entitled to the benefit of the Emergency Credit Line Guarantee Scheme (ECLGS) relied on.

Mr. Mishra, learned Senior Advocate advancing his submission in challenge to petitioner's NPA status as claimed by its counterpart, taking this Court to the clause 2.1.6 of Master Circular of RBI contended that for the Master Circular of the Reserve Bank of India, a Bank is required to make provision for NPAs at the end of each calendar quarter i.e. as at the end of March / June / September / December. It is, in view of the above provision mentioned in the Master Circular of the Reserve Bank of India Mr. Mishra, learned Senior Advocate contended that it was otherwise also not possible to declare a customer NPA prior to end of March and the claim of declaration of the petitioner under NPA status is stated to be a story hatched by the opposite party for the purpose of keeping the petitioner away from the benefit of the Emergency Credit Line Guarantee Scheme (ECLGS). Coming to the other limb of submission Mr. Mishra, learned Senior Advocate also contended that the intention behind the Emergency Credit Line Guarantee Scheme (ECLGS) is to support the small Business Enterprises struggling to meet their operationalization liabilities due to Covid-19 pandemic and Nationwide lockdown and any transaction involving the original loan should not have any bearing in dealing with the case of the petitioner involving claim of benefit under the Emergency Credit Line Guarantee Scheme (ECLGS).

In supplementing his claim Mr. Mishra, learned Senior Advocate taking this Court to the circulars at Annexures-1 & 2 claimed that the opposite party should simply provide benefit of Emergency Credit Line Guarantee Scheme (ECLGS) to the petitioner-establishment for revival of its business for being affected due to Covid-19 pandemic and Nationwide lockdown, keeping in view that the entire guarantee is given by the Government of India.

8. It is, in the above view of the matter, Mr. Mishra, learned Senior Advocate contended that for the purpose behind the scheme under the circulars vide Annexures-1 & 2, there was no occasion for the opposite party to claim for alternate security acceptable by the Bank to secure the loan facility availed by the petitioner. Mr. Mishra, learned Senior Advocate also claimed that such action of the opposite party is arbitrary and also contrary to the policy of the Government of India as well as the Reserve Bank of India and as such the attempt of the opposite party, appears to be frustrating the implementation of the Emergency Credit Line Guarantee Scheme (ECLGS) otherwise. Reverting back to the opposition to the claim of the opposite party regarding the petitioner's becoming NPA since 28.02.2020 Mr. M.K. Mishra, learned Senior Advocate contended that for their own conduct in making correspondence upto August, 2020, such a plea not only appears to be a cock and bull story created by the opposite party but even assuming the stand of the opposite party that the Master Circular of the Reserve Bank of India referred to by the petitioner does not have any existence and there surfaced, Master Circular of the Reserve Bank of India 2015 takes out the provision at clause 2.1.6. For the introduction of new provision in clause 2.1.4 there is classification of NPA, possible only in terms of paragraph 4.2.4 of the Master Circular 2015 and there is no following of the provision by the opposite party. Mr. Mishra, learned Senior Advocate further taking this Court to the claim of communication of NPA status to the petitioner by the opposite party through telephonic conversation contended that there is no such discussion with the Bank and on the other hand the petitioner came to know about such allegation only through the counter affidavit filed after receipt of notice in the Writ Petition.

9. Mr. Mishra, learned Senior Advocate further taking this Court to the letters dated 15.06.2020, 22.06.2020 & 9.07.2020 appearing to be correspondences in between another branch under the Punjab National Bank and M/s. Vishnu Enterprises issued in the middle of June and first week of September this year respectively, claimed that even in case of finding one establishment in NPA status the Punjab National Bank itself is not only accommodating its clients but also facilitating regularization of such accounts. Mr. Mishra, learned Senior Advocate therefore contended that behaviour of the opposite party towards petitioner remains not only discriminatory but also targeting parties to their sweet will.

Mr. Mishra, learned Senior Advocate appearing on behalf of the petitioner taking this Court to the materials available at page 66 in Annexure-6 submitted that the claim of opposite party that the petitioner's account is already in the NPA status since 28.02.2020 remains contrary to their own documents available on record as in several transactions taking place in the middle of August, 2020 the opposite party-Bank has allowed for operation involving the petitioner's account involved herein.

10. In concluding his submission taking support of the principles laid down by the Hon'ble apex court that on the validity of an order it must be judged by reasons so mentioned and cannot be supplemented by the fresh reasons in shape of affidavits, Mr. Mishra, learned Senior Advocate relied on some judgments of the Hon'ble apex Court in the case of ***Manohar Singh Gill and Another*** *Vrs.* ***The Chief Election Commissioner, New Delhi and others****,* as reported in (1978) I SCC 405, in the case of ***East Coast Railway and another*** *Vrs.* ***Mahadev Appa Rao and Others*** as reported in (2010) 7 SCC 678 and in the last taking this Court to the development taken place in the case of ***Gajendra Sharma*** *Vrs.* ***Union of India & Anr.*** vide Writ petition (s) (Civil) No.825/2020, contended that the view taken by the Hon'ble apex Court involving NPA status of a party is also applicable to the case of the petitioner.

It is, in the above circumstance Mr. Mishra, learned Senior Advocate while claiming for declaring the action of the opposite party as bad also made request for issuing suitable direction to the opposite party to forthwith extend the benefit of the Emergency Credit Line Guarantee Scheme (ECLGS) to the petitioner at least in the interest of survival of the petitioner-establishment who has already entered into bad financial condition for continuous Lockdown due to Covid-19.

11. To the contrary Mr. M.K. Mohapatra, learned counsel for the opposite party-Bank while denying each claim made by the petitioner submitted that the Emergency Credit Line Guarantee Scheme (ECLGS) as per the NCGCT Guideline / circular dated 23.05.2020 and the Reserve Bank of India circular dated 21.06.2020 appearing at Annexures-1 & 2 has a clear stipulation disentitling the benefit of the Emergency Credit Line Guarantee Scheme (ECLGS) to the parties declared as NPA as on 28.02.2020 i.e. prior to the cutoff date on 29.02.2020. This apart, there were also some irregularities in the secured mortgaged properties involving the loan account of the petitioner

disentitling the petitioner from the benefits of the Scheme. Similarly, taking this Court to the plea of the opposite party in the paragraph 6 of the counter affidavit and also referring to the paragraph 7 of the guideline / circular of Emergency Credit Line Guarantee Scheme (ECLGS) dated 23.05.2020 Mr. Mohapatra, learned counsel for the opposite party submitted that the scheme is valid only for existing customer on the book of MLIs and the Borrower accounts should be less than or equal to 60 days past due as on 29.02.2020 in order to be eligible under the scheme. In other words, borrowers which have been classified as SMA-2 or NPA by any of the MLIs as on 29.02.2020 will be eligible for the Emergency Credit Line Guarantee Scheme (ECLGS). In the premises and as the petitioner's loan account had already been declared as NPA on 28.02.2020 i.e. much prior to the cutoff date fixed in the guideline of both the scheme, it is claimed that the petitioner is not eligible or entitled to get the additional working capital term loan.

While disputing the existence of the Master Circular of Reserve Bank of India referred to by Mr. Mishra, learned Senior Advocate for the petitioner, taking this Court to the 2015 Master Circular of the Reserve Bank of India Mr. Mohapatra, learned counsel for the Bank submitted that as the old provision at clause 2.1.6 in the old master circular remains non-existence for the introduction of the 2015 master circular, there is no requirement of declaring one NPA at the end of each quarter year and the Bank involved can declare its borrower in the NPA status at any point of time. In reference to the statement of telephonic conversation filed by the Bank through its memo dated 23.09.2020 Mr. M.K. Mohapatra, learned counsel for the opposite party taking this Court to the call details at page 31 of its memo dated 23.09.2020 involving Mobile No.919337102281 dated 22nd May, 2020 1.46 p.m and 29th February, 2020 4.57 p.m. attempted to establish that there is oral communication to the petitioner for becoming NPA by the Bank through the above telephonic conversations. Mr. Mohapatra, learned counsel for the Bank however did not dispute the allegation of the petitioner that as of now there is no written communication declaring the status of the petitioner as NPA from the side of opposite party Branch.

12. Referring to the judgment cited by Mr. Mishra, learned Senior Advocate appearing on behalf of the petitioner Mr. Mohapatra, learned counsel for the opposite party - Bank contended that for the involvement of different fact and scenario the cases cited on behalf of the petitioner are not applicable to the case at hand. Mr. Mohapatra, learned counsel for the

opposite party – Bank, however, did not dispute the mode of declaring NPA under the 2015 Master Circular of the Reserve Bank of India. Mr. Mohapatra, learned counsel for the opposite party however contended that there is no established procedure to intimate regarding NPA status involving any borrower and therefore, claimed that there is no difficulty in communicating such information through telephone.

In the hearing dated 20.10.2020, Sri Mohapatra, learned counsel for the Bank taking this Court through the comprehensive written note of argument on behalf of the O.P. dated 12.10.2020 on a reiteration of his earlier submission submitted that due to NPA status of the petitioner's loan account as on 28.2.2020, i.e., prior to the cut off date 29.2.2020, the petitioner is not eligible for ECLGS Credit facility and referred to Paragraph-7 as well as Paragraph-8 at Annexure-1 of the counter affidavit to justify his such case. Further referring to Clause 2.1.2 of RBI Master Circular 2015 attempted to submit that under the above provision, the petitioner was clearly barred to get the benefit of ECLGS Scheme. In reiteration of his submission made earlier, Sri Mohapatra again submitted that the Master Circular referred to by Sri Mishra, Sr.Advocate, has no application to the case at hand. Sri Mohapatra also reiterated his stand that there is no established provision to communicate the NPA Status to a borrower and by telephonic conversation as claimed in counter affidavit be deemed to be communication of NPA Status to the petitioner already. Referring to the judgment relied on by Sri Mishra, Sr.Advocate, Sri Mohapatra, learned counsel submitted that none of the citations supports the case of the petitioner and accordingly prayed for dismissal of the writ petition.

13. Considering the submissions made by the respective parties this Court finds, there is no dispute that petitioner is a small Business Entrepreneur and entitled to the benefit under the scheme vide Annexures-1 & 2 provided it satisfies the specific criteria mentioned therein. Submissions of the respective counsel further boil down to the extent, opposite party claims that petitioner establishment is already got into NPA status prior to 29.02.2020, whereas petitioner-entrepreneur claims, there is no such determination as on the date of filing of Writ Petition on 4.08.2020 and Bank is just lying in making such a claim. Sum and substance of submissions of respective counsel also makes it clear that there is a subsequent Master Circular of Reserve Bank of India in the year 2015 and the previous Master Circular may not have an application to the case at hand.

14. From the submission of Mr. Mishra, learned Senior Advocate appearing on behalf of the petitioner it appears, even assuming that a party is already in NPA status, but the Bank is accommodating such party as clearly borne through the letters dated 15.06.2020, 22.06.2020 & 9.07.2020, whereas treating the petitioner differently. There is no denial to such statement of Sri Mishra, learned Senior Advocate by Sri Mohpatra, learned counsel who counters such claim only with the statement that letters referred to belongs to some other Branch and may not have application to the case at hand. This Court takes here note of certain facts i.e. to the application of the petitioner vide Annexure-3 on 28.06.2020 following the circulars at Annexures 1 & 2. For first time vide Annexure-4, the Bank-opposite party on 18.07.2020 responded the petitioner but did not mention about petitioner in NPA status by 28.02.2020.

Similarly by the document vide Annexure-7 series a mail communication dated 12.08.2020 finds place at page 69 of the brief the Bank appears to have made a mail correspondence with the petitioner on 12.08.2020 accompanying therein a draft affidavit again it did indicate regarding petitioner getting into NPA status rather from the contents therein it appears, the Bank was moving to consider the case of the petitioner under the scheme referred to. Surprisingly it took a u-turn and started opposing the claim of entitlement of petitioner on the basis of oral claim of petitioner getting into NPA status. Taking into account the contentions raised by Mr. Mohapatra, learned counsel for the opposite party that the letters referred to hereinabove belongs to some other Branch and that has no application to the case of the petitioner, this Court finds, the Bank is not denying the fact that the Punjab National Bank providing opportunity to the similarly situated persons, may be by a different Branch. Hence this Court here observes, there cannot be different principles applied by different Branches functioning under the main Institution i.e. Punjab National Bank and accordingly, not only holds the allegation of the petitioner that there is no communication to the petitioner of becoming NPA status, has force but the Bank has also the practice of communicating a party becoming a NPA status and giving chances to overcome from such status. It is, in the circumstance, this Court is compelled to observe that story created by the Bank for the petitioner becoming NPA status and therefore not eligible to get the benefit of scheme, becomes illegal and has no foundation. Here taking into consideration the provision at Clause 2.1.4 read with 4.2.4 of the 2015 Master Circular of the R.B.I this Court finds, t he opposite party-establishment being an Institution

under the Reserve Bank of India is bound by the provision at clause 2.1.4 as well as 4.2.4 and as such, the oral stand taken by the Bank for declaration of an Industrial Establishment under NPA status also remains contrary to the provisions in the Master Circular of the Reserve Bank of India 2015.

15. It is here, taking into consideration the decisions referred to hereinabove relied on by Mr. Mishra, learned Senior Advocate appearing on behalf of the petitioner, this Court here finds, the decisions reads as follows:

Vide (1978) 1 SCC 405 the Hon'ble apex Court in para-8 observed as follows:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16
>
> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older:

Similarly in 2010(7) SCC 678 the Hon'ble apex Court in para-9 observed as follows:

> "9. There is no quarrel with the well-settled proposition of law that an order passed by a public authority exercising administrative/ executive or statutory powers' must be judged by the reasons stated in the order or any record or file contemporaneously maintained. It follows that the infirmity arising out of the absence of reasons cannot be cured by the authority passing the order stating such reasons in an affidavit field before the court where the validity of any such order is under challenge. The legal position in this regard is settled by the decision of this Court in ***Commissioner of Police v. Gordhandas Bhanji,*** reported in AIR 1952 SC 16, wherein this Court observed : (AIR p.18, para9)
>
> "9.....public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the

> order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

The Hon'ble apex Court in the case of ***Gajendra Sharma Vrs. Union of India and another*** (Writ Petition (s) (Civil) No(s).825 of 2020) adjourned the matter with the following observation:

> ".....The affidavit, which does not give necessary details, as were required by this Court's order dated 10.09.2020, Shri Tushar Mehta, learned Solicitor General and Shri V. Giri, learned senior counsel, pray for further time to file additional affidavit bringing on record the relevant decisions and circulars issued. Learned counsel appearing for the petitioners including the writ petitioners, related to different sectors, have also prayed for time to file reply to the affidavit, which we are inclined to grant. We, thus, allow one week's time to file reply to the additional affidavit dated 02.10.2020. During the said period, the learned counsel appearing for the Reserve Bank of India and learned Solicitor General as well as learned counsel appearing for the different banks and the Indian Bank Association may also file their additional affidavit bringing on record the relevant policy decisions, guidelines consequent to decision of the Government and Reserve Bank of India. The Union of India and the Reserve Bank of India may also file counter affidavit in other writ petitions where certain additional issues have been raised. The Government of India as well as Reserve Bank of India in the additional affidavit may also give their response with regard to different sectors grievances highlighted by different writ petitioners in the 19 intervention applications. Shri Tushar Mehta, learned Solicitor General, as well as Shri V. Giri, learned senior counsel, pray that they shall be filing consolidated affidavit, copy of which shall be sent to all. Let the affidavit be filed by 09.10.2020. List on 13.10.2020."

For there being no following of provisions required before declaring a borrower NPA and as this Court finds, telephonic communication to a borrower to have come in NPA status, petitioner since denied to have received any such communication, this Court observes, petitioner here is entitled to the benefit of interim order dated 3.09.2020 passed in W.P.(s) (civil) No(s).825 of 2020 in the case of ***Gajendra Sharma*** *Vrs.* ***Union of India & Anr.,*** which reads as follows :

> "At the request of the Mr. Tushar Mehta, learned Solicitor General, the matter is adjourned for 10.09.2020.
>
> Mr. Harish Salve, learned Senior Advocate, submitted that no account shall become NPA at least for a period of two months.
>
> In view of the above, the accounts which were not declared NPA till 31.08.2020 shall not be declared NPA till further orders."

This Court from Annexure-6, page 66-an account statement of petitioner's account involved herein finds, petitioner has been permitted to draw a sum of Rs.1,65,000/- in a transaction on 19.08.2020, this apart, there is also some transaction involving the same account on 14.08.2020 as appearing at page 66 again, thus the claim of opposite party that petitioner's account remains in NPA status and thus not in operation, mismatches with their own materials available on record.

On reading the decisions referred to hereinabove this Court finds, the decisions have application to the stand of the petitioner that there cannot be oral communication in the matter of such serious decisions.

16. Attending to the response of the Bank the opposite party that there is no established practice to notice of one's becoming NPA to the borrower this Court from Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 finds the provision reads as follows:

> "13. Enforcement of security interest.-
>
> (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.
>
> (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as on- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).
>
> (3) The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower."

From the above it becomes clear that once one is declared NPA still there is scope for the borrower to overcome such situation and Bank is required to provide opportunity to the party facing NPA status. Here even assuming that petitioner was declared NPA though not communicated but it having taken place in the month of February, no action as contemplated in Section 13 of the Act, 2002 is undertaken even till now. Thus creating a

grave doubt in the claim of the opposite party so far its claim of NPA involving the petitioner is concerned, such a stand does not stand any taste.

That in deciding several issues Hon'ble apex Court in the case of ***Mardia Chemicals Ltd. Etc.*** *Vs.* ***U.O.I. & Ors. Etc. Etc*** decided on 8.04.2004 as reported in **AIR 2004 SC 2371** in the matter of dealing with NPA status involving a borrower has observed as follows:

> "44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of the Reserve Bank of India in relation to classifying the NPA's while stressing the need of expeditious steps in taking a decision for classifying and identification of NPA's says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved."

Similarly in the case of ***M/s. Sardar Associates & Ors.*** *Vrs.* ***Punjab & Sind Bank & Ors.*** decided on 31st July, 2009 in para 14 & 15 therein observed as follows:

> "14. The Reserve Bank of India is a statutory authority. It exercises supervisory power in the matter of functionings of the Scheduled Banks. The matter relating to supervision of Scheduled Banks is also governed by the Reserve Bank of India Act. For the aforementioned purpose, the Reserve Bank is entitled to issue guidelines from time to time.
>
> 15. The Parliament also enacted the 1949 Act to consolidate and amend the law relating to banking.
>
> Section 5(l) of the 1949 Act defines "Reserve Bank" to mean the Reserve Bank of India constituted under Section 3 of the Reserve Bank of India Act, 1934.
>
> By reason of various provisions of the 1949 Act, the Reserve Bank is empowered to control and supervise the functioning of the Scheduled Banks. The 1949 Act also provides for power of the Reserve Bank to control advances by banking companies in terms of Section 21 of the 1949 Act which reads as under:

> 21 - Power of Reserve Bank to control advances by banking companies (1) Where the Reserve Bank is satisfied that it is necessary or expedient in the public interest or in the interests of depositors or banking policy so to do, it may determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular, and when the policy has been so determined, all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy as so determined.
>
> (2) Without prejudice to the generality of the power vested in the Reserve Bank under sub- section (1) the Reserve Bank may give directions to banking companies, either generally or to any banking company or group of banking companies in particular, as to-
>
> (a) the purposes for which advances may or may not be made,
>
> (b) the margins to be maintained in respect of secured advances,
>
> (c) the maximum amount of advances or other financial accommodation which, having regard to the paid-up capital, reserves and deposits of a banking company and other relevant considerations, may be made by that banking company to any one company, firm, association of persons or individual,
>
> (d) the maximum amount up to which, having regard to the considerations referred to in clause
>
> (c) guarantees may be given by a banking company on behalf of any one company, firm, association of persons or individual, and
>
> (e) the rate of interest and other terms and conditions on which advances or other financial accommodation may be made or guarantees may be given.
>
> (3) Every banking company shall be bound to comply with any directions given to it under this section."

First decision taken note hereinabove decides the manner and steps to be undertaken before declaring a borrower in NPA status whereas the second decision holds the Reserve Bank guidelines are of binding nature on the Banks. This Court, therefore, observes that there is no following of established practice by the opposite party Bank before the so called self declaration of NPA status in the petitioner.

17. Now coming to deal with the claim of the petitioner that the stand of opposite party that petitioner already stood in NPA status on 28.02.2020 i.e. much prior to the cutoff date prescribed in the scheme, is just a creation to oppose applicability of the scheme to the petitioner establishment and runs contrary to their own case, this Court from the materials available on record

and the observations made hereinabove finds, admittedly, there is no document establishing any communication to the petitioner-establishment that it has already been declared in NPA status. Except such a stand, for the first time it surfaces only through the stand of opposite party in para 4 of its counter affidavit and surprisingly to establish such stand, the Bank is taking help of some telephonic conversations in between the parties. This practice is unknown to law.

18. It further appears, in consideration of bad financial conditions in such establishments Government in its appropriate department resolved to waive the compound interest on loan upto rupees twenty million under separate Covid-19 support plan, which is a move to bring relief to millions of borrowers. The Emergency Credit Line Guarantee Scheme (ECLGS) referred to hereinabove by both the parties also makes it clear that intention of Central Govt. by infusion of money by different process is an attempt to see survival of small Industrial Enterprises including M.S.M.Es and for the attitude of the opposite party-Bank in targeting the case of the petitioner in the garb of so called self declaration of back dated NPA, this Court finds, the same appears to be contrary to the intention of the Central Government, which is not in the better interest of the Nation.

19. So far as the opposite party disentitling the petitioner from the benefit of the scheme on the premises of some irregularities in the secured mortgaged properties involving the loan account bearing No.0553008700002392 is concerned, it appears, it is for the first time vide letter dated 12.08.2020 at Annexure-7 it is intimated to the petitioner that there has been some irregularities in the running of the particular account nearly 13 years, only in August, 2020. This Court here observes, in the event there were some irregularities existing and the petitioner was accommodated for such long period, the same could have been dealt with separately and could not have been attached as a condition to the grant of benefit under the Emergency Credit Line Guarantee Scheme (ECLGS) and this Court, therefore, directs the opposite party-Bank, in the event any such irregularities are there, that should not stand on the way of petitioner from getting the benefit of the Scheme and if any such ground exists, that shall be dealt independent of such consideration.

20. Before proceeding to final part of the judgment, this Court taking into account the written submission made in the written note of submission dated

12.10.2020 by the opposite party that this Court did not give similar opportunity of hearing like that given to the learned counsel for the petitioner, finds, this is an unfortunate statement made by the counsel on behalf of the opposite party. Every time the case is taken, it ended only after completion of submissions of respective counsels. Except on one occasion when Video Conferencing was snapped, for which hearing opportunity was given on the next date. There was an attempt by Sri Mohapatra, learned counsel for the Bank to block the hearing of the case, who though filed the counter affidavit, but did not serve copy of the counter affidavit on the learned counsel for the petitioner. Considering this, this Court by order dated 27.08.2020 directed the learned counsel for the Bank to serve a copy of counter affidavit on the learned counsel for the petitioner. Then the case was next taken up on 3.09.2020 for final hearing, on which date on request of learned counsel for the petitioner including learned counsel for Bank the matter was postponed to 7th of September 2020 for hearing. Thereafter the case was posted on 8.09.2020 and accordingly the case was taken up for hearing and though the learned counsel for the Bank joined through Video Conferencing but he could not get contact for hearing through Video conferencing, after hearing him continued for some time, therefore, the matter was adjourned to 11.09.2020 giving opportunity to the opposite party-Bank. On posting of the case on 11.09.2020 Sri Mohapatra, learned counsel for the Bank after arguing at length attempted for adjournment of the matter to meet with the queries made by the Court and thus the matter was adjourned to the week commencing 21st of September, 2020. Matter next came up on 23.09.2020 and was adjourned to next week in view of order dated 8.09.2020, by another Bench. Matter next came up on 30.09.2020, when the matter remained further part heard and posted to next week. On 8.10.2020 after long hearing the matter was closed for judgment. In the meantime, learned Senior Advocate appearing on behalf of the petitioner filed a further note and to provide natural justice to the opposite party-Bank, this Court suo motu directed for listing of the matter on 16.10.2020 under the heading "To be mentioned". On this date counsel for the Bank neither appeared nor prayed for adjournment and this Court suo motu adjourned the matter to 20.10.2020 for further hearing in view of notes of submission by both sides in the meantime. On 20.10.2020 there was again long argument by the learned counsel for the Bank and finally the matter was reserved for judgment to today (21.10.2020). This Court here observes,

In spite of giving fullest opportunity of hearing to both the counsels this Court finds an unfortunate statement made by Sri M.K. Mohapatra

learned counsel for the opposite party - Bank. This Court taking strong exception on the approach of Sri Mohapatra, learned counsel for the Bank while finding adoption of novel attempt for putting pressure on the assigned Court and/or with an ulterior motive to be utilized in future hopes and trusts that the opposite party as well as it's counsel shall refrain themselves from making such casual statements in written note of submissions in future.

21. In the above circumstance, this Court while declaring the letter dated 18.07.2020 vide Annexure-4 issued to the petitioner as bad, also declares that the communication vide Annexure-7 cannot come in the way of petitioner's getting benefit from the Scheme at Annexure-1 and Reserve Bank of India guideline / circular dated 21.06.2020 Annexure-2. This Court since declared the claim of opposite party that the petitioner-establishment has already come to NPA status, remains non-existence, directs the opposite party to release the required financial assistance in favour of the petitioner in terms of ECLGS Scheme as per NCGTC circular dated 23.05.2020 by completing entire exercise within a period of ten days from the date of this judgment.

22. The Writ Petition succeeds, but in the circumstances, there is no order as to cost.

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2020 (III) ILR - CUT-330

P. PATNAIK, J.

W.P.(C) NO. 5512 OF 2003

DR. SAILENDRA KUMAR NAYAK .....Petitioner

.V.

BERHAMPUR UNIVERSITY & ORS. .....Opp. Parties

SERVICE LAW – Promotion – Petitioner was promoted to the post of Professor – Subsequently reverted back on the basis of adverse entries made in the ACR – Writ petition challenging the legality, propriety and sustainability of the impugned order reverting the petitioner from the post of Professor, to the post of Reader – Plea that the order has been passed in total breach of principles of natural justice as no prior notice or show cause was asked before passing of the order and no opportunity of hearing in any manner was provided –

All arguments were examined with reference to the various provisions of the law – Held, on perusal of the impugned order of reversion, it appears that the same has been passed as a major penalty but the provisions laid down under statute 299 of the Odisha First Statute has not been followed which makes the impugned order unsustainable in the eye of law – Order set aside.

Case Laws Relied on and Referred to :-
1. (2005) 1 OLR 66 : (Dr. Birendra Kumar Nayak & Ors. .V. Registrar, Utkal University & Ors.

For petitioner : Mr. Jagannath Patnaik, Sr. Adv.
M/s. A. Dash, T.K.Patnaik & P.K. Jena.

For Opp. Parties : M/s. Akhil Mohapatra, R.C.Sahoo & J.M.Rout.

JUDGMENT Date of Hearing : 18.02.2020 : Date of Judgment : 03.07.2020

P. PATNAIK, J.

In this accompanied writ application the petitioner calls in question the legality, propriety and sustainability of the action of the opposite parties in passing the order dated 28.05.2003 (Annexure-3) by the Registrar, Berhampur University (O.P.No.1) reverting the petitioner from the post of Professor, Mathematics to the post of Reader and, therefore, the petitioner has inter alia, prayed for issuance of writ of certiorari for quashing of Annexure-3.

2. The brief facts as delineated in the writ application is that the petitioner was duly selected and appointed as a Lecturer in Mathematics in Berhampur University on 08.09.1978. During his service tenure, he obtained Ph. D. in the year 1984 and accordingly he was selected and promoted to the post of Reader w.e.f. 22.08.1987 as evident from Annexure-1 to the writ application. While continuing as such, the Selection Committee was constituted for the purpose of considering suitability and otherwise for promotion to the post of Professor as per the guidelines issued by the University Grants Commission for promotion, the petitioner was duly recommended and the said recommendation was accepted and cleared by the UGC, the Syndicate in its meeting dated 25.07.2001 approved the same and the order of promotion as Professor w.e.f. 31.12.1999 in favour of the petitioner was issued on 25.07.2001 vide Annexure-2. Accordingly he joined the promotional post of Professor on 25.07.2001. To the utter surprise and consternation, the order of reversion dated 28.05.2003 vide Annexure-3

has been passed by the Registrar (O.P. No.1) which is impugned in this writ application. Being aggrieved by the impugned order under Annexure-3, the instant writ application has been filed invoking extra-ordinary jurisdiction under Articles 226 & 227 of the Constitution of India for redressal of his grievances.

3.(i) Mr. P.K. Jena, learned counsel for petitioner has mainly contented that the impugned order under Annexure-3 has been passed in total breach of principles of natural justice as no prior notice or show-cause was asked from him before passing of the said order and no opportunity of any manner was provided to him prior to passing of the said order. Therefore, the impugned order is unsustainable in law as per decision rendered by this Court in W.P.(C) NO. 3253 of 2002 decided on 03.10.2002 (Dr. Dibakar Panigrahi v. Vice Chancellor, Berhampur University and others).

(ii) Learned counsel for the petitioner further submitted that the impugned order passed by the Vice Chancellor in pursuance of the letter dated 14.05.2003 issued by the Under Secretary to Chancellor on the ground of adverse ACR as communicated to him vide confidential letter dated 08.09.1998 is in violation of statutory provision of law and the Vice Chancellor failed to apply his mind before passing such order of reversion. Since there has been violation of the Orissa Universities First Statute, 1990 and the order was without ratification in the subsequent meeting of the Syndicate and the Chancellor and Vice Chancellor not being the expert in this subject, cannot act as an appellate authority and annul the decision of the Selection Committee consisting of the experts and the Syndicate, who have followed the guidelines and statutes strictly as per UGC Regulations.

(iii) Learned counsel for the petitioner further submitted that the Chancellor of the University is not the appellate authority to sit in appeal over the selection made and appointment order issued in favour of the petitioner except that he has only a limited power of deciding a dispute when arises between the Selection Committee and Syndicate as contemplated under section 21(5) of Orissa University Act, 1989. But the Chancellor in absence of any reference made under the said provision could not have issued the direction for reversion after lapse of over two years. Learned counsel for the petitioner further contended that by referring to the observation by the Hon'ble Supreme Court in the case of The Chancellor and another v. Bijayananda Kar and others (AIR 1994 SC 579), wherein it has been

succinctly held "this Court has repeatedly held that the decisions of the academic authorities should not ordinarily be interfered with by the Courts. Whether the candidate fulfills the requisite qualifications or not is a matter which should be entirely left to be decided by the academic bodies and the concerned Selection Committees which invariably consists of experts on the subject relevant to the selection……."

(iv) The Chancellor having no expertise to sit in the judgment over the decision of the Selection Committee consisting of eminent experts on the subject, where the nominee of the Chancellor is a part of it and the Vice-Chancellor being the Chairman of the Selection Committee, the decision taken cannot be interfered by the Chancellor or Vice Chancellor subsequently. This position of law has been relied upon by this Court in OJC NO. 6964 of 1993 (Dr. Bijay Kumar Sahu v. Chancellor, Berhampur University) decided on 20.12.1994.

(v) Learned counsel further contended that the Government Resolution dated 31.12.1999 under Annexure-5 in paragraph 4.9.0 deals with career advancement scheme for promotion in Universities and paragraph 4.10 deals with promotion from the post of Reader to the post of Professor after eight years of service as Reader and other eligibility criteria including presentation of the self appraisal report by the applicants.

Paragraph 4.7 deals with Selection Committee and mandates that the guidelines prescribed by the UGC shall be followed keeping in view the existing rules of the State Government and qualification and procedure for selection to the post of Professor prescribed by the UGC. The UGC in its Resolution dated 24.12.1998 under Annexure-4 issued guidelines relating to revision of pay and minimum qualification for appointment of teachers in Universities and Colleges. The said notification dated 24.12.1998 emphasizes to ensure the selection to the post of Professor after following rigorous selection procedure through selection committees constituted for the purpose.

Clause 2.6.0 of the UGC Regulations, 2000 is in regard to the minimum qualification for appointment on career advancement of teachers which provides among others that the Selection Committee to the post of Professor should be the same as that of direct recruitment and the candidates should present the self appraisal report which was duly presented by the petitioner before the Selection Committee along with other documents and

upon consideration of the same, he was found suitable and was promoted to the post of Professor. As such there was no irregularities or illegalities in the order of promotion.

(vi) Further contention of the learned counsel for the petitioner is that in view of section 21 of the Universities Act and Statute 258 of the Orissa Universities First Statute, 1990 which govern the field of appointment/promotion to the post of Professor in the University under C.A.S. (Career Advancement Scheme), the Selection Committee have followed the objective system of evaluation and on consideration of the suitability of the petitioner as per law more specifically the P.A.R. (Personal Appraisal Report) his name was recommended by the UGC approved by the Sub-Committee and the Syndicate, promotion to the post of Professor was given as such it cannot be said that the Selection Committee has not considered the ACR of the petitioner.

(vii) Further it has been submitted by the learned counsel for the petitioner that the reversion of the petitioner from the post of Professor to the post of Reader can be otherwise viewed as a major penalty but the mandatory provisions laid down under section 299 of the Orissa Universities First Statute has not been followed.

(viii) It has also been contended that the adverse remark on the ACR communicated to him vide confidential letter dated 08.09.1998 after one year and five months in violation of the guidelines and norms prescribed for such communication against which the petitioner had preferred appeal to the Hon'ble Chancellor under Annexure-9 to the writ application and the W.P.(C) NO. 6469 of 2003 are still pending.

(ix) Further contention of the learned counsel for the petitioner is that the impugned order of reversion passed on 28.05.2003 is not ratified in the immediate next meeting of the Syndicate which is in violation of Statute (Section 6(15) of the Act).

4. Controverting the averments made in the writ application, counter affidavit has been filed by O.Ps.1 & 2 wherein it has been submitted that the order of reversion of the petitioner is neither arbitrary nor illegal on the other hand the same has been passed as per the established Rules and procedure.

The U.G.C. vide D.O. dated 27.10.1999 directed the Universities to ensure that the selection to the post of Professor is made after following a

rigorous selection procedure through a Selection Committee constituted for the purpose. According to Para 4.10(d) (i) of the Government Resolution dated 31.12.1999 (Annexue-5), self appraisal reports are mandatory in order to be eligible for promotion to the rank of Professor under CAS. In the case of the petitioner, he had adverse entries in his self appraisal reports pertaining to the years 1995-96, 1996-97 and 1997-98. Hence he was not eligible for promotion to the rank of Professor under CAS. The Selection Committee which was privy to the self appraisal reports should have not recommended his case for promotion in view of adverse entries. When the fact came to the notice of Hon'ble Chancellor, he issued directions for reversion of the petitioner which was communicated vide letter dated 14.05.2003 by the Under Secretary to Chancellor. Further it has been submitted that it is an established fact that reversion is not a punishment and it does not violate any right of an individual. If the decision of the Selection Committee is not as per rules and procedures, the same can be interfered with to correct the irregularity. The adverse entries in the self appraisal reports are the basis on which the merit and suitability of an officer is assessed while promoting him to the next higher post. If that is not done, simply recording of adverse entries will have no effect. Statute 258 is a provision which provides for criteria for direct recruitment to the posts of University. However, in case of promotion, past performance as reflected in the self appraisal reports is vital to assess the merit and suitability of a person.

Statute 299 is meant for imposing punishment on the employees for the facts of omission and commission. In the present case, the irregularity in selection of the petitioner, in spite of having adverse CCRs have been rectified. Hence statute 299 has no relevance to the present case as the petitioner is not being punished for any of his acts of omission or commission. The impugned order is within the jurisdiction of the opposite parties and does not violate any of the provisions of the statutes and Act. Further it has been submitted that as per sub-section (15) of section 6 of the Act, the Vice Chancellor is competent to pass such order or take such decision as he deems proper and place the order or decision, as the case may be, before the Syndicate in its next meeting for ratification. In the present case, the Hon'ble Chancellor is the highest authority over the Syndicate and the Syndicate can not override the decision of the Hon'ble Chancellor.

5. Rejoinder to the counter affidavit has been filed by the petitioner wherein it has been contended that with regard to applicability of Statute 299,

there being no act of omission or commission on the part of the petitioner and no irregularity in the process of selection of the petitioner to the post of Professor, the order of reversion is passed which tantamounts to punishment for which Statute 299 is applicable. Moreover, since the impugned order affects adversely the interest of the petitioner, the principle of natural justice should have been very much followed as per the decision of this Court in the case of Dr. Dibakar Panigrahi (supra).

6. Additional affidavit has been filed by the petitioner wherein it has been submitted that for promotion to the post of Professor, consideration of ACR/CCR is not mandatory which is clear from the UGC Regulations, 2000. In the said Regulations, consideration of ACR/CCR has been made mandatory for promotion to the post of Lecturer (Senior Scale) and Lecturer (Senior Grade) but the same has not been made mandatory for promotion to the post of Professor. The relevant portion of the UGC Regulations 2.7.0 has been quoted in the said affidavit. Further it has been submitted that in the meantime the petitioner has already retired as Professor in Mathematics on reaching the age of superannuation w.e.f. 31.03.2010.

7. From the conceptual pleadings of the respective parties, the moot point that remains to be adjudicated, as to whether the impugned order of reversion under Annexure-3 issued by the Registrar pursuant to the orders of the Hon'ble Chancellor, is illegal and sustainable ?

8. In order to delve into and dwell upon the aforesaid issue, it would be apposite to refer to the clauses 7.5 and 7.6 of the C.A.S. which provides criteria for promotion from Reader to Professor and the same applies to every University established or incorporated by or under a Central Act, Provincial Act or a State Act as mentioned under Annexure-4 to the writ application.

Further the UGC prescribes a rigorous selection procedure through a Selection Committee constituted for the purpose of selection to the post of Professor where the nominee of Chancellor was one of them along with three experts in the concerned subject and Vice Chancellor will be the Chairperson of the Committee.

The Government of Odisha in its resolution dated 31.12.1999 vide Annexure-5 had decided to extend the UGC Scheme for University and College Teachers. This resolution provides criteria for promotion to the post

of Professor. UGC Regulations, 2000 vide Annexure-11 prescribes minimum qualification for appointment and Career Advancement of Lecturers, Readers and Professors of the Universities wherein consistent good performance is the criteria for promotion to the post of Lecturers, Readers under clauses 2.2.0 and 2.4.0 respectively whereas for promotion to the post of Professor the criteria is under clause 2.6.0.

9. In the instant case, the petitioner was appointed as Professor w.e.f. 31.12.1999 under Career Advancement Scheme as per UGC notification dated 24.12.1999, Govt. of Odisha Resolution dated 31.12.1999, notification of the Chancellor dated 3.3.2001 and the order was in derogation of the recommendations of the Selection Committee and clearance by the UGC vide letter dated 24.12.1998 as indicated under Anexure-8 to the writ application and accordingly the petitioner joined the promotional post on 25.07.2001. While continuing as such, against adverse remarks, petitioner filed an appeal dated 27.02.2001 vide Annexure-9 to Chancellor, Berhampur University for expunction of the adverse remarks but the same did not evoke any response. While the petitioner was on leave, the impugned order of reversion has been passed vide Annexure-3 for which the petitioner filed the instant writ application. Interim order dated 03.06.2003 of staying operation of Annexure-3 was passed until further order in Misc. Case No.5220 of 2003 and thereafter the petitioner retired on superannuation w.e.f. 31.03.2010 in the post of Professor in Mathematics as evident from the additional affidavit dated 1.11.2010.

10. The Chancellor of the University under section 5(9) of the Act, has the power to issue direction/instructions not inconsistent with the provisions with the Act and Statute on any matter connected with an University when any authority or Vice Chancellor fails to act in accordance with the provisions of the Act. Similarly section 5(10) of the Act provides the Chancellor to pass an order in writing annulling the proceeding the Senate, Syndicate, academic counsel or any other authority which is not in conformity with the Act/Statute/regulations/directions issued under Sub-section (9), provided before making any such order, he shall call upon the authority concerned to show cause as to why such an order should not be made and if any cause is shown within a reasonable time, he shall after giving an opportunity of hearing if so deemed proper consider the same. The direction in sub-section (9) of section 5 is in the nature of command to do a thing or instruction to guide when the authority failed to act under law but

such direction or instruction would not authorize a direction to undo a thing said to have already been done contrary to the provisions of law. The direction contemplated under sub-section (9) would not cover a case where the authorities have already acted in a manner consistent with law.

11. This has been held by this Court in deciding a batch of identical cases of reversion for adverse entry in the ACR of the Teaching Staff of Utkal University reported in (2005) 1 OLR 66 (Dr. Birendra Kumar Nayak and others v. Registrar, Utkal University and others). It would be relevant to refer to paragraph-18 of the aforesaid decision which is quoted herein below :

> "18. In view of our finding that the power under Sub-section (9) of Section 5 could not have been exercised in directing reversion of the petitioners on the ground that the selections and appointments made were not in conformity with law, it has to be considered as to whether the direction issued by the Chancellor can be sustained otherwise, treating it to be one under Sub-section (10) of Section 5 of the Act. It is the settled proposition of law that when an authority takes action which is within its competence, it cannot be held to be invalid merely because it purports to be made under a wrong provision of law, if it can be shown to be within its power under any other provision. But in this case, even though the Chancellor is vested with the power under Sub-section (10) of Section 5 to annul any decision of the Selection Committee as well as of the Syndicate in case he holds that the decision was not in conformity with law, but before exercise of such power, it is required under the proviso thereto, to issue a notice to the concerned authority and afford an opportunity to have its say in the matter and as such the final order to revert the petitioners thereby in effect annulling the decisions and the appointments made, cannot be saved, even if it is taken to have been issued under Sub-section (10) of Section 5 of the Act since undisputedly no show cause has been served on such authorities before the order was passed, Thus the impugned orders of the Chancellor under Sub-section (9) of Section 5 of the Act directing the University to revert the petitioners to their former post of Readers are quashed. Resultantly, the orders of the University reverting the petitioners to their former post of Readers are also quashed.

12. Apart from the aforesaid provisions, on perusal of the impugned order of reversion, it appears that the same has been passed as a major penalty but the provisions laid down under statute 299 of the Odisha First Statute has not been followed which makes the impugned order unsustainable in the eye of law.

13. On the cumulative effect of the aforesaid facts, reasons and judicial pronouncement, the impugned order of reversion under Annexure-3 is quashed and set aside. Accordingly the writ application stands allowed.

2020 (III) ILR - CUT-339

B. P. ROUTRAY, J.

CRLA NO. 246 AND 134 OF 2013

SRINIVAS RAO ……Appellant

.V.

STATE OF ORISSA ……Respondent

CRIMINAL APPEAL NO.134 OF 2013

ASISH KUMAR SWAIN ……..Appellant

.V.

STATE OF ORISSA ……..Respondent

CRIMINAL TRIAL – Offence U/s.20 (b) (ii) (c) of the NDPS Act – Informant is the investigating officer – Plea raised that, the informant cannot act as investigating officer – Effect on the trial – Held, It cannot be said that, in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled for acquittal – The question of bias or prejudice would depend upon the facts and circumstances of each case – Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias.

Case Laws Relied on and Referred to :-

1. (2009) 8 SCC 539 : Karnail Singh Vs. State of Haryana.
2. (2018) 70 OCR-340 : Ram Krushna Sahu Vs. State of Orissa.
3. 2018(17) SCC 627 : Mohanlal Vs. State of Punjab.
4. 2020 SCC OnLine SC 700 : Mukesh Singh Vs. State (Narcotic Branch of Delhi).

CRIMINAL APPEAL NO.246 OF 2013

For Appellant : Mr.M.K.Panda.

For Respondent : Mr.S.S.Mohapatra, A.S.C

CRIMINAL APPEAL NO.134 OF 2013

For Appellant : Mr.Tanmay Mishra.

For Respondent : Mr.S.S.Mohapatra, A.S.C.

JUDGMENT Date of Judgment :01.10.2020

B.P.ROUTRAY, J.

Both the appellants in the above two appeals have been convicted and sentenced to undergo rigorous imprisonment for ten years each and to pay

fine of Rs.1,00,000/- each for committing the offence under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "N.D.P.S.Act").

2. The charge was for the offence for which the appellants have been convicted by the learned trial court.

3. The prosecution story in nutshell is that, on 16.2.2011 at about 0.15 A.M., P.W.10, Ram Chandra Nayak, the Sub-Inspector of Police, Boipariguda Police Station received reliable information about transportation of contraband ganja in an Indica Car bearing Registration No.CG-17C-1388 from Malkangiri side. Said P.W.10 made Station Diary Entry No.343 dtd.16.2.2011 to that effect. Then he along with other staff viz. P.Ws.8, 9 and other officials went to Kundura crossing at Boipariguda bazar. At 05.30 A.M. he noticed the said vehicle i.e., Indica Car bearing Registration No.CG-17C-1388 coming on road which was intercepted by P.W.10. But before that one of the occupant, who is the third convict in the case, namely, Chintu@Gupta Prasad Jalla managed to flee away from the spot. These two appellants, who were in the front seat of the vehicle, as appellant Srinivas Rao was driving the vehicle and appellant Asish Kumar Swain was sitting in the side seat of the driver, were nabbed along with the vehicle. P.W.10 then found ganja packets kept in the vehicle. Both the appellants were asked as to if they wanted to be searched before any Gazatted Officer or Executive Magistrate to which they preferred for Executive Magistrate for searching. Accordingly, P.W.10 sent requisition for deputation of the Executive Magistrate (P.W.4) and also called a photographer, weighman (P.W.3) and other independent witnesses (P.Ws.1 & 2). The Executive Magistrate arrived at the spot at about 11.00 A.M. and before him the appellants were searched. On the personal search of appellant-Srinivas Rao, one purse, cash of Rs.20/- and one mobile set were recovered and from the appellant-Asish Kumar Swain, cash of Rs.500/- and one mobile set were recovered. During search, 24 packets of ganja were found kept in the backseat and dicky of the vehicle and those packets were seized from the vehicle in presence of the Executive Magistrate, independent witnesses and other officials present. The packets were found containing contraband ganja all total weighing to 186kg. 810gram. After weighment sample ganja was drawn in duplicate each containing 25 gram from each packets. Then the bulk packets as well as the sample packets were packed and sealed with the impression of brass seal (M.O.-XXV) of P.W10 and the accused persons were arrested along with seizure of the contraband packets. The brass seal

was handed over to the Executive Magistrate then and there. After completing all formalities a plain paper F.I.R. was drawn at the spot by P.W.10 and was presented to P.W.11 at the Police Station, who is the Inspector-In-Charge of Boipariguda Police Station. The bulk ganja packets as well as sample ganja packets were kept in the Malkhana of the Police Station after making necessary entry in Malkhana Register and the same were produced before the court on the next day i.e., on 17.2.2011 along with the appellants. By order of the court, the sample packets were sent for chemical examination to Regional Forensic Science Laboratory, Berhampur for chemical examination. From the chemical examination, the same were confirmed to be the fruiting and flowering tops of the cannabis plant (ganja). The appellants along with another faced the trial.

4. The prosecution examined eleven witnesses in total and marked twenty four exhibits along with forty nine material objects. The defense did not adduce any evidence, either oral or documentary. Basing on the prosecution evidence, learned trial court convicted all the three accused persons including the present two appellants for the offence under Section 20(b)(ii)(c) of the N.D.P.S. Act and sentenced them as aforestated.

5. Learned counsel for the appellants argued that, there are several breaches and error in compliance of the mandatory provisions under the N.D.P.S.Act regarding search, seizure and sending of the contraband to chemical examiner. Further, the investigation has been biased as the informant himself became the Investigating Officer. Particularly, compliance of Sections 42 and 55 of the N.D.P.S. Act has been violated and also Section 100(4) of the Cr.P.C. It is thus argued that, the prosecution has failed to prove its case beyond all reasonable doubts and it has failed in it's duty to cover the entire path free from doubts. The prosecution needs to prove its case in all material particular leaving no room for any suspicion.

6. Coming to examine the compliance regarding Section 42 of the N.D.P.S.Act, it has been held by the Hon'ble Supreme Court in the case of ***Karnail Singh Vrs. State of Haryana,*** reported in (2009) 8 SCC 539, as follows:

> "35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in sub-section (1) of Section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the 47 goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, 48 or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

7. Looking to the present facts, it is the evidence of P.W.10, the informant, that, he received the information of illegal transportation of ganja at 0.15 A.M. on 16.2.2011 and he entered the said fact in the Station Diary Entry No.343. The extract of the said entry has been marked as Ext.20 and the letter of intimation to the Sub-Divisional Police Officer i.e., the higher authority dated 16.2.2011 has been marked as Ext.18.

8. As per the submission of the appellants, Station Diary Entry No.343 which is regarding recording of the prior information by P.W.10 is a subsequent manufactured document because, there is no such enclosure to the letter sent to S.D.P.O.(Ext.18) and in the extract it is mentioned as "extract of S.D.E. No.343 dtd.15.2.2011". But upon examination of the contention and the record, I would say that, they are minor discrepancies in prosecution case. The letter under Ext.18 is dated 16.2.2011 and the S.D. Entry is dated 16.2.2011. Further the detection is on 16.2.2011 at 05.30 A.M.. Undoubtedly the compliance under Section 42 of the N.D.P.S. Act is mandatory in nature in view of the rulings held in the case of *Karnail Singh (supra) and State of Rajasthan Vrs. Jag Raj Singh @ Hansa*, reported in (2016) 64 OCR (SC) 827. When the seal of office of S.D.P.O. affixed on Ext.18 shows the date of receipt of communication is also dated 16.2.2011, nothing is found impeaching the evidence of P.W.10 that he communicated the prior information to immediate superior officer within the time stipulated in Section 42. In the case of ***Ram Krushna Sahu Vrs. State of Orissa,*** reported in (2018) 70 OCR-340, cited by the appellants, there was no corresponding documentary evidence in support of the oral evidence led by the detecting officer regarding intimation sent by him of the prior information to his immediate official superior. But in the present facts of case at hand, the letter of P.W.10 under Ext.18 is clear particularly in view of the date seal of the office of S.D.P.O. affixed on it. When the time of receipt of prior information by P.W.10 is at 0.15 A.M. on 16.2.2011, the total non-compliance of Section 42 of the N.D.P.S. Act cannot be conclusively opined. As such, compliance of requirements of Section 42 as per prosecution case is affirmed.

9. Next relating to search in terms of Section 100(4) Cr.P.C. as contended by the appellants, the independent witnesses P.W.1 & P.W.2 are not the local inhabitants of the area where the detection, search and seizure took place. But this is not found correct on record. As per their depositions, they belong to Main Road and Katha Mill Sahi of Boipariguda respectively. Further it is confirmed by the I.O.(P.W.11) in his cross-examination that the houses of both P.W.1 and P.W.2 are situating at the place of occurrence. Therefore no weight remains in such contention of the appellants about violation of statutory provision contained in Section 100(4) of the Cr.P.C.. Moreover it is the settled proposition that evidence of official witnesses cannot be discarded for want of independent corroboration. It is also settled principle of law that evidence of official witnesses in absence of independent corroboration because of hostile attitude of such Independent witnesses,

should be assessed carefully while considering the credibility of the evidence. If the statements of official witnesses relating to search and seizure are found cogent, reliable and trustworthy, the same can be acted upon. These P.W.1 and P.W.2 as well as P.W.3 have been turned hostile of course, but the same would not itself affect the prosecution version.

10. In the context of argument of the appellants that there is violation of statutory provision of Section 55 of the N.D.P.S. Act in maintaining the safe custody of the contraband, it is needed to have a relook to the provision of Section 55 of the N.D.P.S.Act. It speaks as follows:

> **"55. Police to take charge of articles seized and delivered**-—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

Thus, two requirements are to be satisfied as per the said provision. First, an officer may accompany the seized article shall be allowed by the officer-in-charge of the police station to affix its seal to such article and take sample thereof. Secondly, it is also required that all samples so taken shall also be re-sealed with the seal of the officer-in-charge of the police station.

Here in the present case, it is the consistent evidence of both P.Ws.10 & 11 that the seized articles were produced by P.W.10 before P.W.11 in the police station and P.W.11 being the Inspector-in-Charge of the Police Station, took charge of the said seized article and kept the same in safe custody of P.S. Malkhana by entering the fact in the P.S. Malkhana register. It is argued by the appellants that the packets were not re-sealed by P.W.11 and therefore, the doubt arises about safe custody of the seized item including those sample packets which were sent for chemical examination. But upon close examination of the evidence of those two witnesses, no discrepancy is seen thereof. P.W.11 has admitted to have taken charge of the seized article on 16.2.2011 from P.W.10 and the P.S. Malkhana register has been produced on record as Ext.19. The chemical examination report (Ext.14) also reveals that

the packet was sealed at the time of receipt at their end and the samples on examination are found to be the flowering and fruiting tops of cannabis plant. When the Malkhana register has been produced in support of the oral evidence of P.Ws.10 & 11 about keeping of the seized contraband in P.S. Malkhana overnight and further the chemical examination corroborates the intactness of the seal affixed on it and the brass seal (M.O.XV) have been produced in Court, there hardly remains any doubt in the version of P.W.11 to question the safe custody of the seized articles. Moreover, the evidence of official witnesses in this regard are found consistent. Therefore, it is convinced to believe that the seized contraband and seized articles were kept in safe custody overnight in the P.S. Malkhana before production of the same in court and sending them for chemical examination. The trustworthiness of the evidence of P.W.11 corroborated by other documentary material cannot be taken away in absence of proof of re-sealing of the seized item by him while keeping it in his custody.

11. Here in this case 186kg. 810gram of contraband ganja has been recovered from the vehicle of which both the appellants were occupants. The receipt of prior information sent by the detecting officer has been found duly complied in terms of Section 42 of the N.D.P.S. Act, though some dispute has been raised on the same from defense side, which has been discarded as per the discussions made in the preceding paragraphs. Section 50 requirements have also been complied with and the search and seizure has been made in presence of the Executive Magistrate. Though the independent witnesses, viz. P.Ws.1, 2 and 3 allegedly present at the time of search and seizure have all turned hostile, still the Executive Magistrate stands confirmed to prosecution case and the documents like seizure list, detailed report and the intimation sent to the higher authority have well-founded in support of prosecution case. After detection of the offence and after search and seizure, P.W.10, who undoubtedly is the empowered officer under Section 42, has presented the written report to P.W.11 and deposited all the seized articles including the contraband before P.W.11. Thereafter the seized articles and the appellants as accused persons were produced before the court on the next day and then as per the direction of the court, the samples taken were sent for chemical examination to R.F.S.L. Though some procedural flaws have been argued on behalf of the defense/appellants regarding safe custody of the contraband before it is sent for chemical examination, but such flaws as pointed out by the appellants are not found material infirmity to affect the prosecution version as has been discussed in the above paragraphs.

P.W.10 after detection, search and seizure and after presenting the written report (F.I.R.) to P.W.11, who is the I.I.C. of the Police Station, continued investigation of the case as per the direction of P.W.11 till 8.3.2011. Then P.W.11 himself took up investigation and submitted the chargesheet on 22.6.2011. Here the learned counsel for the appellants raised an objection that, P.W.10 being the informant should not have conducted the investigation substantially and thereby the entire prosecution case vitiates. To support his contention, the case of ***Mohanlal Vrs. State of Punjab,*** reported in 2018(17) SCC 627 has been resorted to by the appellants.

12. It is true that P.W.10 has conducted the investigation of the case till 8.3.2011 and during that period he seized documents like detailed report sent to the office of the S.P. and the intimation of prior information sent to the S.D.P.O..

On examination of the evidences brought on record, it is seen that P.Ws.5, 6 and 7 are the witnesses of such seizure of those documents and on analysis of their evidence no doubt can be casted on the fairness of investigation by P.W.10. Further P.W.11 in his evidence has categorically stated that in course of investigation he examined P.W.10 and re-examined all other witnesses examined by P.W.10. The documents like the S.D.Entry, Malkhana Register, seizure list and all other documents adduced as evidence in course of trial by the prosecution have been marked in trial without any objection by the defense. The defense has not recorded any single objection while marking them in evidence in course of trial. Therefore it is apparent that the defense has not raised any prejudice against P.W.10 being the investigating officer. When the search and seizure of the contraband has undisputedly been effected in presence of the Executive Magistrate who supported the prosecution case fully, there hardly remain any doubt about the fairness of investigation by P.W.10. Further, the evidence of P.W.11 is found clear and cogent to brush aside all reasonable doubts to question on fairness of investigation. In the recent case of ***Mukesh Singh Vrs. State (Narcotic Branch of Delhi),*** *2020 SCC OnLine SC 700*, the Hon'ble Supreme Court have observed that the case of *Mohanlal (supra)* and any other decision taking a contrary view that the informant cannot be the investigator and in such a case, the accused is entitled to acquittal are not good law and they are specifically overruled. The relevant observation of the Supreme Court are reproduced below:

"101. Therefore, as such, there is no reason to doubt the credibility of the informant and doubt the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. As held by this Court in the case of *Ram Chandra* (supra) the question of prejudice or bias has to be established and not inferred. The question of bias will have to be decided on the facts of each case *[See Vipan Kumar Jain* (supra)]. At this stage, it is required to be noted and as observed hereinabove, NDPS Act is a Special Act with the special purpose and with special provisions including Section 68 which provides that no officer acting in exercise of powers vested in him under any provision of the NDPS Act or any rule or order made thereunder shall be compelled to say from where he got any information as to the commission of any offence. Therefore, considering the NDPS Act being a special Act with special procedure to be followed under Chapter V, and as observed hereinabove, there is no specific bar against conducting the investigation by the informant himself and in view of the safeguard provided under the Act itself, namely, Section 58, we are of the opinion that there cannot be any general proposition of law to be laid down that in every case where the informant is the investigator, the trial is vitiated and the accused is entitled to acquittal. Similarly, even with respect to offences under the IPC, as observed hereinabove, there is no specific bar against the informant/complainant investigating the case. Only in a case where the accused has been able to establish and prove the bias and/or unfair investigation by the informant-cum-investigator and the case of the prosecution is merely based upon the deposition of the informant-cum-investigator, meaning thereby prosecution does not rely upon other witnesses, more particularly the independent witnesses, in that case, where the complainant himself had conducted the investigation, such aspect of the matter can certainly be given due weightage while assessing the evidence on record. Therefore, as rightly observed by this Court in the case of *Bhaskar Ramappa Madar* (supra), the matter has to be decided on a case to case basis without any universal generalisation. As rightly held by this Court in the case of *V. Jayapaul* (supra), there is no bar against the informant police officer to investigate the case. As rightly observed, if at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer the question of bias would depend on the facts and circumstances of each case and therefore it is not proper to lay down a broad and unqualified proposition that in every case where the police officer who registered the case by lodging the first information, conducts the investigation that itself had caused prejudice to the accused and thereby it vitiates the entire prosecution case and the accused is entitled to acquittal.

102. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:

I. That the observations of this Court in the cases of *Bhagwan Singh* v. *State of Rajasthan,* (1976) 1 SCC 15*; Megha Singh* v. *State of Haryana,* (1996) 11 SCC

709*;* and *State by Inspector of Police, NIB, Tamil Nadu* v. *Rajangam* (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;

II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of *Mohan Lal v. State of Punjab* (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled."

13. Thus, having considered the submissions of the appellants and the evidences brought on record against them in course of trial and after a close analysis of such evidences, no reason is found to interfere with the finding of the trial court in convicting the appellants for the offence under Section 20(b)(ii)(c) of the N.D.P.S. Act. Further, as seen, the sentence imposed on the appellants is the minimum prescribed for the same and therefore no scope remains there to interfere with the quantum of sentence as such.

14. Both the appeals are accordingly dismissed. The direction for disposal of the properties by the learned trial court is also upheld and shall be carried on subject to the direction, if any, passed in the appeal preferred by the 3rd convict.

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2020 (III) ILR - CUT- 349

B. P. ROUTRAY, J.

BLAPL NO. 5996 OF 2020

RAMAKANTA TURUK @ HARIJAN .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167 read with section 37 of the NDPS Act, – Distinction – Offence U/s.20 (b) (ii) (C) of the NDPS Act – Petitioner remained in custody for 180 days – After expiry of such statutory period filed an application for mandatory/default bail U/s.167 (2) of the Cr.P.C – Session Court denied to grant bail on the ground of bar provided under section 37 of the NDPS Act – Order of the Session Court challenged – Held, Section 37 (1) (b) of the NDPS Act is not in exclusion of the provisions of Cr.P.C on grant of bail – The Provisions contained in sub-section (3) of Section 36-A & section 51 of the NDPS Act makes the position clear – Further the express reference to sub- section 2 of section 167 of the Cr.P.C made in sub-section 4 of section 36-A and the Provisions Contained in sub-section 2 of section 37, removes all doubts for application of provision under sub-section 2 of section 167 of the Cr.P.C in the matter of right to bail of the accused on default by the investigating agency/ prosecution concerning offences under the NDPS Act – Therefore, the right to bail as per section 167(2) of the Cr.P.C is not affected by the mandate of section 37 (1) (b) of NDPS Act.

For Petitioner : Mr.Manoranjan Padhy
For Opp. Party : Mr.T.Patnaik, A.S.C.

ORDER Date of Order:19.10.2020

B.P.ROUTRAY, J.

The petitioner in this application under Section 439 Cr.P.C. has prayed to release him on default bail.

2. The facts of this case in short are that, five accused persons were arrested while illegally transporting the contraband ganja (cannabis) weighing 411kg. 800grams in two vehicles, by the Sub-Inspector of Police of Jaypore Sadar Police Station pertaining to F.I.R.No.95 dated 11.6.2019. Accordingly, T.R.No.34 of 2019 was registered before the learned Sessions Judge-cum-Special Judge, Koraput-Jeypore for commission of offences

under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the N.D.P.S. Act"). In the said case, the present petitioner was taken to custody on remand on 6.1.2020 for the aforestated offences read with Section 29 of the N.D.P.S. Act. On 6.7.2020 after completion of 180 days of custody, the petitioner filed an application before the learned Sessions Judge-cum-Special Judge, Koraput-Jeypore to release him on default bail in terms of Section 167(2) of the Code of Criminal Procedure (in short "the Cr.P.C"). The said prayer of the petitioner was rejected by the learned Sessions Judge-cum-Special Judge on the same day on the ground that Section 37 of the N.D.P.S. Act overrides the provision of the Cr.P.C. and the accused is not thus entitled to bail under Section 167(2).

3. On the next day i.e., on 7.7.2020, chargsheet no.165 dated 1.7.2020 was filed against the present petitioner before the learned Sessions Judge-cum-Special Judge and consequently cognizance for the aforesaid offences was taken in respect of the accused.

4. Assailing the order dated 6.7.2020 passed by the Sessions Judge-cum-Special Judge, it is submitted by the petitioner that law is well settled on the point that right to bail under Section 167(2) of the Cr.P.C. is indefeasible and the limitations under Section 37(1) does not affect the same.

5. In the above context, the factual aspects regarding the period of custody of the petitioner and non-submission of challan within 180 days, are not disputed by the parties. Thus, the only point falls for determination is whether the embargo under Section 37(1)(b) of the N.D.P.S.Act would stand as a bar upon right of the accused for bail under Section 167(2) of the Cr.P.C.

6. Section 4(2) of the Cr.P.C. prescribes that all offences under any law other than the Indian Penal Code shall be investigated, tried and otherwise dealt in accordance with the provisions of the Cr.P.C., but subject to such enactment providing otherwise. Section 167 of the Cr.P.C. authorizes the Court before whom the accused is produced for his detention pending completion of investigation subject to the maximum limit specified, and by operation of Section 36-A(4) of the N.D.P.S.Act, the maximum period for the purpose is extended up to 180 days (or for more days for specific reasons). Section 37 of the N.D.P.S. Act stipulates certain conditions in the

matter concerning bail of the accused relating to specific offences including for offences involving commercial quantity. It is further prescribed under sub-section 2 of Section 37 that those limitations prescribed under clause (b) of sub-Section (1) are in addition to the limitations given under the Cr.P.C. on grant of bail. Therefore, it is clear that, the provisions of Section 37(1)(b) of the N.D.P.S. Act are not in exclusion of the provisions of Cr.P.C. on grant of bail. The provisions contained in sub-section (3) of Section 36-A and Section 51 of the N.D.P.S. Act makes the position clearer. Further the express reference to sub-section 2 of Section 167 of the Cr.P.C. made in sub-section 4 of Section 36-A and the provisions contained in sub-section 2 of Section 37, removes all doubts for application of provision under sub-section 2 of Section 167 of the Cr.P.C. in the matter of right to bail of the accused on default by the investigating agency/prosecution concerning offences under the N.D.P.S. Act. Therefore, the right to bail as per Section 167(2) of the Cr.P.C. is not affected by the mandate of Section 37(1)(b) of N.D.P.S.Act.

7. The Hon'ble Supreme Court while discussing and interpreting different provisions of the N.D.P.S. Act and Cr.P.C. have settled the law that there is no such provision under the N.D.P.S. Act to indicate any contrary intention in order to exclude the application of proviso to sub-section 2 of Section 167 of the Cr.P.C. It is held in the said case, reported in (1995) 4 SCC 190 (Union of India Vrs. Thamisharasi and others) that ;

> "12. The limitation on the power to release on bail in Section 437 Cr.P.C. is in the nature of a restriction on that power, if reasonable grounds exist for the belief that the accused is guilty. On the other hand, the limitation on this power in Section 37 of the N.D.P.S. Act is in the nature of a condition precedent for the exercise of that power, so that, the accused shall not be released on bail unless the Court is satisfied that there are reasonable grounds to believe that he is not guilty. Under Section 437 Cr.P.C., it is for the prosecution to show the existence of reasonable grounds to support the belief in the guilt of the accused to attract the restriction on the power to grant bail; but under Section 37 N.D.P.S. Act, it is the accused who must show the existence of grounds for the belief that he is not guilty, to satisfy the condition precedent and lift the embargo on the power to grant bail. This appears to be the distinction between the two provisions which makes Section 37 of the N.D.P.S. Act more stringent.
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> 13. Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provisions in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1)

> of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to sub-section (2) of Section 167 Cr.P.C. which operates in a different field relating to the total period of custody of the accused permissible during investigation."

8. In the present case at hand, the offence involves commercial quantity. It is seen from the order of the learned Sessions Judge-cum-Special Judge that he relied upon a decision of the Gauhati High Court, reported in 1994 Crl.L.J. 213 (Sankar Singh Vrs. State of Assam) to reach his reasoning that provisions of Section 37 of the N.D.P.S. Act override the provisions of the Cr.P.C. But in view of the law pronounced by the Hon'ble Supreme Court in the case stated above, the said decision of the Gauhati High Court has become inoperative and cannot be relied on. Further, the decision of the Madras High Court in the case of Thamisharasi which differed from the said decision of the Gauhati High Court, the view of the Madras High Court has been ultimately confirmed by the Hon'ble Supreme Court in the aforesaid case.

9. As stated earlier, since facts regarding period of custody of the petitioner and non-submission of final report within the stipulated period are not disputed by both parties, the petitioner is certainly entitled for enlargement on default bail in terms of Section 167(2) of the Cr.P.C. and the limitations under Section 37(1)(b) of the N.D.P.S.Act cannot operate as a bar for such release of the petitioner.

10. Accordingly, it is directed that the petitioner be released on bail by the learned Sessions Judge-cum-Special Judge, Koraput-Jeypore in T.R.No.34 of 2019 on such terms and conditions as the learned Sessions Judge-cum-Special Judge may deem fit and proper.

11. In the result, the bail application is allowed.

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