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The Branch Manager, M/S. United India Insurance Company Ltd. -V- Nila Pradhan

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the husband is that the grant of interim maintenance from the date of filing of the section 12 application is illegal – Further plea that the wife is already getting maintenance under section 125 of Cr. P. C – Held, the pleas cannot be accepted in view of the law that if an interim relief is claimed on a petition filed under Section 12 of the P.W.D.V. Act seeking different relief, an interim application claiming such interim relief under the Act is not a requirement – Admittedly in this case, it being not disputed that in the petition under Section 12 of the P.W.D.V. Act, interim relief under Section 23 of the P.W.D.V. Act had also been claimed – In such premises, even if the independent petition was filed thereafter seeking interim monetary relief in the shape of interim maintenance and other relief, the learned J.M.F.C. directing payment of interim maintenance under Section 23 of the P.W.D.V. Act from the date the petition under Section 12 of the P.W.D.V. Act cannot be said to be exercise of jurisdiction vested with material irregularity and illegality – So far the maintenance under section 125 Cr. P.C , the court held that the husband is entitled to set off the said amount against the interim maintenance in view of the law laid down in the case of Rajnesh v. Neha & Anr., reported in (2020) 80 OCR (SC) – 891.

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2021 (I) ILR-Cut…… 611

SERVICE LAW – Contractual service – Termination – Petitioner was engaged on contractual basis as a tenure employee – Allegation of irregularity in work – Petitioner was no way connected with the project work where the irregularity detected – Report of Ombudsman who caused an independent enquiry, has reported involvement of other persons and suggested for proceeding against them – However during pendency of the enquiry the Collector terminated the service of the petitioner – Whether proper ? – Held, No – The person under whom the work was done should be made responsible and as such the action so taken is absolutely based on no materials and aimed to cause harassment to the petitioner, who was engaged on contractual basis for his livelihood, thus, the same is illegal, arbitrary and unreasonable, and accordingly directed for reinstatement of the petitioner in service.

Santosh Kumar Pandu-V-Collector-Cum-Dcp-Mgnregs,Rayagada & Ors.

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2021 (I) ILR - CUT- 481

THE SUPREME COURT OF INDIA

Dr. DHANANJAYA Y CHANDRACHUD, J & M. R. SHAH, J.

CIVIL APPEAL NO 399 OF 2021
(ARISING OUT OF SLP (C) NO 12553 OF 2020)

THE STATE OF ANDHRA PRADESH & ANR. .....Appellant(s)
.V.
SMT. DINAVAHI LAKSHMI KAMESWARI .....Respondent(s)

(A) SERVICE LAW – Payment of salaries and Pension – Whether payment thereof can be deferred or delayed? – Held, no, while payment of pension is for the years of past service rendered by the pensioners to the State and hence a matter of a rightful entitlement recognised by the applicable rules and regulations which govern the service of the employees of the State and the salaries in other words constitute the rightful entitlement of the employees, the same cannot be deferred or delayed.

(B) SERVICE LAW – Payment of salaries and Pension – Delay thereof – Whether interest for such delay is payable? – Held, Yes.

"The direction for the payment of the deferred portions of the salaries and pensions is unexceptionable. Salaries are due to the employees of the State for services rendered. Salaries in other words constitute the rightful entitlement of the employees and are payable in accordance with law. Likewise, it is well settled that the payment of pension is for years of past service rendered by the pensioners to the State. Pensions are hence a matter of a rightful entitlement recognised by the applicable rules and regulations which govern the service of the employees of the State. While learned counsel for the respondents submits that the award of interest was on account of the action of the Government which was contrary to law, we are of the view that the payment of interest cannot be used as a means to penalize the State Government. There can be no gainsaying the fact that the Government which has delayed the payment of salaries and pensions should be directed to pay interest at an appropriate rate." *(Paras 14 & 15)*

For Petitioner(s): Mr. Shekhar Naphade, Sr. Adv.
Mr. J.N. Bhushan, AAG
Mr. Mahfooz Ahsan Nazki, AOR.
Mr. Polanki Gowtham.
Mr. Shaik Mohamad Haneef.
Mr. T. Vijaya Bhaskar Reddy.
Mr. Amitabh Sinha.
Mr. Shrey Sharma.

For Respondent(s): Mr. Yelamanchili Shiva Santosh Kumar.
Mr. Naumene Suraparaj Karlapalem.
Mr. Tarun Gupta, AOR.

ORDER Date of Order 08. 02.2021

Dr. DHANANJAYA Y CHANDRACHUD. J.

1. Leave granted.

2. This appeal arises from a judgment and order of the Andhra Pradesh High Court dated 11 August 2020. The State of Andhra Pradesh issued GOMs No. 26 on 31 March 2020 and GOMs No. 37 on 26 April 2020. The backdrop for the orders was the outbreak of Covid-19 and the financial crises which had resulted as a consequence. The revenues of the State of Andhra Pradesh were impacted by the onset of the pandemic. The financial position of the State finds reference in the judgment of the High Court, which has been extracted below:

> "The States' own revenue consisting of tax revenue and non-tax revenue have shown a precipitous decline of 52% i.e. Rs. 7593 crores in first quarter of 2020-21 as compared to 2019-20. The receipts were only Rs 7089 crores against Rs 14,682 crores of 2019-20. The States' own revenue have not shown any appreciable improvement in the month of July, 2020 also as the decline is to an extent of 49% amounting to Rs 2,129 crores for the first 20 days of the month of July, 2019."

The above extract in the judgment of the High Court is based on the submissions of the State.

3. By GOMs No. 26 of 31 March 2020, the State Government determined that it was necessary, as an urgent measure, to provide for a deferment of the salaries and pensions which it was obligated to pay. Consequently, paragraph 5 stipulated as follows:

> "5. Government, after careful consideration of the situation arising due to the COVID-19 outbreak, the economic consequences of the lock down, the cessation of the revenue inflows and extra burden imposed on the State's resources to contain the epidemic & to provide relief to the people affected/likely to be affected, hereby orders for the deferment of Salaries/Wages/Remuneration/Honorarium/Pensions on gross basis, as per the following pattern:

> (i) There shall be (100)% deferment in respect of Hon'ble C.M./Hon'ble Ministers/Hon'ble M.L.As/ Hon'ble M.L.Cs, Chairperson & Members of all Corporations, elected representatives of all Local Bodies & people holding equivalent posts, as per the orders issued from time to time.
>
> (ii) There shall be (60)% deferment in respect of All India Service Officers viz., IAS, IPS and IFS;
>
> (iii) There shall be (50)% deferment in respect of all other Government employees, including work-charged employees & persons engaged under the category of direct individuals professions & through 3rd party, except Class-IV Employees;
>
> (iv) There shall be (10)% deferment in respect of Class-IV, Out-sourcing, Contract and the Village & Ward Secretariat employees;
>
> (v) The deferment mentioned in respect of Para 5(i), (ii), (iii) & (iv) supra shall be made applicable mutatis-mutandis in respect of the retired employees in the respective categories.
>
> (vi) The above deferment shall be equally applicable to the serving & retired employees of all PSUs/Government aided Institutes/ Organizations/Universities / Societies / Autonomous bodies / Semi autonomous bodies, etc. in respect of their Salaries/ Wages / Honorarium / Pensions."

4. It is also provided that the above orders would come into force in respect of the salary, wages, remuneration and pensions for the month of March 2020, payable in April 2020 and would continue to remain in force until further orders.

5. On 4 April 2020, there was a modification by the State Government in terms of GOMs No.27 which provided for the payment of full salary to the employees of three departments, namely, (i) medical and health department; (ii) police department; and (iii) sanitation workers working in rural local bodies or urban local bodies, such as Nagar Panchayats, Municipalities and Municipal Corporations.

6. On 26 April 2020, GOMs No.37 provided for a further modification under which the Government, having noticed the hardships which were being faced by the pensioners, directed the payment of full pension to all categories of pensioners.

7. A writ petition under Article 226 of the Constitution was filed before the High Court by a former District and Sessions Judge. The gravamen of the

grievance was that salaries and pensions are due as a matter of right to employees and, as the case may be, to former employees who have served the State. Consequently, a direction was sought in the petition to the State Government to pay the outstanding salaries and pensions which had remained due.

8. The High Court by its judgment and order dated 11 August 2020 held that:

(i) The PIL at the behest of a public spirited citizen was maintainable, the petitioner before the High Court having instituted the proceedings *pro bono* without any personal interest;

(ii) Pension is payable to the retired employees for the past services rendered by them to the State;

(iii) Under Rule 9 of the Andhra Pradesh Revised Pension Rules 1980, pension can only be withheld or deferred under specific circumstances such as if the pensioner is found guilty of grave misconduct or negligence during employment in a departmental or judicial proceeding. These circumstances had not been established;

(iv) Article 72 of the Andhra Pradesh Financial Code deals with the payment of salary to employees of the State, and provides that salary is payable on the last day of every month;

(v) The entitlement to the payment of salary is intrinsic to the right to life under Article 21 and to the right to property which is recognized by Article 300A of the Constitution;

(vi) The State could not by means of a government order have provided for the deferment of salaries and pensions without following recourse to law.

(vii) Although the GOMs make reference to the state plan under Section 23 of the Disaster Management Act, 2005, none of the provisions of the said Act provide for deferred payment of salaries or pensions.

9. On the above premises, the High Court directed (i) payment of the deferred salary for the months of March-April 2020 together with interest at the rate of 12% per annum and (ii) payment of deferred pension for the month of March 2020 with a similar rate of interest.

10. Aggrieved by the judgment of the High Court, the Government of Andhra Pradesh moved these proceedings under Article 136 of the Constitution. The State Government clarified in its Special Leave Petition that it was restricting its challenge only to the component of interest which had been imposed by the judgment and order of the High Court. On 18 November 2020, while considering the Special Leave Petition at the preliminary hearing, the Court issued a direction to the effect that the deferred portion of the payments on account of salaries, pensions and honoraria due to the employees or, as the case may be, to former employees be paid in two equal tranches. The first was directed to be paid on or before 15 December 2020, while the second was directed to be paid on or before 15 January 2021. The direction in regard to the payment of interest was stayed by this Court.

11. In pursuance of the above directions, the Government of Andhra Pradesh has disbursed the full amount of salary and pensions which came to be deferred by the GOMs which have been noted earlier. The only issue which now survives for determination is the liability to pay interest.

12. Mr Shekhar Naphade, learned senior counsel appearing on behalf of the appellants with Mr Mahfooz Ahsan Nazki, learned counsel, submits that the decision to defer the payment of salaries and pensions was taken due to the precarious financial position in which the State found itself as a consequence of the pandemic. Mr Naphade submitted that immediately after the issuance of first GOMs, a relaxation was provided for front-line workers such as those in the police, health and sanitation departments. Moreover, by a subsequent relaxation a direction was issued for payment of pensions to the pensioners. Hence, it has been submitted that the State had acted bona fide and there would be no reason to saddle it with the liability to pay interest. Alternately, it has been submitted that if interest is directed to be paid, the payment should be confined only in regard to the employees of the State falling in categories 3, 4 and 5 of the GOMs dated 31 March 2020.

13. Opposing the submissions of Mr Naphade and Mr Nazki, Mr Yelamanchili Shiva Santosh Kumar, learned counsel appearing on behalf of

the respondents, urged that the intervention of the High Court must be understood in the perspective of the background facts, namely, that the State had intervened by issuing an administrative order in exercise of its powers under Article 162 of the Constitution without enacting a proper legislation for the deferment of salary or, as the case may be, pensions. Learned counsel highlighted the serious hardships which would have been caused to pensioners as a result of the order of deferment and hence submitted that the High Court is fully justified in entertaining the PIL and in directing payment of interest at the rate of 12% per annum.

14. The direction for the payment of the deferred portions of the salaries and pensions is unexceptionable. Salaries are due to the employees of the State for services rendered. Salaries in other words constitute the rightful entitlement of the employees and are payable in accordance with law. Likewise, it is well settled that the payment of pension is for years of past service rendered by the pensioners to the State. Pensions are hence a matter of a rightful entitlement recognised by the applicable rules and regulations which govern the service of the employees of the State. The State Government has complied with the directions of this Court for the payment of the outstanding dues in two tranches. Insofar as the interest is concerned, we are of the view that the rate of 12% per annum which has been fixed by the High Court should be suitably scaled down. While learned counsel for the respondents submits that the award of interest was on account of the action of the Government which was contrary to law, we are of the view that the payment of interest cannot be used as a means to penalize the State Government. There can be no gainsaying the fact that the Government which has delayed the payment of salaries and pensions should be directed to pay interest at an appropriate rate.

15. We accordingly order and direct that in substitution of the interest rate of 12% per annum which has been awarded by the High Court, the Government of Andhra Pradesh shall pay simple interest computed at the rate of 6% per annum on account of deferred salaries and pensions within a period of thirty days from today. This direction shall, however in the facts and circumstances, be confined to categories 3, 4, 5 and 6 of GOMs No 26 dated 31 March 2020. We clarify that interest shall be paid to all pensioners of the State at the rate of 6% per annum on the deferred portion, for the period of delay. Having regard to the prevailing bank interest, the rate of 12% per annum which has been fixed by the High Court, would need to be and is accordingly reduced.

16. The appeal is accordingly disposed of in terms of the above directions. There shall be no order as to costs.

17. Pending applications, if any, stand disposed of.

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2021 (I) ILR - CUT- 487

SANJAY KISHAN KAUL,J. DINESH MAHESHWARI,J & HRISHIKESH ROY,J.

CIVIL APPEAL NOS. 3786-3787 OF 2020

JOYDEEP MAJUMDAR ……Appellant(S)

.V.

BHARTI JAISWAL MAJUMDAR …….Respondent(S)

HINDU MARRIAGE ACT, 1955 – Section 13 – Dissolution of marriage – Mental cruelty – Respondent wife made several defamatory complaints to the appellant's superiors in the Army for which, a Court of inquiry was held by the Army authorities against the appellant – For those allegations, the appellant's career progress got affected – The wife was also making complaints to other authorities, such as, the State Commission for Women and has posted defamatory materials on other platforms – The net outcome of above has resulted in affecting the appellant's career and reputation has also suffered – Whether such act of wife can be termed as cruelty? – Held, Yes.

"Proceeding with the above understanding, the question which requires to be answered here is whether the conduct of the respondent would fall within the realm of mental cruelty. Here the allegations are levelled by a highly educated spouse and they do have the propensity to irreparably damage the character and reputation of the appellant. When the reputation of the spouse is sullied amongst his colleagues, his superiors and the society at large, it would be difficult to expect condonation of such conduct by the affected party. The explanation of the wife that she made those complaints in order to protect the matrimonial ties would not in our view, justify the persistent effort made by her to undermine the dignity and reputation of the appellant. In circumstances like this, the wronged party cannot be expected to continue with the matrimonial relationship and there is enough justification for him to seek separation. Therefore, we are of the considered opinion that the High Court was in error in describing the broken relationship as normal wear and tear of middle class married life. It is a definite case of cruelty inflicted by the respondent against the appellant and as such enough justification is found to set aside the impugned

judgment of the High Court and to restore the order passed by the Family Court. The appellant is accordingly held entitled to dissolution of his marriage and consequently the respondent's application for restitution of conjugal rights stands dismissed. It is ordered accordingly." (Paras 10 to 15)

Case Laws Relied on and Referred to :-

1. (2007) 4 SCC 511 : Samar Ghosh Vs. Jaya Ghosh.

For Appellant : M/s. Gaurav Goel.

For Respondent : M/s. S. K. Verma.

JUDGMENT Date of Judgment : 26.02.2021

HRISHIKESH ROY, J.

1. Heard Mr. Gopal Sankaranarayanan, the learned Senior Counsel appearing for the appellant (Husband). Also heard Mr. Ahmad Ibrahim, learned counsel appearing for the respondent (Wife).

2. The challenge in these appeals is to the analogous judgment and order dated 25.6.2019 in the First Appeal No. 81 of 2017 and First Appeal No. 82 of 2017 whereby the High Court of Uttarakhand had allowed both appeals by reversing the common order dated 4.7.2017 of the Family Court, Dehradun. Before the Family Court, the appellant succeeded with his case for dissolution of marriage but the respondent failed to secure a favourable verdict in her petition for restitution of conjugal rights.

3. The appellant is an Army Officer with M.Tech qualification. The respondent is holding a faculty position in the Government P G College, Tehri with Ph.d degree. They got married on 27.9.2006 and lived together for few months at Vishakhapatnam and at Ludhiana. But from the initial days of married life, differences cropped up and since 15.9.2007, the couple have lived apart.

4. Following the estrangement, the appellant earlier applied for divorce from the Family Court at Vishakhapatnam**.** The respondent then filed a petition against the respondent in the Dehradun Court for restitution of conjugal rights. Later, when she learnt of the case filed by the appellant at Vishakhapatnam, the respondent filed Transfer Petition (C) No. 1366/2011 before this Court. The appellant appeared before the Supreme Court and stated that the case at Vishakhapatnam would be withdrawn. This Court then recorded the following order:

> "Counsel for the respondent states that the respondent would withdraw his petition pending before the Family Court at Visakhapatnam, Andhra Pradesh and in case he has to file any petition seeking any relief against the petitioner (his estranged wife), he will file the petition only before the proper Court at Dehradun, Uttarakhand.
>
> In view of the statement made at the Bar, the petitioner is left with no grievance.
>
> The transfer petition is disposed of.
>
> We may, however, observe that in case the respondent files a petition at Dehradun, the Dehradun Court shall take it up and dispose it of expeditiously and without any undue loss of time."

5. In the divorce proceeding, the appellant pleaded that he was subjected to numerous malicious complaints by the respondent which have affected his career and loss of reputation, resulting in mental cruelty. On the other hand, the respondent in her case for restitution of conjugal rights contended that the husband without any reasonable cause had deserted her and accordingly she pleaded for direction to the appellant, for resumption of matrimonial life.

6. The Family Court at Dehradun analogously considered both cases. The learned judge applied his mind to the evidence led by the parties, the documents on record and the arguments advanced by the respective counsel and gave a finding that the respondent had failed to establish her allegation of adultery against the husband. It was further found that the respondent had subjected the appellant to mental cruelty with her complaints to the Army and other authorities. Consequently, the Court allowed the appellant's suit for dissolution of marriage and simultaneously dismissed the respondent's petition for restitution of conjugal rights.

7. The aggrieved parties then filed respective First Appeals before the Uttarakhand High Court. On consideration of the pleadings and the issues framed by the trial Court, the High Court noted that cruelty is the core issue in the dispute. The Court then proceeded to examine whether the wife with her complaints to various authorities including the Army's top brass, had treated the appellant with cruelty to justify his plea for dissolution of marriage. While it was found that the wife did write to various authorities commenting on the appellant's character and conduct, the Division Bench opined that those cannot be construed as cruelty since no court has concluded that those allegations were false or fabricated. According to the Court, the conduct of the parties against each other would at best be squabbles of ordinary middle class married life. Accordingly, the High Court set aside the decree for dissolution of marriage and allowed the respondent's suit for restitution of conjugal rights, under the impugned judgment.

8. Challenging the High Court's decision, Mr. Gopal Sankaranarayanan, the learned Senior Counsel highlights that the respondent had filed a series of complaints against the appellant before the superior officers in the Army upto the level of the Chief of Army Staff and to other authorities and these complaints have irreparably damaged the reputation and mental peace of the appellant. The appellant cannot therefore be compelled to resume matrimonial life with the respondent, in the face of such unfounded allegations and cruel treatment. Moreover, matrimonial life lasted only for few months and the couple have been separated since 15.9.2007 and after all these years, restitution would not be justified or feasible.

9. Per contra, Mr. Ahmad Ibrahim, the learned counsel submits that the respondent is keen to resume her matrimonial life with the appellant. According to the counsel, the respondent wrote letters and filed complaints only to assert her legal right as the married wife of the appellant and those communications should therefore be understood as efforts made by the wife to preserve the marital relationship. It is further contended that only because the appellant had filed the divorce case before the Vishakhapatnam Court and had obtained an ex-parte order, the respondent was constrained to write to various authorities to assert her right as the legally wedded wife of the appellant.

10. For considering dissolution of marriage at the instance of a spouse who allege mental cruelty, the result of such mental cruelty must be such that it is not possible to continue with the matrimonial relationship. In other words, the wronged party cannot be expected to condone such conduct and continue to live with his/her spouse. The degree of tolerance will vary from one couple to another and the Court will have to bear in mind the background, the level of education and also the status of the parties, in order to determine whether the cruelty alleged is sufficient to justify dissolution of marriage, at the instance of the wronged party. In ***Samar Ghosh Vs. Jaya Ghosh***[1], this Court gave illustrative cases where inference of mental cruelty could be drawn even while emphasizing that no uniform standard can be laid down and each case will have to be decided on its own facts.

11. The materials in the present case reveal that the respondent had made several defamatory complaints to the appellant's superiors in the Army for which, a Court of inquiry was held by the Army authorities against the

1. (2007) 4 SCC 511

appellant. Primarily for those, the appellant's career progress got affected. The Respondent was also making complaints to other authorities, such as, the State Commission for Women and has posted defamatory materials on other platforms. The net outcome of above is that the appellant's career and reputation had suffered.

12. When the appellant has suffered adverse consequences in his life and career on account of the allegations made by the respondent, the legal consequences must follow and those cannot be prevented only because, no Court has determined that the allegations were false. The High Court however felt that without any definite finding on the credibility of the wife's allegation, the wronged spouse would be disentitled to relief. This is not found to be the correct way to deal with the issue.

13. Proceeding with the above understanding, the question which requires to be answered here is whether the conduct of the respondent would fall within the realm of mental cruelty. Here the allegations are levelled by a highly educated spouse and they do have the propensity to irreparably damage the character and reputation of the appellant. When the reputation of the spouse is sullied amongst his colleagues, his superiors and the society at large, it would be difficult to expect condonation of such conduct by the affected party.

14. The explanation of the wife that she made those complaints in order to protect the matrimonial ties would not in our view, justify the persistent effort made by her to undermine the dignity and reputation of the appellant. In circumstances like this, the wronged party cannot be expected to continue with the matrimonial relationship and there is enough justification for him to seek separation.

15. Therefore, we are of the considered opinion that the High Court was in error in describing the broken relationship as normal wear and tear of middle class married life. It is a definite case of cruelty inflicted by the respondent against the appellant and as such enough justification is found to set aside the impugned judgment of the High Court and to restore the order passed by the Family Court. The appellant is accordingly held entitled to dissolution of his marriage and consequently the respondent's application for restitution of conjugal rights stands dismissed. It is ordered accordingly.

16. With the above order, the appeals stand disposed of leaving the parties to bear their own cost.

2021 (I) ILR - CUT- 492

Dr. S. MURALIDHAR, C.J & KUMARI SANJU PANDA, J.

WRIT PETITION (CIVIL) NO. 32947 OF 2020

PRADYUMNA KUMAR MOHAPATRA ……..Petitioner

.V.

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

(A) ORISSA EXCISE ACT, 2008 – Section 47 – Power to cancel or suspend licence, permit or pass – Petitioner an EP holder in respect of five IMFL shops in different places – In respect of one shop, upon seizure of some spurious liquid, a show cause notice was issued for cancellation of license – Reply submitted – Order of cancellation passed by a non-speaking order without assigning any reason – Writ petition – Opposite Parties trying to supplement the reasons for cancellation in the counter affidavit – Whether can be accepted? – Held, No – "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 effect the acting 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." (Para 23)

(B) ORISSA EXCISE ACT, 2008 – Section 47 – Power to cancel or suspend licence, permit or pass – Petitioner an EP holder in respect of five IMFL shops in different places – In respect of one shop, upon seizure of some spurious liquid, a show cause notice was issued for cancellation of license – Reply submitted – Order of cancellation passed without assigning any reason – Subsequently licenses of all the rest four shops also cancelled without any show cause notice – The question arose as to whether such an order can be sustained in the eye of law? – Held, No – Reasons indicated.

"As far as cancellation of the licenses in respect of other four shops, while Section 47 (2) can be read as an enabling provision, giving a discretion to the authority to cancel other license, it is obviously subject to Section 47(4), which mandates giving of at least seven days' notice in writing to the holder of the license of the authority's intention to cancel the license. In other words, Section 47(2) has to be read along with Section 47(4) of the OE Act and not dehors it. Consequently, the

action of the Opposite Parties that under Section 47(2) of the OE Act that the license in respect of the Shop at Badambadi having been cancelled, it would give rise to automatic cancellation of other licences, even without notice to the Petitioner, is not legally tenable and is rejected as such. In other words, the impugned order in so far as it cancels the licenses of four other IMFL 'Off' Shops of the Petitioner, it is unsustainable in law." (Para 25)

(C) ORISSA EXCISE RULES, 2017 – Rule 35 – Provisions under – Grant of licences or exclusive privilege for sale of intoxicants – Not to be granted to a person, who has been convicted by a Criminal Court of a non-bailable offence – Mere initiation of a criminal case, whether can be a ground for not granting the privilege ? – Held, No.

"It may be added here that mere fact that a criminal case has been instituted against the Petitioner will not per se disqualify him from holding an EP license. Learned counsel for the Petitioner rightly pointed out that Rule 35 of the OE Rules envisages not granting a license to a person 'who has been found guilty within the previous five years of any serious breach of the conditions of his licence' or importantly "to a person, who has been convicted by a Criminal Court of a non-bailable offence". In other words, mere institution of a criminal case against a person will not per se make him ineligible to hold the license, if otherwise satisfies the other conditions under the OE Act and OE Rules." (Para 26)

Case Laws Relied on and Referred to :-

1. 2007 (Supp. II) OLR 845 : Suryanarayan Sahoo Vs. Government of Odisha.
2. 78 (1994) CLT 877 : Dushasan Behera Vs. State of Odisha.
3. AIR 1970 SC 1302 : Mahabir Prasad Santosh Kumar Vs. State of U.P.
4. AIR 1978 SC 851 : Mohinder Singh Gill Vs. The Chief Election Commissioner.

For Petitioner : Mr. Biraja Prasanna Das.
For Opp. Parties : Mr. D. Mohanty, Addl. Govt. Adv.
For Interveners : Mr. P.K. Rath.

JUDGMENT Date of Judgment : 12.01.2021

Dr. S. MURALIDHAR, C.J.

1. The challenge in this writ petition is to an order dated 23rd November, 2020 passed by the Collector, Cuttack cancelling the licenses granted in favour of the Petitioner in respect of (1) IMFL 'Off' Shop, Badambadi, (2) IMFL 'Off' Shop, Gandarpur, (3) IMFL 'Off' Shop, Subhadrapur, (4) IMFL 'Off' Shop, Jaripada and (5) IMFL 'Off' Shop, Samserpur in the district of Cuttack for the remaining period of 2020-21.

2. The background facts are that the petitioner is an Excise Permit (EP) holder of aforementioned IMFL 'Off' Shops in five locations. It is stated that all licenses were valid till 31st March, 2021. The Petitioner alleges that on account of his approaching the Superintendent of Police (Vigilance), Cuttack a vigilance case came to be instituted against the Head-Clerk in the office of the Superintendent of Excise, Cuttack, which led to the Petitioner being harassed by conducting surprise raids on three of his IMFL 'Off' Shops on 9th August, 2019. It is stated that from a letter dated 10th August, 2019 from the Superintendent of Excise, Cuttack it transpired that during the said raid one half bottle of some noxious liquid was recovered/seized from the sale counter of Badambadi IMFL 'Off' Shop.

3. On 16th September, 2019, the District Excise Office, Cuttack issued the Petitioner a show cause notice under Section 47(4) of the Odisha Excise Act, 2008 (for short 'OE Act') in respect of Badambadi IMFL 'Off' Shop calling upon the Petitioner to submit his reply within seven days. On 21st September 2019, the Petitioner wrote a letter to the Superintendent of Excise, Cuttack, seeking, *inter alia*, that a copy of the result/report of the Chemical Analysis of the seized liquid. On 25th September 2019, the Petitioner wrote to the Collector, Cuttack seeking a fresh enquiry into the matter. When there was no response received, the Petitioner filed W.P.(C) No. 19335 of 2019, which came to be disposed of on 15th October, 2019 by a Division Bench of this Court by the following order:

> "Heard the petitioner in person.
>
> By way of this writ petition, the petitioner has challenged the order dated 10.08.2019 under Annexure-2. Further, the petitioner has a made a prayer to quash the impugned order and direct the Collector, Cuttack to allow the petitioner to open his Badambadi IMFL OFF Shop at Cuttack.
>
> During the course of hearing, it is stated by the petitioner that the Collector, Cuttack may be directed to consider and dispose of his representation dated 25.09.2019 at Annexure-6 within a stipulated period.
>
> Considering the limited nature of prayer made by the petitioner and without expressing any opinion on the merits of the case, we direct opposite party no.3-Collector, Cuttack to consider and dispose of the representation dated 25.09.2019 under Annexure-6 made by the petitioner, in accordance with law, within a period of four weeks from the date of receipt of copy of this order, if such representation is still pending for consideration.
>
> With the aforesaid observation and direction, the writ petition stands disposed of.

I.A(s) connected to the writ petition, if any, is/are disposed of accordingly.

Urgent certified copy of this order be granted as per the Rules."

4. Thereafter, on 4th November, 2019, the Collector, Cuttack issued a communication to the Petitioner requiring him to appear before him on 6th November, 2019. Again another notice was issued on 25th November, 2019 requiring him to appear on 27th November, 2019.

5. It appears that on 28th November, 2019, the Collector, Cuttack appointed the Sub-Collector, Sadar, Cuttack as Inquiring Officer to enquire into the matter and submit a report. After conducing an inquiry, a report was submitted by the Sub-Collector on 7th December, 2019 to the Collector. The Petitioner states that the said report was prepared behind his back, since he had not participated in the enquiry. Thereafter on 14th December 2019, the Collector, in view of the finding of the Sub-Collector in his inquiry report, rejected the representation dated 25th September, 2019 of the Petitioner.

6. The Petitioner states that the said order dated 14th December, 2019 was served on him on 3rd January, 2020. However, despite the Petitioner applying for it, the copy of the Inquiry report dated 7th December, 2019 of the Sub-Collector was not furnished to him. It appears that the Petitioner filed another writ petition, being W.P.(C) No. 4284 of 2020 seeking the quashing of the order dated 10th August, 2019 whereby the Collector, Cuttack, soon after the raid was conducted, directed temporary closure of the Badambadi IMFL 'Off' Shop. In that writ petition Petitioner also challenged the order dated 14th December, 2019 passed by the Collector, Cuttack rejecting the representation of the Petitioner.

7. During the pendency of the said writ petition the impugned order dated 23rd November, 2020 was passed cancelling not only the licence in respect of the IMFL 'Off' Shop at Badambadi but four other IMFL 'Off' Shops of the Petitioner as well for the remaining period of 2020-21. Thereafter, the Collector, Cuttack decided to settle three of the aforementioned five IMFL 'Off' Shops through lottery for the remaining period of 2020-21 on 3rd December, 2020. Aggrieved by the cancellation of license in respect of said five IMFL 'Off' Shops, the present writ petition was filed on 26th November, 2020.

8. When the present writ petition first listed for hearing before this Court on 1st December, 2020, the following order was passed:

> "This Court is convened through Video Conferencing.
>
> Heard Mr. M. Kanungo, learned Senior Advocate appearing on behalf of the petitioner.
>
> List this matter on 4th December, 2020 along with W.P.(C) No.18889 of 2020.
>
> As an interim measure, it is directed that the auction process may take place, but no final decision shall be taken thereon till the next date.
>
> As restrictions are continuing due to COVID-19, learned counsel may utilize the soft copy of this order available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020."

9. The said interim order is continuing till date.

10. In the reply filed by Opposite Party No.4 (Superintendent of Excise, Cuttack) it is denied that the institution of vigilance case against the ex-Head Clerk, in charge of the office of the Superintendent of Excise, Cuttack at the instance of the present Petitioner, has anything to do with the cancellation of the Petitioner's IMFL 'Off' Shops licenses. It is stated that the raid was conducted on the basis of the complaint of the local inhabitants of Badambadi, Cuttack and that during the raid some noxious liquid which was suspected to be spurious one was recovered/seized. Hence the Collector issued the order dated 10th August, 2019 for temporary closure of Badambadi IMFL 'Off' Shop of the Petitioner. It is stated that after the order dated 14th December 2019, the Collector sent a proposal to the Excise Commissioner, Odisha, Cuttack on 24th January, 2020 for cancellation of the license of the Petitioner in respect of aforementioned five IMFL 'Off' Shops.

11. When the matter stood thus, and during the pendency of the W.P.(C) No. 8284 of 2020 filed by the Petitioner, one T.Kiran Kumar Rao had filed W.P.(C) No. 18889 of 2020 for a direction to the Opposite Parties to close down the Shops of the Petitioner. The said writ petition came to be disposed of by this Court on 25th August, 2020 permitting the Petitioner in that case to submit a comprehensive representation to the Collector, Cuttack, on which the Collector would take a final decision within a period of one month. It is stated that thereafter the said Petitioner T. Kiran Kumar Rao again filed I.A. No. 9838 of 2020 for modification of the above order. The said application was disposed of on 3rd September, 2020 modifying the earlier order dated

25th August, 2020 to the extent that T. Kiran Kumar Rao was permitted to move the Principal Secretary to the Government in the Excise Department, who would take a decision on the recommendation of the Collector, as forwarded by the Excise Commissioner to the Government, within a period of one month.

12. It is stated that soon after the above order was passed by this Court, the Excise Commissioner, Odisha, Cuttack by letter dated 29th October, 2020 recommended the cancellation of the licences issued to the Petitioner in respect of the IMFL 'Off' Shops at Badambadi and four other locations, on the basis of the proposal of the Collector, Cuttack in its letter dated 24th January, 2020.

13. In response to the principal ground urged by the Petitioner that the cancellation of the IMFL 'Off' Shops licenses was in violation of the principles of natural justice, a point reiterated by Mr. B.P. Das, learned counsel for the Petitioner, it is contended by Mr. D. Mohanty, learned Additional Government Advocate on behalf of the Opposite Parties that under Section 47(4) of the OE Act, as regards cancellation of the license of the IMFL 'Off' Shop at Badambadi, a show cause notice was issued to the Petitioner and it is only after considering his reply thereto and after the rejection of his representation, the impugned order was passed. Therefore there is no violation of the principles of natural justice.

14. As regards the cancellation of the license in respect of four other Shops of the Petitioner, Mr. Mohanty, draws attention of the Court to Section 47(2) of the OE Act, which envisages cancellation of other licenses held by the same persons, whose license has been cancelled in terms of Section 47(1) of the OE Act.

15. Mr. Mohanty, learned Additional Government Advocate also submits that criminal cases have been instituted against the present Petitioner arising out of the raid and which are pending in the Court of the J.M.F.C.(City), Cuttack. Cases were also instituted against the Petitioner and his authorized salesmen for the alleged commission of offences under Sections 47, 55,56,59,61 and 66 of the OE Act. It is stated that a charge sheet has also been filed in that case.

16. Reference is made by Mr. Mohanty to the decision of this Court in ***Suryanarayan Sahoo v. Government of Odisha 2007 (Supp. II) OLR 845***, where it has been observed as under:

> "A comparative study of the aforesaid provisions shows that Section 42 though prescribes cancellation of license on conviction of the licensee on any offence punishable under the Act and the violations mentioned therein but at the very outset it provides that the same is subject to such restrictions as the State Government may prescribe. Section 43 provides that besides the grounds mentioned in Section 42, the license or exclusive privilege can be withdrawn for any cause other than those specified in Section 42 meaning thereby that even if a person is not convicted of any offence and in whose case Section 42 does not apply, his license or exclusive privilege can be withdrawn on any other cause. Therefore, it is not necessary that a person should be convicted and only then that the exclusive privilege can be withdrawn. Section 45 clearly specified that no person to whom any license or exclusive privilege has been granted under the Act shall have any claim to the renewal of license as a matter of right."

17. The Petitioner has, in his rejoinder, contended that while initiating process of cancelling the Petitioner's IMFL 'Off' Shops license, no prior notice, in terms of Section 47(4) of the OE Act and Rule 49 of the Odisha Excise (OE) Rules was followed, particularly, in respect of cancellation of license of four other IMFL 'Off' Shops. It is pointed out that there is no issue in relation to those Shops and therefore there is no reason for cancellation of the licenses thereof. It is also pointed out that Rule 34 of the OE Rules does not expressly permit settlement of the excise shops through lottery and therefore, the action taken in that regard was unlawful. Reference is also made to Rule 45 of the OE Rules, which according to the Petitioner does not place an absolute embargo on a person from being issued a licence merely on the initiation of a criminal case against such person. In this regard, reference is made by the learned counsel for the Petitioner to the decision of this Court in ***Dushasan Behera v. State of Odisha 78 (1994) CLT 877*** and the decision dated 3rd Sepetember, 2009 in W.P.(C) No. 8276 of 2009 (***Iswar Chandra Behera v. State of Odisha***).

18. It may be mentioned here that I.A. No. 15447 of 2020 has been filed by three Interveners, who were the beneficiaries of the process of settlement of three of the five IMFL 'Off' Shops at Samserpur, Jaripada and Subhadrapur as a result of cancellation of the Petitioner's license in respect of those shops. It is stated that because of the interim order passed by this Court, the final orders allotting the said Shops have not been passed.

19. The above submissions have been considered by the Court. To begin with Section 47 of the OE Act reads as under:

> "**47. Power to cancel or suspend licence, permit or pass-**
>
> (1) Subject to such restrictions as may prescribed, the authority suspend granting any exclusive privilege, license, permit or pass under this Act may cancel or suspend it irrespective of the period to which the same relates-
>
> (a) if it is transferred or sublet by the holder thereof without the permission of the said authority; or
>
> (b) if any duty or fee payable by the holder thereof has not been paid; or
>
> (c) in the event of any breach by the holder thereof or by any of his servants, or by any one acting on his behalf, with his express or implied permission, of any of the terms or conditions thereof; or
>
> (d) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue or of any cognizable and non-bailable offence; or
>
> (e) where a licence, permit or pass has been granted on the application of the holder of an exclusive privilege granted under section 20 on the requisition in writing of such holder; or
>
> (f) if the conditions of the exclusive privilege, licence, permit or pass provide for such cancellation or suspension at will.
>
> (2) When an exclusive privilege, licence, permit or pass held by any person is cancelled under clause (a), (b), (c) or (d) of sub-section (1), the authority aforesaid may cancel any other exclusive privilege, licence, permit or pass granted to such person under this Act, or under any other law for the time being in force relating to Excise.
>
> (3) The holder of an exclusive privilege, licence, permit or pass shall not be entitled to any compensation for its cancellation or suspension under this section, or to the refund of any fee or consideration money paid or deposit made, in respect thereof.
>
> (4) Before cancellation of the exclusive privilege, licence, permit or pass the authority cancelling it shall give to the grantee at least seven days' notice in writing of his intention to cancel it and offer an opportunity to him to show cause within the said period as to why his exclusive privilege, licence, permit or pass should not be cancelled."

20. As far as the cancellation of license of IMFL 'Off' Shop at Badambadi is concerned, a show cause notice was issued and opportunity of

hearing was also given to the Petitioner. It is apparent from the facts narrated and the documents placed on record that the rejection of the representation of the Petitioner dated 25th September, 2019 by the Collector, Cuttack by the order dated 14th December, 2019 was based primarily on the report submitted on 7th December, 2019 by the Sub-Collector, Sadar, Cuttack to the Collector. It is not in dispute that the copy of the said report was not furnished to the Petitioner prior to the passing of the impugned order dated 23rd November, 2020 which simply states that the Collector 'after careful consideration' has decided to cancel the license granted to the Petitioner in respect of the five IMFL 'Off' Shops. The order is, therefore, a non-speaking one. It does not spell out the reasons why the cancellation is justified.

21. Mr. Mohanty, in seeking to defend the said order, refers to the fact that in the counter affidavit filed by Opposite Party No.4, there is a report of the Sub-Collector dated 7th December, 2019 enclosed and that supplied the reasons for cancellation. In the considered view of the Court, the impugned order cancelling the license ought to itself contain the reasons for cancellation. The reasons cannot be supplied subsequently through a counter affidavit or a document enclosed with such counter affidavit. While the procedure under Section 47 of the OE Act may have been followed as far as issuance of show cause notice and seeking the Petitioner's reply, that will not obviate the Collector to spell out the reasons while cancelling the licenses.

22. The legal position in this regard may be discussed at this stage. In ***Mahabir Prasad Santosh Kumar v. State of U.P AIR 1970 SC*** **1302**, the appellants, who were holders of a licence under the U.P. Sugar Dealers' Licensing Order, 1962, to deal in sugar and were also licenced to deal in flour, were called upon by a letter dated June 5,1967 to explain certain irregularities detected on inspection of their shop. The next day they were directed to hand over their stocks of sugar and flour to a Cooperative Marketing Society. Their representations against this direction to the District Magistrate were not attended to, and they were therefore obliged to surrender their stocks. By a letter dated June 28 1967, the appellants were informed that the District Magistrate had cancelled their licences as dealers in sugar and flour but no reasons were given for this order. An appeal under clause 8 of the Order of 1962 to the State Government was rejected but no reasons were communicated to the appellants for this rejection. A writ petition challenging the orders of the District Magistrate and the State Government in appeal was dismissed by the High Court. On appeal to the

Supreme Court, it was held that the orders passed by the District Magistrate and the State Government cancelling the licences of the appellants must be quashed.

> "Opportunity to a party interested in the dispute to present his case on questions of law as well as fact, ascertainment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them, and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found, are attributes of even a quasi-judicial determination. It must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him : it must appear that he has reached a conclusion which is according to law and just, and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Satisfactory decision of a disputed claim may be reached only if it be, supported by the most cogent reasons that appeal to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may deter-mine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just."

23. For the proposition that reasons must be contained in the order itself and not a subsequent affidavit filed after notice in the petition, reference may be made to the opinion of Krishan Iyer, J. in ***Mohinder Singh Gill v. The Chief Election Commissioner AIR 1978 SC 851***, the relevant portion of which reads thus:

> "…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 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 effect 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."

24. In so far as the impugned order cancelling the license in favour of the Petitioner for the 'Off' Shop at Badambadi is concerned, the order being a non-speaking one, cannot be sustained in the eye of law and the same is set aside on that ground.

25. As far as cancellation of the licenses in respect of other four shops, while Section 47 (2) can be read as an enabling provision, giving a discretion to the authority to cancel other license, it is obviously subject to Section 47(4), which mandates giving of at least seven days' notice in writing to the holder of the license of the authority's intention to cancel the license. In other words, Section 47(2) has to be read along with Section 47(4) of the OE Act and not dehors it. Consequently, the action of the Opposite Parties that under Section 47(2) of the OE Act that the license in respect of the Shop at Badambadi having been cancelled, it would give rise to automatic cancellation of other licences, even without notice to the Petitioner, is not legally tenable and is rejected as such. In other words, the impugned order in so far as it cancels the licenses of four other IMFL 'Off' Shops of the Petitioner, it is unsustainable in law.

26. It may be added here that mere fact that a criminal case has been instituted against the Petitioner will not per se disqualify him from holding an EP license. Learned counsel for the Petitioner rightly pointed out that Rule 35 of the OE Rules envisages not granting a license to a person 'who has been found guilty within the previous five years of any serious breach of the conditions of his licence' or importantly "to a person, who has been convicted by a Criminal Court of a non-bailable offence". In other words, mere institution of a criminal case against a person will not per se make him ineligible to hold the license, if otherwise satisfies the other conditions under the OE Act and OE Rules.

27. For all the aforementioned reasons, the impugned order dated 23rd November, 2020 cancelling the Petitioner's license in respect of five IMFL 'Off' Shops is hereby quashed. The Intervention Application is not entertained. It is clarified that all consequential actions taken by the Opposite Parties including settling the licences in respect of three IMFL 'Off' Shops in favour of the interveners cannot be sustained in law. If any money has been collected by the Opposite Parties from any of the interveners, it shall be

forthwith returned by the Opposite Parties to them. The Intervention Application is accordingly disposed of.

28. It is however clarified that it will be open for the Opposite Parties to proceed to initiate a fresh process for cancellation of the Petitioner's licenses strictly following the provisions of the OE Act and Rules.

29. With the above observations and directions, the writ petition is allowed, but in the circumstances, there shall be no order as to costs.

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

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2021 (I) ILR - CUT- 503

Dr. S. MURALIDHAR, C.J & BISWAJIT MOHANTY, J.

WRIT PETITION (CIVIL) NO. 13774 OF 2005

PURNA CHANDRA MOHAPATRA & ANR. .....Petitioners

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition claiming compensation for custodial death – The position at the conclusion of the investigation was that there was nothing to prove that the death was a 'custodial death' caused by the police – It is evident from the report of investigation that deceased was in police custody for more than seven hours till his death – Effect of – Held, even if it is not established that the ante mortem injuries found on his person during post-mortem were caused by the Police, the law of strict liability for the negligence of the police in not meeting the basic minimum standard of care in providing him prompt medical attention

would stand attracted and the police have to be held liable for the avoidable death of deceased, while in their custody, on account of their negligence – Compensation awarded.

Case Laws Relied on and Referred to :-

1. (1975) 3 SCC 185 : D Bhuvan Mohan Patnaik Vs. State of Andhra Pradesh
2. (1978) 4 SCC 104 : Charles Sobraj Vs. Superintendent, Central Jail, Tihar, New Delhi.
3. (1978) 4 SCC 494 : Sunil Batra (I) Vs.Delhi Administration.
4. (1993) 2 SCC 746 : Neelabati Behera Vs. State of Orissa.
5. (1997) 1 SCC 416 : D K Basu Vs. State of West Bengal.
6. (1997) 2 SCC 642 : Rama Murthy Vs. State of Karnataka.
7. (1998) 9 SCC 604 : Murti Devi Vs. State of Delhi.
8. (2000) 3 SCC 521 : Ajab Singh Vs. State of Uttar Pradesh.
9. (2000) 2 SCC 465 : Chairman Railway Board Vs. Mrs. Chandrima Das.
10. 2011 (5) AD (Del) 36 : Nina Rajan Pillai Vs. Union Of India.
11. (2000) 5 SCC 712 : State of Andhra Pradesh Vs. Challa Ramkrishna Reddy/

For Petitioner : Mr. Akshyanshu Sekhar Nandy,

For Opp. Parties : Mrs. Suman Pattanayak, Addl. Govt. Adv.

ORDER Date of Order : 27.01.2021

Dr. S. MURALIDHAR, C.J.

1. This writ petition was filed on 7th November, 2005 seeking, *inter alia,* the compensation of Rupees four lakhs to be paid to the Petitioners for the alleged custodial death of their son Manoj Kumar Mohapatra (Manoj).

2. The Petitioners had earlier filed W.P.(Crl) No. 407 of 2005 on 25th October, 2005 in this Court where the prayer was for directing the Opposite Parties to show cause as to why no action has been taken on the basis of the F.I.R. filed by the Petitioners against Opposite Party No.3 (Inspector-in-Charge, Dhenkanal Town Police Station) and seeking a fair investigation of the case. That petition, which was to be heard with the present petition was, however, dismissed for non-prosecution on 28th August, 2017.

3. As far as present writ petition is concerned, it was pointed out that a representation had been made by the Petitioners on 7th June, 2005 to the District Superintendent of Police, Dhenkanal to take strong action against the concerned police personnel of the Town Police Station (PS) of Dhenkanal. The Petitioners' case was that their son Manoj was returning home at about 2

am on 6th June, 2005 from watching a 'melody concert' performed at Minabazar, when the Inspector-in-Charge (IIC) of the Town PS, accompanied by some other policemen, forcibly took him to the PS. The next morning at 10.30 am the Police informed the Petitioners that Manoj had been taken to Sadar Hospital, Dhenkanal. After the Petitioners reached the Sadar Hospital, on the advice of the doctors there, Manoj was taken to the SCB Medical College and Hospital, Cuttack by a medical ambulance. Unfortunately, he died on the way. The case of the Petitioners is that he died due to brutal torture by the Dhenkanal Police.

4. The Petitioners have also placed on record a copy a fact-finding report of the Peoples Union for Civil Liberties of Dhenkanal and Cuttack treating this to be a custodial death and calling for fair investigation to the F.I.R. No. 145 dated 7th June, 2005 under Section 302/34 of the Indian Penal Code (IPC).

5. The Investigating Officer (IO) Shri Ramakrishna Panda, Inspector of Police, filed a counter affidavit dated 18th April, 2006 in this Court. The version of the Police is that the deceased had entered into a foreign liquor shop in a drunken state by making a hole in the asbestos roof; that he fell down from the roof to the floor and thereafter started making unusual sounds. This attracted the police patrolling party. The shop was thereafter opened and Manoj was brought to the PS in the early hours of 7th June, 2005 and kept in the verandah for verification. At about 8.50 am when Manoj complained of pain in his abdomen and started vomiting, he was shifted to Dhenkanal Headquarters Hospital for treatment.

6. The affidavit states that during the post-mortem examination, six external injuries were detected, all of which were ante-mortem. However, no injuries were mentioned in the bed head ticket of the deceased while he was admitted to the Hospital. It is stated that as it was a case of custodial death, the State Human Rights Protection Cell (HRPC), Odisha took charge of the investigation from the local police on 8th June, 2005. In paragraph 6 of the affidavit, it is stated as under :

> "6. That it is respectfully submitted that the process of post-mortem was Video recorded. During investigation none has stated that neither Gyan Behera nor any police officer assaulted the accused-victim inside the Police Station. During investigation no evidence of assault to the deceased by the

> local police has been established. The Police noticed no external injury when the victim was brought to the Police Station. No third degree method and torture was applied to the deceased. As per the guidelines of NHRC the case is under investigation by the State HRPC and the investigation is under progress."

7. Thereafter, it appears that nothing substantial happened in the petition. For some reason, it appears to have not even been listed once between 2006 and 2019. Unfortunately, everyone, including the counsel for the Petitioners, appear to have slipped into a collective amnesia. It appears that on 4th December, 2019 an affidavit was filed by the Deputy Superintendent of Police (DSP), H.R.P.C., and Odisha, in which at paragraph 3 it is stated as under:

> "3. That it is humbly submitted that pursuant to the direction of Addl. Director General of Police, State HRPC, Odisha, Cuttack, the matter was investigated by Sri Rabindranath Mohanty as I.O. in Dhenkanal Police Case No. 145 of 2005. After necessary investigation, on 26.12.2008 final report was submitted as Mistake of Fact, under section 302/34 IPC vide Final Form No. 193/08, dated 26.12.2008 and submitted the same before the learned S.D.J.M., Dhenkanal."

8. A copy of the Final Report dated 26th December, 2008 submitted before the S.D.J.M., Dhenkanal has been enclosed with the affidavit of the DSP. What is clear from the report is that Manoj was brought to the PS in an inebriated condition at 3.20 am on 7th June, 2005. The report states that Manoj 'was made to sit on the P.S. verandah and was detailed there *with an impression that he was under influence of liquor and will be interrogated after coming to normal condition*.' (emphasis supplied) The inescapable conclusion is that although Manoj was brought to the PS admittedly at 3.20 am, and in a physically precarious condition, for over five and a half hours thereafter i.e. till 8.50 am no one bothered to even attend to him. According to the affidavit, when Sub-Inspector Harmohan Nayak returned to the PS after investigating some other case, and started interrogating Manoj, the latter complained of pain in his abdomen and 'babbled'. It is only then, at 9 am, he was shifted to the hospital for treatment.

9. Mr. Akshyanshu Sekhar Nandy, learned counsel for the Petitioners, referred to the fact that although no external injuries were visible on the head when post mortem took place, it was found that there was a fracture of the

sternum and the presence of a cranio-cerebral injury in the head. These injuries too were confirmed to be ante mortem in nature. The six external injuries were in the form of abrasions on the arms, legs and left shoulder joint and these were not opined to be fatal. However, the internal injuries to the head and sternum were opined to be caused 'by hard and blunt force impact'. The final medical opinion was that Manoj's death was due to the aforementioned cranio-cerebral injuries.

10. Mrs. S. Pattanayak, learned Additional Government Advocate, has referred to the closure report filed and orders passed by the learned SDJM, Dhenkanal. She pointed out that despite several opportunities, and notice to them, the Petitioners did not appear before the SDJM to file a protest petition and this led the SDJM to accept the closure report filed by the police.

11. Indeed it appears from the copy of the proceedings before the SDJM that despite the Petitioners having been served with the notice in the proceedings on 26th December, 2008 itself, they did not participate and file a protest petition. It appears that on 26th November, 2010 that one Sri O.P. Saran, Advocate appeared on their behalf before the learned SDJM and filed his vakalatnama. Thereafter, several hearings took place in 2011 and 2012 before the SDJM during which the Petitioners and their counsel remained absent. The last order was passed by the learned SDJM on 25th November, 2012 accepting the final closure report submitted by the IO. The final report was that it was 'a mistake of fact'. In the absence of any protest petition, the said report was accepted by the SDJM, Dhenkanal. The position that emerged at the conclusion of the investigation was that there was nothing to prove that the death was a 'custodial death' caused by the police.

12. However, this does not absolve the police of their responsibilities of ensuring timely medical help to a person, who had obviously been arrested and brought in a condition of pain into the Town PS at Dhenkanal at 3.20 am on 7th June, 2005. When on their own showing the police on breaking open the foreign liquor shop found the deceased on the floor writhing in pain, there was no justification in keeping him in the PS in their custody without any medical attention from 3.20 am to 9 am. This was nothing but negligence, plainly inexcusable. The very serious cranio-cerebral injuries suffered by the deceased, even if it was due to the fall inside the shop from the roof as alleged by the Police, required immediate attention. Manoj should have been immediately rushed for medical treatment. The six hour delay was obviously fatal.

13. The law in regard to the liability of state functionaries for acts of negligence has been well settled in a series of decisions, many of which deal with deaths of persons while in judicial custody. These would apply with equal force to a situation of proven case of death while in police custody as a result of negligence of the police. Once a person is in the custody of the police, the security of that person's life and liberty is in their hands. They are answerable for whatever happens to the person in their custody.

14. Among the early decisions of the Supreme Court dealing with the living conditions of under trial prisoners is ***D Bhuvan Mohan Patnaik v. State of Andhra Pradesh (1975) 3 SCC 185***, where Chandrachud, J. (as the Learned Chief Justice of India then was) held as under (SCC @ 188):

> "The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against the very essence of a scheme of ordered liberty. ... ***No person, not even a prisoner, can be deprived of his 'life' or 'personal liberty' except according to procedure established by law***. The American Constitution by the 5th and 14th Amendments provides, inter alia, that no person shall be deprived of "life, liberty, or property, without the due process of law". Explaining the scope of this provision, Field J. observed in *Munn v. Illinois (1877) 94 US 113* that the term "life" means something more than mere animal existence and the inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed. This statement of the law was approved by a Constitution Bench of this Court in *Kharak Singh v. The State of UP AIR 1963 SC 1295*." (emphasis supplied)

15. Justice Krishna Iyer reiterated the essentiality of fundamental rights for jail inmates in ***Charles Sobraj v. Superintendent, Central Jail, Tihar, New Delhi (1978) 4 SCC 104*** in the following passage (SCC @ 109-110):

> "If a whole atmosphere of constant fear of violence frequent torture and denial of opportunity to improve oneself is created or if medical facilities and basic elements of care and comfort necessary to sustain life are refused then also the humane jurisdiction of the court will become operational based on Article 19. ... prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise."
>
> (emphasis supplied)

16. A Constitution Bench of the Supreme Court took serious note of the treatment meted out to undertrials, convicts and those awaiting death penalty in the case of ***Sunil Batra (I) v. Delhi Administration (1978) 4 SCC 494***. The majority held as under (SCC @ 568):

> "It is no more open to debate that convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed [see *Procunier v. Martinex 40 L Ed 2d 224 at 248 (1974)*]. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial."

17. In ***Neelabati Behera v. State of Orissa (1993) 2 SCC 746*** it was reiterated that prisoners and detenues are not denuded of their fundamental rights under Article 21 and only such restrictions as are permitted by law can be imposed on them. It was held:

> "It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and its is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen o life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, expect according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

18. These decisions were in cases of custodial deaths or violence while the victims were in police or judicial custody. The liability of state functionaries for acts of omission or commission constituting constitutional tort was extended to deaths or violence that occurred, not necessarily at the hands of the officials, but while in their custody. One such decision was ***In re Death of Sawinder Singh Grover [1995 Supp (4) SCC, 450***. There, the detenu, while in the custody of the Enforcement Directorate (ED) and during

interrogation, jumped to his death. On the ground that the death took place while he was in their custody, the Supreme Court, after getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, directed both the Union of India as well as the ED to pay Rs. 2 lakhs as compensation to the widow of the deceased.

19. In the landmark decision ***D K Basu v. State of West Bengal (1997) 1 SCC 416***, the Supreme Court observed pertinently:

> "Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

20. In ***Rama Murthy v. State of Karnataka (1997) 2 SCC 642***, the Supreme Court took note of a letter petition by a prisoner in Central Jail, Bangalore. It issued several directions to improve the living conditions of inmates. Among the major problems it identified as afflicting the system and which needed immediate attention was, apart from overcrowding, delay in trial, torture and ill-treatment, "neglect of health and hygiene". On neglect of health care facilities, the Court observed as under: (SCC @ 657)

> (S)ociety has an obligation towards prisoners' health for two reasons. First, the prisoners do not enjoy the access to medical expertise that free citizens have. Their incarceration places limitations on such access; no physician of choice, no second opinions, and few if any specialists. Secondly, because of the conditions on their incarceration, inmates are exposed to more health hazards than free citizens. Prisoners therefore, suffer from a double handicap."

21. ***In Murti Devi v. State of Delhi (1998) 9 SCC 604*** the Supreme Court found the Tihar Jail authorities negligent and awarded compensation to the Petitioner for the death of her husband, an under trial prisoner, Raj Kumar. The jail authorities made an unsuccessful attempt at convincing the Court that the deceased " was a drug addict and presumably as a consequence of

withdrawal symptoms had suffered some injuries and also on account of an old injury in kidney, he had died." The Supreme Court held that, "prompt and appropriate action in rendering medical aid in a hospital was also not given to the said deceased. ... There is no manner of doubt that because of the gross negligence on the part of the jail authorities, the said Raj Kumar, an under trial prisoner in Tihar Jail, was subjected to serious injuries inside the jail which ultimately caused his death."

22. The facts in ***Ajab Singh v. State of Uttar Pradesh (2000) 3 SCC 521*** were similar to the case on hand. There the deceased Rishipal was lodged in the District Jail, Meerut. According to the jail officials "Rishipal had gone to the jail hospital on 31st May, 1996 and complained of "jaundice" and weakness, yellow urine and lack of appetite. He was admitted to the jail hospital and treated for jaundice. On the evening of 31st May 1996, Rishipal started vomiting and was given treatment. The jail doctor referred him to the Medical College, Meerut where he was admitted at about 8.40 p.m. on 1st June, 1996. His condition did not improve "and he died as result of the jaundice and liver failure". The Supreme Court termed the post mortem report as "rather misleading which narrated the cause of death as 'shock and haemorrhage due to ante mortem injuries'." Taking a strong view on the affidavit, the Supreme Court held as under: (SCC @ 524)

> "(W)hat appears to us to be a concocted story is that set out in the respondent's affidavits. They are, to our mind, desperate attempts to avoid responsibility for acts committed while Rishipal was in judicial custody. There can be no doubt that the respondents have not investigated the cause of death of Rishipal as they ought to have done or that, at any rate, they have not placed all relevant material before this Court. They have attempted to pull the wool over the eyes of this Court. We do not appreciate the death of persons in judicial custody. When such deaths occur, it is not only to the public at large that those holding custody are responsible; they are responsible also to the courts under whose orders they hold such custody."

23. The Supreme Court directed the CBI to investigate into the circumstances of Rishipal's death and the State of UP to pay compensation of Rs. 5 lakhs.

24. The liability of the state to compensate for the death of a prison inmate in unnatural circumstances was reiterated in ***State of Andhra Pradesh v. Challa Ramkrishna Reddy (2000) 5 SCC 712***. The Supreme Court

dismissed the appeal of the State of Andhra Pradesh against the decision of the High Court of Andhra Pradesh granting compensation to the family members of an under trial who got killed in an attack targeting him in the jail due to the negligence of jail authorities at sub-jail Koilkuntla. "On being lodged in jail, the deceased Challa Chinnappa Reddy and Challa Ramkrishna Reddy (P.W.1) both informed the Inspector of Police that there was a conspiracy to kill them and their lives were in danger. … In spite of the representation made by the deceased and Challa Ramkrishna Reddy, adequate protection was not provided to them…" There were two guards on duty instead of the stipulated nine. The Court held the incident to be a result of "failure to take reasonable care."

25. The basic principle of liability of government officials for acts constituting constitutional tort was elaborated by the Supreme Court in ***Chairman Railway Board v. Mrs. Chandrima Das (2000) 2 SCC 465***, as under:

> "The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from *Rudul Sah v. State of Bihar 1983(3) SCR 508.*
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> In cases relating to custodial deaths and those relating to medical negligence, this Court awarded compensation under Public Law domain in *Nilabati Behera vs. State of Orissa* (*supra*); *State of M.P. v. Shyam Sunder Trivedi (1995) 4 SCC 262; People's Union for Civil Liberties v. Union of India (1997) 3 SCC 433; Kaushalya v. State of Punjab (1996) 7 SCALE (SP) 13; Supreme Court Legal Aid Committee v. State of Bihar (1991) 3 SCC 482; Dr. Jacob George v. State of Kerala (1994) 3 SCC 430; Paschim Bangal Khet Mazdoor Samity v. State of West Bengal & Ors. (1996) 4 SCC 37; and Mrs. Manju Bhatia v. N.D.M.C. (1997) 6 SCC 370.*

26. The Supreme Court rejected the contention of the Railways that the victim herself should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution. It was held that:

> "Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law."

27. In ***Nina Rajan Pillai v Union Of India 2011 (5) AD (Del) 36*** the Tihar jail authorities sought to project the death of the Petitioner's husband while in judicial custody as being due to "natural causes". Nevertheless a Commission of Inquiry headed by a former Chief Justice of the Himachal Pradesh High Court established that "it is clear that it was the failure or omission of the jail authorities on several counts that were found to have resulted in such death." It was held that "with timely medical assistance his life may have been saved. There are no mitigating factors which can explain the omission of the jail authorities in providing such timely medical assistance." It was further held: "The basic minimum right to life and dignity should be available to every prisoner. When that non-derogable minimum standard is breached, the principle of strict liability should be invoked against the jail authorities making them answerable in law for the consequences of such breach."

28. In ***Re-Inhuman Conditions in 1382 Prisons reported in (2017) 10 SCC 658*** the Supreme Court reiterated the need to award compensation in cases of custodial deaths and observed:

> "55. Over the last several years, there have been discussions on the rights of victims and one of the rights of victims and one of the rights of a victim of crime is to obtain compensation. Schemes for victim compensation have been framed by almost every State and that is a wholesome development. ***But it is important for the Central Government and the State Governments to realize that persons who suffer an unnatural death in a prison are also victims - sometimes of a crime and sometimes of negligence and apathy or both***. There is no reason at all to exclude their next of kin from receiving compensation only because the victim of an unnatural death is a criminal. Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison custody, that person could nevertheless be a victim of an unnatural death. Hence the need to compensate the next of kin."
>
> (emphasis supplied)

29. Reverting to the case on hand, it is evident from the report of investigation of the police themselves that Manoj remained in police custody from 3.20 am till his death more than seven hours later on 7th June 2005. Even if it is not established that the ante mortem injuries found on his person during post-mortem were caused by the Police, the law of strict liability for the negligence of the police in not meeting the basic minimum standard of care in providing him prompt medical attention would stand attracted. The police have to be held liable for the avoidable death of Manoj, while in their custody, on account of their negligence.

30. The Court then perused the two affidavits filed on behalf of the Opposite Parties to find out if any compensation has been paid to the Petitioners for the death of Manoj while he was in the custody of the police. The Court was unable to find any statement to that effect in either of the affidavits. Mrs. S. Pattanayak, learned Additional Government Advocate, then sought time to seek instruction on this aspect. Nevertheless, the Court is of the view that the State Government should pay the compensation for the said custodial death to the parents of the deceased i.e., the Petitioners.

31. On the question of the quantum of compensation that must be awarded in the instant case, the Court notes that the claimants belonged to economically weaker section of the society and have had to suffer the agony of an extraordinarily long wait of over 15 years for justice. The Court directs that a sum of Rs.5,00,000/- (Rupees five lakhs) be paid by the State of Odisha to the Petitioners as compensation for the death of their son while in police custody. The compensation amount if any already paid shall be adjusted against the aforesaid sum and the balance be paid to the Petitioners not later than 8th March, 2021.

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

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

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2021 (I) ILR - CUT- 515

Dr. S. MURALIDHAR, C.J & B.P. ROUTRAY, J.

WRIT PETITION (CIVIL) NO. 9475 OF 2020

M/S. MAA KANAK DURGA ENTERPRISES .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ Petition – Tender matter – Allegation of illegal rejection of the Bid of the petitioner – Scope of interference by court – Matter was examined with reference to the settled law – Held, judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides – Its purpose is to check whether choice of decision is made 'lawfully' and not to check whether choice or decision is 'sound' – When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. (2007) 14 SCC 517, Jagdish Mandal -Vrs- State of Orissa and others followed). (Para 12)

Case Laws Relied on and Referred to :-

1. (2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa & Ors.

For Petitioner : Mr. S.K. Dalai

For Opp. Parties : Mrs. S. Pattanayak, Addl. Govt. Adv. (For Opp Party Nos.1 to 3).

Mr.S. Nanda, (For Opp. Party No.5).

JUDGMENT Date of Judgment : 23.02. 2021

B.P. ROUTRAY, J.

1. The Petitioner participated in the bidding process pursuant to Tender Call Notice (TCN) dated 30th December, 2019 issued by Opposite Party No.3 for supply of diet (dry and cooked) for SCB Medial College and Hospital, Cuttack. The TCN prescribed the conditions of submission of required documents, inter alia, the labour license and food license with three years relevant experience.

2. It is the case of the Petitioner that he having fulfilled all the conditions of eligibility participated in the tender along with Opposite Party

Nos.4, 5 and 6. He was intimated to remain present before the Tender Committee on 17.2.2020 at SCB Medical College and Hospital, Cuttack for finalization of the technical bid. During scrutinization, he was intimated of non-submission of uptodate renewal labour license. So apprehending rejection of his technical bid, he earlier filed W.P.(C) No.6574 of 2020 before this Court, which was dismissed by order dated 20th February, 2020 observing the same as pre-mature since no final decision has been taken on the tender. Thereafter coming to know about the rejection of his technical bid and selection of Opposite Party No.5 as the successful bidder through RTI application, he preferred the present writ petition praying to accept his offer and to award the contract in his favour.

3. Opposite Party No.3, the Superintendent of SCB Medical College and Hospital, Cuttack, has filed the reply refuting the claim of the Petitioner. As per their statement, the technical bid of the Petitioner was rejected for non-submission of appropriate labour license and proper certificate of three years experience in diet preparation and supply and as such, the Petitioner being disqualified in the technical bid was debarred from participating further.

4. Opposite Party No.5, who was selected as the successful bidder, has also come to contest the writ petition by filing his counter. Said Opposite Party No.5 in his counter reply has supported the stand of Opposite Party No.3 that, the Petitioner being disqualified in the technical bid has been debarred from participating in the financial bid. It is also stated that, by order dated 27th November, 2020, the work order has been issued in his favour and presently he is supplying the diet with effect from 1st December, 2020.

5. It is submitted by Mr. Dalai, learned counsel for the Petitioner that the labour license submitted by the Petitioner is valid and is as per the requirement in terms of the conditions prescribed in the TCN. Further the experience certificate of three years in diet preparation and supply is also as per the requirements. But Opposite Party No.3 in connivance with Opposite Party No.5 has rejected his technical bid with mala fide intentions as he has quoted the lowest price. It is also submitted that the theory of labour license under the Contract Labour (Regulation and Abolition) Act, 1970 is a new concept advanced by Opposite Party No.3 which was never the requirement as per the conditions of the TCN.

6. Having considered the submissions of the respective parties, it is seen from Annexure-1 that the conditions stipulated as per the Clause VI.3.3 and VI.3.9 are as follows:

> **"VI.3. Eligibility Criteria:**
>
> xx xx xx
>
> 3. The bidder should have a minimum of 3 years experience in diet preparation and its supply/services in Govt. or Private Health Institutions only having minimum 200 no. of bed.
>
> xx xx xx
>
> 9.The bidder should have valid labour license (registration no. & date) of Labour department."

7. The main thrust of argument of Mrs. S. Pattanayak, learned Additional Government Advocate on behalf of Opposite Party No.3 is that, the bidders are required to submit the labour license issued by the Labour Department in terms of Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970. But what is submitted by the Petitioner is the registration certificate granted under the Odisha Shops and Commercial Establishments Act, which is not sufficient for the purpose.

8. Mr. Nanda, learned counsel appearing for the Opposite Party No.5 also argued in the same line persuading us to go through the eligibility criteria prescribed in the TCN under Annexure-1.

9. As mentioned above, Clause 9 of the eligibility criteria is candid and clear requiring valid license of Labour Department. The said stipulation never mandates the license to be issued under the Contract Labour (Regulation and Abolition) Act, 1970. In the wake of the purpose, which is to supply diet, therapeutic and no therapeutic to the patients to the hospital, we fail to concede to the submissions of requirement of labour license under the Contract Labour (Regulation and Abolition) Act, 1970. Rather the submission of the Petitioner that, the same is required under the Odisha Shops and Commercial Establishments Act appears more acceptable. Therefore, the contention of the Opposite Parties requiring the labour license under the Contract Labour (Regulation and Abolition) Act, 1970 does not seem justified in view of the stipulation made in the TCN. When the

submission of labour license (registration no. and date) by the Petitioner under the Odisha Shops and Commercial Establishments Act is not disputed, in our considered opinion the same satisfies the requirement sought for at Clause 9.

10. Coming to the other shortfall as contended by the Opposite Parties regarding lack of three years experience in terms of Clause 3 of the eligibility criteria, the admitted case of the parties are that the Petitioner has submitted the certificate issued by All India Institute of Medical Science, Bhubaneswar relating to experience of providing patient dietary service in AIIMS since 8th August, 2015 till 26th October, 2018. This has been negatived by the Opposite Party No.3 by saying that the period of service of the Petitioner in AIIMS, Bhubaneswar was not in chronological order and the certificate furnished by the Petitioner was having gap period of extension order from 6th August, 2017 to 31st July, 2018. Such analysis of Opposite Parties in our considered view is flimsy on the face of Annexure-9 which is the experience certificate issued in favour of the Petitioner by the AIIMS, Bhubaneswar. Moreover, the period of experience from 8th August, 2015 to 26th October, 2018 when exceeds three years period, the same appears to be satisfying the requirement of Clause-3 without any hesitation.

11. As such upon a close scrutiny of the submissions made by the parties and the documents filed on record, we hold that the rejection of technical bid of the Petitioner is illegal, arbitrary and contrary to the terms of the TCN.

12. In the case of ***Jagdish Mandal vs. State of Orissa and others, reported in (2007) 14 SCC 517***, the Hon'ble Supreme Court considering the scope of the Court to interfere in tender and contractual matters in exercise of powers of judicial review has held as follows:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at

> the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> Or
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
>
> (ii) Whether public interest is affected.
>
> If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

13. It is admitted by the Opposite Parties that in the meantime during pendency of the writ petition, Opposite Party No.5 has been issued with the work order on 27th November, 2020 and he commenced with the supply of work with effect from 1st December, 2020. This undoubtedly a development made during pendency of the writ petition and as such is governed by the principle of *lis pendens* and of course such development happened in the meantime is subject to final result of the writ petition.

14. In view of the discussions made above as the bid of the Petitioner is found rejected illegally and contrary to the conditions of the TCN and the Petitioner specifically states that he was the lowest in the financial bid which the Opposite Parties has not replied cleverly, the action of Opposite Parties in rejecting the bid of the Petitioner and selecting Opposite Party No.5 for the purpose to grant him the contract, the same can safely be opined as mala fide action of the Opposite Parties. Accordingly, the grant of contract in order dated 27th November, 2020 under Annexure-F/3 is quashed.

15. In the result while quashing Annexure-F/3, Opposite Party Nos.1 to 3 are directed to issue work order in favour of the Petitioner in the event his financial bid is found lower than Opposite Party No.5 to commence the supply work with effect from 1st March, 2021. Needless to say that Opposite Party No.5 may continue his supply till 28th February, 2021.

16. The writ petition is accordingly allowed. There shall be no order as to costs.

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2021 (I) ILR - CUT- 520

Dr. S. MURALIDHAR, C.J & B.P. ROUTRAY, J.

WRIT PETITION (CIVIL) NO. 11283 OF 2012

STATE OF ORISSA .....Petitioner

.V.

(1) **RASHMI MOHAPATRA**
(2) **ORISSA HUMAN RIGHTS COMMISSION** .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order directing revision of provisional pension passed by the Odisha Human Rights Commission – Petitioner before OHRC was the wife of a Govt. servant against whom a criminal case is pending under the PC Act – The question arose as to whether there has been violation of human rights for not revising provisional pension owing to pendency of a criminal case against the Govt. servant? – Held, No – There was no justification for the OHRC to pass such order – Order of OHRC set aside.

For Petitioner : Mr. P.K. Muduli, Addl. Govt. Adv.
For Opp. Party : Mrs. Pami Rath.

JUDGMENT Date of Judgment 25. 02. 2021

Dr. S. MURALIDHAR, C.J.

1. The State of Odisha through the Commissioner-cum-Secretary, Housing and Urban Development Department has filed this writ petition challenging an order

dated 21st April 2011 passed by the Orissa Human Rights Commission, Bhubaneswar ('OHRC')-Opposite Party No.2, in Case No. 192 of 2009 filed by Opposite Party No.1.

2. The background facts are that the husband of Opposite Party No.1 is stated to have retired as Chief Engineer, Public Health, Orissa on 30th September, 2001 on attaining the age of superannuation. After his retirement, the provisional pension as admissible to him was sanctioned by an order dated 10th October, 2001. The unutilized leave salary is also stated to have been sanctioned in his favour. According to the Petitioner the final GPF was also released.

3. It is pointed out by the Petitioner that while he was in service a criminal case was registered against the husband of Opposite Party No.1 under the Prevention of Corruption Act, 1988 ('PC Act') for possession of assets disproportionate to his legal known sources of income. As of the date of filing of the present petition, the said criminal case was pending. In view of the pendency of the said vigilance case, only provisional pension as provided under Rule 66 of the OCS (Pension) Rules, 1992 was sanctioned.

4. Opposite Party No.1 filed Case No. 192 of 2009 before the OHRC praying that the Petitioner should release the full pension and all pensionary benefits to her husband along with 18% interest from the date of his retirement.

5. By an order dated 21st April 2011, the OHRC issued a direction to the Petitioner to revise the provisional pension of the husband of Opposite Party No.1 with effect from 1st January, 2006 within four weeks and also to pay the arrears within six weeks. According to the OHRC, the mere pendency of a vigilance case would not come in the way of provisional pension of the husband of the Opposite Party No.1 being revised.

6. One of the grounds urged by Mr. P.K. Muduli, learned Additional Government Advocate on behalf of the Petitioner, is that the impugned order is beyond the jurisdiction of the OHRC. He referred to Regulation 10 (h) of the Odisha Human Rights Commission (Procedure) Regulations, 2003 ('Regulations, 2003') which states that complaints relating to service matters or labour or industrial disputes or to claims and grievances arising out of conditions of service or service rules or labour laws 'shall not be entertained' by the OHRC and 'shall be dismissed in limine.' Mr. Muduli points out that the refusal to revise the provisional pension of a government servant, who has a vigilance case pending against him, would not give rise to any issue of violation of human rights.

7. On the other hand Mrs. Pami Rath, learned counsel appearing for the OHRC sought to justify the impugned order by first pointing out that there has been an amendment to the Regulation 10 (h) of the Regulations, 2003 to the effect that where such complaint relating to a service matter involves the violation of human rights, it could be entertained. She also referred to the judgment dated 18th February, 2020 of the Supreme Court of India in Civil Appeal No. 1677-1678 of 2020 (***Dr. Hira Lal v. State of Bihar***), where it was reiterated that the right to receive pension is a right to property protected under Article 300-A of the Constitution of India; that pension and gratuity are not mere bounties, given out of generosity by the employer and cannot be taken away by a mere executive fiat or administrative instruction.

8. While the legal position that pension is not a bounty and cannot be taken away by an executive instruction is unexceptionable, the question that arises for consideration in the present petition is whether in light of the restrictions under Regulation 10 (h) of the Regulations, 2003, the OHRC was justified in entertaining the complaint brought forth by Opposite Party No.1?

9. In the first place it is required to be noted that nowhere in the impugned order does the OHRC states that the husband of Opposite Party No.1 was in any manner precluded from approaching the OHRC for any reason. It is a mystery why he could himself have not come forward to claim the revised provisional pension. Secondly, even assuming that Regulation 10 (h) of the Regulations, 2003 permits the OHRC to entertain a complaint pertaining to a service matter, as long as it involves violation of human rights, in the present case, it cannot by any stretch of imagination be held that the non-revision of the provisional pension of a government servant, who has a pending criminal case against him involving offences under the PC Act, results in the violation of any human rights. The expression 'human rights'is defined under Section 2 (d) of the Protection of Human Rights Act, 1993 (Act') thus:

> "Human Rights means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

10. In the present case, the husband of Opposite Party No.1 was granted provisional pension, and other retiral benefits upon his superannuation. The pension was provisional on account of the pendency of a pending criminal case against husband of Opposite Party No.1 for offences under the PC Act. In the circumstances, the refusal to revise the provisional pension of the husband of Opposite Party No.1on account of the pendency of the criminal case, cannot be viewed as a violation of the human rights of such person or of his wife and family.

11. Viewed from any angle, therefore, there was no justification for the OHRC to have entertained the complaint of Opposite Party No.1 and to have issued the directions as contained in the impugned order. Accordingly the impugned order of the OHRC is hereby set aside.

12. The writ petition is allowed, but in the circumstances there shall be no orders as to costs.

13. An urgent certified copy of this judgment be issued as per rules.

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2021 (I) ILR - CUT- 523

Dr. S. MURALIDHAR, C.J.

ARBP NO. 63 OF 2019
I.A. NO. 28 OF 2020

M/S. UNIEXCEL GROUP HOLDING CO. LTD. …….Petitioner
.V.
NATIONAL ALUMINIUM CO. LTD. ……Opp. Party

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 and 36(2) read with section 9 – Provisions under – Application under section 34 challenging the award without an application under section 36(2) seeking stay of the award by the Respondent – Application under section 9 of the Act by the claimant seeking a direction to Respondent to deposit the award amount before the High Court – Admitted fact is that the Respondent has no asset in India so as to secure the amount of award – The claimant may not be able to enforce the award – Maintainability of the application under section 9 questioned – Law on the issue discussed in detail – Held, it is permissible for the claimant to invoke Section 9 of the Act to secure the award amount.

Case Laws Relied on and Referred to :-

1. 2019 SCC Online SC 1520 : Hindustan Construction Company Ltd. .Vs. Union of India.

2. 2018 SCC Online Cal 2430 : Candor Gurgaon Two developers & Projects Pvt. Ltd. .Vs. Srei Infrastructure Finance Ltd..
3. 2016 SCC Online Mad 9122 : M/s. Samson Maritime Limited .Vs. Hardy Exploration & Production (India) Inc.
4. (2019) SCC Online Bom 1614 : Centrient Pharmaceuticals India Pvt. Limited .Vs. Hindustan Antibiotics Ltd..
5. MANU/MH/2473/2014 : Karvy Financial Services Ltd. .Vs. Progressive Construction Ltd..
6. (2019) 4 SCC 401 : M/s. Icomm Tele Ltd .Vs. Punjab State Water Supply and Sewerage Board.
7. (2007) 6 SCC 798 : Arvind Constructions Company Private Limited .Vs. .Vs. Kalinga Mining Corporation.
8. (2008) 2 SCC 302 : Raman Tech & Process Engineering Co. .Vs. Solanki Traders.
9. (2007) 7 SCC 125 : Adhunik Steels Ltd. .Vs. Orissa Manganese and Minerals Pvt. Ltd.
10. (2012) 1 CTC 225 : C.S.S. Corp Pvt. Ltd. .Vs. Space Matrix Design Consultants Pvt. Ltd..
11. (2012) 4 Arb. LR 113 : Nimbus Communications Ltd. .Vs. BCCI.
12. (2015) 218 DLT 200 (DB) : C.V. Rao .Vs. Strategic Ports Investments KPC Ltd.,
13. (2004) 1 SCC 540 : National Aluminium Co. Ltd. .Vs. Pressteel and Fabrications Pvt. Ltd..
14. (2009) 17 SCC 796 : Fiza Developers & Inter Trade Pvt. Ltd. .Vs. AMCI (I) Pvt. Ltd. .
15. (2018) 6 SCC 287 : BCCI .Vs. Kochi Cricket Pvt. Ltd..

ORDER Date of Order : 05.03.2021

Dr. S. MURALIDHAR, C.J.

1. Heard Mr. D. Panda, learned counsel for the Petitioner M/s. Uniexcel Group Holding Co. Ltd. (UGHCL) and Mr. S. Parekh, learned counsel for the Opposite Party National Aluminium Company Limited (NALCO).

2. NALCO has filed this application under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 'Act') for a direction to UGHCL to deposit the entire amount awarded under the arbitral Award dated 15th July, 2019 in the Registry of this Court as a pre-condition for hearing of the arbitration petition i.e. ARBP No.63 of 2019 filed by UGHCL under Section 34 of the Act and for securing the said amount awarded by the sole Arbitrator in favour of NALCO.

3. The background to the present application is that UGHCL is a company incorporated under the Laws of British Virgin Islands, having its registered office at Fu Hsing North Road Tapiei 10476 Taiwan (Republic of

China). A fact, which is not in dispute, is that UGHCL is not operating in India and has no assets in India. Another admitted fact is that along with its petition under Section 34 of the Act i.e. ARBP No.63 of 2019, UGHCL did not file any application under Section 36 (2) of the Act seeking stay of the Award dated 15th July, 2019.

4. The arbitration by a sole Arbitrator was an international commercial arbitration and took place under the aegis of the International Chambers of Commerce. The case of NALCO, which was the claimant, was that UGHCL committed a breach of the contract of sale of goods by refusing to take the last shipments of the goods. The sole Arbitrator awarded NALCO damages constituting the difference between the contract price and the market price of the goods on the date of the breach. The sole Arbitrator awarded NALCO a sum of USD 469,850 together with the post award interest @ 9.5%.

5. Mr. Sameer Parekh, learned counsel for NALCO submits that since UGHCL has no assets in India, NALCO is not in a position to file an application for the execution of the Award in India. He submits that even if ARBP No.63 of 2019 filed by UGHCL under Section 34 of the Act is dismissed, NALCO would not be able to enforce the Award in India. Additionally, Mr. Parekh points out that the entire fees of the ICC arbitration, including UGHCL's share, was deposited by NALCO. It is also pointed out that the Award is a foreign award in an international commercial arbitration and, therefore, the scope to challenge under Section 34 of the Act, after the amendment to the Act with effect from 23rd October 2015, is narrow since no review on merits of the dispute is permissible. The ground of patent illegality on the face of the award is no longer available. He urges that UGHCL should be asked to either deposit the entire awarded sum in this Court or provide adequate security to ensure its enforceability in the event of UGHCL failing in its challenge to the Award.

6. Mr. Parekh, in support of his submissions on the maintainability of the application under Section 9 of the Act relied on the decision of the Supreme Court in ***Hindustan Construction Company Ltd. v. Union of India, 2019 SCC Online SC 1520*** (hereafter ***HCCL***), the decision of the Delhi High Court in ***Power Mech Projects Ltd. v. SEPCO Electric Power Construction Corporation*** (decision dated 17th February, 2020 in O.M.P.(I) (COMM) 523 of 2017) (hereafter '***Power Mech***'), the decision of the Calcutta High Court in ***Candor Gurgaon Two developers & Projects Pvt. Ltd. v. Srei Infrastructure***

Finance Ltd. 2018 SCC Online Cal 2430, and the decision of the Madras High Court in ***M/s. Samson Maritime Limited v. Hardy Exploration & Production (India) Inc. 2016 SCC Online Mad 9122***.

7. UGHCL resists the application. It is first submitted by Mr. D. Panda, learned counsel for UGHCL, that the timing of present application is suspect. It is pointed out that no reply was filed by NALCO to UGHCL's petition under Section 34 of the Act for about seventeen months, and when the petition was ripe for arguments, the present application has been filed only to scuttle the hearing. It is repeatedly urged by Mr. Panda that there is no change in the circumstances from the time of the contract to warrant the seeking of interim relief from the Court by invoking Section 9 of the Act. NALCO always knew that UGHCL has no assets in India and is operating entirely on foreign soil.

8. While not disputing that even now UGHCL is not seeking a stay of the Award in question, Mr. Panda, relying on the decision of the High Court of Bombay in ***Centrient Pharmaceuticals India Pvt. Limited v. Hindustan Antibiotics Ltd. (2019) SCC Online Bom 1614***, submits that on the plain reading of Sections 9 and Section 36 of the Act, the only remedy available to NALCO was to execute the Award and recourse of Section 9 of the Act is not available. Reliance is also placed on another decision of the Bombay High Court in ***Karvy Financial Services Ltd. v. Progressive Construction Ltd, MANU/MH/2473/2014***. Mr. Panda seeks to refer to certain passages of the decision in ***HCCL*** to urge that the question of providing appropriate security does not arise since the award is fully capable of being executed and this if at all, would be a matter within the province of the executing court alone.

9. Mr. Panda does not dispute that UGHCL has no assets in India. Nevertheless, according to him, at this stage when NALCO can seek to enforce the Award under Section 36 (2) read with Section 36 (3) of the Act, the question of NALCO being granted interim relief under Section 9 of the Act does not arise. A comparison is drawn with Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act), which mandates pre-deposit of the awarded sum for entertaining a challenge to the award, and the absence of such a provision in the Act. It is submitted that NALCO should not be permitted to achieve indirectly what it cannot directly.

10. Mr. Panda points out that the same learned Single Judge of the Delhi High Court who authored the decision in ***Power Mech*** delivered a subsequent decision in ***Indian Oil Corporation Limited v. Toyo Engineering Corporation*** (decision dated 6th March 2020 in O.M.P. (COMM) 316/2019), where a prayer for deposit of 100% of the awarded amount as a pre-condition for entertaining a challenge to the Award under challenge in a petition under Section 34 of the Act was rejected.

11. Mr. Panda refers to the decision in ***M/s. Icomm Tele Ltd v. Punjab State Water Supply and Sewerage Board (2019) 4 SCC 401*** where such 'deposit-at-call' clause in the contract requiring deposit of 10% of the awarded sum as a precondition for invoking arbitration was held to be *ultra vires* Article 14 of the Constitution of India as it discourages arbitration.

12. Lastly Mr. Panda referred to the decisions in ***Arvind Constructions Company Private Limited v. Kalinga Mining Corporation (2007) 6 SCC 798*** and ***Raman Tech & Process Engineering Co. v. Solanki Traders, (2008) 2 SCC 302*** and urged that the general rules that govern the grant of interlocutory reliefs would be applicable even while dealing with an application under Section 9 of the Act post the stage of pronouncement of the Award. He also referred to the decision in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd. (2007) 7 SCC 125,*** the decision of the High Court of Madras in ***C.S.S. Corp Pvt. Ltd. v. Space Matrix Design Consultants Pvt. Ltd. (2012) 1 CTC 225***; of the Bombay High Court in ***Nimbus Communications Ltd. v. BCCI, (2012) 4 Arb. LR 113*** and the decision of the Delhi High Court in ***C.V. Rao v. Strategic Ports Investments KPC Ltd., (2015) 218 DLT 200 (DB)*** and submitted that this Court has to examine whether the balance of convenience is in favour of UGHCL in denying the interim relief as prayed for by NALCO.

13.1 Since both the parties have relied extensively on the decision in ***HCCL***, the Court first would like to discuss the said decision in some detail. HCCL, an infrastructure construction company, undertaking projects for public utilities was said to be facing a major problem when awards in its favour were challenged under Section 34 of the Act resulting in an automatic stay of their enforcement. It was argued by HCCL that Article 36 of the UNCITRAL Model Law, on which the Act was based, did not provide for such an automatic stay.

13.2 One of the issues that arose for consideration before the Supreme Court concerned the correctness of its earlier decision in ***National Aluminium Co. Ltd. v. Pressteel and Fabrications Pvt. Ltd. (2004) 1 SCC 540***. In para 30 of the judgment in ***HCCL***, the three-Judge Bench of the Supreme Court categorically held that the decisons in ***NALCO*** *(supra)* and ***Fiza Developers & Inter Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd. (2009) 17 SCC 796*** were 'per incuriam' since they failed to notice Sections 9 and 36 and in particular the second part of Section 36 of the Act. It was held that the subsequent amendment to Section 36 of the Act in 2019 was 'clarificatory in nature". It merely reiterated the position under the unamended Section 36 that did not result in the grant of an automatic stay of an Award. It was held that the judgment in ***BCCI v. Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287*** had already clearly enunciated the law in this regard, viz., that there is no automatic stay of an Award if there is a challenge laid to it under Section 34 of the Act.

13.3 Specific to the interplay between Section 9 and Section 36 of the Act, it was held by the Supreme Court that the language of Section 9 of the Act supported the proposition that there was no automatic stay with the mere filing of a Section 34 petition. It was observed as under:

> "27. This also finds support from the language of Section 9 of the Arbitration Act, 1996, which specifically enables a party to apply to a Court for reliefs ....after the making of arbitration award but before it is enforced in accordance with Section 36." The decision in *NALCO* (*supra*) and *Fiza Developers and Intra-Trade Pvt. Ltd.* (*supra*) overlook this statutory position. These words in Section 9 have not undergone any change by reason of the 2015 or 2019 Amendment Acts.
>
> 28. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in *Dirk India Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd., 2013 SCC OnLine Bom 481* held that :
>
> '13. ...The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement."

> 29. This being the legislative intent, the observation in *NALCO* (*supra*) that once a Section 34 application is filed, "there is no discretion left with the Court to pass any interlocutory order in regard to the said Award..." flies in the face of the opening words of Section 9 of the Arbitration Act, 1996, extracted above."

14. Although it was sought to be contended by Mr. Panda, learned counsel for UGHCL that the ***HCCL*** judgment supports the proposition that the recourse can be had only to execution proceedings when no stay is sought by the Petitioner challenging an Award under Section 34 of the Act, the Court is unable to draw such inference from a reading of the judgment in ***HCCL*** or the plain language of Section 9 of the Act.

15. On the contrary, the judgment of Delhi High Court in ***Power Mech*** *(supra)* supports the case put forth by **NALCO**. Interestingly, in ***Power Mech*** *(supra)* what appears to have persuaded the Court to require pre-deposit of the awarded amount was that the Petitioner in that case did not have any assets in India. Even its ongoing projects in India could not be accepted as security for making the award enforceable. This was after noticing that the Petitioner in that case was a Central Government owned entity registered in China affiliated to the Power Construction Corporation in China.

16. Although it was sought to be argued by Mr. Panda that the same learned Single Judge of Delhi High Court who decided ***Power Mech*** *(supra)* had declined a similar relief in a subsequent decision in ***Indian Oil Corporation*** (*supra*), it is seen that in was in a different set of circumstances as is evident from the following passage:

> "15. I have gone through the various orders including the judgment passed by this Court in the case of SEPCO (supra). It is important to mention that in the case of *SEPCO* (supra), this Court had noted that there is no mandate of law that in every case the Court should direct 100% deposit of the awarded amount. This is purely in the discretion of the Court and the discretion has to be exercised in the facts and circumstances of each case. In so far as *SEPCO* (*supra*) is concerned what had weighed was the fact that the petitioner therein was a foreign Company, with no assets in India. The various affidavits filed by its disclosing its ongoing projects were also a subject matter of serious dispute between the parties. Most significantly, the distinguishing factor in the case of SPECO (supra) was that when the Court passed the order on 17.02.2020, it was exercising its discretion to direct the petitioner to deposit an amount subject to which the Enforcement of the Award was to be stayed and it was also to be decided whether petition was to be admitted to

> hearing. Therefore, the stage in *SEPCO* (*supra*) was a stage which is comparable with the stage in the present petition when the order of 09.08.2019 was passed. Thus, in my view the two cases are incomparable."

17. As far as the present case is concerned, since it is not even disputed that the Petitioner has no assets in India, it is obvious that even if the petition under Section 34 of the Act were to be dismissed, NALCO would not be able enforce the Award in India.

18. The argument that it is open to NALCO to enforce the Award rightaway and, that making the maintainability of the petition under Section 34 of the Act conditional upon predeposit of the awarded would be unreasonable, overlooks the fact that the present stage is a post-Award and not a pre-Award one. The change in circumstance since the contract between UGHCL and NALCO, is that there is now an international award in favour of NALCO. Given the problem faced by NALCO of not being able to enforce the Award in India, it is permissible for NALCO to invoke Section 9 of the Act to bind down UGHCL to the extent of securing the Award amount. The fact that UGHCL has no assets in India also persuades the Court to accept such a prayer by NALCO.

19. None of the decisions cited on behalf of UGHCL by Mr. Panda are of assistance to him particularly in the context of the case at hand. An important distinguishing feature in those decisions and the facts at hand, is that UGHCL is an entity incorporated outside India and has no assets whatsoever in India. The fact that the Award is enforceable since no application for stay has been filed by UGHCL, does not change the position.

20. Mr. Panda placed great emphasis on the decision of the Delhi High Court in ***Avantha Holdings Limited v. Vistra ITCL India Ltd.*** (Decision dated 14th August, 2020 in O.M.P. (I) (COMM) 177/2020) and in particular in para 26 regarding the applicability of the known principles for grant of interim relief to an application under Section 9 of the Act. Even if it were to be accepted that all the principles that govern the grant of interim relief apply to an application under Section 9 of the Act, the balance of convenience in the present case is clearly in favour of NALCO in granting the interim relief as prayed for.

21. For all the aforementioned reasons, the application is allowed. The Petitioner UGHCL is directed to deposit the entire awarded amount in this

Court on or before 1st May, 2021 as a pre-condition to entertaining the arbitration petition i.e. ARBP No.63 of 2019. The amount so deposited, will be kept by the Registry of this Court in a fixed deposit in any Nationalized Bank initially for a period of six months and will be kept renewed thereafter during pendency of the arbitration petition.

22. The I.A. is allowed in the above terms but with no order as to costs.

23. The ARBP No.63 of 2019 be listed on 18th June, 2021 as already directed.

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2021 (I) ILR - CUT- 531

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

W.P.(C) NO. 12150 OF 2020

DWARIKANATH KAR .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner was engaged as an Operator of Photo Phone Projector in the year 1988 – Disengaged in 1993 – OA filed – Tribunal directed for reinstatement by following rules – Tribunal's order not complied with and in consequence thereof another two OAs and a writ petition filed – Even thereafter orders were not complied with – Petitioner attended the age of superannuation – Effect of – Held, the petitioner is entitled for compensation – Rupees Five lakhs awarded.

For the Petitioner : Satyabrata Mohanty & Associates.
For the Opp. Parties : A.G.A.

ORDER Date of Order : 22.02.2021

BY THE BENCH

Heard learned counsel for the petitioner and learned Addl. Government Advocate.

Petitioner in this writ petition assails the order dated 3.2.2018 passed by the Government in the Department of Forest and Environment vide Annexure-13 rejecting his prayer regarding reinstatement in service with all consequential service benefits with a further prayer to direct the opposite parties to reinstate him in service or in the alternative to extend all the service benefits as deem fit and proper.

This is the second round of litigation. From the record the following fact reveals:-

The petitioner was engaged in the year 1988 to work in Chilika Wildlife Division for operation of Photo phone Projector. His engagement letter was issued on 28.9.88 by the Divisional Forest Officer, Chilika Wildlife Division, Bhubaneswar vide Annexure-1. While continuing as such he has been disengaged from service on 3.3.1993 vide Annexure-4 issued by Divisional Forest Officer, Chilika Wild Life Division, Bhubaneswar due to paucity of funds. Challenging the said order petitioner had approached the Tribunal in O.A. No. 54(C) of 1994 to regularize him in service as Film Project Operator.

The Tribunal passed an interim order on 14.1.1994 to the effect that pendency of the application will not be a bar to appoint the applicant subject to the conditions that availability of post and funds for manning it and adherence to the reservation position. The said interim order was passed after modification of the earlier order. During pendency of the Original Application the Government in the Department of Forest & Environment in its letter dated 9th July, 1997 informed the Director, Nandankan Zoological Park, Bhubaneswar regarding to fill up of the post of Project Operator wherein it was stated that the post of Project Operator was vacant and pursuant to the interim order passed in O.A. No. 54(C) of 1994 the representation of the petitioner namely, Dwarikanath Kar can be considered for appointment against the said vacant post. It was further stated that in case the vacant post will be filled up by some other person in such event leave of the Tribunal is to be obtained. In view of the above fact, action may be taken immediately as per the department letter dated 31.3.1997. Thereafter another letter was issued to the Chief Conservator of Forests (Wildlife) Orissa on 18.1.1999 to implement the order of the Tribunal. The Chief Conservator of Forests (Wildlife), Orissa written a letter on 3.6.1999 to the Director, Nandankanan Zoological Park, Bhubaneswar for implementation of the order

of the Tribunal wherein it was stated that the case of Sri D.N.Kar for his appointment as Projector Operator against the existing vacant post following all relevant rules and as per instruction of Forest & Environment Department issued on 28.1.1999. Thereafter, the Chief Conservator of Forests (Wildlife), Orisssa again written a letter to the Commissioner-cum-Secretary to Government, Forest & Environment Department, Orissa, Bhubaneswar stating that two posts of Projector Operator for Nandankanan was created, one post was filled up by a staff of Nandankanan having requisite qualification in exigencies of Government work. Due to imposition of ban order on fresh appointment by Government it has been delayed to fill up the second post. However as per the order of the Tribunal in O.A. No. 54(C) of 1994 and Government instruction issued thereon in Forest & Environment Department on 21.6.1998 the Director, Nandankanan is taking steps to appoint Sri Dwarikanath Kar as Projector Operator against the second vacant post observing all the formalities stipulated by the Tribunal. Again on 20th February, 2001 the Chief Conservator of Forests (Wildlife) Orissa written a letter to the Government stating therein that the post of Projector Operator is lying vacant since long and it is absolutely necessary to fill up the same immediately to conduct wildlife documentary film show in Nandankanan for the education of the visitors. Due to imposition of restriction of Finance Department the post has not been filled up and there is every possibility for contempt of Court if the case of Sri Kar is not finalized soon. On the above reason he has sought for necessary clearance from the Finance Department. He has also mentioned that the vacant post of Projector Operator in Nandankan can be filled up as Sri Kar is found suitable by the Selection Committee held on 23.11.2000.

In spite of the fact that following the rules the Selection Committee found the applicant suitable for the post however, the order of the Tribunal was not complied with. Accordingly the petitioner filed O.A. No. 1638(C) of 2005 to reinstate him as Projector Operator in view of the subsequent development during pendency of the earlier O.A. No. 54(C) of 1994. During pendency of those Original Applications one Ramesh Chandra Parida was engaged in the year 2009. Both the Original Applications were disposed by a common order dated 16.3.2011 with a direction to the respondent-authorities to consider the grievance of the applicant for his engagement as Projector Operator taking into account the recommendation of the Chief Principal Conservator of Forests (Wildlife) Division dated 20.2.2001 and pass appropriate order for engagement of the applicant, if the post is still exists

and is lying vacant, after obtaining required concurrence from the Finance Department, if necessary. The entire exercise shall be completed within a period of three months from the date of communication of the order.

However instead of complying the same the Principal Secretary to Government had passed a order on 27.3.2012 to the effect that the recommendation of the PCCF are based on Selection Committee reportedly held on 23.11.2000 much after the ban on filling up of base level vacant posts imposed by the Government and there is no functional requirement for the said post any more. Accordingly, the petitioner again approached the Tribunal in O.A. No. 3660(C) of 2012 and by order dated 6.1.2017 rejected the prayer of the petitioner regarding his reinstatement in service.

Challenging the order of the Tribunal dated 6.1.2017 the petitioner had approached this Court in W.P.(C) No. 5697 of 2017 which was disposed of on 10.8.2017 with a direction to the opposite parties to take a decision regarding appointment of the petitioner within a period of four weeks from the date of receipt of a copy of the order. This Court while passing the said order has considered that a post was available and the interim order passed by the Tribunal is to be complied with. However by dilly dally tactics even if the ban was lifted, the common order of the Tribunal dated 16.3.2011 passed in O.A. No. 54(C) of 1994 and in O.A. No. 1638(C) of 2005 has not been complied with in spite of the Selection Committee selected the applicant. The same has not been considered by the Tribunal while passing the order dated 6.1.2017 in O.A. No. 3660(C) of 2012. This Court also considers the additional affidavit filed by opposite party Nos. 1 to 4 i.e.(1. State of Orissa represented through Principal Secretary to Government, Forest & Environment Department, Bhubaneswar, 2.Divisional Forest Officer, Chilika Wildlife Division, 3. Director, Nandankanan & Zoological Park, Bhubaneswar, 4. Addl. Principal Chief Conservator of Forest (Wildlife) & Chief Wildlife Wardon, Bhubaneswar) in W.P.(C) No. 5697 of 2017 wherein it was stated that Ramesh Chandra Parida has not been appointed as Projector Operator. He has been appointed as Assistant Projector Operator by the Director of the erstwhile Social Forestry Project, Odisha and subsequently he has been continuing in the Office of the Principal Chief Conservator of Forest, Odisha with effect from 1.10.2003 after abolition of Social Forestry Projects and merger of its staff with the office of the Principal Chief Conservator of Forest, Odisha. In the year 2008 the Principal Chief Conservator of Forest (Wildlife) and Chief Wildlife Warden, Odisha was

requested by opposite party No.4 by letter dated 12.12.2008 to place the services of Sri Parida, Assistant Projector Operator at the disposal of Wildlife Organisation against the vacant post of Projector Operator in the Office of the Dy. Director, Nandankanan Zoological Park. He was posted to work under the establishment of Deputy Director, Nandankanal Zoological Park and joined the post on 29.4.2009 and subsequently he was withdrawn from Nandankanan Zoological Park to the Office of PCCF on 23.7.2009. Considering the above facts and after withdrawal of Sri Parida the vacant post was available for which this Court has directed the authority to take a decision regarding appointment of the petitioner within a period of four weeks. Again the opposite parties have rejected the prayer of the petitioner for which the present writ petition was filed. Due to inaction of the opposite parties to comply the direction issued by the Tribunal as well as this Court, in the present writ petition, the petitioner has prayed for to quash the order dated 3.2.2018 and in alternative to extend all the service benefits as he is entitled to in the interest of justice as deem fit and proper.

The aforesaid facts were not disputed by the opposite parties. The opposite party No.1 filed a counter affidavit reiterating the earlier facts without giving any explanation why the earlier order passed by the Tribunal on (16.3.2011) which has reached its finality has not been complied with. After lapse of so many years and series of litigations, taking a stand that he was disengaged 24 years ago and there is no functional requirement of the said post any more.

The order passed by the Court and Tribunal are sacrosanct and same should have been complied with unless until it was set aside or varied in higher forum. The authorities are not sitting in appeal to take a decision contrary to the direction issued by the Court or Tribunal. The citizens have no luxury to approach the Tribunal or Court without any reason or cause rather when they have suffered injustice, they have a Constitutional right to approach the Court/Tribunal for redressal of their grievances against the Government. The Government instead of acting as a model employer harasses its citizens and forces them to face series of litigation. It may be pleasure for the Government to encourage litigation. However its citizens have not any fascination to linger the litigation to get justice. Rule of Law prevails under the Constitution of India by inaction/improper action of the authority the matters are pending for years together and series of litigations are crop up and a poor litigant wait to get justice due to such apathy.

In the present case since the petitioner has attained the age of superannuation and as discussed above the petitioner is entitled to get equitable relief. Considering the peculiar facts and circumstances of the case, we assess the compensation of Rs.5,00,000/- (five lakhs) which shall be paid to the petitioner by the opposite parties within a period of six weeks or by end of March, 2021. The writ petition is disposed of accordingly.

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2021 (I) ILR - CUT- 536

S.K.MISHRA, J & J.P. DAS, J.

WPCRL NO. 93 OF 2014

NIHAR PANDA .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of habeas corpus – Custody of minor child – Divorce application along with the application for custody of minor child filed before the Superior court of Los, Angeles – Ex-parte order passed against the Opp. Party no.-4 (mother) and the court also directed not to remove the child outside California – However Opp. party No-4(mother of the child) left for India with the child without notifying the Court and the Petitioner/father – Present writ application filed by the petitioner/father seeking custody of child – Question raised that, whether the order of the foreign court is the determining factor while deciding the issue of habeas corpus? – Plea of child welfare raised – Held, order passed by the foreign court is only a factor to be considered and not the only determining factor to issue the Writ of habeas corpus, rather child welfare is the paramount consideration, so placing the child with the father will be against the interest of child – Hence, the writ petition is dismissed.

Case Laws Relied on and Referred to :-

1. (1998) 1 SCC-112 : Dhanwanti Joshi Vs. Madhav Unde.
2. (2017) 8 SCC 454 : Nithya Anand Raghavan Vs State of (NCT of Delhi) & Anr.
3. (2018) 9 SCC 578 : Kanika Goel Vs State of Delhi through Station House Officer & Anr.
4. (2018) 2 SCC 309 : Prateek Gupta Vs Shilpi Gupta & Ors.

For Petitioner : M/s. Attin Shankar Rastogi, Geeta Luthra, Deepak Kumar & Ms.Pinky Anand

For Opp. Parties : Mr. Bijay Ku. Dash, M.P. Debnath, S.K. Singh, Mr. Jayant Das, Sr. Adv. A.B Mishra, Mr. Aditya N. Das, S.R. Dash, Mrs. Nisha Agrawal & Mr. A.P. Bose (C.G.C.)

JUDGMENT Date of Judgment :17.05.2019

S.K.MISHRA, J.

The present petition has been filed by the petitioner to issue a writ of habeas corpus for the production of the minor daughter, referred as *M*, aged about 6 years and for handing over the custody of the minor daughter with passport to the petitioner-her father. The petitioner and the opposite party no.6 have married under the provision of Special Marriage Act and subsequently, as per the Hindu Rituals and Custom on 27.11.2004 and 05.12.2004. Thereafter, they left for New York. There some disturbance arose in their marital life and the opposite party no.6 has come back to India. The petitioner asserts that the attitude of opposite party no.6 towards the petitioner was not congenial and she picked up fight with the petitioner for no reason. However, after her returned to India, there was a compromise between them and both of them again moved back to U.S.A. On 23.11.2007, the minor daughter *M* was born out of the wedlock in U.S.A. The petitioner completed higher education and was very lucratively employed in California. In the meantime, the opposite party no.6 and the minor girl child visited India for twice. In the year, 2011 the minor child started attending pre-school. In 2012, the minor child was sent to kindergarten. However, in November, 2012, after return from a vacation to Las Vegas, the opposite party no.6 and the petitioner quarreled and the opposite party no.6 decided to return to India along with her minor child. In December, 2012, the opposite party no.6 agreed to return to Los Angeles and petitioner went to India and brought the opposite party no.6 along with minor child. In August, 2013, the minor child was enrolled in Grade-I at Castlebay Lane Elementary School. In August, 2013, again dispute arose between the petitioner and opposite party no.6, which according to the petitioner was due to violent nature of the opposite party no.6. Hence, on 15.08.2013, the petitioner filed petition for divorce and custody of the minor child before the Superior Court, Los Angeles. The court allegedly passed an ex-parte order against the opposite party no.2 not to remove the child outside California. On 23.08.2013, the opposite party no.6 left for India with the minor child allegedly without

notifying the court or the petitioner. In September, 2013 the petitioner tried to pursue the opposite party no.6 to return to U.S.A. but she refused. Ultimately, on 27.01.2014, the petitioner filed this application for habeas corpus under Article 226 of the Constitution of India and prayed that the opposite party no.6 be directed to go back to U.S.A. along with the minor child.

2. Most of the materials averment has been denied by the opposite party nos.6 and 7 in their counter. The opposite party no.6 also denies that she was served with a notice of the California Superior Court restraining her from leaving the State of California or removing the child from the said State.

3. Learned counsel for the petitioner argued that since the Superior Court at California has passed an ex-parte order against the opposite party no.6 and the opposite party no.6 violating the order passed by the Superior Court left U.S.A and came to India, there is no other option but to direct the said opposite party to subject herself to the Court of California and return the child. Several judgments have been cited by the learned counsel for the petitioner.

4. The learned counsel for the opposite party nos.6 and 7 however argued that this Court is not an executing court of the Superior Court in U.S.A. and writ of habeas corpus cannot be issued to execute the order passed by the foreign court. It is also submitted that in all the judgments cited by both the parties a Golden Thread that runs to the effect that whenever such a situation comes out, the courts in India should look into the welfare of the child and the order of the foreign court is only a factor but not the only determining factor to issue a writ of habeas corpus.

5. Primarily, two questions arise in this case, whether there has been a service of summon on the alleged ex-parte order passed by the Superior Court at California and whether the act of opposite party no.6, who is known as the biological mother of the minor child, is illegal and against law and, therefore, the writ of habeas corpus should be issued.

6. As far as the first question is concerned, with closer examine of Annexures-3 and 4, it reveals that the Superior Court at California has passed an ex-parte interim order and issued summon in Ext.-Annexure-4. From the certificate given by the person serving summons, it is also clear that summon

has been served on the opposite party no.6. Thus, the contention of the petitioner in this regard is accepted.

7. Coming to the 2nd question, whether any writ of habeas corpus should be issued or not, it is appropriate to examine the law laid down by the Hon'ble Supreme Court in this regard. In the case of ***Dhanwanti Joshi Vs. Madhav Unde***, (1998) 1 SCC-112, the said question was raised and the Hon'ble Supreme Court at Paragraphs 28 to 30, 32 & 33 of the reported judgment has laid down the law. It reads as follows:

> "28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in *McKee v. McKee.* In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17.12.1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign court in US would yield to the welfare of the child. "Comity of courts demanded not its enforcement, but its grave consideration". This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in *J v C*. This is the law also in USA (see 24 *American jurisprudence*, para 1001) and Australia. (See *Khamis v. Khamis*.)"
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> "29. However, there is an apparent contradiction between the above view and the one expressed in *H*. (*infants*). *R* and in *E*. (*an infant*), R to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (*minors*) (*wardship : jurisdiction*), *R* and in *R*. (*minors*)

(*wardship : jurisdiction*), *R*. It was held by the Court of Appeal in *L., R* that the view in *McKee v. McKee* is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. *The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, -- for these are all acts which could psychologically disturb the child.* Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. *Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed*. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See *Rayden & Jackson*, 15th Edn., 1988, pp. 1477-79; *Bromley, Family law*, 7th Edn., 1987.) In *R*. (*minors*) (*wardship : jurisdiction*), *R* it has been firmly held that the concept of *forum convenience* has no place in wardship jurisdiction."

"30. *We may here state that this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw, while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be*

1974 in L. (*minors*) (*wardship : jurisdiction*), *R* and in *R*. (*minors*) *sent back to USA to the mother not only because of the principle of comity but also because, on facts, -- which were independently considered -- it was in the interests of the child to be sent back to the native State*. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to *H*. (*infants*), *R* which case, as pointed out by us above has been explained in *L. R* as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in *McKee v. McKee* and *J v. C* and the distinction between summary and elaborate inquiries as stated in *L.* (*infants*), *R* are today well settled in UK, Canada, Australia and the USA. *The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits*, having regard to the delay from 1984 -- even assuming that the earlier orders passed in India do not operate as constructive res judicata."

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"32. In this connection, it is necessary to refer to the *Hague Convention of 1980* on "Civil Aspects of International Child Abduction". *As of today, about 45 countries are parties to this Convention. India is not yet a signatory*. Under the Convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority. Under Article 16 of the Convention, if in the process, the issue goes before a court, the Convention prohibits the court from going into the merits of the welfare of the child. *Article 12 requires the child to be sent back, but if a period of more than one year has lapsed from the date of removal to the date of commencement of the proceedings before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a return could be refused if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return*. In England, these aspects are covered by the Child Abduction and Custody Act, 1985."

"33. *So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee unless the Court*

> *thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained* in *L. R*. As recently as 1996-1997, it has been held in *P* (*A minor*) (*Child Abduction: Non-Convention Country*), *R*, by Ward, L.J. [1996 Current Law Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence -- which was not a party to the Hague Convention, 1980, -- *the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established*. See also *A* (*A minor*) (*Abduction: Non-Convention Country*) [*R*, *The Times* 3-7-97 by Ward, L.J. (CA) (quoted in *Current Law*, August 1997, p. 13]. This answers the contention relating to removal of the child from USA."

8. The said question was raised and the Hon'ble Supreme Court at paragraphs-28 to 30, 32 and 33 has laid down the law. The observations made by the Hon'ble Supreme Court in ***Dhanwanti Joshi v. Madhav Unde*** (supra) has been quoted with approval by three judgments of the Hon'ble Supreme Court in the case of ***Nithya Anand Raghavan vs. State of (NCT of Delhi) and Another***, (2017) 8 SCC 454. 25. In para 40 of the *Nithya Anand Raghavan' s case*, the Apex Court has observed as follows:

> "40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". *As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless he court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare*. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native State and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to return to his native State because of the difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native State and more particularly in spite of a pre-existing order of the foreign

court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing order of the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry--- the welfare of the child is of paramount consideration. *Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return*. We are in respectful agreement with the aforementioned exposition."

Again in para 42, the Court observed thus :(SCC p.478)

"42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. *In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child*. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. *In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf*. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State."

26. It will be apposite to also advert to paras 46 and 47 of the reported decision, which read thus: (Nithya Anand case, SCC pp.479-80)

"46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all

the attending facts and circumstances including the settled legal position referred to above. *Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court*. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the India Court for the custody of the child, if so advised."

"47. *In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction*. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

27. Again in para 50, the Court expounded as under :(Nithya Anand case, SCC pp.483-84)

"50. The High Court in such a situation may then examine whether the return of the minor to his/her native State would be in the interests of the minor or would be harmful. *While doing so, the High Court would be well within its jurisdiction if satisfied, that having regard to the totality of the facts and circumstances, it would be in the interests and welfare of the minor child to decline return of the child to the country from where he/she had been removed; then such an order must be passed without being fixated with the factum of an order of the foreign court directing return of the child within the stipulated time, since the order of the foreign court must yield to the welfare of the child. For answering this issue, there can be no straitjacket formulae or mathematical exactitude*. Nor can the fact that the other parent had already approached the foreign court or was successful in getting an order from the foreign court for production of the child, be a

decisive factor. Similarly, the parent having custody of the minor has not resorted to any substantive proceeding for custody of the child, cannot whittle down the overarching principle of the best interests and welfare of the child to be considered by the Court. That ought to be the paramount consideration."

28. In para 67 and 69, the Court propounded thus: (Nithya Anand case, SCC P.490)

"67. The facts in all the four cases primarily relied upon by Respondent 2, in our opinion, necessitated the Court to issue direction to return the child to the native State. That does not mean that in deserving cases the courts in India are denuded from declining the relief to return the child to the native State merely because of a pre-existing order of the foreign court of competent jurisdiction. That, however, will have to be considered on case-to-case basis—be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment."

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"69…..*The summary jurisdiction to return the child be exercised in cases where the child had been removed from its native land and removed to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child*. Again the summary jurisdiction be exercised only if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child."

9. The case of Nithya Anand Raghavan v. State (NCT of Delhi) (supra) has again been followed by the Hon'ble Supreme Court in later judgment, i.e. in the case of ***Kanika Goel vs. State of Delhi through Station House Officer and Another***, (2018) 9 SCC 578. Thus, the law has been well settled that it is not open to contend that the custody of the female minor child with her biological mother would be unlawful, unless there is presumption to the contrary. In this case, the High Court whilst exercising jurisdiction under Article 226 for issuance of a writ of habeas corpus need not make any further enquiry but if it is called upon to consider the prayer for return of the minor female child to the native country, it has the option to resort to a summary inquiry or an elaborate inquiry, as may be necessary in the fact situation of

the given case. The Hon'ble Supreme Court in the case of ***Kania Goel v. State of Delhi through Station House Officer and Another*** (supra) further held that the High Court noted that it was not inclined to undertake a detailed inquiry. The question is having said that whether the High Court took into account irrelevant matters for recording its conclusion that the minor female child, who was in custody of her biological mother, should be returned to her native country. As observed in ***Nithya Anand Raghavan's*** case, the Court must take into account the totality of the facts and circumstances whilst ensuring the best interest of the minor child. In ***Prateek Gupta vs. Shilpi Gupta and Others***, (2018) 2 SCC 309, the Hon'ble Supreme Court noted that the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration. Further, the doctrine of "intimate and closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom, etc. with the portent of mutilative bearing on the process of its overall growth and grooming.

10. In this case, we find that the minor child was admitted into Grade-I in an elementary school and at present, she is residing at Bhubaneswar and that there are number of public schools and also some private schools, which are imparting teaching in English. Moreover, she has roots in India and there is no disruption of her education nor she is being subjected to a foreign system of education likely to psychologically disrupt her. On the other hand, the minor child *M* is under the due care of her mother and maternal grandparents and other relatives since her arrival at Bhubaneswar. If she returns to USA as per the relief claimed by the petitioner, she would be inevitably under the care of a nanny as petitioner will be away during the daytime for work and no one else from the family would be there at home to look after her. The plea of the petitioner that his parents are moving to USA to reside with them also does not inspire confidence of the Court. Most likely the child *M* will be placed under a trained nanny who cannot be harmful as such but it is certainly avoidable. There is also likelihood that the minor child being psychologically disturbed after her separation from her mother, who is the primary care given to her. In other words, there is no compelling reason to direct return of the minor child *M* to the USA as prayed by the petitioner nor her stay in the company of her mother, along with maternal grandparents and extended family at Bhubaneswar, prejudicial to her in any manner, warranting her to return to the USA.

11. Thus, from the above conspectus and judgment of the Hon'ble Supreme Court on the point, we hereby conclude that the order passed by the Superior Court at California in USA is only a factor to be considered and not the only determining factor to issue a writ of habeas corpus. If such a situation is confronted, primary concern for the court is welfare of the child and in this case giving anxious thought to the issue in hand, we are of the opinion that any writ of habeas corpus to place the custody of child with her father will be against her interest and, therefore, we are not inclined to issue a writ of habeas corpus.

12. Thus, the writ petition is devoid of any merit and the same is dismissed. There shall be no orders as to costs.

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2021 (I) ILR - CUT- 547

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

JCRLA NO. 67 OF 2009

RAGHUNATH @ PALU TUDU ……..Appellant.

.V.

STATE OF ORISSA ……..Respondent.

CRIMINAL TRIAL – Offence under section 302 Indian Penal Code, 1860 – Conviction – Plea that solitary eye witness turned hostile – Burden of proof – Held, lies on the prosecution – The burden to prove a case beyond reasonable doubt is on the prosecution –The prosecution may discharge such burden by leading evidence in the shape of oral testimony of eyewitnesses, which is popularly known as direct evidence, or by circumstantial evidence – When, if in a case, both direct and circumstantial evidence are forthcoming, the failure of the prosecution to establish the case on the basis of descriptions of eye witnesses will not preclude the Court from coming to a conclusion about the case basing on the circumstantial evidence.

For the Appellant : Mr. Chitta Ranjan Sahu
For the Respondent : Mr. M.S. Sahoo, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment: 17.02.2021

S. K. MISHRA, J.

In this appeal, the sole appellant-Raghunath @ Palu Tudu assailed his conviction for commission of murder of two persons in evening of 29.07.2007 in village-Siripur. He has been convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "Penal Code" for brevity) by the Sessions Judge, Keonjhar and sentenced to undergo imprisonment for life vide judgment dated 24.01.2009 in Sessions Trial No. 27/2008.

2. The case of the prosecution in short is that the appellant at about 7 p.m. on 29.09.2007 entered into the house of Karmi Tudu and Pana Tudu of village-Siripur and assaulted them by a knife. As a result of assault, Karmi Tudu died at the spot with a pool of blood and Pana Tudu struggle for his life having sustained severe bleeding injuries. She was taken to hospital, but on the way, she died. Informant Nabin Chandra Soren lodged F.I.R. The police thereafter, took up investigation and after taking all necessary steps for investigation submitted charge sheet against the appellant under Section 302 of the Indian Penal Code.

3. The defence took a plea of complete denial.

4. In order to prove its case the prosecution has examined eight witnesses, relied upon several documents as exhibits and one material object i.e. knife was produced on behalf of the prosecution. Neither any witness nor any document was marked on behalf of the defence.

5. P.W.3 Sita Soren is the solitary eye witness to the occurrence. She has not supported the case of the prosecution. P.W.1- Nabina Chandra Soren happens to be the informant of this case. He is also the all-important witness basing on whose testimony, the conviction has been recorded by the learned Sessions Judge. P.W.2- Laxman Hansda, P.W.4-Madan Mohan Jena and P.W.5-Sarat Chandra Tudu are the co-villagers of the appellant. P.W.6-Dr. Babaji Charan Nayak and P.W.7-Dr. Monalisa Mohanty are the two doctors who conducted postmortem examination of the dead body of the deceased-Pana Tudu and Karmi Tudu. P.W.8-Dibyakanti Lakra, is the then S.I. of police and the Investigating Officer in this case.

6. As noticed earlier, the solitary eyewitness to the occurrence has not supported the case of the prosecution. However, on the basis of

circumstantial evidence appearing in this case, the learned Sessions Judge, Keonjhar has come to the conclusion that the prosecution has proved its case beyond all reasonable doubt.

7. The circumstantial appearing in this case is described below:-

i). The homicidal nature of the death of the deceased-Pana Tudu and Karmi Tudu. It is borne out from the evidence of P.W.6-Dr. Babaji Charan Nayak and P.W.7-Dr. Monalisa Mohanty that the deaths of the deceased were homicidal in nature. No ambiguity appears in their testimonies in this regard. The learned counsel for the appellant also does not dispute the homicidal nature of the deaths of the deceased.

ii). The evidence of P.W.1- Nabina Chandra Soren reveals that on the date of occurrence at about 6.30 P.M. to 7 P.M. he was in his house and he heard shout from the house of Karmi and Pana. He came out and found that the appellant was emerging from the house with a knife.

iii). The wearing apparels of the appellant were found i.e. deep ash colour cotton Jean full pant, one navy blue colour full Ganji and two numbers of Ash black brown mixed colour Action Shoes were found to be stained with blood of human origin though no opinion as to its origin could be given.

(iv) The knife was seized in course of investigation and on chemical examination found to have been stained with human blood.

(v) The objective determination of the spot of the occurrence i.e. the house of Karmi Tudu through chemical examination. Blood stains were collected from the spot were found to be human blood of "A" group the same group i.e. found on the wearing apparels of one of the deceased.

8. So from the aforesaid circumstances, the learned Sessions Judge has come to the unequivocal conclusion that each of the circumstance is consistent with guilt of the accused-appellant. All the circumstances taken together form a complete chain of events unerringly pointing towards the guilt of the deceased.

9. Mr. Sahoo argued that the prosecution case should be disbelieved and the appellant should be acquitted only because the solitary eye witnesses has not supported the case of the prosecution and it is not permissible to rely on the circumstantial evidences.

10. The burden to prove a case beyond reasonable doubt is on the prosecution. The prosecution may discharge such burden by leading evidence in the shape of oral testimony of eyewitnesses, which is popularly known as direct evidence, or by circumstantial evidence. When, if in a case, both direct and circumstantial evidence are forthcoming, the failure of the prosecution to establish the case on the basis of descriptions of eye witnesses will not preclude the Court from coming to a conclusion about the case basing on the circumstantial evidence.

11. Having carefully examined the evidences available in the case and the discussions undertaken by the learned Sessions Judge, Kenojhar. We are of the opinion that there is no merit in the appeal. Hence, the appeal is dismissed and the judgment of conviction and order of sentence are hereby confirmed. The L.C.R. be sent back to the concerned court below forthwith.

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2021 (I) ILR - CUT- 550

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

JCRLA NO. 34 OF 2009

ARJUNA SABAR .....Appellant.

.V.

STATE OF ORISSA .....Respondent.

CRIMINAL TRIAL – Offence under Section 302 of the Indian Penal Code, 1860 – Conviction – Assault by means of a wooden batten – Plea of defence that the death of the deceased is not a case of culpable homicide amounting to murder rather it's a case of culpable homicide not amounting to murder – Distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder – Held, if any of the four conditions, is not satisfied, then the offence will be culpable homicide not amounting to murder – These are:- (i) the act was done with the intention of causing death; or (ii) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused: or (iii) with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary

course of nature to cause death; or (iv) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above. **(**Para 11)

Case Laws Relied on and Referred to :-

1. AIR 1958 SC 465 : Virsa Singh .Vs. State of Punjab.
2. AIR 1966 SC 1874 : Rajwant and another .Vs. State of Kerala.
3. (1877) ILR 1 Bom 342 : Reg. .Vs. Govinda
4. (1976) 4 SCC 382 : State of Andhra Pradesh .Vs. Rayavarapu Punnayya & Anr:

For Appellant : M/s Saroj Ku. Barik, I. Banjelin, B. Pani.
M/s C. Kasturi & N. Mohanty.

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

JUDGMENT Date of Hearing and Judgment : 03.03.2021

S. K. MISHRA, J.

The sole appellant-Arjuna Sabar assails his conviction for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "Penal Code," for brevity) and to undergo imprisonment for life, recorded by the learned Sessions Judge, Sambalpur in S.T. Case No.84 of 2008, vide, judgment of conviction and order of sentence dated 10th March, 2009.

2. The prosecution case is that, on 10.03.2008, at about 12.30 P.M., the deceased was present in his house. The appellant came with a stick and beat him to death. Brother of the deceased, the informant in this case, submitted a report before the I.I.C., Charmal Police Station. On the basis of the said report, the Investigating Officer, P.W.6, Rabindra Ku. Mallick took up investigation of the case, examined the informant and other witnesses, recorded their statements, despatched the dead body for postmortem examination after holding inquest over the dead body, seized the material objects and arrested the accused. On the basis discovery statement of the accused, he recovered the weapon of offence i.e. wooden batten (M.O.-I). He obtained the opinion of the doctor, who has conducted postmortem examination on the dead body of the deceased regarding the weapon of offence and the injuries found on the deceased. Material objects were sent through the learned S.D.J.M., Sambalpur for chemical examination to

R.F.S.L., Sambalpur. After completion of investigation, he submitted the charge sheet against the appellant under Section 302 of the Penal Code.

3. The appellant took the plea of simple denial and pleaded his innocence.

4. In order to prove its case, the prosecution examined altogether six witnesses altogether. P.W.1, brother of the deceased Ghau Sabar is the informant in this case. But, he is not an eye witness, as he was informed about the incident. P.W.2, Laxmana Sabara, P.W.3, Sambhu Sabar and P.W.4, Bira Sabara are the three eye witnesses to the occurrence. P.W.5, Dr. Shravan Agrawal has conducted postmortem examination on the dead body of the deceased. He has also rendered opinion on examination of the weapon of offence i.e. wooden batten (M.O.-I). Ext.-6 is the postmortem examination report and Ext.-7 is his opinion on the examination of the weapon of offence. P.W.6, Rabindra Ku. Mallick, the I.I.C., of Charmal Police Station is the Investigating Officer in this case. No witnesses have been examined on behalf of the Defence. The prosecution has also lead into evidence 12 exhibits and 1 material object.

5. The learned Sessions Judge, Sambalpur taking into consideration the evidence of P.Ws.2, 3 and 4, the eye witnesses, whose testimonies are supported by the evidence of P.W.5, the doctor, who conducted postmortem examination and also examined the wooden batten, together with the recovery of the wooden batten, in pursuance of the disclosure statement made by the appellant under Section 27 of the Indian Evidence Act, came to the conclusion that the prosecution has proved its case beyond reasonable doubt. He proceeded to convict the appellant for commission of offence punishable under Section 302 of the Penal Code and sentenced him to undergo imprisonment for life and to pay a fine of Rs.2,000/- in default to undergo rigorous imprisonment for two years.

6. Without assailing the findings of the learned Sessions Judge, Sambalpur regarding homicidal nature of death of the deceased and proof of implication of the appellant in commission of the offence, Ms. C. Kasturi, learned counsel for the appellant would argue that it is not a case of culpable homicide amounting to murder punishable under Section 302 of the Penal Code. She further submits that this a case of culpable homicide not amounting to murder.

7. Mr. J. Katkia, learned Additional Government Advocate, however, submits that as successive blows by means of a 'batten' have been dealt on the sensitive part of the body of the deceased, this is a case of culpable homicide amounting to murder.

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

> "That the prosecution must prove the following before it can bring a case under Section 300 of Indian Penal Code third clause.
>
> (1) It must establish, quite objectively, that a bodily injury is present.
>
> (2) The nature of the injury must be proved; these are purely objective investigations.
>
> (3) It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> (4) It must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
>
> The third clause of Section 300 of Indian Penal Code consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is found to be present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. The words "and the bodily injury intended to be inflicted" are merely descriptive. All this means is, that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury found to be present was the injury intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention."

9. In the case of **Rajwant and another –vrs.- State of Kerala**: reported in AIR 1966 SC 1874 the Hon'ble Supreme Court held that two offences involve the killing of a person. They are the offences of culpable homicide and the more henious offence of murder. What distinguishes these two offences is the presence of a special *mens rea,* which consists of four mental

attitudes and the presence of any of which the lesser offence becomes greater. These four mental attitudes are stated in Section 300 of the I.P.C. as distinguishing murder from culpable homicide. Unless the offence can be said to involve at least one such mental attitude it cannot be murder. Hon'ble Supreme Court further held that the first clause says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matter so clearly within the general principle of *mens rea* as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies in which case the offence is reduced to culpable homicide not amounting to murder. Xx xx xx The second clause says that if there is first intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury. English Common Law made no clear distinction between intention and recklessness but in our law the foresight of the death must be present. The mental attitude is thus, made of two elements-(a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death. Therefore, for the application of third clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established. The last clause is ordinarily applicable to cases in which there is no intention to kill any one in particular which comprehends, generally, the commission of imminently dangerous acts which must in all probability cause death. In that case, the assailants conspired together to burgle the safe of the Base Supply Office on the eve of the pay-day and had collected various articles such as a Naval Officer's dress, a bottle of chloroform, a hacksaw with spare blades, adhesive plaster, cotton wool and ropes and in presence of that there was a murder. So, the act of the assailants of that case was held to be done with the intention of causing such bodily injury as was likely to kill and the appellants' conviction under Section 302/34 of the I.P.C. was upheld by the Hon'ble Supreme Court.

10. Much prior to the judgment rendered by the illustrious Judge Vivian Bose in the case of **Virsa Singh** (supra), in the case of of **Reg. – vrs.- Govinda**: reported in (1877) ILR 1 Bom 342, the distinction between the culpable homicide amounting to murder and the culpable

homicide not amounting to murder as defined under Sections 299 and 300 respectively, of the I.P.C. has been pithily brought out by Justice Melvill as follows:

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

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

'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause".

The Hon'ble Supreme Court further held:

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

Section 299	**Section 300**
A person commits culpable homicide, if the act by which the death is caused is done-	Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done-
	INTENTION
(a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is *likely* to cause death; or	(1) with the intention of causing death; or (2) with the intention of causing such bodily injury as the *offender knows to be likely* to cause the death *of the person to whom* the harm is caused; or (3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinarily course of nature* to cause death; or

KNOWLEDGE

(c) with the knowledge that the act is *likely* to cause death.	(4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

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

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

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

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

> (i) the act was done with the intention of causing death; or
>
> (ii) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused: or
>
> (iii) with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinarily course of nature to cause death; or
>
> (iv) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

12. Keeping in view the aforesaid principles enunciated in the aforesaid judgments', we are of the opinion that in this case the prosecution has not established that the appellant had the intention of causing death of the deceased or causing such bodily injury as he knows to be likely to cause death of the person to whom the harm is caused. There is no material on record to show that the appellant knew that the bodily injury intended to be inflicted is sufficient in the ordinarily course of nature to cause death of the deceased or that there was knowledge on the part of the appellant that the act is so imminently dangerous that it must in all probability cause death.

13. Keeping in view the aforesaid facts of the case, we are of the opinion that the prosecution has failed to establish its case of culpable homicide amounting to murder punishable under Section 302 of the Penal Code. Rather, the prosecution has established its case of culpable homicide not amounting to murder punishable under Section 304, Part-I of the Penal Code.

14. Hence, the conviction of the appellant under Section 302 of the Penal Code recorded by the learned Sessions Judge, Sambalpur and sentence to undergo imprisonment for life is hereby set aside. Instead, the appellant is convicted for the offence under Section 304, Part-I of the Penal Code. It is borne out from the record that the petitioner is in custody since March 2008 and in the meantime, he has already undergone about 13 years of imprisonment. In our considered opinion the punishment of period already undergone for offence under Section 304, Par-I of the enal Code shall

subserve the interest of justice. Hence, he is sentenced to undergo imprisonment for the period already undergone. No separate sentence of fine is imposed, as the petitioner is a member of the scheduled tribe category and belongs to humble walks of life. He was also not able to engage a counsel of his choice, and therefore, State Defence Counsel was engaged to defend him before the learned trial court. He preferred appeal from jail and Amicus Curiae was appointed to argue the appeal in this Court. Hence, we are not inclined to impose any fine. Since he has lready undergone the sentence imposed, the appellant be set at liberty forthwith, unless his detention is required in any other case. Accordingly, this JCRLA is disposed of. The Trial Court Records (T.C.Rs) be returned back to the trial court forthwith along with copy of this judgment.

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2021 (I) ILR - CUT- 559

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

W.P.(C) NO. 29273 OF 2019

KSHIRODA PRASAD NAYAK ……..Petitioner

.V.

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

SERVICE LAW – Recruitment – Advertisement issued for filling up of one post of Gramina Dak Sevak Mail Deliverer – Selection list prepared and the candidate securing first position was appointed – Subsequently resigned – Claim of appointment by the candidate having second position in the select list – Whether can be accepted? – Held, No – Reasons indicated. (The case of Dr. Rajalaxmi Beura v. Vice Chancellor, OUAT & others; reported in 2017 (II) ILR- CUT-923 and the Division Bench judgment in the case of Shri Gagan Behari Pradhan v. State of Orissa and others reported in 2006(1) OLR 31 are not good laws) (Para 5)

Case Laws Relied on and Referred to :-

1. 2017 (II) ILR- CUT 923 : Dr. Rajalaxmi Beura Vs. Vice Chancellor, OUAT & Ors.
2. 2006(1) OLR 31 : Shri Gagan Behari Pradhan Vs. State of Orissa & Ors.
3. (2010) 6 SCC 777 : State of Orissa & Anr. Vs. Rajkishore Nanda & Ors.

For the Petitioner : Mr. Sanjib Mohanty, B.Biswal,P.K.Harichanda & A Parija.

For Opp.Parties : Mr. Prasanmna Kumar Parhi, ASG, &
Mr. Chandrakanta Pradhan, CGC

ORDER Date of Order: 19.3.2021

S. K. MISHRA, J.

In this writ petition, the Petitioner assails the correctness of the judgment dated 22nd January, 2019 delivered by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.260/773/2015 rejecting the application of the Petitioner for a direction to appoint him as Gramina Dak Sevak Mail deliverer/MC, Kanbageri Block under G. Udayagari.

2. The facts of the case are not disputed. The Petitioner was a candidate for the post of Gramina Dak Sevak Mail Deliverer (in short GDSMD), Kanbageri B.O., under G. Udayagairi Sub-division Office. He along with others applied for selection of the aforesaid post. Another candidate secured the first position. The said candidate, who had secured first position joined the post. However, after some time he resigned and thereafter the Petitioner was called upon to produce the original documents for verification. At that time, the Opposite Party No.4 received an instruction from the Higher Authority not to proceed with the appointment of the present Petitioner. Hence he did not issue a letter of appointment.

3. Learned Central Administrative Tribunal, Cuttack Bench, Cuttack held that the action of the Opposite Party No.4 in issuing a letter for production of certificate for verification was improper. It further held that the Petitioner could not produce any rule or instructions showing that when recruitment is made for only one post of GDS, after joining of the candidate with higher merit, the merit list shall remain valid and others would be given appointment in the event of subsequent vacancy. In absence of such instruction, the action of Opposite Party No.4 to issue a letter date 23.2.2015 will not be appropriate. Hence, the Tribunal dismissed the application of the Petitioner.

4. Mr. Sanjib Mohanty, learned counsel for the petitioner, relied upon the reported case of ***Dr. Rajalaxmi Beura v. Vice Chancellor, OUAT & others;*** reported in 2017 (II) ILR- CUT-923 and contended that in a similar case a Single Bench of this Court had directed the appointment a candidate who was placed at Sl. No.4 in the merit on the resignation of the Sl. No.1,

Sl.Nos.2 and 3 having joined elsewhere. He also relied upon a Division Bench judgment of this Court in the case of ***Shri Gagan Behari Pradhan v. State of Orissa and others*** reported in 2006(1) OLR 31. Similar view has been taken by the Division Bench of this Court.

5. However, we rely upon the judgment rendered by the Hon'ble Supreme Court in the case of ***State of Orissa and another v. Rajkishore Nanda and others;*** reported in (2010) 6 SCC 777, we find it appropriate to take note of the exact words used by the Hon'ble Supreme Court in that case (Pages 782 & 783, Paras11,12,13,14,15 & 16):-

> "11. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 (1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permission only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law.
>
> 12. In ***State of Punjab v. Raghbir Chand Sharma***; (2002)1 SCC 113, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No.1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that the post can be filled up offering the appointment to the next candidate in the select list observing as under: (SCC p.115, para 4);
>
> > "4….. With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select panel prepared, the panel ceased to exist and has outlived its utility and, at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."
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> 13. In ***Makul Saikia v. State of Assam***; (2009) 1 SCC 386 , this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised. The select list "got exhausted when all the 27 posts were filled." Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of select list had

expired as soon as the number of posts advertised were filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies" and the said course is not permissible in law.

14. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the bet is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.

15. A Constitution Bench of this Court in ***Shankarsn Dash v. Union of India***; (1991) 3 SCC 47 held that appearance of the name of a candidate in the select list does not give him a right of appointment. Mere inclusion of the candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The candidate concerned cannot claim that he has been given a hostile discrimination.

16. A select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required. It is the settled legal proposition that no relief can be granted to the candidate if he approaches the Court after the expiry of the select list. If the selection process is over, select list has expired and the appointments had been made, no relief can be granted by the court a belated stage."

6. Thus in view of such settled principle of law as nunciated by the Hon'ble Supreme Court, we are of the opinion that the petitioner's claim is without merit and the judgment of the learned Single Judge and the Division Bench of this Court cited (supras) are not good law. Hence, the Writ Petition is dismissed.

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2021 (I) ILR - CUT- 562

Dr. B.R.SARANGI, J.

W.P.(C) NO. 671 OF 2021

RAJIB KUMAR BEHERA .....Petitioner

.V.

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

(A) CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order passed by the Odisha Human Rights Commission – Prayer to issue a writ of certiorari quashing the impugned order – Writ of certiorari – When can be issued? – Held,

Certiorari, under Article 226, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate Court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exits none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice. (Para 12)

(B) WORDS AND PHRASES – The expression 'human rights' – The concept, meaning and the scope – Discussed.

Apart from the same, the expression 'human rights' has its origin in international law, appertaining to the development of the status of an individual in the international legal system, which was originally confined to the relation between sovereign States, who were regarded as the only persons in international law. The concept of human rights, embodied the minimum rights of an individual versus his own State. When human rights are guaranteed by a written Constitution, they are called 'Fundamental Rights' because a written Constitution is the fundamental law of a State. Though the concept of human rights is as old as the ancient doctrine of 'natural rights' founded on natural law, the expression 'human rights' is of recent origin, emerging from (post Second World War) international Charters and Conventions. *(Paras 19 to 21)*

Case Laws Relied on and Referred to :-

1. AIR 1978 SC 1025 : Nandini Satpathy .Vs. Dani (P.L.).
2. AIR 1943 PC 164 : Ryots of Garabandho .Vs. Raja of Paralakhimedi.
3. AIR 1954 SC 440 : T.C. Basappa .Vs. T. Nagappa.
4. AIR 1950 SC 188 : Bharat Bank .Vs. Employees of Bharat Bank.
5. AIR 1955 SC 223 : Hari Vishnu .Vs. Ahmad Ishaque.
6. AIR 1958 SC 398 : Nagendra Nath Bora v. Commr. of Hills Division.
7. AIR 1975 SC 2151 : (1975) 2 SCC 557 : State of Andhra .Vs. Chitra Venkata Rao.
8. (2003) 6 SCC 675 : AIR 2003 SC 3044 : Surya Dev Rai .Vs. Ram Chander Rai.
9. AIR 1954 SC 440 : T.C. Basappa .Vs. T. Nagappa.
10. AIR 1950 SC 222 : Province of Bombay .Vs. Khushaldas S. Advani.
11. AIR 1996 SC 81 : Dwarka Nath .Vs. ITO.
12. 2020 (II) OLR 238 : Santosh Kumar Sahoo .Vs. Secretary, State Transport Authority, Odisha, Cuttack.
13. 2020 (II) OLR -747 : General Manager, East Coast Railway & Ors. .Vs. Surendra Jal & Ors.
14. 2020 (I) CLR 474 : Bidyut Manjari Sethi .Vs. State of Odisha & Ors.
15. AIR 1973 SC 1091 : Santokh Singh .Vs. Delhi Administration.

For Petitioner : M/s. P.K. Satapathy, P. Panda and B. Das.

For Opp.Parties : Mr. A.K. Sharma, Addl. Govt. Adv.

JUDGMENT Decided On : 13.01.2021

Dr. B.R.SARANGI, J.

The petitioner, Rajib Kumar Behera, the then S.I. of Police (IO in Aska PS Case No. 9 of 2013), has filed this writ petition to quash the order dated 11.11.2020 passed by the Odisha Human Rights Commission, Bhubaneswar in OHRC Case No.1650 of 2013 under Annexure-1, and further seeks direction to exonerate him from the charges levelled against him.

2. The factual matrix of the case, in hand, is that opposite party no.4-Minakshi Pattnaik, being the complainant before the Odisha Human Rights Commission (OHRC), filed a petition on 22.05.2013 making certain allegations against the present writ petitioner and his staff, who have been harassing and inflicting atrocities on her and her family members. She specifically alleged that on 04/05.05.2013, some police personnel came to her house at 2.00 A.M. in the night and forcibly took her husband to the police station and tortured him physically and mentally.

2.1 On receipt of such complaint dated 22.05.2013, copy of the same was sent to Superintendent of Police, Ganjam with a request to get the matter enquired into and submit a factual report to the Commission. In response to the same, a report was received, which was also sent to opposite party no.4 for her information and response. In the said report it was mentioned that the allegations made by opposite party no.4 are found to be false. The report which was called for from the Superintendent of Police, Ganjam would show that he had conducted the enquiry through Bichitrananda Samal, Ex-IIC, Aska Police Station, who is the same police officer, who was inquiry officer of the case. Considering the lacuna in the report of the Superintendent of Police, Ganjam and the allegations made in the complaint being serious in nature, even after five years have lapsed, the Commission thought it proper to cause an independent enquiry to the allegations. Accordingly, requested the Addl. D.G. of Police-cum-Director Investigation, OHRC to entrust the inquiry to any of the officers at his disposal. Consequently, inquiry was conducted by Deputy Superintendent of Police, Investigation Wing of the Commission, who submitted report to the Commission and in order to give an opportunity of hearing before passing any order, notice was issued to Bichitrananda Samal, the then IIC, Aska police station and the petitioner

(Rajib Kumar Behera, I.O. in Aska P.S. Case No.9 of 2013) to appear in person before the Commission on 19.11.2019.

2.2 Pursuant to such notice, the petitioner appeared before the Commission on 13.12.2019 and copies of the inquiry report of the investigation wing of OHRC was supplied to him. But he took a plea that opposite party no.4 had paid a sum of Rs.1,10,000/- to one Manjula Bahadur with an assurance to provide government job to the daughter of opposite party no.4 in the railway department on oral agreement. Even after lapse of assured time, there was failure on the part of Manjula Bahadur to provide job. Therefore, on 22.10.2012 evening at about 6.00 P.M., opposite party no.4 came to Raghunath Nagar with an auto rickshaw and with dishonest intention lifted the CBZ Xtreme motor cycle of Manjula Bahadur, without her knowledge and consent, while it was parked in front of the house of Raghunath Choudhury at Raghunath Nagar, Aska. Opposite party no.4 also threatened with dire consequences to Manjula Bahadur and demanded to return the cash she paid to her. On examination of Majula Bahadur, her son and other witnesses, the petitioner registered the case. But opposite party no.4 was absconded from the locality and this Court in BLAPL No. 1358 of 2013 granted bail and accordingly she was released on bail in obedience to the order of the High Court. Therefore, being aggrieved by registration of theft case against opposite party no.4 by Manjula Bahadur, she filed false case against the petitioner.

2.3 On the basis of above reply given by the petitioner and the FIR lodged, the same was referred to opposite party no.4 for her response to the report of Superintendent of Police, Ganjam, who enquired into the matter by the same I.O. and submitted a report before the Commission which was not accepted and, as such, opposite party no.4 denied the same. Thereby, the Commission conducted an independent inquiry and on the basis of such inquiry report of the investigation wing of the Commission submitted by the Deputy Superintendent of Police, proceeded with the matter by affording opportunity of hearing to all the parties. The Commission relying upon the judgment of the apex Court in the case of ***Nandini Satpathy v. Dani*** (P.L.), AIR 1978 SC 1025 and after perusal of records as well as the report submitted by the Deputy Superintendent of Police, investigation wing of Commission, came to a definite conclusion that there is violation of human rights of Purna Chandra Pattnaik, the husband of opposite party no.4, for which he is entitled to get compensation. As such, taking the entire report into consideration, the Commission recommended as follows:-

"(1) A sum of Rs.2,00,000/- (Rupes two lakhs) be paid to the victim Shri Purna Chandra Pattnaik by the State and the same be recovered from Shri Rajib Kumar Behera, the then SI of Police (IO in Aska PS Case No.9 of 2013).

(2) Shri Bichitrananda Samal, the then IIC, Aska Police Station be cautioned not to file statement before the Commission or any other authority which is against the material available on record.

(3) Let the Director General of Police, Odisha Cuttack issue a circular/advisory to all the Police Stations in the State to keep the CCTV cameras in fullest operation. Any plea of non-fucntioning of the CCTV cameras will certainly be viewed adversely agaisnt the In-Charge of the Police Station. This is a common recommendation.

(4) The Director General of Police, Odisha, Cuttack may consider to take any other action as deem fit and proper."

The Commission also further directed that compliance be made within a period of two months of receipt of the order and report compliance be submitted to the Commission by 29.01.2021. Hence this application.

3. Mr. P.K. Satpathy, learned counsel for the petitioner contended that the impugned order dated 11.11.2020 passed in OHRC Case No.1650 of 2013 by the Commission imposing liability on the petitioner is liable to be set aside as it has not accepted the explanation given by the petitioner and ignored the vital witnesses as well as committed procedural irregularity, for which the said order cannot sustain in the eye of law. It is further contended that the Commission, while passing the order impugned, relied upon the inquiry report of the Deputy Superintendent of Police, OHRC and not taken into consideration the explanation given by the petitioner and also the station dairy records of Aska Police Station. As such, there was no raid on 04/05.05.2013 in the night for arresting the accused in Aska P.S. Case No.9 of 2013. It is further contended that the evidence of Smt. R. Chhatoi, who is the vital witness to the inquiry, has not been taken into consideration by the Commission in proper perspective. Thereby, he seeks for quashing of the order impugned by exercising the extraordinary power under Articles 226 and 227 of the Constitution of India.

4. Mr. A.K. Sharma, learned Addl. Government Advocate justifying the action taken by the OHRC contended that there is no illegality or irregularity committed by the Commission by taking into consideration the inquiry report submitted by the Deputy Superintendent of Police, OHRC, who conducted

an independent inquiry and submitted its report to the Commission on the basis of the direction given. More so, the petitioner was also given opportunity and having availed the same by participating in the process of hearing without any objection, if the Commission has passed the order impugned, that cannot be found to be faulted with so as to cause interference by this Court at this stage. Therefore, the writ petition has no merit and the same should be dismissed with cost.

5. This Court head Mr. P.K. Satapathy, learned counsel for the petitioner and Mr. A.K. Sharma, learned Addl. Government Advocate through virtual mode, and perused the record. As the matter is being decided at the stage of fresh admission, this Court is not inclined to issue notice to opposite party no.2-Secretary, OHRC or to private opposite party no.4. As it is a certiorari proceeding, on the basis of materials available on record, this writ petition is being disposed of finally with the consent of learned counsel for the parties.

6. The facts delineated above are not in dispute. On perusal of the order dated 11.11.2020 passed by the OHRC it appears that the Commission acted with due diligence to find out the truthfulness of the allegations and initially though inquiry was conducted by the Superintendent of Police, Ganjam, who relying upon the inquiry conducted by IIC, Bichitrananda Samal, submitted the report vide Annexure-3 dated 27.06.2013, in which it has been stated that opposite party no.4 had given a sum of Rs.1,10,000/- to one Manjula Bahadur of Aska Sugar Factory, Nuagaon as hand loan, but she did not return the same and, therefore, opposite partyno.4 forcibly kept the motor cycle of Manjula Bahadur. On the other hand, on the written report of Manjula Bahadur, Aska P.S. Case No.9 of 13.01.2013 under Sections 341/379/506/34 IPC was registered against opposite party no.4 and, as such, the case is under investigation. The Commission having not satisfied with such report, requested the Addl. D.G.-cum-Director Investigation to entrust the inquiry to any of the officer at his disposal. On that basis, the Deputy Superintendent of Police, OHRC conducted inquiry and examined seven witnesses, one of whom is Purna Chandra Pattnaik, the husband of opposite party no.4. The inquiring officer also verified the documents like station diary entries and recorded that CCTV footage of Aska police station of the relevant period was not available. The inquiry officer has submitted its report in extenso and in the conclusion of the said report, it has been stated as under:-

*"**CONCLUSION***

(i) Sri Rajib Kumar Behera, the then SI of Aska police station and the Investigating Officer of that PS case No.09 dated 13.01.2013 u/s 341/379/506/34 IPC, being accompanied by three other staff of that police station, entered into the house of Smt. Minakshi Pattnaik, the complainant of this OHRC case, located at village Karatali under Aska Police Station limit of Ganjam District on 05.05.2013 at about 2AM and forcibly brought her husband Sri Purna Chandra Pattnaik, a senior citizen and old man, to Aska Police Station and detailed him illegally inside that Police Station till 10 AM on that day, violating his human rights. He was not involved in any case and there was no reason for such bringing on the part of police. Law does not mandate to detain any person to effect arrest of his/her spouse, involved in any case.

(ii) Though Sri Bichitrananda Samal, the then IIC of Aska PS, denied his knowledge of such illegal detention, his version is not believable in support of the fact that he was present at the Police Station during that period of detention as per the station diary of that Police Station. But neither the complainant Smt. Minakshi Pattnaik, nor her husband Sri Purna Chandra Pattnaik has made allegation against him."

7. After perusal of the report of the Deputy Superintendent of Police, OHRC, the Commission observed that due to non-functioning of CCTV in the police station and in number of cases, where allegation of this nature comes to the notice of the Commission, it has been seen that the CCTV is either gone out order or footage are not available. More so, when the allegation of Section 379 IPC has been raised against a lady, opposite party no.4 herein, what promoted the police officers to raid her house at 2.00 A.M., which itself creates a doubt in the mind of Commission to proceed with the matter. Thereby, the Commission has accepted the report submitted by Deputy Superintendent of Police, OHRC and relying upon the decision of the apex Court in ***Nandini Satpathy*** mentioned supra has come to a conclusion that there is violation of human rights of Purna Chandra Pattnaik and made recommendation as has already been quoted hereinbefore.

8. The contention raised by learned counsel for the petitioner that the explanation submitted by the petitioner has not been taken into consideration, is not correct. So far as examination of vital witnesses are concerned, since the Commission has relied upon the independent inquiry report submitted by Deputy Superintendent of Police, OHRC, who has taken evidence of seven witness, it cannot be said that there is procedural irregularity committed by the Commission so as to cause interference by this Court at this stage. Therefore, the contention so raised cannot sustain in the eye of law.

9. It is not in dispute that this Court is exercising the power under Article 226 of the Constitution of India in writ of certiorari.

Relying upon ***Ryots of Garabandho v. Raja of Paralakhimedi***, AIR 1943 PC 164, the apex Court in ***T.C. Basappa v. T. Nagappa,*** AIR 1954 SC 440 held as follows:

> *"The writ of certiorari is so named because in its original form it required that the King should "be certified" of the proceedings to be investigated and the object was to secure by the authority of the superior Court, that the jurisdiction of the inferior tribunal should be properly exercised."*

10. In **Halsbury's Law of England,** 4th Ed., vol.1, Para 1531 it is stated as follows:

> *"The order of certiorari issues out of High Court, and is directed to the Judge or officer of an inferior tribunal to bring proceedings in a cause or matter pending before the tribunal into the High Court to be dealt with in order to ensure that the applicant for the order may have the more sure and speedy justice. It may be had in either civil or criminal proceedings."*

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

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

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

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

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

> *"(1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.*
>
> *(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.*
>
> *(3) The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well a right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence, and substitute its own findings in certiorari."*

15. In ***Nagendra Nath Bora v. Commr. of Hills Division,*** AIR 1958 SC 398, the apex Court held as follows:

> *"The jurisdiction under Article 226 of the Constitution is limited to seeing that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi judicial powers do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them. In other words, its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even through of law, will not be sufficient to attract this extraordinary jurisdiction.*

16. In ***State of Andhra v. Chitra Venkata Rao***, AIR 1975 SC 2151 : (1975) 2 SCC 557, the apex Court held that since the function of the superior Court in a proceeding for certiorari is supervisory and not appellate, the

superior Court will not review in intra vires findings of the inferior tribunal, even if they are erroneous.

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

This Court has also considered the same in its judgments in the cases of ***Santosh Kumar Sahoo v. Secretary, State Transport Authority, Odisha, Cuttack,*** 2020 (II) OLR 238; ***General Manager, East Coast Railway and others v. Surendra Jal and others,*** 2020 (II) OLR -747 and ***Bidyut Manjari Sethi v. State of Odisha and others,*** 2020 (I) CLR 474.

18. Applying the principles laid down by the apex Court as well as this Court mentioned supra, this Court is of the considered view that none of the conditions for issuance of writ of certiorari has been satisfied in interfering with the order impugned passed by the Orissa Human Rights Commission.

19. Apart from the same, the expression *'human rights'* has its origin in international law, appertaining to the development of the status of an individual in the international legal system, which was originally confined to the relation between sovereign States, who were regarded as the only persons in international law.

20. The concept of *human rights*, embodied the *minimum rights of an individual versus his own State*. When human rights are guaranteed by a written Constitution, they are called 'Fundamental Rights' because a written Constitution is the fundamental law of a State.

21. Though the concept of *human rights* is as old as the ancient doctrine of 'natural rights' founded on natural law, the expression 'human rights' is of recent origin, emerging from (post Second World War) international Charters and Conventions.

22. India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on the 16th December, 1966. The human rights embodied in the aforesaid Covenants stand substantially protected by the Constitution. There has been growing concern in the country and abroad about issues relating to human rights. Having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and system of administration of justice; with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation. Therefore, an act to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matter connected therewith or incidental thereto, the parliament enacted a law, called "The Protection of Human Rights Act, 1993".

23. Human rights are rights available against the State. There must, therefore, be cases of conflict between the interests of the individual and of the State. Hence, a guarantee of human rights must necessarily contain the limitations or exceptions; the guarantee of human rights will prevail subject to these limitations, so that the collective interests may not be jeopardized. The Indian constitution acknowledges that there cannot be any such thing as absolute or uncontrolled liberty, for that would lead to anarchy and disorder.

24. In ***Santokh Singh v. Delhi Administration,*** AIR 1973 SC 1091, it has been held that liberty has to be limited in order to be effectively possessed. The question, therefore, arises an each case of adjusting the conflicting interests of the individual and of the society.

25. In ***Re Kerala Education Bill,*** AIR 1958 SC 956, the apex Court held that any element without which a guaranteed Fundamental Right cannot be 'effectively exercised', cannot be taken away by the State in exercise of its power to regulate or restrict the exercise of the Fundamental Right.

26. Applying the principles of law, as discussed above, to the present factual position, this Court is of the considered view that no error has been committed by the Odisha Human Rights Commission by passing the impugned order dated 11.01.2020 in Annexure-1 so as to cause interference of this Court in the present proceeding.Therefore, this Court does not find any merit in this writ petition, which is accordingly dismissed. No order to costs.

2021 (I) ILR - CUT- 573

Dr. B.R. SARANGI, J.

W.P.(C) NO. 4242 OF 2021

Dr. SNEHALATA MALLICK .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order rejecting the application of the petitioner seeking grant of NOC for appearing in an interview – Petitioner serving as Assistant Professor in the Department of O & G, Pandit Raghunath Murmu Medical College and Hospital, Baripada, Mayurbhanj – Wanted to apply for a post in AIIMS, Bhubaneswar – For interview NOC is required from the existing Employer – Application rejected on the ground that inadequacy of faculties in Government Medical Colleges – The question thus arose as to whether the authority is justified in rejecting the representation for issuance of NOC to enable her to appear in the interview? – Held, No, having considered the matter in the touchstone of reasonableness, arbitrariness within the meaning of Articles 14 and 16 of the Constitution of India, it was held that such rejection is not only in gross violation of Article 14 of the Constitution of India but also arbitrary, unreasonable and discriminatory – Ordered to issue NOC. (Paras 14-18)

Case Laws Relied on and Referred to :-

1. AIR 2011 SC 1989 : Narmada Bachao Andolan (III) Vs. State of Madhya Pradesh.
2. AIR 2013 SC 1226 : Rajasthan State Industrial Development and Investment Corporation Vs. Subhas Sindhi Co-operative Housing Society Jaipur.
3. AIR 1990 SC 820 : Video Electronics Pvt. Ltd. Vs. State of Punjab.
4. AIR 1952 SC 123 : Kathi Raning Rawat Vs. State of Saurashtra.
5. AIR 1981 SC 1636 : Vishundas Hundumal Vs. State of Madhya Pradesh.
6. (1991) 2 SCC 48 : Prem Chand Somchand Shah Vs. Union of India.
7. AIR 2013 SC 3066 : State of Uttar Pradesh Vs. Dayanand Chakrawarty.

For Petitioner : M/s. (Dr) J.K. Lenka, B.K. Nayak & A.K. Sahoo.

For Opp. Parties: Mr. B. P. Tripathy, Addl. Govt. Adv.

JUDGMENT Decided On : 12.02.2021

Dr. B.R. SARANGI, J.

The petitioner, who is at present working as Assistant Professor in the Department of O & G, Pandit Raghunath Murmu Medical College and

Hospital, Baripada, Mayurbhanj, has filed this writ petition to quash the order dated 21.01.2021 at Annexure-6 passed by opposite party no.1 rejecting her representation for issuance of "No Objection Certificate" (NOC) to appear in the interview for the post of faculty at All India Institute of Medical Sciences (AIIMS), Bhubaneswar pursuant to advertisement No. AIIMS/ BBSR/ RECT./ REG.FAC/ 2020/873/3406 dated 13.11.2020 on the ground of inadequacy of faculties in Government Medical Colleges.

2. The factual matrix of the case, in hand, is that the petitioner, after completion of her Post Graduation in O & G, was initially recruited as Assistant Surgeon pursuant to open advertisement made in the year 2006. Accordingly, appointment order was issued in 2007, pursuant to which she joined in District Headquarter Hospital, Kandhamal at Phulbani.

2.1. While she was so continuing, an advertisement bearing no.10 of 2016-17 was issued by Odisha Public Service Commission inviting online applications from the prospective candidates for recruitment to the post of Assistant Professor (Specialist) in different disciplines under the Odisha Medical Education Service (OMES) cadre for posting in Government Medical Colleges in the State in the rank of Group-A under Health and Family Welfare Department. The petitioner, having requisite qualification and eligibility, applied for the post of Assistant Professor and she came out successful in the written examination, whereafter in February, 2019 she joined as Assistant Professor in the Department of O & G, Pandit Raghunath Murmu Medical College & Hospital, Baripada, Mayurbhanj and continuing as such till date.

2.2. The Director, AIIMS, Bhubaneswar issued an advertisement on 13.11.2020 for recruitment of Faculty posts (Group-A) in various Departments of AIIMS, Bhubaneswar on direct recruitment basis for the recruitment year 2020. The AIIMS, Bhubaneswar is an Autonomous Institute of National importance and an apex health care institute being established by the Ministry of Health and Family Welfare, Government of India under the Pradhan Mantri Swathya Surakhya Yojana (PMSSY) with an aim of correcting regional imbalance in quality tertiary level health care in the country and attaining self-sufficiency in Graduate, Post Graduate and higher medical education and training.

2.3. The petitioner belonging to S.T. category fulfilled all the eligibility criteria for being appointed in faculty post (Group-A), i.e., Asst. Professor in

O & G and had applied in time for the said post as per advertisement dated 13.11.2020. But, as per Clause-19 of the advertisement, the petitioner was to submit NOC from the present employer at the time of interview or as per the instructions issued from time to time. It was also clarified in the said advertisement that no candidate will be allowed to appear in the interview without NOC from his employer. Therefore, the petitioner, vide letter dated 25.11.2020, requested the Commissioner-cum-Secretary, Health & Family Welfare Department for issuance of NOC and the Dean and Principal, Pandit Raghunath Murmu Medical College and Hospital, Baripada, vide letter dated 02.12.2020 under Annexure-4, forwarded the same to the Director of Medical Education & Training for issuance of NOC to appear in the interview for recruitment in faculty post (Group-A) as per advertisement issued by AIIMS, Bhubaneswar. The Director of Medical Education & Training, Odisha, vide letter dated 15.12.2020 under Annexure-5, requested the Government for issuance of NOC in favour of the petitioner. But, opposite party no.1, vide letter dated 21.01.2021 under Annexure-6, intimated the Director of Medical Education & Training, Odisha that the Government after careful consideration rejected the application of the petitioner for grant of NOC taking into consideration the inadequacy of faculties in Government Medical Colleges. Hence this application.

3. Dr. J.K. Lenka, learned counsel for the petitioner argued emphatically that non-grant of "no objection certificate" to the petitioner to enable her to participate in the interview pursuant to the advertisement issued in Annexure-2 affects her fundamental rights, inasmuch as, depriving her from participating in the process of selection is arbitrary, unreasonable and contrary to the provisions of law and, more particularly, is discriminatory one which violates Articles 14 and 16 of the Constitution of India. It is further contended that every person has a right to be considered for the choice post, pursuant to the advertisement issued by the authority and such consideration cannot be denied by the employer by rejecting the application for issuance of NOC and that itself amounts to arbitrary exercise of power by the authority concerned. It is further contended that with the touchstone of the provisions contained under Articles 14 and 16 of the Constitution of India, there shall be equal opportunity for all the citizens in the matter relating to employment or appointment to any post under the State and under Article 16(2) no citizen shall on the grounds of religion, race, caste, sex, deceit, place of birth, residents or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Thereby, every eligible person

is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualification. Thereby, rejection of the representation filed by the petitioner for grant of NOC by opposite party no.1 is in gross violation of the constitutional mandate, as enshrined under Articles 14 and 16 of the Constitution of India, therefore seeks for interference of this Court.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State argued with vehemence justifying the order rejecting the representation for NOC filed by the petitioner. It is contended that the representation for issuance of NOC, which was received by the Department of Health & Family Welfare on 11.01.2021, on being forwarded by the Director of Medical Education and Training, Odisha, was examined with reference to the dearth of faculties in the Department of O & G, Pandit Raghunath Murmu Medical College & Hospital, Baripada and contended that out of total sanctioned strength of 30 nos. of Asst. Professors in O&G Discipline, the man in position is only 17. Besides that, one new medical college and hospital is going to start at Puri from the year 2021 and many new government medical colleges are in the pipeline. Thereby, the State Government is duty bound to fill up the faculty posts in all the medical colleges and hospitals as per the NMC criteria. Therefore, the opposite party no.1 is well justified in rejecting the representation submitted by the petitioner for grant of NOC, even though the same was duly recommended to the Government by the Dean and Principal of Pandit Raghunath Murmu Medical College & Hospital, Baripada and also the Director of Medical Education and Training, Odisha, Bhubaneswar and, thereby, no illegality or irregularity has been committed so as to cause interference by this Court in the present application.

5. This Court heard Dr. J.K. Lenka, learned counsel for the petitioner and Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties by virtual mode, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The facts, as delineated above, are not in dispute. The substantial question that falls for consideration by this Court is whether the opposite party no.1 is well justified in rejecting the representation filed by the

petitioner for issuance of NOC to enable her to appear in the interview, pursuant to the advertisement issued by the AIIMS, Bhubaneswar in Annexure-2 dated 13.12.2020. The same should be considered in the touchstone of reasonableness, arbitrariness within the meaning of Articles 14 and 16 of the Constitution of India.

7. As the facts are not in dispute and admittedly the petitioner belonged to ST category and continuing as Asst. Professor in Pandit Raghunath Murmu Medical College & Hospital, Baripada in the district of Mayurbhanj, pursuant to the advertisement issued by the AIIMS, Bhubaneswar dated 13.12.2020 under Annexure-2, she applied for the post of Asst. Professor under S.T. category, but before the interview conducted, she had to produce an NOC to be granted by the present employer.

8. In the present context, Clause-19 of the advertisement, being relevant is extracted hereunder:-

> *"19. The applicants already in Government service (including AIIMS Employees) shall have to produce No Objection Certificate from their present employer at the time of Interview or as per the instructions issued from time to time. However, they have to take prior permission from their employer while applying for the post. No candidate will be allowed to appear the interview without NOC from his employer."*

Admittedly, the petitioner is already in government service and therefore she has to produce NOC from the present employer at the time of interview or as per the instructions issued from time to time and she has to take prior permission from her employer while applying for the post and, as such, no candidate will be allowed to appear in the interview without NOC from the employer. To satisfy this requirement, the petitioner submitted a representation to opposite party no.1, which was duly recommended by the Dean and Principal of Pandit Raghunath Murmu Medical College & Hospital, Baripada, Mayurbhanj and approved by the Director of Medical Education and Training, Odisha, Bhubaneswar, which was placed before opposite party no.1 for grant of NOC. But such recommendation of the Dean and Principal of Pandit Raghunath Murmu Medical College & Hospital, Baripada, Mayurbhanj and approval made by the Director of Medical Education and Training, Odisha, Bhubaneswar has been rejected taking into consideration inadequacy of faculties in the Government Medical Colleges. The reason which has been assigned in rejecting the claim of the petitioner is absolutely

misconceived, in view of the fact that every person has a desire to achieve his goal in life by participating in the process of selection conducted by the competent authority. Being a model employer, the State Government cannot and should not stand on the way of a prospective candidate like the petitioner, who wants to grow in future, by creating obstacle in rejecting her representation to grant NOC which is mandatorily required for the purpose of appearing in the interview. On her participating in the interview, whether the petitioner will come out successful or not, that is still in embryonic stage. But depriving her from participating in the process of selection in not granting NOC amounts to causing death of foetus before it sees the light of day and no model employer should do that, otherwise it will create havoc in the matter of employment.

9. Reasons for inadequacy of faculties, if will be considered from other angle, will be attributable to the State authority and no other person. Instead of going for regular recruitment to the posts, which are available, by following due recruitment process in accordance with law, the State Government is taking a novel stand by increasing the age of superannuation of the doctors in the State. As is revealed from the past experience, the age of superannuation of the doctors in the State, which was earlier fixed to 58 years was enhanced to 60 years and thereafter to 62 years and now it is 65 years. At present, it is being contemplated to enhance their age to 70 years, which has also been objected to by the beneficiaries, who are in service, through their associations. By enhancing their age of superannuation, it creates a blockage on the entry into service by the newly qualified persons those who are eligible to be considered for getting an appointment by following due process of law. In other angle also, if it will be taken into consideration, the Government is also facing economic ruination by enhancing the age of superannuation of the higher grade officers by curtailing the lower grade posts and not filling up the same by following due procedure of law. For example, at the remuneration, which is paid to a Professor, two Asst. Professors can get appointment in the base level post, which could have mitigated the inadequacy of faculties in the department itself. More so, it would have given encouragement to the youngsters to work vigorously and to cater to the needs of the public at large, and by this process the State would have been benefited and the situation which the State is facing would not have been there.

10. As a welfare State, the State of Odisha has an obligation to encourage its citizens to do much better in their life time for the interest of the public at large. Rejection of the representation of the petitioner for NOC, even though recommended by the competent authority, by the State Government on the plea of inadequacy of faculties in the Government Medical Colleges cannot have any justification. More particularly, in a matter where a candidate wants improvement in his life by appearing in interview, that cannot be taken away in such a slipshod manner, which amounts to arbitrary and unreasonable exercise of power, being volatile of Articles 14 and 16 of the Constitution of India.

11. The petitioner has specifically pleaded in paragraph-10 of the writ petition to the following effect:

> *"10. That, one, Dr Manas Ranjan Das, while working as Associate Professor in the Department of Surgery, SCB Medical College & Hospital, Cuttack had applied for the post of Professor of Surgery in AIIMS. Even if there is acute shortage/inadequacy of faculties, the Govt. issued NOC in his favour during 2017-18 and he was subsequently selected and appointed as Professor, AIIMS, Bhubaneswar. In not giving NOC to the petitioner is illegal, arbitrary and discriminatory being violative of Articles 14 and 16 of the Constitution."*

Even though a counter affidavit has been filed by opposite party no.1, there is no specific denial to such pleadings of the petitioner. Thereby, opposite party no.1 has admitted such position. If permission has been accorded in respect of a similarly situated candidate to participate in the process of interview enabling him to get selected and appointed as Professor, similar benefit cannot be denied to the petitioner on the ground of inadequacy of faculties. The situation, which was prevailing at the time when the candidate had applied, i.e., during 2017-18, the same situation is also prevailing now. Thereby, the action of opposite party no.1 is discriminatory one, which violates Article 14 of the constitution of India.

12. In ***Stroud's Dictionary of Law***, Vol.1 Page-695, the word "discrimination" has been defined to mean the difference in treatment of two or more persons or subjects.

In ***Dictionary of Political Science Joseph Dunner***, 1965 Page-148, it has been defined that discrimination is an act of depriving an individual or a group of equality of opportunity.

13. In ***Narmada Bachao Andolan (III) v. State of Madhya Pradesh***, AIR 2011 SC 1989, the apex Court explained the phrase "discrimination" observing as follows:

> *"Unequals cannot claim equality. In* ***Madhu Kishwar v. State of Bihar****, AIR 1996 SC 1864:1996 AIR SCW 2178: (1996) 5 SCC 125, it has been held by Supreme Court that every instance of discrimination does not necessarily fall within the ambit of Article 14 of the Constitution."*

14. In ***Rajasthan State Industrial Development and Investment Corporation v. Subhas Sindhi Co-operative Housing Society Jaipur***, AIR 2013 SC 1226, the apex Court examined the scope of discrimination. A party seeking relief on the ground of discrimination must take appropriate pleadings, lay down the factual foundation and must provide details of the comparable cases, so that the court may reach a conclusion, whether the authorities have actually discriminated against that party; and whether there is in fact any justification for discrimination, assessing the facts of both sets of cases together.

15. In ***Video Electronics Pvt. Ltd. v. State of Punjab***, AIR 1990 SC 820, the apex Court held that discrimination means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination arises from oversight which the State is ready to rectify.

This view has also been taken by the apex Court in ***Kathi Raning Rawat v. State of Saurashtra***, AIR 1952 SC 123.

16. In ***Vishundas Hundumal v. State of Madhya Pradesh***, AIR 1981 SC 1636, the apex Court held that when discrimination is glaring, the State cannot take recourse to inadvertence in its action resulting in discrimination. In a case where denial of equal protection is complained of and the denial flows from such action and has a direct impact on the fundamental rights of the complainant, a constructive approach to remove the discrimination by putting the complainant in the same position as others enjoying, favourable treatment by inadvertence of the State authorities, is required.

17. In ***State of Uttar Pradesh v. Dayanand Chakrawarty***, AIR 2013 SC 3066, while referring to ***Prem Chand Somchand Shah v. Union of India***, (1991) 2 SCC 48, the apex Court held as follows:

> *"8. As regards the right to equality guaranteed under Article 14 the position is well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the ground and that differentia must have a rational relation to the object sought to be achieved by the statute in question."*

18. Applying the law laid down by the apex Court as mentioned supra to the present context, this Court is of the considered view that action of the State opposite party no.1 is not only in gross violation of Article 14 of the Constitution of India but also arbitrary, unreasonable and discriminatory. Thereby, the order dated 21.01.2021 in Annexure-6 rejecting the representation filed by the petitioner seeking NOC to appear in the interview for faculty at AIIMS, Bhubaneswar, pursuant to advertisement issued on 13.11.2020, cannot sustain in the eye of law and is liable to be quashed and accordingly quashed. Opposite party no.1 is directed to issue necessary NOC in favour of the petitioner to enable her to appear in the interview for the post of faculty at AIIMS, Bhubaneswar, pursuant to advertisement issued on 13.11.2020 in Annexure-2, in terms of Clause-19 within a period of seven days from the date of receipt of the judgment without creating any hindrance thereof.

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

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2021 (I) ILR - CUT- 582

Dr. B.R. SARANGI, J.

W.P.(C) NO. 15552 OF 2012

SANTOSH KUMAR PANDU …….Petitioner

.V.

COLLECTOR-CUM-DCP-MGNREGS, RAYAGADA & ORS. …….Opp.Parties

(A) SERVICE LAW – Contractual service – Termination – Petitioner was engaged on contractual basis as a tenure employee – Allegation of irregularity in work – Petitioner was no way connected with the project work where the irregularity detected – Report of Ombudsman who caused an independent enquiry, has reported involvement of other persons and suggested for proceeding against them – However during pendency of the enquiry the Collector terminated the service of the petitioner – Whether proper ? – Held, No – The person under whom the work was done should be made responsible and as such the action so taken is absolutely based on no materials and aimed to cause harassment to the petitioner, who was engaged on contractual basis for his livelihood, thus, the same is illegal, arbitrary and unreasonable, and accordingly directed for reinstatement of the petitioner in service. (Paras 11 & 17)

(B) SERVICE LAW – Contractual service – Petitioner was engaged on contractual basis as a tenure employee – Termination simpliciter of a tenure employee – Whether permissible? – Held, Yes – However, the courts will review and set aside such termination where it is penal and for this purpose even though the order itself is innocuously couched, the Court will consider the attendant circumstances, as well as the affidavit filed, to come to the conclusion that the termination was penal or not. (Para 13)

(C) WORDS AND PHRASES – 'Misconduct' – Meaning thereof – Misconduct arising from ill motive; acts of negligence, error of judgment, or innocent mistake, do not constitute such misconduct – The expression 'misconduct' means, wrong or improper misconduct, unlawful behaviour, misfeasance, wrong conduct, misdemeanour etc. (Para 14)

Case Laws Relied on and Referred to :-

1. 2014 (II) OLR-75 : Haramohan Samantaray Vs. Commissioner-cum-Secretary to Govt. Panchayat Raj Department, Odisha, B.B.S.R.& three Ors.

2. (2001) 10 SCC 83 : A.P. State Federation of Coop. Spinning Mills Ltd. Vs. P.V. Swaminathan.
3. (1979) 2 SCC 286 : Union of India Vs. J. Ahmad.
4. (2006) 3 SCC 736 : Punjab State Civil Supplied Corpn. Ltd. Vs. Sikander Singh.
5. (2002) 3 SCC 667 : AIR 2002 SC 1124 :Baldev Singh Gandhi Vs. State of Punjab.

For Petitioner : M/s. Biraja Prasanna Das, A. Ekka, & J.S. Maharana.
For Opp.Parties : Mr. Y.S.P. Babu, Addl. Govt. Adv.

JUDGMENT Decided On : 25.02.2021

Dr. B.R.SARANGI, J.

The petitioner, who was working as a "Gram Rozgar Sevak" of Bankili Gram Panchayat under Kolnara Block in the district of Rayagada on contractual basis, has filed this writ petition seeking to quash the office order dated 31.07.2012 under Annexure-12 terminating his service and relieving him of his duty w.e.f. 31.07.2012, and further seeks direction to reinstate him in the said post.

2. The factual matrix of the case, in hand, is that the Collector, Rayagada issued an advertisement inviting applications for the post of "Gram Rozgar Sevak" (GRS) from eligible intending candidates of different Gram Panchayats under Rayagada district. As per the said advertisement, preference was to be given to the candidates belonging to their own Gram Panchayat. In response to the said advertisement, the petitioner, having requisite qualification for the post of GRS, submitted his candidature in respect to Bankili Gram Panchayat under Kolnara Block. By following due procedure of selection, the petitioner was selected for the post of GRS and his service was placed at the Bankili Gram Panchayat under Kolnara Block vide letter dated 22.02.2009 and he was engaged on contractual basis under the MGNREG Scheme. Thereafter, an agreement was executed on 17.02.2009 between the Sarapanch, Bankili Gram Panchayat and the petitioner, as per the government instructions. As per the terms and conditions of the agreement, monthly salary of the petitioner was fixed at Rs.2,000/- for a period of one year with effect from the date of agreement. The service of the petitioner was also extended up to 01.03.2013 with same terms and conditions, but the consolidated remuneration was enhanced and fixed at Rs.3,000/-. While he was so continuing, on 09.05.2012, the Block Development Officer, Kolnara issued a show cause notice to all persons associated with the project to submit their reply pertaining to irregularities committed by them regarding execution

of "Mo Pokhari" of Smt. Amana Senapati of village- Kankubadi under MGNREG Scheme on the basis of the audit report dated 18.04.2012.

2.1. On 11.05.2012, the petitioner received an order from the B.D.O., Kolnara- opposite party no.3 regarding deposit of an amount of Rs.35,625/- in MGNREGS account. Therein, the BDO, Kolnara had specifically directed that all the persons, those who were associated with the project and were found guilty, were to deposit equally an amount of Rs.7,125/- each in MGNREGS account. The BDO also issued an individual show cause notice to the petitioner on 11.05.2012, wherein he was directed to file reply for the gross irregularities. On being noticed, the petitioner on 22.05.2012 submitted his explanation to the imputations made against him in show cause notice dated 11.05.2012 for committing irregularities in execution of work under his Gram Panchayat and withdrawal of amount by adducing false bills.

2.2. The petitioner on 26.05.2012 approached the learned Ombudsman (MGNREGS), Rayagada for consideration of his case contending that behind his back, the opposite parties no. 4 and 5 had prepared a false bill and directed him to make/prepare muster roll of the said job, which was not within his knowledge. The measurement of the work was done by the opposite party no.4 in October, 2011 and, thereafter, check measurement was done by the Asst. Engineer- opposite party no.5. As such, the said opposite parties no. 4 and 5 are the real culprits and the author of the irregularities and have prepared the false bills. By stating so, he denied to be any way connected with such irregularities and contended that such irregularities were committed by opposite parties no. 4 and 5.

2.3. On 23.06.2012, the opposite party no.1- Collector-cum-DCP, MGNREGS, Rayagada issued show cause notice to the petitioner to submit his explanation for violating the norms of MGNREGS, fabricating the muster roll knowingly in the sense that no such work of "Mo Pokhari" of Smt. Amana Senapati of Kankudibadi village under Bankili Gram Panchayat of Kolnara Block was done. In respect to the same, the petitioner submitted his explanation on 19.07.2012 to the charges levelled against him by the opposite party no.1 in show cause notice dated 23.06.2012 and refuted all the allegations made against him. After submission of show cause reply on 19.07.2012, he was terminated from service vide order dated 31.07.2012 and relieved on the very same day. Hence this application.

3. Mr. B.P. Das, learned counsel for the petitioner contended that while terminating the petitioner from the service, he has not been given opportunity of hearing and, more so, no show cause notice was issued to opposite parties no. 4 and 5, who are associated with the said alleged work and, as such, the order dated 11.05.2012 issued by the BDO, Kolnara Block had never been taken into consideration. The enquiry conducted by the opposite party no.2 has no transparency and the persons, who had committed gross irregularities and misappropriation of public funds by way of adducing false bills, have been exonerated. In order to save the opposite parties no. 4 and 5, the petitioner has been crucified by terminating him from service by the impugned order. It is further contended that the BDO, Kolnara Block in his letter dated 11.05.2012 vide Annexure-6 clearly mentioned that all the persons associated with the said work were jointly and severally liable for the loss and accordingly directed each persons to pay Rs.7,125/- in order to save the public fund. This fact has never been taken into consideration by the opposite party no.1, while passing the order of termination against the petitioner. Before taking such drastic action of termination of service of the petitioner, the petition dated 26.05.2012 of Srinibas Heprka, Sarapanch of Bankili Gram Panchayat, the petition of Krushna Chandra Senapati and the account slip dated 25.05.2012 have never been taken into consideration. The account slip dated 25.05.2012 clearly reveals that there was deposit of entire amount of Rs.35,625/- by the son of the beneficiary. As the amount involved has already been deposited in the account of State exchequer, passing order of termination for the self same cause of action, cannot sustain in the eye of law. It is further contended that when Ombudsman, MGNREGS was causing an enquiry, at that stage, the action taken by the opposite party no.1-Collector, Rayagada terminating the service of the petitioner without awaiting the report of the Ombudsman cannot sustain in the eye of law and, thereby, the same should be quashed. To substantiate his contention, he has relied upon the judgment of this Court in ***Haramohan Samantaray v. Commissioner-cum-Secretary to Govt. Panchayat Raj Department, Odisha, Bhubaneswar and three others***, 2014 (II) OLR-75.

4. Per contra, Mr. Y.S.P. Babu, learned Addl. Government Advocate for the State contended that several opportunities were given to the petitioner by the opposite party no.1-Collector, Rayagada and opposite party no.3- BDO, Kolnara to adduce his grievance. Firstly, he was issued with show cause notice vide letter dated 11.05.2012 by opposite party no.3, which was duly replied by him. Secondly, a personal hearing before the Ombudsman,

MGNREGS, Rayagada was given to the petitioner along with other concerned officials on 25.05.2012 in the Block Office, during which the petitioner submitted his reply. Subsequently, the opposite party no.1-Collector-cum- DPC, MGNREGS, Rayagada gave him another chance to show cause vide letter no. 1833 dated 23.06.2012, to which the petitioner replied. Therefore, having not satisfied with such replies, action has been taken by the Collector, which is well within his competence and, thereby, the action so taken is well justified. It is further contended that the petitioner was entered with an agreement. Clauses-1, 10 and 11 of the agreement stipulate the grounds for termination of service. For the irregularities committed by the petitioner, even without notice on the ground of misconduct, he can be disengaged from service in terms of the agreement and, thereby, no irregularity or illegality can be said to have been committed by the Collector in taking the impugned action. It is further contended that the petitioner is responsible for proper maintenance of muster roll for the work in question. As such, he violated the norms of MGNREGS and fabricated the muster roll for execution of work without asking opposite parties no. 4 and 5 for payout, which amounts to gross misconduct and doubtful integrity of the petitioner. The muster roll was prepared without any spot visit and as per direction of opposite party no.4, which itself is a serious misconduct. Thereby, the Collector is well justified in terminating the service of the petitioner vide impugned order dated 31.07.2012 under Annexure-12. Accordingly, the writ petition is liable to be dismissed.

5. This Court heard Mr. B.P. Das, learned counsel for the petitioner and Mr. Y.S.P. Babu, learned Addl. Government Advocate appearing for the State opposite parties by virtual/physical mode, and perused the records. In this writ petition, this Court issued notice, vide order dated 22.11.2012, to the opposite parties and passed interim order that any appointment made to the post of Gram Rojgar Sevak of Bankili Gram Panchayat under Kolnara Block shall be subject to the result of this writ petition. Notice as against opposite parties no. 1 to 4 has been made sufficient after valid service. So far as AD in respect of opposite party no. 5 is concerned, a report was called for from the customer care of Post Office, Chandinichowk and on the basis of the letter of the Manager, GPO, Cuttack, this Court vide order dated 26.08.2014 held that service of notice on opposite party no.5 is sufficient. As it reveals, the opposite parties no. 4 and 5 have been impleaded as parties by name, who were working as Gram Panchayat Technical Assistant, Kolnara Block and Asst. Engineer, Kolnara Block respectively at relevant point of time and they

chose not to appear. The opposite parties no. 1 to 3 have filed their counter affidavit on 24.09.2014, to which the petitioner has filed rejoinder affidavit on 25.11.2014. Consequentially, an affidavit was also filed by opposite parties no.1 and 3 on 06.12.2019 and reply affidavit to the same was also filed by the petitioner on 13.12.2019. Though it is a case of the year 2012, this Court proceeded with the matter for final disposal with the consent of the learned counsel for the petitioner and learned Addl. Government Advocate appearing for the State-opposite parties.

6. Admittedly, the petitioner was duly selected as GRS and engaged in Bankili Gram Panchayat by way of executing an agreement between the Sarapanch of the Bankili Gram Panchayat and the petitioner on 17.02.2009, vide Annexure-3. Clause-1, 10 and 11 of the agreement read as follows:

> *"1. That the First Party shall provide engagement to the Second Party in Block for a period of one year commencing on 17 day 02 Month 2009 year and ending on the 16 day of 02 Month of 2010 Year as agreed to by both the parties and the contract of this engagement ipso facto shall be terminated on completion of the date specified for which no formal notice or order is required to be issued by the first party. The contract will stand rescinded on expiry of the period.*
>
> *xx xx xx*
>
> *10. That breach of any of the terms or, condition of this agreement by the Second Party shall be treated as misconduct.*
>
> *11. That the Second Party has agreed to serve in the manner as required and perform the duties as assigned by the First Party and he/she has agreed to be disengaged without any notice on the ground of misconduct even during the operation of this agreement."*

Such agreement was extended by executing subsequent agreement on 02.03.2012 and was valid up to 01.03.2013 vide Annexure-4 with same terms and conditions mentioned under Clauses-1 to 12. As such, the petitioner is bound by the agreement executed between the Sarapanch and himself.

7. The parliament, in order to provide for the enhancement to livelihood security of the households in rural areas of the country by providing at least one hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do unskilled manual work and for matters connected therewith or incidental thereto, has enacted an Act called the "National Rural Employment Guarantee Act, 2005" (in

short the "Act, 2005"). For the purpose of an effective adjudication of the case, Sections-19, 25, and 27, being relevant, are quoted below:

> *"19. The State Government shall, by rules, determine appropriate grievance redressal mechanisms at the Block level and the district level for dealing with any complaint by any person in respect of implementation of the Scheme and lay down the procedure for disposal of such complaints.*
>
> *xx xx xx*
>
> *25. Penalty for non-compliance.-Whoever contravenes the provisions of this Act shall on conviction be liable to a fine which may extend to one thousand rupees.*
>
> *Xx xx xx*
>
> *27. Power of Central Government to give directions.-(1) The Central Government may give such directions as it may consider necessary to the State Government for the effective implementation of the provisions of this Act.*
>
> *(2) Without prejudice to the provisions of sub-section (1), the Central Government may, on receipt of any complaint regarding the issue or improper utilisation of funds granted under this Act in respect of any Scheme if prima facie satisfied that there is a case, cause an investigation into the complaint made by any agency designated by it and if necessary, order stoppage of release of funds to the Scheme and institute appropriate remedial measures for its proper implementation within a reasonable period of time."*

On perusal of the above mentioned provisions, it is made clear that the State shall by rules have to determine the appropriate grievance redressal mechanisms at the Block level and the district level for dealing with any complaint by any person in respect of implementation of the Scheme and lay down the procedure for disposal of such complaint. For effective implementation of the provisions of Act, 2005, the Central Government has got power to issue direction as it may consider necessary to the State Governments for implementation of such Act. It also states, if any prima facie satisfaction is made, then it may cause an investigation into the complaint made by any agency designated by it and if necessary, order stoppage of release of funds to the Scheme. Consequentially, appointment of Ombudsman was made in consonance with the provisions contained under Section 27 of the Act. Accordingly, notification dated 19.06.2010 was issued by the State Government to all the Collector-cum-DPCs and notification of the Government of India dated 14.06.2011 explicitly provide the power and function of Ombudsman vide Annexure-17 series. The power of Ombudsman is provided by the Government of Odisha in its letter dated 19.06.2010 by the Panchayati Raj Department, which reads as follows:

"Power of Ombudsman.

The Ombudsman shall have the power to :

1. *Receive complaints from MGNREGA workers and others.*
2. *Consider such complaints and facilitate their disposal in accordance with law.*
3. *Require the NREGA Authority complained against to provide any information or furnish certified copies of any document relating to the subject matter of the complaint which is or is alleged to be in his possession.*
4. *Issue direction for conducting spot investigation.*
5. *Lodge FIRs against the erring parties.*
6. *Initiate proceedings suo motu in the event of any circumstance arising within his jurisdiction that may cause any grievance.*
7. *Engage experts for facilitating the disposal of the complaint.*
8. *Direct redressal, disciplinary and punitive actions.*
9. *Report his findings to the Chief Secretary of the State and the Secretary, Panchayati Raj Department for appropriate legal action erring persons.*

Ombudsman is not a Judicial body. Ombudsman should report the State Government to take disciplinary action against an officer found guilty following the laid down procedure for such disciplinary and punitive action. The findings of Ombudsman will be investigated and action will be taken by the State Government if deemed necessary. But the Ombudsman can not directly hand out punishments."

In view of such letter, the Ombudsman can direct for redressal, disciplinary and punitive actions and report his findings to the Chief Secretary of the State and the Secretary, Panchayati Raj Department for appropriate legal action against erring persons. As such, it has also been clarified that the Ombudsman should report the State Government to take disciplinary action against an officer found guilty following the laid down procedure for such disciplinary and punitive action. The findings of Ombudsman will be investigated and action will be taken by the State Government, if deemed necessary, but the Ombudsman cannot directly handout punishments. In view of such power vested with the Ombudsman, an enquiry was conducted to the allegations made, so far as the irregularities committed by the persons indulged in such activities. The Ombudsman submitted his report on 17.12.2012 with following conclusions.

*" **Conclusion:***

From the statements submitted by different Officials, it was confirmed that

a. The existing pond was excavated during the financial year 2006-07/2007-08 by Watershed department and reported by PD Watershed.

b. Participants in the Social Audit held on 18.04.2012 raised the issue and recorded in the proceedings vide Sl. No. 5.

As JE and AE taken initiative for measurement and check measurement without anybody's knowledge, which at later stages automatically ended with preparation of muster roll and releasing of payment to the tune of Rs.35,625/- and further as confirmed, both of them have knowingly done the unknown mistake in good faith with negligence. However, by virtue of their experience and exposure in the same field they are supposed to identify the status of work as regards to current and old. Moreover without plan and layout why and how Sri Sahu GPTA was tempted to measure the said Pokhari of Bankili GP working in Theruvali GP, which was further endorsed by Sri B.V. Raman AE through check measurement with the same intensity of mistake."

On perusal of the above conclusion it is made clear that illegality started from the very beginning, i.e., from the stage of measurement and check measurement done by opposite parties no. 4 and 5 respectively, and he suggested to take action against those erring officials. Nothing has been placed on record to show that there is involvement of the present petitioner in such irregularities. As it reveals from the documents filed by the opposite parties no. 1 to 3, disciplinary proceeding was already initiated by the BDO, Kolnara on 11.05.2012 under Annexure-C/3 and by the Collector, Rayagada on 15.02.2012 under Annexure-M/3. FIR was also lodged by the BDO, Kolnara regarding irregularities committed by Ex-Sarapanch, Bankili Panchayat, Executive Officer, Bankili, Gram Rozgar Sevak, Bankili, GPTA, Kolnara Block and Asst. Engineer, Kolnara Block.

8. Section 25 of the Act, 2005 envisages that if anybody contravenes the provisions of Act shall be liable to pay fine which may extend to Rs.1,000/-, Thereby, there is a penal provision available under the Act for contravention of the provisions of Act itself. During course of hearing, this Court passed orders on 01.07.2019, 24.07.2019 and 17.01.2020 to the following effect:

*"**15. 01.07.2019***

Heard Mr. B.P. Das, learned counsel for the petitioner and Mr. S. Mishra, learned Addl. Government Advocate.

Mr. B.P. Das, learned counsel for the petitioner undertakes to file appropriate application for deletion of opposite party no.2 as party to this case.

Mr. B.P. Das, learned counsel for the petitioner contended that as per the National Rural Employment Guarantee Act, 2005, power has been vested with the Central Government to issue direction to the State Government for effective implementation of the Act and in reference to Section 27(1) of the said Act, the Panchayatiraj Department of Orissa has to appoint Ombudsman in each district, who shall report the State Government to take disciplinary action against the officers found guilty following the laid down procedure for such disciplinary and punitive action. The findings of the Ombudsman will be investigated and action will be taken by the State Government, but the Ombudsman cannot directly hand out punishments. It is contended that the petitioner approached the Ombudsman and the Ombudsman has given a report in Annexure-15 dated 17.12.2012 and before the Ombudsman submitted its report, the petitioner has already been disengaged from service on 31.07.2012. It is contended that the disengagement of the petitioner has to be followed by the report given by the Ombudsman, but here the Ombudsman has given the report subsequent to the disengagement order passed by the authority concerned. It is also contended that under Section 25 of the Act, only penalty of Rs.1000/- can be imposed on the petitioner not the order of disengagement. To substantiate such contention, reliance has been placed on the judgment of this Court in the case of ***Haramohan Samantray v. Commissioner-cum-Secretary to Government, Panchayati Raj Department, Odisha, Bhubaneswar****, 2014 (II) OLR 75.*

Mr. S. Mishra, learned Addl. Government Advocate seeks time to examine the matter.

List after two weeks."

"16. 24.07.2019

Heard Mr. B.P. Das, learned counsel for the petitioner and Mr. D.K. Pani, learned Addl. Standing Counsel for the State.

Mr. D.K. Pani, learned Addl. Standing Counsel for the State will apprise the Court under what provision of law, the Collector has got jurisdiction to initiate proceeding against the petitioner, though it is contended that in view of the Clause-10 of the agreement if there is breach of any of the terms or, condition of the agreement by the second party shall be treated as misconduct, save and except nothing has been mentioned with regard to jurisdiction of the Collector to initiate proceeding. On the next occasion he will produce the relevant provision of law indicating that the Collector has jurisdiction to initiate such proceeding.

Call this matter after two weeks."

"21. 17.01.2020

Heard Mr. B.P. Das, learned counsel for the petitioner and Mr. A.K. Mishra, learned Additional Government Advocate.

In compliance of the order dated 01.07.2019, the State Government filed an affidavit on 06.12.2019 wherein it is contended that in view of letter dated 25.08.2006 under Annexure-O/3 issued by Panchayati Raj Department the selection of Gram Rozgar Sevaks will be done strictly on the basis of marks obtained in the 10+2 examination and shall be made at the district level by a Committee headed by the Collector-cum-CEO, Zilla Parishad, other members of the Committee being nominated by Collector-cum-CEO. Thereby, the Collector-cum-CEO, Zilla Parishad is also competent to take disciplinary action including removal for unsatisfactory performance, indiscipline or otherwise after getting feedback from the concerned Gram Panchayat through Programme Officer.

Mr. B.P. Das, learned counsel for the petitioner refuted such contentions raised in the affidavit and stated that in the reply to affidavit dated 06.12.2019 filed by the State Government wherein it is stated that as per notification dated 19.06.2010 issued by the State Government, Ombudsman is the competent authority for taking disciplinary action and report his findings to the Chief Secretary of the State and the Secretary, Panchayati Raj Department for appropriate legal action against erring persons. the findings of Ombudsman will be investigated and action will be taken by the State Government if deemed necessary. But the Ombudsman cannot directly hand out punishments. It is stated that since the Ombudsman is causing inquiry at that stage, the Collector-cum-CEO, Zillaparishad has taken punitive action disengaging the petitioner from the post of Gram Rozgar Sevak and as such, the said order is without jurisdiction.

Mr. A.K. Mishra, learned Additional Government Advocate seeks time to obtain instructions whether the Collector-cum-CEO, Zilla Parishad is competent enough to pass any order without receiving information from Ombudsman, when Ombudsman is enquiring into the matter.

Put up this matter after two weeks."

In compliance of order dated 01.07.2019, affidavit was filed by opposite parties no. 1 and 3 on 06.12.2019, paragraph-4 whereof reads as under:

"4. That in pursuance to Clause-A (ii) of letter No. 17146 /PR, dtd.25.8.2006, the selection of Grama Rozgar Sevak (GRS) was being done in the year, 2006 strictly on the basis of marks obtained in 10+2 examination and shall be made at the district level by a Committee headed by the Collector-cum-Zilla Parishad, other members of the Committee being nominated by Collector-cum-CEO. Likewise Collector-cum-CEO, Zilla parishad is also competent to take Disciplinary Action including removal for unsatisfactory performance, indiscipline or otherwise after getting feed back from concerned Gram Panchayat through Programme Officer. Copy of Letter No. 17146/PR dtd. 25.08.2006 issued by the Panchayati Raj Department is annexed herewith as ***ANNEXURE-O/3."***

In reply to the order dated 17.01.2020, nothing has been placed on record by the State Counsel to show, whether the Collector-cum-CEO, Zilla Parishad is competent enough to pass any order without receiving information from Ombudsman, when Ombudsman is enquiring into the matter.

9. Admittedly, in the present case, when the Ombudsman was seisin over the enquiry proceeding, the order terminating the petitioner was passed vide Annexure-12 dated 31.07.2012. As it reveals from the documents available on record, the Ombudsman submitted his report on 17.12.2012 vide Annexure-15, whereas the impugned order was passed on 31.07.2012, which is much prior to the enquiry report submitted by the Ombudsman. From the conclusion part of such enquiry report, it is revealed that opposite parties no. 4 and 5 had admitted that the irregularities were committed by them. In the counter affidavit filed by opposite parties no. 1 to 3, it is stated that the BDO, Kolnara confirmed the involvement of the petitioner regarding initiation of false muster roll in execution of "Mo Pokhari" of Amana Senapati, without intimating the opposite parties no. 4 and 5 for giving layout of the work, but when this fact has no justification, relying upon the report of the BDO, the Collector placed the petitioner under suspension for misconduct.

10. The entire gamut indicates that the authorities have tried to crucify the petitioner, who is the lowest rank employee in the Scheme and, as such, he has to act in accordance with the directions given by the authority concerned. Nothing has been placed on record to show his involvement in preparing the muster roll, as alleged. Rather, the Ombudsman, who caused an independent enquiry, has reported involvement of opposite parties no. 4 and 5 and suggested for proceeding against them.

11. In ***Haramohan Samantaray*** (supra), this Court has already held that if any irregularity is found out by the competent authority, the person under whom the work was done should be responsible. In that case, without application of mind, the proceeding was initiated against the petitioner, who was no way connected with the project work and ultimately he was disengaged from the service. Thereby, this Court held that the action so taken is absolutely based on no materials and, as such, the same is illegal, arbitrary and unreasonable, and accordingly directed for reinstatement of the petitioner in service.

12. In the case at hand, admittedly, the petitioner was engaged on contractual basis as a tenure employee. On perusal of the impugned order of

termination, it would be seen that the same has been passed in terms of agreement clauses-1, 10 and 11, which is of penal in nature.

13. In ***A.P. State Federation of Coop. Spinning Mills Ltd. v. P.V. Swaminathan,*** (2001) 10 SCC 83, the apex Court held that although the termination simpliciter of a tenure employee is permissible, the courts will review and set aside such termination where it is penal. And for this purpose even though the order itself is innocuously couched, the Court will consider the attendant circumstances, as well as the affidavit filed, to come to the conclusion that the termination was penal.

14. It cannot be lost sight of that on the allegation of misconduct on the part of the petitioner, drastic action of termination from service has been taken by the impugned order under Annexure-12 dated 31.07.2012.

15. In ***Union of India v. J. Ahmad,*** (1979) 2 SCC 286, the apex Court held, 'misconduct' means, misconduct arising from ill motive; acts of negligence, error of judgment, or innocent mistake, do not constitute such misconduct. This meaning has been taken from STROUD'S Judicial Dictionary.

Similar view has also been taken by the apex Court in ***Punjab State Civil Supplied Corpn. Ltd. v. Sikander Singh,*** (2006) 3 SCC 736.

16. In ***Baldev Singh Gandhi v. State of Punjab,*** (2002) 3 SCC 667 : AIR 2002 SC 1124, the apex Court held that the expression 'misconduct' means, wrong or improper misconduct, unlawful behaviour, misfeasance, wrong conduct, misdemeanour etc.

17. If the above meaning of "misconduct" is applied to the present context, nothing has been placed on record to indicate the manner and the way in which the petitioner has misconducted himself, save and except alleging that muster roll was prepared at the behest of the opposite parties no. 4 and 5 by the petitioner. But the Ombudsman in his enquiry report has specifically mentioned to take action against the opposite parties no. 4 and 5 and nothing has been stated about the petitioner. Thereby, this Court comes to a definite conclusion that in order to cause harassment, the petitioner, who was engaged on contractual basis for his livelihood, has been deprived of the same by issuing the impugned order of termination dated 31.07.2012 under

Annexure-12, which is liable to be quashed and is hereby quashed. The Collector, Rayagada-opposite party no.1 is directed to forthwith reinstate the petitioner in service as before.

18. The writ petition is accordingly allowed. No order as to costs.

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2021 (I) ILR - CUT- 595

Dr. B.R. SARANGI, J.

W.P.(C) NO. 12539 OF 2018

SOUMYA RANJAN ACHARYA ..... Petitioner

.V.

SECRETARY, NATIONAL INSTITUTE OF OPEN SCHOOLING, (NIOS) & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order rejecting the application for correction of date of birth – Documents mentioning the date of birth as "08.03.1994" was produced at the time of admission – The certificates were issued to the petitioner mentioning his date of birth as "08.03.1974", instead of "08.03.1994" – Mistake/error was committed at the level of authority while entering the date of birth of the petitioner in their admission record – Rejection of application for correction of a typographical error – Held, improper – Direction issued to correct the DOB. (Paras 12 & 13)

Case Laws Relied on and Referred to :-

1. (2011) 10 SCC 420 : Cauvery Coffee Traders Vs. Hornor Resources (International) Co. Ltd.

For Petitioner : M/s. N.K. Sahu & B. Swain.

For Opp. Parties : Mr. T.N. Pattanayak, S. Pattanaik & Manoj Ojha, Mr. C.A. Rao, Sr. Adv. & Mr. S.K. Behera.

JUDGMENT Decided On : 04.03.2021

Dr. B.R. SARANGI, J.

The petitioner, who is a student of National Institute of Open Schooling (NIOS), has filed this writ petition seeking to quash the order dated 11.06.2018 under Annexure-11 rejecting his application for correction of date of birth.

2. The factual matrix of the case, in hand, is that the petitioner was prosecuting his study at M.R. Boys' High School, Parlakhemundi as a regular student. He appeared H.S.C. Examination in the year 2010 under the Board of Secondary Education, Orissa and became unsuccessful. Consequentially, he left the said school and was issued with transfer certificate (T.C.) bearing No. 1286501 dated 18.10.2010, along with Enrollment Card (E.C.) bearing No. DAM001/230/08 vide Annexures-1 and 2 respectively issued by the Board of Secondary Education, Orissa, wherein the date of birth of the petitioner was mentioned as "08.03.1994". On receipt of such certificate, the petitioner took admission at National Institute of Open Schooling (NIOS), which is an autonomous Institution under the Ministry of Human Resources Development (HRD) Department, Government of India, having its regional centre and accredited institutes all over India.

2.1. The petitioner took admission in Sri Lakshmi Gangapathi Degree College, Dharmapuri, Vizianagaram, which is affiliated to Regional Centre at Vishakapatham under NIOS, by producing the transfer certificate and the enrollment card issued by the Board of Secondary Education, Orissa. He appeared the H.S.C. Examination under Regional Center at Vishakhapatnam in the month of April, 2012 bearing Roll No. 932711200322 and became successful. After he became successful in the H.S.C. examination, he went to the Regional Centre, Vishakhapatnam on 15.08.2012 to obtain certificate from the authority. The provisional certificate, mark sheet and the migration-cum-transfer certificate were issued to the petitioner by the Director, NIOS Evaluation. After receipt of the same, the petitioner came to know that his date of birth in the certificate has been mentioned incorrectly as "18.03.1974", though his actual date of birth is "18.03.1994".

2.2. The petitioner immediately on 27.08.2012 applied to the authority in the format provided for the purpose of correction of certificate and also deposited Rs.500/- in the form of bank draft on 29.08.2012, along with an affidavit, seeking correction of the wrong entry of the date of birth in the

aforesaid certificates on the basis of the transfer certificate and enrolment card issued by the B.S.E., Orissa, but no action was taken by the opposite parties. Consequentially, father of the petitioner, on 18.10.2012 submitted representation to the authority with a request to treat the matter as urgent and issue correct certificate immediately as his son has joined in ITI at Vishyakarma Industrial Training Centre, Berhampur with an undertaking to submit the corrected certificate in proof of his date of birth after issuance of the same by the authority under NOIS. In spite of such request being made, no action was taken. Subsequently, father of the petitioner again on 26.11.2012, 08.02.2013 and by making email correspondence on 08.01.2014 requested the Secretary and Director of Evaluation, NOIS, but all efforts gone in vain.

2.3. Due to non-grant of corrected certificate, the petitioner could not appear the examination of ITI. Consequentially, petitioner issued notice to the opposite party authorities through his advocate on 25.01.2016. Since no response came from the opposite parties, finding no other alternative, the petitioner preferred W.P.(C) No. 6831 of 2018, which was disposed of on 27.04.2018 directing opposite party no.2 to take a decision in accordance with law within four weeks from the date of the receipt of the order. In compliance of the order passed by this Court, the impugned order in Annexure-11 dated 11.06.2018 was passed, wherein it has been specifically mentioned that the NIOS does not permit for change in date of birth of learners and further provides that no change in the date of birth once recorded in the NIOS records shall be made. However, corrections to rectify the genuine typographical errors/ factual errors can be made. Application for correction in date of birth can be considered within three years from the date of registration in NIOS, but prior to appearing in the first examination, hence the case of the petitioner was badly barred by the limitation. It is also further mentioned that the petitioner has furnished the particulars at the time of admission in admission form which was kept by the Board (NIOS) for certification purpose and the certificate was issued to the petitioner on 12.06.2012. Thereby, due to the above reasons, no change in the date of birth can be considered at the late stage and the matter stands disposed of. Hence this application.

3. Mr. N.K. Sahu, learned counsel for the petitioner contended that at the time of admission, the petitioner had produced the transfer certificate annexed as Annexure-1 and also the enrollment card issued by the Board of

Secondary Education, Orissa, which is annexed as Annexure-2, wherein the date of birth has been mentioned as "08.03.1994". But, when the petitioner passed the annual examination conducted by the NIOS, he was issued with provisional certificate, marks statement and migration-cum-transfer certificate, wherein the date of birth has been mentioned as "08.03.1974". It is contended that there may be some typographical error indicating the date of birth as "08.03.1974" in place of "08.03.1994". Therefore, as required under law, the petitioner applied in prescribed proforma for correction in the admission record, vide Annexure-4 series by depositing the requisites fees. Though the same was duly acknowledged, but not acted upon in spite of the several requests made by the petitioner and his father. Subsequently, in compliance of the direction given by this Court, vide order dated 27.04.2018 passed in W.P.(C) No. 6831 of 2018, the application of the petitioner was rejected on the plea of barred by limitation as three years period prescribed for correction of date of birth was already over. It is contended that the same is purely non-application of mind. As it reveals from the application submitted for correction, the same was produced on 27.08.2012 under Annexure-4 series, which is well within the time specified. Therefore, the reasons assigned in the impugned order cannot have any justification, particularly when the same contradicts the record itself. Thereby, the petitioner seeks for quashing of letter dated 11.06.2018 in Annexure-11 and prays for correction of date of birth. It is further contended that valuable time of the petitioner was lost due to callous attitude of the opposite parties no. 1 and 2 by not correcting the date of birth, which are based on record.

4. Mr. T.N. Patnaik, learned counsel appearing for the opposite parties no. 1 and 2 contended that the NIOS has framed rules, regulations and guidelines for effecting corrections/changes in the admission records. Clause-3.3 (i) and (ii) stipulates that application for correction of date of birth to be considered within a period of three years from the date of registration in NIOS, but prior to appearing in the 1st examination, and no change in the date of birth once recorded in the NIOS records shall be made. However, corrections to rectify the genuine typographical errors/factual errors can be made. Thereby, it is contended that since the petitioner has not approached the authority concerned within a period of three years of issuance of certificate, the same cannot be corrected and the order impugned passed by the authority, in compliance of order dated 24.07.2018 passed by this Court in W.P.(C) No. 6831 of 2018, is well justified. Thereby, no illegality

or irregularity has been committed by passing the order impugned so as to cause interference of this Court.

5. Mr. C.A. Rao, learned Senior Counsel appearing along with Mr. S.K. Behera, learned counsel for opposite party no.3 endorsed the contention raised by Mr. T.N. Pattanayak, learned counsel for opposite parties no. 1 and 2, and justifies the action taken by the opposite parties no. 1 and 2 by way of filing counter affidavit.

6. This Court heard Mr. N.K. Sahu, learned counsel for the petitioner; Mr. T.N. Pattanayak, learned counsel for opposite parties no. 1 and 2; and Mr. C.A. Rao, learned Senior Counsel appearing for opposite party no.3; and perused the record. Pleadings have been exchanged between the parties and with their consent the matter is being disposed of finally at the stage of admission.

7. Before delving into the legality and propriety of the communication dated 11.06.2018 under Annexure-11, which has been sought to be quashed, it is apt to have a glance through clause 4.11 of the prospectus issued by the NIOS for the academic Session 2011-12, the extract of which has been annexed as Annexure-5 to the writ petition, relying on which prayer of the petitioner for correction of his date of birth in the certificates has been denied by the NIOS. Clause-4.11, which provides procedure for correction in the admission records, reads thus:

> *"4.11* ***Procedure for correction in the Admission records.***
>
> - *The admission to a particular course is normally confirmed by NIOS by issuing an Identity Card having details of learner's admission particulars as per the record available in NIOS.*
> - *In case of any discrepancy in "Name" or "Father's Name" or "Date of Birth" or "Address" or "Photo" etc., please apply for correction at your study centre of the concerned Regional Centre along with the documentary proof.*
> - *In case if you notice the discrepancy after your result has been declared and you have been issued the passing documents (Marksheet, Migration or Provisional Certificates) please apply within a month for correction at your study centre or at the concerned Regional Centre along with the documentary proof and the documents (Marksheet, Migration or Provisional Certificate or finaly certificate) with incorrect details issued by NIOS.*

- *Please note that the revised corrected documents will be issued only if you have submitted the documents (Marksheet, Migration or Provisional Certificate or finaly certificate) with incorrect details issued by NIOS."*

On perusal of the above, it is evident that in case any discrepancy is noticed after declaration of the result in passing documents issued by the authority, i.e. mark-sheet, migration or provisional certificates, the candidate has to apply to the authority within a month for correction at the study centre or at the concerned regional centre, along with the documentary proof and the documents (mark-sheet, migration or provisional certificates or finally certificate) with incorrect details issued by the NIOS.

8. Admittedly, the provisional certificate, marks statement and migration-cum-transfer certificate dated 12.06.2012 were supplied to the petitioner on 15.08.2012. On receipt of the same, the petitioner found error in the date of birth, which was recorded as "18.03.1974" in place of "18.03.1994". Therefore, vide Annexure-4 series, he applied to the authority on 27.08.2012 in the proforma prescribed for the purpose of correction of certificate by depositing requisite fees of Rs.500/- in the shape of bank draft dated 29.08.2012, along with an affidavit seeking for correction of wrong entry of the date of birth in the said certificates. Thereby, the petitioner has submitted his application, along with documentary proof, within one month period for correction of his date of birth in the certificates issued by NIOS.

9. Mr. T.N. Pattnayak, learned counsel appearing for opposite parties no. 1 and 2 submitted that NIOS issued Rules Regulations and Guidelines for effecting corrections/changes in the admission records of NIOS, which were approved in 14th meeting of Academic Council held on 24.05.2013 and 65th meeting of Executive Board held on 17.10.2013. Clause-3.3 thereof, which is relevant for just adjudication of the case, is quoted below:

"3.3 CORRECTION IN THE DATE OF BIRTH OF LEARNER

(i) No change in the date of birth once recorded in the NIOS records shall be made. However, correction to rectify the genuine typographical error/ factual errors can be made.

(ii) Application for correction in date of birth can be considered within three years from the date of registration in NIOS but prior to appearing in the first examination.

(iii) Correction in the Date of Birth of a candidate in case of a genuine clerical error(s) will be made with the approval of Director (SSS) if it is established to the satisfaction that wrong entry was made in the Admission Form of the candidate.

(iv) The Application for correction in the date of birth should be submitted to the concerned Regional Centre of NIOS along with the following documents:-

(a) Attested copy of the admission form of the Candidate.

(b) Attested copy of Birth Certificate issued by the Municipal Authority or the District Office of the Registrar of Births and Deaths. (c) SLC/TC/ indicating the Date of Birth of the Candidate issued by the last formal School attended by the applicant. In case of Govt. School, SLC/TC should be signed by the Principal concerned. In case of Private School, it should be countersigned by the Competent Authority of State's Education Department or by the District Education Officer.

(d) In case of orphan/juvenile/Street Children the Medical- Legal Certificate be provided as proof of Date of Birth.

(e) Attested photocopies of any other official documents such as Passport, voter I-Card, Aadhar Card etc. Old incorrect documents (certificate/ mark sheet/registration card) in original issued by NIOS.

(f) Payment of prescribed fee of Rs. 100/-."

On perusal of the above provisions, it is made clear that no change in the date of birth once recorded in the NIOS records shall be made. However, correction to rectify the genuine typographical error/factual error can be made. Correction in the date of birth of a candidate in case of a genuine clerical error will be made with the approval of Director (SSS), if it is established to the satisfaction that wrong entry was made in the admission form of the candidate. The application for correction in the date of birth should be submitted to the concerned regional centre of NIOS along with the documents mentioned therein under clause (a) to (e) on payment of prescribed fee. It is not in dispute that the petitioner produced the certificates issued by the Board of Secondary Education under Annexures-1 and 2 to get admission into NIOS. The date of birth was mentioned therein as 08.03.1994. But, while issuing certificates vide Annexure-3 series, the opposite parties no. 1 and 2, wrongly mentioned the date of birth of the petitioner as "08.03.1974" in place of "08.03.1994". Thereby, a typographical mistake has been occurred, as because only digit '7' has been mentioned in place of digit '9', and to justify that mistake crept in the certificates issued by opposite parties no. 1 and 2, vide Annexure-3 series, the petitioner has followed all the principles by making application on 27.08.2012 vide Annexure-4 series. The petitioner specifically pleaded in paragraph-6 of the application as follows:

"6. That the Petitioner having come to know about the aforesaid defect in the certificate, immediately on 27.08.2012 applied to the authority in the format provided for the purpose of correction of certificate and also deposited Rs.500/- in the form the bank draft on 29.08.2012 alongwith an affidavit, seeking correction of the wrong entry of the date of birth mentioned in the aforesaid certificate specially mentioning in the application that his correct date of birth is 8.3.1994 and the same should be corrected by verifying the transfer certificate and the enrollment card issued by the Board of Secondary Education, Orissa.

The copy of the application dtd.27.8.2012, the copy of the bank draft dtd.29.8.2012 and the necessary affidavit dt.29.8.2012 submitted by the Petitioner seeking correction of the date of birth are annexed herewith as ***Annexure- 4 series****."*

10. In view of the aforesaid assertion made in paragraph-6, to which there is no specific denial in the counter affidavit filed by opposite parties no. 1 and 2, it can safely be construed that the opposite parties no. 1 and 2 have admitted the contention raised in paragraph-6 itself. Since petitioner has applied to the authority on 27.08.2012 in the format prescribed for the purpose of correction of certificates by depositing the requisite fees of Rs.500/- in the shape of bank draft on 29.08.2012, if there is no specific denial to that extent and, as such, the same is admitted, there is no valid and justifiable reason not to carry out the typographical error crept in the certificates issued by the opposite parties no. 1 and 2 in Annexure-3 series, so far as date of birth is concerned.

11. Furthermore, in the transfer certificate and enrollment card issued by the Board of Secondary Education, Orissa, which have been filed as Annexures-1 and 2 respectively, the date of birth of the petitioner has been mentioned as "08.03.1994". Those Annexures-1 and 2 were very much produced by the petitioner at the time of admission to the NIOS. Therefore, the above mistake/error must have committed at the level of opposite parties no. 1 and 2, while entering the date of birth of the petitioner in their admission record. Subsequently, when the certificates were issued to the petitioner in Annexure-3 series mentioning his date of birth as "08.03.1974", instead of "08.03.1994", the petitioner submitted an application for correction vide Annexure-4 series. Therefore, in the considered opinion of this Court, the application of the petitioner for correction of date of birth, which is in the nature of a typographical error, should not have been rejected by passing impugned order dated 11.06.2018 in Annexure-11 taking a flimsy ground that such an application can be considered within three years from the date of registration in NIOS, but prior to appearing in the first examination.

12. More so, as per clause-3.3(i), the correction to rectify the genuine typographical error/factual errors can be made.

"**Error"** means something incorrectly done though ignorance or inadvertence.

In **Black's Law Dictionary, 7th Edn., "error"** means a psychological state that does not confirm to objective reality; a belief that what is false or that what is true is false.

In ***Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.,*** (2011) 10 SCC 420, the apex Court held that error means a mistake in judgment/assessment in a process or proceeding; some wrong decision taken inadvertently; unintentional mistake; something incorrectly done through ignorance or inadvertence; mistake occurred from an accidental slip; deviation from standard or course of right or accuracy, unintentionally; to be wrong about; to think or understand wrongly; an omission made not by design, but by mischance.

As such, in view of above, the petitioner had applied for correction of error vide Annexure-4 series within three years period, but, due to inaction of the opposite parties no. 1 and 2, he has been made to suffer.

13. For all the above reasons, the order dated 11.06.2018 in Annexure-11 refusing to make correction of typographical error of the date of birth of the petitioner, having been passed on flimsy grounds and without application of mind, cannot sustain in the eye of law and is liable to be quashed and accordingly quashed. The opposite parties no. 1 and 2 are directed to make correction of typographical error of date of birth of the petitioner in their admission record and the certificates issued to the petitioner in Annexure-3 series as "08.03.1994" in place of "08.03.1974", as has been entered in transfer certificate and enrollment card issued by Board of Secondary Education, Orissa in Annexues-1 and 2 as expeditiously as possible, preferably within a period of six weeks from the date of communication of this judgment.

14. With the above observation and direction, the writ petition is allowed. No order to costs.

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2021 (I) ILR - CUT- 604

D. DASH, J.

RSA NO. 210 OF 2019

CENTRAL ELECTRICITY SUPPLY UTILITY OF ODISHA & ORS. ……..Appellants.

.V.

DAMAYANTI SAMAL AND ANR. ……..Respondents.

ELECTROCUTION DEATH – Negligence – Claim of compensation – Principle of "Res ipsa loquitur" as well as Rule of strict liability discussed – Enhancement of compensation upheld.

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1480 : Charan Lal Sahu Vs. Union of India.
2. AIR 1987 SC 1690 : Division Bench in Gujarat State Road Transport Corpn. Vs. Ramanbhai Prabhatbhai.
3. AIR 2001 SC 485 : Kaushnuma Begum Vs. New India Assurance Co. Ltd.
4. AIR 2002 SC 551 : M.P. Electricity Board Vs. Shail Kumar & Ors.

For the Appellants : M/s.B. Dash, P.K. Mohanty, N.C. Jena & A.K. Pandey.
For the Respondent : M/s. B. Mohanty & Smt. R.N. Das.

JUDGMENT Date of Hearing : 01.03.2021 : Date of Judgment:15 .03.2021

D. DASH, J.

The Appellants, by filing this appeal, under section 100 of the Code of Civil Procedure (for short, 'the Code') have assailed the judgment and decree passed by the learned Additional District Judge, Salipur in RFA No. 50 of 2015 filed by the present Appellants being faced with a cross appeal from the side of the Respondent no. 1. By the said judgment, the lower appellate court while deciding the appeal as well as cross appeal having affirmed the finding of the learned Civil Judge(Senior Division) 2nd Court, Cuttack in CS (III) No. 27 of 2012 on the core issues such as framing of the suit and the negligence of the defendants incurring the liability to be saddled with the payment of compensation has however taken a view that the assessment of compensation as made by the trial court is on a lower side. Accordingly, the trial court having awarded compensation of Rs.5,50,300/- with interest at the rate of 6.5% per annum with effect from 27.09.2021 till payment as payable by the Appellants to the Respondent; lower appellate court has enhanced the compensation to Rs. 6,30,000/- with interest at the rate of 6% per annum with effect from 03.11.2012, the date of filing of the suit till payment as just and proper.

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

3. Plaintiffs' case is that on 27.09.2012 when her husband was going to his agricultural field, he suddenly came in contact with 11 K.V. electric wire, electrocuted and met an instantaneous death by said electrocution. The report to that effect being lodged with the Inspector-incharge, Mahanga Police Station; P.S. Case No. 146 of 2012 was registered and post mortem examination over the dead body was made. The husband of the Plaintiff No.1is said to be aged about 44 years at the time of death and it is stated that he was engaged in cultivation and sale of the agricultural products and in this way earning a sum of Rs.8,000/- per month. For the said death, the Plaintiff No. 1 and Plaintiff No. 2 being the wife and mother of the deceased respectively filed the suit claiming compensation from the Defendants i.e. Central Electricity Supply Utility of Orissa and its official In-charge of the supply of electricity and maintenance etc. in the area. It may be stated here that the Plaintiff No.2, the mother of the deceased having died in the meantime, she is no more in the arena of this lis. It is also pertinent to state that the deceased has also left behind two minor sons who are now in care and custody of the Plaintiff No.2. Those two minor although are not added as Plaintiffs, yet the Plaintiff No.1 has clearly pleaded the same and the compensation has also been claimed in their behalf. In view of the above, Plaintiff No.1 hereinafter is referred to as the 'Plaintiff'

4. The Defendants contested the suit by denying that the said death of husband of the Plaintiff No. 1 by electrocution to have taken place on account of any negligence on their part and it is stated that for the same the Defendants are in no way responsible. In this connection, it has been specifically pleaded that an electric wire being snapped when touches the ground, automatically supply of electricity gets disrupted through the entire wire and it is only in the event any one touches the over head live electric wire by some way or other, it may be fatal. It is, therefore, said that the case of the Plaintiff that her husband died by electrocution by coming in contact with live electric wire lying on the road being snapped from over head drawn electric line is totally false.

5. The trial court on the above rival case having framed six issues appears to have rightly proceeded to take up issue nos. 1, 4 and 5 as those are

the core issues. In the backdrop of the rival case of the parties and upon appreciation of evidence let in; the trial court has recorded the findings that the death of the husband of the Plaintiff has taken place on account of negligence of the Defendants and as such the Plaintiffs are entitled to be compensated by them.

Having said so, taking into account the evidence as to the age of the deceased and selecting multiplier of 13, in further and holding the monthly income of the deceased at Rs.4,000/-, the Defendants had been held liable to pay compensation of Rs.5,50,300/- with interest as aforesaid.

6. The Defendants having preferred an appeal challenging the said judgment and decree passed by the trial court; the Plaintiff also filed cross appeal. The lower appellate court after hearing and on reappreciating the evidence in the touchstone of the pleading has recorded the same finding as that rendered by the trial court on the issues as to negligence and entitlement of the Plaintiff to the compensation for the death of the deceased on 27.09.2012 by electrocution. It has however then found the trial court's finding as regards the monthly income of the deceased to be against the weight of evidence on record and monthly income of the deceased upon appreciation of evidence having been held to be Rs.5,000/-, the lower appellate court has selected multiplier of 14 as the appropriate one for the case in hand. Accordingly, while dismissing the appeal, the lower appellate court has allowed the cross-appeal enhancing the quantum of compensation from Rs.5,50,000/- to Rs.6,30,000/- with interest as stated as above.

7. The second appeal has been admitted on the following substantial questions of law:-

> "1. Whether the courts below have accepted some of such evidence let in by the plaintiff which had not been hinted in the pleading and thereby can be said to have rendered the finding on the count of negligence of the Defendants by travelling beyond the pleading for which finding if invites the stigma of being the outcome of perverse appreciation of evidence?
>
> 2. Whether the determination of the quantum of compensation by the lower appellate court payable to the Plaintiff for the said death by electrocution is not in consonance with the said principles of law holding the field?"

8. Learned counsel for the Appellants (defendants) submitted that the finding of the courts below with regard to negligence of the Defendants for not properly maintaining overhead live electric wire stretched between the

poles is not only perverse but also against to the reality as established in defence. According to him, on the basis of the evidence that the overhead live electric wire being snapped when touches the ground, the supply of electricity through that wire is totally disrupted from end to end which has gone unchallenged; the courts below ought not to have said that the death of the husband of Plaintiff was due to the electrocution for the reason that the deceased came in contact with snapped overhead electric wire when he was on his way to the agricultural field. He further submitted that the finding on the above factual aspect as recorded by the courts below are beyond the pleadings and based on the evidence let in by the Plaintiffs as such, ought not to have been looked into or eschewed from consideration.

He next submitted that the quantum of compensation awarded for the said death of the husband of the Plaintiff is not in consonance with the settled principles of law. According to him, the lower appellate court has erred on facts and law in enhancing the quantum of compensation by holding the monthly income of the deceased to be more than what had been held by the trial court as also by selecting the higher multiplier which in the facts and circumstances, is inappropriate.

9. Mr. B. Mohanty, learned counsel for the Respondent (Plaintiff) submitted all in favour of the finding rendered by the lower appellate court. According to him, the court below did commit no mistake in recording the said findings under attack and those are based on just and proper appreciation of evidence on record. It was submitted that the assessment of compensation as made by the lower appellate court is also in consonance with the settled principles as have been holding the field.

10. The Plaintiffs case is that on 27.09.2012, the deceased was going to his agricultural field for attending the cultivation work and on the way, he came in contact with a snapped live electric wire, as a consequence thereof, the deceased got electrocuted and met an instantaneous death. It is stated that the Defendants having the duty being in charge of supply of electricity in the area as also maintenance of overhead electric lines etc. are liable for the said death as in the admitted facts and circumstance, negligence on their part being presumed, has not been rebutted by clear and cogent evidence. The death of the deceased by electrocution stands proved through oral and documentary evidence mainly, the post mortem report Ext.3 and the incident as to the electrocution of the husband of the Plaintiff to have happened on the relevant date and time has also been proved through evidence, oral as well as

documentary such as Ext. 1, the information to the police by the brother of the Plaintiff, Ext.2 the report of the police officer who had held inquest over the dead body and the dead body challan issued for Post Mortem examination, i.e, Ext.4.

The Defendants claim that the case projected by the Plaintiff that the deceased was electrocuted by coming in contact with a snapped electric wire is false as in that event of snapping of the overhead electric wire, the supply of electricity through the same stood disconnected from end to end. Although it has been so pleaded, yet the Defendants in the case have not established through clear, cogent and acceptable evidence that at that point of time in that wire, there was no flow of electric current so as to cause any fatality to anyone unknowingly and accidentally coming in contact with it. It is also not stated that at the spot where the incident took place, the overhead electric wires were intact remaining duly stretched from pole to pole so as to show that the case projected by Plaintiff is based on falsehood.

11. Principle of law is settled that a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability".

The doctrine of strict liability has its origin in English Common Law when it was propounded in the celebrated case of Rylands v. Fletcher, 1868 Law Reports (3) HL 330, Justice Blackburn had observed thus:

> "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does so he is prima facie answerable for all the damage which is the natural consequence of its escape."
>
> There are seven exceptions formulated by means of case law to the said doctrine. One of the exceptions is that "Act of stranger i.e. if the escape was caused by the unforeceable act of a stranger, the rule does not apply". (Winfield on Tort, 15th Edn. Page 535).
>
> The rule of strict liability has been approved and followed in many subsequent decisions in England and decisions of the apex Court are a legion to that effect. A

Constitution Bench of the apex Court in Charan Lal Sahu v. Union of India, AIR 1990 SC 1480 and a Division Bench in Gujarat State Road Transport Corpn. V. Ramanbhai Prabhatbhai, AIR 1987 SC 1690 had followed with approval the principle in Rylands (supra). The same principle was reiterated in Kaushnuma Begum v. New India Assurance Co. Ltd., AIR 2001 SC 485.

In M.P. Electricity Board v. Shail Kumar and others, AIR 2002 SC 551, one Jogendra Singh, a workman in a factory, was returning from his factory on the night of 23.8.1997 riding on a bicycle. There was rain and hence the road was partially inundated with water. The cyclist did not notice the live wire on the road and hence he rode the vehicle over the wire which twitched and snatched him and he was instantaneously electrocuted. He fell down and died within minutes. When the action was brought by his widow and minor son, a plea was taken by the Board that one Hari Gaikwad had taken a wire from the main supply line in order to siphon the energy for his own use and the said act of pilferage was done clandestinely without even the notice of the Board and that the line got unfastened from the hook and it fell on the road over which the cycle ridden by the deceased slided resulting in the instantaneous electrocution. In paragraph 7, the Apex Court held as follows:

"It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human, being, who gets unknowingly trapped into if the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should utomatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps."

(emphasis laid)

The principle of ‘res ipsa loquitur’ is well known. It is explained in a very illustrative passage in Clerk & Lindsell on Torts, 16th Edn., pp. 568-569, which reads as follows:

"Doctrine of res ipsa loquitur. The onus of proof, which lies on a party alleging negligence is, as pointed out, that he should establish his case by a pre-ponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording prima facie evidence of want of due care on the other's part: 'res ipsa loquitur is a principle which helps him to do so'. In effect, therefore, reliance on it is

a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by Erle, C.J.:

'There must be reasonable evidence of negligence

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.' It is no more than a rule of evidence and states no principle of law. "This convenient and succinct formula", said Morris, L.J., possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin". It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The court hears only the plaintiff's side of the story, and if this makes it more probable than not that the occurrence was caused by the negligence of the defendant, the doctrine res ipsa loquitur is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. It is not necessary for res ipsa loquitur to be specifically pleaded."

As held above, a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps. The opposite parties can not shirk their responsibility on trivial grounds. For the lackadaisical attitude exhibited by the opposite parties, a valuable life was lost.

12. The evidence piloted by the parties being gone through and as already discussed when tested in the touchstone of the above principles of law holding the field; this Court is led to record the answer on the substantial question of law No.1 as at part-5 against the Defendants.

In so far as the substantial question of law No. 2 is concerned, the finding of the lower appellate court on the factual aspects as to the monthly income of the deceased and his age appears to be well in order and no such material is shown to conclude that the some are the outcome of perverse appreciation of evidence. Rather it is seen that the mistake committed by the trial court on those factual aspects by ignoring certain evidence on record and in not taking judicial notice of certain facts has been well rectified in appeal and in that way, it is found that the lower appellate court has so exercised its jurisdiction and power within the four corners of law.

The multiplier as selected by the lower appellate court in assessing the compensation in the facts and circumstances of the case as those emanate from the evidence on record does not appear to be inappropriate.

13. In that view of the matter, the lower appellate court having bestowed with the power under order 41 rule 33 of the Code in my considered view has rightly enhanced the compensation in modifying the decree as passed by the trial court.

Aforesaid discussion and reason provide the answer to the substantial question of law No. 2 in the negative.

14. Accordingly, the appeal stands dismissed and in the peculiar facts and circumstances, without cost.

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2021 (I) ILR - CUT- 611

S.PUJAHARI, J.

CRLREV NO. 304 OF 2020

CHITTRASEN BARIK .....Petitioner

.V.

SMT. KASTURI BARIK @ LENKA .....Opp. Party

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 12 and 23 read with section 125 of the Code of Criminal Procedure, 1973 – Provisions under – Application under section 12 of the Act was filed in 2018 claiming various relives including the claim of maintenance – Subsequently a petition was filed claiming interim maintenance in 2019 – Interim maintenance granted from the date of filing of the section 12 application – Plea of the husband is that the grant of interim maintenance from the date of filing of the section 12 application is illegal – Further plea that the wife is already getting maintenance under section 125 of Cr. P. C – Held, the pleas cannot be accepted in view of the law that if an interim relief is claimed on a petition filed under Section 12 of the P.W.D.V. Act seeking different relief, an interim application claiming such interim relief under the Act is not a requirement – Admittedly in this case, it being not disputed that in the petition under Section 12 of the P.W.D.V. Act, interim relief under Section 23 of the P.W.D.V. Act had also been claimed – In such

premises, even if the independent petition was filed thereafter seeking interim monetary relief in the shape of interim maintenance and other relief, the learned J.M.F.C. directing payment of interim maintenance under Section 23 of the P.W.D.V. Act from the date the petition under Section 12 of the P.W.D.V. Act cannot be said to be exercise of jurisdiction vested with material irregularity and illegality – So far the maintenance under section 125 Cr. P.C, the court held that the husband is entitled to set off the said amount against the interim maintenance in view of the law laid down in the case of Rajnesh v. Neha & Anr., reported in (2020) 80 OCR (SC) – 891. (Paras 6 to 8)

Case Laws Relied on and Referred to :-

1. (2020) 80 OCR (SC) 891 : Rajnesh Vs. Neha & Anr.

For the Petitioner : M/s. Biswanath Behera, A.K.Rout, H.P.Mohanty & K.K.Dash.

For the Opp. Party : M/s.Sanjay Kumar Pattanaik, T.K.Nayak, P.K.Sahoo, L.Singh, G.Barik & D.Moharana.

ORDER Date of Order : 22.02.2021

S.PUJAHARI, J.

Heard the learned counsel for the Petitioner-husband and the learned counsel for the Opposite Party-wife.

2. This criminal revision is directed against the order dated 28.01.2020 passed by the learned 2nd Additional Sessions Judge, Cuttack in Criminal Appeal No.96 of 2019 wherein the learned 2nd Additional Sessions Judge, Cuttack confirmed the order dated 17.08.2019 passed by the learned J.M.F.C. (City), Cuttack in D.V. Misc. Case No.322 of 2018 directing the Petitioner-husband to pay the interim maintenance to Opposite Party-wife under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (in short "the P.W.D.V. Act") from the date the application under Section 12 of the P.W.D.V. Act was filed though at a reduced scale.

3. As it appears, the aforesaid D.V. Misc. Case, a petition under Section 12 of the P.W.D.V. Act, was filed by the Opposite Party-wife on 12.12.2018 claiming different relief under the P.W.D.V. Act and therein the Opposite Party-wife filed a petition under Section 23 of the P.W.D.V. Act on 08.08.2019 claiming certain interim relief. The learned J.M.F.C. (City), Cuttack, while addressing such prayer under Section 23 of the P.W.D.V. Act after hearing both the parties, directed the Petitioner-husband to pay interim

maintenance of Rs.4,000/- per month to his wife-Opposite Party as interim relief with effect from 12.12.2018. The Petitioner-husband preferred the aforesaid Criminal Appeal wherein the learned 2nd Additional Sessions Judge, Cuttack though upheld the order of the learned J.M.F.C. (City), Cuttack that the Opposite Partywife is entitled to interim relief, but reduced the same to Rs.3,000/-. The Petitioner-husband has assailed the legality of such order. It is a case of the Petitioner-husband that directing interim maintenance to him, a labourer having no source of regular income at the rate of Rs.3,000/- every month that too from a date anterior to the date of interim application is in utter disregard to the facts and law and, as such, an arbitrary one.

4. Learned counsel for the Petitioner-husband submits that the Petitioner-husband is a labourer and he has no perennial source of income and, as such, the Court should not have assessed his income to be Rs.8,400/- and directed the payment of interim maintenance @ Rs.3,000/- per month that too from the date of application under Section 12 of the P.W.D.V. Act when the Opposite Party had claimed the interim relief from 17.8.2019. Furthermore, during the course of hearing, it is also submitted that the Petitioner-husband in the meanwhile having been also saddled with liability to pay Rs.2,500/- as maintenance under Section 125 of Cr.P.C., he is not liable to pay the aforesaid interim maintenance. Hence, the order impugned being illegal and arbitrary, liable to be quashed.

5. In response, learned counsel appearing for the Opposite Party-wife submits that the petition under Section 12 of the P.W.D.V. Act specifically indicates that the Opposite Party-wife had also claimed relief under Section 23 of the P.W.D.V. Act. An independent petition in such premises being not a requirement to grant interim relief, filing of a petition under Section 23 of the P.W.D.V. Act, therefore, could not defeat her entitlement to get interim maintenance order from the date of application under Section 12 of the P.W.D.V. Act. So far as quantum of maintenance is concerned, the Petitionerhusband being capable of earning as a labourer, the learned J.M.F.C. taking note of the minimum wage in the absence of any materials having assessed of his income to be Rs.8,400/- as unskilled labour and directed the payment of maintenance of Rs.4,000/- per month, which was reduced by the appellate court to Rs.3,000/-. The amount being too meager for maintenance of the Opposite Party now-a-days considering cost of living, the impugned order suffers from no illegality either on facts or law warranting an interference of this Court. So far as payment of maintenance

under Section 125 of Cr.P.C. is concerned, it is submitted that the relief under Section 23 of the P.W.D.V. Act being in addition to the relief granted in other Acts, the prayer that since the Petitioner-husband is paying maintenance Rs.2,500/- in a petition under Section 125 of Cr.P.C., he is not liable to pay further maintenance is without any substance.

6. If an interim relief is claimed on a petition filed under Section 12 of the P.W.D.V. Act seeking different relief, an interim application claiming such interim relief under the P.W.D.V. Act is not a requirement. Admittedly in this case, it being not disputed that in the petition under Section 12 of the P.W.D.V. Act, interim relief under Section 23 of the P.W.D.V. Act had also been claimed. In such premises, even if the independent petition was filed thereafter seeking interim monetary relief in the shape of interim maintenance and other relief, the learned J.M.F.C. directing payment of interim maintenance under Section 23 of the P.W.D.V. Act from the date the petition under Section 12 of the P.W.D.V. Act was filed in this case, hence cannot be said to be exercise of jurisdiction vested with material irregularity and illegality.

7. Now coming to the quantum of maintenance, it appears that the learned J.M.F.C. (City), Cuttack in the absence of any material with regard to income of the Petitioner-husband and the claim of the Petitioner that he is a labourer, held the Petitioner-husband to be unskilled labourer and assessed his income to be Rs.8,400/- per month taking the notification of the minimum wages of Government of Odisha. The Petitionerhusband disputes the same and said that he has no sufficient means to maintain the Opposite Party-wife being a labourer having no perennial source of income. However, sufficient means does not mean that he must have a definite employment with perennial source of income. If he is healthy and able body, it must be held that he possessed to have sufficient means to support the wife. Even if someone begging or has become a monk, he cannot wriggle out from his responsibility to support his wife so long as he is able bodied one on the ground that he has no income. Therefore, in this case, it being not disputed that the Petitioner-husband is able bodied person capable of earning and the learned J.M.F.C. has fixed his minimum earning to be Rs.8,400/- taking note of the minimum wage per month and fixed the interim maintenance of Rs.4,000/- per month, which has been reduced by the appellate court to Rs.3,000/-, the same cannot be said to be illegal and arbitrary or exorbitant when the same include provision for clothing, residence, medical expenses etc. considering the

present cost of living. Therefore, challenging the aforesaid order on the aforesaid grounds, is without any substance.

8. However, if the Petitioner-husband has been saddled with liability under Section 125 of Cr.P.C. to pay maintenance of Rs.2,500/- and he is paying the same, needless to say that he is entitled to set off the said amount against the interim maintenance in view of the law laid down in the case of ***Rajnesh v. Neha & Anr., reported in (2020) 80 OCR (SC) – 891***.

9. With the aforesaid order, this Criminal Revision stands dismissed.

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2021 (I) ILR - CUT- 615

BISWANATH RATH, J.

W.P.(C) NO.10894 OF 2010

M/S. ALOM EXTRUSIONS LTD. & ANR. .....Petitioner

.V.

REGIONAL PROVIDENT FUND COMMISSIONER, BHUBANESWAR & ORS. .....Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order rejecting the review by the Authority under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 – Plea that alternative remedy by way of appeal is available – The question is as to whether the writ petition is maintainable? – Held, not maintainable as all the grounds raised can very well be considered by the appellate authority – Alternative remedy – Laws on the issue discussed with reference to the case laws reported in (2003) 5 SCC 399 (Seth Chand Ratan vrs. Pandit Durga Prasad (D) Lrs. & others), (2005) 8 SCC 264 (U.P.State Spinning Co. Ltd. vrs. R.S.Pandey & another) and (2010) 4 SCC 772 (Raj Kumar Shivhare vrs. Assistant Director, Directorate of Enforcement & another).

Case Laws Relied on and Referred to :-

1. (2003) 5 SCC 399 :(Seth Chand Ratan Vs. W.P.(C) NO.10894 OF 2010 Pandit Durga Prasad (D) Lrs. & ors)

2. (2005) 8 SCC 264 (U.P.State Spinning Co. Ltd. Vs. R.S.Pandey & Anr.)
3. (2010) 4 SCC 772 (Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement & Aan.)

For the Petitioner : Mr. Karunakar Jena.
For the Opp.Parties : M/s. Santosh ku. Patnaik, U.C.Mohanty, P.K.Patnaik, D.Patnaik & S.Patnaik.

ORDER Date of Order : 01.02.2021

BISWANATH RATH, J.

This matter is taken up through Video Conferencing.

2. Heard Sri K.K.Jena, learned counsel for the petitioner and Sri S.K.Patnaik, learned senior counsel appearing for O.P.2.

3. Sri Jena, learned counsel for the petitioner submits that for the petitioner coming to this Court challenging the rejection order passed in the Review Petition at the instance of the petitioner by the Provident Fund Authority, there was no scope to the petitioner for preferring Appeal and thus the writ petition is very much maintainable. Sri S.K.Patanaik, Senior Advocate in his opposition opposes the entertainability of the writ petition on the premises of petitioner having clear statutory Appeal remedy. Sri Pattanaik also submits that that filing of writ is intended to override making statutory deposit and if the writ petition is entertained then the provision in the statute will be frustrated.

4. This Court considering the submission made observes, once a Review Petition is decided involving the main case, the review order always merges with the principal order. For the clear appeal provision in the EPF & MP Act, there is no prevention in filing such order in Appeal. The grounds raised herein can very well be agitated in Appeal and also considered by the Appellate Authority.

5. Law of the land on the score as to if writ petition under Article 226 of the Constitution of India is maintainable in the event there is statutory remedy of appeal available, which reads as follows :-

(2003) 5 SCC 399 (***Seth Chand Ratan vrs.*** **W.P.(C) NO.10894 OF 2010** ***Pandit Durga Prasad (D) Lrs. & others)***, Paragraph-13 of which reads as follows :-

"13. Even otherwise, the view taken by the Division Bench of the High Court for repelling the objection of the appellant regarding the maintainability of the writ petition that an alternative remedy does not divest the High Court of its powers to entertain petitions under Articles 226 and 227 of the Constitution, has hardly any application on the facts of the present case. It has been settled by a long catena of decisions that when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is no doubt a rule of policy, convenience and discretion and the court may in exceptional cases issue a discretionary writ of certiorari. Where there is complete lack of jurisdiction for the officer or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal acted under a provision of law, which is ultra vires, then notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant relief. In the present case, the alternative remedy of challenging the judgment of the court was not before some other forum or tribunal. On the contrary, by virtue of sub-section (3) of Section 27 of the Act, the order passed by the court amounted to a decree against which an appeal lay to the High Court. When the party had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Articles 226 and 227 of the Constitution. Such a course of action may enable a litigant to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount or fulfillment of some other conditions for entertaining the appeal."

(2005) 8 SCC 264 (***U.P.State Spinning Co. Ltd. vrs. R.S.Pandey & another)***, Paragraphs-11 & 17 of which are as follows :-

"11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the

writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in *L. Hirday Narain* v. *ITO* [(1970) 2 SCC 355 : AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

(2010) 4 SCC 772 (***Raj Kumar Shivhare vrs. Assistant Director, Directorate of Enforcement & another)***, Paragraphs-31, 35, 37 & 39 of which are as follows :-

"31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

35. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

37. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if the High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA.

39. In the instant case none of the aforesaid situations are present. Therefore, principle laid down in *Ratan case* [(2003) 5 SCC 399] applies in the facts and circumstances of this case. If the appellant in this case is allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal under Section 35 of FEMA this will enable him to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount of penalty or fulfilment of some other conditions for entertaining the appeal. (See para 13 at SCC p. 408.) It is obvious that a writ court should not encourage the aforesaid trend of bypassing a statutory provision."

6. Reading the whole writ petition, this Court finds, all the grounds raised can very well be considered by the appellate authority and there is no ground to bypass the appellate authority and to avail the writ remedy.

For the decisions of the Hon'ble apex Court taken note herein above, the writ petition at hand remains wholly not entertainable in exercise of power under Article 226 of the Constitution of India. In this view of the matter, this Court finds, the writ petition is not entertainable at this stage, but however since the petitioner has the remedy of appeal and wrongly pursuing the writ remedy, if so advised, it may file an appeal involving both Section 7A and Review under the provision of Employees' Provident Funds and Miscellaneous Provision Act. 1952 within fifteen days along with copy of limitation petition. In such event the Appeal shall be heard on its own merit on condonation of delay.

7. The writ petition stands disposed of accordingly.

8. The petitioner may utilise the soft copy of this order available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notification No.4587 dated 25.3.2020.

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2021 (I) ILR - CUT- 619

BISWANATH RATH, J.

W.P.(C) NO. 569 OF 2021

RABI NARAYAN NANDA ……...Petitioner

.V.

STATE OF ORISSA (FOOD SUPPLIES & CONSUMER WELFARE DEPT.) & ANR. …….Opp. Parties.

SERVICE LAW – Promotion – Vigilance case pending – Effect of – Held, pendency of the criminal proceeding for long time should not stand as a bar on giving ad hoc promotion to the employees which is however subject to the decision of the Promotion Committee kept in the sealed cover and also subject to the outcome in the vigilance proceeding.

(Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. (1995) 2 SCC 570 : State of Punjab & Ors. Vs. Chamanlal Goyal.

For Petitioner : Mr. M.Pati, P.K.Khateio, S.Kar & S.S.Pati.
For Opp.Parties : Mr. H.M.Dhal, Addl. Govt.

JUDGMENT Date of Hearing & Judgement:24.02.2021

BISWANATH RATH,J.

This writ petition involves the following prayer:

> "The petitioner therefore prays that your lordships would graciously be pleased to direct the Opp. Parties to open the sealed cover in which the findings of the DPC dated 11.04.2017 in respect of promotion of petitioner to the post of CSO kept in sealed cover and he shall be promoted to the post of CSO with effect from the date of promotion of his immediate junior with all consequential service and financial benefits in favour of the petitioner by considering Annexrue-7 within a stipulated time.
>
> And pass such order/directions as this Hon'ble Court may deem fit and proper;
>
> And fro this act of kindness, the petitioner as in duty bound shall ever pray."

2. Taking this Court to the pleading in the writ petition Sri Pati, learned counsel for the petitioner submitted that petitioner's case for promotion being taken up by the Promotion Aadalat, the Promotion Adalat vide Annexure-4, the order dated 7.12.2020 has given a direction for suitable 2 promotion of the petitioner for the prolonged delay in finalization of vigilance case. It is, however, the concerned department taking up such direction of the Promotion Adalat at page 18 observed that for pendency of the vigilance case and also disciplinary proceeding, the consideration of the case of the petitioner for promotion and the result therein kept in sealed cover cannot be opened. Challenging this aspect of the authority, Sri Pati, learned counsel for the petitioner submitted that even assuming that there has been a Criminal proceeding but for the Criminal proceeding since initiated in the year, 2009 is still to be over even after 11 years. further since the petitioner is going to be superannuated in September, 2021, in the event the petitioner is not promoted and ultimately he gets acquitted in the Criminal Proceeding, the suffering of the petitioner due to no promotion given for the time being cannot be compensated in any manner. It is also claimed that the disciplinary proceeding if any, initiated soon after the case of the petitioner is taken for promotion has no relevancy in the matter of promotion of the petitioner taken up in the year, 2017. Further relying on Supreme Court decision in the case of ***State of Punjab and others Vs. Chamanlal Goyal, reported in (1995) 2 SCC 570***, taking aid of the direction of the Hon'ble Supreme Court therein, Sri Pati, learned counsel also attempted to take support of the judgment to the petitioner's case. Petitioner also relied on a judgment / order of this Court in Division Bench in disposal of

W.P.(C).No.3850 of 2018 finds place at Annexure-5 and thus claimed allowing the writ petition on reversal of the impugned order.

3. To the contrary, Sri Dhal, learned Additional Government Advocate appearing for the State pointed out that for the several proceeding involving the petitioner pending, at this stage, no fault can be found with the 3 Disciplinary Authority in keeping the promotion aspect of the petitioner in sealed cover and, therefore, a submission is made in the Court saying until the vigilance proceeding is over, it may not be appropriate to open the sealed cover. Sri Dhal, learned Additional Government Advocate, therefore taking support of the stand of the Disciplinary Authority prayed for dismissal of the writ petition. Sri Dhal, learned Additional Government Advocate however did not dispute that the vigilance case initiated in the year 2009 is yet to be over and that the case filed by the petitioner has application to the case of the petitioner at hand.

4. Considering the rival contentions of the parties, this Court finds undisputedly the case of the petitioner has already been taken up for promotion and the result in the said promotion process involving the petitioner even though not declared, it has been kept in sealed cover subject to outcome in the vigilance proceeding and disciplinary proceeding indicated hereinabove. It is at this stage of the matter, this Court finds the dispute is already taken care up by the Promotion Adalat being set up by the State Authority itself. From the observation of the Disciplinary Authority, the Commissioner-cum-Secretary at page 18 of the brief, it appears once a State Authority has set up an Adalat to consider promotion involving the parties and such Adalat gives a direction to proceed in a manner, until such orders are assailed in higher forum by the opposite party, the order of the Promotion Adalat is binding on both the parties. Admittedly, there is no challenge to the Promotion Adalat order and for the opinion of the Court, the Disciplinary Authority cannot sit over the decision of the Promotion Adalat, a mechanism is created by the State to ease promotion dispute. In this 4 view, this Court finds the decision of the competent authority at Annexure-4 per se illegal and unauthorized.

5. Now coming to consider the dispute being raised by the State Counsel that admittedly there is a vigilance proceeding pending vide Vigilance Case No.18 of 2009, this Court finds, there being no dispute that the vigilance Case No.18 of 2009 is still pending. It is at this stage of the matter, this Court

taking into account a decision of the Hon'ble Apex Court involving authority, pendency of Criminal Proceeding, deciding such issue in the case of ***State of Punjab and others Vs. Chamanlal Goyal, reported in (1995) 2 SCC 570***, the Hon'ble Apex Court has directed as follows:

> "xxx xxx xxx
>
> Considering the nature of the prayer and keeping in view the provisions contained in the Govt. instruction and the ratio of the decision of the Hon'ble Apex Court as extracted above, Respondent nos.1 and 2 are directed to open the sealed cover in respect of promotion of the applicant to the rank of DSP, within a period of two months from the date of receipt of a copy of this order and to give effect to the recommendation of the DPC within such period by giving him promotional benefits and consequential benefits with effect from the date from which his immediate juniors, i.e. Respondent nos.4 & 5 were given such promotion.
>
> It is made clear that promotion given to the applicant will only be adhoc and subject to the final result of the Vigilance case.
>
> xxx xxx xxx"

6. This Court here again finds following such decision taking into account a promotion matter involving a proceeding in the Orissa Administrative Tribunal, a Division Bench of this Court in disposal of W.P.(C).No.3850 of 2018 has also come to the same view.

7. It is in the circumstance, this Court finds pendency of the criminal proceeding for long time should not stand as a bar on giving adhoc 5 promotion to the parties which is however subject to the decision of the Promotion Committee kept in sealed cover as nobody is yet to know the decision of the Promotion Committee.

8. Be that as it may, for the Supreme Court decision covering the case of the petitioner, on applying the same principle to the case of the petitioner further considering that petitioner is going to superannuate shortly, this Court interfering in the order at Anenxure-4, sets aside the same and directs the competent authority for opening of the sealed cover subject to the decision involving the outcome in the Vigilance proceeding. In the event there is recommendation for promotion of the petitioner considering that he is going to superannuate September, 2021, the petitioner be given conditional promotion subject to ultimate outcome of Vigilance Case No.18 of 2009 and further also subject to undertaking of the petitioner in the event he is given promotional benefit subject to the outcome in the vigilance case and if he suffers in the vigilance case, ultimately he shall not claim any equity on the basis of this judgment.

9. In result, the writ petition succeeds. No cost.

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2021 (I) ILR - CUT- 623

BISWANATH RATH, J.

W.P.(C) NO. 6271 OF 2021

PRAKASH CHANDRA NAYAK ……..Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

ORISSA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULES 1990 – Rule 2(b) read with Rules 3 and 5 – Provisions under – Claim of compassionate appointment under the rehabilitation assistance rules – Application by the son of the deceased employee – Rejected on the ground that at the time of submission of rehabilitation assistance application, the said application was not submitted along with medical unfitness certificate in respect of the spouse of the deceased-Government employee – Rules never restricted rehabilitation assistance employment in favour of the spouse only, when family members consist of so many persons – Order of rejection set aside, direction to give appointment. (Paras 6 & 7)

For Petitioner : M/s. P.K.Mishra & S.Mishra

For Opp.Parties : Mr. H.M.Dhal, Addl.Govt.Adv.

JUDGMENT Date of Hearing & Judgment : 05.03.2021

BISWANATH RATH, J.

This writ petition involves the following prayer :-

"In view of the above and settled position of law, it is prayed, therefore that this Hon'ble Court may graciously be pleased to;

i) Admit the writ petition and;

ii) Issue RULE NISI calling upon the Opp.Parties to show cause as to why the impugned order of rejection vide No.2317 dated 22.01.2021 at Annexure-9 and order vide No.8553 dated 8.4.2016 at Annexure-6 so far as itrelates to petitioner shall not be quashed and as to why the petitioner shall not be appointed in any post commensurate to his qualification under O.C.S.(R.A.), Rules, 1990 w.e.f. his due date;

iii) And if the Opposite Parties fail to show cause or show insufficient cause, the rule may be made absolute against Opposite Parties and a writ of mandamus may be issued to the Opposite Parties in quashing the

impugned order of rejection vide No.2317 dated 22.01.2021 at Annexure-9 and order vide No.8553 dated 08.04.2016 at Annexure-6 so far as it relates to petitioner with direction upon the O.Ps. to appoint the petitioner in any post commensurate to his qualification under O.C.S.(R.A.), Rules, 1990 w.e.f. the due date within a stipulated period of time.

iv) Pass such other order(s), direction(s) as deem fit and proper to the facts and circumstances of the case to givecomplete relief to the petitioner;"

2. Undisputed fact involves death of the deceased employee taken place on 9.1.2014. Finding harness and the sole bread-earner dying in the family, the Petitioner being the only son put up an application for rehabilitation assistance appointment on 3.6.2014 appearing at Annexure-3. Further undisputed fact remains vide Annexure-4, on 3.3.2015 the Executive Engineer, Nimapara Irrigation Division forwarded the application of the Petitioner for consideration for rehabilitation assistance appointment. There also remains vide Annexure-5, there is already a recommendation in favour of the Petitioner by the competent authority for providing appointment since 25.3.2015.

It is in the above view of the matter, while bringing to the notice of the Court that for coming to know that there has been rejection of the case of the Petitioner involving such appointment, the Petitioner approached this Court in W.P.(C) No.3563 of 2020, which matter appears to have been rejected on the ground of prematureness in the Writ Petition but however, in disposal of the Writ Petition this Court directed the competent authority, O.P.2 therein to take decision on the application of the Petitioner at least within a period of one and half months from the date of communication of the order. In the meantime, a Contempt Petition has also been filed. Based on repeated directions of this Court in W.P.(C) No.3563 of 2020 as well as CONTC No.3224 of 2020, pursuant to which ultimately there appears though the Competent Authority took a decision on the request of the Petitioner but with a rejection order, vide Annexure-9.

3. Taking this Court to the rejection order at Annexure-9, Sri P.K.Mishra, learned counsel for the Petitioner contended that there being no restriction to provide appointment under Rehabilitation Assistance Rules, 1990 to any of the family members requiring

simply a no objection from the other legal heirs, rejection of the request of the Petitioner on the premises that in the availability of spouse in absence of valid reason, there is no scope for providing employment under such Scheme to anybody other than the spouse becomes bad. It is in this view of the matter, Sri Mishra prayed for setting aside the order at Annexure-9 and issuing suitable direction.

4. Sri H.M.Dhal, learned Additional Government Advocate appearing for the Opposite Parties while not disputing that the date of death of the deceased involved herein remaining 9.1.2014 admitted the fact that the Petitioner had filed an application for rehabilitation assistance appointment on 3.6.2014, further on the existence of forwarding the claim of the Petitioner, vide Annexure-4 as well as the recommendation, vide Annexure-5, Sri Dhal contended that for the rejection of the claim of the Petitioner on the premises of availability of spouse of the deceased, there appears, there is no wrong on the part of the competent authority in passing the impugned order and as such, the Writ Petition should be dismissed for having no ground.

5. Considering the rival contentions of the parties, this Court finds, admittedly the death of the deceased employee took place on 9.1.2014. There remains also no dispute that the application at the instance of the Petitioner under the Rehabilitation Assistance Scheme, as existed then, was made on 3.6.2014. There is also no dispute with regard to the forwarding case of the Petitioner at Annexure-4. Similarly there is also no dispute with regard to the fact that there has been also a recommendation of the case of the Petitioner by the competent authority, vide Annexure-5 on 25.3.2015.

6. It is at this stage, coming to scan the impugned order at Annexure-9, this Court finds, the application of the Petitioner has been rejected on the premises that at the time of submission of rehabilitation assistance application, the said application was not with medical unfitness certificate in respect of the spouse of the deceased-Government employee but however the Petitioner produced the same on 15.1.2015. Though it is also observed therein that submission of medical unfitness certificate of the first

legal heir after the date of submission of rehabilitation assistance application is afterthought but for already submission of certificate, this issue became irrelevant. Further there appears also the ground of rejection of the application of the Petitioner on the premises that extension of benefit in the rehabilitation assistance application to the legal heir of the deceased-Government Servant other than the spouse without reasonable and proper justification violates the basic objective of the OCS (RA) Rules, 1990.

Coming to the grounds of rejection in Annexure-9, impugned herein, this Court finds, Rule 2(b) of the OCS (RA) Rules, 1990 as existing at the relevant point of time reads as follows :-

Rule 2(b) states family member shall mean and include the following members in order of preference –

i) Wife/Husband;

ii) Sons or step sons or sons legally adopted through a registered deed;

iii) Unmarried daughters and unmarried stepdaughter;

iv) Widowed daughter or daughter-in-law residing permanently with the affected family;

v) Unmarried or widowed sister permanently residing with the affected family;

vi) Brother of unmarried Governmentservant who was wholly dependent on such Government servant at the time of death."

Rule-3 stipulates that the assistance shall be applicable to a member of the family of the Government servant, who dies while in service.

Similarly Rule-5 deals with appointment to be made in deserving cases, which reads as follows :-

> "Rule-5- Appointment to be made in deserving cases – In deserving cases, a member of the family of the Government servant who dies while in service may be appointed to any Group-C or Group-D post only by the appointing authority of that deceased Government servant provided he/she possesses requisite qualification prescribed for the post in the relevant recruitment rules of instructions on the Government without following the procedure prescribed for recruitment…"

Reading all these Rules, this Court finds, the 1990 Rules never restricted rehabilitation assistance employment only in favour of the spouse when family members consist of so many persons. In the circumstance, there is no question of ignoring other members as family members. Son also comes under the definition of family member. In the case at hand, admittedly mother is sick, for which her remaining unfit was claimed through medical certificate issued by the competent authority. Legal Heir Certificate at Page-20, vide Annexure-2 also contains names of only two persons; one being the spouse and the other one is a son, the present Petitioner. Admittedly, mother remaining sick did not apply for appointment and not only that mother had even given an affidavit in favour of the son available at Page-22 of the Brief. The application for rehabilitation assistance was filed in the year 2014. In the meantime, seven years have passed. Had there been any objection from the other family members, objection would have come in the meantime. The family involved here being the motherand son only. Mother has already given no objection in favour of the son by way of affidavit, as clearly seen at Page-22 of the Brief leaving no doubt that there is only one applicant remaining in fray.

7. From the above, this Court finds, there is mechanical rejection of the case of the Petitioner, vide Annexure-9, for which the order at Annexure-9 is interfered with and set aside. For setting aside of Annexure-9, this Court since finds, there is already sufficient delay in providing employment to the Petitioner under the Rehabilitation Assistance Scheme, further taking into consideration the recommendation of the competent authority already there at Annexure-5, this Court while allowing the Writ Petition directs that the recommendation at Annexure-5 made by the Superintending Engineer, Central Irrigation Circle, Bhubaneswar in favour of the Petitioner shall be worked out by issuing appointment order in favour of the Petitioner by O.Ps.1 & 3 within a period of ten days from the date of receipt of this order.

8. The Writ Petition succeeds. In the circumstances, however, there is no order as to cost.

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2021 (I) ILR - CUT- 628

P. PATNAIK

W.P.(C) NO. 25950 OF 2017, W.P.(C) NO.03 OF 2018 &
W.P.(C) NO. 8145 OF 2018

PROF. Dr. NACHIKETA DAS .....Petitioner.

.V.

RAVENSHAW UNIVERSITY & ORS. .....Opp.Parties

W.P.(C) No.03 of 2018 :

PROF.DR.JAYAKRUSHNA PANDA .....Petitioner.

V.

RAVENSHAW UNIVERSITY & ORS. .....Opp.Parties

W.P.(C) No.8145 of 2018 :

SUBASH CHANDRA SAMAL .....Petitioner.

.V.

STATE OF ODISHA AND ORS. ..... Opp.parties

(A) SERVICE LAW – Recruitment/Selection Process – Having participated in the process of recruitment/selection, whether such process can be challenged and whether such challenge can be tenable in the eye of law? – Held, Yes. the Circumstances indicated.

(B) APPOINTMENT – Allegation with regard to appointment of Vice-Chancellor of the Ravenshaw university – University Grant Commission Regulation 2010 & its amended Regulation 2013 – Neither the State has adopted the U.G.C regulation nor the Ravenshaw university has framed its own statute, however the university has received grants from central commission – Plea raised that, U.G.C Regulations have not been followed while appointing the Vice-chancellor – Question raised that, whether in case of appointment of Vice-Chancellor, U.G.C regulation was to be followed? – Held, Ravenshaw University Act being a subordinate legislation and receiving U.G.C grant, has to abide by the U.G.C Act and regulation/guideline so far as the appointment of teachers are concerned – Since the post of vice-chancellor is not a teaching post as per the section 8 of the Ravenshaw University Act, 2005, the said Regulation is not applicable.

Case Laws Relied on and Referred to :-

1. 2015(6) SCC 363 : Kalyani Mathivanan .Vs. K.V.Jayaraj & Ors.

2. (2006) 1 SCC 314 : S.K.Shukla.Vs. State of U.P.
3. 2004 (1) Cr.L.J.165 : Laxmidhar Rout.Vs. Debraj Mohanty.
4. (2017) 9 SCC 478 : Dr.Saroja Kumari.Vs. Helen Thilakom .
5. (1995) 3 SCC 486 : Madanlal Vs. State of J. & K.
6. (2010) 12 SCC 576 : Manish Kumar Shahi Vs. State of Bihar.
7. (2016) 1 SCC 454 : Madras Institute of Development Studies .Vs. Dr.K.Sivasubramaniyan.
8. 2015(6) SCC 363 : Kalyani Mathivanan Vs. K.V.Jayaraj and Ors.
9. 2016(1) OLR 434 : Manorama Patri & Ors. Vs. State of Odisha & Ors.
10. 2016 (1) OLR 434 : Manorama Patri & Ors. .Vs. State of Odisha & Ors.

W.P.(C) No.25950 of 2017 :

For the Petitioner : Mr.J.K.Rath,Sr.Adv., M/s. Debasish Mahakud, A.K.Saa, Saswat Das, K.Mohanty.

For Opposite Party : M/s. Subir Palit, Nos.1,2 & 3 P.C.Mishra, A.Mishra, Mr.A.K.Parija, Sr.Adv.

For Opp.Party no.4 : Mr.J.K.Mishra,Senior Adv., M/s.P.C.Behera & S.S.Mohanty.

For Opp.Party no.5 : Mr.Kabir kumar Jena, Adv.

W.P.(C) No.03 of 2018 :

For The Petitioner : M/s. Debasish Mahakud, B.S.Rayaguru, Saswat Das, S.K.Sahu & Aswini Kumar Mishra.

For Opp.Party No.2 : M/s. Subir Palit, P.C.Mishra, A.Mishra, Mr.A.K.Parija, Sr. Adv.

For Opp.Party no.4 : M/s..Pratap Ch. Mishra & A.K.Barik.

W.P.(C) No.8145 of 2018 :

For the Petitioner : Mr.S.S.Das, Sr.Adv, M/s. Saswat Das and S.K.Sahu.

For Opp. Party No.3 : M/s. Subir Palit, P.C.Mishra, A.Mishra, Mr. A.K.Parija, Sr. Adv.

For Opp.Party No.4 : Mr.J.K.Mishra,Senior Adv. M/s.P.C.Behera & S.S.Mohanty.

For Opp.Party no.2 : M/s. Sarada Prasad Sarangi, D.K.Das,P.K.Das, V.Mohapatra, T.Patnaik & S.Sahu.

JUDGMENT Date of Hearing : 13.01.2020 : Date of Judgment: 25.02.2020

P. PATNAIK, J.

The aforementioned writ petitions involve common question of law and with the consent of respective counsel, the said writ petitions have been heard analogously and are being disposed of by this common judgment/order.

2. The brief facts as has been delineated in the writ petitions are stated herein below:-

In W.P.(C) No.25950 of 2017, the petitioner, who is an applicant for appointment to the position of Vice Chancellor of Ravenshaw University pursuant to advertisement notice No.4724 dated 27.10.2017 has preferred this writ petition assailing the appointment of opposite party No.5 to the position of Vice Chancellor on the ground of infraction and contravention of University Grant Commission Regulation 2010. The petitioner has inter alia sought for the following reliefs:

a) The Opposite party-Ravenshaw University be directed to revise the advertisement under Annexure-1 in conformity with the UGC Regulation 2010 making inclusion of administrative experience.

b) The petitioner be called to appear the interview/interaction before the Search Committee, opposite party no.3 considering his distinguished academic and administrative experience

c) The opposite parties be directed to make the selection process transparent through open publication in University website and Notice Board

i) Further prayer has been made for issuance of writ of certiorari by quashing Notification dated 18.10.2017 issued by the Office of Chancellor under Annexure-5 as well as the order of appointment dated 23.12.2017 issued in favour of opposite party no.5 under Annexure-6.

ii) And Further issuance of writ of mandamus directing the opposite parties to conduct the selection to the post of Vice Chancellor of Ravenshaw University afresh by considering the candidature of the present applicant vis-à-vis other eligible candidates in accordance with law by following Rules and Regulation as framed by the University Grants Commission".

In pursuance of Advertisement notice dated 23.10.2017 of the opposite party no.1 the eligible candidates below 62 years of age as on 31.12.2017 and the petitioner having a distinguished academic career with 1st class all through and having received common wealth staff scholarship by completing the M.Phil in from Glasgo, Scotland submitted his application in time. He has served as Professor, Zoology in Ravenshaw University for about six years and held many important administrative positions. He was a visiting Professor to Hirosima University of Japan since 2010. Apart from tremendous experience he has written several books and few articles in distinguished journals. But to the utter consternation and dismay, the

petitioner did not receive a call letter from the concerned University. It has been averred in the writ petition that the petitioner became a victim of advertisement issued in violation of UGC Regulation, 2010 and the administrative experience of the petitioner has not been taken into consideration. It is further averred that Ravenshaw University is a State University which is governed by Rules and Regulations of the UGC for appointment to various positions in University including that of Vice Chancellor. The petitioner has assailed the advertisement which is in contravention of UGC Regulation 2010. The relevant portion of the UGC Regulation 2010 has been annexed to the writ petition. By virtue of the Notification dated 18.10.2017 issued by the Chancellor, Ravenshaw University, the three members Search/Selection Committee was constituted for appointment to the post of Vice Chancellor of the Ravenshaw University. Such Selection Committee consisted of three members namely (i) R.K.Mishra, I.A.S. (Retired) (ii) Professor, Sanjaya Pani and (iii) Santosh Ch. Panda as evident from Notification dated 18.07.2018 and the selection committee so constituted recommended the names of the candidates for appointment to the post of Vice Chancellor and pursuant to such recommendation, the Chancellor vide order dated 23.12.2017 appointed opposite party no.5 as Vice Chancellor of Ravenshaw University as per Annexure-6 to the writ petition. In the captioned writ petition the appointment of opposite party No.5 has been assailed being contrary to UGC Regulation 2010 on the following grounds:

a) Sub-Rule II of Rule 7.3.0 of the UGC Regulation 2010 provides that the selection of Vice Chancellor may be made through identification of panel of 3/5 names by search committee through a public Notification or nomination or an appointment search process or in combination. The members of the above search committee shall be persons of eminence sphere of higher education and shall not be connected in any manner with University concerned or its colleges. The nominee of Hon'ble Chancellor and the Chairman of the Search/Selection Committee Sri R.K.Mishra is a retired IAS Officer, who is not a person of eminence from the sphere of higher education. Another member Professor, Santosh Ch. Panda, who is the nominee of Executive Council of Ravenshaw University is in close connection with Ravenshaw University. Hence he is not qualified to be a member of Search/Selection Committee as per UGC Regulation. Another Member of the Search Committee named, Sanjay Pani who is the nominee of the Chairman of University Grants Commission is too closely connected with the Ravenshaw University. Therefore, the constitution of Selection Committee is illegal and non-est being contrary to the UGC Regulation 2010 and in clear violation of sub-Rule II of Rule 7.3.0.

In W.P.(C) No.03 of 2018 the petitioner having 37 years of teaching experience with more than 16 years as Professor in P.G. department of Business Administration in Utkal University was an applicant for appointment to the position of Vice Chancellor of Ravenshaw University pursuant to the advertisement dated 23.10.2017. Despite distinguished academic credential and administrative experience since the petitioner was not shortlisted he has been constrained to challenge the constitution of selection committee under Annexure-3. The petitioner in the aforesaid writ petition has inter alia prayed for the following reliefs:

"The petitioner in the above facts and circumstances of the case, most humbly prays that the Hon'ble Court may graciously be pleased to issue RULE NISI to the opposite parties calling upon them to show cause as to why:-

a) The Search/Selection Committee constituted at Annexure-3 as well as Advertisement under Annexure-1 shall not be declared illegal and be quashed being in contravention to UGC Regulations 2010 and Ravenshaw University Act, 2005.

b) The Selection and appointment of O.P.No.4 as Vice Chancellor made pursuant to the aforesaid illegal and arbitrary constitution of search/Selection Committee and illegal advertisement shall not be declared illegal and void.

c) The opposite parties shall not be directed to make fresh advertisement in conformity with UGC Regulations 2010 and Ravenshaw University Act, 2005 and make the selection process transparent and open though website and notice etc.

And if the opposite parties fail to show cause or causes shown re insufficient the said Rule may be made absolute.

In W.P.(C) No.8145 of 2018 the petitioner being a social activist has filed the writ petition challenging the appointment of opposite party no.5 as Vice Chancellor of Ravenshaw University which is in gross violation of University Grants Commission Act and Regulation framed thereunder.

With regard to locus of this petitioner, it has been averred in the writ petition that the petitioner is a Graduate in Arts of 1996 batch and has been awarded National Service Scheme certificate for participating in National Integration camp organsied by National Service Scheme, Ranchi University. The petitioner has been engaged in various types of social activities which have been enumerated in paragraph-3 of the writ petition.

The factual matrix as has been depicted in the writ petition in a nutshell is that to fill up the post of Vice Chancellor, Ravenshaw University, Opposite party No.2 had issued advertisement dated 23.12.2017 inviting applications from intending candidates to offer their candidatures for appointment to the post of Vice Chancellor. Advertisement has been annexed as Annexure-3 to the wit petition. Pursuant to the said advertisement opposite party no.5 and other candidates offered their candidatures for the post of Vice Chancellor in the Ravenshaw University and they were called to appear before the Selection Committee which was constituted pursuant to Notification dated 18.10.2017 as per Annexure-4 to the writ petition and the selection committee shortlisted seven number of candidates including the opposite party no.5 and all the 7 candidates were invited for personal interaction on 15.12.2017 as per Annexure-5. In pursuance of the proceeding of the meeting of the selection committee all the candidates including opposite party no.5 appeared before the committee and final order of appointment dated 23.12.2017 was issued in favour of opposite party no.5 appointing him as Vice Chancellor of Ravenshaw University as evident from Annexure-6. The appointment of opposite party no.5 has been challenged in the writ petition on the ground that :

a) The Ravenshaw University Act, 2005 came to be notified vide Notification dated 27.06.2005. The University Act, 2005 came into force from the date of its publication in the official Gazette. Section-8 of the Act names the officers of the University. Section 10 deals with appointment of Vice Chancellor. Section 21 confers power on the authorities for framing the University Statute for different matters. Though the statutory provisions conferred power on the University to frame Statute, but till date no Statute has been framed by the University authorities. When the Ravenshaw University authorities moved the Government by virtue of an internal communication, the department in Higher Education dated 11.01.2011 directed the University to adopt the Orissa Universities First Statutes, 1990 which was framed by the State Government. Copy of the letter dated 11.01.2011 has been annexed as Annexure-7 to the writ application.

Rule 3(3) of Part-II, Chapter-I of the Orissa Universities First Statutes, 1990 reads as follows:-

> (3) The recruitment policy for different post including the teaching post of the University and the requisite qualification of officers for recruitment to such posts shall be such may be specified in the Rules by the respective appointing authority with the prior approval of the Chancellor. Such Rules shall be in conformity with the guidelines, if any, issued by the University Grants Commission and of the Government of India from time to time."

From a conjoint reading of both the statutory provisions as prescribed under Ravenshaw University Act, 2005 and the Orissa Universities First Statutes 1990, it is absolutely clear that any appointment, either to administrative posts (officers) or teaching posts of the University, shall be in conformity with the guidelines issued by the University Grants Commission and the Government of India from time to time. The Regulation 7.3.0 of the University Grants Commission Regulations, 2010 deals with appointment of the Vice Chancellor has been quoted in the writ petition. It has been averred that the members of the Search Committee shall be persons of eminence in the sphere of higher education and shall not be connected in any manner with the University concerned or its Colleges and the Committee. While preparing the panel, the Committee must give much weightage to the academic excellence, exposure to the Higher Education system in the country and abroad and adequate experience in academic and administrative governance. Their recommendation is to be given in writing. No appointment to the post of Vice Chancellor could have been made other than by following the requirements which have been provided in the statutory provisions as contemplated under the Ravenshaw University Act, 2005, Orissa Universities First Statutes, 1990 and the UGC Regulations, 2010. But in the case on hand, the Search Committee was not constituted in terms of the statutory provisions, therefore selection of opposite party No.5 is vitiated being by way of infraction of the aforesaid statutory provisions.

3. A counter affidavit has been filed by opposite party No.1 controverting the assertions made in the writ application. In the counter affidavit, it has been inter alia submitted that the appointment of Vice Chancellor of Ravenshaw Universty and the entire process of the same appointment has been conducted and approved by opposite party Nos.2 and 3. Hence the Registrar, Ravenshaw University has nothing to do with regard to the appointment of the Vice Chancellor and subsequent decision taken thereof. The opposite party No.1 issued the impugned advertisement after getting approval from the Search Committee (consisting of Chairman and two members). Pursuant to the said advertisement 37 numbers of applications have been received by the opposite party No.1. The opposite party no.1 placed all those 37 number of applications before the Search Committee, opposite party no.3. Then the opposite party No.3 (Chairman, Search Committee) along with two other members of that committee after scrutinizing/verifying the applications of the candidates shortlisted 7 numbers of applicants out of 37 number of applicants and authorized opposite party

no.1 to send letter of intimation to the shortlisted candidates calling them for interview/interaction before the Search committee, opposite party no.3, which was held on 15.03.2017 in the premises of Raj Bhawan Odissa, as evident from Annexure-A/1.

They have referred to eligibility criteria of UGC Regulations 2010 and the eligibility criteria as mentioned in the advertisement dated 23.10.2017 which are quoted hereunder:

UGC

> Persons of the highest level of competence, integrity, morals and institutional commitments are to be appointed as Vice Chancellors. The Vice Chancellor to be appointed should be a distinguished academician, with a minimum of ten years of experience as Professor in a University system or ten years of experience in an equivalent position in a reputed research and/or academic administrative organization."

Ravenshaw University:

> " The applicant should be a distinguished academician of proven academic and administrative excellence, a well round personality with a minimum of 10 years experience as Professor in a University system or 10 years in an equivalent position in reputed research and/or Academic organization."

Accordingly, it is submitted that "Administrative experience" is very much a requirement. Further it has been submitted that the petitioners in W.P.(C) No.25950 of 2017 & W.P.(C) No.03 of 2018 are now challenging the legality and validity of the advertisement when their names were not shortlisted by the Search Committee. On that score, the writ petitions are not maintainable. Earlier, the petitioner has moved this Court challenging the previous advertisement dated 16.09.2014 for the position of vice Chancellor, Ravenshaw University in W.P.(C) No.24052 of 2014 and the said writ petition was disposed of as withdrawn. Further, it has been submitted that morality of that petitioner casts a reasonable apprehension regarding the safeguard and to keep the interest of the Ravenshaw University.

4. A counter affidavit has been filed by the University Grants Commission-opposite party No.4 wherein it has been submitted that it is the University concerned i.e., the opposite party Nos.1 to 3 as well as opposite party no.5 are the opposite parties to justify their stand in terms of the pleadings advanced by the writ petitioner. Further it has been submitted that

in the year 2010 the University Grants Commission in exercise of powers conferred under Clause (e) and (g) of Sub-section (1) of section 26 of University Grants Commission Act, 1956 framed its Principal Regulations called "University Grants Commission Minimum Qualification for Appointment of Teachers and other Academic Staff in University and Colleges and Measures for the Maintenance of the Standards in Higher Education) Regulations, 2010. The said Regulation came into force with its publication in the official Gazette of Government of India on 18.09.2010. In the year 2013, Clauses 6.01, 6.02, 7.30 and the and the Table-1 (Category I, II, III of Appendix-III of the Principal Regulation stood amended and substituted respectively in the amended regulations notified in the Gazettee of India on 13.06.2013. With reference to the context and the issue involved in this writ petition, it has been submitted that

> a) Clause 7.3.0 of UGC Regulations 2010 prescribes the selection of Vice Chancellor of Universities, a true extract copy of which has been filed as Annexure-A/4.
>
> b) Pursuant to the UGC (2nd Amendment) Regulations 2013 Clause 7.3.0 was substituted a true extract copy of which has been filed as Annexure-B/4.

In view of the above provisions with regard to the criteria for selection and appointment of Vice Chancellor as per the UGC Regulations, it is the University which is to follow the UGC norms in strict compliance and without any deviation.

5. Counter Affidavit has been filed by opposite party no.2 denying the contention/statements made in the writ application. In the counter affidavit, it has been submitted that the Ravenshaw University has been established by Orissa Act 8 of 2015 i.e., the Ravenshaw University Act, 2005. It is governed by the provisions of the said Act, 2005. Therefore, the procedure which has been followed for appointment of Vice Chancellor is as per the Act,2005 and the relevant portion of the provisions of the Act 2005 deals with the appointment and service of the Vice Chancellor are contained in Section 10.

xxx xxx xxx xxx

The Advertisement dated 23.03.2017, and Notification dated 18.10.2017 by virtue of which the selection committee formulating recommendations was constituted and the Notification of appointment dated

23.12.2017 have been made in consonance with the statutory procedure laid down in the Act, 2005 more particularly Section 10 thereof. It has been submitted that Clause 7.3.0 of the University Grants Commission Regulations 2010 which deals with Vice Chancellor, has been amended and substituted by the UGC Regulations 2013. The amended Clause 7.3.0 clearly states that constitution of the Search Committee has to act as per the Act/Statutes of the concerned University.

Clause 7.4.0 of the UGC Regulations 2010 (which has not been amended in 2013) stipulates that the State Government or the University concerned have to adopt the Regulations and then accordingly amend the Act/Statutes. Clause 7.4.0 as reads as follows:-

7.4.0 The Universities/State Governments shall modify/amend the relevant Act/Statutes of the University concerned within six months of adoption of these Regulations."

The University Grants Commission Regulations have not been adopted by the State of Odisha and are therefore only directory in nature and not mandatory. As such the petitioner's reliance on the UGC Regulations 2010 is misplaced and misconceived. The submissions of this opposite party are fortified by the pronouncement of the Hon'ble Apex Court in the case of ***Kalyani Mathivanan-vrs.-K.V.Jayaraj and others reported in 2015(6) SCC 363*** and paragraphs-35 and 62 of the said judgment have been referred to. It has been further submitted that the aforesaid judgment has been followed by the Hon'ble High Court of Gujarat in its judgment dated 05.07.2018 in the case of **Gambhirdan Kanubhai Gadhavi –vrs.-The State of Gujarat** wherein it was held that so far as he applicability of the UGC Regulation is concerned the issue is no longer res integra inasmuch as the same stands concluded by the decision of the Hon'ble apex Court in the case of **Kalyani Mathivanan-vrs.-K.V.Jayaraj and others.** The said judgment of the Hon'ble Apex Court has also been relied by the Hon'ble High Court of Delhi in the judgment dated 30.11.2017 in the case of **Chetan Yadav-vrs.-Delhi Technological University and another** as well as the Hon'ble High Court of Allahabad in its judgment dated 20.08.2015 in the case of **Dr.S.K.Rai vrs.-Secretary, UGC**

Further, it has been reiterated that Ravenshaw University being governed by the Act 2005 has issued an advertisement for appointment of

Vice Chancellor dated 23.10.2017 as per the provisions of Section 10 of the Act, 2005 which provides that the Chancellor shall appoint the Vice Chancellor from a panel of three names recommended by a Selection Committee. The constitution of such Selection Committee is as per sub-Section (1) of section 10 of the Act, 2005.

Further, it has been reiterated that UGC Regulations, 2010 having been amended and substituted by the UGC Regulations 2013. Unamended UGC Regulations do not apply and that the present advertisement and the subsequent appointment on the basis of the recommendations of the selection Committee, is in consonance with the Act, 2005. The UGC Regulations, 2010 having been amended and substituted by the UGC Regulations, 2013, have no bearing in the present case. The UGC Regulations, 2013 specifically provides that the constitution of the Committee for the selection of candidates for appointment of the vice Chancellor could be as per the Act/Statute of the concerned University. It is important to mention that advertisement dated 23.10.2017 has been issued for appointment of Vice Chancellor as per Section 10 of the Ravenshaw University Act, 2005 and the procedure thus started in consonance with the provisions of the Act, 2005 concluded with the appointment of Prof. Dr.Ishan Kumar Patro as the Vice Chancellor of the Ravenshaw University vide appointment order dated 23.12.2017. Section 10 of the Act provides that selection committee will be consisted of three members, one nominated by the UGC, one elected by the Executive Council of the Ravenshaw University and one nominated by the Chancellor. Further, the Chancellor has been vested with the power to designate one of the members as Chairman of the Committee. Sub-Section 2 thereof provides for the eligibility of a member in the committee which reads as under:

> "10(1) xx xx xx
>
> (2) No person shall be eligible to be a member of the Committee, if he/she is (a) a member of any of the authorities of the University, or (b) an employee of this University, or (c) an employee of any college/institution maintained or recognized by or affiliated to any other University in the state of Orissa."

Mr.R.K.Mishra is the nominee of the Chancellor. He is a distinguished IAS Officer, who enjoys a higher reputation of honesty and integrity and has wide experience of men and matters, having worked in various fields as revealed from his personal profile. Professor Santosh Panda is the elected member by the Executive Council of the Ravenshaw University. He is the Director of the Delhi School of Economics, therefore,

he was assigned, upon recommendation by the Academic Council of Ravenshaw University the task to design/update the course of Economics offered by the opposite party No.1. Professor, Sanjay Puri is the nominee of the UGC. He is also an eminently qualified person. None of these three members fall within the mischief of sub-Section (2) of Section 10 to attract disqualification/ineligibility as a member of the election committee. Therefore, constitution of the Selection Committee is legal being in consonance with the statutory provisions and the action taken by such committee in accordance with the Statute, cannot therefore be faulted with as being illegal and arbitrary. Copy of the appointment letter dated 23.12.2017 of Vice Chancellor has been annexed as Annexure-F/2.

6. Further it has been reiterated that procedure for constitution of a Selection Committee, shall be governed by the provisions of the Ravenshaw University Act, 2005 and not the University Grants Commission Regulations 2010 because the aforesaid Regulations are merely directory for the Universities, Colleges and other higher educational institutions under the purview of the State Legislation. The University Grants Commission Regulation, 2010 is not applicable to the teaching staff of the Universities, Colleges and other higher educational institutions coming under the purview of the State Legislation, unless the State Government wish to adopt and implement the Scheme subject to terms and conditions mentioned therein.

It has been submitted that as per Section 5 of General Clauses Act 1897 since an Act or Regulation affects the rights of the public, it can come into force only when it has been formally adopted and implemented by publication in the Official Gazettee of the State. The relevant provisions of General Clauses Act 1897 reads as under.

> "5. Coming into operation of enactments:- (2) Where any Central Act is not expressed to come into operation in a particular day, then it shall come into operation on the day which it receives the assent;
>
> a) In the case of a Central Act made before the commencement of the Constitution, of the Governor General and
>
> b) In the case of an Act of Parliament, of the President."

The aforementioned position of law has been affirmed by the Hon'ble Supreme Court in the case of **S.K.Shukla-vrs.-State of U.P.** reported in **(2006) 1 SCC 314** as well as by this Hon'ble Court in the case of

Laxmidhar Rout-vrs.-Debraj Mohanty reported in **2004 (1) Cr.L.J.165**. Therefore, in the present matter, the absence of a formal Notification or publication in the Official Gazettee of the State very clearly establishes that the UGC Regulation 2010 has not been adopted by the State of Odisha and hence the Ravenshaw University Act, 2005 shall be the only applicable law.

7, Composite Additional Counter Affidavit on behalf of opposite party No.1 in reply to the amendment made to the writ petition has been filed wherein the counter affidavit filed by opposite party no.2 has been adopted and reiterated.

8. Rejoinder Affidavit filed by the petitioner W.P.(C) No.W.P.(C) No.25950 of 2017 in reply to the counter affidavit filed by opposite party Nos. 1 and 2 and the said rejoinder has been sworn by one Kanhu Charan Behera being duly authorized by the petitioner by authorization letter dated 19.12.2018. In the said rejoinder affidavit it has been mentioned that Section 21(ii) of the Ravenshaw University Act, 2005 confers powers on the authorities for framing the Statute of the University for the appointment of the Officers (which includes the Vice Chancellor) of the University, but no Statute was framed following the request of Ravenshaw University, The Government of Odisha in the department of Higher Education vide letter dated 11.01.2011 directed the University to adopt the Orissa Universities First Statutes, 1990 which was framed by the State Government in exercise of the powers conferred under Sub-Section (3) of section 24 of the Orissa Universities Act, 1989 since then Ravenshaw University has adopted the Orissa Universities First Statute 1990 and has been conducting its business as per this Statute, as per Rule 3(3) of Part-II Chapter-I of the Orissa Universities First Statutes 1990 the Rules for the recruitment of Vice Chancellor shall be in conformity with the guidelines issued by the University Grants commission and the Government of India from time to time.

Further, it has been submitted that in all appointments of teaching posts during the recent years, the Ravenshaw University has made advertisement on the basis of UGC Regulations, 2010 as evident from Annexue-10 series. Further it has been submitted that so far as the judgment rendered by the Hon'ble Apex Court and various High Courts, the State in clear and unambiguous terms speaks that UGC Regulations, 2010 is mandatory in nature to the extent it is adopted by the concerned State

Government. In the case at hand, the UGC Regulations/guidelines having been adopted by the State Government in terms of the letter dated 11.01.2011 and the University is bound to adopt the procedure as contemplated under the Ravenshaw University Act read with the Orissa University First Statute further read with the UGC Regulations, 2010 while making any selection or appointment to the post of Vice Chancellor. The Orissa Universities First Statute, 1990 having been published in the official Gazettte is commensurate with the provisions of General Clauses Act. If the contentions of the opposite parties are to be accepted then certainly it is a fact that no Statute has been framed by the State Government to carry out the provisions of the Ravenshaw University Act, 2005 rendering the Act unworkable and thus the very impugned Notification of constitution of Selection Committee and the appointment of opposite party no.5 as vice Chancellor are illegal and not sustainable in the eye of law.

9. In Additional Affidavit, in reply to the rejoinder affidavit filed by the petitioner filed on behalf of Ravenshaw University-opposite party no.2 it has been submitted that Composite Additional Counter Affidavit has been filed disputing the baseless and utterly frivolous allegations raised by the petitioner while demonstrating that the selection to the post of Vice Chancellor has indeed been undertaken in due compliance with all applicable laws and procedure. It has been submitted at the cost of repetition that the petitioner failed to meet the minimum eligibility criteria as laid down in the said advertisement as he did not possess the required experience as Professor apart from other qualifications, he was not shortlisted by the Selection Committee. It is only then and thereafter that the petitioner decided to institute the present petition on 25.11.2017. It is settled law that a candidate who has participated in the process of selection without demur or protest is estopped from challenging the same. Therefore, the present petitioner lacks the locus to institute the present petition. It has been submitted that constitution of Search Committee also complies with the UGC Regulations, 2010 as amended in 2013 by the UGC (2nd Amendment) Regulations, 2013. The said amendment under paragraph 7.3(ii) thereof, provides that the constitution of the Search Committee could be as per the Act/Statutes of the concerned University. Since the constitution of the Search Committee is as per the Ravenshaw University Act, 2005, the composition of the Search Committee also satisfies the UGC Regulations, 2010. In any event, it is submitted that the UGC Regulations 2010 are only directory in nature for a State University like Ravenshaw University as the said Regulations have not

been adopted by the State. Further, it has been mentioned that approximately 95% of funding and grants in respect of the Ravenshaw University comes from the State of Odisha and only 5% of funding and grants comes from the University Grants Commission. Further it has been submitted that the Orissa Universities First Statute, 1990 cannot be read to impose mandatory obligations on a State University to comply with any and all UGC Regulations, 2010 irrespective of whether such Regulations have been adopted and made applicable to the State. It can only necessarily mean and refer to such UGC Regulations which are applicable to State Universities having been specifically adopted by the State of Odisha as per due process of law through formal notification or publication in the Official Gazette. The UGC Regulations, 2010 having not been adopted by the State of Odisha are not mandatorily applicable to Ravenshaw University and therefore the Ravenshaw University Act, 2005 is the only applicable law in the present matter.

10. Further, it has been submitted that efforts made by the petitioner to establish that UGC Regulations are mandatory simply because University itself has followed the UGC Regulations, 2010 in other instances is hopeless misplaced. In fact, as per the law laid down by the Hon'ble Apex Court, the said Regulations being merely directory in nature, the University is at liberty to refer to the same. But the same by itself cannot give any rise to any mandatory obligation on the part of the University to follow such Regulations in all matters at all times. Any contrary interpretation will be in the teeth of the law settled by the Hon'ble Apex Court.

11. From the conspectus of the factual and legal position, the seminal issues which hinge for determination are as follows:

> i) Whether the writ petitions filed at the instance of the petitioners are maintainable ?
>
> ii) Whether constitution of Selection/Search Committee for the post of Vice Chancellor is a violation/infraction of Odisha University First Statute of 1990 and Regulations 2010 and 2013 of the University Grants Commission ?
>
> iii) Whether omission of word 'Administrative' in the advertisement for the post of Vice Chancellor is not in consonance with the statutory provisions made by the U.G.C. ?

ISSUE NO.(i) :

12. In order to dwell upon and delve into the question of maintainability of the writ applications, it may be noted here that the petitioners in W.P.(C) No. 25950 of 2017 and W.P.(C) No.03 of 2018 participated in the selection

process. Therefore, their locus has been challenged by the opposite parties by relying upon the judgment of the Hon'ble Supreme Court in **Dr.Saroja Kumari-vrs.-Helen Thilakom (2017) 9 SCC 478**. On the contrary, the learned counsel for the petitioner in the aforesaid writ petitions have relied upon the judgment of the Hon'ble Apex Court in the case of **Dr.(Major) Meeta Sahai-vrs.-State of Bihar and others** decided on 17.12.2019 in **Civil Appeal No.9482 of 2019. Paragraph-18** of the said judgment is quoted hereunder :

> "18. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable, illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process."

The 3rd writ petition i.e. W.P.(C) No.8145 of 2018 has been filed by a social activist invoking extraordinary writ jurisdiction under Articles 226 and 227 of the Constitution of India. The learned senior counsel for that petitioner Mr.S.S.Das, with regard to maintainability of the writ petition has relied on decision of the Hon'ble Apex Court reported in (2013) 1 SCC 501 (Rajesh Awasthi-vrs.-Nandlal Jaiswal and others). On perusal of the said judgment it is clear that the ratio of the said judgment is that any citizen can claim a writ of Quo Warranto and he stands in a position of a 'Relater". He need not have any special interest or personal interest. The real test is to see whether the person holding the office is authorized to hold the same as per law. Delay and laches do not constitute any impediment to deal with the lis on merits. Thus, delay and laches can never be taken as a ground to question the maintainability of the writ of Quo Warranto.

Learned Advocate General with regard to writ of Quo Warranto has referred the decision reported in ***AIR 1968 SC 1495 Statesman (Private) Ltd.-vrs.-H.R.Deb and others***.

13. Mr.Subir Palit, learned counsel for opposite party Nos. 1 and 2 has raised the objection with regard to maintainability of the writ petition by

advancing his argument that law is well settled once a person takes parts in the process of selection and is not found fit for appointment, the said person is estopped from challenging the process of selection. In order to fortify his submission, learned counsel has referred to decisions in the case of **Madanlal vrs. State of J. & K,** reported in **(1995) 3 SCC 486, Manish Kumar Shahi vrs. State of Bihar,** reported in (2010) 12 SCC 576 and **Madras Institute of Development Studies vrs.-Dr.K.Sivasubramaniyan,** reported in **(2016) 1 SCC 454** wherein it has been inter alia held that if a candidate takes a calculated chance and participates in a recruitment process then only because the result of the selection is not palatable to him, he cannot turn around and subsequently contend that the process of recruitment is unfair or the Selection Committee was not properly constituted.

14. After hearing the learned counsel for the respective parties and on perusal of the judgment cited from both the sides, this Court is of the considered view that the writ petitions are not to be set at naught at the threshold on hyper technicalities when violation of relevant statutory provisions is the bone of contention in the writ petitions filed at the instance of the petitioners in different writ applications. Accordingly relying on the decision of **Major Dr.(Major) Meeta Sahai**, this Court holds that the writ petitions are maintainable.

ISSUE NO.(ii) :-

15. Mr.J.K.Rath & Mr.S.S.Das, learned senior counsels on behalf of the petitioner in W.P.(C) No.25950 of 2017 and W.P.(C) No.03 of 2018 while assailing the constitution of the Search/Selection Committee for the post of Vice Chancellor have submitted with vehemence that the Search Committee which had conducted the interview/interaction for selection of appointment of Vice Chancellor of Ravenshaw University was constituted in gross violation of the statutory provisions by inducting three members, (1) Shri R.K.Mishra,I.A.S.(Retired), nominee of the Chancellor, (2) Professor Santsoh Chandra Panda, Nominee of the Executive Council of Ravenshaw University and (3) Prof. Sanjay Puri, Nominee of the Chairman U.G.C. In order to buttress their submission, leaned senior counsel submitted that the Ravenshaw University Act, 2005 came into force from the date of its publication in the official Gazette. Section-8 of the Act deals with the officers of the University. According to it, Vice Chancellor is one of such Officer.

Relevant Portion of Section 21 of the University Act, 2005 which confer power on the authorities for framing the University Statute reads as under.

> "21. Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely:-
>
> (i) xx xx xx
>
> ii) the appointment, powers and duties of the officers of the University and their emoluments."

Since as on date, no Statute has been framed by Ravenshaw University, the University authorities moved the Government by virtue of communication dated 18.11.2010 in the matter and the Government in the Department of Higher Education vide letter dated 11.01.2011 directed the University to adopt the Orissa Universities First Statutes, 1990 which was framed by the State Government in exercise of the powers conferred under Sub-Section (3) of Section 24 of the Orissa Universities Act, 1989 which has been notified on 01.01.1990 and was published in the Odisha Gazettee on 01.01.1990. The Orissa Universities First Statutes, 1990 came into force from the date of its publications in the official Gazette. Since the Orissa Universities First Statute, 1990 has been notified in the Odisha Gazette, the State Government by implication of Rules and by its conduct, has adopted UGC Regulations from the date it came into force for all practical purposes. Therefore when State Government instructed Ravenshaw University to adopt the Orissa Universities First Statutes, 1990 by virtue of letter dated 11.01.2011, hence the UGC Regulations are required to be mandatorily followed by Ravenshaw University/State Government. Learned Senior Counsel further submitted Section 10(1) of the Ravenshaw University Act, 2005 envisages that the Vice Chancellor shall be a appointed by the Chancellor from a panel of three names recommended by a committee consisting of three members, one nominated by the UGC, one elected by the Executive Council and one nominated by the Chancellor and the Chancellor shall designate one of the members as Chairman of the Committee. Since one of the committee member is to be nominated by the UGC, UGC has a purposive participation in the formation of the committee and selection of the Vice Chancellor.

Learned Senior Counsel for the petitioners have referred to Regulations 7.3.0 of U.G.C. Regulations, 2010 which specifically deals with

appointment of Vice Chancellor and constitution of selection committee for such appointment. Clause 7.3.0 of the UGC Regulations 2010 has been amended by the UGC Regulations 2013. In the amendment the statutory provisions as referred to above as per UGC Regulation, 2010 i.e., the members of the Search Committee shall be persons of eminence in the sphere of Higher Education and shall not be connected in any manner with the university concerned or its colleges remain unaltered. Again Clause (iv) of amended Regulation 7.3.0 of UGC Regulations, 2013 states that the condition of service of the Vice Chancellor shall be in conformity with the Principal Regulations, i.e. Regulations, 2010.

Learned senior counsels further submitted that if the Notification dated 11.01.2011 is not made applicable for any reason whatsoever, then there would be an absolute impasse in the appointment of the officers in Ravenshaw University as Section 10 of the Ravenshaw University Act, 2005 only speaks of a committee of 3 members which under no circumstances can ever be accepted objectively. In order to ensure that the very object of Section 10 is achieved, the qualifications of the members as provided in the UGC Regulations are to be strictly followed.

Learned senior counsels further submitted that the very objective of the statutory provision to select a person to the high and dignified office of the Vice Chancellor of Ravenshaw University has been frustrated by appointing a retired IAS Officer as the Chairman of the Search Committee in place of a person of eminence from the sphere of Higher Education. Further, the very objective of the statutory provision to make the selection process to the post of Vice Chancellor clean, transparent and untainted has been frustrated by appointing the two other persons connected with Ravenshaw University as members of the Search Committee. Therefore, the entire process of selection is vitiated in law.

Learned senior counsels on behalf of the petitioners have referred to the judgment rendered in the case of (Mr.Anurag Mittal-vrs.-Shaily Mishra Mittal) reported in Vol.126 2018 CLT 1001 S.C. Paragraphs-14 and 15.

16. Mr.A.K.Parija, learned senior counsel on behalf of opposite party Nos.1 and 3 has vociferously submitted that the prayer of the petitioner in the above mentioned writ petition is based upon misconstruction of Ravenshaw University Act, 2005 enacted by the State Legislature under

Entry 25 of List III of 7th Schedule of the Constitution, Rule 3(3) of Orissa Universities First Statutes and the UGC Regulations, 2010 as well as misreading of the judgment reported in 2016 Vol.I OLR 434 Manorama Patri -vrs.-State of Odisha and others.

Mr.Parija, learned senior counsel has referred to Section 10 of the Ravenshaw University Act, 2005 which has been enacted by the State Legislature under Entry 25 of List III of 7th Schedule of the Constitution of India. Section 10 of the said Act specifically, sub-Section(1) and (2) of the Act provide for appointment of the Vice-Chancellor. Since the term of the erstwhile Vice Chancellor of Ravenshaw University was coming to an end in 2017 and there was a need to fill up the said post for appointment of a new incumbent, the Hon'ble Chancellor constituted the Search Committee in accordance with Section 10 of the Act on 18.10.2017. The Committee consisted of (i) One member nominated by the University Grants Commission; (ii) One member elected by Executive Council; and (iii) One member nominated by the Chancellor as required under section 10(1) of the Act. Section 10(2) prescribes the eligibility criteria for members of Search Committee. It is nobody's case that the constitution of Search Committee was as per section 10(1) and section 10(2) of the Ravenshaw University Act, 2005. It has been further submitted that after thorough process of selection the names of opposite party no.5 along with two other candidates were recommended to Hon'ble Chancellor for consideration for appointment to the post of Vice Chancellor on 15.12.2017 and the Chancellor appointed opposite party no.5 from the said three persons as Vice Chancellor of Ravenshaw University for a period of three years with effect from 23.12.2017. Further, it has been argued that the provisions for the First Statutes for the Ravenshaw University are provided under section 21 and section 22 of the Act. Section 22(1) of the Act provides that the first Statute are to be prepared by the Government of Odisha. In fact the opening words of section 21 of the Act clearly stipulates that subject to the provisions of this Act, the Statute may provide for inter alia constitution, power and function of the authorities, appointment, powers and duties of the officers etc. Therefore, the First Statute has already been in aid of and not in derogation of the Act and for filling in the gaps left in the Act. The letter dated 10.01.2011 of the State Government on which strong reliance has been placed can be relied to conduct University business. In other words, the First Statute is to be relied upon in cases where the Act is silent, for instance on the procedure for appointment of officers under Section 8(g) of the Act. Since the Ravenshaw

University Act is exhaustive and self-contained like Section 10 which exhaustively provides for appointment of Vice Chancellor. Further it has been contended that Rule 3(3) of the First Statute has no application to Section 10 of the Act which is self- contained for appointment of Vice Chancellor. Learned Senior Counsel during the course of hearing has referred to UGC Regulation 2010 and Clause 7.3.0 of the said Regulation which deals with the Vice Chancellor and constitution of Search Committee. Clause 7.4.0 envisages the University/State Government shall modify or amend the relevant provisions within six months from the date of adoption of these Regulation. A bare reading of sub-clause(ii) of Clause 7.3.0 reveals that the constitution of the Search Committee could be as per the Act/Statutes of the concerned University. It has been further argued that assuming for the sake of argument and without prejudice the UGC Regulations 2010 as amended in 2013 applies to Ravenshaw University then also Clause 7.3.0 of the said Regulations have been complied inasmuch as the constitution of Search Committee has been in accordance with Section 10, Ravenshaw University Act, 2005. Furthermore, a reading of the Clause 7.4.0 would indicate that the said Regulation will be applicable in respect of a State University, created by a State legislation only if

i) The same was adopted by the State, and

ii) The State Act was amended within six months of the adoption by the University.

Accordingly, the UGC Regulations are applicable only upon fulfillment of the said conditions and not otherwise. The decision reported in (2015) 6 SCC 363, (Kalyani Mathivanan –vrs.-KV Jeyaraj) Para-62 thereof has been referred to. The said issue is no more res integra in view of the said judgment. The learned Advocate General further submits that the decision rendered in the case of Manorama Patri & others, 2016 (I) OLR 434 is not applicable, since in the said decision interpretation of section 10 of Ravenshaw University Act 2005 relating to constitution of a Search Committee for appointment of Vice Chancellor did not arise for consideration and the said judgment also did not consider the impact of Clause 7.3.0 and 7.4.0 of the U.G.C. Regulations which are special clauses relating to Vice Chancellor and its appointment. Learned Advocate General on demurrer submits that the Search Committee also meets the standards set in the Regulation. Since the U.G.C. Regulation 2010 as amended in 2013 applies to Ravenshaw University then also the same has been complied with inasmuch as the constitution of the Search Committee has been in accordance

with Section 10, Ravenshaw University Act, 2005. Even on further demurrer and assuming for the sake of argument, but not conceding, learned Senior Counsel further submitted that if standard for Search Committee set in UGC Regulations 2013 are applicable then the same are also satisfied.

17. Mr.Subir Palit, learned counsel for opposite party Nos.1 and 2 has forcefully submitted that as has been alleged that Sri R.K.Mishra, Chairman of the Search/Selection Committee is not a person of eminence in the field of higher education is not correct. It is further submitted that Sri R.K.Mishra is the nominee of the Chancellor of the University and a detailed Additional affidavit has been filed providing a thorough description of the role and experience of Sri Mishra in the sphere of higher education. Further, it has been submitted that the UGC Regulations has not been implemented and the nomination of Shri R.K.Mishra is applicable as per Section 10 of the Ravenshaw University Act. With regard to allegation that Prof. Santosh Panda is closely connected with the Revenshaw University and therefore his presence in the Selection committee violates the UGC Regulations, 2010, it has been submitted that UGC Regulation 2010 as amended 2013 categorically provided that the constitution of the Search/Selection Committee can be as per the relevant Act of the concerned University. The allegation against Sri Panda has been made solely on the basis of the assignment to design and update the course of Economics. In fact Prof. Panda has a vast experience of 42 years in the field of Economics and has held many respectable positions such as Managing Director of Centre for Development of Economics, Heads of the Department of Economics, Executive Director of the Centre for Development of Economics and Director of Delhi School of Economics. Therefore, by virtue of his vast experience Prof.Panda is eminently qualified to be the member of the Selection Committee and thus has been duly elected by the Executive Council of the Ravenshaw University. Further in respect of the allegations made against Prof. Sanjay Puri, it is submitted that Prof. Puri is the nominee of the Chairman of the UGC and thus the University has no power or control in respect of such nomination. Further it has been submitted that nomination has been made in accordance with the applicable law i.e. Section 10 of Ravenshaw University Act, 2005.

18. Mr.J.K.Mishra, learned senior counsel on behalf of U.G.C. has vehemently submitted that the University Grants Commission in its counter affidavit has consistently taken the stand that 7.3.0 of U.G.C. Principal

Regulation, 2010 so also in the UGC (Second Amendment) Regulations, 2013 has to be strictly followed without any deviation relating to the selection of Vice Chancellor of a State University. It has been submitted that the UGC Principal Regulations 2010 as amended thereafter in 2013 were framed in exercise of the power conferred upon UGC under Clause (e) or Clause (f) or Clause (g) of sub-Section (1) of section 26 of the UGC Act, 1956. In Clause 1.2 of the UGC Principal Regulations 2010 it has been specifically made clear that the Regulation so framed shall apply to every University established or incorporated by or under a Central Act, Provincial Act or a State Act, every institution including a constituent or affiliated college recognized by the Commission, in consultation with the University concerned under Clause (f) of Section 2 of the UGC Act, 1956 and every institution deemed to be University under section 3 of the said Act. Learned senior Counsel for UGC further submitted that even though the Ravenshaw University Act, 2005 came into force with effect from 27.07.2005 yet for the reasons best known to the authorities of the University no Statute has been framed as provided under section 21 of the Ravenshaw University Act, 2005 so as to cover the appointment, powers and duties of the Officers of the University and their emoluments. As per section 8(1) of the Ravenshaw University Act, 2005 the Vice Chancellor is an Officer of the University. Under section 22(1) of the said Act, it is the State Government to prepare the First Statutes of the Ravenshaw University. It has been submitted from the pleadings in the writ petition bearing W.P.(C) No.8145 of 2018, that during November, 2010, Ravenshaw University took the initiative by submitting its proposal to the State Government for framing the Statutes for the University. In response to the same, the Government of Odisha through its Department of Higher Education in their wisdom acceded to the proposal by issuing a direction to the Authorities of Ravenshaw University to adopt the provisions of Orissa Universities First Statute 1990 to conduct University business till a separate Statute for Ravenshaw University is approved by the Government. If that be so, Rule 3(3) of Part-II under Chapter-1 of the Orissa Universities First Statute, 1990 is relevant to determine the real controversy in issue. Therefore, the appointment to the post of Vice Chancellor shall be regulated in conformity with UGC norms and strict compliance of the UGC Regulation with terms and conditions without any deviation and the decisions cited by the opposite parties, the Ravenshaw University is distinctively different.

19. In order to adjudicate the issue No.(ii) it would be apposite to refer the relevant provisions of Ravenshaw University Act, 2005.

Section-8 :

The following shall be the officers of the University:-

a) The Vice Chancellor,
b) The Registrar,
c) The Comptroller of Finance,
d) The Controller of Examinations;
e) The Dean of Students Welfare;
f) The Librarian; and
g) Such other officers as the Statutes may declare.

Section-10 :

10(1) The Vice-Chancellor shall be a whole-time officer of the University and shall be appointed by the Chancellor from a panel of three names recommended by a Committee consisting of three members, one nominated by the University Grants Commission, one elected by the Executive Council and one nominated by the Chancellor. The Chancellor shall designate one of the members as Chairman of the Committee.

(2) No person shall be eligible to be a member of the Committee, if he/she is (a) a member of any of the authorities of this University, or (b) an employee of this University, or (c) an employee of any college/institution maintained or recognized by or affiliated to any other University in the State of Orissa.

(3) The business of the Committee shall be conducted in such manner as may be prescribed.

(4) If the persons approved on priority basis by the Chancellor out of the panel so recommended, are not willing to accept the appointment, the Chancellor may call for a fresh panel of three different names from the said Committee or if the Chancellor is of the opinion that none of the persons out of the said panel is suitable for appointment as Vice Chancellor, the Chancellor may take steps to constitute another Committee to give a fresh panel of three different names and shall appoint one of the persons named in the fresh panel as the Vice Chancellor.

(5) The term of office of the Vice-Chancellor shall be three years from the date he assumes office or on attainment of six five years of age whichever is earlier.

Provided that no person shall be appointed as Vice Chancellor for more than two terms.

(6) The Chancellor may extend from time to time the term of office of the Vice Chancellor for a total period not exceeding six months without following the procedure laid down in sub-section(1).

(7) In case the office of the Vice-Chancellor falls vacant due to the absence of the Vice-Chancellor, the Chancellor shall appoint a person on such terms and conditions as he deems necessary to act as the Vice-Chancellor and such person shall be entitled to al emoluments attached to the office.

(8) In case the office of the Vice-Chancellor falls vacant due to any other reason, the vacancy shall be filled up in the manner specified in sub-section (1) and the person appointed to fill up such vacancy shall be eligible for re-appointment in accordance with the provisions contained in sub-section (5)

Provided that where it is not reasonably practicable to fill up the vacancy in the manner aforesaid immediately after it occurs, the Chancellor may appoint a person to act as the Vice-Chancellor for such period, not exceeding six months, as he/she may fix and the person so appointed shall exercise the powers and perform the functions of the Vice-Chancellor and shall be entitled to all emoluments attached to the office.

(9) The Executive authority of the University shall vest in the Vice-Chancellor.

(10) The Vice-Chancellor of the University shall, when present preside over the meetings of the Senate, the Executive Council and the Academic Council or in every meeting of any other authority of which he is a member and in the absence of the Chancellor, shall also preside over the Convocations of the University.

(11) The conditions of service such as safety and allowances of the Vice-Chancellor of the University shall be such as may be prescribed.

(12) Subject to availability of funds in the budget, the Vice-Chancellor of the University shall have power to sanction, after obtaining the opinion of the Comptroller of Finance, expenditure up to such sum as may be prescribed during the course of a financial year and shall make a report of all such expenditure to the Executive Council at the earliest opportunity.

(13) If the Vice-Chancellor of the University is of the opinion that any order or decision in respect of any matter, which is required under the provisions of this Act or the Statutes to be passed or made by any authority of the University, is necessary to be passed or made immediately and it is not practicable to convene a meeting of the concerned authority for that purpose, he/she may pass such order or make such decision, as the case may be, and place before the concerned authority at its next meeting for ratification, and where the authority differs from the Vice-Chancellor, the matter shall be referred to the Chancellor, whose decision thereon shall be final.

Provided that if the mater involves any financial transaction, the Vice-Chancellor shall, before passing such order or taking such decision, obtain the opinion of the Comptroller of Finance, but the Vice-Chancellor is at his discretion to differ from such opinion, if he/she deems it so fit, after record his/her reasons thereof.

(14) The Vice-Chancellor of the University shall review the performance of teachers and officers of the University annually and submit a report thereon to the Chancellor in the manner prescribed.

(15) The Vice-Chancellor shall have the powers-

a) to require the teachers of the Departments/Schools of the University to report him/her all academic aspects including, if any, about the conduct of University examinations; and

b) to give such directions to the Officers-in-charge of such examinations, as he/she deems necessary, in consultation with the Controller of Examinations.
(16) The Vice-Chancellor shall inspect the Departments/Schools of the University as and when he/she feels necessary and at least once in a year.

(17) The Chancellor may, at any time, by an order in writing remove the Vice Chancellor of the University from office if in his opinion it appears that his continuance in office is detrimental to the interest of the University.

Provided that no such removal shall be made without holding an enquiry being conducted by a Committee consisting of at least three members not below the rank of a Vice-Chancellor.

(18) From the date specified in the order made under sub-section (17) the Vice-Chancellor shall be deemed to have relinquished the office and the office of the Vice-Chancellor shall fall vacant.

Section 21. (The Statutes)

20. Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely:

(i) the constitution, powers and functions of the authorities and other bodies of the University, the qualifications and disqualifications for membership of such authorities and other bodies, appointment and removal of members thereof and other matter connected herewith;

ii) the appointment, powers and duties of the officers of the University and their emoluments;

iii) the appointment, terms and conditions of service and the powers and duties of the employees of the University;

iv) the administration of the University, the establishment and abolition of Departments/Schools in the University, the institution of fellowships, awards and the like, the conferment of degrees and other academic distinctions and the grant of diplomas and certificates;

v) any other matter which is necessary for the proper and effective management and conduct the affairs of the University and which by this Act is to be or may be provided for by the Statutes.

Section- 22. (1) the first Statutes are to be prepared by the Government of Orissa.

(2) The Executive Council may, from time to time, make new or additional Statutes or may amend or repeal the Statutes in the following manner.

Provided that the Executive Council shall not make, any Statutes affecting the Statutes, powers or constitution of any existing authority of the University until such authority has been given an opportunity of expressing an opinion on the proposal and any opinion so expressed shall be in writing and shall be considered by the Executive Council.

Provided further that no Statutes shall be made by the Executive Council affecting the discipline of students, and determination and maintenance of standards of teaching research and examination except after consultation with the Academic Council.

(3) Every new Statutes or addition to the existing Statutes or any amendment or repeal of a Statute shall require the approval of the Chancellor who may assent thereto or withhold assent or remit to the Executive Council for reconsideration in the light of the observation if any, made by him.

(4) A new Statute or a Statute amending or repealing an existing Statute shall have no validity unless it has been assented to by the Chancellor.

Section 25. (1) The University shall establish a fund to be called the University Fund to which shall be credited, namely-

a) any contribution or grant by the State Government, Central Government, University Grants Commission, Industrial Undertakings, Corporations, Companies, Associations, other bodies or local authorities;

b) any income of the University from all sources including income from fees and charges and sale proceeds;

c) bequests, donations, endowments and other grants, if any received by the University; and

d) miscellaneous receipts.

(2) The University may, from time to time, establish such other funds in such name and for such specific purposes as may be decided by the Executive Council with the prior consultations with the Government regarding establishment of such funds.

3) The fund shall be kept in Nationalised or Scheduled Bank or invested in such securities as may be decided by the Executive Council.

4) The funds and all moneys of the University shall be managed in such manners as may be prescribed by the Statutes.

5) The University may, with previous sanction of the Government as regards the purpose and amount of loan, and subject to such conditions as may be specified by the Government as to security and rate of interest, borrow any sum of money from any Nationalised Bank or Scheduled Bank or any other corporate body or any financial institution.

6) The University shall prepare the financial estimate of receipts and expenditure of the University in such manner as may be prescribed by the Statute.

7) The Executive Council shall consider the estimates so prepared and approve them with or without modification.

8) The University shall submit such estimates as approved by the Executive Council to the Government for the purpose of providing he annual grant.

9) The Government may pass such order with reference to the said approved estimates as it thinks fit and communicate the same to the University which shall give effect to such order.

10) The Executive Council may, in urgent cases where expenditure in excess of the amounts provided for in the budget is fund to be necessary, for reasons to be recorded in writing, incur such expenditure.

Section-29. Where any authority of the University is given power by this Act or the Statutes to appoint Committees shall, save as otherwise provided consist of the members of the authority concerned and of such other persons, if any, as the authority in each case may think fit.

Rule 3.3 of the Orissa Universities First Statutes 1990 reads as under:

Rule 3.3 of the Orissa Universities First Statutes 1990

(3) The recruitment policy for different posts including the teaching posts of the University and the requisite qualifications of officers for recruitment to such posts

shall be such as may be specified in the rules by the respective appointing authority with the prior approval of the Chancellor. Such rules shall be in conformity with the guidelines, if any, issued by the University Grants Commission and of the Government of India from time to time.

The relevant provisions of U.G.C. Regulations 2010 is quoted hereunder :

7.3.0 Vice Chancellor:

i. Persons of the highest level of competence, integrity, morals and institutional commitment are to be appointed as Vice-Chancellors. The Vice-Chancellor to be appointed should be a distinguished academician, with a minimum of ten years of experience as Professor in a University system or ten years of experience in an equivalent position in a reputed research and/or academic administrative organization.

ii. The selection of Vice-Chancellor should be through proper identification of a Panel of 3-5 names by a Search Committee through a public Notification or nomination or a talent search process or in combination. The members of the above Search Committee shall be persons of eminence in the sphere of higher education and shall not be connected in any manner with the University concerned or its colleges. While preparing the panel, the search committee must give proper weightage to academic excellence, exposure to the higher education system in the country and abroad and adequate experience in academic and administrative governance to be given in writing along with the panel to be submitted to the Visitor/Chancellor. In respect of State and Central Universities, the following shall be the constitution of the Search Committee.

a) A nominee of the Visitor/Chancellor who should be the Chairperson of the Committee.

b) A nominee of the Chairman, University Grants Commission.

c) A nominee of the Syndicate/Executive Council/Board of Management of the University.

iii) The Visitor/Chancellor shall appoint the Vice-Chancellor out of the Panel of names recommended by the Search Committee.

iv) The conditions of service of the Vice Chancellor shall be prescribed in the Statutes of the Universities concerned in conformity with these Regulations.

v. The term of office of the Vice Chancellor shall form part of the service period of the incumbent concerned making him/her eligible for all service related benefits.

7.4.0 :

The Universities/State Governments shall modify or amend the relevant Act/Statutes of the Universities concerned within 6 months of adoption of these Regulations.

The relevant provisions of U.G.C. Regulations 2013 is extracted hereunder:

7.3.0 Vice Chancellor:

i. Persons of the highest level of competence, integrity, morals and institutional commitment are to be appointed as Vice-Chancellors. The Vice-Chancellor to be appointed should be a distinguished academician, with a minimum of ten years of experience as Professor in a University system or ten years of experience in an equivalent position in a reputed research and/or academic administrative organization.

ii. The selection of Vice-Chancellor should be through proper identification of a Panel of 3-5 names by a Search Committee through a public Notification or nomination or a talent search process or in combination. The members of the above Search Committee shall be persons of eminence in the sphere of higher education and shall not be connected in any manner with the University concerned or its colleges. While preparing the panel, the search committee must give proper weightage to academic excellence, exposure to the higher education system in the country and abroad and adequate experience in academic and administrative governance to be given in writing along with the panel to be submitted to the Visitor/Chancellor. The constitution of the Search Committee could be as per the Act/Statutes of the concerned university.

iii) The Visitor/Chancellor shall appoint the Vice-Chancellor out of the Panel of names recommended by the Search Committee.

iv) The conditions of service of the Vice Chancellor shall be prescribed in the Act/Statutes of the University concerned in conformity with the Principal Regulations.

v.) The term of office of the Vice Chancellor shall form part of the service period of the incumbent concerned making him/her eligible for all service related benefits."

Letter dated 11.01.2011 which is the trump card on behalf of the petitioner is reproduced herein below**:**

Government of Orissa
Department of Higher Education

No.1 HE UM-07/2011----------HE, dated

From :

Sri A.P.Sahoo, O.F.S.(SAG),
F.A.cum-Addl. Secretary to Government

To

The Registrar, Ravenshaw University, Cuttack.

Sub: Statutes for Ravenshaw University.

Sir,

In inviting a reference to the Letter No. RO 402/ 18.11.2010 of the Ravenshaw University on the aforesaid subject, I am directed to say that Government in Higher Education Department have been pleased to allow the Ravenshaw University to adopt the provisions of Orissa University First Statutes, 1990 to conduct University business till a separate statutes for Ravenshaw University is approved by Government.

Yours faithfully,

F.A.cum-Addl. Secretary to Government.

Memo No. 1019 /HE, dated 11.01.11.

Copy forwarded to the Joint Secretary to the Chancellor of Ravenshaw University, Raj Bhavan, Bhubaneswar for information and necessary action.

Sd/- dt.10/1/11
F.A.cum-Addl. Secretary to Government.

On conjoint reading of the aforesaid provisions which are germane to decide the contentious and knotty issues, it appears that though Section 10(1) of Ravenshaw University Act, 2005 envisages for appointment of Vice Chancellor, but with regard to composition of search committee, no Statute has been framed/prepared by the State of Odisha as envisaged under section 22(1) of Ravenshaw University Act. Therefore, this has led to anomalous situation or impasse and also reasons are not forthcoming from the counter affidavit as to why there has been inordinate delay in framing of the Statute of the Ravenshaw University. The letter dated 11.01.2011 on which much emphasis has been harped upon by the learned counsel for the petitioners

clearly refers to adoption of 1st Statute of Orissa University Act. Rule 3.3 of Chapter-I of Orissa University First Statute, 1990 indubitably refers to University Statute to be in conformity with the guidelines of the University Grants Commission from time to time. But nothing to show that the Executive Council has adopted Orissa University First Statute, 1990.

University Grants Commission Regulations 2010 and 2013 deals with nomination of members of the Search/Selection committee. Admittedly, in the case on hand the appointment of Vice Chancellor has been made exclusively based on relevant provisions of the Ravenshaw University Act and the Search/Selection Committee as per the Ravenshaw University Act and not in consonance with the University Grants Commission Regulations 2010 and 2013. But as indicated earlier there is nothing to show that Executive Council of Ravenshaw University has adopted Orissa University First Statute 1990. It would be apposite to refer to paragraphs 62.4 and 62.5 of the decision of the Hon'ble apex Court in the case of ***Kalyani Mathivanan-vrs.-K.V.Jayaraj and others reported in 2015(6) SCC 363*** which are as hereunder:

> **62.4** The UGC Regulations, 2010 are directory for the universities, colleges and other higher educational institutions under the purview of the State legislation as the matter has been left to the State Government to adopt and implement the Scheme. Thus, the UGC Regulations, 2010 are partly mandatory and is partly directory.
>
> **62.5** The UGC Regulations, 2010 having not been adopted by the State of Tamil Nadu, the question of conflict between the State legislation and the Statutes framed under the Central legislation does not arise. Once they are adopted by the State Government, the State legislation to be amended appropriately. In such case also there shall be no conflict between the State legislation and the Central legislation.

So far as Regulation 2010 is concerned, there is no gain saying of the fact that the State of Odisha has adopted the University Grants Commission Regulation in the case of First Statute of Orissa University. So it cannot be said that the State has not adopted or implemented the scheme of the University Grants Commission. No-doubt the petitioners have not challenged the selection of the Vice Chancellor on the ground that there has been infraction of Ravenshaw University Act.

It would be relevant to refer the Clause 1.2 of the University Grants Commission Principal Regulations 2010 which specifically makes it clear that the Regulation so framed by the UGC shall apply to every University established or incorporated by or under a Central Act, Provincial Act or a State Act being affiliated college recognized by the Commission, in consultation with the University concerned under Clause (f) of section 2 of the University Grants Commission Act, 1956 and every institution deemed to be a University under Section 3 of the said Act.

Sections 2 & 3 of the U.G.C.Act read as follows:

" In this Act, unless the context otherwise requires-

2. (a) "Commission" means the University Grants Commission established under section 4;

(b) "executive authority" in relation to a University, means the chief executive authority of the University (by whatever name called) in which the general administration of the University is vested;

(c) "Fund" means the Fund of the University Grants Commission constituted under section 16;

(d) "member' means a member of the University Grants Commission and includes the Chairman2 (and Vice- Chairman];

(e) "prescribed' means prescribed by rules made under this Act;

(f) "University" means a University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the Commission in accordance with the regulations made in this behalf under this Act.

3. The Central Government may, on the advice of the Commission, declare by notification in the Official Gazette, that any institution for higher education, other than a University, shall be deemed to be a University for the purposes of this Act, and on such a declaration being made, all the provisions of this Act shall apply to such institution as if it were a University within the meaning of clause (f) of section 2."

Moreover, there has been prevaricating stand with regard to adoption of UGC Regulations which can be deciphered from the counter affidavit filed by the University.

In the case of ***Manorama Patri & others-vs.-State of Odisha and others, reported in 2016(1) OLR 434***, this Hon'ble Court held in paragraphs-39,40,41 and 42 as follows:

> "**39.** With due respect to the decision, we find that there is dispute between the U.G.C. and Madurai Kangry University with regard to the appointment of teachers including Vice Chancellor. After analyzing the facts of the case and the principles under different earlier decisions of Hon'ble Supreme Court, Their Lordships of the of the view that U.G.C. guidelines being passed by both the houses of Parliament, over a subordinate legislature is binding on the Universities to which it applies, because under entry No.25 of the concurrent list, the State legislature repugnant to the Central legislation would be inoperative. Following decision we are of the view that U.G.C. Regulations, 2010 is applicable to the Universities and colleges thereunder and it will not apply to such colleges who ought not to have got any grant from U.G.C. However it is clear from the aforesaid decision that U.G.C. Regulation being central legislation, is binding on the State legislation so far as appointment of teachers and their training is concerned. So the real test is whether the UGC Act and Regulations is binding on the Universities that can be derived from the facts and circumstances of each case.
>
> **40.** After adverting to the facts of the case, it is found from the date of publication in the gazette that is in 2005, Ravenshaw University Act came under the purview of U.G.C. This view is supported from the contents of section 36 of the Ravenshaw University Act since the O.P.-Ravenshaw University is receiving U.G.C. grant, as per provisions of the Act, 2005.
>
> **41.** From the aforesaid discussion, we are of the considered view that the Ravenshaw University Act being a subordinate legislation and receiving U.G.C. grant, has to abide by the U.G.C.Act and Regulation/guidelines so far as the appointment of teachers are concerned. The U.G.C. Act being under entry No.25 of the concurrent list and having been enacted by the Parliament, have the responsibility of prescribing standard of recruitment of t4eachers.Such standard has to be maintained by the Universities concerned including Deemed and Autonomous colleges. The U.G.C. being the apex body to formulate the policy and carry out the same for creating better education and to restore the teacher and student relationship, particularly with regard to the philosophy of education s propounded by Gandhiji. It does not mean that Universities can violate or by-pass the standards as prescribed by the U.G.C. so far as eligibility criteria of the teachers, standard of teaching they impart and conditions under which such standard to be implemented, have to be strictly complied with.
>
> **42.** In the counter, Ravenshaw University have never averred that the U.G.C.Act and Regulations are not binding on them. On the other hand, we are of the view that the U.G.C. Act and Regulations/guidelines are binding on Ravenshaw University so far as appointment of teachers and allied matters are concerned."

The Hon'ble High Court of Gauhati in ***W.A.No.109 of 2019 decided on 16.08.2019 in the case of Archana Sharma-vrs.-The University Grants Commission (UGC) and others*** at paragraphs-34 and 35 held as follows".

> "**34.** Adoption of the Regulations by the State Government has to be formal and determinative and it cannot be presumed on the basis of surmises. The date of adoption is very relevant as Clause 7.4.0 mandates the Universities/State Governments to modify or amend the relevant Act/Statutes of the Universities concerned within six months of adoption of the Regulations. Learned senior counsel for the appellant has not been able to show the date on which the Regulations, 2010 was adopted. In fact, there is not even any averments in the writ petition with regard to adoption of the Regulations, 2010 by the State Government. The letter dated 10.08.2010 of the Director of Higher Education, Assam, only mentions that benefit of revised UGC/AICTE pay scale is to be ensured. The letters dated 11.05.2010 and 09.06.2010 referred to therein are prior to coming into effect of the Regulations, 2010 on 30.06.2010. The letter dated 1.05.2010 indicates that in exercise of powers conferred by proviso to Article 309 of the Constitution of India the Governor of Assam was pleased to extend the benefit of revised UGC/AICTE pay sales to the teachers in universities and colleges. Even that letter did not indicate adoption of any previous Regulation of UGC by the State Government. It is also relevant to note that GU Act has not been amended. If the Regulations, 2010 had been adopted, the GU Act had to be amended appropriately. No action was also taken by UGC under section 14 of the UGC Act as a consequence of any failure of the university to comply with the Regulations, 2010.
>
> **35.** In the background of the above facts, we are of the considered opinion that in the attending facts and circumstances of the case, the UGC Regulations, 2010 has to be considered as directory for Gauhati University and, therefore, it was not necessary to take recourse to Clause 7.3.0 for the purpose of selection of Vice-Chancellor and the selection of Vice-Chancellor has to be undertaken in terms of Section 8A(1) of the GU Act.**"**

The Hon'ble High Court of Madras in ***Writ Petition Nos. 22565 and 22566 of 2015 decided on 06.04.2016 in the case of Change India and others-vrs.-Government of Tamil Nadu and others*** in paragraphs-36 and 37 held as follows:

> "**36.** The question thus arises is that, if the amendments have so not been done what would be the effect of the same. The legal position in this behalf has been enunciated by the Apex Court in Kalyani Madhivanan's case (supra) while framing the questions to be decided as set out in paragraph-18 of that judgment. The Supreme Court came to the conclusion that the UGC Regulations, 2010 having not been adopted by the State of Tamil Nadu, the question of conflict between the State Legislation and the Statutes framed by

> the Central Government does not arise, but once adopted by the State Government, the State Legislation would be amended appropriately.
>
> **37.** We have, thus necessarily, to come to the conclusion that the UGC Regulations in this behalf would not apply on account of the recalcitrant stand of the State Government not to amend the University Statutes so as to bring them in conformity with the Regulations, even though assurances were held out while availing of the financial aid."

So far as reliance of the petitioner to the decision in case of ***Manorama Patri and others vrs.State of Odisha and others reported in 2016 (1) OLR 434*** is concerned this Court is of the considered view that in the aforesaid decision the Hon'ble Court has not dealt with section 10 (1 & 2) of the Ravenshaw University Act, 2005 which deals with appointment of Vice Chancellor. Secondly, aforesaid decision is also distinguishable on the ground that the letter dated 11.01.2011 of the Government of Odisha, Higher Education on which much emphasis has been laid has not been referred to in the said decision. Thirdly, the Hon'ble Court in the aforesaid decision has been pleased to hold that the UGC Act and Regulations/guidelines are binding on Ravenshaw University so far as appointment of teachers and allied matters are concerned. Since the post of Vice Chancellor is not a teaching post as per the Section 8 of the Ravenshaw University Act, 2005, the said decision on that score is not applicable to the case of the petitioners.

Here excepting the letter dated 11.01.2011 wherein Government has permitted Ravenshaw University to adopt the Orissa Universities First Statutes, 1990, no resolution of Executive Council exists for adoption of Orissa Universities First Statutes, 1990. Further there is nothing to show on record that letter dated 11.01.2011 of the department of Higher Education to Ravenshaw University has been assented by the Hon'ble Chancellor. Only if Orissa Universities First Statutes, 1990 applies, then U.G.C. Regulations would apply since as discussed earlier Orissa Universities First Statutes 1990 has not yet been adopted by Ravenshaw University. Therefore the attack by the petitioners with regard to violation of Orissa Universities First Statutes 1990 and UGC Regulations cannot be accepted. Issue No.(ii) is answered accordingly.

Issue No.(iii) :

Since Orissa Universities First Statutes 1990 and UGC Regulations are not attracted to the facts of these cases, this Court is not inclined to go

into the said issue. In view of the discussions made above, all these writ applications fail.

Before saying omega, this Court would like to observe that as discussed earlier there exists a vacuum as no Statute has been framed pursuant to the Ravenshaw University Act 2005, for last more than 15 years nor the First Statute of the University has been adopted by the Ravenshaw University. Therefore, it would be advisable and desirable that the State Government ought to frame a Statute in pursuance of the Ravenshaw University Act. 2005 within a period of four months and the process of future selection of Vice Chancellor be made as per Ravenshaw University Act, 2005 and the said Statute. Accordingly, all the writ petitions stand disposed of.

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2021 (I) ILR - CUT- 664

K.R. MOHAPATRA, J.

CMP NO. 135 OF 2021

BIRAT CHANDRA DAGARA .....Petitioner

.V.

ODISHA MANGANESE & MINERALS LTD., BHUBANESWAR. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XXI Rule 32(3) & (4) – Attachment – Computation of period of six months – Whether such attachment shall be computed from the date of order or from the date of actual/physical attachment? – Held, computing the period of attachment from the date of the order will not serve the purpose and object of the provisions made therein, which necessarily infers that computation of six months should be from the date of attachment and not from the order of attachment.

Case Laws Relied on and Referred to :-

1. AIR 1983 Punjab & Haryana 174, para-4 : Bagicha Singh .Vs. Suba Singh & Ors.
2. 1995 AIHC 2155 : Nadhaniyel Samuel & Ors. .Vs. Madhavan Ponnachan & Anr.
3. (2021) 2 SCC 317 : Sagufa Ahmed & Ors. .Vs. Uper Assam Plywood Products Pvt. Ltd. & Ors.

For Petitioner : M/s. Banshidhar Baug, M.R. Baug, R.R. Baug, G.R. Sahoo, R.R. Jethi,A. Choudhry & D. Tripathy.

For Opp. Parties : Mr. S. P. Mishra, Sr. Adv., M/s. P.K. Dash & A.K.Kanungo.

JUDGMENT Date of Judgment : 30.03.2021

K.R. MOHAPATRA, J.

The Petitioner in this CMP calls in question the order dated 5th March, 2021 (Annexure-13) passed by learned District Judge, Mayurbhanj at Baripada in Execution Case No. 1 of 2019, whereby he directed the properties under Schedules 'A' and 'B' kept under attachment to be sold to execute the decree. He further appointed learned Civil Judge (Senior Division), Rairangpur to conduct the sale by putting the attached property in public auction in accordance with law.

2. The averments made in the CMP reveal that the Petitioner (for short 'J.Dr.') is the lessee in respect of Suleipat Iron Ore Mine situated in village Hatisikly under Badampahad Tahasil in the District of Mayurbhanj. In order to set up a steel plant, he executed a Joint Venture Agreement (JVA) with the Opposite Party (for short 'D.Hr.') on 12th April, 2010. On the very same day, a raising contract was also executed between the J.Dr. and D.Hr. permitting later to raise iron ores from the mine as per the terms and conditions stated therein. As per Clause-4.5 of the JVA under Annexure-1, the J.Dr. also executed a registered Power of Attorney in favour of D.Hr. on 12th April, 2010. As the D.Hr. did not set up the steel plant at Rairangpur as agreed upon by the parties, a dispute arose between the J.Dr. and D.Hr. Consequently, the D.Hr. moved this Court in ARBP No. 14 of 2015 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of an Arbitrator. By order dated 7th April, 2016, Hon'ble Justice B.P. Das (Retd.) was appointed as the sole Arbitrator by Hon'ble Chief Justice of this Court. The said order was assailed in SLP (C) Nos.13599, 13803 and 13824 of 2016 before the Hon'ble Supreme Court. While confirming the order for appointment of an Arbitrator, Hon'ble Supreme Court appointed Hon'ble Justice Bikramjit Sen (Retd.) as the sole Arbitrator in place of Justice B.P. Das (Retd.). However, a settlement was arrived at between the parties in the arbitration proceeding and both the parties filed terms of settlement before the Hon'ble Arbitrator on 13th June, 2017. Accordingly, vide order dated 20th January, 2018, Hon'ble Arbitrator disposed of the arbitration proceeding in terms of the said compromise/settlement by passing a Consent Award (Annexure-3). Alleging

non-compliance of the terms of settlement, the D.Hr. initiated execution proceeding before learned District Judge, Mayurbhanj at Baripada with a prayer to direct the D.Hr. to perform his part of the obligation under the Consent Award dated 20th January, 2018 and for attachment of 'A' and 'B' schedule properties of the execution petition and also for detention of the J.Dr. in civil prison, which was registered as Execution Case No.1 of 2019. On 7th February, 2019, learned executing Court passed an order restraining the J.Dr. from operating the mine in any manner. However, on the application of the J.Dr., learned executing Court vide its order dated 2nd April, 2019 recalled the restraint order dated 7th February, 2019 subject to deposit of Rs.5.00 crores by the J.Dr. The D.Hr. being dissatisfied with the order dated 2nd April, 2019 filed W.P.(C) No. 7445 of 2019 before this Court. The J.Dr. also filed W.P.(C) No.7537 of 2019 assailing the said order dated 2nd April, 2019 directing him to deposit Rs.5.00 crores. This Court upon hearing learned counsel for the parties set aside the order dated 2nd April, 2019 passed by learned executing court and restored the order dated 7th February, 2019. Assailing the same, the J.Dr. preferred SLP (C) No. 16647 of 2019 before the Hon'ble Supreme Court, which was dismissed vide order dated 2nd August, 2019.

3. Thereafter, the J.Dr. filed an application before the executing court in the tune of a petition under Section 47 C.P.C. questioning the executability of the Consent Award and jurisdiction of learned executing Court to entertain such an application. By order dated 13th September, 2019, learned executing Court held that the Consent Award is executable and the execution proceeding is maintainable in view of the provisions of Section 36 of the Act read with Order XXI Rule 32 C.P.C. The J.Dr. assailing the said order filed CMP No. 1062 of 2019, which was dismissed vide order dated 7th January, 2020 and a direction was issued to complete the execution proceeding within a period of six weeks. The J.Dr. being dissatisfied with the said order preferred SLP(C) No. 892 of 2020 before the Hon'ble Supreme Court, which was dismissed vide order dated 20th January, 2020. Accordingly, learned executing Court attached 'B' schedule properties vide order dated 24th January, 2020 and physical attachment of 'B' schedule properties was completed on 19th March, 2020. Likewise, 'A' schedule properties was attached on 21st July, 2020 and its physical attachment was completed on 31st July, 2020. Assailing the said attachment of Schedule 'A' property, part of which is the mine, the J.Dr. preferred W.P.(C) No.17649 of 2020, which is pending for adjudication. By order dated 28th July, 2020, this Court passed an interim order to the effect that

the order of attachment of 'A' schedule properties dated 21st July, 2020 shall be subject to the result of the said writ petition. While the matter stood thus, the D.Hr. filed an application on 2nd February, 2021 for sale of attached 'A' and 'B' schedule properties (Annexure-11). Likewise, the J.Dr. also filed an application on 2nd February, 2021 (Annexure-9) for lifting the attachment of 'A' schedule properties on the ground that statutory period of six months had already expired. The J.Dr. also filed an objection to the application under Annexure-11 stating that he had performed his part of the obligation as per the Consent Award and thus, has satisfied the decree. A specific stand has been taken by the J.Dr. to the effect that since six months has already expired from the date of attachment of the schedule properties, no petition for sale will be maintainable. Learned District Judge (executing Court) considering the rival contentions of the parties held the petition for sale of schedule properties to be maintainable and passed the impugned order. Hence, this CMP has been filed assailing the said order under Annexure-13.

4. Mr. Baug, learned counsel for the Petitioner submitted that the J.Dr. has performed his part of the obligation as per the terms of the Consent Award passed by Hon'ble Arbitrator. Thus, he has satisfied the decree. Referring to the provisions of sub-rules (3) and (4) of Order XXI Rule 32 C.P.C., Mr. Baug, learned counsel submitted that as no application for sale of attached properties was filed before expiry of six months, the attachment ceases and application for sale of attached properties is not maintainable. It is his submission that the order of attachment of 'B' schedule properties was passed on 24th January, 2020 and physical attachment was completed on 19th March, 2020. As such, the statutory period of six months expired on 18th September, 2020. Similarly, by order dated 21st July, 2020, 'A' schedule properties were attached and physical attachment of 'A' schedule properties was completed on 31st July, 2020. As such, the statutory period of attachment of 'A' schedule properties expired on 31st January, 2021 (not 1st February, 2021 as observed by learned executing Court). Thus, an application for sale of attached property filed only on 2nd February, 2021 is not maintainable, as no application for sale of attached property was pending at the end of six months from the date of attachment. In support of his case, he relied upon the case law of ***Bagicha Singh –v- Suba Singh and others***, reported in AIR 1983 Punjab & Haryana 174, para-4 of which reads as follows:

> *"4. Once attachment was effected on 4th July, 1979, under sub-rule (1), the point which now falls for determination would be--when would it cease to operate and what would*

be its consequence?..... It is clear that all through the execution proceedings remained pending and the decree-holder was wanting compliance of the decree by the judgment-debtors, which was not complied with and instead the judgment-debtors resorted to the remedy of revision in this Court and then appeal to the Supreme Court, in which he obtained stay. After they failed in the Supreme Court on 14th April, 1980 in getting the entire order of the executing Court set aside, they had opportunity to comply with the decree and their non-compliance till 15th May, 1980 clearly gave a cause to the decree-holder to move the executing Court for further proceedings with the execution in accordance with law in view of the Supreme Court order. On these facts 'further proceedings in accordance with law' meant that opportunity may be granted to the judgment-debtor through Court to once again comply with the decree and if they failed to do so then to proceed with the matter in accordance with law, namely by selling the attached property and/or by directing the decree-holders to recover possession by issue of warrants or by appointing a local commissioner to get the possession of the land in dispute restored to the decree-holder. The executing Court issued notice of the executing to the judgment-debtors who instead of complying with the decree in spite of the dictum of the highest Court, filed objection on 18th August, 1980 to the effect that the attached properties could not be sold as he six months' period had elapsed. This further shows the willful disobedience of the decree in the sense that they did not want to comply with the same in spite failing up to the highest Court. As I have found above only 5 months and 13 days ha done by when the decree-holder moved the executing Court to further proceed with the executing in accordance with law in view of the Supreme Court order. Therefore, it cannot be said either that the six months' period had elapsed or that the decree-holder took no steps to have the attached property sold o to have further steps in getting compliance of his decree. Accordingly, I hold that the Executing Court clearly fell in error in coming to the conclusion that when the decree-holder moved application for execution on 15th May, 1980, the six months' period had elapsed. The period during which the order of the Executing Court remained suspended because of the stay order granted by the Supreme Court, that period has to be excluded in accounting six months' period under Section 15(1) of the Limitation Act. Therefore, it is clear that the judgment-debtors (decree-holder?) moved well within six months and since by the end of six months the judgment-debtors had not obeyed the decree, there was no other option with the Executing Court but to order the sale of the attached properties. In view of the above, I hold that the attachment continued till 15th May, 1980, when the decree-holder moved an application for proceeding further with the execution and after setting aside the order of the Court below, order that the attached property of the judgment-debtors be put to sale and from the sale proceeds to pay compensation to the decree-holder equal to the mesne profits which could accrue from the land in dispute from July, 1974 up to the date the possession of the land in dispute is restored to the decree-holder besides costs of the execution proceedings through-out." (emphasis supplied)

5. He further relied upon the case law in the case of ***Nadhaniyel Samuel and others -v- Madhavan Ponnachan and another,*** reported in 1995 AIHC 2155.

"3. xxx xxx xxx

> *The above provisions would indicate that award of compensation is in the discretion of the court where there had been an attachment of the property of the judgment debtor and the decree holder applied for sale of the same during the period the attachment remained in force viz. six months. Where there was no attachment and sale under sub-rule (3), award of compensation even as a measure of damages seems to be impermissible. In other words, outside the provisions of Order XXI Rule 32(1) and (3), award of compensation for the loss sustained by the decree holder at the hands of the violator of the decree would be illegal. The procedural requirements of the above rules will have to be satisfied to sustain the award of compensation. It is clear that the court below had failed to abide by the said provisions and granted the request made on behalf of the decree holder, who rested his claim on the report of the commissioner. The impugned order is clearly in excess of the jurisdiction of the court below, is illegal and is hence set aside. The matter is directed to be disposed of afresh in the light of the above observations and in accordance with law, after giving the parties opportunity to sustain their respective contentions". (emphasis supplied)*

He, therefore, submitted that the impugned order for sale under Annexure-11 is not sustainable and prays for setting aside the same.

6. Mr. Mishra, learned Senior Advocate appearing on behalf of D.Hr. refuting the submission of Mr. Baug, learned counsel for J.Dr. submitted that neither the J.Dr. obeyed the order of injunction dated 7th February, 2019 nor he obeyed the order dated 13th September, 2019 even if granted ample opportunity for which learned executing Court vide its order dated 21st July, 2020 attached the leasehold interest in 'A' schedule properties in terms of Order XXI Rule 32 (1) C.P.C. The order of attachment can only come to an end after satisfaction of the decree. As the J.Dr. failed to satisfy the decree at the end of six months, the D.Hr. filed an application for sale of attached property. The J.Dr. instead of complying with the direction, as aforesaid, also filed an application under Order XXI Rule 32(4) read with Section 151 C.P.C for de-attachment of the schedule properties. The application filed by the D.Hr. for sale of attached properties vide Annexure-11 was well within the time in view of the order dated 8th March, 2021 passed by the Hon'ble Supreme Court in the case of ***Cognizance for Extension of Limitation***, reported in ***MANU/SC/0158/2021,*** in which it is held as follows:

> *"1. This Court has taken suo motu cognizance of the situation arising out of the challenge faced by the counter on account of COVID-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/ applications/ suits/ appeal/all other proceedings within the period of limitation prescribed under the general law of limitation or under special laws (both Central and/or State).*
>
> *2. To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective courts/tribunals across the*

counter including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended w.e.f. 15.3.2020 till further order(s) to be passed by this Court in present proceedings.

3. We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all courts/tribunals and authorities.

4. This order may be brought to the notice of all High Courts for being communicated to all subordinate courts/tribunals within their respective jurisdiction.

5. Issue notice to all the Registrars General of the High Courts returnable in four weeks."

7. Hence, he submitted that the D.Hr. is entitled to exclusion of period from 15th March, 2020 till 14th March, 2021 for filing of application for sale under Annexure-11. It is his submission that despite rejection of all his objections, the J.Dr. has adopted every ploy not to perform his part of obligation under the Consent Arbitral Award by filing frivolous applications in order to kill time and thereby making all efforts to frustrate the Consent Arbitral Award itself, which has become a decree of the Civil Court. The decree for specific performance of contract has not been obeyed by the J.Dr. even though ample opportunity was afforded to him by learned executing Court. It is his submission that as per the Consent Arbitral Award, all agreements have been revived and the D.Hr. has the exclusive right to act as a raising contractor and should have been allowed by the J.Dr. to work. On the contrary, the J.Dr. had commenced mining operation and despatched substantial quantity of iron ores from schedule 'A' mining for which learned executing Court was constrained to attach the leasehold interest and existing stock of the iron ore. In spite of the order of attachment, the J.Dr. has not made any attempt to comply with the order passed by learned executing Court for implementation of the Consent Arbitral Award. Sub-rule (5) of Rule 32 of Order XXI C.P.C. makes it abundantly clear that the Court is empowered to direct that the act required to be done may be done so far as practicable by the D.Hr. or some other person appointed by the Court, at the cost of J.Dr. and upon the act being done, the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree. The said power can be exercised by learned executing Court in lieu of or in addition to the procedure laid down under Order XXI Rules 32(1) to (4) C.P.C. where the J.Dr. fails to obey the

decree for specific performance of contract or for an injunction. Thus, it is a fit case where learned executing Court can also take assistance of sub-rule (5) of Rule 32 of Order XXI C.P.C. for execution of the decree.

8. It is his submission that learned executing Court passed the impugned order for sale of the minerals extracted from Schedule 'A' properties as well as 'B' schedule properties which were under attachment in exercise of power conferred under sub-rule (3) read with sub-rule (5) of Rule 32 of Order XXI C.P.C. so as to compel the J.Dr. to perform his part of the contract for implementation of the Consent Arbitral Award.

9. In support of his case, Mr. Mishra, learned Senior Advocate relied upon paragraphs-5 and 6 of **Bagicha Singh** (supra), which are as follows;

> **"***5. The facts of the case are so vocal that it is a fit case in which sub-rule (5) should also be resorted to. After the judgment-debtors failed in the Supreme Court in avoiding execution of the decree by any mode other than the detention in civil prison, they should have moved the executing Court for surrendering possession to it for being restored to the decree-holder. Instead of doing so, they filed objections to avoid/delay the execution of the decree which again has taken over two years since the Supreme Court decision. Therefore, I am of the view that the mere sale of the attached property of the judgment-debtors and payment of compensation in lieu of mesne profits, would not meet the ends of justice, until possession of the land in dispute is also restored to the decree-holder.*
>
> *6. Courts do not grant decrees either for the fun of it or for being violated in the manner it has been violated in this case. Violation has continued for almost for about eight years by now, because the decree-holder was dispossessed in July, 1974. Sub-rule (5) clearly provides for this eventuality. Accordingly, I am of the opinion that the executing Court should appoint in an Advocate as Local commissioner for taking over possession of the land in dispute and for delivering the same to the decree-holder. The expenses and costs of the same shall also be borne by the judgment-debtors. If these expenses are not paid by the judgment-debtors in Court, then the same would also be recoverable from the sale proceeds of the attached property, as it they were also included in the decree."*

10. He, therefore, submitted that learned executing Court can't be a mute spectator to the Consent Arbitral Award being violated and disrespected. The impugned order is reasoned one and has been passed following due procedure of law. As such, the same needs no interference and prayed for dismissal of the CMP.

11. Mr. Baug, learned counsel for the J.Dr in response to submission of Mr. Mishra, learned Senior Advocate also advanced his argument on the

applicability of the direction in ***Cognizance for Extension of Limitation case*** (supra). It is his submission that D.Hr. is not entitled to the benefit of extension of limitation granted in ***Cognizance for Extension of Limitation case*** (supra). Law of limitation find its root in two Latin Maxims; one of which is *Vigilantibus et non dormientibus jura subveniunt,* which means the law will assist only those who are vigilant about their rights and not those who sleep over the same. The D.Hr. all throughout during the period of Pandemic of COVID-19, even when the restrictions were imposed, participated in the proceeding along with the J.Dr. In the Petition filed by the D.Hr. under Order XXI Rule 32 (4)CPC, the Opposite Party had never taken a stand that due to restriction imposed due to Pandemic of COVID-19, he could not file the Petition for sale within the statutory period. The schedules 'A and 'B' properties were attached on the application made by the D.Hr. and it pressed hard for attachment of the property before learned executing Court. Once the property was attached by the Court, the period of six months automatically starts to run. Thus, on expiry of the period of six months, the attachment automatically ceases if any of the pre-conditions of sub-rule (4) Rule 32 Order XXI CPC is satisfied. The order of attachment was never suspended by any competent Court of law. Thus, the period of attachment automatically comes to an end (cease) on expiry of the period of six months from the date of attachment and the petition for sale of the attached property filed beyond the period of six months is not maintainable. In support of his case, he relied upon the case of ***Sagufa Ahmed and others –v- Uper Assam Plywood Products Private Limited and others***, reported in (2021) 2 SCC 317, in which the Hon'ble Supreme Court has elaborated the meaning of the period of limitation prescribed under the General Law of Limitation or under Special law (both Central and/or State). Para-16 onwards of the said case law is relevant for the purpose of our discussion, which are reproduced hereunder:-

> "*16. To get over their failure to file an appeal on or before 18.03.2020, the appellants rely upon the order of this Court dated 23.03.2020 in Cognizance for Extension of Limitation, In re*[3]*. I reads as follows: (SCC paras 1-5).....*
>
> *17. But we do not think that the appellants can take refuge under the above order in cognizance for Extension of Limitation, In re. What was extended by the above order of this Court was only "the period of limitation" and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The above order passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless*

> *to point out that the law of limitation finds its root in two Latin maxims, one of which is vigilantibus et non dormientibus jura subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over them." (emphasis supplied)*

12. In view of the above, he submitted that Court can extend or enlarge time, when it has power to do so. Since the Court exercising power under sub-rule (4) of Rule 32 of Order XXI C.P.C. has no power to enlarge the period provided therein, the benefit of ***Cognizance for Extension of Limitation case*** (supra) cannot be extended to J.Dr.

13. Mr. Mishra, learned Senior Advocate, of course, refuted the same and submitted that the provisions made by the Hon'ble Supreme Court at para -2 of the said decision has a universal application and the same is squarely applicable to the case of the D.Hr.

14. Heard learned counsel for the parties at length and scrutinized the materials placed before this Court along with the case law.

15. Rule 32 Order XXI C.P.C. provides the procedures to be followed by the executing Court while executing the decree for specific performance, for restitution of conjugal right or for injunction. Sub-rule (1) of Rule 32 provides that where a party against whom a decree, as aforesaid, has been passed and he having an opportunity of obeying the same has willfully failed to obey, such decree can be enforced by attachment of the property or by detention of the J.Dr. in the civil prison or by both. Sub-rule (2) is not relevant for the purpose of our discussion in this case. Sub-rules (3) and (4) are relevant for our discussion, which are reproduced hereunder:

> *"(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.*
>
> *(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property-sold has been made, or if made has been refused, the attachment shall cease."*

16. A careful reading of sub-rule (3) makes it clear that where any attachment has remained in force for six months and the decree as aforesaid

has not been obeyed by the J.Dr., the property so attached may be sold, provided any application for sale of such property has been made by the decree holder. It further provides that the Court may award compensation as it thinks fit to the decree holder from the sale proceeds of the said property and the balance, if any, to be returned to the J.Dr. on his application. Sub-rule (4) of the said Rule provides that at the end of six months from the date of attachment, if the J.Dr. has obeyed the decree and paid all costs of executing the same, which he is bound to pay or where no application to have the property sold has been made or if made, has been refused, the attachment shall cease. The language and tenor of sub-rule (4) makes it clear that the attachment will cease on expiry of the period of six months on any of the eventualities as follows:

(i) the J.Dr. has obeyed the decree and paid all costs of executing the same which is bound to pay; or

(ii) where no application for sale of the property so attached, has been made within the said period of six months; or,

(iii) If such an application is made, the same has been refused.

17. In the case of ***Bagicha Singh*** **(*supra*)**, the Full Bench of Punjab and Haryana High Court on discussion of the facts held that since five months and thirteen days had passed when the decree holder moved the executing Court for sale, it cannot be said either that six months period had already elapsed or that the decree holder took no step to have the attached property sold within six months. In the case of ***Nadhaniyel Samuel and others (supra),*** the Kerala High Court in clear terms held that the award of compensation under sub-rule (4) is in the discretion of the Court where there has been an attachment of the property of the J.Dr. and the D.Hr. applied for sale of the same during the period the attachment remained in force, i.e., six months. From the discussion made above as well as the case law (supra) there remains no iota of doubt that an application for sale of the attached property has to be made by the D.Hr. during the period the attachment remained in force. The sub-rules (3) and (4) make it abundantly clear that an order of attachment made under sub-rule (1) can remain in force for a maximum period of six months, provided the same is not varied by a higher Court or any of the eventualities under sub-rule (4), as aforesaid, has taken place. In the case at hand, neither the order of attachment has been varied by any competent Court of law nor any of the eventualities of sub-rule (4), as aforesaid, has taken place. Thus, it will remain valid for a maximum period of six months and not beyond that.

18. However, a question arose with regard to computation of the period of six months of attachment. From the language employed in sub-rules (3) and (4), it can be safely inferred that the 'attachment' remains in force for a maximum period of six months. In fact, the attachment seldom takes place on the date the order of attachment is passed. It may take some time for physical attachment of the property in question by the executing Court depending upon the circumstances. Thus, computing the period of attachment from the date of the order will not serve the purpose and object of the provisions made therein, which necessarily infers that computation of six months should be from the date of attachment and not from the date of order of attachment.

19. In the instant case, the physical attachment of 'B' schedule properties was made on 19th March, 2020 and that of 'A' schedule properties was made on 31st July, 2020. Thus, the application for sale of 'B' schedule properties by the D.Hr. ought to have been made within six months from the respective dates of physical attachment. Admittedly, the petition for sale of 'A' and 'B' schedule properties was made on 2nd February, 2021, which is beyond the period of six months from the dates of attachment of both 'A' and 'B' schedule a property.

20. Mr. Mishra, learned Senior Advocate for the Opposite Party relying upon the provisions made in Cognizance *of Extension of Limitation, In-re* (supra) submitted that the period of limitation for any suit, appeal, application or proceeding stands extended by the aforesaid order irrespective of the fact that the period of limitation had expired during 15th March, 2020 to 14th March, 2021. Wherever the limitation expired during the period between 15th March, 2020 till 14th March, 2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15th March, 2021 to lodge any suit, appeal, application or proceeding or any longer period, if the balance period of limitation remaining beyond 15.03.2021 is more than 90 days. Thus, the limitation for filing of petition under Sub-rule (4) (Annexure-11) has not yet expired and petition under Annexure-11 is well within the time. However, the direction for sale made by learned executing Court shall remain suspended for the aforesaid period of 90 days, subject to compliance of the part of obligation by the J.Dr. The case law in ***Sagufa Ahmed and others (supra)*** has no application to the case at hand as the subject matter of dispute was under the provisions of the Companies Act, 2013 and the context in which the law has been laid down is also different.

21. This Court is not in a position to fathom the argument advanced by Mr. Mishra, learned, Senior Advocate in view of the fact that by filing an application for sale under Annexure-11 under sub-rule (4), the D.Hr. has set the process of attachment in motion. Considering the rival contentions of the parties, learned executing Court passed an order of attachment in respect of 'B' schedule properties on 24th January, 2020 and that of schedule 'A' properties was passed on 21st July, 2020. The physical attachment of 'B' schedule properties was made on 19th March, 2020 and that of 'A' schedule properties was made on 31st July, 2020. Assailing the order of attachment dated 21st July, 2020, the J.Dr. preferred W.P.(C) No. 16749 of 2020, which is pending before this Court for adjudication. However, an interim order was passed by this Court to the effect that the attachment made shall be subject to the result of the writ petition. Thus, the attachment of both 'A' and 'B' schedule properties was never kept in abeyance by any competent Court of law. Once the attachment has been made, it will automatically come to an end after six months unless it is varied/suspended or any of the eventualities of sub-rule (4) has taken place. No eventualities, as aforesaid, having taken place in the meantime, the order of attachment will automatically come to an end (cease) on expiry of the period of six months from the date of attachment. The order passed in *Cognizance of Extension of Limitation, In-re (*supra) has been passed keeping the difficulties that might have been faced by the litigants across the country in filing the applications/suits/appeals/all other proceedings within the period of limitation prescribed under the General Law of Limitation or any Special Laws (both Central and State) due to pandemic of COVID-19 or due to restrictions imposed for the same. In the case at hand, none of the parties appears to have faced any difficulty in moving the learned executing Court in asserting their rights. In fact, both the parties have contested the case diligently either appearing through virtual mode or physically. Further, on a close reading of the petition for sale under Annexure-11, it appears that pandemic of COVID-19 was not, at all, a constraint on the D.Hr. to file the petition under Annexure-11. In fact, the D.Hr. had filed the petition under Annexure-11 on 2nd February, 2021 on the plea that in spite of the order of attachment, the J.Dr. failed to perform his part of obligation as per the Consent Arbitral Award within six months. There is also no whisper in the petition under Annexure-11 to the effect that due to pandemic of COVID-19, filing of the petition under Annexure-11 was delayed. Thus, when neither the pandemic of COVID-19 nor restrictions imposed during 15th March, 2020 to 14th March, 2021 had in any way prevented the D.Hr. from filing the petition under Annexure-11 within six

months from the date of attachment of schedule 'A' and 'B' properties, the benefit of *Cognizance of Extension of Limitation, In-re* (supra) is not applicable to its case. Further, as held in ***Sagufa Ahmed and others (supra)***, when the D.Hr. himself was not vigilant about its right and slept over the same, he is not entitled to any extension of time to file the petition under Annexure-11, in view of principle '*Vigilantibus et non dormientibus jura subveniunt,* more so when he had not prayed for extension of time before learned executing Court to file the petition and contested the said petition in spite of specific objection of J.Dr. to the effect that the petition is barred by time.

22. Mr. Mishra, learned Senior Advocate also raised a plea that learned executing Court has ample jurisdiction under sub-rule (5) of Rule 32 of Order XXI CPC to get the Consent Arbitral Award executed, which can be exercised either in lieu of or in addition to the procedure laid down under sub-rules (1) to (4). Thus, in any case, the impugned order should not be interfered with. In the case at hand, neither any prayer was made by the D.Hr. to exercise power under sub-rule (5) before learned executing Court nor learned executing Court has exercised the power thereunder to pass the impugned order. Thus, it will not be proper to make any observation on the same.

23. Learned District Judge, thus, has committed an error of law in holding that sub-rule (4) does not envisage that the petition for sale should be filed before expiry of the period of six months from the date of attachment. By misreading the provisions under sub-rule (3), learned District Judge held that the occasion to file a petition for sale would arise where the properties have remained in force for a period of six months and J.Dr. has not obeyed the decree.

24. In view of the discussions made above, such an observation is contrary to law and is not sustainable. Accordingly, the direction to sell the materials available in schedule 'A' properties as well as schedule 'B' properties by public auction is held to be not sustainable in the eyes of law and order under Annexure-13 to that effect is set aside. Resultantly, the CMP is allowed to the aforesaid extent. But, in the circumstances, there shall be no order as to cost.

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2021 (I) ILR - CUT- 678

B.P.ROUTRAY, J.

CRLMC NO. 759 OF 2020

SUSIL KUMAR PATTNAIK …….Petitioner

.V.

STATE OF ODISHA (VIGILANCE) ……..Opp. party

CRIMINAL TRIAL – Sanction – Offence under section 13(2) r/w sections 13(1)(c)(d) of P.C Act along with sections 409/471/120-B of IPC – Sanction U/s.19 of the P.C Act was refused by the competent authority however no sanction U/s.197 of IPC was sought for – Question raised that, whether the proceeding against the petitioner is vitiated in view of the above? – Held, the proceeding under P.C Act is vitiated against the petitioner but not in the case of offences under Penal code. Hence the petition is partly allowed.

Case Laws Relied on and Referred to :-

1. (2010) 14 SCC 527 : State of Himachal .Vs. Nishant Sareen.
2. (2015) 14 SCC 186 : Nanjappa .Vs. State of Karnataka.
3. (2013) 10 SCC 705 : Anil Kumar & Ors. .Vs. M.K.Aiyappa.
4. AIR 2007 SC 1274 : Prakash Singh Badal and Anr. .Vs. State of Punjab & Ors.
5. (2015) 1 SCC 513 : Rajib Ranjan & Ors..Vs. R.Vijaykumar.
6. (2006) 13 SCC 252 : P.K.Pradhan .Vs. State of Sikkim State, CBI Vs. Sashi Balasubramanian & Anr.

For Petitioner : Mr.Gautam Mishra, Sr.Adv.
For Opp. Party : Mr.Niranjan Moharana, A.S.C .(Vigilance)

JUDGMENT Date of Hearing :27.11.2020 : Date of Judgment:25.01.2021

B.P.ROUTRAY, J.

The petitioner has challenged the order dated 13.01.2020 of the learned Special Judge, Vigilance, Berhampur passed in G.R.No.28 of 2013(V), wherein his prayer for discharge from the offences under Section 13(2) read with Section 13(1)(c)(d) of the Prevention of Corruption Act (in short "P.C.Act") and Sections 409/471/120-B of the Indian Penal Code (in short "I.P.C.") has been rejected.

2. It is the case of the petitioner that he is presently working as A.B.D.O. of Dharakote Block in the district of Ganjam. He was remained Incharge Executive Officer of Chikiti N.A.C. from 1.3.2008 to 6.8.2009. It is alleged that during the said period of his incumbency in Chikiti N.A.C., he, by

committing irregularity in tender process issued the work order to a nonexistent farm run by the co-accused-Priyabrata Biswal to procure the Cesspool Emptier resulting wrongful loss to the public fund and unlawful pecuniary advantage to the accused persons. Concerning manipulation of tender papers and use of forged document in the transaction, the chargesheet was filed by Vigilance Police in Berhampur Vigilance P.S.Case No.28 dated 30.9.2013 for the aforestated offences. Consequently cognizance for the offences was taken on 29.11.2016 and subsequently the charge was framed in the impugned order by refusing his prayer for discharge.

3. It is submitted that, the Director of P.R. Department, Government of Odisha, who is the sanctioning authority, has declined to issue sanction of prosecution against the petitioner and despite such refusal of sanction, the learned court below has committed illegality in taking cognizance of the offences against the petitioner as well as refusing his prayer for discharge.

It is argued on behalf of the petitioner that sanction of prosecution in respect of a public servant is the mandate of law for his prosecution of the penal offences either under the P.C. Act or under the I.P.C. When the prayer for sanction by the prosecuting agency has been refused by the competent authority, the court cannot take cognizance of the offences as barred under Section 19 of the P.C. Act as well as 197 of the Cr.P.C. It is also submitted that since the public servant is protected through sanction from facing the prosecution, in absence of such approval from the competent authority, the proceeding is vitiated against him. Accordingly, the petitioner prays for his protection.

4. The petitioner in support of his contention has relied on the decisions of the Hon'ble Supreme Court in the case of ***State of Himachal vs. Nishant Sareen, reported in (2010) 14 SCC 527, Nanjappa vs. State of Karnataka, reported in (2015) 14 SCC 186 and Anil Kumar and others vs. M.K.Aiyappa, reported in (2013) 10 SCC 705.***

5. On the contrary, it is submitted by the learned counsel for the Vigilance that admittedly the sanction sought for under Section 19 of the P.C.Act against the petitioner has been refused by the competent authority. But the sanction for prosecution of the petitioner for the offences under the I.P.C. is not at all required and as such was never sought for. Learned counsel further submits that since the offences under the I.P.C. have been alleged in

addition to the offences under the P.C.Act, the order taking cognizance and consequent prosecution against the petitioner is never vitiated as the law has been settled in catena of decisions that no sanction is required for prosecution of the public servant in such matters where he has misutilised his official position to commit the offences as the same is not a part of his official duty. To support of his contention, he mainly relies on the ratio decided in the case of ***Prakash Singh Badal and another vs. State of Punjab and others, reported in AIR 2007 SC 1274*** and additionally in other cases *Viz.* ***Rajib Ranjan and others vs. R.Vijaykumar, reported in (2015) 1 SCC 513, P.K.Pradhan vs. State of Sikkim*** represented by the Central Bureau of Investigation, reported in ***(2001) 6 SCC 704*** *and* ***State, CBI vs. Sashi Balasubramanian and another, reported in (2006) 13 SCC 252.***

6. On the backdrop of those submissions and counter submissions, the admitted facts as seen from the record are that, the petitioner was working as In-charge Executive Officer of Chikiti N.A.C. from 1.3.2008 to 6.8.2009. It is also not disputed that the petitioner has issued Order No.887 dated 12.6.2009 directing to supply the machine. It is also admitted that the competent authority i.e., the Director of P.R. Department, Government of Odisha has declined sanction of prosecution against the petitioner for the offences under the P.C.Act. So far as the offences under the I.P.C. are concerned, it is admitted on behalf of the Vigilance that no sanction was sought for those offences against the petitioner. Thus, what is derived from the submissions that, the sanction for prosecution has been refused in respect of the offences under the P.C.Act and no sanction is there in respect of the offences under the I.P.C.

7. It reveals that, the case of the prosecution relating to sanction is segregated in two folds, one under Section 19 of the P.C.Act and the other under Section 197 of the Cr.P.C. Coming to examine on the point of sanction in respect of the offences under the P.C.Act, it is mentioned in the chargsheet dated 3.10.2016 that, the Director, P.R. Department, Government of Odisha has declined to issue sanction of prosecution against the accused, Susil Kumar Patnaik (petitioner), ex-E.O., Chikiti N.A.C. under Section 19(1) of the P.C. Act to prosecute under Sections 7, 10, 11, 13 and 15 of the P.C. Act. Therefore when the sanction has been clearly refused by the competent authority for prosecution against the petitioner, the order taking cognizance of the offences under the P.C.Act against the petitioner by the learned Addl. Sessions Judge (Vigilance) does not seem appropriate. Because Section 19 is

clear that no cognizance can be taken for any offence under the P.C.Act against a public servant without required sanction. The present one is a case of refusal of sanction and not a case of mere absence of sanction. There is difference between a case where sanction has been refused and a case where there is no sanction. When the sanction has been refused by the competent authority in clear words, it means that the employer in his discretion has shielded his employee from prosecution and it is to be remembered here that Section 19 is the statutory power in the hands of the sanctioning authority with the object to ensure that a public servant does not suffer harassment on false, frivolous or unsubstantiated allegations. Therefore when the competent authority has refused to grant sanction for prosecution, the petitioner has got immune in his favour from prosecution and in such cases of refusal of sanction, the prosecution against the public servant is certainly vitiated.

8. It is true that the petitioner has not questioned the order taking cognizance but has challenged refusal of his prayer for discharge and the question of framing the charge. But this will not preclude him raising the question at the stage of framing charge. It cannot be said that the accused is prohibited from exercising his right of discharge for the reason he has not questioned the order of cognizance. Therefore the accused has every right to question the framing of charge against him and for the same he need not necessarily challenge the order of cognizance.

9. Now coming to the question of sanction in respect of the offences under the I.P.C., it is the admitted case of the Vigilance that no sanction has been sought for by the prosecution against the public servants as the same is not required under Section 197 of the Cr.P.C. Here, the decisions of the Hon'ble Supreme Court in the case of Prakash Singh Badal (supra), Rajib Ranjan (supra) and P.K.Pradhan (supra) have been strenuously relied on by the Vigilance Department.

In the case of Prakash Singh Badal (supra), it has been observed as follows:

> "35. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable

cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. This aspect makes it clear that the concept of Section 197 does not immediately get attracted on institution of the complaint case.

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43. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.

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54. Great emphasis has been led on certain decisions of this Court to show that even in relation to the offences punishable under Sections 467 and 468 sanction is necessary. The foundation of the position has reference to some offences in *Rakesh Kumar Mishra* case. That decision has no relevance because ultimately this Court has held that the absence of search warrant was intricately *(sic linked)* with the making of search and the allegations about alleged offences had their matrix on the absence of search warrant and other circumstances had a determinative role in the issue. A decision is an authority for what it actually decides. Reference to a particular sentence in the context of the factual scenario cannot be read out of context.

55. The offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120B can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or

purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of the offence.

In the case of Rajib Ranjan (supra), it has been observed as follows:

"15. The sanction, however, is necessary if the offence alleged against public servant is committed by him "while acting or purporting to act in the discharge of his official duties". In order to find out as to whether the alleged offence is committed while acting or purporting to act in the discharge of his official duty, following yardstick is provided by this Court in *Dr. BudhikotaSubbarao* in the following words:

"6. ……..If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed."

16. This principle was explained in some more detail in the case of *Raghunath Anant Govilkar v. State of Maharashtra,* which was decided by this Court on 8-2-2008 in SLP (Crl.) No.5453 of 2007, in the following manner: (SCC pp.298-99, para 11)

"11. '7….. "66……..On the question of the applicability of Section 197 of the Code of Criminal Procedure, the principle laid down in two cases, namely, *Shreekantiah Ramayya Munipalli v. State of Bombay and Amrik Singh v. State of Pepsu* was as follows: (Amrik Singh case, AIR p.312, para 8)

> '8…….It is not every offence committed by a public servant that requires sanction for prosecution under Section 197 (1) of Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.

The real question therefore, is whether the acts complained of in the present case were directly concerned with the official duties of the three public servants. As far as the offence of criminal conspiracy punishable under Sections 120-B read with Section 409 of the Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act, are concerned they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar."

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The ratio of the aforesaid cases, which is clearly discernible, is that even while discharging his official duties, if a public servant enters into a criminal conspiracy

or indulges in criminal misconduct, such misdemeanor on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted. In fact, the High Court has dismissed the petitions filed by the appellant precisely with these observations, namely, the allegations pertain to fabricating the false records which cannot be treated as part of the appellants' normal official duties. The High Court has, thus, correctly spelt out the proposition of law. The only question is as to whether on the facts of the present case, the same has been correctly applied."

In the case of P.K.Pradhan (supra), it has been held as follows:

"5. The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with the previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from office save by or with the sanction of the Government touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point for determination is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of situation.

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15. Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction

> under Section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused, that the act that he did was in course of the performance of his duty was reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

10. It is the contention of the petitioner that the aforesaid decisions relied on by the Vigilance Department are not applicable to the present facts of the case as they are distinguishable for the reason that in none of such cases the grant of sanction under the P.C. Act was refused by the competent authority.

11. It needs to be stated here that in the case of Prakash Singh Badal(supra) where the offences alleged were both under the P.C. Act and I.P.C., the sanction was granted under the P.C.Act and sanction was absent in respect of the I.P.C. offences. In the case of Rajib Ranjan (supra), no offence under the P.C.Act was alleged and all the offences alleged well under the I.P.C. In the case of P.K.Pradhan(supra), the offences were under both the I.P.C. and P.C.Act, but no sanction was granted or refused since both the public servant accused persons have seized to continue as such public servants at the time of taking cognizance.

12. Thus, the petitioner is found true in his contention that in such decisions as cited by the Vigilance, grant of sanction was not declined. Even though the afore cited cases are found some how different in the factual context with the present case, still the petitioner cannot stand on his leg to discard the observations of the Hon'ble Supreme Court made in those decisions to distinguish those cases completely non- applicable in the facts of present case. The Hon'ble Supreme Court have decided the principles of law on requirement of sanction under Section 197 of the Cr.P.C. Law is well settled that no question of sanction can arise under Section 197 unless the act complained of is an offence, which was committed in the discharge of official duty. It is further clear from the afore-stated observations of the Hon'ble Supreme Court that there must be a reasonable connection between the act and the official duty where the official act either have been performed in the discharge of official duty or in dereliction of it. It is also settled that in order

to determine whether the act committed in course of the performance of duty was a reasonable one or pretended or fanciful and the best time of examining the same is the course of trial.

13. On the backdrop of the above stated principle, the time has again come to turn to the factual aspect of the present case. As seen from the contentions of the chargsheet, the petitioner issued quotation call notice for purchase of two emptier and other machinery and three farms have submitted their quotations, which were opened on 12.6.2009. Amongst those three farms, except the farm selected, two other farms were non-existent and the farm for which the order was placed to the co-accused Priyabrata Biswal, its registration certificate was cancelled with effect from 21.12.2011 and it has submitted a fake manipulated sales tax clearance certificate. The machine (cesspool emptier) was procured by the accused Priyabrata Biswal in pursuance to the order placed by the petitioner at a low price through another registered farm belonging to him and the higher rate was paid to the co-accused. Thus upon a close examination of such factual aspects in commission of the offences including forgery and criminal conspiracy, it is found such a complicated issue which is required to be appreciated in course of trial. So at this stage, it would not be appropriated to opine that the alleged offences under the P.C.Act and the I.P.C. are interrelated and insegregable. Therefore, the refusal for discharge and framing of charge for the offences under the I.P.C. against the petitioner cannot be discarded at this stage.

14. In the result, the prayer of the petitioner is partly allowed where he is directed to be discharged from the offences under the P.C.Act only. It is needless here to hold that the prosecution against the petitioner for the alleged offences under the I.P.C. is not impeded and in respect of the same, the prayer of the petitioner is rejected. With the aforesaid observation, the CRLMC is disposed of.

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S.K. PANIGRAHI, J.

BLAPL NO. 4592 OF 2020

SUBHRANSHU ROUT @ GUGUL ……Petitioner

.V.

STATE OF ODISHA ……Opp. Party

CONSTITUTION OF INDIA, 1950 – Article 21 read with the provisions of Personal Data Protection Bill, 2019 – Right to privacy and the Right to be forgotten which refers to the ability of an individual to limit, delink, delete, or correct the disclosure of the personal information on the internet that is misleading, embarrassing, or irrelevant etc. as a statutory right – Application for bail in alleged offences under Sections 376, 292, 465, 469, 509 of IPC read with Sections 66, 66(C), 67, 67(A) of the I.T. Act, 2000 – It appears that the petitioner has uploaded the said photos/videos on a social media platform i.e. Facebook – Presently, there is no statue which recognizes right to be forgotten but it is in sync with the right to privacy, which was hailed by the Apex Court as an integral part of Article 21 (right to life) – Effect in such a situation when there is no express law on the subject of right to be forgotten – The court observes as follows:

"While examining the pages of the case records, prima facie, it appears that the petitioner has uploaded the said photos/videos on a social media platform i.e. Facebook and with the intervention of the police, after some days, he deleted the said objectionable contents from the Facebook. In fact, the information in the public domain is like toothpaste, once it is out of the tube one can't get it back in and once the information is in the public domain it will never go away. Under the Indian Criminal Justice system a strong penal action is prescribed against the accused for such heinous crime but there is no mechanism available with respect to the right of the victim to get the objectionable photographs deleted 5 from the server of the Facebook. The different types of harassment, threats and assaults that frighten citizens in regard to their online presence pose serious concerns for citizens. There is an unprecedented escalation of such insensitive behavior on the social media platforms and the victim like the present one could not get those photos deleted permanently from server of such social media platforms like facebook. Though the statute prescribes penal action for the accused for such crimes, the rights of the victim, especially, her right to privacy which is intricately linked to her right to get deleted in so far as those objectionable photos have been left unresolved. There is a widespread and seemingly consensual convergence towards an adoption and enshrinement of the right to get deleted or forgotten but hardly any effort has been undertaken in India till recently, towards adoption of such a right, despite such an issue has inexorably posed in the technology dominated world. Presently, there is no statute in India which provides for the right to be forgotten/getting the photos erased from the server of the social media platforms permanently. The legal possibilities of being forgotten on line or off line cries for a widespread debate. 6 It is also an undeniable fact that the implementation of right to be forgotten is a thorny issue in terms of practicality and technological nuances. In fact, it cries for a clear cut demarcation of institutional boundaries and redressal of many delicate issues which hitherto remain unaddressed in Indian jurisdiction. The dynamics of hyper connectivity- the abundance, pervasiveness and accessibility of communication network have redefined the

memory and the prescriptive mandate to include in the technological contours is of pressing importance."

"However, this Court is of the view that Indian Criminal Justice system is more of a sentence oriented system with little emphasis on the disgorgement of victim's loss and suffering, although the impact of crime on the victim may vary significantly for person(s) and case(s)-- for some the impact of crime is short and intense, for others the impact is long-lasting. Regardless, many victims find the criminal justice system complex, confusing and intimidating. Many do not know where to turn for help. As in the instant case, the rights of the victim to get those uploaded photos/videos erased from Facebook server still remain unaddressed for want of appropriate legislation. However, allowing such objectionable photos and videos to 21 remain on a social media platform, without the consent of a woman, is a direct affront on a woman's modesty and, more importantly, her right to privacy. In such cases, either the victim herself or the prosecution may, if so advised, seek appropriate orders to protect the victim's fundamental right to privacy, by seeking appropriate orders to have such offensive posts erased from the public platform, irrespective of the ongoing criminal process."

Case Laws Relied on and Referred to :-

1. [2018] EWHC 799 (QB) : NT1 and NT2 Vs. Google LLC
2. *C-131/12*[2014] QB 1022 : Google Spain SL & another Vs. Agencia Espanola de Protection de Datos (AEPD) and another
3. Case C-507/17 : Google LLC Vs. CNIL
4. (1998) 8 SCC 296 : Mr 'X' Vs. Hospital 'Z'
5. 2017 SCC OnLine Kar 424 : Vasunathan Vs. The Registrar General, High Court of Karnataka
6. 2019(175) DRJ 660 : Zulfiqar Ahman Khan Vs. Quintillion Business Media Pvt. Ltd. and Ors
7. Writ Petition (Civil) Nos.36554-36555/2017decided on 4th January, 2018 : {Name Redacted} Vs. The Registrar General
8. MANU/GJ/0029/2017 : Dharamraj Bhanushankar Dave Vs. State of Gujarat & Ors.

For the Petitioner : Shri Bibhuti Bhusan Behera & S. Bahadur.

For the Opp. Party: Shri Manoj Kumar Mohanty, Addl. Standing Counsel

JUDGMENT Date of Hearing: 20.10.2020 : Date of Judgment: 23.11.2020

S.K. PANIGRAHI, J.

1. The present application is preferred under Section 439 of the Criminal Procedure Code, 1973 in connection with G.R. Case No.171 of 2020 arising out of Rasol P.S. Case No.62 of 2020, pending in the Court of learned SDJM, Hindol registered for the commission of offences punishable under Sections 376, 292, 465, 469, 509 of IPC read with Sections 66, 66(C), 67, 67(A) of the I.T. Act, 2000.

2. The factual conspectus as set forth in the F.I.R. is that on 03.05.2020 one Rupali Amanta, D/o. Raghunath Amanta of Village-Giridharprasad, P.S. Rasol, District-Dhenkanal alleged that for a period of about one year, she had been in love with the petitioner. Both the petitioner as well as the accused were village mates and classmates. On the day of last Kartika Puja, the petitioner went to the house of the informant and taking advantage of the fact that she was alone he committed rape on the informant and recorded the gruesome episode in his mobile phone. When the informant warned petitioner that she would apprise her parents of the brutal incident and its serious undertones, the petitioner threatened to kill her as well as to make viral the said photos/videos. Further, she has alleged that since 10.11.2019, the petitioner had maintained physical intimacy with the informant. Upon the informant narrating the incident to her parents, the petitioner opened a fake Facebook ID in the name of the informant and uploaded all the objectionable photos using the said ID in order to further traumatize her. Though the informant disclosed the said fact to the IIC, Rasol P.S.by way of a written complaint on 27.04.2020, the Police has failed to take any step on the said complaint and thereby portrayed unsoundness of the police system. After much difficulty, finally, the informant could get the present FIR lodged.

3. Learned counsel for the petitioner submits that both the victim and accused are adults and hence they know the best what is right or wrong. He submits that the petitioner is an ITI Diploma holder who is in search of a job and hence his detention will spoil his career. He further stated that the petitioner is interested to marry the victim girl unconditionally.

4. Per contra, learned counsel for the State submits that the petitioner had not only forcibly committed sexual intercourse with the victim girl, but he had also deviously recorded the intimate sojourn and uploaded the same on a fake Facebook account created by the Petitioner in the name of the victim girl. The allegation is very serious since there is specific allegation of forced sexual intercourse by the accused/ petitioner against the will of the victim. Statement recorded under Section 161 of Cr. P.C. of the victim girl also clearly divulges the fact that the petitioner has been threatening and blackmailing her stating that if she discloses these facts to anybody, he would eliminate her and also make her intimate scenes viral on the social media. He further submits that the investigation of the case has not yet been completed. The entire allegation in the FIR as well as the statement recorded under Section 161 of Cr.P.C read with other materials available on records are a pointer to the fact that the crime committed by the petitioner are serious in nature. The victim has been at the receiving end of an unabated mental torture due to the blackmailing tactics used by the petitioner.

5. While examining the pages of the case records, prima facie, it appears that the petitioner has uploaded the said photos/videos on a social media platform i.e. Facebook and with the intervention of the police, after some days, he deleted the said objectionable contents from the Facebook. In fact, the information in the public domain is like toothpaste, once it is out of the tube one can't get it back in and once the information is in the public domain it will never go away. Under the Indian Criminal Justice system a strong penal action is prescribed against the accused for such heinous crime but there is no mechanism available with respect to the right of the victim to get the objectionable photographs deleted from the server of the Facebook. The different types of harassment, threats and assaults that frighten citizens in regard to their online presence pose serious concerns for citizens. There is an unprecedented escalation of such insensitive behavior on the social media platforms and the victim like the present one could not get those photos deleted permanently from server of such social media platforms like facebook. Though the statute prescribes penal action for the accused for such crimes, the rights of the victim, especially, her right to privacy which is intricately linked to her right to get deleted in so far as those objectionable photos have been left unresolved. There is a widespread and seemingly consensual convergence towards an adoption and enshrinement of the right to get deleted or forgotten but hardly any effort has been undertaken in India till recently, towards adoption of such a right, despite such an issue has inexorably posed in the technology dominated world. Presently, there is no statute in India which provides for the right to be forgotten/getting the photos erased from the server of the social media platforms permanently. The legal possibilities of being forgotten on line or off line cries for a widespread debate. It is also an undeniable fact that the implementation of right to be forgotten is a thorny issue in terms of practicality and technological nuances. In fact, it cries for a clear cut demarcation of institutional boundaries and redressal of many delicate issues which hitherto remain unaddressed in Indian jurisdiction. The dynamics of hyper connectivity- the abundance, pervasiveness and accessibility of communication network have redefined the memory and the prescriptive mandate to include in the technological contours is of pressing importance.

6. However, this instant issue has attracted sufficient attention overseas in the European Union leading to framing of General Data Protection Regulation (GDPR) which governs the manner in which personal data can be collected, processed and erased. The aspect of right to be forgotten appears in Recitals 65 and 66 and in Article-17 of the GDPR[1],which vests in the victim a right to erasure of such material after due diligence by the controller expeditiously. In addition to this, Article 5 of the GDPR requires data controllers to take every

reasonable step to ensure that data which is inaccurate is "erased or rectified without delay". Every single time, it cannot be expected that the victim shall approach the court to get the inaccurate data or information erased which is within the control of data controllers such as Facebook or Twitter or any other social media platforms.

7. A similar issue was raised in England in the Wales High Courts in **NT1 and NT2 Vs. Google LLC**[2] which ordered Google to delist search results referring to the spent conviction of a businessman known as NT2 but rejected a similar request made by a second businessman, NT1. The claimants therein had been convicted of certain criminal offences many years ago who complained that search results returned by Google featured links to third-party reports about the convictions in the past which were either inaccurate and/or old, irrelevant and of no public interest or otherwise an illegitimate interference with their rights. The reliefs sought in those cases were based on the prevailing data protection laws and English Law principles affording protection in case of tortuous misuse of private information. The Court rejected NT1's request based on the fact that he was a public figure with a role in public life and thus the crime and its punishment could not be considered of a private nature. In contrast, the Court upheld NT2's delisting claim with the reasoning that his crime did not involve dishonesty. His punishment had been based on a plea of guilt, and information about the crime and its punishment had become out of date, irrelevant and of no sufficient legitimate interest to users of Google to justify its continued availability.[3]

8. In the case of ***Google Spain SL & another v. Agencia Espanola de Protection de Datos (AEPD) and another***[4] the European Court of Justice ruled that the European citizens have a right to request that commercial search engines, such as Google, that gather personal information for profit should remove links to private information when asked, provided the information is no longer relevant. The Court in that case ruled that the fundamental right to privacy is greater than the economic interest of the commercial firm and, in some circumstances; the same would even override the public interest in access to information. The European Court in the aforesaid case had affirmed the judgment of the Spanish Data Protection Agency (SPDA)in a case which concerned a proceeding relating to bankruptcy which

1. The data subject shall have the right to obtain from the controller regarding the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay.

2. [2018] EWHC 799 (QB), **3**. Para 223 of Judgment , **4**. *C-131/12*[2014] QB 1022

had ordered removal of material from the offending website by recognizing a qualified right to be forgotten and held that an individual was entitled to have Google de-list information of which he complained.

9. Recently, the European Court of Justice, in ***Google LLC vs. CNIL***[5] ruled that *"currently there is no obligation under EU law, for a search engine operator to carry out such a de-referencing on all the versions of its search engine."* The Court also said that the search operator must "take sufficiently effective measures" to prevent searches for differenced information from within the EU. The court specifically held as under:

> "69. That regulatory framework thus provides the national supervisory authorities with the instruments and mechanisms necessary to reconcile a data subject's rights to privacy and the protection of personal data with the interest of the whole public throughout the Member States in accessing the information in question and, accordingly, to be able to adopt, where appropriate, a de-referencing decision which covers all searches conducted from the territory of the Union on the basis of that data subject's name.
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> 70. In addition, it is for the search engine operator to take, if necessary, sufficiently effective measures to ensure the effective protection of the data subject's fundamental rights. Those measures must themselves meet all the legal requirements and have the effect of preventing or, at the very least, seriously discouraging internet users in the Member States from gaining access to the links in question using a search conducted on the basis of that data subject's name (see, by analogy, judgments of 27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, paragraph 62, and of 15 September 2016, McFadden, C-484/14, EU:C:2016:689, paragraph 96).
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> 71. It is for the referring court to ascertain whether, also having regard to the recent changes made to its search engine as set out in paragraph 42 above, the measures adopted or proposed by Google meet those requirements.
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> 72. Lastly, it should be emphasized that, while, as noted in paragraph 64 above, EU law does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit such a practice. Accordingly, a supervisory or judicial authority of a Member State remains competent to weigh up, in the light of national standards of protection of fundamental rights (see, to that effect, judgments of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 29, and of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paragraph 60), a data subject's right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine.
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> 73. In the light of all of the foregoing, the answer to the questions referred is that, on a proper construction of Article 12(b) and subparagraph (a) of the first paragraph of

5. Case C-507/17

> Article 14 of Directive 95/46 and Article 17(1) of Regulation 2016/679, where a search engine operator grants a request for dereferencing pursuant to those provisions, that operator is not required to carry out that dereferencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request."

10. Presently, there is no statue which recognizes right to be forgotten but it is in sync with the right to privacy, which was hailed by the Apex Court as an integral part of Article 21 (right to life) in ***K.S. Puttaswamy (Privacy-9J.).***[6] However, the Ministry of Law and Justice, on recommendations of Justice B.N. Srikrishna Committee, has included the ***Right to be forgotten*** *which refers to the ability of an individual to limit, delink, delete, or correct the disclosure of the personal information on the internet that is misleading, embarrassing, or irrelevant etc.* as a statutory right in Personal Data Protection Bill, 2019. The Supreme Court in K.S. Puttaswamy (Privacy- 9J.)has held right to be let alone as part of essential nature of privacy of an individual. The relevant paras of the judgment are as under:

> *"XXXXX*
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> *R. Essential nature of privacy*
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> 297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual.
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> The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each

6. (2017) 10 SCC 1

individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

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402. "Privacy" is "[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions" [Black's Law Dictionary (Bryan Garner Edition) 3783 (2004)] . The right to be in this condition has been described as "the right to be let alone" [Samuel D. Warren and Louis D. Brandeis, "The Right To Privacy", 4 Harv L Rev 193 (1890)] . What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.

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479. Both the learned Attorney General and Shri Sundaram next argued that the right to privacy is so vague and amorphous a concept that it cannot be held to be a fundamental right. This again need not detain us. Mere absence of a definition which would encompass the many contours of the right to privacy need not deter us from recognising privacy interests when we see them. As this judgment will presently show, these interests are broadly classified into interests pertaining to the physical realm and interests pertaining to the mind. As case law, both in the US and India show, this concept has travelled far from the mere right to be let alone to recognition of a large number of privacy interests, which apart from privacy of one's home and protection from unreasonable searches and seizures have been extended to protecting an individual's interests in making vital personal choices such as the right to abort a foetus; rights of same sex couples—including the right to marry; rights as to procreation, contraception, general family relationships, childbearing, education, data protection, etc. This argument again need not detain us any further and is rejected.

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560. The most popular meaning of "right to privacy" is—"the right to be let alone". In Gobind v. State of M.P. [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] , K.K. Mathew, J. noticed multiple facets of this right (paras 21-25) and then gave a rule of caution while examining the contours of such right on case-to-case basis.

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636. Thus, the European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural

> persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] has recognised what has been termed as "the right to be forgotten". This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognise a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy."
>
> The Hon'ble Apex court while considering the issue of a conflict between the right to privacy of one person and the right to a healthy life of another person has held that, in such situations, the right that would advance public interest would take precedence."
>
> (emphasis supplied)

11. The Hon'ble Supreme Court of India in the case of **Mr 'X' v. Hospital 'Z'**[7] has recognized an individual's right to privacy as a facet Article 21 of the Constitution of India. It was also pertinently held that the right which would advance the public morality or public interest would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the halls known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day."

12. The Ld. Single Judge of High Court of Karnataka in the case of **Vasunathan v. The Registrar General, High Court of Karnataka**[8] has acknowledged the right to be forgotten, keeping in line with the trend in the Western countries where it is followed as a matter of rule. The High Court of Delhi in its recent judgment in **Zulfiqar Ahman Khan vs. Quintillion Business Media Pvt. Ltd. and Ors**[9] has also recognized the "right to be forgotten" and 'Right to be left alone' as an integral to part of individual's existence. The Karnataka High Court in **{Name Redacted} vs. The Registrar General**[10] recognized "Right to be forgotten" explicitly, though in a limited sense. The petitioner's request to remove his daughter's name from a judgment involving claims of marriage and forgery was upheld by the Court. It held that recognizing right to be forgotten would parallel initiatives by 'western countries' which uphold this right when 'sensitive' cases concerning the 'modesty' or

7. (1998) 8 SCC 296

'reputation' of people, especially women, were involved. However, the High Court of Gujarat in **Dharamraj Bhanushankar Dave v/s State of Gujarat & Ors.**,[11] in a case involving the interpretation of the rules of the High Court has taken a contrary and narrow approach.

13. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, India's first legal framework recognized the need to protect the privacy of personal data, but it failed to capture the issue of the "Right to be forgotten". The Hon'ble Supreme Court of India in the case of **K.S. Puttaswamy v. Union of India (supra)** held that purpose limitation is integral for executive projects involving data collection – unless prior permission is provided, third parties cannot be provided access to personal data.12This principle is embodied in S.5 of the yetto- be-implemented Personal Data Protection Bill, 2019. Purpose Limitation enhances transparency in data processing and helps examine the proportionality of the mechanism used to collect data for a specific purpose. Moreover, it prevents the emergence of permanent data 'architectures' based on interlinking databases without consent. In the present case the proposition of purpose limitation is not applicable as the question of seeking consent does not arise at all. No person much less a woman would want to create and display gray shades of her character. In most of the cases, like the present one, the women are the victims. It is their right to enforce the right to be forgotten as a *right in rem.* Capturing the images and videos with consent of the woman cannot justify the misuse of such content once the relation between the victim and accused gets strained as it happened in the present case. If the right to be forgotten is not recognized in matters like the present one, any accused will surreptitiously outrage the modesty of the woman and misuse the same in the cyber space unhindered. Undoubtedly, such an act will be contrary to the larger interest of the protection of the woman against exploitation and blackmailing, as has happened in the present case. The sloganeering of "betibachao" and women safety concerns will be trampled.

14. Section 27 of the draft Personal Data Protection Bill, 2018 contains the right to be forgotten. Under Section 27, a data principal (an individual) has the right to prevent continuing disclosure of personal data by a data fiduciary. The aforesaid provision which falls under Chapter VI (Data Principal Rights) of the Bill, distinctly carves out the "right to be forgotten" in no uncertain terms. In terms of this provision, every data principal shall have the right to restrict or prevent continuing disclosure of personal data (relating to such data principal)

8. 2017 SCC OnLine Kar 424, **9.** 2019(175) DRJ 660, **10.** Writ Petition (Civil) Nos.36554-36555/2017decided on 4th January, 2018, **11.** [MANU/GJ/0029/2017], **12.** See Para 166 of K.S. Puttaswamy Judgment.

by any data fiduciary if such disclosure meets any one of the following three conditions, namely if the disclosure of personal data:

(i) has served the purpose for which it was made or is no longer necessary; or (ii) was made on the basis of the data principal's consent and such consent has since been withdrawn; or (iii) was made contrary to the provisions of the bill or any other law in force.

In addition to this, Section 10 of the Bill provides that a data fiduciary shall retain personal data only as long as may be reasonably necessary to satisfy the purpose for which it is processed. Further, it imposes an obligation on every data fiduciary to undertake periodic reviews in order to determine whether it is necessary to retain the personal data in its possession. If it is not necessary for personal data to be retained by a data fiduciary, then such personal data must be deleted in a manner as may be specified.

15. In the instant case, prima facie, it appears that the petitioner has not only committed forcible sexual intercourse with the victim girl, but has also deviously recorded the intimate sojourn and uploaded the same on a fake Facebook account. Statement recorded under Section 161 of Cr. P.C. of the victim girl is also clearly in sync with FIR version. Considering the heinousness of the crime, the petitioner does not deserve any consideration for bail at this stage. However, this Court is of the view that Indian Criminal Justice system is more of a sentence oriented system with little emphasis on the disgorgement of victim's loss and suffering, although the impact of crime on the victim may vary significantly for person(s) and case(s)-- for some the impact of crime is short and intense, for others the impact is long-lasting. Regardless, many victims find the criminal justice system complex, confusing and intimidating. Many do not know where to turn for help. As in the instant case, the rights of the victim to get those uploaded photos/videos erased from Facebook server still remain unaddressed for want of appropriate legislation. However, allowing such objectionable photos and videos to remain on a social media platform, without the consent of a woman, is a direct affront on a woman's modesty and, more importantly, her right to privacy. In such cases, either the victim herself or the prosecution may, if so advised, seek appropriate orders to protect the victim's fundamental right to privacy, by seeking appropriate orders to have such offensive posts erased from the public platform, irrespective of the ongoing criminal process.

16. In view of the foregoing discussion of the case, this Court is not inclined to enlarge the petitioner on bail. Hence, the present bail application stands dismissed.

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2021 (I) ILR - CUT- 698

SAVITRI RATHO, J.

MACA NO. 384 OF 2019

THE BRANCH MANAGER, M/S. UNITED INDIA INSURANCE COMPANY LTD. ..……Appellant

.V.

1. NILA PRADHAN
2. SIDHESWAR PRADHAN
3. RAJESH PRADHAN
4. JHARANA PRADHAN
5. BHASKAR PRADHAN
6. BILASINI PRADHAN
7. **NITIN KISHOREBHAI MAISERI** ……..Respondents

MACA NO.274 OF 2019

1. NILA PRADHAN
2. SIDHESWAR PRADHAN
3. RAJESH PRADHAN
4. JHARANA PRADHAN
5. BHASKAR PRADHAN
6. BILASINI PRADHAN ……Appellants

.V.

1. MR. NITIN KISHOREBHAI MAISERI
2. BRANCH MANAGER, M/S. UNITED INDIA INSURANCE COMPANY LTD. ……....Respondents

(A) MOTOR ACCIDENT CLAIM – Claim of compensation by the legal representatives which includes major married sons who are earning and not completely dependent on the deceased – Whether their claim can be considered? Held, Yes – It is no longer res integra that even major married sons will also be entitled to compensation as they will be covered under the term 'legal representative'.

(B) MOTOR ACCIDENT CLAIM – Grant of penal interest – Tribunal awarded interest at the rate of 6% per annum from the date of filing of the claim petition and further directed penal interest at the additional rate of 1% per annum if the amount is not paid within the stipulated time – Whether such grant of penal interest legal? – Held, No – As per section 171 of the M.V Act, 1988 the Tribunal may award simple interest on amount of compensation to be awarded on a particular rate and from a particular date, however, it does not provide for retrospective enhancement of the rate of interest in the case of default payment of compensation.

Case Laws Relied on and Referred to :-

1. (2020) 11 SCC 356 : National Insurance Company Ltd Vs. Birender & Ors.
2. (2007) 10 SCC 643 : Manjuri Bera vs. Oriental Insurance Ltd.
3. (2004) 2 SCC 370 : AIR 2004 SC 1581 : National Insurance Co. Ltd. Vs. Keshav Bahadur & Ors.
4. (2004) 3 SCC 297 : National Insurance Co. Ltd vs Swaran Singh.

For the Appellants : M/s. Bijoy Dasmohapatra & B.N. Bhol.
For the Respondents : M/s. B.N.Rath, A.K.Jena & B.Dash

ORDER Date of Order : 07.01.2021

SAVITRI RATHO, J.

These appeals were taken up through Video Conferencing Mode due to COVID-19 Pandemic.

I have heard Mr. Bijoy Dasmohapatra, learned counsel for the appellant-insurance Company and Mr B.N. Rath learned counsel for the respondents No 1 to 6 claimants in MACA No.384 of 2019. Mr. Rath is also the counsel for the appellants No. 1 to 6 -claimants in MACA No.274 of 2019. I have also heard Mr. S.K. Mohanty, learned counsel for the respondent No.2 United Insurance Company in MACA No 274 of 2019 .

MACA No.274 of 2019 has been preferred by the appellants-claimants and MACA No.384 of 2019 has been preferred by the Branch Manager, United India Insurance Company Ltd., Similipada. Both have challenged the judgment/award dated 08.03.2019 passed by the learned A.D.J.-cum-4th M.A.C.T., Angul in MAC Case No.194 of 2017 on different grounds.

The case of claimants is as follows:

On 18.10.2017 at about 2.30 P.M., while the deceased-Lalit Pradhan was coming from Sambalpur side to his villge on N.H.55 in a motorcycle on the extreme left side of the road, on the way near village Thirly the offending truck bearing registration No.MH-21-X-6799 came from Jujumara side in a rash and negligent manner at a high speed and dashed against Lalit Pradhan, as a result of which he sustained grievous injuries on his head and vital part of his body and died at the spot. The ill fated accident happened only due to gross negligence of the driver of the offending truck resulting in the death of the deceased Lalit Pradhan and the deceased had no contribution The accident occurred due to the sole negligence of the driver of the offending truck, which could have been easily avoided, if the driver of the offending truck would have taken slight care

as the road was quite wide and spacious .They have stated that the owner and insurer of the truck are jointly and severally liable to pay the compensation as they are joint tort feasors . They have claimed that the deceased was earning more than Rs 12,000/- per month and contributing major share of his income to his family . They claimed a sum of Rs 14,00,000/- alongwith interest of 14 % per annum from the date of filing the application towards pain , suffering , mental agony , loss of future income , loss of love and affection , loss of estate . loss of consortium and funeral expenses.

Mr. Bijoy Dasmohapatra, learned counsel for the appellant-Insurance company has submitted that the impugned judgment is liable for interference as the accused driver was not having a valid driving licence which is a breach of policy condition and hence the direction of the learned Tribunal to indemnify the owner is erroneous. He states that he has filed I.A no 733 of 2019 alongwith the copy of the driving licence of the accused driver Gajanan Jadhav which indicates that he was not authorized to drive the offending vehicle- truck on the date of occurrence.He further submits that the direction to pay the default (penal) interest) is illegal and should be set aside. He also submits that the compensation amount is on the higher side as only 1/4th instead of 1/3rd of the income has been deducted towards personal expenses even though the sons of the deceased were major.

Mr. S.K. Mohanty, learned counsel appearing for the respondent – insurance company in M.A.C.A No 274 of 2019 reiterates the contentions of Mr. Das Mohapatra learned counsel.

Mr. B.N. Rath, learned counsel for the claimants has submitted that the impugned judgment is liable for interference as the learned Tribunal has committed gross illegality in calculating the compensation by fixing the monthly income of the deceased at only Rs.5000/- when the oral evidence and pleadings clearly established that the deceased was earning Rs.12000/- per month from cultivation and vegetable business. Even otherwise as the accident took place in the year 2017, when a manual labourer was not getting less than Rs.300/- per day and the deceased was maintaining a family consisting of six members, the income is on the lower side .He further submits that at least 10% of the income should have been added towards loss of future prospects and Rs.70000/- should have been given towards loss of consortium, loss of estate and funeral expenses to the widow and Rs.40,000/- each should have been awarded for loss of parental consortium in favour of the children and filial consortium for the mother and unmarried sister. He finally submits that the compensation amount is liable to be increased to Rs. 10,31,244/- and rate of interest increased to 9 % per annum.

In the absence of any documentary evidence regarding the age of deceased, the learned Tribunal has relied on the charge sheet, inquest report and post mortem report to hold that the deceased was 52 years old and applied the multiplier of 11 relying on the judgment of the Apex Court rendered in ***Smt. Sarala Verma Vrs. Delhi Transport Corporation*** and calculated the earnings of the deceased to be Rs. 6,60,000/- (= 5000 x 12 x 11) (Rupees six lakhs and sixty thousand) only . From this amount , the amount of Rs. 1, 65,000 /- (=5000 x 12 x 1/4 x 11) has been deducted towards expenses of the deceased and loss of income has been fixed at Rs. 4,95,000/- (Rupees four lakhs and ninety five thousand only). In addition to this amount, the learned Tribunal has awarded Rs 10,000/- towards funeral expenses, Rs. 20,000/- towards loss of estate and amount of Rs.20,000/- towards loss of consortium. Hence, the total amount of compensation was calculated to be Rs.5,45,000/- (= 4,95,000 + 10,000 + 20,000 + 20,000). It has awarded interest at the rate of 6% per annum from the date of filing of the claim petition and penal interest at the additional rate of 1% per annum if the amount is not paid within two months from the date of order.

As no documentary evidence was produced by the claimants in support of their pleading that the deceased was earning more than Rs.12,000/- per month, the trial Court has taken the minimum monthly income of the deceased to be Rs.5000/-. Considering the minimum wages being paid during that time , Rs. 5000/- is not unreasonable and hence there is no reason is found to interfere with the said finding.

Considering the fact that the deceased had six dependents, the learned Tribunal has observed that the number of dependents is six which comes under the table of 4 to 6 dependents and deducted 1/4th of the total income of the deceased towards his personal expenses in place of 1/3rd . No fault can be found with this reasoning, even if some of the claimants (sons of the deceased) were major, as it is no longer res integra that even major married sons who are earning and not completely dependent on the deceased will also be entitled to compensation as they will be covered under the term “legal representative ” and it would be the bounden duty of the tribunal to consider their application for compensation and not to limit their claim to conventional heads only as decided by the Hon’ble Apex Court in the case of held by the decided in the case of ***National Insurance Company Ltd vs. Birender and others : (2020) 11 SCC 356***

In the case of ***National Insurance vs. Birender*** (supra), the Hon’ble Apex Court has referred to its decisions in the case of ***Pranay Sethi*** (supra) and ***Manjuri Bera vs. Oriental Insurance Ltd : (2007) 10 SCC 643*** and held as follows :

"…….12. The legal representatives of the deceased could move application for compensation by virtue of clause (c) of Section 166(1). The major married son who is also earning and not fully dependant on the deceased, would be still covered by the expression "legal representative" of the deceased. This Court in ***Manjuri Bera*** (supra) had expounded that liability to pay compensation under the Act does not cease because of absence of dependency of the concerned legal representative. Notably, the 7 expression "legal representative" has not been defined in the Act. In Manjuri Bera (Supra), the Court observed thus: (SCC 647-48 paras 9-12).

"9. In terms of clause (c) of sub-section (1) of Section 166 of the Act in case of death, all or any of the legal representatives of the deceased become entitled to compensation and any such legal representative can file a claim petition. The proviso to said sub-section makes the position clear that where all the legal representatives had not jointed, then application can be made on behalf of the legal representatives of the deceased by impleading those legal representatives as respondents. Therefore, the High Court was justified in its view that the appellant could maintain a claim petition in terms of Section 166 of the Act.

10. … The Tribunal has a duty to make an award, determine the amount of compensation which is just and proper and specify the person or persons to whom such compensation would be paid. The latter part relates to the entitlement of compensation by a person who claims for the same.

11. According to Section 2(11) CPC, "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or it sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Almost in similar terms is the definition of legal representative under the Arbitration and Conciliation Act, 1996 i.e. under Section 2(1)(g).

12. As observed by this Court in ***Custodian of Branches of BANCO National Ultramarino v. Nalini Bai Naique (1989 Supp. (2) SCC 275***) the definition contained in Section 2(11) CPC is inclusive in character and its scope is wide, it is not confined to legal heirs only. Instead it stipulates that a person who may or may not be legal heir competent to inherit the property of the deceased can represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". As observed in Gujarat SRTC v. Ramanbhai Prabhatbhai (1987) 3 SCC 234 a legal representative is one who suffers on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parent and child."

13. In paragraph 15 of ***Manjuri Bewa***,(supra) while adverting to the provisions of Section 140 of the Act, the Court observed that even if there is no loss of dependency, the claimant, if he was a legal representative, will be entitled to compensation. In the concurring judgment of Justice S.H. Kapadia, as his Lordship then was, it is observed that there is distinction between "right to apply for compensation" and "entitlement to compensation". The compensation constitutes part of the estate of the deceased. As a result, the legal representative of the deceased would inherit the estate. Indeed, in that

> case, the Court was dealing with the case of a married daughter of the deceased and the efficacy of Section 140 of the Act. Nevertheless, the principle underlying the exposition in this decision would clearly come to the aid of the Respondent Nos. 1 and 2 (claimants) even though they are major sons of the deceased and also earning.
>
> 14. It is thus settled by now that the legal representatives of the deceased have a right to apply for compensation. Having said that, it must necessarily follow that even the major married and earning sons of the deceased being legal representatives have a right to apply for compensation and it would be the bounden duty of the Tribunal to consider the application irrespective of the fact whether the concerned legal representative was fully dependant on the deceased and not to limit the claim towards conventional heads only. The evidence on record in the present case would suggest that the claimants were working as agricultural labourers on contract basis and were earning meager income between Rs.1,00,000/- and Rs.1,50,000/- per annum. In that sense, they were largely dependant on the earning of their mother and in fact, were staying with her, who met with an accident at the young age of 48 years"

The learned Tribunal has awarded of Rs. 10000/- towards funeral expenses and Rs.20000/- towards loss of estate and a further amount of Rs.20000/- towards the loss of consortium which is not unreasonable hence no enhancement is necessary as regards these amounts.

The learned Tribunal has awarded 6% interest from the date of filing of the writ petition which is not illegal. Hence the contentions of the learned counsel for the claimants that the compensation amount and rate of interest are liable to be increased and the contentions of the counsels for the Insurance Company that the amount of compensation is liable to be reduced are rejected.

I however find force in the contention of the counsels for the insurance Company that imposition of penal interest is illegal.

As per Section 171 of the Act, 1988, the Tribunal may award simple interest on amount of compensation to be awarded on a particular rate and from a particular date, however, it does not provide for retrospective enhancement in the rate of interest in the case of default in payment of compensation.

The Hon'ble Apex Court in ***National Insurance Co. Ltd. Vs. Keshav Bahadur & Ors : (2004) 2 SCC 370 : AIR 2004 SC 1581***, has held as under :

> …"13. Though Section 110-CC of the Act (corresponding to Section 171 of the New Act) confers a discretion on the Tribunal to award interest, the same is meant to be exercised in cases where the claimant can claim the same as a matter of right. In the above background, it is to be judged whether a stipulation for higher rate of interest in case of default can be imposed by the Tribunal. Once the discretion has been exercised by the Tribunal to award simple interest on the amount of compensation to be awarded at a particular rate and from a particular date, there is no scope for retrospective enhancement for default in payment of compensation. No express or implied power in this regard can be culled out from Section

> 110-CC of the Act or Section 171 of the new Act. Such a direction in the award for retrospective enhancement of interest for default in payment of the compensation together with interest payable thereon virtually amounts to imposition of penalty which is not statutorily envisaged and prescribed. It is, therefore, directed that the rate of interest as awarded by the High Court shall alone be applicable till payment, without the stipulation for higher rate of interest being enforced, in the manner directed by the Tribunal."

Hence the direction to pay penal interest being illegal is set aside.

The accident has taken place on 18.10.2017. A perusal of the Photostat copy of the extract of the driving licence annexed to I.A. No.733 of 2019 filed in MACA No.384 of 2019 reveals that Gajanan Jadhav S/o Tukaram Jadhav was authorized to drive transport vehicle from 16.01.2018 to 15.01.2021. If the document is to be accepted as correct , then it is apparent that the driver of the offending truck was not authorized to drive the truck which is a transport vehicle a transport on the date of occurrence and this amounts to violation of policy conditions.

In view of the decision of the Hon'ble Apex Court in ***National Insurance Co. Ltd vs Swaran Singh : (2004) 3 SCC 297***, the appellant- insurance company is given the liberty to proceed against the registered owner of the truck bearing No. NH-21-X-6799, in accordance with law, for recovery of the compensation amount.

MACA No 384 of 2019 is thus partly allowed and MACA No 274 of 2019 is dismissed.

The appellant-Insurance Company is directed to deposit the awarded compensation amount of Rs.5,45,000/- along with interest @ 6 % per annum from the date of application with the learned Tribunal within eight weeks hence. On the amount being deposited, the tribunal shall disburse the amount to the claimants proportionately.

The Insurance Company is given the liberty to recover the amount from the owner of the vehicle in accordance with law.

The amount deposited towards statutory amount deposited in the Registry of this Court in MACA No 384 of 2019 shall be refunded with accrued interest to the appellant-Insurance Company, on production of receipt showing deposit of the modified compensation amount and interest with the Tribunal.

The MACAs are accordingly disposed of.

As restrictions are continuing due to COVID-19 pandemic, learned counsels 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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