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ADVERSE POSSESSION – Claim thereof – Plaintiffs have claimed right, title and interest over the suit land as occupancy rayats all throughout on the basis of a lease deed – At no place they have accepted the Government to be the true owner of the suit land – They further claimed title by adverse possession on the plea that their possession is open and continuous for more than thirty years in the same suit – Claim of right over the suit land as occupancy rayat and the claim of title by adverse possession in the same suit – Distinction – Held, both are mutually destructive claims and not permissible under law and the edifice of claim of title by adverse possession cannot stand on the foundation of denying the title of the true owner.

Dasarath Sharma & Ors. -V- State of Odisha.
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Habil Sindhu -V- State of Odisha.
(Jail Criminal Appeal No. 132 of 2005)
2021 (I) ILR-Cut…… 767

Articles 226 and 227 – Writ petition – Petitioner No.1, a Company engaged in the business of manufacturing sponge iron, pellet and other steel products – Suspension of license and transit permit followed by show cause notice was issued upon noticing certain discrepancies in the figure in return forms filed as required under the Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules 2007 – Reply to show cause notice considered and suspension revoked, but on the basis of fresh observation' made by Reconstituted EAC in a letter which prima facie pointed to "irregularities committed by the various entities of the Rashmi Group of Companies and their promoters", no transit permit was issued – Writ petition challenging such action – Plea that the observations have been clarified in subsequent meeting and that on the basis of such observation the transit passes should not have been stopped – Plea considered and held, it must be noted that under Rule 9 of 2007 Rules, the competent authority can suspend or cancel the licence for breach of the terms and conditions of the license but this has to be a precedent by a show cause notice – In the present case, the earlier suspension of the licence which already stood revoked was subject only to the condition that Petitioner No.1 would rectify the discrepancies and undertake not to repeat such mistake in future – As regards the reasons given for suspension of the transit permits, Mr. Misra has rightly contended that the purported violation of any conditions regarding Environmental Clearance (EC) of any group entity of Petitioner No.1 cannot constitute a valid ground, in terms of Rule 9 of 2007 Rules, to proceed against Petitioner No.1 – There is also merit in the contention, based on the judgment of this Court in Rashmi Cement Ltd. v. State of Odisha (2012) 113 CLT 177, which in turn followed the judgment of the Supreme Court in Commissioner of Police v. Gordhan Das Bhanji, AIR 1952 SC 16 that a quasi-judicial authority vested with the power for cancellation of a license, could not have acted under the 'dictation' of another authority – Also the impugned action of suspension of the issuance of transit passes ought to have been preceded by an enquiry, that prima facie discloses wrong doing by Petitioner No.1 in the form of violation of the terms of the license – The suspension of a licence even before the inquiry reveals prima facie violation of the terms of the license would obviously be vulnerable to invalidation on the ground of it being arbitrary and irrational.

M/s. Orissa Metaliks Pvt. Ltd. & Anr. -V- State of Odisha & Ors.

(W. P. (C) NO. 8228 OF 2021)

Articles 226 and 227 – Writ petition – Permission for establishment of educational institution – Challenge is made to the order keeping in abeyance the decisions taken in the High Power Committee regarding grant of permission and recognition to self-financing courses run by different institutions, including the petitioner-institution, until further orders, as desired by the Minister, Higher Education of Orissa, and further directing that a committee under the Chairmanship of the Director, Higher Education, Orissa shall further inspect the proposals within a period of four months – Permission already granted under the provisions of Orissa Education Act – Plea that the action of the authority in keeping the decision in abeyance was without jurisdiction – Held, if the power has been vested with the particular authority, the same can only be exercised by the same authority and the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all.

Rudra Prasad Sarangi -V- State of Orissa & Ors.
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Articles 226 and 227 – Writ petition – Tender matter – Administrative decision – Judicial review – Scope of interference – Principles – Discussed.

Orissa Transformers Pvt. Ltd.-V- State of Odisha & Ors.
(W.P. (C) NO.1299 OF 2021 (With Batch of Cases)
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CODE OF CRIMINAL PROCEDURE, 1973 – Sections 370 and 392 – Provisions under – Accused persons charged for commission of offences under sections 148/323/447/302/354/149 of the Indian Penal Code – Conviction recorded only under sections 447 and 302 of the IPC in respect of two accused persons – Appeal – Heard by division bench – Difference in views – While one of the Hon'ble Judges was of the opinion that the Appellants have been rightly convicted by the Trial Court for commission of offence under section- 447 and 302 of the IPC; the other Hon'ble Judge expressed the difference of opinion in arriving at a conclusion that the Appellants are entitled to the benefit of doubt as to their complicity in the occurrence and thus not liable to be convicted for the offences – Matter placed before third

judge – Conviction based on the evidence of PWs 11, the son and 12, the wife of the deceased – Conjoint reading of evidence emits the smell that they have resorted to said course lest it may be adversely viewed and are not consistent as to the happenings right from the beginning till the accused persons are said to have left the place – Their evidence being read as a whole also gives rise to doubt as to the exact place of incident and the exact reason of said happening which in turn makes their version doubtful – Held, for these reasons, the approach of the Trial Court in accepting the evidence of P.W.11 and 12 in part while discarding the other part is not right and under the circumstances the course adopted by the Trial Court is impermissible – In the totality of the evidence let in by the prosecution and their critical analysis in the backdrop of the surrounding circumstances obtained in evidence, the Appellants were entitled to the benefit of doubt.

Kangress @ Kailash Lenka & Sarat Lenka -V- State of Orissa. (CRA No. 44 of 2000)

2021 (I) ILR-Cut…… 829

CRIMINAL TRIAL – Appreciation of evidence – Offence under section 302 of Indian Penal Code – Allegation of poisoning – Conviction based on circumstantial evidence – Principles to be followed for recording conviction in a case of poisoning – Indicated.

Pabitra Sahu -V- State of Orissa. (CRA NO.19 OF 2002)

2021 (I) ILR-Cut…… 760

CRIMINAL TRIAL – Offence of murder – Absence of motive – Effect of – Held, it has been held by the Hon'ble Apex Court that even if there is absence of motive, it would not benefit the accused when there is a reliable and acceptable version of the eyewitnesses, which is supported by the medical evidence. (Shamsher Singh v. State of Haryana (2002) 7 SCC 536 Followed)

Rohidas Kisku -V- State of Orissa. (CRLA NO. 33 OF 2004)

2021 (I) ILR-Cut…… 751

CRIMINAL TRIAL – Offences under the NDPS Act – Appreciation of evidence – Independent witnesses do not support the prosecution case – Corroboration by official witnesses – Whether conviction can be based on the evidence of official witnesses? – Held, if the

statements of the official witnesses relating to search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon to adjudicate the guilt of the accused – The court will have to appreciate the relevant evidence and determine whether the evidence of the police officer/excise officer is believable after taking due care and caution in evaluating their evidence.

Amresh Chandra Barik -V- State of Odisha.
(CRLA NO. 126 OF 2015)
2021 (I) ILR-Cut…… 890

CRIMINAL TRIAL – Offence of murder – Non-examination of any one witness during trial – Effect of – Held, cannot be termed as material irregularity.

Rohidas Kisku -V- State of Orissa. (CRLA NO. 33 OF 2004)
2021 (I) ILR-Cut…… 751

CRIMINAL TRIAL – Offence under the NDPS Act – Non-production of brass seal or facsimile seal impression or personal seal in court – Whether it vitiates the prosecution case? – Held, Yes. – Principles Discussed.

Amresh Chandra Barik -V- State of Odisha.
(CRLA NO. 126 OF 2015)
2021 (I) ILR-Cut…… 890

CRIMINAL TRIAL – Offences under sections 120-B, 468,470 of Penal code read with 13 (1) (d) of the Prevention of Corruption Act – Allegation of misappropriations of public money through false voucher without constructing the public road – The D.D.O (Executive Engineer) neither has been arrayed as a accused nor as a charge sheet witness – Accused pleaded that, the executive engineer being the D.D.O has cleared the bill and also the wok was verified after two years of its completion that means after the end of two rainy seasons – Pleas of the accused considered – Held, when the execution of work was properly done under the supervision of the executive engineer, who has not been arrayed as an accused and the payment of bills made by the Executive Engineer cannot be presumed that excess amount was paid for the disputed work – The question of conspiracy or preparations of false vouchers by the accused persons are based on surmise and conjectures – Conviction set aside.

Tapan Garnaik @ Tapan Kumar Garnaik -V- State of Orissa.
(CRLA NOS. 363, 389 & 390 OF 2018)
2021 (I) ILR-Cut…… 906

CRIMINAL TRIAL – Offence of murder – Single eye witness to the occurrence – Whether conviction can be based on such sole eye witness? – Held, Yes – Reasons – Discussed.

Rohidas Kisku -V- State of Orissa. (CRLA NO. 33 OF 2004)
2021 (I) ILR-Cut…… 751

CRIMINAL TRIAL – Offence under the NDPS Act – Seized contraband articles were not kept in Malkhana though the same were produced before the court in trial – Whether it vitiates the prosecution case? – Held, Yes.

Amresh Chandra Barik -V- State of Odisha.
(CRLA NO. 126 OF 2015)
2021 (I) ILR-Cut…… 890

CRIMINAL TRIAL – Offences under NDPS Act – Whether compliance of section 42 is always necessary? – Held, where search and recovery of contraband article was made from public place and that too during day time after receipt of reliable information, the compliance of section 42 is not necessary as it is coming under the provision of section 43 of the Act.

Amresh Chandra Barik -V- State of Odisha.
(CRLA NO. 126 OF 2015)
2021 (I) ILR-Cut…… 890

THE FACTORIES ACT, 1948 – Section 2(K) – Cooking & Preparation of food – Whether it is coming under the definition of manufacturing – Held, Yes.

Vice Chancellor, Rabindra Bharati Biswabidyalaya, Kolkata & Anr. -V- Jagannath Patra & Anr. (F.A.O. NO. 556 OF 2015)
2021 (I) ILR-Cut…… 858

LEGAL MAXIM–"Expressio Unius est exclusion alterius" – Meaning thereof – If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred.

Rudra Prasad Sarangi -V- State of Orissa & Ors. (W.P.(C) NO. 9193 OF 2008)
2021 (I) ILR-Cut…… 775

THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) read with Section 25 – Offence under – Punishment for allowing premises, etc., to be used for commission of an offence – Being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for commission of an offence – The word 'knowingly permits' – Effect and scope for punishment – Held, mere ownership of the vehicle in which transportation of contraband articles was found is by itself not an offence – The words 'knowingly permits' are significant – The expression 'knowingly' has to be given due weight – It is not enough if the evidence establishes that the person has reason to suspect or even to believe that a particular state of affairs existed – When these words are used, something more than suspicion or reason to believe is required – Thus, it is for the prosecution to establish that with the owner's or driver's knowledge, the vehicle was used for commission of an offence – It would be a travesty of justice to prosecute the owner or driver of a vehicle and to hold them guilty for the act committed by a passenger travelling in the vehicle who was found to be carrying contraband articles in his luggage without even any semblance of material that the vehicle was knowingly permitted to be used for the commission of the offence.

Sibaram Swain -V- State of Orissa. (CRLA NO. 580 OF 2013)
2021 (I) ILR-Cut…… 862

THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 35 – Culpable mental state – Definition – Ingredients required for establishing the mental link – Held, Section 43(b) of the N.D.P.S. Act states that any officer of any of the departments mentioned in section 42 of the said Act, can detain and search any person whom he has reason to believe to have committed an offence punishable under the said Act and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company – Merely because a person is arrested being in the company of another person against whom reasonable belief arises to have committed the offence

under the N.D.P.S. Act, that would not ipso facto prove his culpable mental state as required under section 35 of the N.D.P.S. Act particularly in view of the definition of the term 'culpable mental state' as appearing in the explanation to section 35(1) of the said Act.

Sibaram Swain -V- State of Orissa. (CRLA NO. 580 OF 2013)
2021 (I) ILR-Cut…… 862

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Proceedings under – Special Leave Petition in relation to a dispute which remained pending for the past 16 years – Concerned with large number of cases filed under Section 138 of the Act, 1881 pending at various levels, a Suo Motu Writ Petition (Criminal) captioned as "Expeditious Trial of Cases under Section 138 of N.I. Act 1881" was initiated – Matter was heard at length – Following directions were issued.

Suo Motu Writ Petition. (CRL.) NO.2 OF 2020)
2021 (I) ILR-Cut…… 705

ORISSA HIGH COURT PUBLIC INTEREST LITIGATION RULES, 2010 – Rule 8 – Provision under – Filing of PIL – PIL petitions are filed immediately after filing of representation without giving a reasonable time to examine the same by the concerned authority – Effect of – Held, it is not conceivable that the Opposite Parties would be able to examine the representation and take a decision thereon within such a short period – As Rule 8 states, only in very urgent cases where the making of a representation and waiting for a response "would cause irreparable injury or damage, a petition can be filed straightway by giving prior notice." – This is not one such case, since clearly the Petitioner has given a prior notice to the Opposite Parties – If the representation is "akin to what is postulated in Section 80 CPC", the Petitioner should at least give a two months' time to the Opposite Parties to take a decision thereon – Further, if he serious about the matter, then he should send at least one reminder within the said two months.

Madan Mohan Sahu -V- Collector, Angul & Ors.
(W.P.(C) NO. 5327 OF 2021)
2021 (I) ILR-Cut…… 733

ORISSA SURVEY AND SETTLEMENT ACT, 1958 – Section 15 – Power of the Commissioner/Board of Revenue – Whether the

commissioner can delegate the power to Tahasildar to correct the ROR after publication of the same under section 12-B of the Act? – Held, No, after publication of the ROR under section 12-B of the Act, the Tahasildar cannot sit over the correctness of recording of ROR and map – He can only act within the parameters and the contingencies mentioned in Rule 34 of the Rules – The Tahasildar can also make correction under Rule 34 of the rules as well as Section 41 of the Act, not beyond that – The commissioner is under legal obligation to take final decision in the revision and if necessary may issue direction to the concerned Tahasildar to give effect to the said order only – He has no jurisdiction to remit back to the Tahasildar to take final decision in the matter.

Anantadan Suna & Ors.-V-Joint Commissioner, Settlement & Consolidation, Berhampur & Ors. (W.P.(C) NO. 8734 OF 2012)
2021 (I) ILR-Cut…… 924

PRINCIPLE OF ESTOPPEL – Recruitment of Dental Surgeon – Advertisement by OPSC – Petitioner applied with all requisite documents as in service candidate along with the certificate from the appointing authority showing his service period to get the benefit of over age relaxation and the permission to apply – OPSC acted upon such documents and allowed the petitioner to appear in the examination – Result was not published and the ground of such non-publication of result was that due to non-submission of the certificate of past service from the Govt. or DHS the over age relaxation was not given and the application was rejected – Nothing in the advertisement requiring that the certificate of past service was to be submitted by obtaining the same from the Govt. or DHS – Plea that the action of OPSC was hit by the principles of estoppel – Held, yes, rejecting the candidature of the petitioner on the ground of overage due to non-submission of service certificate from Government or DHS was hit by principle of estoppel as the OPSC has acted upon the application.

Dr. Kaushik Patnaik -V- State Of Orissa & Anr.
(W.P.(C) NO. 19501 OF 2019)
2021 (I) ILR-Cut…… 798

SERVICE LAW – Judicial Officer – Compulsory retirement – Plea challenging such compulsory retirement – Principles – Discussed –

Held, the judicial officers of the subordinate courts in the State are under the administrative control of the High Court in terms of Article 235 of the Constitution of India – They are different from other civil servants – A single blot in their service record makes them vulnerable – They are expected to have a good character in all respect – Materials produced Justifies compulsory retirement.

Rama Chandra Mohanty -V- State of Orissa & Anr.
(W. P. (C) NO.19435 OF 2010)
2021 (I) ILR-Cut…… 726

SERVICE LAW – Recruitment – Appointment of Anganwadi Worker – Select/merit list prepared – 1st candidate did not join – 2nd candidate in the select/merit list was given appointment – Whether illegal? – Held, no, it is well settled in law, if the selected candidate did not join for some reason or other and merit list was prepared, engagement should be given from the list to a candidate who stood 2nd.

Manasi Bisi -V- ADDL. DIST. Magistrate, Bargarh & Ors.
(W.P.(C) NO. 10016 OF 2012)
2021 (I) ILR-Cut…… 793

SERVICE LAW – Recruitment – Fraud played by the candidate for obtaining engagement of Anganwadi Worker on the ground of physical disability – The percentage of disability shown by the candidate is 45% whereas the actual disability is 25% – Effect of such fraud – Held, if by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a court of law as the employment secured by fraud renders it voidable at the option of the employer – Fraud and justice never dwell together *(fraus et jus nanquam cohabitant).*

Urmila Sethi -V- State of Orissa & Ors. (W.P.(C) NO. 11527 Of 2013)
2021 (I) ILR-Cut…… 809

SERVICE LAW – "Competent authority" – Definition – Advertisement for recruitment of Dental Surgeon – Requirement was that the in service candidates were to submit past service certificate from the competent authority – No definition of competent authority provided – Petitioner submitted such certificate from the appointing

authority – Whether the appointing authority can be construed as competent authority? – Held, Yes – Reasons indicated.

Dr. Kaushik Patnaik -V- State of Orissa & Anr.
(W.P.(C) NO. 19501 OF 2019)
2021 (I) ILR-Cut…… 798

WORDS AND PHRASES – Doctrine of "Strict liability" – Meaning thereof – Held, Principle of law has been 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" – Claim of compensation for electrocution – Awarded.

C.E.O., Now Renamed Asauthorized Officer, NESCO Utility -V- Smt. Kalimani Rout & Ors. (RSA NO. 123 OF 2019)
2021 (I) ILR-Cut…… 823

WORDS AND PHRASES – The terms “fiduciary” and “fiduciary relationship” – Explained.

Jyoshnamayee Bahinipati & Ors. -V-Lingaraj Bahinipati.
(RSA. NO. 226 OF 2017)
2021 (I) ILR-Cut…… 816

WORDS AND PHRASES – The word ‘reside’ – Meaning thereof – Held, the word ‘reside’ means dwell permanently or for a considerable time; to have one’s settled or usual abode; to line in or at particular place, but it does not include casual or flying visits – AIR 2000 SC 525 (Union of India Vrs. Dudhnath Prasad) referred**.**

Mamatarani Dalei @ Samal-V- State of Orissa & Ors.
(W.P.(C) NO. 7269 OF 2013)
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2021 (I) ILR - CUT- 705

THE SUPREME COURT OF INDIA

S. A. BOBDE, C.J. L. NAGESWARA RAO, J. B. R. GAVAI, J.
A.S. BOPANNA, J & S. RAVINDRA BHAT, J.

SUO MOTU WRIT PETITION (CRL.) NO.2 OF 2020

In Re: EXPEDITIOUS TRIAL OF CASES UNDER SECTION 138 OF N.I. ACT 1881.

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Proceedings under – Special Leave Petition in relation to a dispute which remained pending for the past 16 years – Concerned with large number of cases filed under Section 138 of the Act, 1881 pending at various levels, a Suo Motu Writ Petition (Criminal) captioned as "Expeditious Trial of Cases under Section 138 of N.I. Act 1881" was initiated – Matter was heard at length – Following directions were issued.

"The upshot of the above discussion leads us to the following conclusions:

1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.

3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

6) Judgments of this Court in Adalat Prasad (supra) and Subramanium Sethuraman (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section

322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021."

Case Laws Relied on and Referred to :-

1. (2014) 14 SCC 638 : Vijay Dhanuka & Ors. Vs. Najima Mamtaj & Ors.
2. (2017) 3 SCC 528 : Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and Anr.
3. (2019) 16 SCC 610 : Birla Corporation Limited Vs. Adventz Investments and Holdings Limited & Ors.
4. (2016) 11 SCC 105 : K.S. Joseph Vs. Philips Carbon Black Ltd & Anr.
5. (2000) 1 SCC 285 : Balbir Vs. State of Haryana & Anr.
6. 2019 (10) SCJ 238 : Vani Agro Enterprises Vs. State of Gujarat & Ors.
7. (1964) 3 SCR 297 : State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao & Anr.
8. (1992) 1 SCC 217 : K. M. Mathew Vs. State of Kerala & Anr.
9. (2004) 7 SCC 338 : Adalat Prasad Vs. Rooplal Jindal and Others
10. (2004) 13 SCC 324: Subramanium Sethuraman Vs. State of Maharashtra & Anr.
11. (2018) 1 SCC 560 : Meters and Instruments Private Limited and Another Vs. Kanchan Mehta.
12. (1980) 1 All ER 529 (HL) : Dupont Steels Ltd. Vs. Sirs.
13. 1992 Supp (1) SCC 323 : Union of India Vs. Deoki Nandan Aggarwal.

ORDER Date of Order: 16.04 .2021

BY THE BENCH:

1. Special Leave Petition (Criminal) No. 5464 of 2016 pertains to dishonour of two cheques on 27.01.2005 for an amount of Rs.1,70,000/-. The dispute has remained pending for the past 16 years. Concerned with the large number of cases filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter 'the Act') pending at various levels, a Division Bench of this Court consisting of two of us (the Chief Justice of India and L. Nageswara Rao, J.) decided to examine the reasons for the delay in disposal of these cases. The Registry was directed to register a Suo Motu Writ Petition (Criminal) captioned as "Expeditious Trial of Cases under Section 138 of N.I. Act 1881". Mr. Sidharth Luthra, learned Senior Counsel was appointed as Amicus Curiae and Mr. K. Parameshwar, learned Counsel was requested to assist him. Notices were issued to the Union of India, Registrar Generals of

the High Courts, Director Generals of Police of the States and Union Territories, Member Secretary of the National Legal Services Authority, Reserve Bank of India and Indian Banks' Association, Mumbai as the representative of banking institutions.

2. The learned Amici Curiae submitted a preliminary report on 11.10.2020 which was circulated to all the Respondents. On 19.01.2021, the learned Amici Curiae informed this Court that only 14 out of 25 High Courts had submitted their responses to the preliminary report. The Reserve Bank of India had also filed its suggestions. Seven Directors General of Police had filed their affidavits putting forward their views to the preliminary report. The parties who had not filed their responses were granted further time and the matter was listed on 24.02.2021 for final disposal. During the course of the hearing, it was felt by a Bench of three Judges, consisting of the Chief Justice of India, L. Nageswara Rao, J. and S. Ravindra Bhat, J. that the matter had to be considered by a larger bench in view of the important issues that arose for determination before this Court. The reference of the matter to a larger bench was also necessitated due to the submission made by the learned Amici Curiae that certain judicial pronouncements of this Court needed clarification. We have heard learned Amici Curiae, Advocates for some States, the learned Solicitor General of India, Mr. Vikramjit Banerjee, learned Additional Solicitor General of India, Mr. Ramesh Babu, Advocate for the Reserve Bank of India and Dr. Lalit Bhasin, Advocate for the Indian Banks' Association.

3. Chapter XVII inserted in the Act, containing Sections 138 to 142, came into force on 01.04.1989. Dishonour of cheques for insufficiency of funds was made punishable with imprisonment for a term of one year or with fine which may extend to twice the amount of the cheque as per Section 138. Section 139 dealt with the presumption in favour of the holder that the cheque received was for the discharge, in whole or in part, of any debt or other liability. The defence which may not be allowed in a prosecution under Section 138 of the Act is governed by Section 140. Section 141 pertains to offences by companies. Section 142 lays down conditions under which cognizance of offences may be taken under Section 138. Over the years, courts were inundated with complaints filed under Section 138 of the Act which could not be decided within a reasonable period and remained pending for a number of years.

4. This gargantuan pendency of complaints filed under Section 138 of the Act has had an adverse effect in disposal of other criminal cases. There was an imminent need for remedying the situation which was addressed by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. Sections 143 to 147 were inserted in the Act, which came into force on 06.02.2003. Section 143 of the Act empowers the court to try complaints filed under Section 138 of the Act summarily, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (hereinafter, 'the Code'). Sub-section (3) of Section 143 stipulates that an endeavour be made to conclude the trial within six months from the date of filing of the complaint. Section 144 deals with the mode of service of summons. Section 145 postulates that the evidence of the complainant given by him on affidavit may be read as evidence in any inquiry, trial or other proceeding under the Code. Bank's slip or memo denoting that the cheque has been dishonoured is presumed to be prima facie evidence of the fact of dishonour of the cheque, according to Section 146. Section 147 makes offences punishable under the Act compoundable. The punishment prescribed under the Act was enhanced from one year to two years, along with other amendments made to Sections 138 to 142 with which we are not concerned in this case.

5. The situation has not improved as courts continue to struggle with the humongous pendency of complaints under Section 138 of the Act. The preliminary report submitted by the learned Amici Curiae shows that as on 31.12.2019, the total number of criminal cases pending was 2.31 crores, out of which 35.16 lakh pertained to Section 138 of the Act. The reasons for the backlog of cases, according to the learned Amici Curiae, is that while there is a steady increase in the institution of complaints every year, the rate of disposal does not match the rate of institution of complaints. Delay in disposal of the complaints under Section 138 of the Act has been due to reasons which we shall deal with in this order.

6. The learned Amici Curiae identified seven major issues from the responses filed by the State Governments and Union Territories which are as under:

a) Service of summons
b) Statutory amendment to Section 219 of the Code
c) Summary trials
d) Attachment of bank accounts

e) Applicability of Section 202 of the Code
f) Mediation
g) Inherent jurisdiction of the Magistrate

7. Service of summons on the accused in a complaint filed under Section 138 of the Act has been one of the main reasons for the delay in disposal of the complaints. After examining the responses of the various State Governments and Union Territories, several suggestions have been given by the learned Amici Curiae for speeding up the service of summons. Some of the suggestions given by him pertain to dishonour slips issued by the bank under Section 146 of the Act, disclosing the current mobile number, email address and postal address of the drawer of the cheque, the details of the drawer being given on the cheque leaf, creation of a Nodal Agency for electronic service of summons and generation of a unique number from the dishonour memo. The Union of India and the Reserve Bank of India were directed to submit their responses to the suggestions made by the learned Amici Curiae on these aspects. After hearing the learned Solicitor General of India and Mr. Ramesh Babu, learned counsel for the Reserve Bank of India, on 10.03.2021, it was considered appropriate by this Court to form a Committee with Hon'ble Mr. Justice R.C. Chavan, former Judge of the Bombay High Court, as the Chairman to consider various suggestions that are made for arresting the explosion of the judicial docket. The recommendations made by the learned Amici Curiae relating to attachment of bank accounts to the extent of the cheque amount, pre-summons mediation and all other issues which are part of the preliminary note and the written submissions of the learned Amici Curiae shall be considered by the aforementioned Committee, in addition to other related issues which may arise during such consideration. The Committee is directed to deliberate on the need for creation of additional courts to try complaints under Section 138 of the Act.

MECHANICAL CONVERSION OF SUMMARY TRIAL TO SUMMONS TRIAL

8. The learned Amici Curiae submitted that Section 143 of the Act provides that Sections 262 to 265 of the Code shall apply for the trial of all offences under Chapter XVII of the Act. The second proviso empowers the Magistrate to convert the summary trial to summons trial, if he is of the opinion that a sentence of imprisonment exceeding one year may have to be passed or that it is undesirable to try the case summarily, after recording

reasons. The learned Amici Curiae has brought to the notice of this Court that summary trials are routinely converted to summons trials in a mechanical manner. The suggestions made by him in his preliminary note that the High Courts should issue practice directions to the Trial Courts for recording cogent and sufficient reasons before converting a summary trial to summons trial have been accepted by the High Courts.

9. Section 143 of the Act has been introduced in the year 2002 as a step-in aid for quick disposal of complaints filed under Section 138 of the Act. At this stage, it is necessary to refer to Chapter XXI of the Code which deals with summary trials. In a case tried summarily in which the accused does not plead guilty, it is sufficient for the Magistrate to record the substance of the evidence and deliver a judgment, containing a brief statement of reasons for his findings. There is a restriction that the procedure for summary trials under Section 262 is not to be applied for any sentence of imprisonment exceeding three months. However, Sections 262 to 265 of the Code were made applicable "as far as may be" for trial of an offence under Chapter XVII of the Act, notwithstanding anything contained in the Code. It is only in a case where the Magistrate is of the opinion that it may be necessary to sentence the accused for a term exceeding one year that the complaint shall be tried as a summons trial. From the responses of various High Courts, it is clear that the conversion by the Trial Courts of complaints under Section 138 from summary trial to summons trial is being done mechanically without reasons being recorded. The result of such conversion of complaints under Section 138 from summary trial to summons trial has been contributing to the delay in disposal of the cases. Further, the second proviso to Section 143 mandates that the Magistrate has to record an order spelling out the reasons for such conversion. The object of Section 143 of the Act is quick disposal of the complaints under Section 138 by following the procedure prescribed for summary trial under the Code, to the extent possible. The discretion conferred on the Magistrate by the second proviso to Section 143 is to be exercised with due care and caution, after recording reasons for converting the trial of the complaint from summary trial to summons trial. Otherwise, the purpose for which Section 143 of the Act has been introduced would be defeated. We accept the suggestions made by the learned Amici Curiae in consultation with the High Courts. The High Courts may issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 from summary trial to summons trial in exercise of power under the second proviso to Section 143 of the Act.

INQUIRY UNDER SECTION 202 OF THE CODE IN RELATION TO SECTION 145 OF THE ACT

10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: **Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors.[1], Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr.[2]** and **Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.[3]**). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

11. The learned Amici Curiae referred to a judgment of this Court in **K.S. Joseph v. Philips Carbon Black Ltd & Anr.[4]** where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in **Vijay Dhanuka** (supra), **Abhijit Pawar** (supra) and **Birla Corporation** (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.

1. (2014) 14 SCC 638 **2.** (2017) 3 SCC 528 **3.** (2019) 16 SCC 610, **4.** (2016) 11 SCC 105

12. Another point that has been brought to our notice relates to the interpretation of Section 202 (2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202 (1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145 (2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202 (2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202.

SECTIONS 219 AND 220 OF THE CODE

13. Section 219 of the Code provides that when a person is accused of more offences than one, of the same kind, committed within a space of 12 months, he may be tried at one trial for a maximum of three such offences. If more than one offence is committed by the same person in one series of acts so committed together as to form the same transaction, he may be charged

with and tried at one trial, according to Section 220. In his preliminary report, the learned Amici Curiae suggested that a legislative amendment is required to Section 219 of the Code to avoid multiplicity of proceedings where cheques have been issued for one purpose. In so far as Section 220 of the Code is concerned, the learned Amici Curiae submitted that same/similar offences as part of the same transaction in one series of acts may be the subject matter of one trial. It was argued by the learned Amici Curiae that Section 220 (1) of the Code is not controlled by Section 219 and even if the offences are more than three in respect of the same transaction, there can be a joint trial. Reliance was placed on a judgment of this Court in **Balbir v. State of Haryana & Anr.**[5] to contend that all offences alleged to have been committed by the accused as a part of the same transaction can be tried together in one trial, even if those offences may have been committed as a part of a larger conspiracy.

14. The learned Amici Curiae pointed out that the judgment of this Court in **Vani Agro Enterprises v. State of Gujarat & Ors.**[6] needs clarification. In **Vani Agro** (supra), this Court was dealing with the dishonour of four cheques which was the subject matter of four complaints. The question raised therein related to the consolidation of all the four cases. As only three cases can be tried together as per Section 219 of the Code, this Court directed the Trial Court to fix all the four cases on one date. The course adopted by this Court in **Vani Agro** (supra) is appropriate in view of the mandate of Section 219 of the Code. Hence, there is no need for any clarification, especially in view of the submission made by the learned Amici that Section 219 be amended suitably. We find force in the submission of the learned Amici Curiae that one trial for more than three offences of the same kind within the space of 12 months in respect of complaints under Section 138 can only be by an amendment. To reduce the burden on the docket of the criminal courts, we recommend that a provision be made in the Act to the effect that a person can be tried in one trial for offences of the same kind under Section 138 in the space of 12 months, notwithstanding the restriction in Section 219 of the Code.

15. Offences that are committed as part of the same transaction can be tried jointly as per Section 220 of the Code. What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be

5. (2000) 1 SCC 285 **6.** 2019 (10) SCJ 238

difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction[7]. There is no ambiguity in Section 220 in accordance with which several cheques issued as a part of the same transaction can be the subject matter of one trial.

16. The learned Amici Curiae have brought to our notice that separate complaints are filed under Section 138 of the Act for dishonour of cheques which are part of the same transaction. Undue delay in service of summons is the main cause for the disproportionate accumulation of complaints under Section 138 before the courts. The learned Amici suggested that one way of reducing the time spent on service of summons is to treat service of summons served in one complaint pertaining to a transaction as deemed service for all complaints in relation to the said transaction. We are in agreement with the suggestion made by the learned Amici Curiae. Accordingly, the High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

INHERENT POWERS OF THE MAGISTRATE

17. In **K. M. Mathew v. State of Kerala & Anr.**[8], this Court dealt with the power of the Magistrate under Chapter XX of the Code after the accused enters appearance in response to the summons issued under Section 204 of the Code. It was held that the accused can plead before the Magistrate that the process against him ought not to have been issued and the Magistrate may

7. State of Andhra Pradesh v. Cheemalapati Ganeswara Rao & Anr., (1964) 3 SCR 297 **8.** (1992) 1 SCC 217

drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. This Court was of the opinion that there is no requirement of a specific provision for the Magistrate to drop the proceedings and as the order issuing the process is an interim order and not a judgment, it can be varied or recalled. The observation in the case of **K. M. Mathew** (supra) that no specific provision of law is required for recalling an erroneous order of issue of process was held to be contrary to the scheme of the Code in **Adalat Prasad v. Rooplal Jindal and Others**[9]**.** It was observed therein that the order taking cognizance can only be subject matter of a proceeding under Section 482 of the Code as subordinate criminal courts have no inherent power. There is also no power of review conferred on the Trial Courts by the Code. As there is no specific provision for recalling an erroneous order by the Trial Court, the judgment in the case of **K. M. Mathew** (supra) was held to be not laying down correct law. The question whether a person can seek discharge in a summons case was considered by this Court in **Subramanium Sethuraman v. State of Maharashtra & Anr.**[10]**.** The law laid down in **Adalat Prasad** (supra) was reiterated.

18. It was contended by learned Amici Curiae that a holistic reading of Sections 251 and 258 of the Code, along with Section 143 of the Act, should be considered to confer a power of review or recall of the issuance of process by the Trial Court in relation to complaints filed under Section 138 of the Act. He referred to a judgment of this Court in **Meters and Instruments Private Limited and Another v. Kanchan Mehta**[11] which reads as follows:

> *"While it is true that in Subramanium Sethuraman v. State of Maharashtra this Court observed that once the plea of the accused is recorded under Section 252 CrPC, the procedure contemplated under Chapter XX CrPC has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to the 2002 Amendment. The statutory scheme post-2002 Amendment as considered in Mandvi Coop. Bank and J.V. Baharuni has brought about a change in law and it needs to be recognised. After the 2002 Amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the*

9. (2004) 7 SCC 338, **10**. (2004) 13 SCC 324 **11**. (2018) 1 SCC 560

complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 CrPC which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of CrPC are applicable "so far as may be", the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible i.e. with such deviation as may be necessary for speedy trial in the context."

19. In **Meters and Instruments** (supra), this Court was of the opinion that Section 143 of the Act confers implied power on the Magistrate to discharge the accused, if the complainant is compensated to the satisfaction of the court. On that analogy, it was held that apart from compounding by the consent of the parties, the Trial Court has the jurisdiction to pass appropriate orders under Section 143 in exercise of its inherent power. Reliance was placed by this Court on Section 258 of the Code to empower the Trial Courts to pass suitable orders.

20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply "as far as may be" to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. The judgment of this Court in **Meters and Instruments** (supra) in so far as it conferred power on the Trial Court to discharge an accused is not good law. Support taken from the words "as far as may be" in Section 143 of the Act is inappropriate. The words "as far as may be" in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter XVII. Conferring power on the court by reading certain words into provisions is impermissible. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation[12]. The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires[13]. The court cannot add words to a statute or read words into it which are not there[14].

12. J. Frankfurter, "Of Law and Men: Papers and Addresses of Felix Frankfurter".
13. Dupont Steels Ltd. v. Sirs (1980) 1 All ER 529 (HL)
14. Union of India v. Deoki Nandan Aggarwal 1992 Supp (1) SCC 323

21. A close scrutiny of the judgments of this Court in **Adalat Prasad** (supra) and **Subramanium Sethuraman** (supra) would show that they do not warrant any reconsideration. The Trial Court cannot be conferred with inherent power either to review or recall the order of issuance of process. As held above, this Court, in its anxiety to cut down delays in the disposal of complaints under Section 138, has applied Section 258 to hold that the Trial Court has the power to discharge the accused even for reasons other than payment of compensation. However, amendment to the Act empowering the Trial Court to reconsider/recall summons may be considered on the recommendation of the Committee constituted by this Court which shall look into this aspect as well.

22. Another submission made by the learned Amici Curiae relates to the power of the Magistrate under Section 322 of the Code, to revisit the order of issue of process if he has no jurisdiction to try the case. We are in agreement with the learned Amici Curiae that in case the Trial Court is informed that it lacks jurisdiction to issue process for complaints under Section 138 of the Act, the proceedings shall be stayed and the case shall be submitted to the Chief Judicial Magistrate or such other Magistrate having jurisdiction.

23. Though we have referred all the other issues which are not decided herein to the Committee appointed by this Court on 10.03.2021, it is necessary to deal with the complaints under Section 138 pending in Appellate Courts, High Courts and in this Court. We are informed by the learned Amici Curiae that cases pending at the appellate stage and before the High Courts and this Court can be settled through mediation. We request the High Courts to identify the pending revisions arising out of complaints filed under Section 138 of the Act and refer them to mediation at the earliest. The Courts before which appeals against judgments in complaints under Section 138 of the Act are pending should be directed to make an effort to settle the disputes through mediation.

24. The upshot of the above discussion leads us to the following conclusions:

1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.

3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

6) Judgments of this Court in **Adalat Prasad** (supra) and **Subramanium Sethuraman** (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in **Meters and Instruments** (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee.

25. List the matter after eight weeks. Further hearing in this matter will be before 3-Judges Bench.

26. We place on record our appreciation for the valuable assistance rendered by Mr. Sidharth Luthra, learned Senior Counsel and Mr. K. Parameshwar, learned Counsel, as Amici Curiae.

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2021 (I) ILR - CUT- 719

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

WRIT PETITION (CIVIL) NO. 8228 OF 2021

M/S. ORISSA METALIKS PVT. LTD. & ANR. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner No.1, a Company engaged in the business of manufacturing sponge iron, pellet and other steel products – Suspension of license and transit permit followed by show cause notice was issued upon noticing certain discrepancies in the figure in return forms filed as required under the Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules 2007 – Reply to show cause notice considered and suspension revoked, but on the basis of fresh observation' made by Reconstituted EAC in a letter which prima facie pointed to "irregularities committed by the various entities of the Rashmi Group of Companies and their promoters", no transit permit was issued – Writ petition challenging such action – Plea that the observations have been clarified in subsequent meeting and that on the basis of such observation the transit passes should not have been stopped – Plea considered and held, it must be noted that under Rule 9 of 2007 Rules, the competent authority can suspend or cancel the licence for breach of the terms and conditions of the license but this has to be a precedent by a show cause notice – In the present case, the earlier suspension of the licence which already stood revoked was subject only to the condition that Petitioner No.1 would rectify the discrepancies and undertake not to repeat such mistake in future – As regards the reasons given for suspension of the transit permits, Mr. Misra has rightly contended that the purported violation of any conditions regarding Environmental Clearance (EC) of any group entity of Petitioner No.1 cannot constitute a valid ground, in terms of Rule 9 of 2007 Rules, to proceed against Petitioner No.1 – There is also merit in the contention, based on the judgment of this Court in Rashmi Cement Ltd. v. State of Odisha (2012) 113 CLT 177, which in turn followed the judgment of the Supreme Court in Commissioner of Police v. Gordhan Das Bhanji, AIR 1952 SC 16 that a quasi-judicial authority vested with the power for cancellation of a license, could not have acted under the 'dictation' of another authority – Also the impugned action of suspension of the issuance of transit passes ought to have

been preceded by an enquiry, that prima facie discloses wrong doing by Petitioner No.1 in the form of violation of the terms of the license – The suspension of a licence even before the inquiry reveals prima facie violation of the terms of the license would obviously be vulnerable to invalidation on the ground of it being arbitrary and irrational.

Case Laws Relied on and Referred to :-

1. (2012) 113 CLT 177 : Rashmi Cement Ltd. Vs. State of Odisha.
2. AIR 1952 SC 16 : Commissioner of Police Vs. Gordhan Das Bhanji.

For Petitioners : Mr. Pinaki Misra, Sr. Adv., A.R. Mohanty, A. Hota, Naveen Kumar & N. Massey.

For Opp. Parties : Mr. Ashok Kumar Parija, (A.G.) Mr. P.K. Muduli, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 08.03 2021

Dr. S. MURALIDHAR, C.J.

1. Heard Mr. Pinaki Misra, learned Senior Advocate assisted by Mr. A.R. Mohanty, learned counsel for the Petitioners and Mr. A. K. Parija, learned Advocate General assisted by Mr. P.K. Muduli, learned Additional Government Advocate for the State-Opposite Parties.

2. Petitioner No.1 is a Company engaged *inter alia* in the business of manufacturing sponge iron, pellet and other steel products in the State of West Bengal, which has two manufacturing units, such as Unit-I and Unit-II. Unit-I is engaged in manufacturing of sponge iron and Captive Power and was issued with a licence on 7th April 2016, by the Joint Director of Mines Joda, Keonjhar, Odisha, which was valid till 6th April, 2021. It was a licence for procurement of Iron ore and coal for processing, end-use and sale of residuals outside the State of Odisha. Unit-II manufactures iron ore pellet and beneficiation of iron ore, for which a licence was issued on 7th April 2016, valid till 6th April, 2021. This licence was for procuring iron ore and manganese for processing, end-use and sale of residuals outside the State. Both the licences stand renewed for further period and the copies of renewed licences have been enclosed with the petition. Incidentally, the renewal was granted on 20th February 2021.

3. There are three monthly return forms, such as Form-A and Form-E under the Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation)

Rules 2007 (in short '2007 Rules') and Form-L under MCDR Rule, 2017 ('2017 Rules') that were required to be submitted by Petitioner No.1. Noticing certain discrepancies in the figure in those returns, a show-cause notice (SCN) was issued to Petitioner No.1 by the Joint Director of Mines, Joda, Keonjhar (Opposite Party No.3) on 6th January, 2021. The licences were suspended and the transit permits were also cancelled.

4. In response to the SCN, on 12th January 2021, the Petitioner filed a reply enclosing a verified tabulated chart giving the month-wise procurement of iron ore. Another SCN was issued on 25th January 2021 seeking to rescind rescission of the transit permits/licenses. Petitioner No.1 again filed a reply on 29th January 2021, wherein it pointed out that there was a *bona fide* clerical error in filling out the figures in the forms.

5. On 10th February 2021, after examining the reply, Opposite Party No.3 wrote the following letter to Petitioner No.1:

"xx xx xx

In inviting a reference to the subject cited above, I am to say that in pursuance to letter No.1123/DM. dt. 10.02.2021 of Director of Mines, Odisha and affidavit submitted by you on 10.02.2021, the suspension order issued for both the units (license code No.071813429531 & No.071813429631) vide this office letter No.87/Mines dtd. 06.01.2021 is hereby revoked.

Further you are instructed to rectify the discrepancies notice in Form-N and Form-L immediately and not to repeat such type of mistake in future."

6. It appears that two days thereafter i.e. on 12th February 2021, the Director of Mines, Government of Odisha (Opposite Party No.2) wrote a letter to Opposite Party No.3 inviting reference to the 25th meeting of Reconstituted EAC (Industry-I) of the Ministry of Mines, Government of India (held on 25th -27th November, 2020). The letter noted that a 'fresh observation' had been made by REAC, which prima facie pointed to "irregularities committed by the various entities of the Rashmi Group of Companies and their promoters", which were under investigation of the Ministry of Environment of Forest and Climate Change (MoEF and CC). It then observed "Besides, it is alleged that, there is land transfer by various entities amongst themselves and it is not possible to know where exactly the trade licensee is actually stocking the ore procured. Till the time it is clearly established whether any entity of Rashmi Group has diverted the iron ore

fines procured from Odisha to Rashmi Cement Ltd, and if so which entity has done such diversion, it is not desirable to allow any further Transit Permit to any of the entities who have trading license in Odisha."

7. Despite the above revocation of suspension of the licences, there was a sudden stoppage in dispatch of iron ore, coal and manganese ores which led Petitioner No.1 to send an email to Opposite Party No.3 seeking the reasons therefor. In a reply e-mail dated 15th February, 2021 Opposite Party No.3 referring to the above letter of Opposite Party No.2 dated 12th February 2021. Petitioner No.1 then made a representation to the Government of Odisha on 22nd February, 2021 protesting against the stoppage of issuance of transit permits. When no response was received, the present petition was filed.

8. On 4th March 2021, this Court passed the following order:

> "1. Heard Mr. Pinaki Misra, learned Senior Advocate assisted by Mr. A.R. Mohanty, learned counsel for the Petitioners.
>
> 2. Petitioner No.1 Company, of which Petitioner No.2 is the Director, is aggrieved primarily by instructions dated 12th February 2021, issued by the Director of Mines, Odisha to the Joint Director of Mines, as a result of which, all transit passes to Petitioner No.1 have been stopped till inquires against Petitioner No.1 and its group of entities are concluded.
>
> 3. Mr. Pinaki Misra, learned Senior Advocate appearing for the Petitioners, refers to the ostensible reason in the impugned letter that there were "fresh observations made by REAC as stated in the minutes of meeting dated 25-27th November 2020" from which "prima facie it appears that irregularities committed by the various entities of the Rashmi Group ... are under investigation of MoEF & CC."
>
> 4. On instructions, Mr. Misra states that all those queries that were raised in the aforementioned meeting were clarified in a subsequent meeting of the REAC. He seeks, and is permitted, to file an affidavit before the next date placing on record the subsequent minutes, copies of which are stated to have been obtained by the Petitioners from the website.
>
> 5. The immediate concern expressed by Mr. Misra is that the licenses issued to Petitioner No.1, which incidentally have been renewed recently, pertain to not just to iron ore, but also coal and manganese ore, all of which are required for running the units of Petitioner No.1. It is submitted that the impugned order will cause great inconvenience, if the units are compelled to shut down. He states that Petitioner No.1 is willing to abide by any reasonable terms that may be imposed for the issuance of transit permits, for keeping the operations of Petitioner No.1 continued.
>
> 6. Issue notice.

> 7. Mr. P. K. Muduli, learned Additional Government Advocate for the State assisting the learned Advocate General accepts notice for Opposite Parties.
>
> 8. Learned Advocate General states that on the question of interim relief, he will seek instructions.
>
> 9. At his request, list on Monday i.e. on 8th March, 2021."

9. Pursuant to the above order, Petitioner No.1 has filed an additional affidavit dated 5th March, 2021 enclosing therewith the minutes of the 25th meeting of the REAC held during 25th to 27th November, 2020 and the minutes of the 31st of meeting held on 25th to 26th February 2021. Copy of the letters dated 23rd February and 1st March, 2021 written by Petitioner No.1 to the Government of Odisha have also been enclosed.

10. On the same date, a preliminary affidavit has been filed on behalf of the Opposite Party No.1. In this affidavit, it is stated in para-4.5 that the rectification by the Petitioner, in terms of the letter dated 10th February 2021 revoking the suspension licence was "yet to be effected by the licensee". The affidavit then proceeds to refer to a detailed inquiry launched by the State into the mismatches as observed and admitted by the licensee and to the fact that since the inquiry was in progress, the permission for transactions relating to the Petitioner had been put on hold. It states that further decision on the matter will be taken as per law on completion of the detailed investigation.

11. Mr. Misra, learned Senior Advocate for the Petitioner draws the attention of the Court to the minutes of the 25th meeting of the REAC on 25th to 27th November, 2020. It contains detailed observations in relation to M/s. Rashmi Cement Limited and M/s. Rashmi Udyog Private Limited but none with regard to Petitioner No.1. He also drew attention to the subsequent minutes of the 31st meeting of REAC held on 25th to 26th February 2021 and in particular to the portion where the REAC has recommended the project proposals in relation to both the entities, subject to compliance with certain conditions. His submission is that the earlier observations in the 25th meeting of the REAC vis-à-vis the two entities no longer held good and stood clarified at the subsequent 31st meeting of the REAC. Mr. Misra submits that since the very basis of the letter dated 12th February, 2021 by opposite party No.2 to Opposite Party No.3 was rendered non-existent, there is no justification in continuing to suspend the transit permits of Petitioner No.1.

12. Mr. Parija, learned Advocate General for the State (Opposite Parties), in reply referred to the fact that Petitioner No.1 had admitted to the

discrepancy in forms A, E and L and to the fact that the revocation of suspension of license was made subject to Petitioner No.1 rectifying the discrepancies in the said forms 'immediately' and undertaking 'not to repeat such type of mistake'.

13. At this stage, Mr. Misra, learned Senior Counsel handed over a copy of the letter written by Petitioner No.1 to Opposite Party No.3 stating that they had submitted the revised Form L online for the month of November, 2020 with a copy to the Indian Bureau of Mines (IBM). A copy was also handed over to the Court. He added that it was accompanied with an indemnity bond.

14. Mr. Parija, learned Advocate General nevertheless stated that Petitioner No.1 should be asked to file an affidavit stating that it has rectified the discrepancies and should undertake not to repeat such type of mistake in future. He also submitted that the right of the Opposite Parties to proceed against the Petitioner in accordance with law, in case the result of the inquiry warrants such action, should be reserved.

15. Having considered the above submissions, it appears to the Court that the basis for the impugned action against Petitioner No.1 was the letter written by the Opposite Party No.2 to Opposite Party No.3. In the e-mail communication sent to the Petitioner No.1 by Opposite Party No.3, when asked for the reasons for suspension of transit passes, the only reason given was the above letter which sets out the ostensible ground for the impugned action by referring to the minutes of 25th meeting of the REAC. From the minutes of the subsequent 31st meeting of the REAC, copy of which has been enclosed with the additional affidavit of Petitioner No.1, the correctness of which has not disputed, it is apparent that the observations pertaining to the two group entities of Petitioner No.1 mad in the 25th meeting of the REAC were clarified in the subsequent 31st meeting. The project proposals of the said two entities appear to have been approved subject to certain terms. Therefore, it does appear that the very basis for the action against Petitioner No.1 has been rendered non-existent.

16. At this stage, it must be noted that under Rule 9 of 2007 Rules, the competent authority can suspend or cancel the licence for breach of the terms and conditions of the license but this has to be a precedent by an SCN. In the present case, the earlier suspension of the licence which already stood revoked by the letter dated 10th February 2021, was subject only to the

condition that Petitioner No.1 would rectify the discrepancies and undertake not to repeat such mistake in future. Although Mr. Misra has handed over to Mr. Parija a copy of the letter dated 1st March, 2021 in which it is stated that Petitioner No.1 has rectified the discrepancies, the Court finds no difficulty in directing that Petitioner No.1 will, not later than 10th March 2021, file an affidavit with Opposite Party No.3 confirming that it has rectified the discrepancies and undertaking not to repeat such mistake in future, as required by the letter dated 10th February, 2021 issued by Opposite Party No.3.

17. As regards the reasons given for suspension of the transit permits, Mr. Misra has rightly contended that the purported violation of any conditions regarding Environmental Clearance (EC) of any group entity of Petitioner No.1 cannot constitute a valid ground, in terms of Rule 9 of 2007 Rules, to proceed against Petitioner No.1. There is also merit in the contention, based on the judgment of this Court in ***Rashmi Cement Ltd. v. State of Odisha (2012) 113 CLT 177,*** which in turn followed the judgment of the Supreme Court in ***Commissioner of Police v. Gordhan Das Bhanji, AIR 1952 SC 16*** that a quasi-judicial authority vested with the power for cancellation of a license, could not have acted under the 'dictation' of another authority. Also the impugned action of suspension of the issuance of transit passes ought to have been preceded by an enquiry, that *prima facie* discloses wrong doing by Petitioner No.1 in the form of violation of the terms of the license. The suspension of a licence even before the inquiry reveals prima facie violation of the terms of the license would obviously be vulnerable to invalidation on the ground of it being arbitrary and irrational.

18. In that view of the matter, the Court sees no justification in the Opposite Parties continuing to suspend the issuance of transit passes/permits to Petitioner No.1. It is directed that subject to Petitioner No.1 filing an affidavit as directed hereinabove on or before 10th March, 2021 with the Opposite Party No.3, the decision of the Opposite Parties to suspend issuance of transit passes/permits to Petitioner No.1 shall stand quashed. It is clarified that in the event that the inquiry undertaken by the Opposite Parties reveals prima facie violation of the conditions of the licences issued to Petitioner No.1, it would be open to the Opposite Parties to proceed against Petitioner No.1 strictly in accordance with law.

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

20. An urgent certified copy of this order be issued as per rules.

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2021 (I) ILR - CUT- 726

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

WRIT PETITION (CIVIL) NO.19435 OF 2010

RAMA CHANDRA MOHANTY ……..Petitioner

.V.

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

SERVICE LAW – Judicial Officer – Compulsory retirement – Plea challenging such compulsory retirement – Principles – Discussed – Held, the judicial officers of the subordinate courts in the State are under the administrative control of the High Court in terms of Article 235 of the Constitution of India – They are different from other civil servants – A single blot in their service record makes them vulnerable – They are expected to have a good character in all respect – Materials produced Justifies compulsory retirement.

Case Laws Relied on and Referred to :-

1. SLP (Civil) No.20202 of 2006 : Swaran Singh Chand Vs. Punjab State Electricity Board & Ors.
2. A.I.R.1984 SC 630 : J. D. Shrivastava Vs. State of M.P. & Ors.
3. W.P.(C) No.7398 of 2013 : Suvendra Mohanty Vs. State of Orissa.
4. W.P.(C) No.11108 of 2013 : Epari Vasudeva Rao, Bhubaneswar Vs. State of Orissa & Anr.
5. OJC No.6601 of 1995 : Indramani Sahu Vs. State of Orissa & Anr.
6. (1992) 2 SCC 299 : Baikuntha Nath Das Vs. Chief District Medical Officer, Baripada.
7. (1988) 3 SCC 211 : Registrar, High Court of Madras Vs. R. Rajiah.
8. (2015) 13 SCC 156: Punjab State Power Corporation Limited Vs. Hari Kishan Verma.
9. (2013) 10 SCC 551 : Rajasthan State Road Transport Corporation Vs. Babulal Jangir.

For Petitioner : Mr. J. Patnaik, Sr. Adv.

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

JUDGMENT Date of Judgment : 17 .03. 2021

B.P. ROUTRAY, J.

1. The Petitioner, a Judicial Officer, has sought the quashing of an order of compulsory retirement and for all consequential service benefits.

2. The Petitioner joined as a Probationary Munsif on 2nd January, 1985 at Dhenkanal being selected as such in due process of selection. On 7th

March, 1987, he was posted as J.M.F.C., Soro and then at different places from time to time. In the year 1992, while serving as J.M.F.C., Aska, his service was appreciated by the then Hon'ble Chief Justice of Orissa, who recommended his promotion out-ofturn. The Petitioner was promoted out-of-turn as S.D.J.M., Kuchinda on 8th July, 1994. By efflux of time he was transferred to Jharsuguda as S.D.J.M., to Cuttack as 2nd Munsif and then promoted to the cadre of Civil Judge (Sr.Division) and posted as Registrar, Civil and Sessions Court, Bolangir on 27th September, 1999. He was then transferred as Civil Judge (Sr. Division), Kamakhyanagar, Civil Judge (Sr.Division), Dharmagarh and as Civil Judge (Sr.Division), Koraput. While serving at Koraput he was directed to retire in public interest with effect from 22nd March, 2010 vide Notification dated 9th March, 2010 of Government of Orissa in Law Department under Annexure-1.

3. During his tenure two departmental proceedings bearing D.P.No.9/03 and 4/07 were initiated against the Petitioner. In the first proceeding, in the year 2003, five charges were framed relating to unauthorized retention of Government quarters, deliberate delay in making payment of bills towards purchase of law journals for Bolangir Judgeship, illegal counting of leave in his own leave account in the year 2000-2001 and lesser deduction of rent towards occupation of Government quarters, touching to gross misconduct and failure in due discharge of duties under Rules 3 and 4 of the Orissa Government Servant Conduct Rules, 1959.

4. In respect of D.P.No.4 of 2007, the charge against the Petitioner was that, he availed a loan in the name of one of his Class-IV servants without his knowledge and consent and did not repay the same till a complaint was made by the said Class-IV employee.

5. It is stated by the Petitioner that except those two disciplinary proceedings, there is no adverse entry in his ACR/CCR, which has been communicated to him. Of course, he was formally cautioned to be careful over some trivial issues. Further as a matter of fact, the Petitioner's out of turn inter se seniority over his senior colleagues has been quashed in a writ application by this Court. It is stated by the Petitioner that pending such departmental proceedings, he was removed by way of premature retirement as per Rule 44 of the O.S.J.S. and O.J.S. Rules, 2007 (hereinafter referred to as 'Rules, 2007') without recognizing his commendable service as appreciated by the then Hon'ble Chief Justice under Annexure-2. It is further

stated that no adverse entry in his service record has ever been communicated to him, except for the tenure at Kamakshyanagar and Dharmagarh and without offering him any single opportunity to explain his stance, he was removed prematurely from service at the age of fifty inflicting the stigma for no fault of his. He was not even viewed a show cause notice and without any opportunity of being heard, the order of compulsory retirement was passed within a few days of his confirmation in the substantive post of Civil Judge (Sr. Division).

6. Opposite Party No.2, the Register General of High Court of the Orissa, has filed a counter reply denying all the allegations made by the Petitioner. It is stated that the entire personal file of the Petitioner was placed before the Full Court on the administrative side and a conscious unanimous decision was taken to prematurely retire the Petitioner. Pursuant to the recommendation of the High Court, the State Government issued the impugned notification under Annexure-1. The High Court after considering the CCRs, overall work and conduct of the Petitioner, recommended his premature retirement in the interests of general public in terms of Rule 44 of 2007 Rules.

7. It is stated in the reply that there are adverse entries against the Petitioner in his CCRs which have been duly communicated to him from time to time. Such adverse entries touching on the honesty and integrity of the Petitioner, duly communicated to him, was not the only factor taken into consideration. Multiple factors which played a vital and important role for recommending premature retirement of the Petitioner, were also considered. It is further stated that in the matter of compulsory retirement, as a result of review in terms of Rule 44, no opportunity of hearing or issuance of a show cause notice prior to the decision being taken is envisaged.

8. The Petitioner in his rejoinder reply reiterates that no adverse entry has ever been communicated to him. He adds that by way of an application under the Right to Information Act, he received information from the High Court regarding the entries made in his CCRs, which are advisory in nature.

9. Shri Pattnaik, learned Senior Counsel appearing for the Petitioner contends that, there is absolutely no allegation against the Petitioner with regard to his honesty and integrity during the long service career of twenty-five years and in absence of any single factor, the order of compulsory

retirement is unjustified and uncalled for. The Petitioner was never questioned over his performance, efficiency or competency during his unblemished service career and the Opposite Parties after taking a decision on 5th January, 2010 confirming the promotion of the Petitioner substantively in the cadre of Civil Judge (Sr. Division), without any reason and material placed on record have decided to recommend for premature retirement within twenty six days thereof. It is further submitted that, the so called adverse entries of which the Petitioner got information through R.T.I. application under Anenxure-4 series are not at all adverse in nature but advisory and instructive in nature. It is therefore urged that in absence of any material in justifying the order of compulsory retirement which has been passed even without granting any opportunity of hearing to the Petitioner, is not sustainable in the eye of law. On the whole, it is submitted that when the Petitioner was never suspended during his service period and no adverse report is communicated to him, the punishment of compulsory retirement, which is stigmatic in nature, has been passed without taking into consideration his entire service record of twenty five years.

The decisions in the case of ***Swaran Singh Chand v. Punjab State Electricity Board and others in SLP (Civil) No.20202 of 2006, J. D. Shrivastava v. State of M.P. and others, A.I.R.1984 SC 630 and the decisions of this Court in Suvendra Mohanty v. State of Orissa in W.P.(C) No.7398 of 2013, Epari Vasudeva Rao, Bhubaneswar v. State of Orissa and another in W.P.(C) No.11108 of 2013, Indramani Sahu v. State of Orissa and another in OJC No.6601 of 1995*** have been relied on by the Petitioner to support his case.

10. Shri Sahoo, learned Additional Government Advocate for the Opposite Parties, submitted that, the order of compulsory retirement is neither punitive nor stigmatic. The Petitioner cannot claim any opportunity of hearing as the principles of natural justice have no application in such matters. The decision is based on the subjective satisfaction of the Full Court on the administrative side. It is further submitted that besides two disciplinary proceedings pending against the Petitioner for grave charges, the entire service record of the Petitioner has been taken into consideration before the decision of premature retirement was taken.

11. The entire personal record including his CCRs have been produced before this Court for its perusal.

12. Rule 44 of 2007 Rules authorizes the High Court to retire in public interest any member of the service, who has attained the age of fifty years. Such consideration, for all the officers in the service, shall be made at least three times i.e., when he is about to attain the age of fifty years, fifty-five years and fifty-eight years.

13. It is needless to observe that, judicial officers of the subordinate courts in the State are under the administrative control of the High Court in terms of Article 235 of the Constitution of India. They are different from other civil servants. A single blot in their service record makes them vulnerable. They are expected to have a good character in all respects. In the matter of compulsory retirement in public interest, the Hon'ble Supreme Court has laid down the governing legal principles in ***Baikuntha Nath Das vs. Chief District Medical Officer, Baripada, (1992) 2 SCC 299*** as under:

> "34. The following principles emerge from the above discussion:
>
> (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.
>
> (ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.
>
> (iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary – in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.
>
> (iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.
>
> (v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

> Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

14. In ***Registrar, High Court of Madras v. R. Rajiah***, ***(1988) 3 SCC 211***, the Hon'ble Supreme Court has approved the power of the High Court, on its administrative jurisdiction to recommend compulsory retirement of a member of the judicial service in accordance with the rules framed in that regard. It has further observed that it cannot be arbitrary and there has to be materials to show that an officer has outlived his utility. The Supreme Court has further pointed out in that case that, the High Court while exercising its power of control over the subordinate judiciary, is under a constitutional obligation to guide and protect judicial officers from being harassed.

15. Needless to say that the object of compulsory retirement is to weed out the dishonest, the corrupt and the deadwood. It is true that if an honest and sincere judicial officer is compulsory retired, it might lower the morale of his colleagues. Equally, an officer having sound knowledge of the law but lacking in integrity or having a dubious character, is a great danger to the smooth functioning of the judiciary. What is to be weighed is the performance of the officer on an overall evaluation of his entire service period. Above all, his impartiality, reputation, integrity as well as moral character should be taken into account.

16. We have perused the service record of the Petitioner. The entries made in his CCRs during the entire service period have been carefully examined. The entries in the CCRs relevant for the purpose are reproduced below:-

> *"During his twenty five years of service career, his overall grading was poor for the year 2005-2006 so also his quality of work. The overall grading was average for the year 1987, 1988(P), 1989, 1990, 1991(P), 1993, 1994, 1995(P), 1999, 2000(P), 2001(P), 2003, 2004(P) & 2007(P). Further his overall grading was good for the year 1985, 1986, 1988(P), 1991(P), 1992, 1995(P), 1996, 1997, 1998, 200(P), 2001(P), 2002(P) & 2007(P).*
>
> *Besides above, his integrity was suspicious and doubtful for the years 2005 and 2006."*

17. The personal file of the Petitioner reveals that several complaints were received against him, right from his posting as J.M.F.C., Soro till the end of his career as Civil Judge (Sr. Division), Koraput. Admittedly, two disciplinary proceedings have been initiated against him for grave charges.

18. The personal record of the Petitioner does not support his contention that he had an unblemished career as a judge. The appreciation of his work by the then Hon'ble Chief Justice resulted in his out-of-turn promotion is no doubt. But his track record subsequent thereto, leaves much to be described. Further, as a result of the order of this Court or at judicial side, he stood reverted to his original position. The pending disciplinary proceedings against him, the nature of charges framed thereunder, and the entries made in the CCRs, as well as the nature of complaints seen from the personal file, all present a picture that at oddly with what the Petitioner has sought to project. Not only the adverse remarks, which were duly communicated to him, but at other materials on record justify the impugned order of compulsory retirement.

19. In ***Punjab State Power Corporation Limited vs. Hari Kishan Verma, (2015) 13 SCC 156***, the Hon'ble Supreme Court, after a discussion of the case law on the subject, observed as follows:

> "14. In ***State of Orissa v. Ram Chandra Das***, ***(1996)5 SCC 331,*** a three-Judge Bench has emphatically held that object behind compulsory retirement is public interest and, therefore, even if an employee has been subsequently promoted, the previous entries do not melt into insignificance. To quote:-
>
> "7……Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the Government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that self-same material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the Government servant in service after he attained the required length of service or qualified period of service for pension."
>
> 15. The aforesaid dictum has been approved and followed in ***State of Gujarat v. Umedbhai M. Patel***, ***(2001) 3 SCC 214,*** wherein emphasis has been laid on the factum that the entire service record of the Government servant is to be examined. Same principle has also been followed in another three-Judge Bench decision in ***Pyare Mohan Lal v. State of Jharkhand, (2010) 10 SCC 693***. Slightly recently, a Division Bench in ***Rajasthan SRTC v. Babulal Jangir, (2013) 10 SCC 551***, after discussing number of authorities, has held thus:-
>
> "22. It clearly follows from the above that the clarification given by a two-Judge Bench judgment in *Badrinath v. State of Tamil Nadu* is not correct and the

> observations of this Court in *State of Punjab v. Gurdas Singh* to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement."

20. It has been further held in the case of ***Rajasthan State Road Transport Corporation vs. Babulal Jangir, (2013) 10 SCC 551***, that;

> "27. It hardly needs to be emphasised that the order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of non-application of mind, mala fide, perverse, or arbitrary or if there is non-compliance with statutory duty by the statutory authority. Power to retire compulsorily the government servant in terms of service rule is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest."

21. Upon a careful scrutiny of the entire service record of the Petitioner, and the materials produced before us, we do not see anyreason to view the order of compulsory retirement as mala fide, stigmatic or not warranted in public interest.

22. The writ application is dismissed. No order as to costs.

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2021 (I) ILR - CUT- 733

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

W.P.(C) NO. 5327 OF 2021

MADAN MOHAN SAHU .....Petitioner

.V.

COLLECTOR, ANGUL AND ORS. .....Opp. Parties

ORISSA HIGH COURT PUBLIC INTEREST LITIGATION RULES, 2010 – Rule 8 – Provision under – Filing of PIL – PIL petitions are filed immediately after filing of representation without giving a reasonable time to examine the same by the concerned authority – Effect of – Held, it is not conceivable that the Opposite Parties would be able to

examine the representation and take a decision thereon within such a short period – As Rule 8 states, only in very urgent cases where the making of a representation and waiting for a response "would cause irreparable injury or damage, a petition can be filed straightway by giving prior notice." – This is not one such case, since clearly the Petitioner has given a prior notice to the Opposite Parties – If the representation is "akin to what is postulated in Section 80 CPC", the Petitioner should at least give a two months' time to the Opposite Parties to take a decision thereon – Further, if he serious about the matter, then he should send at least one reminder within the said two months.

For Petitioner : Mr. B. B. Routray
For Opp. Parties : Smt. S. Patnaik, Addl. Govt. Adv.

ORDER Date of Order : 30.03.2021

BY THE BENCH

1. The Court finds that in a large number of Public Interest Litigation (PIL) matters, the Petitioners are filing writ petitions soon after making a representation without waiting for a response.

2. The relevant Rule of the Orissa High Court Public Interest Litigation Rules, 2010 (2010 Rules) in this regard reads thus:

> "8. Before filing a PIL, the Petitioner must send a representation to the authorities concerned for taking remedial action, akin to what is postulated in Section 80 CPC. Details of such representation and reply, if any, from the authority concerned along with copies thereof must be filed with the petition. However, in urgent cases where making of representation and waiting for response would cause irreparable injury or damage, petition can be filed straightway by giving prior notice of filing to the authorities concerned and/or their counsel, if any."

3. In this case, the Petitioner is objecting to the construction of a building over forest land in Pallahara, District-Angul. According to him, none of the present members of Bana Surakhya Samiti of Saharagurujang are supporting him and, therefore, he made a representation on 5th February 2021, to the Opposite Parties, which is pending consideration.

4. However, he has filed the present writ petition on 9th February 2021, i.e. four days thereafter. It is not conceivable that the Opposite Parties would

be able to examine the representation and take a decision thereon within such a short period. As Rule 8 of 2010 Rules states, only in very urgent cases where the making of a representation and waiting for a response "would cause irreparable injury or damage, a petition can be filed straightway by giving prior notice."

5. This is not one such case, since clearly the Petitioner has given a prior notice to the Opposite Parties. If the representation is "akin to what is postulated in Section 80 CPC", the Petitioner should at least give a two months' time to the Opposite Parties to take a decision thereon. Further, if he serious about the matter, then he should send at least one reminder within the said two months.

6. Leaving it open to the Petitioner to first comply with the above requirements, and if the cause of action still survives, to file a fresh petition in accordance with law, the writ petition is disposed of.

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2021 (I) ILR - CUT- 735

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

W.P. (C) NO.1299 OF 2021 (With Batch of Cases)

ORISSA TRANSFORMERS PVT. LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Administrative decision – Judicial review – Scope of interference – Principles – Discussed.

> *"At this juncture, the Court would like to recapitulate the principles concerning judicial review of administrative action in the matter of awarding of contracts pursuant to evaluation of tenders which have been succinctly explained by the Supreme Court in Tata Cellular v. Union of India (1994) 6 SCC 651 as under: "77. The duty of the court is to confine itself to the question of legality. Its concern should be: 1. Whether a decision-making authority exceeded its powers? 2. Committed an error of law, 3. Committed*

a breach of the rules of natural justice, 4. Reached a decision which no reasonable tribunal would have reached or, 5. Abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality, namely, Wednesbury unreasonableness. (iii) Procedural impropriety.

In the present case, on carefully examining the documents placed on record, the Court is satisfied that there was no illegality committed in the tender evaluation process; there is nothing to show that the Procurement Committee acted arbitrarily or based its decision on extraneous considerations or abused its powers." *(Para 18)*

Case Laws Relied on and Referred to :-

1. (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.
2. AIR 1990 SC 2205 : State of West Bengal Vs. Atul Krishna Shaw.

For Petitioner : Mr. Soumendra Pattnaik.
For Opp. Parties : Mr. M.S. Sahoo, Addl. Govt. Adv. & Mr. Sumit Lal.

ORDER Date of Order : 31.03.2021

BY THE BENCH:

1. These five writ petitions arise out of a similar set of facts concerning the same Petitioner, and are accordingly being disposed of by this common order.

2. The background to the filing of the present petitions is that the Petitioner is a company manufacturing transformers of different specifications. It claims to be supplying transformers to many of the electricity companies in Odisha. An E-tender was floated by the Western Electricity Supply Company of Orissa (WESCO) Utility for supply of 500/250/100/25/16 KVA BIS energy efficiency Level-II rating distribution transformers by a tender notice dated 11th March, 2020. The last date for submission of the online tender documents was 25th March, 2020.

3. The last date was further extended to 30th June, 2020. The Petitioner submitted E-tender documents for supply of 12 Nos of 500 KVA

Transformers, 61 Nos. of 250 KVA Transformers, 610 Nos. of 100 KVA Transformers, 974 Nos. of 25 KVA Transformers and 95 Nos. of 16 KVA Transformers. This specification was stated to have been submitted on 29th June, 2020.

4. The Techno Commercial bid was opened on 3rd July, 2020. On 26th August, 2020 the tendering authority of WESCO wrote to the Petitioner seeking clarifications of Techno Commercial bid in respect of the tender for procurement of all five specifications of Transformers i.e., 16 KVA, 25 KVA, 100 KVA, 250 KVA and 500 KVA BIS Level-II Transformers.

5. One of the deficiencies pointed out as regards the performance certificate that was required to be submitted, read as under:

> "You have not submitted the Performance Certificate for 16 KVA, 11/0.25 KVA & 25 KVA, 11/0.433 KV transformer.
>
> For 100 KVA, 11/0.433 KVA you have submitted a performance certificate issued by Executive Engineer (Store), NESCO in support of your past performance.
>
> However on verification NESCO Utility has clarified that no such certificate has been issued to you. Therefore you are required to clarify on the status of the performance certificate submitted with the bid vis-a-vis as denied by NESCO Utility of issuing the same, falling which your bid will not be considered for evaluation and action as deemed proper will be taking against you as per the prevailing Rules & Regulations."

6. According to the Petitioner, by letter dated 2nd September, 2020 the Petitioner supplied the clarifications as required. It is stated in para-11 of the petition that the Petitioner submitted the relevant past supply experience, performance certificate, the annual turnover certificate and has given undertaking to submit the BIS Level-II certificate and type test report before the dispatch as per clause No.5.1.1. (d) of the tender document.

7. WESCO stated to have issued the second clarification dated 6th November, 2020 asking the Petitioner to submit audited financial report for the past three years for due compliance of the commercial section of the bid. The Petitioner states that it complied with this requirement on 10th November, 2020.

8. The Petitioner states that it was surprised to receive five separate letters dated 28th December, 2020 from WESCO to the effect that its bids for

the supply of 500 KVA, 250 KVA, 100 KVA and 25KVA transformers were 'techno commercially disqualified', the tender for the supply of 16 KVA transformers was cancelled. The said letters did not indicate any reasons for the rejection of the Petitioner's bids or for the cancellation of the tender for the supply of 16 KVA transformers.

9. Despite the Petitioner writing a letter seeking reasons, those were not provided. In the circumstances, these writ petitions were filed in this Court, one each pertaining to the rejection of the Petitioner's bids for supply of 500 KVA, 250 KVA, 100 KVA and 25 KVA and the cancellation of the tender for supply of 16 KVA transformers. In each of the petitions, notice was issued by this Court on 13th January, 2021.

10. A counter affidavit has been filed by TPWODL (the erstwhile WESCO Utility) (Opposite Party No.2) in W.P. (C) 1301 of 2021. It is first pointed out that in terms of Clause 8.1 (B) of the Tender Specification the responsibility for the authenticity of the documents uploaded was that of the bidder. If the information furnished by a bidder was found to be false the bidder would be blacklisted and his bid security would stand forfeited. Reference is also made, *inter alia,* to Clause 25 whereby WESCO reserved the right to reject any bid or cancel the tender without assigning any reasons. Reference is also made to Clause 28.2 which reserves the right of the Purchaser to accept or reject any bid without "any obligation to inform the affected bidder" the grounds for "the Purchaser's action".

11. Further, a reference is made to Clause 30 of the Instructions to Bidders (ITB) which requires them to observe the highest standards of ethics and states that the Purchaser will reject a bid if it determines that "the bidder recommended for the award of contract has engaged in corrupt or fraudulent practice in competing for the contract in question."

12. It is pointed out by Opposite Party No.2 that the Petitioner had with its bid for the supply of 100 KVA transformers, enclosed the performance certificate dated 30th November 2019 purportedly issued by the office of the Executive Engineer, Electricity Stores Division, NESCO Utility at Balasore stating that the Petitioner had supplied to NESCO 200 Nos. of 100 KVA transformers against a purchase order dated 31st December 2018 and that all the said transformers were "running very satisfactory". WESCO wrote to NESCO on 6th August 2020 asking it to confirm the authenticity of the said

certificate. On the same date NESCO replied stating that the "signature, letter no. and date available in the document submitted" by the Petitioner were verified "and found that there is no authenticity in the said document." Accordingly on 26th August, 2020 WESCO wrote to the Petitioner asking it to clarify the status of the performance certificate submitted with the bid "failing which your bid will not be considered for evaluation." It is stated that while Petitioner by its reply dated 2nd September 2020 submitted clarifications on the different queries raised by WESCO, in respect of the performance certificate the Petitioner while relying on the one already submitted requested that it would submit a fresh one. However, the Petitioner failed to do so.

13. Opposite Party No.2 further states that since the performance certificate submitted was no authentic, there were sufficient grounds to disqualify the Petitioner in terms of Clause 30 of the ITB. Accordingly at its meeting on 14th December 2020, the Procurement Committee of WESCO decided not to open the price bid of the Petitioner for supply of all specification of transformers.

14. This Court has heard the submissions of learned counsel for the parties. The Court posed a specific query to Mr. Soumendra Pattnaik, learned counsel for the Petitioner, whether in fact the Petitioner either furnished a clarification in respect of the performance certificate enclosed with its bid or furnished a fresh one from NESCO as undertaken by it to WESCO Utility in its letter dated 2nd September 2020. In response, Mr. Pattnaik referred to the copy of a letter dated 24th March, 2021 issued by NESCO Utility, enclosed with the Petitioner's rejoinder affidavit, stating that the Petitioner had successfully supplied 200 Nos. of 100 KVA Transformers pursuant to the purchase order dated 31st December, 2018.

15. The fact remains that it is only with the rejoinder affidavit in this Court that the Petitioner has submitted a new performance certificate issued by NESCO, which is yet to be verified by NESCO. Further, it is dated 24th March, 2021 i.e. long after the deadline for submission of documents has been crossed, and in fact after notice was issued in these petitions. Thus it is obvious that the Petitioner failed to either furnish to WESCO Utility a clarification in respect of the performance certificate enclosed with its bid or furnish a fresh one from NESCO as undertaken by it in its letter dated 2nd September 2020. In the last-mentioned letter, the Petitioner stated that it had

written to NESCO on 27th August 2020 for a performance certificate and that it would "resubmit the same as we receive it." Interestingly, the certificate dated 24th March 2021 purportedly issued by NESCO makes no reference to the aforementioned request made by the Petitioner to it on 27th August 2020. Thus, when the Procurement Committee of WESCO Utility met on 14th December 2020, it did not have before it an authentic performance certificate issued by NESCO confirming the supply of transformers by the Petitioner. What in fact remained on record was a certificate which NESCO confirmed to be not authentic. In the circumstances the Procurement Committee was fully justified in deciding not to open the price bid of the Petitioner for the bids submitted by it for all specifications of transformers.

16. Mr. Pattnaik then submitted that even if the performance certificate for supply of 100 KVA Transformers was unable to be furnished in good time by the Petitioner, it did not justify the rejection of all of the Petitioner's bids for supply of transformers with the other specifications. He further submitted that in a letter written to the Petitioner on 6th November 2020 WESCO Utility had only sought for certain audited financial statements and had made no mention of the performance certificate of NESCO and therefore it should be presumed that WESCO had given up on that objection.

17. Again, this Court is unable to agree with the above submission. The furnishing of a performance certificate, testifying to the past experience of the Petitioner, was an essential condition and could not have been diluted much less ignored by the Procurement Committee of WESCO Utility. There is nothing to suggest that it waived the objection in this regard pointed out in its letter dated 26th August 2020. The tender conditions made it clear that furnishing false or incorrect information would entail rejection of the bid. With NESCO informing WESCO Utility that the certificate enclosed by the Petitioner with its bid was not an authentic one, clearly this was a serious violation of the tender conditions and such a bidder risked having all its bids rejected notwithstanding that the certificate may have pertained to one of the bids for a particular specification of transformer. The question before the Procurement Committee was whether such a bidder could be trusted as regards the authenticity of the documents and information furnished. A negative conclusion in this regard even in regard to one of the five bids submitted by the same Petitioner could adversely impact the decision with regard to its other bids submitted at the same time. The question before the Court is whether in the above circumstances the decision of the Procurement

Committee not to open any of the financial bids of the Petitioner was a reasonable one? Applying the settled legal principles in this regard, the Court concludes that that the said question must be answered in the affirmative.

18. At this juncture, the Court would like to recapitulate the principles concerning judicial review of administrative action in the matter of awarding of contracts pursuant to evaluation of tenders which have been succinctly explained by the Supreme Court in ***Tata Cellular v. Union of India (1994) 6 SCC 651*** as under:

> "77. The duty of the court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers?
>
> 2. Committed an error of law,
>
> 3. committed a breach of the rules of natural justice,
>
> 4. reached a decision which no reasonable tribunal would have reached or,
>
> 5. abused its powers.
>
> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i) Illegality: This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> (ii) Irrationality, namely, Wednesday unreasonableness.
>
> (iii) Procedural impropriety.
>
> The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind 28*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

19. In the present case, on carefully examining the documents placed on record, the Court is satisfied that there was no illegality committed in the

tender evaluation process; there is nothing to show that the Procurement Committee acted arbitrarily or based its decision on extraneous considerations or abused its powers.

20. Mr. Pattanik submitted that in none of the letters written to the Petitioner by WESCO Utility on 28th December 2020 informing it of the rejection of its bids, and in one instance of the cancellation of the tender, have reasons been provided and therefore on this solitary ground the decisions must be set aside. Reliance is placed on the decision of the Supreme Court in ***State of West Bengal v. Atul Krishna Shaw AIR 1990 SC 2205***.

21. As far as the above submission is concerned, the Court finds that at the earliest instance, the Petitioner was made aware by WESCO Utility of the defect in its bid and told in uncertain terms that if the defect was not rectified, its bid was liable to be rejected. The Petitioner was aware that it had furnished a document that was shown to be inauthentic and yet made no effort to rectify that very serious defect. The Petitioner has been unable to dispute that despite undertaking in its reply dated 2nd September, 2020 to furnish a fresh performance certificate of NESCO, the Petitioner failed to do so in good time and definitely not by the time the Procurement Committee held its deliberations. In other words, the Petitioner was fully aware of the reasons for the rejection even if the letter informing it of such rejection did not specify it. Therefore, the decision in ***Atul Krishna Shaw*** *(supra)* does not help the Petitioner's case since it is not as if the Petitioner was unaware of the reasons for the rejection of its bids.

22. For the aforementioned reasons, this Court finds no grounds for interference. The writ petitions are dismissed.

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2021 (I) ILR - CUT- 742

Dr. S. MURALIDHAR, C.J.

ARBP NO. 46 OF 2020

GRASIM INDUSTRIES LTD. .....Petitioner

.V.

M/S. JAYASHREE CHEMICALS LTD. ……Opp. Party

THE ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 (6) – Appointment of Arbitrator – Composite clause in Business Transfer Agreement provides for negotiations and arbitration – Dispute between the parties – The first is that arising out of the Business Transfer Agreement (BTA), there is an unresolved dispute between the parties to the BTA and the second is that, there is an arbitration clause in the BTA, which envisages the appointment of a sole arbitrator to adjudicate the disputes between the parties arising from the BTA – Key elements as far as Section 11(6) of the Act concerned viz., the existence of disputes, and the existence of an arbitration clause, stands fulfilled in the present case – Plea that since the dispute between the parties, notwithstanding being one to enforce contractual rights of indemnity under the BTA has become subject matter of a writ petition, it should await the decision in the writ petition which involves an issue which partakes the character of an action in rem – Action in rem and in personam – Distinction – Held, in the facts and circumstances of the present case, the cause of action in the dispute between GIL and JCL has given rise to an action in personam and therefore there is no bar to its arbitrability at this stage – To repeat, with GIL not being a party to the writ petition by JCL against the OSPCB, the outcome of the said writ petition will not affect its claim against JCL – Having already paid the dues demanded by OSPCB, GIL is out-of-pocket, and can maintain a claim against JCL.

Case Laws Relied on and Referred to :-

1. (2021) 3 SCC 103 : Vidya Drolia Vs.Durga Trading Corprn.
2. (2009) 1 SCC 267 : National Insurance Company Limited Vs. Boghara Polyfab Pvt. Ltd.

For Petitioner : Mr. Laxmidhar Pangari, Sr. Adv.

For Opp. Party : Mr. Siddhartha Datta

ORDER Date of Order : 23.04.2021

Dr. S. MURALIDHAR, C.J.

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act'), seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner Grasim Industries Limited (GIL) and the Opposite Party Jayashree Chemicals Limited (JCL) arising out of a Business Transfer Agreement (BTA) dated 8th September, 2014 along with its amendment.

2. The background facts are that in terms of the above BTA that stood amended on 8th September 2015, the predecessor in interest of GIL, Aditya Birla Chemicals (India) Limited (ABCIL) purchased the business undertaking of JCL on "as is where is" basis, as a going concern by way of a slump sale. The agreements contained covenants, representations, warranties and indemnities. ABCIL was merged with GIL with effect from 4th January, 2016 by an order dated 24th November, 2015 passed by the High Court of Jharkhand. All assets, liabilities, interests, titles, claims, etc. including the above business undertaking are stated to have merged and become part of GIL. For all purposes, including the BTA, GIL stepped into the shoes of ABCIL.

3. Clause 13 of the BTA, which provides for the seller JCL indemnifying the buyer, i.e. GIL, reads as under –

> *"13.1.1 The Seller hereby agrees indemnify and hold the Purchaser, its respective Affiliates and directors, officers, agents and representatives and any Person claiming by and through it harmless from and against any and all Losses arising out of or otherwise related to:*
>
> *a) Any defect in the title relating to Real Property pertaining to Business undertaking; or*
>
> *b) Any act, deed, omission or non-compliance with applicable Law on or before the Closing Date by the Seller, their agents, representatives, employee, officers, or directors; or*
>
> *c) Any breach or inaccuracy of any representation and warranty made by the seller in this Agreement or in any Related Agreement; or*
>
> *d) Any obligation, Loss or liability of the Seller or any Affiliate of the Seller (not otherwise provided for in any other Sub-clauses of this Clause 13.1.1) whether disclosed or not disclosed relating to matters or events arising at or prior to Closing; or*
>
> *e) Any non-fulfillment, non-observance, non-performance or breach of any covenant or agreement by the Seller contained in this Agreement or in any Related Agreements; or*
>
> *f) Any obligation, Loss or liability of the Seller or any Affiliate of the Seller arising with respect to any of the Excluded Liabilities; or*
>
> *g) Any claim from Southern Electricity Supply Company of Orissa Limited pursuant to the qualifying remarks in the electricity bill or the outcome of the WP(C) No.10955 of 2013 pending before the Hon'ble High Court of Odisha."*

4. According to GIL, due to non-compliance by JCL with environmental laws, a sum of Rs.2,11,36,662/- had to be deposited by the GIL with the Odisha State Pollution Control Board (OSPCB) towards preliminary study, investigation and remediation of the mercury contaminated site of the Ganjam unit of JCL.

5. According to GIL, further on account of violation and noncompliance of environmental laws, the OSPCB estimated the remediation cost to be Rs.28.70 crores including cost to be incurred for the various activities related to remediation of mercury contaminated soil, sediments and waste, surfaces water, ground water and shifting of mercury contaminated sludge from the unlined pit to constructed Secured Land Fill (SLF) within the premises as per existing rules.

6. GIL then issued a notice on 14th October, 2019 to JCL enforcing the aforementioned indemnity clause and seeking to be paid Rs.2,11,36,662/- and Rs.28.70 crores respectively in terms of Clause 13 of the BTA. By letter dated 8th November, 2019 and 20th December, 2019, JCL denied its liability.

7. In view of the dispute between the parties, GIL invoked Clause 16 of the BTA for resolution of the dispute through negotiation and arbitration. It must be noted here that this is a composite clause that provides for negotiations between the parties at two internal levels, failing which the parties can go in for arbitration.

8. On 23rd January 2020, GIL first sought resolution of the dispute by senior officers of the parties in terms of Clause 16.1.1 of the BTA. A meeting was held on 8th February, 2020 for this purpose, but the dispute remained unresolved. Thereafter, by letter dated 4th March, 2020, GIL, in terms of Clause 16.1.2 of the BTA, requested JCL for resolution of the dispute at the senior management level. The senior management officers of both GIL and JCL met on 26th June, 2020. The resolution of the dispute remained elusive.

9. Thereafter, GIL invoked Clause 16.2.1 of the BTA and issued a notice dated 10th September, 2020 to JCL proposing the name of the sole arbitrator, being a former judge of this Court. By letter dated 24th September, 2020, JCL conveyed its inability to accept GIL's nominee to be the sole arbitrator. Instead it suggested the names of two other arbitrators, for GIL to choose from. This was unacceptable to the GIL and this was conveyed to JCL by its letter dated 7th October, 2020. Thereafter the present petition was filed.

10. In response to the petition, JCL has filed a fairly detailed reply on 15th January, 2021. It is pointed out that, on 1st May, 2015 a notice under Section 5 of the Environment Protection Act, 1986 was issued to JCL by the OSPCB asking it to pay Rs.2,11,36,662/- for violation of the Hazardous Waste (Management, Handling & Transboundary) Rules, 2008. This demand was challenged by JCL in this Court by filing WP(C) No. 12713 of 2015 on 13th July, 2015.

11. In the said writ petition, which is pending, an interim order was passed by this Court to the effect that no coercive steps shall be taken against JCL. JCL has alleged that, GIL has suppressed material facts in the present petition by not adverting to the above pending writ petition.

12. Mr. L. Pangari, learned Senior counsel for GIL, submitted that the essential requisites for maintaining a petition under Section 11 (6) of the Act stood fulfilled in the present case. First, there was no denial that there was a dispute between the parties arising out of the BTA and secondly, that there was an arbitration clause in the BTA providing for a mechanism for the resolution of such dispute. He submitted that since GIL had already paid the sums demanded by OSPCB, its claim against JCL would be maintainable notwithstanding the outcome of JCL's petition against PSPCB questioning the demand.

13. In reply, Mr. Siddhartha Datta, learned counsel appearing for JCL, urged that since JCL's writ petition was not yet decided, the present petition seeking the appointment of an arbitrator should be stood over. According to him, the subject matter of W.P. (C) No.12713 of 2015 pending in this Court is no different from the core issue required to be adjudicated in the arbitration. Mr. Dutta submitted that the claims could be either *in personam* or *in rem.* He submitted that the claim of OSPCB against JCL was a claim *in rem* whereas the liability of the JCL to indemnify GIL was *in personam*. However, the latter arose out of and was dependant on the former. He submitted that the arbitrator would be in no position to decide the issue of non-compliance by JCL with the Hazardous Waste (Management, Handing & Transboundary) Rules, 2008 and that issue could be decided only by this Court. Reliance was placed by Mr. Datta on the decision of the Supreme Court in ***Vidya Drolia v.Durga Trading Corprn. (2021) 3 SCC 103***. Mr. Datta submitted that while it was understandable that GIL had sent its notice to JCL before the expiry of five years from the date of the BTA, since the

outcome of the pending writ petition by JCL against the OSPCB would have a direct bearing on the present claim of GIL, the hearing of the present petition should be deferred to await the result of the writ petition.

14. The Court has considered the above submissions. At the outset, it requires to be noticed that there are certain facts that are not in doubt. The first is that arising out of the BTA, there is an unresolved dispute between the parties to the BTA. The second is that, there is an arbitration clause in the BTA, which envisages the appointment of a sole arbitrator to adjudicate the disputes between the parties arising from the BTA. IN this connection it may be noted that GIL has exhausted the other mechanisms that were required to be invoked under Clause 16 of the BTA before resorting to arbitration. Therefore, the two key elements as far as Section 11(6) of the Act concerned viz., the existence of disputes, and the existence of an arbitration clause, stands fulfilled in the present case.

15. As regards the writ petition pending in this Court at the instance of the JCL against the OSPCB, it is seen that the GIL is not a party to that writ petition. Therefore, the interim order the JCL may have in its favour and against the OSPCB in the said writ petition could not have helped GIL to refuse to honour the demand raised against the unit by the OSPCB. In other words, even while JCL may have got an interim order that prevents OSPCB from recovering any amount from it, at no point of time was there any interim order in favour of GIL restraining OPSCB from proceeding against it for failure to honour the demand.

16. The Court is unable to accept the contention of JCL that since the subject matter of the dispute between the parties, notwithstanding being one to enforce contractual rights of indemnity under the BTA, should await the decision in the writ petition which involves an issue which partakes the character of an action *in rem*. There appears to be a conceptual confusion in this submission. If indeed the claim of GIL against JCL was directly dependant on the outcome of the litigation between JCL and OSPCB, then it would have been in JCL's interest to have made GCL a party to that litigation. For reasons kwon to it, JCL did not adopt that course of action. Moreover, factually, GIL did not await the outcome of the said writ petition, even assuming it knew of its pendency in this Court. It went ahead and paid OSPCB the dues and on that basis is today maintaining its claim against JCL. The latter dispute, based on the indemnity clause in the BTA, cannot be said

to be an action *in rem*. It is undoubtedly an action *in personam*. Also, since GIL is not a party to the writ petition, coupled with the fact that it has already paid the demand of OSPCB, the outcome of the writ petition will not affect its claim against JCL. It is, therefore, not possible to accept JCL's contention that the *in personam* cause of action that gave rise to the claim of GIL against JCL arises out of and is dependent on the *in rem* cause of action giving rise to the writ petition by JCL against the OSPCB.

17. At this stage it would be useful to recapitulate what the scope of the present proceedings are. In ***National Insurance Company Limited v. Boghara Polyfab Private Limited (2009) 1 SCC 267***, the Supreme Court identified and segregated the issues that arise for consideration in an application under Section 11 of the Act into three categories, viz. (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide or leave it to the arbitral tribunal to decide; and (iii) issues which should be left to the arbitral tribunal to decide. The first category included the issues:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

18. In ***Vidya Drolia v. Durga Trading Corporn***. (*supra*), the Supreme Court was essentially dealing with the kind of disputes that could be said to be arbitrable and those that were not. In that context it further examined the aspect of actions *in rem* and actions *in personam* and observed:

> "In view of the above discussion, we would like to propound a four- fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:
>
> (1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
>
> (2) when cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
>
> (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable."

19. In ***Vidya Drolia*** (*supra*), the Supreme Court further decided to which of the three categories delineated in ***Boghara Polyfab*** (*supra*) the issue whether the cause of action relates to action *in personam* or *in rem* belonged, and answered it thus:

"The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action *in personam* or *rem*; whether the subject matter of the dispute affects third party rights, have *erga omnes* effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statue (s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the arbitral tribunal to decide. We would not like be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable."

20. On the above parameters, it is unmistakable that the dispute between GIL and JCL arising from the BTA and their claims vis-àvis each other would be actions *in personam*. While the dispute between JCL and OSPCB might partake the character of an action *in rem*, in the facts and circumstances of the present case, the cause of action in the dispute between GIL and JCL has given rise to an action *in personam* and therefore there is no bar to its arbitrability at this stage. To repeat, with GIL not being a party to the writ petition by JCL against the OSPCB, the outcome of the said writ petition will not affect its claim against JCL. Having already paid the dues demanded by OSPCB, GIL is out-of-pocket, and can maintain a claim against JCL. The *in personam* cause of action that gives rise to GIL's claim against JCL is not dependent on the outcome of the *in rem* cause of action giving rise to the writ petition by JCL against the OSPCB.

21. This Court, in the present petition, is not called upon to adjudicate whether the claim of GIL against JCL is justified or not. For that matter, this Court is not even called upon to answer the question whether OPSCB is justified in proceeding against JCL or GIL. The scope of the arbitration proceedings is the claims and counter-claims of GIL and JCB vis-à-vis each other. OSPCB is not party to the BTA and, therefore, not a party to the arbitration. There is merit in GIL's contention that having been out of pocket as far as the dues claimed by OSPCB are concerned, it cannot be prevented from proceeding with its claim against JCL, notwithstanding the outcome of the writ petition by JCL against the OSPCB. In any event, even this is an issue that is best left to be decided by the Arbitrator. This Court, therefore, expresses no opinion in that regard. Equally, it expresses no opinion on the principal contention of JCL that it is not liable to indemnify GIL for the amounts the latter had to pay to the OSPCB. All these are left to be urged before the Arbitrator for decision.

22. The Court nevertheless accepts the contention of GIL that the mere pendency of JCL's writ petition in this Court against the OSPCB should not prevent GIL from seeking to invoke the arbitration clause in the BTA for resolution of its disputes against JCL and incidental thereto to seek the appointment of an rbitrator. The dispute *inter se* between GIL and JCL relates to an action *in personam* and is arbitrable. That indeed is the limited scope of the present petition.

23. Therefore, without commenting one way or the other on the merits of the respective contentions of the parties, the Court is of the view that with the

two basic elements for the appointment of the arbitrator in terms of Section 11 of the Act standing fulfilled, there is no difficulty in proceeding to appoint a sole arbitrator to adjudicate their inter se disputes arising from the BTA. It is clarified that, all the contentions of the parties are left open to the urged before the learned Arbitrator in accordance with law.

24. This Court accordingly appoints Justice P.K. Mishra, the former Chief Justice of the High Court of Patna as the sole Arbitrator to adjudicate the disputes between the parties. The arbitration will take place under the aegis of the Orissa High Court Arbitration Centre.

25. The petition is disposed of in the above terms.

26. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of this order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No. 4587 dated 25th March, 2020 as modified by Court's Notice No. 4798 dated 15th April, 2021. A copy of the order be provided to the learned Arbitrator by the Registry forthwith.

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2021 (I) ILR - CUT- 751

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

CRLA NO. 33 OF 2004

ROHIDAS KISKU ……..Appellant

.V.

STATE OF ORISSA ……..Respondent

(A) CRIMINAL TRIAL – Offence of murder – Absence of motive – Effect of – Held, it has been held by the Hon'ble Apex Court that even if there is absence of motive, it would not benefit the accused when there is a reliable and acceptable version of the eyewitnesses, which is supported by the medical evidence. (Shamsher Singh v. State of Haryana (2002) 7 SCC 536 Followed) (Para 9)

(B) CRIMINAL TRIAL – Offence of murder – Single eye witness to the occurrence – Whether conviction can be based on such sole eye witness? – Held, Yes – Reasons – Discussed. (Paras 11 & 12)

(C) CRIMINAL TRIAL – Offence of murder – Non-examination of any one witness during trial – Effect of – Held, cannot be termed as material irregularity.

> *"Furthermore, non-production of one Jagannath Lohar, who accompanied P.W.6, cannot vitiate the trial or render the proceeding unfair or illegal as he was not a witness, who was essential to the unfolding of the narrative on which the prosecution was based. Therefore, the same cannot be termed to be a material irregularity as he was not a material witness. No adverse inference can be drawn for such non-examination. It cannot be a ground to discard the entire prosecution case by itself. As opined by the Hon'ble Supreme Court in Malkhan Singh v. State of U.P.6, it is not the quantity but the quality of the evidence that is determinative. If the prosecution's case is proven beyond reasonable doubt by other cogent, reliable evidence, then no infirmity to the trial occurs. As Jagannath Lohar was not an eye witness to the actual attack, nor was any inference drawn about his presence at the scene of the incident, whether during or after investigation, the absence of his testimony is not fatal/of little consequence to the trial of the accused."*
>
> *(Para 15)*

Case Laws Relied on and Referred to :-

1. (1960) 3 SCR 130 : Rabari Ghela Jadav Vs. State of Bombay.
2. (2002) 7 SCC 536 : Shamsher Singh Vs. State of Haryana.
3. (1973) 2 SCC 793 : Shivaji Sahebrao Bobade Vs. State of Maharashtra.
4. (1991) 2 SCC 32 : Jai Prakash Vs. State (Delhi Admn.)
5. 1991 Supp (2) SCC 677 : Jayaram Shiva Tagore Vs. State of Maharashtra.
6. 1995 Supp (4) SCC 650 : Malkhan Singh Vs. State of U.P.
7. (1985) 1 SCC 505 : State of U.P. Vs. M.K. Anthony.
8. (1997) 1 SCC 283 : Binay Kumar Singh Vs. State of Bihar.

For Appellant : Shri Surayakant Dwibedi (Amicus Curiae)
For Respondent : Mr. Sk. Zafrulla, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 24.03.2021

S.K. PANIGRAHI, J.

1. The present appeal has been directed against the judgment of conviction and order of sentence dated 05.12.2003 passed by the learned Additional Sessions Judge, Rairangpur in S.T. Case No.13/67 of 2002, whereby the appellant has been convicted for commission of offence

punishable under Section 302 of the Indian Penal Code, 1860 and sentenced to undergo imprisonment for life and to pay fine of rupees one thousand or in default to further S.I. for one month.

2. Bereft of unnecessary details, the facts of the matter presented before us remain that on 26.08.2001 at around 8:00 P.M., the accused was taken to the house of the informant–Madhu Majhi (P.W.1) by Sawan Kisku (deceased), his son Baidyanath (P.W.2), his two son-in-laws; Balaram (P.W.6) and Singrai (P.W.4), as the accused was suffering from fever and possibly malaria. P.W.1 requested everyone to return in the morning as he would be treating the accused with herbal medicines only after observing his condition throughout the night. However, the deceased, P.W.2, P.W.4 and P.W.6 decided to stay and wait. The deceased and P.W.1 went to sleep in P.W.1's room, where P.W.1 rested on his cot and the deceased laid on a mattress on the floor. P.W.2, P.W.4 and P.W.6 were cooking food outside the house. Around midnight upon hearing some noise, the P.W.1 noticed that the accused had picked up a Barisi (an iron instrument with a short handle generally used by carpenters) which was lying in the room and assaulted the deceased by means of the same on the left side of his head, ear and neck region. Immediately P.W.1 created a "hulla" (commotion) due to which the accused ran out of the room but was apprehended by P.W.2, P.W.4 and P.W.6 who were cooking outside and had rushed towards the door hearing the commotion. In the struggle that ensued to apprehend the accused, P.W.6 received some injuries. P.W.1, P.W.2, P.W.4 and P.W.6, however, were finally able to tie up the accused. Immediately afterwards, P.W.1 along with one Jagannath Lohar went to the Police Station at Badampahad and lodged a report at around 2 A.M. Police registered the FIR and came to the spot, but by then the deceased has already died due to the injuries inflicted upon him. The police arrested the accused and in course of investigation, seized the weapon of offence, i.e., the Barisi, the blood stained clothes of the deceased, the mattress, on which the deceased was sleeping, one blood stained lungi of the accused, and collected blood samples of the accused, the deceased and P.W.6, and sent all those for chemical examination. After due investigation, the police charge sheeted the accused for the offences U/s.302/324 I.P.C.

3. The trial court thereafter framed 4 issues. The prosecution examined 6 witnesses; out of whom P.W.1 is the informant and eye witness to the incident; P.W.3 is the Medical Officer, who conducted the Post Mortem Examination; P.Ws.2, 4 and 6 are the family members who had accompanied

the accused and the deceased to the house of P.W.1 and were present around the spot at the time of the alleged incident and P.W.5 is the Investigating Officer. The plea of alibi taken by the appellant included complete denial of the allegations made against him. However, no witnesses were produced from the appellant's side before the trial court in support thereof.

4. Upon going through the testimony of P.W.1, it is revealed that the accused was brought to his house at around 7:00 P.M. by the deceased and P.Ws.2, 4 and 6 for treatment of fever, madness or possibly malaria. P.W.1 deemed it fit to observe the accused's condition overnight before prescribing any medication and thus did not give any medication at that time. The deceased along with P.Ws.2, 4 and 6 then decided to spend the night there itself. His testimony also reveals that the deceased slept in his room while P.Ws.2, 4 and 6 were outside cooking food. He makes a statement about how the accused kept moving around and acted jittery. He states that he wasn't getting sleep that night, and so upon hearing some noise around midnight saw that the accused had brought out a Barisi and assaulted the deceased. He further clarified that he saw three blows dealt by the accused using the Barisi on the head region, i.e., on the left side ear region, left side scapula region and on the neck region of the deceased. When the accused started to move towards the people outside the room, P.W.1 raised alarm and that is how P.Ws.2, 4 and 6 caught hold of the accused. P.W.1 assisted them in attempting to restrain him. The deceased was struggling for his life due to the severe injuries borne by him. P.W.1 along with one Jagannath Lohar went to Badampahad P.S. and lodged an oral report which was reduced into writing by the police immediately after the incident occurred. He is also a signatory to the inquest report. During cross examination his testimony has not been discredited.

5. The Medical Officer who conducted the post mortem examination on 27.08.2001 was P.W.3 and found the following injuries;

i. One incised wound of size 3" x bone deep situated over left tempo-parietal region placed obliquely about 2" above left ear. The brain matter emerging out of the wound on pressure.

ii. Another incised wound of size 3" length situated at the left side of the nape of the neck about 3" depth involving the deeper structure.

iii. An incised wound over the left shoulder blade (scapula) placed obliquely of size 3 ½ "x 1/3" x 1/3".

All the injuries were ante mortem in nature and were determined to have been caused by a sharp weapon. The Injury No.i extended deep into the brain, piercing the bone thereby causing a haematoma in the brain tissue. The cause of death was determined to be due to the injury to the vital organs. P.W.3 was also asked to examine the weapon of offence, i.e., the iron Barisi marked as M.O.I on 04.09.2001 and opined that the injuries present on the body of the deceased could have been caused by that weapon.

6. P.W.2, the son of the deceased and cousin brother of the accused had accompanied the deceased, accused and others to the house of P.W.1. P.W.2, however, did not support the prosecution case and has even denied his presence at the spot and has thus been declared hostile by the prosecution. P.W.4 and P.W.6 have also been declared hostile by the prosecution as they were also close relatives of the accused and the deceased and have made attempts to shield the accused. P.W.4 admitted that he had accompanied the deceased and the accused to the house of P.W.1. When P.W.4 had entered the room after the commotion of P.W.1, he had found the deceased lying with bleeding injuries and struggling for his life, but he had not seen the deceased being assaulted. The evidence of P.W.6 is similar with P.W.4 and according to him he had not seen the accused being armed with Barisi. P.W.4 and P.W.6 also admitted that P.W.2 was present at the spot.

7. P.W.5 reveals in his testimony that in the night of 26/27.08.2001 he was on duty at Badampahad P.S. and had received the oral report from P.W.1 after which he immediately took up the investigation. He had visited the spot of the incident on same night and found the dead body of the deceased lying in P.W.1's room. He found the accused tied up at the spot and arrested him around 5 A.M. After conducting inquest, he had proceeded to seize the Barisi, the Kantha where the deceased was lying, sample blood stained earth from the spot of the incident, one Dibiri from the spot and one blood stained lungi from the accused at the spot. He immediately despatched the dead body for post-mortem examination. As P.W.6 had also received injuries, he had sent him for medical examination. He had sent all seized articles including the blood samples of the deceased, accused and P.W.6, to the S.F.S.L., Rasulgarh through the learned S.D.J.M., Rairangpur for examination. The chemical examination report revealed that the blood sample of the deceased, the accused and P.W.6 all belonged to "B Group". Human blood belonging to "B Group" has been detected on the Barisi and the Kantha, on which the deceased was sleeping, a napkin of P.W. 6 and the shirt of the deceased.

8. Learned Counsel for the appellant Mr. Suryakanta Dwibedi *(Amicus Curiae)* submits that the judgment and order of the learned court below is contrary to the evidence on record. He submits that the uncorroborated testimony of P.W.1 ought not to have been relied upon as no other eye witnesses have corroborated the same. Furthermore, it was argued that P.W.2 is none other but the son of the deceased, hence, the finding that P.W.2 has suppressed the truth to save his cousin is imaginary and unbelievable. The learned Counsel for the appellant also submits that failure to mark the injury report of P.W.6 and bring the same on record as well as the failure to include Jagannath Lohar, who accompanied P.W.1 to the Police Station, as a prosecution witness, amounts to material irregularities and are bad in law as well as in fact.

9. Learned Counsel for the State Mr. Zafrulla submitted that P.W.1 was an independent eye witness to the incident who had no vested interest in deposing against the accused. However, P.W.2, P.W.4 and P.W.6 have attempted to suppress the truth as they are related to the accused. Furthermore, the allegations of the accused that P.W.1 killed the deceased has not been even mentioned by any of the other witnesses who would have said something to the effect if it was true considering that the deceased is P.W.2's father. In such circumstances, the testimony of P.W.1 is trustworthy and credible. The medical evidence of P.W.3 corroborates the ocular evidence as deposed by P.W.1. Besides this, from the testimony of P.Ws.4 and 6 also some corroboration can be found out to the extent that they have admitted that the accused was nearby the spot at the time of the incident and the accused had been taken to the house of P.W.1 for the purpose of treatment.

10. Heard learned Counsel for the parties. In the case of ***Rabari Ghela Jadav v. State of Bombay***[1], the Hon'ble Supreme Court held that, even if the real cause for the assault may be obscure, if the evidence is clear that the appellant assaulted the deceased, it matters very little if the Court has not before it a very clear motive for the assault. Similarly, in ***Shamsher Singh v. State of Haryana***[2] it has been held by the Hon'ble Apex Court that even if there is absence of motive, it would not benefit the accused when there is a reliable and acceptable version of the eyewitnesses, which is supported by the medical evidence, pointing against him.

1. (1960) 3 SCR 130 **2.** (2002) 7 SCC 536

11. In the present case, the accused has used a sharp weapon, which he is said to have retrieved from the premises of P.W.1 and aimed multiple blows at vital parts of the deceased's body. From the testimony of P.W.1 which was supported by the testimony of P.W.3, three blows were dealt to the deceased, one of which punctured the skull and caused a haematoma. The motive behind the accused's action is of little consequence as it often happens that only the culprit himself knows what moved him to a certain course of action.

12. It is a well settled position of law that a conviction can also be based on the evidence of sole eye witness to an occurrence provided it is unimpeachable, credible and inherently believable and in order to accept such evidence some amount of independent corroboration is required for coming to a conclusion holding the accused guilty. The same was held in the leading case of ***Shivaji Sahebrao Bobade v. State of Maharashtra***[3] where the Hon'ble Supreme Court held that even where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent honest man, although as a rule of prudence courts call for corroboration. It has been famously held therein that;

> "*It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."*

The same was also reiterated in ***Jai Prakash v. State (Delhi Admn.)***[4] and ***Jayaram Shiva Tagore v. State of Maharashtra***[5]. The medical evidence of P.W.3 corroborates the evidence as deposed by P.W.1 as both the testimonies indicate that three injuries to the left side of the head, neck and shoulder were caused by the accused using the Barisi. When there is no discrepancy between medical and ocular evidence, the same is deemed to be corroborating the direct evidence proffered by P.W.1.

13. A perusal of the records of the case depicts that there is no doubt that P.W.2, P.W.4 and P.W.6 were present at the spot. However, their unwillingness to depose against the accused can be chalked up to an attempt to suppress the truth as the accused was their cousin brother. On perusing the evidence of these witnesses, it is obvious that they have turned hostile and they do not want to support the prosecution. All three of them are close relatives of the accused. From their evidence and their statements given to the

3. (1973) 2 SCC 793 **4**. (1991) 2 SCC 32 **5**. 1991 Supp (2) SCC 677

police, which are brought on record, it is difficult to place reliance on any part of their evidence.

14. As per the testimony of the I.O. (P.W.5) and a perusal of the F.I.R., it is observed that while P.Ws.2, 4 and 6 tried to catch hold of, the accused had assaulted P.W.6 with the Barisi and P.W.6 had sustained injuries. Testimony of P.W.5 reveals that he had sent P.W.6 for medical examination and had obtained the injury report. The injury report of P.W.6 has not been marked as an exhibit in this case, as the present whereabouts of the Medical Officer, who had examined the injuries, could not be known as he has retired from Government service. But nevertheless, from these facts it transpires that P.W.6 has also tried to shield the accused from the alleged crime by not deposing about the nature of his injuries or insisting that the same be brought on record.

15. Furthermore, non-production of one Jagannath Lohar, who accompanied P.W.6, cannot vitiate the trial or render the proceeding unfair or illegal as he was not a witness, who was essential to the unfolding of the narrative on which the prosecution was based. Therefore, the same cannot be termed to be a material irregularity as he was not a material witness. No adverse inference can be drawn for such non-examination. It cannot be a ground to discard the entire prosecution case by itself. As opined by the Hon'ble Supreme Court in ***Malkhan Singh v. State of U.P.***[6], it is not the quantity but the quality of the evidence that is determinative. If the prosecution's case is proven beyond reasonable doubt by other cogent, reliable evidence, then no infirmity to the trial occurs. As Jagannath Lohar was not an eye witness to the actual attack, nor was any inference drawn about his presence at the scene of the incident, whether during or after investigation, the absence of his testimony is not fatal/of little consequence to the trial of the accused.

16. As far as the statement of hostile witness P.W.4 goes regarding the tying up of the accused on the cot outside, the same has not been corroborated by the other two witnesses, i.e., P.W.2 and P.W.6 and as such is of little or no consequence. P.W.1 has in fact stated that the accused was moving hither and thither. It is nowhere disputed that the accused was apprehended by P.W.1, P.W.2, P.W.4 and P.W.6, while he was running out of the room, and hence the question of whether or not the accused was tied up

6. 1995 Supp (4) SCC 650

becomes redundant. In the ***State of U.P. v. M.K. Anthony***[7], the Hon'ble Supreme Court held:

> *"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidenceas a whole. …"*

17. With respect to the plea of alibi taken by the accused, it is to be noted that it is well settled in law that when a plea of alibi is taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution. The Hon'ble Supreme Court in ***Binay Kumar Singh v. State of Bihar***[8] has held –

> *"23. The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standardthat the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. …"*

7. (1985) 1 SCC 505 **8.** (1997) 1 SCC 283

There is no doubt in the instant case that the accused was not present at the scene of the crime. The fact that he was found frantically running out of the room where the deceased was killed is corroborated by the statements of P.W.1, P.W.4 and P.W.6. In this scenario where the prosecution has proven the role of the accused in the deceased's death beyond reasonable doubt relying on both ocular and medical evidence, the accused has not shown any evidence supporting his plea of alibi, therefore, the same ought to be rejected.

18. With the above backdrop and discussion, this Court comes to the conclusion that the prosecution has been successful in bringing home the charges against the accused and that the learned court below has rightly dealt with the evidence in the present case.

19. After examining every evidence and material on record meticulously and in the light of the judgments cited above, we are of the considered opinion that the finding arrived at by the court below is in conformity with the law and therefore no scope for interference in the same has been made out by the appellant.

20. Resultantly, this appeal must fail and the same stands dismissed. This Court confirms the conviction and maintains the sentence passed by the court below.

21. It is brought to the notice that the appellant is on bail by order of this Court dated 17.01.2011. In such view of the matter, the bail bonds stand cancelled and the trial court is directed to issue warrant of arrest against the appellant to suffer remaining part of the sentence.The L.C.R. be returned forthwith to the court from which it was received.

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2021 (I) ILR - CUT- 760

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

CRA NO.19 OF 2002

PABITRA SAHU .....Appellant.

.V.

STATE OF ORISSA .....Respondent.

CRIMINAL TRIAL – Appreciation of evidence – Offence under section 302 of Indian Penal Code – Allegation of poisoning – Conviction based on circumstantial evidence – Principles to be followed for recording conviction in a case of poisoning – Indicated.

"Learned counsel for the Appellant has relied upon the judgment of the Hon'ble Apex Court passed in the case of ***Sharad Birdhi Chand Sarda – vrs.- State of Maharashtra****: reported in AIR 1984 SC 1622 in which the Hon'ble Apex Court has given the guidelines for appreciation of evidence in case of poisoning. The Hon'ble Apex Court ruled that in order to establish a case of murder by administering poison, the following facts should be established beyond reasonable doubts.*

(i) There is a clear motive for an accused to administer poison to the deceased;

(ii) that the deceased died of poison said to have been administered;

(iii) that the accused had the poison in his possession; and

(iv) that he had an opportunity to administer the poison to the accused.

The Hon'ble Apex Court further held that in a case based on circumstantial evidence, if on the evidence, two possibilities are available, then the benefit of doubt should be given to the Accused.

In this case, none of the witnesses had seen the Appellant purchasing the insecticide. So they have not deposed about the same. Similarly none of the witnesses stated that they have seen the Appellant mixing insecticide or pesticide in the Rasagolas. The Rasagolas were not seized from the spot house in the first search. Rather, after a long lapse of time it were produced by P.W.1 before P.W.9 who seized the same. In this case, the Investigating Officer has not directed his investigation to find out whether the Appellant was ever in possession of the poison that is stated to be the cause of death of the deceased. Such fact could have been established by examining the dealers of insecticide and pesticide in the locality and in nearby places and the same should have been determined by the Investigating Officer. In this case, no such effort has been made by the Investigating Officer to determine whether the Appellant had purchased insecticide or pesticide. So, a very significant aspect has not been investigated into in this case.

Further, it is apparent that the circumstances proved in this case do not form a complete chain of events unerringly pointing to the guilt of the Appellant. The five golden principles of appreciation of evidence as enunciated by the Hon'ble Supreme Court in the off-quoted judgment passed in the case of ***Sharad Birdhi Chand Sarda*** *(supra) have not been satisfied in this case.*

(Paras 6 & 7)

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 1622 : Sharad Birdhi Chand Sarda Vs. State of Maharashtra.

For Appellant : M/s. D. Nayak, (Sr. Adv.), Mr. Sangram Das, M. Mohanty, R.K. Pradhan & P.K. Deo.

For Respondent : Mr. G.N. Rout, Additional Standing Counsel.

JUDGMENT Date of Hearing: 15.12.2020 : Date of Judgment: 31.03.2021

S. K. MISHRA, J.

The sole Appellant-Pabitra Sahu assails his conviction and sentence to undergo imprisonment for life under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity), to undergo rigorous imprisonment for three years under Section 498A of the Penal Code and to undergo rigorous imprisonment for two years under Section 4 of the Dowry Prohibition Act, 1961 (hereinafter referred to as "the D.P. Act" for brevity) recorded by the learned Additional Sessions Judge, Nayagarh in S.T. Case No.152/26/3/11 of 1997/1995, as per the judgment of conviction and order of sentence dated 31.01.2002. It was further observed that all the sentences are to run concurrently. It is apparent that other two co-accused persons, namely, Sarat Sahu and Susila Sahu have been acquitted of the said charges by the learned Additional Sessions Judge, Nayagarh.

02. The prosecution case, in short, is that the deceased Puspalata was married to the Appellant Pabitra Sahu on 27.01.1993. Since the parents of the deceased were no more by the time of her marriage, her marriage was performed by her two brothers Srinibas Sahu (P.W.1) and Pitabas Sahu (P.W.2). After the marriage, the deceased Puspalata lived in her in-laws' house. The accused Susila Sahu is the mother-in-law of the deceased Puspalata and the accused Sarat Chandra Sahu is the husband of her sister-in-law namely accused Srimati Sahu. Accused Srimati Sahu since dead was staying with her husband- accused Sarat Chandra Sahu in village Daspalla whereas Appellant Pabitra Sahu was living then in the house of Pitabasa Sahu. At the time of marriage, P.Ws.1 and 2 had given gold ornaments, furniture and utensils towards dowry. After the marriage, all the accused persons demanded that a piece of land situated at Hospital Chhak of Daspalla to be registered in the name of the Appellant and as the deceased Puspalata did not agree to the same, she was tortured by all the accused persons.

It is further alleged that the Appellant brought the deceased to her paternal house and left her there saying that unless the land is registered in his name, the deceased would not be accepted in her in-laws' house. During her stay in her parental house, the accused Sarat Chandra Sahu had come to their house several times and had insisted upon P.Ws.1 and 2 to get the land registered in favour of Pabitra and had also threatened with dire consequences if it was not done. Ultimately, the brothers and sisters of the deceased registered the said land in favour of the deceased and sent the deed of conveyance to the father-in-law of the deceased. After some days, her mother-in-law Susila came and took the deceased back to their house.

It is the further case of the Prosecution that the Appellant and other accused persons continued to torture the deceased saying as to why the land was registered in favour of the deceased instead of the Appellant. Deceased Puspalata had told several times to her brothers and sisters about the torture to her by the accused persons and about their demand for registration of a piece of land in the name of the Appellant towards dowry. The deceased died on 27.04.1994. About ten days prior to her death, the Appellant and the deceased had come to the house of P.Ws.1 and 2 in a happy mood and the Appellant told them that he would have a shop room on that piece of land and stay there. The Appellants also told them that he was making arrangement for bricks and other house building materials to make construction of a shop room on the land which was given to Puspalata by them. On the same day evening, while the deceased was grinding black gram for preparation of Pitha, all on a sudden, she became unconscious and fell down. She was immediately carried to Daspalla Hospital, where she was declared dead. Dr. Umesh Chandra Mishra (P.W.11) who was the medical officer submitted a report (Ext.11) to the Daspalla Police Station stating therein that the deceased was admitted to Daspalla Hospital at 09.45 P.M., having repeated attacks of convulsion and expired at 10.00 P.M. on that day.

Sadhu Charan Patra (P.W.9), the then A.S.I. of Police of Daspalla Police Station was directed by the O.I.C. Sarbeswar Sahu to enquire into the matter after registering U.D. Case No.6/94. During the course of enquiry, P.W.9 visited to Daspalla Hospital and held inquest over the dead body of Puspalata and sent the dead body for post-mortem examination on the next morning. During the course of enquiry it came to the light that on 27.04.994 evening i.e. on the day Puspalata died, the Appellant Pabitra Sahu had brought some Rasagolas and Maize (Maka) to their house and told Puspalata

that accused Srimati and her husband accused Sarat had expressed their sorrow as she was not visiting their house and accused Srimati had sent those Rasagolas which she should take. On the request of Appellant Pabitra, the deceased Puspalata took one or two Rasagolas and then attended her work. After sometime, she vomited and became unconscious for which she was taken to hospital and expired there as stated above. On 28.04.1994 at about 2.30 P.M. P.W.9 had seized seven numbers of Rasagolas kept in a polythene bag produced by Srinibas Sahu (P.W.1) which were in broken state and smell of pesticide was coming from those Rasagolas. He had also seized the Xerox copy of the R.O.R. of Plot No.1330 with an extent of 2 decimals and 5 kadis of land recorded in the name of Puspalata and released the same in the zima of Srinibas Sahu.

P.W.9 lodged the written report before the O.I.C., Daspalla Police Station vide Ext.4 on which a case under Section 498A/304B/328 of the Penal Code and Section 4 of the D.P. Act was registered. During the course of investigation, the then O.I.C., Daspalla Police Station (P.W.7) took charge of all the records of U.D. Case from P.W.9 and visited the father's house of the deceased. He received the post-mortem examination report. He sent the viscera of the deceased collected during post-mortem examination report. He sent the viscera of the deceased collected during post-mortem examination and the seized Rasagolas for chemical examination to S.F.S.L., Rasulgarh, Bhubaneswar through the learned J.M.F.C., Daspalla and on chemical examination, insecticidal poison was detected in the viscera as well as in the seized Rasagolas. After completion of investigation, charge-sheet was submitted against all the accused persons under Sections 498A/ 304B/328 of the Penal Code and Section 4 of the D.P. Act. But charges were framed against the accused persons under Section 302/34 of the Penal Code instead of Section 328 of the Penal Code, since the learned trial judge was of the opinion that there was *prima facie* material on record to show that the accused persons had killed Puspalata by administering poison in Rasagolas.

During the course of trial, since the accused Srimati Sahu died, the case against her was abated vide order dated 15.12.2001.

03. Defence took the plea of complete denial of the charge.

04. In order to prove its case, the prosecution examined eleven witnesses. P.Ws.1 (Srinibas Sahu) and 2 (Pitabasha Sahu) are the two brothers and

P.W.4 (Tilotama Sahu) is the sister of the deceased Puspalata Sahu. P.W.3 (Chitaranjan Sahu), P.W.5 (Purna Chandra Mishra) and P.W.6 (Narayana Sahu) are the witnesses to the inquest held over the dead body and seizure of Rasagolas. P.W.11 (Dr. Umesh Chandra Mishra) had reported about the death of Puspalata in the hospital to the Police Station suspecting it to be a case of poisoning. P.W.9 (Sadhu Charan Patra) is the then A.S.I. of Police, Daspalla Police Station who had inquired into the U.D. Case and had lodged F.I.R. P.W.7 (Sarbeswar Sahoo) is the then O.I.C. of Police, Daspalla Police Station who had conducted major part of the investigation and P.W.8 (Jambeswar Mohapatra) is the then O.I.C. of Police, Daspalla Police Station who had only submitted charge-sheet. P.W.10 (Dr. Rajendra Kumar Sahu) who had conducted post-mortem examination on the dead body of the deceased.

The defence has not examined any witness in support of their plea.

05. There is no dispute in this case that the prosecution bases its case solely on circumstantial evidences. There is no evidence that the Appellant administered poison to the deceased. The prosecution seeks to establish poisoning by providing the circumstance that the Appellant brought Rasagolas and forced the deceased to eat the same. On the first search by P.W.9, the Investigating Officer nothing incriminating was seized from that house where the incident took place. However, later on 28.04.1994 at about 2.30 P.M. the said Rasagalos in a broken state were seized on production by P.W.1. The seizure was made by P.W.9. It was also submitted that the prosecution has not established that the Appellant purchased the insecticide that was found in the Rasagolas and the viscera of the deceased and that he administered the said pesticide to the deceased.

06. Learned counsel for the Appellant has relied upon the judgment of the Hon'ble Apex Court passed in the case of **Sharad Birdhi Chand Sarda – vrs.- State of Maharashtra**: reported in AIR 1984 SC 1622 in which the Hon'ble Apex Court has given the guidelines for appreciation of evidence in case of poisoning. The Hon'ble Apex Court ruled that in order to establish a case of murder by administering poison, the following facts should be established beyond reasonable doubts.

(i) There is a clear motive for an accused to administer poison to the deceased;

(ii) that the deceased died of poison said to have been administered;

(iii) that the accused had the poison in his possession; and

(iv) that he had an opportunity to administer the poison to the accused.

The Hon'ble Apex Court further held that in a case based on circumstantial evidence, if on the evidence, two possibilities are available, then the benefit of doubt should be given to the Accused.

07. In this case, none of the witnesses had seen the Appellant purchasing the insecticide. So they have not deposed about the same. Similarly none of the witnesses stated that they have seen the Appellant mixing insecticide or pesticide in the Rasagolas. The Rasagolas were not seized from the spot house in the first search. Rather, after a long lapse of time it were produced by P.W.1 before P.W.9 who seized the same. In this case, the Investigating Officer has not directed his investigation to find out whether the Appellant was ever in possession of the poison that is stated to be the cause of death of the deceased. Such fact could have been established by examining the dealers of insecticide and pesticide in the locality and in nearby places and the same should have been determined by the Investigating Officer. In this case, no such effort has been made by the Investigating Officer to determine whether the Appellant had purchased insecticide or pesticide. So, a very significant aspect has not been investigated into in this case.

Further, it is apparent that the circumstances proved in this case do not form a complete chain of events unerringly pointing to the guilt of the Appellant. The five golden principles of appreciation of evidence as enunciated by the Hon'ble Supreme Court in the off-quoted judgment passed in the case of **Sharad Birdhi Chand Sarda** (supra) have not been satisfied in this case.

08. Another circumstance which is of immense importance to establish the prosecution case is the deed of conveyance allegedly executed in favour of the deceased Puspalata, the wife of the Appellant, as dowry to the Appellant. Though it is the consistent case of the prosecution that the deed of conveyance was executed in favour of the deceased Puspalata, the wife of the Appellant, to satisfy the demand of the Appellant for dowry, the prosecution has not proved that deed of conveyance before the learned trial judge. No plausible explanation has also put forth to justify non production of the deed of conveyance during the trial.

The deed of conveyance having not been proved in this case and the evidence regarding dowry torture meted out to the deceased being omnibus and general in nature, we are of the opinion that the conviction under Sections 498A of the Penal Code and Section 4 of the D.P. Act can also not be confirmed in this case.

09. In the result, the appeal is allowed. The conviction and sentence to undergo imprisonment for life under Section 302 of the Penal Code, to undergo rigorous imprisonment for three years under Section 498A of the Penal Code and to undergo rigorous imprisonment for two years under Section 4 of the D.P. Act recorded by the learned Additional Sessions Judge, Nayagarh in S.T. Case No.152/26/3/11 of 1997/1995, as per the judgment of conviction and order of sentence dated 31.01.2002 are hereby set aside. The Appellant is acquitted of the said charges.

10. Record reveals that the Appellant- Pabitra Sahu has been granted bail upon appeal. He be set at liberty forthwith by cancelling the bail bond executed by him. The T.C.R. be returned back forthwith. Accordingly, the CRA is disposed of.

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2021 (I) ILR - CUT- 767

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

JAIL CRIMINAL APPEAL NO. 132 OF 2005

HABIL SINDHU ……...Appellant

.V.

STATE OF ODISHA ……Respondent

CONSTITUTION OF INDIA, 1950 – Article 39-A – Provisions under – Free legal aid – Delay in trial due to non availability of defence counsel – Engagement of counsel by court – Principles to be followed – Indicated.

Before passing any comment on the issues at hand, we would like to rely upon the observations made by the Hon'ble Supreme Court in the case of Anokhilal vs. State of Madhya Pradesh (supra). After taking to consideration the plethora of judgments of the Supreme Court, the following principles were recognized:

" 20.1. Article 39-A inserted by the 42nd amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.

20.2. It has been well accepted that right to free legal services is an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the right guaranteed by Article 21. The extract from the decision of this Court in Zahira Habibulla H. Shekikh v. State of Gujarat, (2004) 4 SCC 158 : (as quoted in the decision in Mohd. Hussain v. State (NCT of Delhi), (2012) 9 SCC 408) emphasises that the object of criminal trial is to search for the truth and the trial is not about over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.

20.3. Even before insertion of Article 39-A in the Constitution, the decision of this Court in ***Bashira v. State of U.P.,*** *(1969) 1 SCR 32 put the matter beyond any doubt and held that the time granted to the Amicus Curiae in that matter to prepare for the defense was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the accused and was in breach of the procedure established by law.*

20.4. The portion quoted in Bashira v. State of U.P., (supra) from the judgment of the Andhra Pradesh High Court authored by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defence would not carry out the object underlying the rule. It was further stated that the opportunity must be real where the counsel is given sufficient and adequate time to prepare.

20.5 In Bashira v. State of U.P., (supra) as well as in ***Ambadas Laxman Shinde v. State of Maharashtra,*** *(2018) 18 SCC 788 making substantial progress in the matter on the very day after a counsel was engaged as Amicus Curiae, was not accepted by this Court as compliance with 'sufficient opportunity' to the counsel."*

After conclusion of the hearing in the reported case, the Hon'ble Supreme Court has given the following directions

*"**31.1.** In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.*

31.2. *In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.*

31.3. *Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.*

31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in **Imtiyaz Ramzan Khan v. State of Maharashtra,** (2018) 9 SCC 160." (Para 2)

Case Laws Relied on and Referred to :-

1. (2019) 20 scc 196 : Anokhilal Vs. State of madhya Pradesh.

For the Appellant : Mr. Himansu Bhusan Das (Amicus Curiae)
For the Respondent : Mr. M.S. Sahoo (Addl. Govt. Adv.)

JUDGMENT Date of Hearing : 03.03.2021 : Date of Judgment : 13.04.2021

S.K. MISHRA, J.

In this appeal, the sole appellant-Habil Sindhu had assailed his conviction under Section 302/201 of the Indian Penal Code, 1860, hereinafter referred to as 'Penal Code' for brevity by the learned Addl. Sessions Judge (FTC), Baripada in S.T. Case No.40/163 of 2003. As per the judgment dated 30.06.2005, the learned trial Judge convicted the appellant for the aforesaid offence and sentenced him to undergo R.I. for life for the offence under Section 302 of the Penal Code. No separate sentence has been passed for the offence under Section 201 of the Penal Code.

2. The learned Amicus Curiae has assailed the impugned judgment on various grounds pertaining to appreciation of evidence. However, we are inclined to take into consideration the last submission made by the learned Amicus Curiae relying upon the reported case of ***Anokhilal v. State of Madhya Pradesh***, (2019) 20 SCC 196. He would submit that in this case the appellant was not provided with effective free legal services by the State Defence Counsel (SDC). The learned counsel for the appellant argued that although the learned trial Judge engaged a SDC to defend him, but such

counsel was engaged without assessing his ability to defend the accused, who was charged with murder of three persons. Moreover, it is also argued that the counsel was engaged on the date of trial when the private defence counsel appearing for the appellant did not appear. Though on date of trial, no witnesses were examined on behalf of the prosecution, on the next two dates, majority of the material witnesses were examined.

Before passing any comment on the issues at hand, we would like to rely upon the observations made by the Hon'ble Supreme Court in the case of Anokhilal vs. State of Madhya Pradesh (supra). After taking to consideration the plethora of judgments of the Supreme Court, the following principles were recognized:

> "20.1. Article 39-A inserted by the 42nd amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.
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> 20.2. It has been well accepted that right to free legal services is an essential ingredient of *'reasonable, fair and just'* procedure for a person accused of an offence and it must be held implicit in the right guaranteed by Article 21. The extract from the decision of this Court in Zahira Habibulla H. Shekikh v. State of Gujarat, (2004) 4 SCC 158 : (as quoted in the decision in Mohd. Hussain v. State (NCT of Delhi), (2012) 9 SCC 408) emphasises that the object of criminal trial is to search for the truth and the trial is not about over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.
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> 20.3. Even before insertion of Article 39-A in the Constitution, the decision of this Court in ***Bashira v. State of U.P.,*** (1969) 1 SCR 32 put the matter beyond any doubt and held that the time granted to the *Amicus Curiae* in that matter to prepare for the defense was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the accused and was in breach of the procedure established by law.
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> 20.4. The portion quoted in Bashira v. State of U.P., (supra) from the judgment of the Andhra Pradesh High Court authored by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defence would not carry out the object underlying the rule. It was further stated that the opportunity must be real where the counsel is given sufficient and adequate time to prepare.
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> 20.5 In Bashira v. State of U.P., (supra) as well as in ***Ambadas Laxman Shinde v. State of Maharashtra ,*** (2018) 18 SCC 788 making substantial progress in the

> matter on the very day after a counsel was engaged as *Amicus Curiae*, was not accepted by this Court as compliance with 'sufficient opportunity' to the counsel."

3. After conclusion of the hearing in the reported case, the Hon'ble Supreme Court has given the following directions:

> " **31.1.** In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.
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> **31.2.** In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.
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> **31.3.** Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.
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> **31.4.** Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in ***Imtiyaz Ramzan Khan v. State of Maharashtra,*** (2018) 9 SCC 160."

4. Applying the aforesaid principles to the case at hand, we find from the record that originally the appellant had engaged his own counsel. Finally, on 06.07.2004, in the presence of his counsel, charges were framed under Sections 302/201 of the Penal Code by the learned trial Judge and summons were issued to the witnesses. On 16.08.2004, the accused was produced in custody. The Advocates on behalf of the accused did not appear on that date. The accused was asked to engage a private counsel but he failed to engage any counsel during course of the day. Hence, Shri P.D. Sahu, an Advocate was appointed as the SDC on behalf of the accused, who accepted the assignment and filed hazira to that effect. On that day, no witness was present. The case was ordered to be posted to 17.08.2004 for trial (which is the next day) and the accused was remanded to custody.

On 17.08.2004, the accused was produced and the SDC took part in the trial. Four witnesses were examined on that day.

On 18.08.2004, two more witnesses were examined. On 19.08.2004, Dr. Pradeep Kumar Misra, who conducted post-mortem examination on the

dead bodies of the deceased, was examined and the case was adjourned to 14.09.2004. On 14.09.2004, P.W.8, Ram Narayan Acharya was examined, cross-examined and discharged and the case was adjourned to 15.09.2004 for trial. On that date, no witnesses were present. On 16.11.2004, rest of the witnesses were examined. On 13.12.2004, two more witnesses were examined. The Investigating Officer was examined on 17.01.2005. Then, the case was adjourned for examination of other witnesses and it suffers several adjournments. On 19.04.2005, finally the IO was examined. The prosecution case was closed. Then, it was posted to 21.04.2005 and 22.06.2005 for recording of defence evidence. On that dates, arguments were heard. The case was posted to 23.06.2005 for further arguments. Further arguments were heard on 23.06.2005 and the case was posted to 28.06.2005 for judgment. On 28.06.2005, as per the direction of the learned trial Judge, district police through escort produced the appellant before the court, judgment was not pronounced as it was not ready and the case was adjourned to 30.06.2005. On that day, judgment of conviction was pronounced and later on sentence was awarded.

The aforesaid facts set in a chronological order show that the appellant was not given proper legal assistance as enshrined under Article 39-A of the Constitution in the true sense. On a date, when a case was posted for hearing in the absence of the counsel, the appellant was directed to be defended by a SDC. Firstly, the learned trial Judge has not recorded whether the SDC engaged by him was among the counsels short listed by the District Judges' office to be appointed as SDC. Secondly, there is no observation by the learned trial Judge that the SDC engaged by the court to defend the appellant was in fact competent in the assessment of the learned trial Judge to defend the appellant in a complex case of a triple murder. Moreover, the SDC has not been given adequate opportunity to prepare the case. It can be well deciphered from the case record that P.W.1-Trimurty Sundhi, P.W.2-Budhia Boipai, P.W.3-Gourahari Mohanta, P.W.4-Budhurai Baipai, P.W.5-Dr. Sudhir Chandra Malik, P.W.6-Sankarsana Sethi, P.W.7-Dr. Pradip Kumar Mishra, P.W.8-Dr. Ram Narayan Acharya and P.W.9-Barana Sundhi were examined in chief and then cross-examined by the defence on 17th, 18th and 19th August of 2004. They were examined in trial of an accused charged committing murder of three persons by a SDC, who is engaged just one day prior to the examination i.e. on 16.08.2004. So, in our considered opinion, the appellant had no valid, proper and effective legal representation in the case. The learned trial Judge should have granted at least seven days time to the

learned counsel appearing for the appellant to prepare the case. We are therefore of the opinion that this is a case where the accused has been denied a fair trial and it is violative of Article 39-A as well as Article 21 of the Constitution. Mr. M.S. Sahoo, learned Addl. Government Advocate would strenuously argue that even if there is a violation of the principles enshrined under Articles 39-A and 21 of the Constitution, the appellant cannot be acquitted of the offence as he has committed gruesome murders by severing the head of three persons from the rest of their bodies as he suspected that they were practicing witchcraft. He would argue that the malady of witch-hunting is a big problem in the tribals dominated district of Mayurbhanj and, therefore, the appellant cannot be allowed to go scot free.

5. The learned counsel for the appellant submits that the appellant is in custody since the date of his arrest i.e. 03.01.2003 and in the meantime, more than 18 years has elapsed and therefore, he should be set at liberty.

6. It is true that there is a delay in disposal of the appeal. However, the delay in disposal of the appeal cannot be attributed only to the judiciary. There are certain factors, which are beyond the control to the judiciary for which the delayed disposal has occasioned.

7. Keeping in view the entire facts of the case and taking a holistic view of the matter at hand, we are of the opinion that the case should be remanded back to the learned trial Judge for *de nove* trial. It is further brought to our notice that in the meantime, the FTC has been abolished and at present no judge is posted as Addl. Sessions Judge (FTC), Baripada. Be that as it may, we remand the case to the court of learned Sessions Judge, Mayurbhanj, Baripada with a direction to dispose of the case as early as possible preferably within a period of three months from the date of receipt of copy of this judgment. While disposing of the session trial, the learned Sessions Judge shall keep in mind the following observations:-

> 7.1. In a case where the privately engaged counsel does not appear on a date of hearing or trial, then effort should be made by the learned Sessions Judge to draw attention of the counsels appearing to the various provisions of the Bar Council Rules and Advocates Act and they should be politely remained of their duties towards the client, the court and the society. In this connection, our judgment in ***Sapua Das and others v. State of Orissa***, Criminal Misc. Case No.403 of 2018, decided on 20.04.2018 (***Reported in ILR 2018 (I) ILR- CUT- 765*** is relevant.

7.2. While preparing list of a State Defence Counsel or Amicus Curiae, care must be taken by the learned District and Sessions Judge to include the names of those counsels, who have at least ten years of practice. In all such cases, the learned District Judge with inputs of Chief Judicial Magistrate as well as the Registrar of the Civil Court and inputs of the Public Prosecutor, President of the local Bar (s) should form an opinion about the ability of the counsel to provide meaningful assistance to the accused. Only when the District Judge is satisfied, either on his own information or information received by him, then only a counsel should be included in the penal of State Defence Counsel for the purpose of defending persons, who do not have enough means to engage their own private counsel.

7.3. If a situation arises where the privately engaged counsel do not come forward or their assistance cannot be obtained without considerable delay and expenses, then the Presiding Judge of the court, in seisin of the case, may appoint a State Defence Counsel or Amicus Curiae.

7.4 While appointing a counsel to defend an accused, the Presiding Judge of that Court, in seisin of the trial, should be satisfied about his ability to defend the accused.

7.5 In this connection, the learned trial Judge may look into or take into consideration the list prepared by the District Court office. But, it is not binding upon him. If he finds that as per his own judgment while deciding the case that the counsel mentioned in the Penal do not have the ability to defend and give meaningful assistance to the accused, the learned trial Judge may appoint a counsel of his choice, *de hors* the list that has been prepared.

7.6 In such cases of appointment beyond/outside the State Defence Counsel list prepared by the District Court, the payment of the dues (which in our opinion is not sufficient) should not be withheld by the Registrar or such other officer in charge of the finances and accounts of the District Court.

7.7. Such appointment from outside the list of the State Defence Counsel prepared by the District Office shall not be considered as a financial irregularity. We must hasten to add that the learned trial Judge should record a finding that the counsel named in the list, in his opinion, may not be able to render meaningful assistance to the accused. It shall be proper on the part of the learned Judge to record the reasons for his opinion. It is further observed that in order to expedite sessions trial, the learned trial Judge should not procrastinate the trial as is seen in this case. In his anxiety to examine witnesses on that date, though the trial commenced on the next date of appointment of State Defence Counsel, the learned trial Judge went on to adjourn the case for several times thereafter as noted by us in the preceding paragraphs.

8. With such observation, we dispose of the appeal, set aside the conviction and sentence of the appellant and remit the matter back to the learned Sessions Judge, Mayurbhanj, Baripada for *de nove* trial. We further

direct that the learned Sessions Judge shall observe the directions given by us in the preceding paragraphs, especially paragraphs 7.1 to 7.7 while conducting the trial. We hope and trust that the trial should be concluded within a period of three months from the date of receipt of copy of this judgment along with Trial Court Records. We further direct the Registry of this Court to forthwith communicate the copy of this judgment along with TCRs by Special Messenger so to ensure that the records are delivered in the office of the learned Sessions Judge within a period of seven days.

As the restrictions due to the COVID-19 situation are continuing, the learned counsel for the parties may utilize a soft copy of this 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- 775

Dr. B.R.SARANGI, J.

W.P.(C) NO. 9193 OF 2008

RUDRA PRASAD SARANGI .....Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Permission for establishment of educational institution – Challenge is made to the order keeping in abeyance the decisions taken in the High Power Committee regarding grant of permission and recognition to self-financing courses run by different institutions, including the petitioner-institution, until further orders, as desired by the Minister, Higher Education of Orissa, and further directing that a committee under the Chairmanship of the Director, Higher Education, Orissa shall further inspect the proposals within a period of four months – Permission already granted under the provisions of Orissa Education Act – Plea that the action of the authority in keeping the decision in abeyance was without jurisdiction – Held, if the power has been vested with the particular authority, the same can only be

exercised by the same authority and the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all.

> *"In **Nazir Ahmed v. King Emperor**, AIR 1936 PC 253, law is well settled "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." The said principles have been followed subsequently in **State of Uttar Pradesh v. Singhara Singh**, AIR 1964 SC 358, **Dhananjay Reddy v. State of Karnataka**, AIR 2001 SC 1512, **Chandra Kishore Jha v. Mahabir Prasad**, AIR 1999 SC 3558, **Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd**., AIR 2008 SC 1921, **Ram Deen Maurya v. State of U.P.,** (2009) 6 SCC 735." (Paras 9 and 10)*

(B) LEGAL MAXIM – "Expressio Unius est exclusion alterius" – Meaning thereof – If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred. (Para 11)

Case Laws Relied on and Referred to :-

1. 2014 (I) OLR 819 : Governing Body of +2 Science College Vs. State of Odisha.
2. AIR, 2011 SC 1463 : DLF Universal Ltd. & Anr. Vs. Director, T.&C. Planning Haryana.
3. (2015) 7 SCC 690 : Zuari Cement Limited Vs. Regional Director, Employees' State insurance Corporation, Hyderabad and Ors.
4. (1875) LR I Ch D 426 : Taylor Vs. Tailor.
5. AIR 1936 PC 253(2) : Nazir Ahmad Vs. King Emperor.
6. (1999) 3 SCC 422 : Babu Verghese Vs. Bar Council of Kerala.
7. AIR 1936 PC 253 : Nazir Ahmed Vs. King Emperor.
8. AIR 1964 SC 358 : State of Uttar Pradesh Vs. Singhara Singh.
9. AIR 2001 SC 1512 : Dhananjay Reddy Vs. State of Karnataka.
10. AIR 1999 SC 3558 : Chandra Kishore Jha Vs. Mahabir Prasad.
11. AIR 2008 SC 1921 : Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd.
12. (2009) 6 SCC 735 : Ram Deen Maurya Vs. State of U.P.
13. 2016 (I) OLR 922 : Subash Chandra Nayak Vs. Union of India.
14. AIR 1993 SC 1449 : (1993) 2 SCC 458: Hiralal Moolchand Doshi Vs. Barot Raman Lal Ranchhoddas.
15. AIR 1996 SC 1819: (1996) 4 SCC 178 : Urban Improvement Trust, Jodhpur Vs. Gokul Narain.

For the Petitioner : M/s. J.K. Rath, D.N. Rath, S.N. Rath and P.K. Rath.
For the Opp.Parties : Mr. B.P. Tripathy, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 03.03.2021

Dr. B.R.SARANGI, J.

The petitioner, who is the Director of Vedic Educational Trust, Sakhipada in the district of Sambalpur, has filed this writ petition seeking to quash Annexure-6 dated 28.05.2008 passed by the Deputy Director, in the office of the Regional Director of Education, Sambalpur in Annexure-6 keeping in abeyance the decisions taken in the High Power Committee meeting held on 18.04.2008 regarding grant of permission and recognition to self-financing courses run by different institutions, including the petitioner-institution, until further orders, as desired by the Minister, Higher Education of Orissa, and further directing that a committee under the Chairmanship of the Director, Higher Education, Orissa shall further inspect the proposals within a period of four months.

2. The factual matrix of the case, in hand, is that "Vedic Educational Trust" is a registered body established, for the purpose of providing proper education, along with Yoga and Meditation, Spoken English and Personality Development, Vedic Mathematics, Computer Training, teaching regarding Veda and General Knowledge, Group Discussion, Physical Education Training, Martial Art, Excursion and Study Tour, Medical Services etc., besides extending elaborate library facility as well as sports and extra curricular activities within the local students. To provide such facilities, which are ordinarily not available in the general higher secondary educational institutions, the "Vedic Educational Trust" established a Vedic College of +2 Science, a residential institution so as to preach the moral teaching and to make out good, responsible and respective citizens of the future from amongst such students. It provides curriculum, which is prescribed by the Council of Higher Secondary Education, Orissa, along with other moral and spiritual teaching, as mentioned above. Accordingly, steps were taken for grant of permission and recognition in favour of the institution. The petitioner furnished necessary information, affidavits and chalan deposits etc., as required for grant of permission under Section 5 of the Orissa Education Act, which are mandatory for establishment of Educational Institutions in the State of Orissa.

2.1. Section 5 of the Orissa Education Act, as amended from time to time, prescribes the procedure for permission and establishment of the Educational Institution. It provides that an application, along with necessary documents and requisite fees, is to be submitted before the prescribed authority, who shall, after being satisfied, recommend to the committee for grant of

permission in favour of the institution. Such committee is known as High Power Committee consisting of high dignitaries. If the committee is satisfied that the educational need of the local area justifies for establishment of an educational institution, then it will grant permission and make an order to that effect and such order will be communicated by the prescribed authority to the applicant. Necessary application form, along with the affidavit and other documents, was submitted for grant of permission in favour of the petitioner-institution to commence teaching from the session 2008-09. The opposite party no.3, being the prescribed authority, as required under sub-section (5) of Section 5 of the Orissa Education Act, scrutinized the application and finding that the application was complete in all respect and in conformity with the Act and Rules, submitted a report, after causing such enquiry as deemed fit, before the committee for grant of permission as contemplated under sub-Section (6) of Section-5 of the Orissa Education Act.

2.2 Accordingly, the High Power Committee in its meeting held on 18.04.2008 considered the application recommended by the prescribed authority for grant of permission and since the petitioner-institution satisfied the norms and the requirements of the Orissa Education Act and the Rules made thereunder, decided to grant permission for opening of the petitioner-institution, i.e. Vedic College of +2 Science at Ainthapali, Sambalpur on self financing basis from the sessions 2008-09 with the condition to pledge an amount of Rs.5 lakhs before the prescribed authority and further to show bank deposit of Rs.20 lakhs in the name of the college within a period of one month, failing which the institution would not be permitted to admit the students. It was also required that the educational agency/governing body should furnish an undertaking in the form of an affidavit that the institution will not claim any financial assistance or grant-in-aid from the Government in future.

2.3 After permission was granted, the Vedic Science College, Ainthapali, Sambalpur was allowed to open +2 Science with 128 seats (English, MIL & PCMB) 128 seats each, IT & Electronics-64 seats each from the session 2008-09. Necessary communication in regard to the same was made to the petitioner vide Annexue-2 by the Regional Director-opposite party no.3 on 01.05.2008. In compliance of the same, the petitioner-institution pledged Rs.5 lakhs in favour of opposite party no.3 and placed the same before him for verification. The opposite party no.3 verified the same and found to be correct, as per the endorsement made by him on 26.05.2008. The petitioner-

institution also shown the bank deposit of more than 26 lakhs for the satisfaction of the opposite party no.3. The petitioner-institution also submitted an affidavit before the opposite party no.2 in original stating in clear terms that the institution would not claim any aid from the State Government in any circumstance. After complying all the paraphernalia required for the purpose of establishment of institution, all on a sudden, on 28.05.2008, a communication was made by the Deputy Director to the petitioner stating that the decision taken by the High Power Committee in its meeting held on 18.04.2008 regarding grant of permission and recognition to self-financing courses run by different institutions, including the petitioner-institution, is kept in abeyance until further orders as desired by the Minister, Higher Education, Orissa, and the Director, Higher Education, Orissa shall further inspect the proposals within a period of four months. Hence this application.

3. Mr. D.N. Rath, learned counsel for the petitioner contended that in accordance with the statutory provisions if the petitioner-institution has been granted permission by the competent authority, namely, the High Power Committee and has complied with the requirements on being duly communicated, on the basis of an order the permission so granted should not have been kept in abeyance, that too as per desire of the Minister, Higher Education, Orissa, who has no role to play so far as grant of permission is concerned. It is thus contended that the impugned communication made on 28.05.2008 by the Deputy Director cannot sustain in the eye of law, in view of the fact that the Deputy Director is not the competent authority to issue such direction to the petitioner- institution. More so, if the authority, which has passed such an order and made communication thereof, has no jurisdiction, the same is a nullity in the eye of law and thus cannot sustain. Thereby, the order impugned in Annexure-6 dated 28.05.2006 is liable to be quashed.

To substantiate his contention, he has relied upon the judgment of this Court in ***Governing Body of +2 Science College v. State of Odisha***, 2014 (I) OLR 819 and judgment of the apex Court in the case of **DLF Universal Ltd. & Anr vs Director, T.&C. Planning Haryana,** AIR, 2011 SC 1463.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties at the outset sought adjournment to file counter affidavit. As it appears, though time was sought by learned State Counsel on

23.02.2016 to file counter, till date the same has not been filed. Since it a matter of the year 2008 and in the meantime more than 12 years have passed, this Court did not feel inclined to grant any further adjournment. However, opportunity is given to Mr. B.P. Tripathy, learned Addl. Government Advocate to address the Court on the basis of the materials available on record and, as such, while justifying the order impugned under Anenxure-6, he contended that the authority has committed no illegality or irregularity in passing such order so as to cause interference by this Court.

5. This Court heard Mr. D.N. Rath, learned counsel for the petitioner and Mr. B.P. Tripathy, learned Addl. Government Advocate for the State-opposite parties, and perused the records. With the consent of learned counsel for the parties, the matter is being finally disposed of at the stage of admission.

6. For just and proper adjudication of the case, the provisions contained under Section 5 of the Orissa Education Act, 1969 are quoted below:

> *"5.* ***Permission for establishment of Educational Institution****- (1) No private educational institution which require recognition shall be established except in accordance with the provisions of this Act or the rules made thereunder.*
>
> *(2) Any person or body of persons intending to,-*
>
> *(a) establish a private educational institution; or*
>
> *(b) open higher classes, new streams new optional subjects, additional sections or increase the number of students to be admitted or introduce Honours Courses in new subjects in a recognized private educational institutions; or*
>
> *(c) upgrade any such institution*
>
> *may make an application to the Prescribed Authority within such period and in such manner as may be prescribed for grant of permission therefore,*
>
> *Provided that in respect of applications which were pending on the date of commencement of the Odisha Education (Amendment) Act, 1994, the applicants shall be allowed a period of thirty days to submit revised applications in accordance with the provisions of this Act.*
>
> *(3) The applicant along with the application for permission, shall furnish an undertaking that in the event of permission being granted,-*
>
> *(i) adequate financial provision shall be made for continued and efficient maintenance of the institution.*

(ii) the institution shall be located on the lands specified in the application and that such lands are located in sanitary and healthy surroundings;

(iii) the building, playground, furniture, fixtures and other facilities shall be provided in accordance with the provisions of this Act and rules prescribed therefore; and

(iv) all the requirements laid down by the Act, the rules and orders, if any, issued thereunder shall be complied.

(4) Every such application shall be supported by an affidavit attesting the fact that all information furnished therein are true and correct to the best of knowledge of the applicant.

(5) The Prescribed Authority shall scrutinize each application, consider the applicants which are found complete in all respects and have been made in conformity with the Act and rules made thereunder and thereafter may make such inquiry as he may deem necessary. He shall make a report in respect of each application with his recommendations which shall be placed before the Committee constituted in this behalf by the State Government.

(6) If the Committee is satisfied that the educational needs of the local area justify the establishment of an educational institution that the place where the educational institution is proposed to be established is likely to best serve the educational needs of that area, that the location of the educational institution is not otherwise objectionable and that permission may be granted to any person or body of persons, the Committee shall make an order to that effect specifying the conditions to be fulfilled by such agency.

(7) The order made by the Committee shall be communicated to the applicant by the Prescribed Authority in such manner as may be prescribed.

(8) Any applicant aggrieved by an order refusing to grant permission may, within one month from the date of receipt of such order, prefer an appeal before the State Government whose decision thereon shall be final and binding.

Provided that provisions of Sub-sections (3), (4), (5), (6), (7) and (8) shall mutatis mutandis, apply to applicants for purposes specified in Clauses (b) and (c) of Sub-section (2).

(9) When a new private educational institution is established in accordance with the permission granted under this Section the fact of such establishment shall be reported by the Agency to the Prescribed Authority forthwith and in any case not later than forty-five days from the date on which the institution starts functioning.

(10) Where a new private educational institution in relation to which permission has been accorded under this Section fails to start functioning within 45 days from the date of commencement of the academic year following the date on communication of the order of permission, the permission so accorded, shall lapse.

Provided that the Prescribed Authority may, for good and sufficient reasons extend, on application, the date from which the educational institution shall start functioning for such period not exceeding beyond the first day of the following academic year."

7. To give effect to the provisions contained under Section 5, as mentioned above, the rules have been framed, called the Odisha Education (Establishment, Recognition and Management of Private Junior College/Higher Secondary Schools) Rules, 1991 (in short "Rules, 1991"), which has also undergone amendment in 2001. The relevant provisions of Chapter-II of the said Rules, which laid down as to how the application has to be made and as to how permission is to be granted, reads as under:-

*"3. **Preparation of Master-plan** – (1) The Director shall prepare for the State a Master-Plan each year by the end of September listing out the Blocks, in which there is no Junior College or Higher Secondary School and the Municipalities and Notified Area where establishment of Junior Colleges or Higher Secondary Schools is justified in conformity with the provisions of Sub-section (5) of Section 5. The Master-plan shall also project the requirement of additional seats or new streams or subjects in the existing institutions within a Block, Notified Area or Municipality. The Master-plan so prepared shall be placed before the Government for approval.*

(2) The grant of permission for starting any new institution in the State or introduction of new streams or subjects during the next academic session shall be in conformity with the Master-plan prepared under Sub-rule (1) and approved by the Government.

(3) The permission and recognition of a new institution under Sub-section (3) of Section 4 shall be accorded by the Director on behalf of the State Government.

*4. **Application for permission** – (1) Any Educational Agency desirous of establishing a new institution in a particular year shall make an application to the Director between the, 1st day of October and 30th day of November of the year immediately preceding the particular year. Applications received prior to, or after this period shall not be taken into consideration.*

Provided that the State Government may, for good and sufficient reasons, extend the last date of receiving applications in any particular year.

(2) Applications for permission to establish new institutions shall be made in duplicate in Form No.1.

(3) The application shall be accompanied with a fee of Rs.200/- (Rupees two hundred only) to be deposited in Government Treasury.

(4) Applications, received by the Director within the period specified under Sub-rule (1) shall be entered in an Index Register to be maintained for the purpose and the receipt of the applications shall be duly acknowledged.

***5. Documents accompanying the application** – Every application made under Rule-4 shall be accompanied by*

(a) The challan receipt of the feed paid;

(b) A sketch map of the Block or the Municipality or the Notified Area, as the case may be showing the location of the proposed institution along with other existing institutions, if any, and the High Schools located with the Block, the Notified Area or the Municipality;

(c) A sketch plan of the site of the proposed institution.

*6. **Content of the application** – The application in respect of a proposed institution shall inter alia specify the following.*

(a) The number of students to be enrolled in each stream, viz, Arts, Science or Commerce in which teaching is proposed to be imparted.

(b) The names of the subjects, both compulsory and optional proposed to be introduced under each stream with the number of students to be permitted for being offered with each optional subject.

(c) The anticipated annual income of the institution from different sources.

*7. **Grant of permission** – (1) The Director shall scrutinize each individual application and may make such enquiries as may be deemed necessary. After necessary enquiry if the Director is satisfied that there is need for establishing a Junior College or Higher Secondary School in any particular area, he shall after obtaining prior concurrence of the Government make an order under Sub-section (4) of Section 5 granting permission in favour of anyone of the applicants who, in his opinion is likely to best serve the educational needs of that area.*

(2) The order of the Director granting permission to an Educational Agency for establishment of a new institution shall specify the following :-

(a) The Educational Agency in whose favour the permission is granted;

(b) The exact location of the institution;

(c) The date from which the institution is to start functioning;

(d) The streams and optional subjects under each stream in which instructions may be imparted along with the permitted strength of students under each subject;

(e) The conditions to be fulfilled by the institutions in respect of the following;

(i) Site

(ii) Building and accommodation;

(iii) Laboratory equipments and teaching aid;

(iv) Staff;

(v) Fixed deposit to be made and pledged in favour of the Council; and

(f) Such other matter as the Director may specify;

*8. **Date of functioning of institution** – (1) When permission is accorded for establishing a new institution/it shall start functioning from the date specified in the order made by the Director under Rule-7.*

(2) Subject to the proviso to Sub-section (9) of Section 5 the Director may extend this date by a period not exceeding thirty days on an application made by an Educational Agency in whose favour permission has been granted."

8. In view of the provisions contained under Section 5 of the Act read with the Rules, as mentioned above, on receipt of the application along with required documents, the prescribed authority shall scrutinize each of the applications, consider the applications which are found complete in all respects and have been made in conformity with the Act and Rules made thereunder and, thereafter, may make such inquiry as he may deem necessary. He shall make a report in respect of each application with his recommendations which shall be placed before the committee constituted in this behalf by the State Government. As per the provisions of sub-section (6) of Section 5 of the Act, if the committee is satisfied that the educational needs of the local area justify establishment of an educational institution, that the place where the educational institution is proposed to be established is likely to best serve the educational needs of that area, the permission will be granted and the same will be communicated to him who submitted the application. In the case at hand, required procedure, as envisaged under the Act and Rules, was duly followed and accordingly the application submitted by the petitioner was placed before the High Power Committee, which in its meeting held on 18.04.2008 granted necessary permission, as per Annexure-B appended to Annexure-5 to the writ petition, for opening of new +2 science college with 128 seats (English, MIL & PCMB) 128 seats each, I.T. & Electronics-64 seats each from the session 2008-09 and, as such, the said decision was also communicated vide Annexure-2 on 01.05.2008 to the petitioner for compliance of the conditions therein to run the institution. Though the same was complied with by 26.05.2008 and when the institution

was going to be functioning, on 28.05.2008 the order impugned has been issued.

9. It is well settled law laid down by the apex Court that if the power has been vested with the particular authority, the same can only be exercised by the same authority. In ***Zuari Cement Limited v. Regional Director, Employees' State insurance Corporation, Hyderabad and others,*** *(2015) 7 SCC 690*, the apex Court held that it is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this Rule is traceable to the decision in **Taylor v. Tailor,** (1875) LR I Ch D 426, which was subsequently followed by Lord Roche in **Nazir Ahmad v. King Emperor,** AIR 1936 PC 253(2) and subsequently, the said principle has also been followed in **Babu Verghese v. Bar Council of Kerala,** (1999) 3 SCC 422.

10. In ***Nazir Ahmed v. King Emperor***, AIR 1936 PC 253, law is well settled "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." The said principles have been followed subsequently in ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358, ***Dhananjay Reddy v. State of Karnataka***, AIR 2001 SC 1512, ***Chandra Kishore Jha v. Mahabir Prasad***, AIR 1999 SC 3558, ***Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd***., AIR 2008 SC 1921, ***Ram Deen Maurya v. State of U.P.,*** (2009) 6 SCC 735.

11. It is apt to refer here the legal maxim "***Expressio Unius est exclusion alterius****"* i.e. if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred. Similar question had come up for consideration before this Court in ***Subash Chandra Nayak v. Union of India,*** 2016 (I) OLR 922 and this Court in paragraph-8 observed as follows:

> *".....the statute prescribed a thing to be done in a particular manner, the same has to adhered to in the same manner or not at all. The origin of the Rule is traceable to the decision in* ***Taylor v. Tailor,*** *(1875) LR I Ch D 426, which was subsequently followed by Lord Roche in* ***Nazir Ahmad v. King Emperor,*** *AIR 1936 PC 253(2). But the said principle has been well recognized and holds the field till today in* ***Babu Verghese v. Bar Council of Kerala*** *(1999) 3 SCC 422, and* ***Zuari Cement Limited v. Regional Director, Employees' State insurance Corporation,***

Hyderabad and others, *(2015) 7 SCC 690 and the said principles has been referred to by this Court in* ***Manguli Behera v. State of Odisha and others*** *(W.P.(C) No. 21999 of 2014 disposed of on 10.03.2016)".*

12. Similar question had come up for consideration in ***Governing Body of +2 Science College*** mentioned supra, wherein this Court held that as per the statute, no other authority has jurisdiction to change the decision of the High Power Committee. Thereby, the other authority has no jurisdiction to pass the order in contra. As it appears, the order in Annexure-6 dated 28.05.2008 has been passed by the Deputy Director, who is not competent to do so. Thereby, the order in question is without jurisdiction. Apart from the same, the said order keeping in abeyance the decision taken in the High Power Committee meeting held on 18.04.2008 has been evidently passed, as desired by the Minister, Higher Education, Orissa. Therefore, if the power has been vested with the committee to grant permission, the Minister, Higher Education, Orissa cannot have any jurisdiction to interfere with the same because the committee was constituted comprising following members:-

1. Commissioner-cum-Secretary to Government Higher Education Department
2. Vice Chancellor, Shree Jagannath Sanskrit University, Puri
3. Director, Higher Education
4. Chairman, Council of Higher Secondary Education
5. Deputy Secretary to Government, Law Department
6. Deputy Secretary to Government, Finance Department
7. Regional Director of Education, Bhubaneswar
8. Regional Director of Education, Berhampur
9. Regional Director of Education, Berhampur
10. Joint Secretary to Government, Higher Education Department.

In view of such position, if any decision has been taken by the authority, which is not competent to pass such order, the same is a nullity in the eye of law, as he has no jurisdiction.

13. In ***Hiralal Moolchand Doshi v. Barot Raman Lal Ranchhoddas,*** AIR 1993 SC 1449 : (1993) 2 SCC 458, the apex Court held as follows:

> *"A decree is said to be a nullity if it is passed by a Court having no inherent jurisdiction. Merely because a Court erroneously passes a decree or there is an error while passing the decree, the decree cannot be called a nullity. The decree to be called a nullity is to be understood in the sense that it is ultra vires the powers of the Court passing the decree and not merely voidable decree."*

14. While considering Section 2(2) of the Civil Procedure Code, the definition of decree defined as a decree passed by the Court without jurisdiction is nullity. When defect of jurisdiction is such which cannot be cured by consent or waiver of party, the defence of nullity can be set up whenever such decree is sought to be enforced.

In ***Urban Improvement Trust, Jodhpur v. Gokul Narain***, AIR 1996 SC 1819: (1996) 4 SCC 178, the apex Court held that a decree passed by the Court without jurisdiction is a 'nullity'.

15. Similar view has also been taken by the apex Court in **DLF Universal Ltd.** mentioned supra, where in paragraphs-36 and 37 of the judgment, the apex Court held as follows:-

> *"36. In our considered opinion the Director is not authorized to interfere with agreements voluntarily entered into by and between the owner/colonizer and the purchasers of plots/flats. The agreed terms and conditions by and between the parties do not require the approval or ratification by the Director nor is the Director authorized to issue any direction to amend, modify or alter any of the clauses in the agreement entered into by and between the parties.*
>
> *37. It is thus clear that there is no provision in the Act, Rules or in the licence that empowers the Director to fix the sale price of the plots or the cost of flats. The impugned directions issued by the Director are beyond the limits provided by the empowering Act. The directions so issued by the Director suffer from lack of power. It needs no restatement that any order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of its legal effect. An order which is not within the powers given by the empowering Act, it has no legal leg to stand on. Order which is ultra vires is a nullity, utterly without existence or effect in law."*

In view of such settled position of the law, as laid down by the apex Court, with regard to the meaning attached to the word 'nullity', the order passed by the Deputy Director vide Annexure-6 dated 28.05.2008, being without jurisdiction, this Court is of the considered view that the same is a 'nullity' in the eye of law and cannot sustain, as he has no jurisdiction to pass such order.

16. Taking into consideration the factual matrix of the case and the principles of law, as discussed above, this Court is of the considered view

that the order so passed by the Deputy Director on 28.05.2008 in Annexure-6 keeping in abeyance the decision taken by the High Power Committee in its meeting held on 18.04.2008 regarding grant of permission and recognition to self-financing courses run by different institutions, including the petitioner-institution until further orders, cannot sustain in the eye of law. Accordingly, the same is liable to be quashed so far it relates to petitioner institution and is hereby quashed. As a consequence thereof, the opposite parties are directed to implement the order dated 01.05.2008 communicated vide Annexure-2 forthwith, keeping in view the provisions of Section 5 of the Orissa Education Act read with Rules 3 to 8 of the Rules, 1991.

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

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2021 (I) ILR - CUT- 788

Dr. B.R. SARANGI, J.

W.P.(C) NO. 7269 OF 2013

MAMATARANI DALEI @ SAMAL .....Petitioner

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

WORDS AND PHRASES – The word 'reside' – Meaning thereof – Held, the word 'reside' means dwell permanently or for a considerable time; to have one's settled or usual abode; to line in or at particular place, but it does not include casual or flying visits – AIR 2000 SC 525 (Union of India Vrs. Dudhnath Prasad) referred.

Case Laws Relied on and Referred to :-

1. AIR 2000 SC 525 : Union of India Vs. Dudh Nath Prasad.
2. AIR 1963 SC 1521: (1964) 2 SCR 73 : Jagir Kaur Vs. Jaswant Singh.

For Petitioner : M/s. P.K. Das, L. Dash & S.K. Mohapatra.

For Opp. Parties: Mr. B.P. Tripathy, Addl. Govt. Adv.
M/s. A.P. Bose, N. Hota, S.S. Routray, (Mrs) V. Kar
& D.J. Sahoo, M/s P.K. Das-I & S.B. Das.

JUDGMENT Date of Hearing : 04.03.2021 : Date of Judgment : 09.03.2021

Dr. B.R. SARANGI, J.

The petitioner has filed this writ petition seeking to quash the common order dated 14.02.2013 passed by the Addl. District Magistrate, Balasore in Anganwadi Appeal No.04/2012, which was filed by the petitioner, and Anganwadi Appeal No.46 of 2011, which was filed by opposite party no.5, confirming the selection of opposite party no.6, Sabitarani Hazira @ Kar as Anganwadi Worker for Aladiha-4 Anganwadi Centre considering her to be a permanent resident of Aladiha village, as her residential house built on government plot is situated within Aladiha-4 Anganwadi Centre service area.

2. The factual matrix of the case, in hand, is that the petitioner, along with opposite parties no. 5 and 6 as well as other candidates, applied for the post of Anganwadi Worker in respect to Aladiha-4 Anganwadi Centre in the year 2010, pursuant to advertisement issued by the opposite party no.4-C.D.P.O., Baliapal in the district of Balasore. By following due procedure of selection, the petitioner stood 3rd position in the select list, while the opposite parties no. 5 and 6 stood 1st and 2nd position respectively.

2.1. Challenging such selection, the petitioner filed Anganwadi Misc. Case No. 73 of 2010 before the Sub-Collector, Balasore contending inter alia that though opposite parties no. 5 and 6 are residents of Aladiha village, they do not belong to Aladiha-4 Anganwadi Centre service area, as required by the guideline, rather, they are residents of Aladiha-2 Anganwadi Centre service area. Consequentially, the Sub-Collector called for a report from the office of the C.D.P.O., Baliapal regarding residential status of opposite parties no. 5 and 6, along with the petitioner. The C.D.P.O., Baliapal, vide letter dated 26.05.2010, requested the Tahasildar, Baliapal to cause an enquiry and submit a report regarding residential status of the petitioner, as well as opposite parties no. 5 and 6. After causing enquiry, the Tahasildar, Baliapal submitted a report on 10.06.2010 stating that both the opposite parties no. 5 and 6 are not the residents of service area of Aladiha-4 Anganwadi Centre, as per the land documents i.e. khata number and plot number provided by them before the Tahasildar, Baliapal, while obtaining resident certificates. But the Sub-Collector, Balasore dismissed the Anganwadi Misc. Case No. 73 of 2010, vide order dated 11.11.2010, on the

ground that the residential certificates issued by the Tahasildar, Baliapal in favour of opposite party no. 5 and 6 have not been cancelled by the concerned authority. That apart, the residences of opposite parties no. 5 and 6 situated over government plots no. 1498 and 1500 of village Aladiha are coming under the service area of Aladiha-4 Anganwadi Center.

2.2 Challenging the above order, the petitioner filed W.P.(C) No. 22329 of 2010 before this Court. During pendency of the above writ petition, engagement order was issued in favour of opposite party no.6. But the writ petition filed by the petitioner was disposed of vide order dated 29.03.2012 directing the petitioner to file appeal before the learned ADM., Balaosre, who shall dispose of the appeal within a period of two months by giving opportunity of hearing to the parties concerned and also directed that the appointment of opposite party no.6 shall be subject to the result of the appeal. In compliance of the said order, the petitioner preferred Anganwadi Appeal No.4 of 2012 before the ADM., Balasore challenging the selection and engagement of opposite party no.6 as Anganwadi Worker in respect to Aladiha-4 Anganwadi Centre. Challenging engagement of opposite party no.6, opposite party no.5 also filed Ananwadi Appeal No. 46 of 2011 before the ADM., Balasore. Since both the appeals were filed with the same cause of action, the matter was heard analogously and vide impugned order dated 14.02.2013 the ADM., Balasore rejected both the appeals filed by the petitioner as well as opposite party no.5. Hence, this writ petition has been preferred by the petitioner against the said order.

3. Mr. P.K. Das, learned counsel for the petitioner contended that the opposite parties no 5 and 6 are not residents of service area of Aladiha-4 Anganwadi Centre. The enquiry report reveals that the residential certificates submitted by the opposite parties no. 5 and 6, on the basis of the land documents, i.e., plot numbers and khata numbers, are of service area of Aladiha-2 Anganwadi Centre, which are not coming within the service area of Aladiha-4 Anganwadi Centre, but the residential houses of opposite parties no. 5 and 6 over Government Plot No. 1498 and 1500 respectively, are coming under the service area of Aladiha-4 Anganwadi Centre. It is further contended that prior to notification, the opposite parties no. 5 and 6 were residing in the service area of Aladiha-2 Anganwadi Centre and after publication of notification they purposefully built small houses over government plots forcibly without the knowledge of the government, the original land owner, and they reside there as if they are residents of

service area of Aladiha-4 Anganwadi Centre. Therefore, he contended that the order impugned so passed by the ADM, Balasore should be quashed.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate contended that the opposite parties no. 5 and 6 having constructed their houses over government plots, are residing there, which come under service area of Aladiha-4 Anganwadi Centre. Therefore, no illegality or irregularity has been committed by the ADM, Balasore in passing the order impugned.

5. Mr. A.P. Bose, learned counsel appearing for opposite party no.5 contended that the opposite party no.5 is more meritorious than other candidates, those who have applied for the post and she is residing within the service area of Aladiha-4 Anganwadi Centre, in view of the residential certificate issued by the Tahasildar, Baliapal, but the same has not been considered by the selection committee and opposite party no.6 has been selected illegally. Therefore, the selection of opposite party no.6 cannot sustain in the eye of law.

6. Though opposite party no.6 has appeared through her counsel Mr. P.K. Das-1 and associates, none was present at the time of hearing nor has any counter affidavit been filed on her behalf.

7. This Court heard Mr. P.K. Das, learned counsel for the petitioner; Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties; and Mr. A.P. Bose, learned counsel for opposite party no.5, and perused the record. None of the opposite parties have filed their counter affidavit to the writ petition, but contended that since this a certiorari proceeding, the impugned order has to be examined, therefore, they chose not to file the counter affidavit and consented to dispose of the matter at the stage of admission. Therefore, this writ petition is being disposed of finally at the stage of admission with the consent of the parties.

8. The Government of Odisha in its Women and Child Development Department issued revised guidelines for selection of Anganwadi Worker vide Annexure-2 dated 02.05.2007. Clause-1 of the said guidelines read as follows:

> *"1) Applications for selection of Volunteers to work as Anganwadi Workers will be invited for each village/Anganwadi Center area from women residing in the said village/Anganwadi Center area."*

On perusal of the aforementioned clause, it is made clear that the selection of Anganwadi Worker will be made from amongst the women residing in the said village/ Anganwadi Center area.

9. The meaning of 'reside' has been stated in Oxford Dictionary to the following effect:

> *"The word 'reside' means dwell permanently or for a considerable time; to have one's settled or usual abode; to line in or at a particular place."*

The foresaid meaning has been taken note of by the apex Court in ***Union of India v. Dudh Nath Prasad,*** AIR 2000 SC 525.

10. In ***Jagir Kaur v. Jaswant Singh,*** AIR 1963 SC 1521: (1964) 2 SCR 73, the apex Court observed that the word 'reside' means both a permanent dwelling as well as a living temporarily in a place but it does not include a casual stay in, or a flying visit to a particular place.

The aforesaid judgment has also been relied upon in ***Dudh Nath Prasad*** (supra).

11. In view of the meaning attached to the word 'reside', it is made clear that it does not refer to permanent residence. It implies something more than a brief visit but not such a continuity as to amount to domicile. In other words, the expression 'reside' does not include casual or flying visits.

12. It is admitted case of the opposite parties that on the basis of the enquiry report submitted by the Tahasildar, the opposite parties no. 5 and 6 are residing over government plots no. 1498 and 1500 respectively and the said residences are coming under the service area of Aladiha-4 Anganwadi Centre. The opposite parties no. 5 and 6 were residing within the service area of Aladiha-2 Anganwadi Centre, but, subsequently, both are residing in the above noted government plots and, more particularly, the opposite party no.6 is residing over plot no. 1500 by constructing a house. As such, no action has been taken against her for eviction. If the opposite party no.6 is residing over a government plot by constructing a house, in view of the law laid down by the apex Court mentioned supra, the consideration made by the selection committee, that she belonged to service area of Aladiha-4 Anganwadi Centre, cannot be said to be illegal one. Therefore, the selection committee selected the opposite party no.6 to engage her as Anganwadi Worker in

respect of Aladiha-4 Anganwadi Centre basing upon her merit and suitability and the residence certificate furnished by her proves that she is residing in Aladiha-4 Anganwadi Centre service area and her residential house is situated over a government plot, which comes under Aladiha-4 Anganwadi Centre service area. If the requirement of the guidelines dated 02.05.2007 under Annexure-2 has been satisfied, then no illegality or irregularity has been committed by the selection committee by giving engagement to opposite party no.6 as Anganwadi Worker in respect to Aladiha-4 Anganwadi Centre. Taking into account such residential status of opposite party no.6, which comes under Aladiha-4 Anganwadi Centre service area, the ADM., Balasore is justified in passing the order dated 14.02.2013 in Annexure-4, which does not warrant interference of this Court.

13. The writ petition merits no consideration and the same is accordingly dismissed. No order to costs.

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2021 (I) ILR - CUT- 793

Dr. B.R. SARANGI, J.

W.P.(C) NO. 10016 OF 2012

MANASI BISI .....Petitioner

.V.

ADDL. DIST. MAGISTRATE, BARGARH & Ors. .....Opp. Parties

SERVICE LAW – Recruitment – Appointment of Anganwadi Worker – Select/merit list prepared – 1st candidate did not join – 2nd candidate in the select/merit list was given appointment – Whether illegal? – Held, no, it is well settled in law, if the selected candidate did not join for some reason or other and merit list was prepared, engagement should be given from the list to a candidate who stood 2nd. (Para 8)

Case Laws Relied on and Referred to :-

1. AIR 1997 SC 2643 : (1998) 9 SCC 104 : State of Bihar Vs. Kaushal Kishore Singh.
2. (1997) 5 SCC 298 : State of Bihar Vs. Kumar Promod Narain Singh.
3. (2006) 6 SCC 395 : K.H. Siraj Vs. High Court of Kerala.

4. (1994) 1 SCC 126 : State of Bihar Vs. The Secretariat Assistant Successful Examinees' Union,
5. (2005) 9 SCC 22 : Punjab SEB Vs. Malkiat Singh.
6. (2006) 1 SCC 779 : Union of India Vs. Kali Dass Batish.
7. (2006) 6 SCC 474 : State of U.P. Vs. Om Prakash.

For Petitioner : M/s. A.P. Bose, R.K. Mahanta, N. Hota, S.S. Routray & V. Kar.

For Opp. Parties : Mr. B.P. Tripathy, Addl. Govt. Adv. M/s. L.N. Patel & N.K. Das.

JUDGMENT Date of Judgment : 10.03.2021

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 18.04.2012 passed by opposite party no.1-Additional District Magistrate, Bargarh in AWW Appeal No. 31 of 2011, by which the aforesaid appeal filed by opposite party no.3 has been allowed and engagement of the petitioner as Anganwadi Worker of centre no.2 of village Tinkani has been quashed.

2. The facts of the case, in brief, are that opposite party no.2 issued an advertisement inviting applications for filling up the post of Anganwadi Worker of centre no.2 of village Tinkani, pursuant to which, the petitioner, opposite party no.3 and proforma opposite parties no.4 to 6 applied for. The said applications were verified on 16.03.2011 and a merit list was accordingly prepared. The proforma opposite party no.4 got highest marks, but as she was an outsider and there were some allegations against her, she did not join. Consequentially, the petitioner, who stood second in the merit list, was issued with engagement letter vide Annexure-2 dated 23.04.2011 by opposite party no.2. Accordingly, the petitioner joined and continued to discharge her duty as Anganwadi Worker of centre no.2 of village Tinkani.

2.1 Opposite party no.3 challenged the selection and engagement of the petitioner before opposite party no.1-Additional District Magistrate, Bargarh by preferring AWW Appeal No.31 of 2011 stating, inter alia, that once a candidate was selected and she did not join in the said post for any reason whatsoever, opposite party no.2 should have issued fresh advertisement instead of issuing engagement order to the 2nd candidate, i.e. the petitioner.

2.2 Opposite party no.1, having heard the petitioner and opposite parties no.2 and 3, vide order dated 18.04.2012 in Annexure-1, came to a conclusion

that since no provision was there in the proceeding for appointment of next meritorious candidate, if the selected candidate did not join in the post, the decision of the selection committee violated the government guidelines and thereby committed irregularities in giving engagement to the petitioner, who was the 2nd meritorious candidate, without inviting fresh applications through advertisement. Arriving at such a conclusion, he quashed the engagement of the petitioner in the post of Anganwadi Worker of centre no.2 of village Tinkani made by opposite party no.2-Child Development Project Officer (CDPO), Barpali and allowed the appeal filed by opposite party no.3. Hence this writ petition.

3. Mr. A.P. Bose, learned counsel appearing for the petitioner contended that when the first candidate in the merit list did not join, as she was an outsider, the selection committee gave engagement to the 2nd meritorious candidate, i.e. the petitioner. Thereby, the engagement of the petitioner in the post of Anganwadi Worker of centre no.2 of village Tinkani by opposite party no.2-Child Development Project Officer (CDPO), Barpali is well justified. It is further contended that even if there is no provision in the advertisement that in case the 1st candidate in the merit list does not turn up, the 2nd candidate will get a chance, but that does not mean, opposite party no.2 or the selection committee is powerless to engage the next meritorious candidate when there is no bar for the same. Furthermore, it is contended that opposite party no.1 should have called for opposite party no.2 to explain as to whether there is any contrary guideline to the effect that such engagement cannot be made and the same being not done, opposite party no.1 should not have passed the order impugned dated 18.04.2012 under Annexure-1 against the petitioner.

4. Mr. B.P. Tripathy, learned Additional Government Advocate, while justifying the order dated 18.04.2012 under Annexure-1 passed by the Additional District Magistrate, Bargarh in AWW Appeal No.31 of 2011, vehemently contended that either in the advertisement or in the procedure adopted by the selection committee since there was no provision or condition for engagement of the 2nd meritorious candidate from the merit list, in case the 1st meritorious candidate did not choose to join, the Additional District Magistrate, Bargarh directed for fresh selection holding the engagement of the present petitioner as illegal. Therefore, no illegality or irregularity can be said to have been committed by the Additional District Magistrate, Bargarh in passing the order impugned.

5. Mr. L.N. Patel, learned counsel appearing for opposite party no.3 contended that in absence of provisions contained in the advertisement or any other document indicating that if 1st candidate in the merit list did not join, the 2nd candidate would be given engagement, the entire action taken by giving engagement to the petitioner cannot sustain in the eye of law. Thereby, no illegality or irregularity has been committed by the Additional District Magistrate, Bargarh by passing the order impugned dated 18.04.2012 directing for fresh selection, and this Court should not interfere with the same.

6. This Court heard Mr. A.P. Bose, learned counsel for the petitioner; Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties; and Mr. L.N. Patel, learned counsel for opposite party no.3; and perused the record. Since this matter is of the year 2012 and is a certiorari proceeding, this Court, with the consent of learned counsel for the parties, proceeded to examine the correctness of the impugned order under Annexure-1 passed by the Additional District Magistrate, Bargarh and decide the matter finally at the stage of admission taking into account the counter affidavit filed by opposite parties no.1 and 2.

7. The facts mentioned above are not disputed. Pursuant to advertisement, five candidates applied for the post of Anganwadi Worker of centre no.2 of village Tinkani and on scrutiny of documents by following due procedure, the selection committee selected one Sangeeta Sethi for engagement as Anganwadi Worker on the basis of securing highest percentage of marks and issued engagement order in her favour, but she did not join in the said post. Consequently, the petitioner, who was 2nd in the merit list, was issued with the engagement order. Opposite party no.3 preferred appeal alleging that instead of going for fresh advertisement, the petitioner should not have been engaged as Anganwadi Worker, who stood 2nd in the merit list, and contended that her engagement was done violating the government guidelines.

8. The materials available on record would go to show that the 1st candidate, namely, Sangeeta Sethi was selected on the basis of higher percentage of marks, but, she did not join. Since the post was lying vacant, the selection committee took a decision for engagement of the petitioner, who stood 2nd in the merit list, and accordingly issued engagement order in her favour. It is no doubt true, the proceedings of the selection committee

nowhere indicate to give scope to the next eligible candidate, if the selected candidate did not join in the post within the time prescribed. Therefore, the contention has been advance that the selection committee has illegally took the decision for engagement of the petitioner without inviting fresh advertisement. But, it is well settled in law, if the selected candidate did not join for some reason or other and merit list was prepared, engagement should be given from the said list to a candidate who stood 2nd.

9. In ***State of Bihar v. Kaushal Kishore Singh***, AIR 1997 SC 2643 : (1998) 9 SCC 104, the apex Court held that after the selection process is complete, a merit list (also known as select list) has to be prepared. The normal criterion to be followed by the concerned authority in the case of selection is to prepare a list of candidates selected in the order of merit and then recommend to the government for appointment to the post advertised.

10. In ***State of Bihar v. Kumar Promod Narain Singh***, (1997) 5 SCC 298, the apex Court held that if appointment is made without preparing a select list then the same will be arbitrary and illegal.

11. In ***K.H. Siraj v. High Court of Kerala***, (2006) 6 SCC 395, the apex Court held that persons who were not eligible candidates could not question the legality or otherwise of select list.

12. In ***State of Bihar v. The Secretariat Assistant Successful Examinees' Union***, (1994) 1 SCC 126, the apex Court held that the empanelment of the candidate in the select list confers no right on the candidates to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it create a vested right to be appointed unless the service rules provide to the contrary.

The said principle has been followed in ***Punjab SEB v. Malkiat Singh***, (2005) 9 SCC 22, ***Union of India v. Kali Dass Batish***, (2006) 1 SCC 779 and ***State of U.P. v. Om Prakash***, (2006) 6 SCC 474.

13. Applying the above principles to the present case, as the 1st candidate did not join, the petitioner, who stood 2nd in the merit list, was given engagement from the valid empanelled list, which cannot be said to be illegal or arbitrary. This Court, while entertaining this writ petition, passed an

interim order on 04.06.2012 in misc. case no. 8706 of 2012 that operation of the order dated 18.04.2012 passed by the learned Addl. District Magistrate, Bargarh in AWW Appeal No. 31 of 2011 vide Annexure-1 shall remain stayed till next date, pursuant to which the petitioner is still continuing in the post. In the meantime, more than nine years have passed. As such, this Court does not find any illegality or irregularity by giving engagement to the petitioner, who stood 2nd in the merit list. Thereby, the order dated 18.04.2012 passed by the Additional District Magistrate, Bargarh in AWW Appeal No.31 of 2011 cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed.

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

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2021 (I) ILR - CUT-798

Dr. B.R. SARANGI, J.

W.P.(C) NO. 19501 OF 2019

Dr. KAUSHIK PATNAIK .....Petitioner

.V.

STATE OF ORISSA & ANR. .....Opp. Parties

(A) PRINCIPLE OF ESSTOPPEL – Recruitment of Dental Surgeon – Advertisement by OPSC – Petitioner applied with all requisite documents as in service candidate along with the certificate from the appointing authority showing his service period to get the benefit of over age relaxation and the permission to apply – OPSC acted upon such documents and allowed the petitioner to appear in the examination – Result was not published and the ground of such non-publication of result was that due to non-submission of the certificate of past service from the Govt. or DHS the over age relaxation was not given and the application was rejected – Nothing in the advertisement requiring that the certificate of past service was to be submitted by obtaining the same from the Govt. or DHS – Plea that the action of OPSC was hit by the principles of estoppel – Held, yes, rejecting the candidature of the petitioner on the ground of overage due to non-

submission of service certificate from Government or DHS was hit by principle of estoppel as the OPSC has acted upon the application.
(Paras 9 to 11)

(B) SERVICE LAW – "Competent authority" – Definition – Advertisement for recruitment of Dental Surgeon – Requirement was that the in service candidates were to submit past service certificate from the competent authority – No definition of competent authority provided – Petitioner submitted such certificate from the appointing authority – Whether the appointing authority can be construed as competent authority? – Held, Yes – Reasons indicated. (Para 19)

Case Laws Relied on and Referred to :-

1. (2003) 2 SCC 355 : B.L. Sreedhar Vs. K.M. Muireddy.
2. (2010) 12 SCC 458 : H.R. Basavaraj Vs. Canara Bank.
3. (2008) 9 SCC 177 : Meera Sahini Vs. Lt. Governor of Delhi.
4. AIR 1977 SC 747 : Maysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg.
5. AIR 1967 SC 459 : State of Assam Vs. Kripanath Sarma.
6. AIR 1961 SC 276 : T. Cajee Vs. U. Jormanik Siem.

For the Petitioner : M/s. S. Patra-1 & Sandeep Rath.
For the Opp. Parties : Mr. R.P. Mohapatra, Addl. Govt Adv.
Mr. P.K. Mohanty-1, Sr. Adv., M/s. P. Mohanty, P.K. Nayak, P.K. Pasayat, S. Mohanty & S.N. Dash.

JUDGMENT Date of Judgment : 08.03.2021

Dr. B.R. SARANGI, J.

Dr. Kaushik Patnaik, who was a candidate for the post of Dental Surgeon in Group 'A' of Odisha Medical Services (Dental) Cadre under unreserved category, has filed this writ petition seeking to quash communication dated 16.11.2018 under Annexure-12, by which his candidature has been rejected on the ground of overage due to non-submission of service certificate from Government or DHS, and further seeks for a direction to publish the result of the petitioner in the written examination, which was held on 06.05.2018 and to provide the marks awarded to him forthwith.

2. The concise statement of fact is that the Orissa Public Service Commission-opposite party no.2 issued an advertisement vide Annexure-1 in its website for recruitment to the post of Dental Surgeon in Group 'A' (Jr.) of

Odisha Medical Services (Dental) Cadre under Health & Family Welfare Department inviting online applications from the prospective candidates through the proforma application to be made available in the website from 20.03.2018 to 07.04.2018. By the time the advertisement was issued, the petitioner was rendering service as a Senior Resident in the Department of Periodontics at SCB Dental College & Hospital, Cuttack. The petitioner, being eligible for such post, sought permission from the Principal, SCB Dental College & Hospital, Cuttack to appear in such examination to be conducted by opposite party no.2. The Principal, vide letter dated 29.03.2018, certified that the petitioner, MDS is working as Senior Resident in the Department of Periodontics at SCB Medical College & Hospital, Cuttack since 10.08.2015 and continuing till that date, and that the institution has "No Objection" for him to apply for the post of Assistant Dental Surgeon under Odisha Public Service Commission (OPSC).

2.1 After obtaining such permission, the petitioner applied for the post of Dental Surgeon in Group 'A' (Jr.) of Odisha Medical Services (Dental) Cadre under UR category. On receipt of such application, opposite party no.2 allotted registration no. 15171849744 and roll no. 101382 to the petitioner, and consequentially issued a notice on 01.05.2018 vide Annexure-4 regarding programme of examination informing therein that the candidates are admitted to the written examination scheduled to be held on 6th May, 2018. It was also instructed to the candidates to download their "admission certificate" and "instruction to candidates" from the website of the Commission from 01.05.2018 onwards. The above notice would show that the roll no. 101382 of the petitioner was earmarked for the examination centre at "Saraswati Sishu Vidya Mandira, Mahanadi Ring Road, Chahata Ghata, Tulasipur, Cuttack." Pursuant to the instruction vide Annexure-4, the petitioner downloaded "admission certificate" and "instruction to candidates" from the website of the Commission. On 06.05.2018, the petitioner appeared in the written examination in the scheduled examination centre.

2.2 The opposite party no.2, vide notification dated 20.06.2018 at Annexure-6, intimated that the verification of original documents of the shortlisted candidates to the post of Dental Surgeon in Group 'A' (Jr.) of Odisha Medical Services (Dental) Cadre under Health & Family Welfare Department, would be held in the office of the Commission on 28.06.2018 and 29.06.2018 and instructed the candidates to come with all original certificates/documents as per para-10 of the advertisement, duly filled in the

attestation form and submit the same in person on the day of verification. The detail programme of the verification, intimation letter, and attestation form were available in the website of the Commission. In terms of the direction and instruction contained in Annexue-6, the petitioner downloaded the programme of the verification, intimation letter and attestation form from the website of the Commission. As per programme of verification, his roll no.101382 was fixed to 2nd session of 28.06.2018 under the Team No. III. The opposite party no.2, vide notice dated 09.08.2018, recommended the names of 171 candidates as per the list enclosed in order of merit for appointment to the posts of Dental Surgeon Group-"A" (Jr.) of Odisha Medical Services (Dental) Cadre under opposite party no.1, pursuant to the advertisement at Annexure-1. But the petitioner found that his roll no.101382 was not there in the list and his name was not recommended.

2.3 The petitioner sought information under the Right to Information Act, 2005 (for short "RTI Act, 2005") regarding the final cutoff marks of UR, SC & ST recommended candidates and the marks awarded to them. The Public Information Officer of opposite party no.2, vide letter dated 27.08.2018, intimated that final cutoff marks of UR, SC and ST recommended candidates and mark of the applicant is available in the website of the Commission. Prior to seeking information under the RTI Act, 2005, the petitioner had checked the website where his marks were not available. After receipt of letter dated 27.08.2018, the petitioner downloaded the mark sheet, but his marks were not available in the list published by the opposite party no.2 relating to marks secured by the candidates in the written examination. The result of the petitioner was not published nor did his name appear in the list. After obtaining the marks of finally selected candidates, the petitioner applied to the PIO, under the RTI Act, 2005 on 10.08.2018 about his marks secured in the written examination. But, he was intimated by opposite party no.2, vide letter dated 16.11.2018, that his candidature was rejected on the ground of overage due to non-submission of service certificate from the Government or DHS. The petitioner, thereafter, submitted representation to the Chairman of opposite party no.2 on 26.08.2020, but, as no action was taken thereon, the petitioner has approached this Court by filing this writ petition.

3. Mr. S. Patra-1, learned counsel for the petitioner contended that opposite party no.2-OPSC, having allowed the petitioner to appear in the written examination and participate in the process of selection, pursuant to

advertisement at Annexure-1, for the post of Dental Surgeon in Group 'A' (Jr.) of Odisha Medical Services (Dental) Cadre, should not have said vide impugned communication dated 16.11.2018 that the petitioner's candidature was rejected on the ground of overage due to non-submission of service certificate from Government or DHS. It is contended that such communication is hit by principle of estoppel, in as much as the advertisement does not in any way require that in- service candidates were to furnish service certificate from the Government or DHS, save and except the upper age limit shall be relaxed up to 5 years in case of in-service doctors serving under State Government or State Government Undertaking on ad hoc or contractual basis. Admittedly, the petitioner is continuing as a Senior Resident and to substantiate the same, along with his application, he had enclosed the certificate issued by the Principal, SCB Dental College & Hospital, Cuttack. Thereby, the employer of the petitioner having satisfied that the petitioner is rendering service as a Senior Resident in the Department of Periodontics at SCB Dental College & Hospital, Cuttack, rejection of his candidature, on the ground of overage due to non-submission of service certificate from Government or DHS, cannot sustain in the eye of law. It is further contended, the ground taken by opposite party no.2 that the Principal, who has issued the certificate, is not the competent authority, rather, the petitioner ought to have produced the certificate from the Government or DHS, who are competent to do so under law, and in absence of that, the candidature of the petitioner has been rightly rejected, has no basis and is not legally tenable, in view of the fact that nothing has been stated in the advertisement with regard to competent authority to certify that the candidate has been rendering service in the Government or Government undertaking. In absence of the same, the rejection of the candidature of the petitioner vide Annexure-12 cannot sustain in the eye of law.

4. Mr. R.P.Mohapatra, learned Addl. Government Advocate appearing for the State contended that any dispute involving recruitment to the post of Dental Surgeon, pursuant to advertisement issued under Annexure-1, is a lis between the petitioner and opposite party no.2, as the State Government is the only requisitioning authority and has nothing to do in the matter. If any condition stipulated in the advertisement under Annexure-1 has not been complied with, it is the opposite party no.2, which is to give reply to the same and not the present opposite party no.1.

5. Mr. P.K. Mohanty, learned Senior Counsel appearing along Mr. P. Mohanty, learned counsel for opposite party no.2 argued with vehemence that since the petitioner has been rendering service as a Senior Resident in the SCB Dental College and Hospital, Cuttack, he should have produced the certificate of engagement issued by the Government or DHS. Mere production of the certificate given by the Principal enabling the petitioner to get age relaxation to appear in the examination, cannot serve the purpose. Thereby, the impugned communication rejecting the candidature of the petitioner is well justified and the writ petition is to be dismissed in limine.

6. This Court heard Mr. S. Patra-1, learned counsel for the petitioner; Mr. R.P.Mohapatra, learned Addl. Government Advocate appearing for opposite party no.1; and Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P. Mohanty, learned counsel for opposite party no.2-OPSC; 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. For just and proper adjudication of the case, the relevant clauses of the advertisement issued vide Annexure-1 are quoted below:

> *"**3. EDUCATIONAL QUALIFICATION:** (i) A candidate must have possessed a Bachelors Degreein Dental Surgery (BDS) or equivalent Degree from a Medical College or Medical Institution recognized by the Dental Council of India (DCI).*
>
> *(ii) Have possessed a Registration Certificate under the Dentists Act, 1948.*
>
> *(iii) Have possessed required Conversion Certificates recognized by Dental Council of India (DCI) in case of candidates having Degrees from Universities of Foreign Countries.*
>
> ***4. AGE:** A candidate must not under 21 (twenty one) years and must not be above the age of 32 (thirty-two) years as on 1st January, 2018 i.e., he/she must not have been born earlier than 2nd January, 1986 and not later than 1st January, 997. Age relaxation shall be as per Government Rules prescribed for the purpose.*
>
> *Provided further that the upper age limit shall be relaxed up to 5 years in case of in-service Doctors serving under State Government or State Government Undertaking on ad hoc or contractual basis.*
>
> *Provided also that a candidate coming under more than one category, shall be eligible for one only age relaxation benefit, which shall be considered most beneficial to such candidates.*

SAVE AS PROVIDED ABOVE THE AGE LIMITS PRESCRIBED CAN IN NO CASE BE RELAXED.

Date of birth entered in the High School Certificate or equivalent certificate issued by the concerned Board/Council will be accepted by the Commission.

8. <u>OTHER ELIGIBILITY CONDITIONS :</u>

xx xx xx

(vii) Only those candidates, who possesses the required qualification and within the prescribed age limit etc. by the closing date of receipt of online application, will be considered eligible:

xx xx xx

10. <u>CERTIFICATES/DOCUMENTS TO BE ATTACHED</u>

xx xx xx

(xvi) Certificate from competent authority in support of past service as Dental Surgeon under Government of Odisha in respect of candidates who claim age relaxation as serving Doctors. The period of part service as Medical Officer will be taken into account by the Closing date of receipt of online applications.

xx xx xx"

As per the above requirements, the petitioner has requisite educational qualification, but, in order to get age relaxation, as he was an in-service candidate and serving under the State Government as Senior Resident in SCB Dental College & Hospital, Cuttack, in support of the same the Principal, SCB Dental College & Hospital, Cuttack had given a certificate on 29.03.2018 vide Annexure-2, which the petitioner had enclosed with the application form, and in consideration of the same, he was allotted with roll number and was permitted to appear in the written examination by allotting a examination centre at Saraswati Sishu Vidya Mandira, Mahanadi Ring Road, Chahata Ghata, Tulasipur, Cuttack. In pursuance thereof, the petitioner appeared in the examination on the date and time fixed by the authority, but, when the result was published, his roll number did not find place either in the list of successful candidates prepared by opposite party no.2 or in the mark-sheet allotting marks to each of the candidates. On query being made, he was informed vide Annexure-12 dated 16.11.2018 that his candidature has been rejected on the ground of overage due to non-submission of service certificate from the Government or DHS.

8. Fact remains, receipt of service certificate issued by the Principal, SCB Dental College & Hospital, Cuttack, under whom the petitioner has been serving, was acknowledged and acted upon by opposite party no.2. Having done so, the candidature of the petitioner ought not to have been rejected on the ground of non-submission of service certificate from Government or DHS. As per sub-clause (xvi) of Clause-10 of the advertisement, the certificate from competent authority in support of past service as Dental Surgeon under Government of Odisha in respect of candidates, who claim age relaxation as serving doctors, was to be produced. Either in the advertisement or in the extant rules, "competent authority" has not been defined anywhere. Thereby, the petitioner, who has been rendering service as a Senior Resident under the Principal, SCB Dental College & Hospital, Cuttack, has given a certificate claiming age relaxation, which has been duly acknowledged by the authority and acted upon by permitting the petitioner to appear in the written examination. Therefore, subsequently, the opposite party no.2 should not have turned around and rejected the candidature of the petitioner on the ground of overage due to non-submission of service certificate from Government or DHS.

9. The entire action of the opposite party is hit by principal of estoppel. In ***B.L. Sreedhar v. K.M. Muireddy,*** (2003) 2 SCC 355, the apex Court held as follows:

> *"Is a complex legal notice, involving a combination of several essential elements, namely statement to be acted upon, acting on the faith of it, resulting detriment to the actor. 'Estoppel' is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. Estoppel is diffeent from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is necessary steps in continuation of the casue of action. But the whole case of Estoppel fails if the statement is not sufficiently clear and unqualified. 'Estoppel' is based on the maxim allegans contrarir non est audiendus (a party is not to be heard contrary) and is the spicey of presumption juries et de jure (absolute, or conclusive or irrebuttable presumption)."*

10. In ***H.R. Basavaraj v. Canara Bank*** (2010) 12 SCC 458, the apex Court held that in general words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word

given. The principle of estoppel is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

11. Applying the above principles to the present case, this Court is of the firm opinion that the letter issued on 16.11.2018 under Annexure-12 rejecting the candidature of the petitioner on the ground of overage due to non-submission of service certificate from Government or DHS is hit by principle of estoppel.

12. As has been already stated, sub-clause (xvi) of Clause-10 requires that the certificate from "competent authority" in support of past service as Dental Surgeon under the Government of Odisha in respect of candidates, who claim age relaxation as serving doctors, is to be produced. But, on careful perusal of the advertisement under Annexure-1, this Court does not find anywhere in the same "competent authority" has been defined. Therefore, this Court took the pain of making an in-depth study and found that in Section 2(e) of the RTI Act, 2005, Section 2(d) of the Child Labour Prohibition and Regulation) Act, 1986, Section 2(c) of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966, Section 2(b) of the Emblems and Names (Prevention of Improper Use) Act Act, 1950, Section 2(b) of the Multimodal Transportation of Goods Act, 1993, Section 3(a) of the National Highways Act, 1956, Section 2(g) of the Juvenile Justice (Care and Protection of Children), Act, 2000, Section 2(c) of the Minimum Wages Act, 1948, Section 2(h) of the Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Section 2(7A) of the Railways Act, 1989 as inserted by Amending Act (No.11 of 2008) and Section 2(ca) of the Indian Boilers Act as inserted by Amending Act No. (49 of 2007) it has been categorically prescribed that "competent authority" is such authority, as the proper Government, namely, Central Government or State Government, by notification, have indicated. But in the present case, no such notification has been issued by the State Government specifying "competent authority" to enable the employee working under the State Government to give the certificate to appear the examination for selection for the post of Dental Surgeon in Group 'A' of Odisha Medical Services (Dental) Cadre. Nothing has been placed on record to justify as to who is the "competent authority" to give certificate to in-service doctors to claim age relaxation. Therefore, in absence of any such specification of "competent authority" under the law or guidelines or rules and regulations, it is the person under whom the petitioner is rendering service is competent to give certificate. Here, the Principal, SCB Dental

College & Hospital, Cuttack, who has given the certificate, and the opposite party no.2, having acted upon the same, should not have subsequently rejected the candidature of the petitioner vide Annexure-12 on the ground of overage due to non-submission of service certificate from the Government or DHS.

13. In ***Meera Sahini v. Lt. Governor of Delhi,*** (2008) 9 SCC 177, while considering Section 2(b) of the Delhi Land (Restrictions on Transfer) Act. 1072, the apex Court held the "competent authority" means any person or authority authorized by the administrator, by notification in the Official Gazette, to perform the functions of the competent authority under this Act for such areas as may be specified in the notification.

14. In ***Maysore State Road Transport Corporation v. Mirja Khasim Ali Beg,*** AIR 1977 SC 747, the apex Court while considering the sub-section (2) of Section-116 of the States Reorganization Act, 1956, the apex Court held as follows:

> *"The expression 'competent authority' occurring in sub-section (2) of Section 116 of the States Reorganisation Act, 1956 cannot be considered in isolation apart from the rest of the provisions of the Act. It has to be read in conjunction with, construed and understood as having the same meaning as the expression 'appropriate authority' contemplated by sub-s. (1) of that s. which in turn according to Article 311 (1) of the Constitution means the appointing authority or an authority equivalent to or co-ordinate in rank with the appointing authority."*

15. Taking into consideration the above mentioned meaning attached to "competent authority" and applying the same to the present context, since there is no such notification or any definition nor any rules or guidelines prescribed for the same, the petitioner applied for the post of Dental Surgeon in Group 'A' (Jr.) of Odisha Medical Services (Dental) Cadre, in pursuance of the advertisement under Annexure-1, along with the certificate issued by the Principal, SCB Dental College and Hospital, Cuttack so as to get age relaxation, as the petitioner has been rendering service as a Senior Resident in the said institution, and on receipt of the same, the opposite party no.2 has acted upon by issuing roll number and allowing the petitioner to appear in the examination. Therefore, while publishing the result, the candidature of the petitioner should not have been rejected on the ground of overage due to non-submission of service certificate issued by the competent authority, namely, the Government or DHS.

16. It is specifically admitted in paragraph-6 of the counter affidavit filed by opposite party no.2 that the petitioner bearing roll no.101382 was working as Senior Resident in the Department of Periodontics of SCB Medical Dental College and Hospital, Cuttack since 10.08.2015 and was continuing till the closing date of receipt of online application. In view of such specific averment made by opposite party no.2, the requirement for production of service certificate issued by the competent authority, namely, the Government or DHS cannot have any justification.

17. The petitioner has relied upon the resolution dated 3rd February, 2014 published in official gazette by Government of Odisha, Health & Family Welfare Department regarding guidelines for engagement of Senior Resident/Tutor in Government Medical/Dental Colleges in the State of Odisha. Clause-4 of the said resolution deals with "appointing authority", which reads as follows:

> *"4. **Appointing Authority.***
>
> *4.1 Dean & Principal of the concerned Medical Colleges will be the appointing authority for the SR/Tutor."*

Admittedly, the Principal, SCB Dental College & Hospital, Cuttack is the appointing authority of the petitioner under whom the petitioner was rendering service as a Senior Resident. As such, the very same authority has given the certificate with regard to continuance of the petitioner as a Senior Resident in the Dental College & Hospital, Cuttack.

18. In ***State of Assam v. Kripanath Sarma,*** AIR 1967 SC 459, the apex Court held the "appointing authority" means the authority which appoints can only dismiss such persons as have been appointed by it. It cannot dismiss persons appointed by any other authority, if such persons have not been appointed by it in the exercise of its power as appointing authority. Similar view has also been taken by the apex Court in ***T. Cajee v. U. Jormanik Siem,*** AIR 1961 SC 276.

19. In view of principles of law laid down by the apex Court, as discussed above, and referring to the guidelines issued by the Government in Annexure-14 published in the official gazette dated 03.02.2014, since the Principal, SCB Dental College & Hospital, Cuttack is the appointing authority of the Senior Resident/Tutor, he can be construed as "competent

authority" to give certificate of continuance of the petitioner in service. As such, he himself has given the certificate, which is placed on record at Annexure-2 dated 29.03.2018 and on the basis of such certificate the opposite party no.2, having acted upon, cannot subsequently turn around and reject the candidature of the petitioner as the service certificate has not been issued by the competent authority in terms of clause- 10 (xvii). Thereby, the entire action taken by opposite party no.2 cannot sustain in the eye of law.

20. In view of such position, the impugned communication dated 16.11.2018 vide Annexure-12 rejecting the candidature of the petitioner on the ground of overage due to non-submission of service certificate from Government or DHS cannot sustain in the eye of law and the same is liable to be quashed and hereby quashed. The opposite party no.2-OPSC is thus directed to publish the result of the written examination of the petitioner, in pursuance of the advertisement at Annexure-1, as expeditiously as possible, preferably within a period of four weeks from the date of communication of this judgment.

21. The writ petition is thus allowed. No order as to costs.

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2021 (I) ILR - CUT- 809

Dr. B.R. SARANGI, J.

W.P.(C) NO. 11527 OF 2013

URMILA SETHI .....Petitioner

.V.

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

SERVICE LAW – Recruitment – Fraud played by the candidate for obtaining engagement of Anganwadi Worker on the ground of physical disability – The percentage of disability shown by the candidate is 45% whereas the actual disability is 25% – Effect of such fraud – Held, if by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a court of law as the employment secured by fraud renders it voidable at the option of the employer – Fraud and justice never dwell together *(fraus et jus nanquam cohabitant).* (Paras 7 to 13)

Case Laws Relied on and Referred to :-

1. (1956) 1 All ER 341(CA) : Lazarus Estate Ltd. Vs. Beasley.
2. AIR 1994 SC 853 : (1994) 1 SCC 1 : S.P. Chengalvaraya Naidu Vs. Jagannath.
3. AIR 1994 SC 2151 : Andhra Pradesh State Financial Corporation Vs. GAR Re-Rolling Mills.
4. (1994) 2 SCC 481 : State of Maharashtra Vs. Prabhu.
5. AIR 200 SC 1165 : (2000) 3 SCC 581 : United India Insurance Co. Ltd. Vs. Rajendra Singh.
6. (2019) 6 SCC 477 : Sasikala Pushpa & Ors Vs. State of Tamil Nadu.
7. (1990) 3 SCC 655 : Distt. Collector and Chairman Vizianagaram Vs. M. Tripura Sundari Devi.
9. AIR 1964 SC 72 : S. Pratap Singh Vs. State of Punjab.
10. (2004) 6 SCC 325 : Vice-Chairman, Kendriya Vidyalaya Sangathan Vs. Girdharilal Yadav.
11. 2018 (II) ILR-CUT-399 : Netrananda Mishra Vs. State of Orissa & Ors.

For Petitioner : M/s. P.K. Das & D. Sahoo
For Opp. Parties : Mr. Anupam Rath, Addl. Standing Counsel
M/s.B.C. Panda, S. Mishra, J. Panda, L. Das & A. Das.

JUDGMENT Date of Judgment : 30.03.2021

Dr. B.R. SARANGI, J.

The petitioner, who was an applicant for selection of Anganwadi Worker in respect of Kandada-2 Anganwadi Centre under Antara Gram Panchayat in the district of Balasore, has filed this writ petition to quash the order dated 08.03.2013 passed by the Additional District Magistrate, Balasore in Anganwadi Appeal Case No.94 of 2010 in Annexure-9 dismissing the said appeal, and further seeks direction to issue engagement order in her favour as she has secured highest marks.

2. The factual matrix of the case, in hand, is that in order to encourage and ensure regular attendance of poor and B.P.L. family children in the educational institutions, the Government of Orissa, Women and Child Development Department, decided to open some Anganwadi Centres. Accordingly, the State Government published revised guidelines for selection of Anganwadi Worker in Anganwadi Centres and the Commissioner-cum-Secretary to Govt. Women and Child Development Department, Government of Orissa communicated the same to all the Collectors vide Annexure-1 dated 02.05.2007 wherein minimum educational qualification has been prescribed as matriculation and the candidate must be belonged to Anganwadi Centre area and the applicant will be a female candidate in the age group of 18 to 42

years. Percentage of marks obtained in the Matriculation examination shall be the basis of drawing a merit list amongst the applicants. In addition to the above, preferential additional percentage will be given to the different categories of candidates mentioned therein.

2.1 Opposite party no.4-Child Development Project Officer (CDPO), Khaira, Balasore issued an advertisement inviting applications from the interested candidates along with relevant documents so as to consider the same for engagement of Anganwadi Worker. In compliance of the same, the petitioner offered her candidature incorporating all the certificates, mark sheets and other relevant documents such as caste certificate, P.H. certificate. Pursuant to advertisement, opposite party no.4-CDPO, Khaira accepted four applications, including the application of the petitioner, and on 04.12.2009 issued a notice inviting objections, if any, against the said four applicants, which would be reached to the office of I.C.D.S, Khaira on or before 10.12.2009.

2.2 But, the application of the petitioner was rejected on the ground that she had produced a forged handicapped certificate before the authority. In the cancellation list, it was also reflected some objections received against opposite party no.6 regarding Madhyama Certificate. But the same was not taken into consideration and opposite party no.6 was selected and engaged as Anganwadi Worker in respect of Kandada-2 Anganwadi Centre under Antara Gram Panchayat in the district of Balasore.

2.3 Challenging the selection and engagement of opposite party no.6, the petitioner filed W.P.(C) No.11820 of 2010 and this Court vide order dated 16.07.2010 disposed of the same directing the petitioner to file an appeal before the learned Additional District Magistrate, Balasore within a period of two weeks and in such event, the appellate authority shall, after giving notice to the concerned parties, dispose of the said appeal on its own merit within a period of two months from the date of its filing. In compliance thereof, the petitioner filed appeal, which was registered as Anganwadi Appeal Case No.94 of 2010 and the Additional District Magistrate, Balasore after hearing to the parties vide order dated 08.03.2013 rejected the said appeal holding that the handicapped certificate submitted by the petitioner was found manipulated and tampered with changing the extent of handicap than what percentage reflected in the register of CDMO, Balasore and upheld the appointment of opposite party no.6 as Anganwadi Worker in respect of

Kandada-2 Anganwadi Centre under Antara Gram Panchayat in the district of Balasore. Hence this application.

3. Mr. P.K. Das, learned counsel appearing for the petitioner argued with vehemence that the handicapped certificate issued by the competent authority in favour of the petitioner under Annexure-5 dated 04.08.2009 vide certificate no.150 showing as 45% speech and hearing disabled cannot be said as forged one. More so, the petitioner has secured highest mark in the selection process, thereby, she should have been selected instead of rejecting her candidature. It is further contended that pursuant to advertisement, opposite party no.4-CDPO, Khaira accepted four applications, including the application of the petitioner, and on 04.12.2009 issued a notice inviting objections, if any against the said four applicants, which were to be reached in the office of I.C.D.S, Khaira on or before 10.12.2009. But, on the very same day, i.e. 04.12.2009 a list of candidates was prepared. The CDPO, Khaira on 21.05.2010 issued engagement order, whereas rejection of candidature was made on 02.06.2010. Thereby, there is deficiency in the process of selection. As such, there is violation of principles of natural justice. Thereby, the petitioner seeks interference of this Court in the present application. It is further contended that the Additional District Magistrate, while passing the order impugned, has not applied his mind in proper perspective. Therefore, the order so passed in Anganwadi Appeal Case No.94 of 2010 cannot sustain and the same should be quashed. Consequentially, the engagement of opposite party no.6 should also be quashed and engagement order should be issued in favour of the petitioner as she has secured highest mark than other candidates.

4. Mr. Anupam Rath, learned Additional Standing Counsel contended that by following due procedure as envisaged in the revised guidelines issued by the Government of Orissa, Women and Child Development Department dated 02.05.2007 under Annexure-1 opposite party no.6-Jayashree Patra has been selected and engaged as Anganwadi Worker. The candidature of the petitioner was not taken into consideration on the ground that the handicapped certificate produced by her was manipulated and tampered with by changing the extent of handicap other than what percentage was reflected in the register of CDMO, Balasore. To substantiate the same, learned Additional District Magistrate, Balasore referred the register maintained by the CDMO, Balasore. Consequentially, the Additional District Magistrate, Balasore, while hearing the appeal, after verifying the relevant documents,

came to a definite finding that the reliance placed on the handicapped certificate having not been tallied with the extent of disability as per register maintained by the office of the CDMO, Balasore, the application so filed by the petitioner annexing forged certificate cannot sustain, thereby the same was rejected. It is further contended that in view of production of forged certificate, the Collector, Balasore directed to lodge FIR against the candidate and, as such, the District Welfare Officer, Balasore clarified that the candidature of such applicant, who had submitted fabricated certificate was liable for rejection. As it revealed from Annexure-5, the handicapped certificate produced by the petitioner, her disability has been shown as 45%, but it has been found 25% in the issuing register maintained by the CDMO, Balasore. Thereby, the candidature of the petitioner was rejected, which is well justified. Therefore, the petitioner, having filed her application with forged certificate, cannot claim equity from this Court and consequentially, he seeks dismissal of the writ petition.

5. Mr. S. Mishra, learned counsel appearing for opposite party no.6 supported the contentions advanced by Mr. A. Rath, learned Additional Standing Counsel. He contended that it is the settled position of law that fraud avoids all judicial acts, ecclesiastical or temporal. It has also been observed by different Courts that "no judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything". For the reason of playing fraud with the authority by submitting a fake handicapped certificate, the authority has rightly rejected the application of the petitioner and denied the allegations made by the petitioner that opposite party no.6 has got engagement on the basis of Madhyama Certificate, which is also a fake, as she has submitted valid mark sheet and Madhyama Certificate issued by Shri Jagannath Sanskrit Vishvavidyalaya so also the School Leaving Certificate from Banchhakalpa Sanskrit Vidyapitha. It is further contended that the Board of Secondary Education, Orissa, Cuttack has already declared the Madhyama Examination (from 1985 to 2000) conducted by Shri Jagannath Sanskrit Vishvavidyalaya is equivalent to the High School Certificate Examination conducted by the Board of Secondary Education, Orissa.Thereby, opposite party no.6 has got matriculation certificate as per the guidelines issued by the authority and on the basis of such certificate, she has been engaged as Anganwadi Worker in respect of Kandada-2 Anganwadi Centre under Antara Gram Panchayat in the district of Balasore. Thereby, no illegality or irregularity has been committed by the authority in selecting opposite party no.6 as Anwanwadi Worker so as to cause interference of this Court.

6. This Court heard Mr. P.K. Das, learned counsel for the petitioner, Mr. A. Rath, learned Additional Standing Counsel for the State opposite parties and Mr. S. Mishra, learned counsel appearing for opposite party no.6, and perused the records. Pleadings have been exchanged between the parties and since it is a matter of 2013, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of hearing. The petitioner has not filed any rejoinder affidavit rebutting the pleading made in the counter affidavit filed by opposite parties which leads to admission on the part of the petitioner.

7. On the basis of factual matrix, as discussed above, admittedly the petitioner claims for engagement of Anganwadi Worker in respect of Kandada-2 Anganwadi Centre under Antara Gram Panchayat in the district of Balasore pursuant to handicapped certificate under Annexure-5 vide Certificate No.150 dated 04.08.2009, which clearly indicates 45% disability. The petitioner is a scheduled caste candidate and claims the benefit on the basis of physical handicapped certificate issued under Annexure-5, but opposite party no.6 belonged to OBC category and has acquired Upasastri qualification after Madhyama qualification from Shri Jagannath Sanskrit Vishvavidyalaya. As such, Madhyama qualification has been considered as equivalent to matriculation. Thereby, opposite party no.6 has higher qualification than the petitioner. In any case, handicapped certificate, which has been produced by the petitioner indicating 45 % disability, that has been strongly disputed by the State by way of filing counter affidavit by providing the document, i.e. the register maintained in the office of CDMO, Balasore, which states about the name of the PWDs applied for the post of Anganwadi Worker, wherein the petitioner's name finds place at Sl. No.9, which was applied for engagement of Anganwadi Worker in respect of Kandada-2 Anganwadi Centre under Antara Gram Panchayat in the district of Balasore against whom it is shown as 25% disability. If the disability shown in the register of the CDMO, Balasore is 25% and the certificate produced by the petitioner under Annexure-5 indicates 45% disability, which has not been rebutted by the petitioner by filing rejoinder affidavit, thereby, there is fraud played on the authority by the petitioner to have a personal gain of engagement as Anganwadi Worker.

8. In ***Lazarus Estate Ltd. v. Beasley***, (1956) 1 All ER 341(CA), the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything."

9. In ***S.P. Chengalvaraya Naidu v. Jagannath***, AIR 1994 SC 853 : (1994) 1 SCC 1, it is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal."

10. In ***Andhra Pradesh State Financial Corporation v. GAR Re-Rolling Mills***, AIR 1994 SC 2151 and in ***State of Maharashtra v. Prabhu***, (1994) 2 SCC 481, the apex Court observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is, also known to prevent the law from the crafty evasions and subletties invented to evade law."

11. In ***United India Insurance Co. Ltd. v. Rajendra Singh***, AIR 200 SC 1165 : (2000) 3 SCC 581, the apex Court observed that "Fraud and justice never dwell together" (*fraus et jus nanquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

12. In ***Sasikala Pushpa & Ors v. State of Tamil Nadu***, (2019) 6 SCC 477, the apex Court observed that Fraud implies intentional deception aimed or achieving some wrongful gain or causing wrongful loss or injury to another.

13. In ***Distt. Collector and Chairman Vizianagaram v. M. Tripura Sundari Devi***, (1990) 3 SCC 655, the apex Court observed that "if by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a Court of Law as the employment secured by fraud renders it voidable at the option of the employer."

Similar view has also been reiterated by the apex Court in ***S. Pratap Singh v. State of Punjab***, AIR 1964 SC 72 and ***Vice-Chairman, Kendriya Vidyalaya Sangathan v. Girdharilal Yadav***, (2004) 6 SCC 325.

This Court has also taken similar view in ***Netrananda Mishra v. State of Orissa & Ors***, 2018 (II) ILR-CUT-399.

14. So far as allegation made against opposite party no.6 with regard to production of Madhyama certificate is concerned, the same has been placed

vide Annexure-A/3 issued by the Registrar, Shri Jagannath Sanskrit Vishvavidyalaya, wherein it is stated that opposite party no.6 passed High School Certificate Examination conducted in the month of May, 1998 and as per the equivalency certificate granted by the Board of Secondary Education, Orissa, Cuttack, the same has been considered as High School Certificate Examination pursuant to Annexure-D/3 to the writ petition. As such, it cannot be said that the benefit has been extended to opposite party no.6 by producing Madhyama Certificate; the certificate so issued is genuine. Consequentially, the selecting authority has done the selection in consonance with the guidelines issued by the Government. Therefore, no illegality or irregularity has been committed in the process of selection so far as opposite party no.6 is concerned.

15. In view of such position, this Court does not find any illegality or irregularity in the order dated 08.03.2013 passed by the Additional District Magistrate, Balasore in Anganwadi Appeal Case No.94 of 2010 rejecting the said appeal preferred by the petitioner so as to warrant interference of this Court.

16. In that view of the matter, the writ petition merits no consideration and accordingly, the same is dismissed.

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2021 (I) ILR - CUT- 816

D. DASH, J.

RSA. NO. 226 OF 2017

JYOSHNAMAYEE BAHINIPATI & ORS. .....Appellants

.V.

LINGARAJ BAHINIPATI .....Respondent

THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 4 – Prohibition of the right to recover property held benami – (Act 1988 came into force with effect from 05.09.1988, but after amendment with effect from 01.11.2016, said Act stands as the "Prohibition of Benami Property Transactions Act, 1988") – Provisions under – Applicability in case of a benami transaction – Held, the following:

"The position has been well settled by the decisions of the Hon'ble Apex Court that the provision contained in section 4 of the Act as to the right to recover property held benami would not be attracted so as to bulldoze the claim in that regard made by the suitor in the suit filed prior to the coming into force of the Act i.e. prior to 05.09.1988 which would find utterance for adjudication and decision on merit but it would so stand as the bar for such suits filed on 5.9.1988 and thereafter. Similarly the defence on that score asserting the right as such if has been tendered after 05.09.1988 would not be allowed but those tendered before would stand for adjudication on merit." *(Para 7)*

WORDS AND PHRASES – The terms "fiduciary" and "fiduciary relationship" – Explained.

"The terms "fiduciary" and "fiduciary relationship" have been explained in great detail by the Apex Court in case of "CBSE vs. Aditya Bandopadhyay"; (2011) 8 SCC 497 at para-39, page 524-25. It has been said:- 7 "39. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term 'fiduciary relationship' is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction (s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party. It is manifest that while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other." *(Para 8)*

Case Laws Relied on and Referred to :-

1. (2011) 8 SCC 497: CBSE Vs. Aditya Bandopadhyay

For Appellants : M/s. Budhadev Routray, Sr. Adv, S. Das, R.P. Dalaei, S.Jena, K. Mohanty, S.K. Samal, S.D. Routray & S.P. Nath.

For Respondent : None

JUDGMENT Date of Hearing: 24.02.2021: Date of Judgment: 04.03.2021

D. DASH, J.

The Appellants by filing this appeal under section 100 of the Code of Civil Procedure, have assailed the judgment and decree dated 17.03.2017 and 31.03.2017 respectively passed by the learned 3rd Additional District Judge, Berhampur in RFA No. 47 of 2016 confirming the judgment and decree dated 04.05.2016 and 13.05.2016 respectively passed by the learned Civil Judge (Senior Division), Berhampur in C.S. No. 149 of 2012.

The courts below by the above judgments and decrees have non-suited the Plaintiffs (Appellants). The suit filed by the Appellants as the Plaintiffs thus has been dismissed by the courts below.

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

3. Plaintiffs' case is that their predecessor-in-interest namely Padma Charan Bahinipati and one Lingaraj Bahinipati i.e. the Defendant are two brothers being son of Raghunath Bahinipati. Padma Charan Bahinipati is elder to Lingaraj Bahinipati. Upon the death of their father when the Defendant was 9 years old boy, Padma Charan is said to have taken all his care in every front. In the year 1965, the Defendant having obtained MBBS degree ultimately went to United Kingdom for higher study.

It is the further case of the Plaintiffs that in the year 1971, Padma Charan purchased the suit property on his own by spending his earning without the help from any quarter and constructed a house over there for his living with family. The reason for the same as given is that since Padma Charan was then a Govt. employee in the Forest Department by spending his own funds instead of purchasing the property in his name standing as the vendee under said transaction; he preferred to purchase the property in the name of his brother i.e. the Defendant. After purchase, Padma Charan Bahinipati possessed the property as its owner and on his death, the Plaintiffs as the legal heirs and successors are in possession of the same. Having got some information that the Defendant is attempting to alienate the suit property, the Plaintiffs with the apprehension of losing their property have filed the suit for declaration of title, possession and injunction.

The Defendant having entered appearance in the suit had filed the written statement. Finding some objectionable averments to have been placed there in the written statement, the trial court had directed for deletion of the said portion. That being not carried out, the written statement has been struck out.

4. In the backdrop of the case projected by the Plaintiffs' the both oral and documentary evidence, as have been tendered by them being appreciated, the trial court has answered the most crucial issue as to the ownership of the property against the Plaintiffs. It has been categorically held that the provision of sub-section (1) of section 4 of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to 'the Act') stands on the way of entertaining the suit for enforcement of any right as real owners over the suit property said to be held benami against the defendant. In saying so, the trial court has thus negated the contention raised by the Plaintiffs that the transaction in hand under Ext.1 falls within the exception as provided in section 4(3) (b) of the Act as has been proved, further deriving support from the totality of the facts and circumstances as emerge out.

5. Mr. B. Routray, learned Senior Counsel for the Appellants (Plaintiffs) submitted that in the facts and circumstances as have been placed by the Plaintiffs in their evidence in consonance with the pleadings; the courts below have completely erred both on fact and law in rendering the concurrent finding that the transaction of purchase of the suit land under Ext. 1- the sale deed standing in the name of the Defendant is not covered by the exception as provided in clause (b) of sub-section-(3) of section 4 of the Act.

According to him, the relationship between Padma Charan and his brother (Defendant) on the other is clearly based on trust and confidence and that having been established in evidence, the courts below have misdirected themselves in ignoring the factual context in which the question arises and erred in law by holding that the Defendant did not stand in a fiduciary capacity vis-à-vis Padma Charan Bahinipati. He therefore submitted that this appeal be admitted on the following substantial question of law:-

> "Whether the finding of the learned courts below that the benami transaction in respect of the suit property does not come under the exception as provided in clause (b) of sub-section (3) of section 4 of the Act is in consonance with the facts and circumstances as those emerge in the evidence let in upon the base of the pleadings?"

6. The case of the Plaintiffs is that Padma Charan being the elder brother had purchased the suit property in the name of his younger brother i.e. Defendant in the year 1971. At that time Padma Charan was a Govt. servant under the Department of Forest of the State of Odisha. It is their specific case that since Padma Charan Bahinipati was a Govt. servant, he did not wish to purchase the property in his own name and instead obtained the purchase in the name of his brother who was then residing in United Kingdom. Save and except the reason as above assigned nothing more is treated. The facts those are deducible from the above pleadings are that Padma Charan had paid the consideration money from his own pocket without any contribution from the side of the Defendant and he was the real owner, whereas the Defendant was the owner apparent. In other words, it is said that Padma Charan who had purchased the property in the name of the Defendant without intending to benefit him in any way but to benefit himself and his family members. P.Ws. in their evidence have stated that said Padma Charan Bahinipati had full faith and confidence upon the Defendant that in future he would execute the required document for change of the name of the purchaser in respect of the suit property i.e. from his name to the name of Padma Charan.

7. The Benami Transactions (Prohibition) Act, 1988 has come into force with effect from 05.09.1988. After amendment with effect from 01.11.2016, said Act stands as the "Prohibition of Benami Property Transactions Act, 1988".

Section 4 of the Act as it stood prior to the coming into force of Amendment Act 43 of 2016 runs as under:-

> "4. Prohibition of the right to recover property held benami.-
>
> (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be real owner of such property.
>
> (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.
>
> (3) Nothing in this Section shall apply,--

> (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or
>
> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

It may be stated here that by the Amendment Act 43 of 2016 with effect from 01.11.2016, above sub-section (3) with the clauses (a) and (b) to section 4 has been omitted.

The position has been well settled by the decisions of the Hon'ble Apex Court that the provision contained in section 4 of the Act as to the right to recover property held benami would not be attracted so as to bulldoze the claim in that regard made by the suitor in the suit filed prior to the coming into force of the Act i.e. prior to 05.09.1988 which would find utterance for adjudication and decision on merit but it would so stand as the bar for such suits filed on 5.9.1988 and thereafter. Similarly the defence on that score asserting the right as such if has been tendered after 05.09.1988 would not be allowed but those tendered before would stand for adjudication on merit.

8. The terms "fiduciary" and "fiduciary relationship" have been explained in great detail by the Apex Court in case of "CBSE vs. Aditya Bandopadhyay"; (2011) 8 SCC 497 at para-39, page 524-25. It has been said:-

> "39. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term 'fiduciary relationship' is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction (s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.
>
> It is manifest that while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship

> between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other."

It is thus clear from the above that even without giving any precise definition of the expression "fiduciary capacity", it springs out of the relationship which is analogous to the relationship between a trustee and beneficiaries of the trust founded on confidence and trust on the one part and good faith on the other.

9. Adverting to the case in hand, it is seen that it has been pleaded that Padma Charan being a Govt. servant in his anxiety was desirous of avoiding to purchase the property in suit in his name and so he, wished to purchase the property in the name of the brother i.e. Defendant and he did so.

Save and except the above, nothing more has been pleaded in support of the projected the case that the defendant then was very much standing in a fiduciary capacity and that the suit property was not for his benefit but for the benefit of Padma Charan. Mere mention of the relationship that the Defendant is the brother of Padma Charan would however not suffice the purpose and basing upon that it is not permissible to record the finding that the transaction in question would not come within the prohibition contained in section 4 (1) of the Act being so excepted under clause (b) of sub-section 3 of the Act as it stood on the date of institution of the suit. The legislative intent behind the insertion of that clause (b) to sub-section 3 of the Act which was there till 31.10.2016 is clear that normal relationship through blood or akin relationship as such have no play therein and the party in order to have his case within that saving fold has to plead all those facts and circumstances including their *inter se* dealings stretching over a period and also prove those by leading clear, cogent and acceptable evidence of such nature that the court would record the finding that the person in whose name the property is held stood in a fiduciary capacity.

In the absence of any foundation in the pleadings as to all such facts and circumstances and their proof by clear, cogent and acceptable evidence so as to bring the transaction within the fold of the exception as it was there in clause (b) of sub-section 3 of section 4 of the Act; the courts below in my considered view found to have committed no error in recording the concurrent finding that the Plaintiffs have failed to establish their case so as to be entitled to the reliefs claimed in the suit. Moreover, the very case of the

Plaintiffs that the suit property had then been purchased by Padma Charan in the name of the Defendant is in order to show that he had nothing to do with said purchase sine it is said to be for the reason of avoidance of any such problem in his service career. This even taken as such and accepted; the case that the property held in the name of the Defendant standing in fiduciary capacity and that the property was held not for the benefit of Defendant but for that of Padma Charan towards whom the Defendant stands in such capacity falls flat.

10. For the aforesaid, this Court is not in a position to accept the submission of the learned Senior Counsel for the Appellants (Plaintiffs) that the case involves the substantial question of law as aforesaid in sub-para-2 of para-5.

11. The appeal thus does not merit admission and is accordingly dismissed. No order as to cost.

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2021 (I) ILR - CUT- 823

D. DASH, J.

RSA NO. 123 OF 2019

C.E.O., NOW RENAMED AS AUTHORIZED OFFICER, NESCO UTILITY ……..Appellant.

.V.

SMT. KALIMANI ROUT & ORS. ……...Respondents

WORDS AND PHRASES – Doctrine of "Strict liability" – Meaning thereof – Held, Principle of law has been 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" – Claim of compensation for electrocution – Awarded.

(Para 10)

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 and Ors.

For Appellants : Mr. R. Acharya. M/s. B.K. Nayak (1) & A.Dash.

For Respondent : None.

JUDGMENT Date of Hearing : 09.03.2021 : Date of Judgment:15.03.2021

D. DASH, J.

The Appellant, by filing this appeal, under section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by the learned Additional District Judge, Balasore in RFA No. 53 of 2012. By the said judgment and decree, the lower appellate court has set aside the judgment and decree passed by the learned Additional Civil Judge (Senior Division), Balasore in Money Suit No. 14 of 2007 whereby the Plaintiffs suit had been dismissed.

The lower appellate court has then answered the core issues in favour of the Plaintiffs in holding the Defendants to be negligent and responsible for the death of the husband of Plaintiff No. 1. Accordingly, the Defendants have been held liable to pay compensation of Rs.1,42,000/- with interest @ 6% from the date of institution of the suit till realization.

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

3. The case of the Plaintiffs is that the age of Bhanu Charan Rout at the time of incident was 50. He was a cultivator and wage earner. He was looking after the cultivation work for some time and during the rest of the time, he was engaging himself in doing the work as a labourer. Said Bhanu was approximately earning a sum of Rs.2000/- per month. On 11.09.2005, Bhanu Charan when was going to approach the road, he suddenly came in contact with the live 11KV electric wire which was lying being snapped from the poles. In the said incident, Bhanu Charan died on account of electrocution. Alleging improper maintenance of the live electric wire in

supply of the electricity in the area, the Defendants being duty bound and in-charge of maintenance and supply of electricity in the area, the Plaintiffs have stated that the Defendants are liable to pay the compensation on account of said deathof Bhanu Charan by electrocution in the above incident.

4. The Defendants in the written statement have averred that the electric wire being attended properly by them although and all possible care, safeguard and timely precaution having been taken when the fact remains that at no point of time any such grievance has been received as to their negligence in maintaining the overhead electric wire and supply of electricity, they are in no way responsible for the unfortunate incident. It is the case of the Defendants that on 10.09.2005 and 11.09.2005, there was heavy rain and wind followed by thunder, lightening etc. in the area and on 11.09.2005 when the deceased was going on the road by holding an umbrella over his head, the top portion of the iron handle of the umbrella came in contact with the live electric wire which was then in sagging condition and for that the deceased was electrocuted and met his death.

5. The trial court on the above rival pleadings has framed seven issues. On the most crucial issue as to the negligence of the Defendants i.e. issue no. 5, the finding having been rendered against the Plaintiffs , they have been non-suited.

The Plaintiffs being aggrieved by the judgment and decree passed by the trial court in dismissing their suit had carried the appeal under section 96 of the Code.

6. The lower appellate court taking up issue nos. 5 and 6 together for decision, on going through the evidence and upon their appreciation at its level, in the backdrop of the rival claim of the parties by applying the settled law on the subject has in clear term held the finding of the trial court to be erroneous. In that exercise, the lower appellate court has answered those findings in favour of the Plaintiffs holding the death of Bhanu Charan to have taken place on account of the negligence of the Defendants and as to their liability in paying the compensation to the Plaintiff. Accordingly, the other issue relating to the assessment of compensation being taken up, the lower appellate court has held the Defendants liable to pay the compensation of Rs. 1,42,000/- to the Plaintiffs.

7. Although in the memorandum of appeal, no such substantial question of law arising in the case for admission of the appeal is pointed out; in course of hearing, learned counsel for the Appellant (Defendant) submitted that the lower appellate court having rendered the finding on issue nos. 5 and 6 contrary to what had been rendered by the trial court has committed grave error both on facts and law. He submitted that the said finding suffers from vice of perversity as because in arriving at the same, the lower appellate court has ignored certain material evidence on record and rather leaned more upon mere conjunctures surmises. He thus submitted that said findings are clearly the outcome of perverse appreciation of evidence and that is the substantial question of law standing to be answered in this appeal.

8. Keeping in view the submission as above, I have carefully gone through the judgments of the courts below.

9. In the case at hand, issue no.5 and 6 seem to be vital. That being so, the courts below have rightly taken those two together for decision. As it appears that the death of Bhanu Charan due to electrocution as to have taken place on 11.09.2005 stands admitted. It stands admitted to the extent that the electric wire with which the deceased came in contact was then in sagging condition hardly at a height 6 to 7 fts. from the ground and it is also admitted that Bhanu Charan having coming in contact with the said electric wire got electrocuted and met his death.

10. Principle of law has been 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:
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> "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 automatically 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 cannot shirk their responsibility on trivial grounds. For the lackadaisical attitude exhibited by the opposite parties, a valuable life was lost.

Applying the aforesaid principles to the facts and circumstances as obtained from the evidence backed by the pleading, this Court does not find any such reason or justification to differ with the view taken by the lower appellate court. Rather, it is seen that the gross mistake committed by the trial court is not properly appreciating the evidence on record and applying the settled principles on the score by not recording the finding in favour of the Plaintiffs, has been rightly rectified.

11. Coming into quantum of compensation as has been assessed and held payable by the Defendants to the plaintiffs; the lower appellate court on analysis of evidence having held the age of the deceased to be 55 years then as also his monthly earning to be Rs. 2,000/- has selected the multiplier of 11 in computing the compensation. In this exercise, there surfaces no such glaring infirmity warranting interference in seisin of this appeal.

12. In the wake of aforesaid, the submission of the learned counsel for the Appellant (Defendant) that the case involves the substantial questions of law as stated in paragraph-7 cannot be countenanced with. Accordingly, the appeal stands dismissed and in the facts and circumstances without cost.

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2021 (I) ILR - CUT- 829

D. DASH, J.

CRA NO. 44 OF 2000

KANGRESS @ KAILASH LENKA & SARAT LENKA ……..Appellants.

.V.

STATE OF ORISSA ……..Respondent.

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 370 and 392 – Provisions under – Accused persons charged for commission of offences under sections 148/323/447/302/354/149 of the Indian Penal Code – Conviction recorded only under sections 447 and 302 of the IPC in respect of two accused persons – Appeal – Heard by division bench – Difference in views – While one of the Hon'ble Judges was of the opinion that the Appellants have been rightly convicted by the Trial Court for commission of offence under section- 447 and 302 of the IPC; the other Hon'ble Judge expressed the difference of opinion in arriving at a conclusion that the Appellants are entitled to the benefit of doubt as to their complicity in the occurrence and thus not liable to be convicted for the offences – Matter placed before third judge – Conviction based on the evidence of PWs 11, the son and 12, the wife of the deceased – Conjoint reading of evidence emits the smell that they have resorted to said course lest it may be adversely viewed and

are not consistent as to the happenings right from the beginning till the accused persons are said to have left the place – Their evidence being read as a whole also gives rise to doubt as to the exact place of incident and the exact reason of said happening which in turn makes their version doubtful – Held, for these reasons, the approach of the Trial Court in accepting the evidence of P.W.11 and 12 in part while discarding the other part is not right and under the circumstances the course adopted by the Trial Court is impermissible – In the totality of the evidence let in by the prosecution and their critical analysis in the backdrop of the surrounding circumstances obtained in evidence, the Appellants were entitled to the benefit of doubt.

For Appellants : Mr. Sudipto Panda.
For Respondent : Mr. Karunakar Dash, Addl.Standing Counsel.

JUDGMENT Date of Hearing:07.03.2021 : Date of Judgment: 07.04.2021

D. DASH, J.

The Appellants faced the Trial in the Court of learned Additional Sessions Judge, Khurda in S.T. Case No.14/85 of 1999 being charged for commission of offences under section-148/323/447/302/354/149 of the Indian Penal Code. Along with these Appellants, although five other accused persons had faced the said Trial, they have been convicted only for commission of offence under section-447 of the IPC.

The present Appellants have been held guilty of commission of offence under section-447 and 302 of the IPC; and convicted thereunder. The Appellants thereby have been sentenced to undergo imprisonment for life for commission of offence under section-302 of IPC and for the offence under section-447 of the IPC, each of them has been sentenced to undergo rigorous imprisonment for a period of one month.

The Appellants being aggrieved by the above judgment of conviction and order of sentence in the aforesaid Trial have filed this Appeal. The Hon'ble Division Bench of this Court having heard the Appeal delivered the judgment on 23.12.2020. The Bench delivered two judgments, while one of the Hon'ble Judges is of the opinion that the Appellants have been rightly convicted by the Trial Court for commission of offence under section- 447 and 302 of the IPC; the other Hon'ble Judge has expressed the difference of opinion in arriving at a conclusion that the Appellants are entitled to the

benefit of doubt as to their complicity in the occurrence and thus not liable to be convicted and sentenced for the charged offences. This is how; the matter has thus been laid before me as provided under section-370 read with 392 of the Code of Criminal Procedure as per the order of Hon'ble The Chief Justice.

2. The facts having been comprehensively given in the judgments, I shall briefly touch only such as are necessary.

The father of the Appellants on the relevant date, as alleged by the Prosecution was uprooting the southern side of the fence of their Bari. The deceased namely Jalandhar Dalbehera coming to protest, it is said that the accused Jalandhar Lenka, father of the Appellants abused him in filthy languages and called out other accused persons. They reached there with lethal weapons like Lathi and Muli etc. It is further alleged that then they made entry to the Bari of the deceased.

Further prosecution allegation is that all the accused persons dealt blows on the deceased by means of Lathi, Muli etc. and wife of the deceased (P.W.12) when came to protest, her saree was pulled by one of the accused. Son of the deceased (P.W.11) had came to support to rescue his father. The deceased receiving blows from the accused persons fell down. The Appellants and other accused persons left the place as hearing the shout some villagers came rushing.

3. The nature of death as homicidal has been well proved from the side of prosecution by leading evidence; more importantly by the evidence of P.W.10, the Doctor, who had conducted the post-mortem examination over the dead body and that is not so in dispute.

Prosecution in order to bring home the charges against the accused persons including the Appellants in the Trial has altogether examined 13 (thirteen) witnesses. It has projected P.W.5 to 9 and 11 & 12 to have seen the incident. Upon examination of the evidence and on their analysis the evidence of P.W.-5 to 9 in so far as their claim to have seen the incident have been eschewed from consideration being found to be not acceptable assigning good reasons being so culled out from the totality of the circumstances emerging from the evidence on record. A careful reading of the judgment of the Trial Court reveals that the evidence of P.W.10 to 13 have been taken into

account in holding the Appellants guilty of the offences for commission of which they have been convicted.

4. Learned counsel for the Appellants at the outset stressed much emphasis on the point that the Prosecution having failed to establish by leading clear, cogent and acceptable evidence being so tendered through reliable witnesses that the incident had taken place on the threshing floor / bari of the deceased of which he was in possession, the finding as to criminal tress-pass by the Appellants is not recordable. He submitted that in view of the non-establishment of the exact place of incident i.e. the spot, the substratum of case of the prosecution that the Appellants had gone over the land of the deceased and assaulted him when he was standing there and thereafter others coming to his rescue is not believable and that according to him rather probabilizes a case that it is the deceased and others who had come over the other side of their land where all of a sudden the incident took place with exchange of hot words leading to the push and pull from the side of the members of both the camps. He submitted that the weapon of offence when is said to be Thenga, no blood stain having been detected on the same when other weapon Muli has not even been seized, the prosecution version that the Appellants assaulted the deceased by said weapons cannot be believed. He therefore, submitted that the finding of guilt based on the evidence of PW 11 and 12 without critical examination keeping in view all the above important features appearing in evidence cannot this be sustained.

5. Learned Additional Standing Counsel refuting the above submissions contended that the Trial Court on proper appreciation of evidence on record has rightly held these two Appellants guilty of offences under Section 447 as well as 302 IPC. According to him, the two witnesses i.e. PW 11 and 12 having stated about the role of these Appellants in the said incident and as no such material has surfaced as to wholly discredit their version who are natural witnesses and whose presence then cannot be disbelieved; the Trial Court has committed no mistake in relying upon their evidence so as to base the finding of guilt of the Appellants for the above offences.

6. Admittedly, there stood enmity between the deceased and his family members on one hand and these Appellants on the other. Even as per the prosecution version the very protest from the side of the deceased as to the damage being caused to his fence by the accused-Jalandhar Lenka, was the commencement factor of the incident on that day and time.

The Trial Court having placed the evidence of PW 11 and 12 as the eye-witnesses within the arena of consideration while keeping the evidence of other prosecution witnesses so projected as eye witnesses by assigning good reasons as picked up from the surrounding circumstances emerging from the evidence; this Court finds no such infirmity in that approach of the Trial Court. This now takes me to focus upon the evidence of PW 11 and 12 in ascertaining the complicity of the Appellants in the said incident.

P.W.11 & 12 are the son and widow of the deceased respectively and their evidences have been relied upon by the Trial Court. This P.W.11 being a practicing Advocate is a member of the Banpur Bar Association and he happens to be the informant. It is his evidence that on 21.06.1998 around 7.00 am, when he was taking bath at the well near their bari, the incident took place. His evidence run on the score that he had seen his parents going to that bari for cleaning, when they found that accused-Jalandhar Lenka (not on trial) was uprooting the southern side fence of their bari. As per his evidence, when deceased protested, accused Jalandhar Lenka abused him and called out other accused persons. In response to the said call, seventeen accused persons came in a group and these two Appellants were among them. It is his further evidence that all of them entered inside the bari and being directed by accused-Jalandhar Lenka, Appellant No.2, Ramesh Lenka (absconding), Appellant No.1 stood around his father and began assaulting him by means of Lathi and Muli on his head and other nearby sensitive parts, which resulted in the fall of the deceased on the ground. It is stated that then other accused persons trampled over the deceased. This being the evidence of P.W.11, as to the assault on his father, he has next deposed on oath that his mother was assaulted by accused-Baikuntha, Subash and Markanda when she had gone to rescue his father and he has specifically implicated accused- Baikuntha to have as pulled his mother's saree and other two only to have assaulted her mother who fell down. As to his arrival at the exact place it is stated to be at the time when accused-Kailash Jena, Amulya Lenka, Sukuti @ Krushna Lenka and Manoj Pradhan had trampled over the deceased who thereafter also assaulted him. When it is stated by the witness that he was assaulted, he has not been medically examined. When it is his specific evidence that he was then taking bath in the nearby well inside her bari, the defence case is that there was no such well existing in the bari of the deceased. The important feature surfacing in his evidence which is to be taken note of here is that in the Trial, he has given a good bye to his previous version that was not exchange of words between his father and the accused prior to the actual

incident of assault. He is also silent on the score as to how these Appellants entered into the bari. As per the prosecution case the bari was under fencing and some portions being uprooted by accused, Jalandar Lenka, the protest came from the side of the deceased. This witness is not explaining as to whether those accused persons including the Appellants entered the bari through that uprooted portion or by demolishing / uprooting further portion of the fence. It having been stated in the F.I.R. that the parents were cleaning their bari for cultivation and it being confronted with, PW 11 has expressed his ignorance as to if he had stated so in the F.I.R. As per the evidence of this witness, by the time he arrived his mother was there at the spot and being asked during cross-examination, he has not been able to state about the details as to which of the accused persons dealt how many blows by which weapons and what were the seat of assault. Rather, as to the role of accused persons namely Kandha Pradhan, Sarat Lenka, Ramesh Lenka and Kailash Lenka in assaulting his father as had been stated earlier has been given a go bye which is evident from the evidence of Investigating Officer, (PW 13). Although it is there in his earlier statement recorded under section 161 of the Cr.P.C in course of investigation, that receiving the direction from accused-Jalandhar Lenka, accused Kandha Pradhan, Sarat Lenka, Ramesh Lenka and Kailash Lenka surrounded his father and assaulted him by Lathi and Muli; attention of the witnesses having been drawn to the same, he has denied to have stated so earlier which have been proved through the Investigating Officer (PW 13) who had recorded the statement. The defence has drawn the attention of this witness as to the improvements and omissions during the evidence. The defence having again drawn the attention of this witness to his previous statement where he had stated that accused-Kandha Pradhan had assaulted on the head of his father and Ramesh had assaulted on his father's head and near the base of the ear, he has flatly denied to have then so stated which has also been proved through Investigating Officer, PW 13 who had recorded the said statement. Thus the defence stand that this witness having not actually seen the assault upon his father being not present near at the relevant time, has been projected as ocular witness in view of the aforesaid discussion of the obtained evidence being further viewed with the suppressed genesis of the occurrence having the definite tendency to conceal the role of his parents therein gains force which therefore warrants the simultaneous exercise as to scrutiny of the evidence of PW 12.

It is her evidence that on 21.06.1998 around 7.00 am she and her husband had gone to bari land situated near the Kothaghara of the village and

the purpose was to have cultivation work. She has further stated that after some time of their arrival, accused-Jalandhar Lenka was found engaged in demolishing their fence which was protested to by her husband and then all the accused persons came inside their bari and as directed by accused-Jalandhar Lenka; these accused persons namely, Kandha Pradhan, Sarat Lenka, Ramesh Lenka, Kailash Lenka and Jalandhar Lenka assaulted her husband with Lathi and Muli and other accused persons were then surrounding the deceased. She has further deposed about the role of that accused-Baikuntha Lenka in pulling her saree and accused-Subash Pradhan, Makaranda Sasmal and Baikuntha pulling her by holding the toft of hair. Her specific evidence is that at that time, when she was being manhandled by the above accused persons, her son, P.W.11 came to intervene in which he was assaulted by accused- Kailash Jena, Krushna Lenka, Amulya Lenka, Manoj Pradhan and Pradeep Lenka gave him the fist blows. This leads to doubt the evidence of PW 11 that he was then closely nearby as PW 12's version is that by the time of his arrival, deceased was lying on the ground receiving the blows. She had not stated before the I.O. that at the time of incident there was hot exchange of words. The defence having drawn the attention of this witness to such omissions in her previous statement those have been proved through Investigating Officer (PW 13) who had recorded said statement of P.W.12. Her previous statement that at time of incident, accused-Jalandhar Lenka came and directed them to put fence in the appropriate place for which there was exchange of hot words is now being suppressed as is evident from the evidence of Investigating Officer (PW 13) who had recorded her statement in course of investigation. This in my considered opinion is vital as having the bearing on the genesis of the occurrence that then accused Jalandhar was uprooting the fence is seen to be a later introduction. The I.O. (PW 13) having visited the spot has not drawn the spot map nor even noted the extent of damage of the fence and more importantly, he has deposed to have got the information that deceased was then the encroacher. Thus the prosecution shares the blame of not presenting the clear picture on the said vital factual aspect. This rather probabilities a case that then the deceased was putting the fence and accused Jalandhar came and told him to do so on his land. This leads to strong inference that the commencement as to happening of the incident is not being truthfully stated by both the witnesses P.Ws. 11 and 12. Their evidence on a conjoint reading emits the smell that they have resorted to said course lest it may be adversely viewed. All these go to point finger at the veracity of the prosecution case impacting in a negative manner, when these witnesses are seen to be suppressing the said aspect especially as

to the initial role of the deceased, Jalandhar Dalbehera, the husband of PW 12 and father of PW 11. This PW 12 while stating before the I.O. that accused Sarat Lenka, Ramesh Lenka and Kailash Lenka assaulted her husband, has not stated regarding assault by accused Jalandhar Lenka. She has also not stated therein regarding the presence of Gundhicha Lenka at the spot. It was not in her statement before the Investigating Officer that when her husband fell down, all the accused persons trampled over him. While stating that only Jalandhar Lenka uprooted one Lathi from the fence, she has not stated that the accused persons uprooted the fence of her Bari and assaulted her husband. She has also not stated before the Investigating Officer that Jalandhar Lenka directed others to finish her husband. She has stated before the Investigating Officer that after her husband fell down on the ground shouting "MARI GALI, MARI GALI", her son reached and she also has not stated before the Investigating Officer that Subash Pradhan, Markanda Pradhan and Baikuntha Pradhan pulled the tuft of her hair. The defence has proved all these omissions and those in my view can not under the circumstances as above dismissed so lightly brushed aside as minor contradicitons.

The evidence of P.W.11 & 12, in my opinion are not consistent as to the happenings right from the beginning till the accused persons are said to have left the place. Their evidence being read as a whole, thus also gives rise to doubt as to the exact place of incident and the exact reason of said happening which in turn makes their version as to the role of these Appellants therein doubtful. For these reasons, the presence of P.W.11 at that time near the well situated on the Bari also appears to be the doubtful. For all the aforesaid, further keeping in view the surrounding circumstances as those emanates from the totality of the evidence let in by the Prosecution, the approach of the Trial Court in accepting the evidence of P.W.11 and 12 in part while discarding the other part, in my considered view is not right and under the circumstances, as also in view of above discussion of the evidence of P.Ws. 11 and 12, said course adopted by the Trial Court in impermissible.

Thus, in the totality of the evidence let in by the prosecution and their critical analysis in the backdrop of the surrounding circumstances obtained in evidence, I am of the considered view that the Appellants were entitled to the benefit of doubt.

In the wake of aforesaid, the judgment of conviction and order of sentence as have been passed by the Trial Court cannot be sustained.

Accordingly, the Appellants being not found guilty of the offences for commission of which they have been convicted and sentenced, they be set at liberty forthwith.

6. Accordingly the CRA stands allowed.

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2021 (I) ILR – CUT- 837

BISWANATH RATH, J.

RVWPET NO. 422 OF 2019

THE STATE OF ORISSA, G.A. DEPARTMENT .....Petitioner

.V.

RAMESH CHANDRA SWAIN & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 47 Rule 1(c) – Review petition – Scope of interference – Suit for declaring the Plaintiffs as the owners over the land under their possession and for correction of the Record of Rights – Suit decreed – Appeal dismissed as barred by limitation – Civil revision dismissed as delay was not explained – SLP allowed by imposing cost for hearing of the Title appeal on merit – Title Appeal allowed – Review filed almost after six years – Delay condoned by High court was upheld by Supreme court – Plea of the Ops that the review petition, clearly hit by the provision of the Order 47 Rule 1 of C.P.C. – Plea considered – Held, the documents surfaced in the process of the litigation materially affecting the result of the suit would be an error apparent on the face of record and there is no doubt that the case at hand is clearly maintainable under the provision of Order 47 of C.P.C and the State/Petitioner is able to make out a case for review.

> *"On reading of the aforesaid legal provision in entertaining a review, this Court finds, under Sub-rule (c) of Rule 1 of Order 47, the review is entertainable under several grounds. First and foremost ground is, if there is discovery of new or important matter or evidence, which after exercise of due diligence, which is not within his knowledge or could not be produced by him at the time when the decree was passed and also or for any other*

sufficient reason may apply for review of judgment, this Court here finds, judgment of the Single Judge is attacked by the State-the Review Petitioner on two fold; one is that when the Single Judge was hearing appeal involving the remand order being passed in exercise of power under Order 41 Rule 23 of C.P.C., ought not have allowed the appeal by passing a fresh judgment and decree and it is contended that in the event the Single Judge was in disagreement with the judgment of the first appellate court for the first appellate court having not applied its mind on the merit involving the appeal, ought to have remanded the matter to the first appellate court for considering the appeal afresh and the other option left with the Single Judge was, in the event he was agreeing with the findings of the first appellate court, he could have simply dismissed the miscellaneous appeal under the provision at Order 43 rule 1(u) of the C.P.C. Suit is filed in clear suppression of fact that the owner of the land even after receipt of whole compensation of Rs.2,91,955.10/- for whole acquisition of land measuring Ac.46.644 decimals, handed over of entire land to the Revenue Officer on 27.07.1962. The Plaintiffs thus played fraud on Court even. Original land acquisition award involving very same land, payment of full compensation and preparation of abatement statement all these cannot be lost sight of. Above clearly brings the present review application within the fold of Order 47 Rule 1 of C.P.C and the review is thus clearly entertainable and succeeded."

Case Laws Relied on and Referred to :-

1. 2017 (14) SCC 2007 : J.Balaji Singh Vs. Dibakar Kole & Ors.
2. AIR 1999 SC 1125 : Ashwini Kumar K. Patel Vs. Upendra J. Patel & Ors.
3. 1999 SCC Online Kerala 36 : District Executive officer Vs. V.K. Pradeep & Ors.
4. 1998 (8) SCC 222 : State of Punjab & Ors Vs. Bakshish Singh.
5. AIR 1987 SC 1160 : Devaraju Pillai Vs. Sellagge Pillai.
6. (2019) 5 SCC 86 : Asharfi Devi (Dead) Vs. The State of Uttar Pradesh.
7. (2017) 14 SCC 207 : J. Balaji Singh Vs. Diwakar Cole.
8. (1970) 3 SCC 643 : Gulam Abbas & Ors. Vs. Mulla Abdul Kadar.
9. AIR 2009 SC 2991 : State of Orissa Vs. Harapriya Bisoi.
10. (1993) Supp. 3 SCR 422 : S.P. Chengalvaraya Naidu (Dead) by LRS Vs. Jagannath (Dead) by LRS & Ors.
11. (2006) 7 SCC 416 : Hamza Haji Vs. State of Kerala and another.
12. (2003) Supp. 3 SCR 352 : Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education & Ors.
13. (2005) 7 SCC 605 : Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors.
14. (2003) 9 SCC 401 : Vijay Syal Vs. The State of Punjab.
15. (2005) 13 SCC 289 : Rajender Singh Vs. Lt. Governor Andaman and Nicobar Island & Ors.
16. (2007) 136 DLT 44 (D.B.) : Kuldip Gandotra Vs. Union of India & Ors.
17. (2010) 8 SCC 383 : Meghmala & Ors Vs. G. Narasimha Reddy & Ors.

For Petitioner : Mr. S. Palit, AGA Mr. S. Ghose, ASC

For Opp. Party Nos.1 to 6, 8 to 10, 13,17 to 25 : None

For Opp. Party No.7 : M/s. S.P. Mishra, Sr. Adv. S.N. Biswal, S. Sarangi

For Opp. Party Nos.11 & 12 : M/s. M.R. Dash, B. Sahoo

For Opp. Party No.14 : M/s. D. Mahapatra, N.K. Mishra

For Opp. Party Nos.15 & 16 : M/s. H.S. Mishra & B. Rout.

JUDGMENT Date of Hearing : 4.03.2021 : Date of Judgment : 8.04.2021

BISWANATH RATH, J.

The review petition under Order 47 Rule 1 of the C.P.C. at the instance of the State-Respondent arises out of the judgment dated 27.06.2012 passed in Miscellaneous Appeal No.994 of 2001 by the High Court thereby reversing the judgment in T.A. No.4/17 of 2001/1992 dated 12.10.2001 by the learned District Judge, Bhubaneswar interfering in a judgment and decree passed by the trial Court in O.S. No.203 of 1988-I.

2. Short background involved in this case is that the Respondent joining together filed O.S. No.203 of 1988-I in the Court of Munsif, Bhubaneswar making the State of Orissa as Defendant. The suit was filed for declaring the Plaintiffs as the owners over the land under their possession and for correction of the Record of Rights accordingly and thereby intimating the Collector, Puri to correct the Record of Rights involving the suit scheduled property therein; the property more particularly Khata No.38, Mouza-Bomikhal, Plot Nos.13 to 18 also giving therein the corresponding Khata No.109 under Mouza-Bomikhal bearing corresponding plot nos.25, 26, 32 to 36, 42 to 47, 50 to 57. The Respondents herein as Plaintiffs had their case that the Plaintiffs 1 & 2 having four ana share, the Plaintiffs 9 to 17 having five ana four paise share and the Plaintiffs 18 to 21 having two anas eight paise share in the suit property, were also recorded as such in the Record of Rights. Their ancestors being the owners were in possession and as such were recorded as Sabik Record of Rights. It is claimed that after demise of the ancestors the Plaintiffs as the successors and owners remained in possession over the same. It is further claimed that the suit plots 11 to 18 and 370 & 371 under Khata No.38 in Mouza Bomikhal were recorded in the Record of Rights published in the year 1962 in the name of their predecessors and the Plaintiffs continued in paying rent. Plaintiffs also claimed that they have occupancy right and were recognized as such with acceptance of the rents by the vendors. Even the plaintiffs were paid with compensation in respect of the

plot nos.12 & 18 under khata no.38 involving the land acquisition proceeding bearing L.A. Case No.26/73. The Plaintiffs claimed that though an area of Ac.0.069 decimals out of plot no.18 were acquired, balance Ac.0.25 decimals involving the plot no.18 were continued to remain in possession of the Plaintiffs. It is, on the premises that their occupancy was never terminated, nor their rights even acquired validly, further the Government having accepted rent and acquiring a portion out of the recorded plot in 1973 is estopped to say that the plaintiffs are not the owners and in possession. While claiming that the Plaintiffs raised crops from the disputed plot during 1968-70, the certificate proceeding was initiated against the Plaintiffs for arrear rent in respect of the Khata no.38. Whereafter the Plaintiffs continued to pay rent till 1982-83. It is alleged that during current settlement the Defendant unreasonably claimed title over the property and the Settlement Authorities illegally recorded the name of the defendants over the settled property, in spite of Plaintiff's resistance to the same. It is, in the above premises, Plaintiffs claimed that the Defendants having no manner of right, title over the disputed property attempted to disturb the Plaintiffs and as such the Plaintiffs got compelled to file suit for correction of the Record of Rights giving cause of action to be 24.04.1988. The suit was registered as O.S. No.203/1989-1. Pursuant to the notice the Respondent-Defendants contested the matter by filing written statement. The State-Defendant while denying and disputing each of the averments and claim contended that the scheduled property are purely Government land after being acquisitioned by Government during 1962 as per the Land Acquisition proceeding No.9/62-63. Since the Record of Rights was prepared before initiation of the land acquisition proceeding, the land somehow stood in the name of the Plaintiff's predecessor Daitari Sahu and others. For the land acquired through the land acquisition proceeding no.9/62-63 there has been correct preparation of the Record of Rights, subsequently giving a statement of the land acquired in tabular form. The State Government justified being the owner of the land involving the disputed property. It is clearly claimed by the State that the Plot Nos.12 to 18 have been duly acquired. It was claimed that for not being the owner of the disputed property, mere payment of rent cannot create right, title or extinguish valid title involving the suit land. The Defendants reiterated regarding plot nos.12 to 16 corresponding to plot nos.65, 66 & 67. The State claimed that the whole area of plot nos.12 & 18 were acquired during 1962 as per the L.A. Proceeding No.9/62-63, but however, after final publication in 1962, mistakenly there has been acquisition of some further plots in the year 1973, which is claimed to be an illegal double benefits to the Plaintiffs. The

State reiterated that in fact the whole land was already acquired following due process of law and the predecessors of the Plaintiffs have already received the compensation. The State, thus, contended that there is right rejection of the claim of the Plaintiffs for correction of the record of rights involving the disputed property, requiring no interference by any Court of law. The State completely denied the claim of the Plaintiffs to have raised crop over the disputed property. It is, in the above premises, the Defendant-Respondent i.e. the present Review Petitioner sought for dismissal of the suit. Upon entering into trial the Trial Court framed the following issues:

"1. Is the suit maintainable?

2. Is there any cause of action for the suit?

3. Whether the entire suit properties have been acquired by the Government of Orissa in L.A. Case No.9 of 1962 or only some portion have been acquired in L.A. Case No.25 of 1973?

4. Whether the Plaintiffs are the rightful owners of the suit property, having right, title, interest and possession over it?

5. If the Plaintiffs are entitled to the reliefs prayed in the suit?"

The Plaintiffs examined witnesses and also exhibited documents marked as Ext.1 to Ext.5/a. Similarly the defendants while examining witnesses, also exhibited documents marked as Ext.A to Ext.B/1. Consequent upon completion of the trial based on the pleadings and evidence of the parties the Trial Court vide its judgment dated 28.10.1991 and decree dated 11.11.1991 decreed the suit holding that the Plaintiffs are the owners of the suit property and thereby directed the Settlement Authority to correct the record of rights accordingly. It appears, in the suit the State-Defendant filed document marked as Ext.A, A/1 & A/2, which relates to Land Acquisition Case no.9/61-62. It further appears, these documents have been admitted by the Trial Court without objection. Being aggrieved, the G.A. Department of the State of Odisha filed appeal before the learned Additional District Judge, Bhubaneswar vide T.A. No.17 of 1992. The lower Appellate Court hearing the appeal on contest by order dated 16.08.1993, however, dismissed the appeal due to barred by limitation. It appears, being aggrieved by the said dismissal order on the ground of limitation, the Defendant-Appellant filed Civil Revision No.272/1993. This High Court by its order dated 12.07.1995 rejected the Civil Revision No.272/1993 on the premises of failure of the Defendants in explaining the delay. Being aggrieved by the order of dismissal

in the Civil Revision, the Defendants carried SLP(C) No.7912 of 1996 before the Hon'ble Apex Court. It appears, the Hon'ble Apex Court by its judgment dated 5.09.1997 allowed the SLP(C), but however subject to payment of a cost of Rs.20,000/- in restoration of the T.A. There also arose some dispute with regard to non-payment of the cost in the meantime and the misc. case for condonation of delay was again allowed, subject to however payment of additional cost of Rs.10,000/-. The matter again entered into another SLP vide SLP (C) No.4970 of 2000 regarding non-payment of cost issued by order dated 5.01.2001 and while restoring the T.A. the Hon'ble apex Court directed the Additional District Judge to dispose of the appeal within a period of six months. While the matter stood thus, on 12.10.2001 the Additional District Judge, Bhubaneswar allowed the T.A. No.17/92 (4 / 2001) recording his finding for retrial of the suit and affording the defendants also an opportunity to amend the written statement bringing the land acquisition proceeding as well as other relevant notifications, pleadings relating to initiation of land acquisition proceeding and also giving opportunity to the Plaintiffs to controvert the same.

Being aggrieved with the judgment of the Additional District Judge, Bhubaneswar in remanding the suit vide T.A. No.17 of 1992 the Plaintiffs preferred M.A. No.994 of 2001 contemplating that the Additional District Judge, Bhubaneswar has mechanically exercised power under Order 41 Rule 23-A of the C.P.C. The High Court by its judgment dated 27.06.2012 allowed the Miscellaneous Appeal No.994 of 2001 holding that there has been mechanical exercise of power by the lower Appellate Court and thereby, illegally reopened the suit and while observing so, the High Court also passed a judgment declaring the judgment and decree in the suit vide O.S. No.203 of 1989 (I) becomes valid, which resulted filing of the present review by the Plaintiff-Appellants.

3. It is apt to indicate here that the Review No.422 of 2019 was filed undoubtedly with 2195 days of delay. The delay in preferring review was condoned by this Court by order dated 23.12.2019 which order being challenged in the Hon'ble apex Court, the Hon'ble apex Court dismissed the SLP (C) No.3086 of 2020.

4. Now coming to the plea at the instance of the State in the Review Petition, this Court finds, the Review Petition is filed on the plea that after the judgment of this Court in M.A. No.994 of 2001 the Plaintiff-Opposite Parties

filed M.C. No.25769 of 2018 praying for correction of the record on the basis of the judgment of the Court. The G.A. & P.G Department being the custodian of the land within the jurisdiction of the Bhubaneswar Municipal Corporation, a detailed verification was conducted to ascertain the position of the suit land pending for mutation. The State claims that khata no.297 relating to mouza-Bomikhal stands recorded in the name of the G.A. & P.G. Department and being prepared and finally published by the Statutory Authority under the provisions of the Orissa Survey and Settlement Act, 1958. On further inquiry, it was also found that the private land measuring Ac. 46.44 decimals in village Bomikhal was acquired by the Government vide Revenue Department Notification No.18004-LA/271/60 Puri-R-dated 20.04.1960 for development of the road from new capital to University side. This particular land was acquired at public expenditure for public purpose. It is only after requirement of thorough verification to ascertain the Hal Sabik and pre-sabik position in the land acquisition notification, the Revenue Inspector involved clearly indicated that the area applied for mutation correspondences to the land acquired during 1960. Consequently, the Tahasildar, Bhubaneswar was provided with all details to consider the Mutation Case No.25769 of 2018 in accordance with law. The Plaintiff-Respondents by filing W.P.(C) No.13606 of 2019 attempted to quash the communication to the Tahasildar dated 26.07.2019. The aforesaid writ petition is still pending. On verification of the record involving land acquisition record pertaining to L.A. No.9/61-62, it also came to notice that though the original award along with enclosures are not available in the case record, but however, a copy of the award being available on record, it was found, an amount of Rs.2,91,955.10/- has been awarded against this very same land measuring Ac.46.644 decimals of land. Record also establishes handing over of the possession of this very land to the Revenue Officer on 27.07.1962. For this purpose there is also an abatement statement prepared vide letter no.1393 dated 25.07.1974 being filed as Annexure-F to the Review Application. There are also some materials available indicating that possession in respect of acquired land has been handed over to the requisitioning authority on 27.07.1962. Award statement prepared U/s.11 of the Land Acquisition Act is also filed as available at Annexure-1 to the review petition. In the meantime, involving another development the Plaintiffs attempted to go through a contempt application against the high Officials of the Government for working-out the judgment dated 27.06.2012 passed in Miscellaneous Appeal No.994 of 2001 and with a clear intent to save the public property and very valuable property an attempt was made by

the State to reopen the Miscellaneous Appeal and/or the Suit at least to be decided in taking into consideration the relevant facts and materials, which have all come to the notice of the State Authorities and have a definite help for effective adjudication of the dispute involved herein. In spite of the fact that there involves a Civil Court decree and for which execution proceeding though is a clear remedy, it is not known under what provision a contempt petition involving a civil court decree can be entertained to execute a judgment and decree of a Civil Court. This clearly established that the Plaintiffs have attempted their level best to give threat of contempt and that too in the matter of correction of Record of Rights, to which right accrued through a Civil Court judgment and decree. Thus the present Review Petition is filed for clear involvement of fraud, suppression of material facts and developments involving very same land and that too when the property already became a property of the State.

5. In his submission Mr. S. Palit learned AGA with Mr. S. Ghose, learned ASC while reiterating the above factual position and legal background, taking this Court to the findings of the learned Additional District Judge, Bhubaneswar through paragraph nos.9, 10 & 11 of the first appellate court judgment submitted that the lower appellate Court taking into account some of the developments involved herein has already directed for retrial of the dispute by remanding the matter. It is, in the premises that there has been right exercise of power under Order 41 rule 23 of the C.P.C by the first appellate court, Mr. Palit, learned AGA contended that for the better interest of the parties and for a valuable land required for public purpose, even possession of which is already taken by way of land acquisition on payment of appropriate compensation, the order passed by this Court in Miscellaneous Appeal No.994 of 2001is required to be reviewed and a fresh judgment may be passed taking into consideration the materials referred to by the learned Additional District Judge, Bhubaneswar as well as the materials taken support in the review application.

6. Mr. Palit, learned AGA also relying on a decision of the Hon'ble apex Court in the case of ***J.Balaji Singh*** *Vs.* ***Dibakar Kole and Ors.*** as reported in **2017 (14) SCC 2007** submitted that the Petitioner has the support of the above decision and thus placing the said judgment made a request for setting aside the judgment passed in M.A. No.994 of 2001 and passing a fresh judgment after hearing all the parties in the M.A. No.994 of 2001.

7. There has been a lot of hide & seek played by the Opposite Parties in review petition in conducting the case as clearly borne from the order-sheet involving the review petition. Suit was fought jointly, similarly the Appeal was also fought with one set of counsel. In the miscellaneous appeal also all the defendants joining together fought the appeal through one set of counsel, but surprisingly in the review application there has been different set of counsel including dropping of so many counsel in between.

Be that as it may in the final hearing also on several dates the Opposite Parties did not appear to contest the matter, for which the Court was constrained to bring the matter on the heading of "To be mentioned" with an intention to provide last opportunity to the contesting Opposite Parties, to avoid that the matter is not decided *ex parte.* Finally the Plaintiffs in two sets participated in the hearing through Mr. S.P. Mishra, learned Senior Advocate being assisted by Mr. S.S. Biswal, learned counsel for the Opposite Party No.7 and also one Mr. S.S. Mishra, learned counsel for the Opposite Party Nos.11 & 12. The other counsel in spite of several opportunities did not choose to contest the matter.

8. Mr. S.P. Mishra, learned Senior Advocate for the Opposite Party No.7 in his attempt to object the entertainability of the review petition, taking this Court to the provision at Order 47 of the C.P.C. submitted that unless the present review application falls into the conditions in the Order 47 Rule 1 of C.P.C. the same remains unentertainable. Mr. S.P. Mishra, learned Sr. Advocate also referring to the provision at Section 107 of the C.P.C contended that the Court hearing the appeal and deciding the same by a judgment passed in exercise of power under Order 41 Rule 23 of the C.P.C. has power to pass a judgment and decree and is not confined only to confirm the remand order or to set aside the remand order. Taking this Court to the different portions of the judgment of the learned Single Judge in M.A. No.994 of 2001 Mr. S.P. Mishra, learned Senior Advocate even though submitted that normally a matter under this contingency would have been decided either confirming the judgment of the lower appellate court or remanding the matter to the lower appellate court for fresh disposal in disagreement with the judgment of the lower appellate court with a direction to the lower appellate court to pass a fresh judgment in the first appeal. But for the power conferred U/s.107 of the C.P.C. Mr. S.P. Mishra, learned Sr. Advocate contended that the learned Single Judge here is also equally powered to pass a judgment and decree to give complete justice to the parties.

Taking this Court to the decisions in the case of ***Ashwini Kumar K. Patel v. Upendra J. Patel and others*** : AIR 1999 SC 1125 more particularly paragraph nos.7 & 8 therein, in the case of ***District Executive officer vs. V.K. Pradeep and others*** : 1999 SCC Online Kerala 36, in the case of ***State of Punjab and others vs. Bakshish Singh*** : 1998 (8) SCC 222, in the case of ***Devaraju Pillai*** *Vrs.* ***Sellagge Pillai*** : AIR 1987 SC 1160, in the case of ***Ram Singh Chauhan*** *Vrs.* ***Director of Secondary Education*** involving Review Application M.U. No.1155 of 2019 decided by the High Court of Uttarakhand on 10.06.2020 and lastly in the case of ***Asharfi Devi (Dead)*** *Vrs.* ***The State of Uttar Pradesh*** : (2019) 5 SCC 86 Mr. S.P. Mishra, learned Senior Advocate attempted to justify his submissions and claimed that for the support of the above decisions to the case of the Plaintiffs, the review application should be dismissed in confirmation of the decision of the learned Single Judge judgment in M.A. No.994 of 2001.

9. Mr. S.S. Mishra, learned counsel for the Opposite Party Nos.11 & 12, however, taking this Court to the miscellaneous application filed by him submitted that for the allegation of fraud against the Plaintiffs at the instance of the State Government, scope of exercising power through Section 340 of Cr.P.C. should be kept open for the affected Plaintiffs. Mr. S.S. Mishra, learned counsel, however, prayed for keeping such a request reserve for future purpose and in the process simply adopted all the submissions made by Mr. S.P. Mishra, learned Senior Advocate in challenge to the entertainability of the review application and prayed for dismissal of the review application.

10. Considering the rival contentions of the parties, this Court finds, in the beginning on the institution of the suit vide C.S. No.203/1989-1 the Plaintiffs joining together in paragraph nos.2 & 3 claimed that the suit plot nos.11 to 18 and 370 & 371 under Khata No.38, Mouza-Bomikhal were recorded in the name of their predecessors in the record of rights published in the year 1962. At the same time in paragraph no.3 the Plaintiffs again claimed that they were occupancy royats and being recognized by their vendor. The Plaintiffs admitted that they were also paid compensation, but unfortunately, the Plaintiffs have made a statement in paragraph no.3 that they were paid compensation with respect of plot nos.18 & 12 under khata no.38 involving L.A. Case no.26 of 73. In spite of they being party to the L.A. Case No.9/62-63, did not find any mention of the same in the suit proceeding. Even though it was stated that the Plaintiffs subsequently clarified the position involving plot no.18 to the effect that even though the

land measuring Ac.0.069 dec. out of plot no.18 were acquired but the balance Ac.0.251 dec. in the said plot continued to remain in their possession. In the scheduled portion in the suit disclosed as follows:

" **SCHEDULE**

Mouza-Bomikhal, Khata No.38	Plot no.13 Area Ac.2.475 decs.
	Plot no.14 Area Ac.0.870 decs.
	Plot no.15, Area Ac.1.480 decs.
	Plot no.16, Area Ac.0.775 decs.
	Plot no.17, Area Ac.0.280 decs.
	Plot no.18, Area Ac.0.251 decs.
	Out of Ac.0.320 decs.

Entire corresponding to Mouza –Bhoingar –Khata No.109

Plot no.44 area Ac.0.078 dcs.
Plot no.42 area Ac.0.738 decs.
Plot no.43 area Ac.0.401 decs.
Plot no.36 area Ac.0.322 decs.
Plot No.32 area Ac.0.487 decs.
Plot no.33 area Ac.0.177 decs.
Plot no.34 area Ac.0.120 decs.
Plot no.35 area Ac.0.215 decs.
Plot no.45 area Ac.0.877 decs.
Plot no.48 area Ac.0.325 decs.
Plot no.47 area Ac.0.296 decs.
Plot no.50 area Ac.0.631 decs.
Plot no.51 area Ac.0.043 decs.
Plot no.52 area Ac.0.153 decs.
Plot no.53 area Ac.0.092 decs.
Plot no.54 area Ac.0.270 decs.
Plot no.55 area Ac.0.213 decs.
Plot no.56 area Ac.0.306 decs.
Plot no.57 area Ac.0.019 decs.
Plot no.25 area Ac.0.032 decs.
Plot no.26 area Ac.0.226 decs."

11. In filing written statement the State of Odisha while denying each and every claim of the Plaintiffs in paragraph no.4 contended that the suit land as per the scheduled of property appended to the plaint are purely Government land after it is acquisitioned by the Government in 1962 as per the land acquisition proceeding no.9/62-63. Not only this in page 2 of the written statement the State of Odisha also gave a detailed declaration of the land

acquired by the Government. The statement relied on by the State is taken note here as follows:

Sl. No.	Land acquired by Govt. relating to pre-1962 plots	Part/ full corresponding plots as per 1962 R.O.R Sabik Suit plots	Part/ full corresponding plots as per R.O.R 1987-88. Now suit plots
1	2	3	4
1.	62	14	45
2.	63	13, 14, 15	36, 42, 43, 46, 47, 50, 51, 52, 53, 54, 55, 56, 57 & 45
3.	64	12, 13, 15	36, 46, 47, 50, 52, 55, 56, 57, 53
4.	65	15, 16, 17, 18	26, 25, 33, 34, 35, 32
5.	66	12, 15, 16, 17, 18	35, 36

It is, at this stage of the matter, this Court taking into account the serious contest between the parties, more particularly the contentions of Mr. S.P. Mishra, learned Senior Advocate regarding entertainability of the review petition, clearly hit by the provision of the Order 47 Rule 1 of C.P.C., this Court here takes note of the provision at order 47 Rule 1 of C.P.C:

> "(1) Any person considering himself aggrieved-
>
> (a) by a decree or order from which an appeal is allowed, but from no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed, or
>
> (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

12. On reading of the aforesaid legal provision in entertaining a review, this Court finds, under Sub-rule (c) of Rule 1 of Order 47, the review is entertainable under several grounds. First and foremost ground is, if there is discovery of new or important matter or evidence, which after exercise of due diligence, which is not within his knowledge or could not be produced by him at the time when the decree was passed and also or for any other sufficient reason may apply for review of judgment**,** this Court here finds, judgment of the Single Judge is attacked by the State-the Review Petitioner on two fold; one is that when the Single Judge was hearing appeal involving the remand order being passed in exercise of power under Order 41 Rule 23

of C.P.C., ought not have allowed the appeal by passing a fresh judgment and decree and it is contended that in the event the Single Judge was in disagreement with the judgment of the first appellate court for the first appellate court having not applied its mind on the merit involving the appeal, ought to have remanded the matter to the first appellate court for considering the appeal afresh and the other option left with the Single Judge was, in the event he was agreeing with the findings of the first appellate court, he could have simply dismissed the miscellaneous appeal under the provision at Order 43 rule 1(u) of the C.P.C.

13. This Court here taking into account the decision of the Hon'ble apex Court in the case of ***J. Balaji Singh v. Diwakar Cole*** : (2017) 14 SCC 207 finds, in deciding the scope of the Court in exercising its power under Order 43 Rule 1 (u) vide paragraphs 17 & 18 the Hon'ble apex Court has come to observe as follows:

> **17.** So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first appellate court and restored the judgment of the trial court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43 Rule 1(*u*) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law, then it could only remand the case to the first appellate court with a direction to decide the first appeal on merits.
>
> **18.** The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule 1(u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43 Rule 1(u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43 Rule 1(u) which reads thus:-
>
> "1(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court"

On reading through the direction of the Hon'ble apex Court in paragraph nos.17 & 18 this Court finds, for the limited scope with the High Court while exercising power under Order 43 Rule 1(u), once the superior Appellate Court concludes, remand order passed by the lower Appellate Court was bad in law, then it can remand the matter to lower Court with a direction to decide the appeal before it on merits. Thus, there is no doubt that

the Single Bench in deciding the M.A. an appeal under Order 43 Rule 1(u) has exceeded its jurisdiction and thus the judgment involved herein becomes bad in law. Taking into account the judgment of the Hon'ble apex Court more particularly in para-19 therein, this Court for the above position of law finds, power exercised by the learned Single Judge was available only in exercise of power U/s.96 or Section 100 of C.P.C.

14. Further for the clear plea of the State right through the suit that the State had acquired the entire land through land acquisition proceeding No.9/61-62, further materials surfacing like payment of compensation involving such land acquisition proceeding, handing over of the land by the beneficiaries, preparation of abatement statement vide letter dated 25.07.1974 and the other records relied on by the State during 1st Appellate stage, during miscellaneous appellate stage and corroborated through the review petition and no denial on existence of such documents or even on existence of land acquisition proceeding No.9/61-61 by any of the Respondents as of now, particularly keeping in view the vast patch of land in the heart of capital city of Bhubaneswar are already acquired for public purpose that too on payment of compensation and involving such compensation, admittedly no dispute is pending as of now, all these cannot be lost sight of. There is plaint averment in paragraphs 3, 4 & 7 to the effect that there has been partial acquisition of the land for plot no.18 by the State in the L.A. Case no.26/1973. To this there is a written statement with clear pleading in paragraph no.4 that the claim of the Plaintiffs is wholly false, suit land as per the plaint scheduled are purely Government land after it is acquisitioned by the Government during 1962 as per the land acquisition proceeding no.9/62-63. Which plea also stands fortified in the statement of land acquired, thus again the statement made in paragraph no.5 there is a clear statement that the whole land is acquired in L.A. proceeding no.9/62-63, but however, finding defective indication in respect of the land acquired for plot no.12 land involving the plot no.12 was again acquired in 1973 thus it clearly appears the plaintiffs played fraud on the Court by not bringing anything on L.A. proceeding No.9/62-63 and on suppression of vital aspect attempted to grab a decree confining its claim only on the basis of land acquisition case no.26/1973 even though it was only in respect of the part of plot no.12.

15. This Court here finds, on the pleading and demand of parties there is framing of issue no.3 which reads as follows:-

> "Whether the entire suit properties have been acquired by the Government of Orissa in L.A. Case No.9/62-63 or only some portions have been acquired as in L.A. Case No.26/1973."

From the scan of statement of D.W.1, it appears, the State witnesses the D.W.1 the R.I. of the G.A. Deptt. not only clearly stated that the entire suit land have been acquired in 1961-62 under L.A. No.9/1961-62, which is in clear corroboration of pleadings of the State in the W.S. as indicated hereinabove. This Court here finds, even though the State could not file relevant documents to support their above stand, but however, produced Exts.A, A-1, A-2, B, B-1, though after closure of evidence, but case record shows all these documents went on record without objection of Plaintiffs. Since these documents go to the root of the case, in the interest of justice the Trial Court ought to have directed the parties to enter into further pleadings and evidence to establish the contents therein with scope of rebuttal evidence to the Plaintiffs. Unfortunately in spite of admission of Exts.A, A-1, A-2, B & B-1 having greater relevance and in spite of clear pleading of the State, the trial Court did not give any attachment to all these, it is, therefore, the lower Appellate Court, on the other hand, on appreciation of all the above has opened the suit for retrial. Since the Plaintiffs have the scope of rebuttal, there is also no prejudice to the Plaintiffs and in the circumstances, only conclusion in disposal of the M.A. No.994 of 2001 is to approve the judgment of the 1st Appellate Court and see a fresh disposal of the suit by way of open remand. Here this Court observes, the documents surfaced in the process of the litigation materially affecting the result of the suit would be an error apparent on the face of record and there is no doubt that the case at hand is clearly maintainable under the provision of Order 47 of C.P.C and the State / Petitioner is able to make out a case for review. This Court here takes into account the decision of the Hon'ble apex Court in the case of ***Gulam Abbas & Ors. v. Mulla Abdul Kadar*** reported in (1970) 3 SCC 643 which clearly endorses the view hereinabove rendered by this Court.

16. Suit is filed in clear suppression of fact that the owner of the land even after receipt of whole compensation of Rs.2,91,955.10/- for whole acquisition of land measuring Ac.46.644 decimals, handed over of entire land to the Revenue Officer on 27.07.1962. The Plaintiffs thus played fraud on Court even. Original land acquisition award involving very same land, payment of full compensation and preparation of abatement statement all these cannot be lost sight of. Above clearly brings the present review

application within the fold of Order 47 Rule 1 of C.P.C and the review is thus clearly entertainable and succeeded.

This Court here finds, the submissions of Mr. Palit, learned AGA for the State also gets support through the decisions in the cases of ***State of Orissa v. Harapriya Bisoi*** :AIR 2009 SC 2991, ***S.P. Chengalvaraya Naidu (Dead) by LRS v. Jagannath (Dead) by LRS and others*** : (1993) Supp. 3 SCR 422, ***Hamza Haji v. State of Kerala and another*** : (2006) 7 SCC 416, ***Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education and others*** : (2003) Supp. 3 SCR 352, ***Bhaurao Dagdu Paralkar v. State of Maharashtra and others*** : (2005) 7 SCC 605.

17. This Court, at this stage, also examines the decisions cited by Mr. S.P. Mishra, learned Senior Advocate and also taken support by Mr. S.S. Mishra, learned counsel appearing for a set of Plaintiffs/Opposite Parties herein and finds as follows:-

AIR 1928 P.C. 261 *(Tom Boevey Barrett Vs. African Products, Ltd.)* for different facts is not applicable to the case at hand. Similar situation is also involved in AIR 2005 SC 809 *(Sangramsinh P. Gaekwad and others Vs. Shantadevi P. Gaekwad and others).* AIR 1971 (S.C.) 2177 *(Mohan Lal Vs. Anandibai)* cited by Mr. Mishra, learned Sr. Adv. rather supports the case of the State-Petitioner. AIR 1976 (SC) 163 *(Afsar Sheikh and another Vs. Soleman Bibi and others)* involves a second appeal U/s.100 of C.P.C. AIR 1977 (SC) 615 *(Varanaseya Sanskrit Vishwavidyalaya and another Vs. Rajkishore Tripathi (Dr.) and another)* involves an application under Order 39 rules 1 & 2. ILR (1989) Kar. 425 *(K.S. Mariyappa Vs. Siddalinga Setty)* involves a proceeding U/s.96 of C.P.C. Similar situation is in AIR 1986 Orissa 97 *(Padma Bewa Vs. Krupasindhu Biswal and others).* In (1980) Vol.45 STC 212 *(Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi)* here the Hon'ble apex Court said, the review is entertainable where a glaring omission or patent mistake or like grave error has crept on earlier by the judicial fallibility, thus this decision rather supports the State. Similarly (1999) 4 SCC 396 *(Budhia Swain and Others Vs. Gopinath Deb and others)*, (2019) 11 SCC 800 *(Ponnayal Vs. Karuppannan and another)*, (1987) 2 SCC 555 *(Ram Sarup Gupta Vs. Bishun Narain Inter College and Others)*, AIR 1975 SC 1500 *(Sow Chandra Kante and another Vs. Sk. Habib)* are not applicable for difference in facts. Similarly AIR (1998) SC 2276 *(P.K. Ramachandran Vs. State of Kerala and another)*, (2012) 5 SCC 157 *(Maniben Devraj Shah Vs. Municipal Corpn. Of Brihan Mumbai)*, (2013) 4

SCC 52 *(Amalendu Kumar Bera and others Vs. State of W.B.)*, (2012) 3 SCC 563 *(Postmaster General and others Vs. Living Media India Ltd. and another)*, (2012) 5 SCC 566 *(State of U.P. and others Vs. Ambrish Tandon and another)* are all on limitation aspect, which stage in the case at hand is already over. Since condonation of delay aspect in entertaining the review by this Court is already affirmed by the Hon'ble apex Court on dismissal of the SLP (C) No.3086 of 2020, all the above decisions except two decisions which as per the observation of this Court supports the State rather, do not support the case at hand. Involving (2019) 5 SCC 86 *(Asharfi Devi Vs. State of U.P. and others)* this is a case where order of the review was only in challenge in the Hon'ble apex Court and the Hon'ble apex Court observed, the request to involve the challenge to the main judgment not permissible at this stage, has no application to the case at hand. (2018) 4 SCC 587 *(Sivakami and others Vs. State of T.N. and others)* also for different facts involved therein has no application to the case at hand. This Court has also gone through the decisions vide 1999 SCC Online Kerala 36 *(District Executive Officer Vs. V.K. Pradeep & Ors.)* and 1998 (8) SCC 222 *(State of Punjab and others vs. Bakshish Singh)* cited by Mr. S.P. Mishra, learned Senior Advocate and finds, none of these decisions have any application to the case at hand.

18. This Court now proceeds to discuss some other decisions which also support the case of the Review Petitioner, which runs as follows:-

In the case of ***Vijay Syal*** *Vrs.* ***The State of Punjab*** : (2003) 9 SCC 401 the Hon'ble apex Court in para-24 has observed and held as follows:

> "**24.** In order to sustain and maintain the sanctity and solemnity of the proceedings in law courts it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such matters is either mistaken or lightly taken instead of learning a proper lesson. Hence there is a compelling need to take a serious view in such matters to ensure expected purity and grace in the administration of justice."

In the case of ***Rajender Singh*** *Vrs.* ***Lt. Governor Andaman and Nicobar Island and others*** : (2005) 13 SCC 289, the Hon'ble apex Court giving stress on consideration of allegation of overlooking the documents relied on by the appellant held it is a clear case of an error apparent on the face of the record and non-consideration of relevant documents and as such in para-15 & 16 therein held as follows:

> "**15.** We are unable to countenance the argument advanced by learned Additional Solicitor General appearing for the respondents. A careful perusal of the impugned judgment does not deal with and decide many important issues as could be seen from the grounds of review and as raised in the grounds of special leave petition/appeal. The High Court, in our opinion, is not justified in ignoring the materials on record which on proper consideration may justify the claim of the appellant. Learned counsel for the appellant has also explained to this Court as to why the appellant could not place before the Division Bench some of these documents which were not in possession of the appellant at the time of hearing of the case. The High Court, in our opinion, is not correct in overlooking the documents relied on by the appellant and the respondents. In our opinion, review jurisdiction is available in the present case since the impugned judgment is a clear case of an error apparent on the face of the record and non-consideration of relevant documents. The appellant, in our opinion, has got a strong case in his favour and if the claim of the appellant in this appeal is not countenanced, the appellant will suffer immeasurable loss and injury. Law is well settled that the power of judicial review of its own order by the High Court inheres in every court of plenary jurisdiction to prevent miscarriage of justice.
>
> **16.** The power, in our opinion, extends to correct all errors to prevent miscarriage of justice. The courts should not hesitate to review their own earlier order when there exists an error on the face of the record and the interest of justice so demands in appropriate cases. The grievance of the appellant is that though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction. In our opinion, the High Court's order in the review petition is not correct which really necessitates our interference."

In the case of ***Kuldip Gandotra*** *Vrs.* ***Union of India and others*** : (2007) 136 DLT 44 (D.B.) the Hon'ble apex Court in deciding a petition under Order 47 rule 1 of C.P.C. in para-2 & 8 has observed as follows:

> "**2.** Since fraud strikes at the very root of an Order/judgment and effects solemnity, and the Rule of Law, Courts have exercised their inherent power whenever it is brought to their notice that fraud has been practiced. The above principles have been recently reiterated by the Supreme Court in the case of *Hamza Haji* v. *State of Kerala and another* reported in (2006) 7 SCC 416, wherein the entire case law on the subject has been extensively examined and considered. In the said case, it has

been held that a second review application in law is not maintainable but a Court can exercise it's power as a court of record to nullify a decision procured by playing a fraud. A decision procured by fraud must be set at naught and no person who is guilty of having come to Court with unclean hands and practising fraud should be allowed to take advantage and benefit of an order/judgment obtained and tainted by fraud. Power to recall is somewhat different and distinct from power of review. Power of recall is an inherent power, whereas power of review must be specifically conferred on the authorities/Court (Refer *Budhiya Swain* v. *Gopinath Deb* reported in (1994) 4 SCC 396 for the distinction between the two and when power to recall can be exercised).

8. We are conscious of the fact that there is difference between a mere mistake and even negligence which by itself is not fraud but merely evidence of fraud. However, the present case is one in which the petitioner/non-applicant made a false representation deliberately and intentionally concealing facts to mislead the Court. In the present facts, the motive to mislead and the intention to do so is writ large. Fraud is proved when it is shown that false representation was intentionally and recklessly made without caring to know whether it is true or false. In the present matter, vital and relevant material facts were concealed. The Petitioner/non-applicant was fully aware that true facts were not brought to the notice of the Court. Thus actual fraud has been established and it is not a case of mere constructive fraud."

In another case in the case of ***Meghmala and others*** *Vrs.* ***G. Narasimha Reddy and others*** : (2010) 8 SCC 383 dealing with a case involving fraud and an act of conspiracy to take out the right of others and orders obtained on misrepresentation or playing fraud upon competent authority. Such order cannot be sustained in the eye of law. The Hon'ble apex Court in para-28 to 32, para-33, 34, 35 & 36 has held as follows:

"28. –It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853). In Lazarus Estate Ltd. Vs. Besalay 1956 All. E.R. 349), the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything.

29. In *A.P. State Financial Corpn.* v. *GAR Re-Rolling Mills* [(1994) 2 SCC 647 : AIR 1994 SC 2151] and *State of Maharashtra* v. *Prabhu* [(1994) 2 SCC 481 : 1994 SCC (L&S) 676 : (1994) 27 ATC 116] this Court observed that a writ court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law."

30. In *Shrisht Dhawan* v. *Shaw Bros.* [(1992) 1 SCC 534 : AIR 1992 SC 1555] it has been held as under: (SCC p. 553, para 20)

"*20.* Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

31. In *United India Insurance Co. Ltd.* v. *Rajendra Singh* [(2000) 3 SCC 581 : 2000 SCC (Cri) 726 : AIR 2000 SC 1165] this Court observed that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See *Vizianagaram Social Welfare Residential School Society* v. *M. Tripura Sundari Devi* [(1990) 3 SCC 655 : 1990 SCC (L&S) 520 : (1990) 14 ATC 766] , *Union of India* v. *M. Bhaskaran* [1995 Supp (4) SCC 100 : 1996 SCC (L&S) 162 : (1996) 32 ATC 94] , *Kendriya Vidyalaya Sangathan* v. *Girdharilal Yadav* [(2004) 6 SCC 325 : 2005 SCC (L&S) 785] , *State of Maharashtra* v. *Ravi Prakash Babulalsing Parmar* [(2007) 1 SCC 80 : (2007) 1 SCC (L&S) 5] , *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Co.* [(2007) 8 SCC 110 : AIR 2007 SC 2798] and *Mohd. Ibrahim* v. *State of Bihar* [(2009) 8 SCC 751 : (2009) 3 SCC (Cri) 929] .)

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide *Vimla (Dr.)* v. *Delhi Admn.* [AIR 1963 SC 1572 : (1963) 2 Cri LJ 434] , *Indian Bank* v. *Satyam Fibres (India) (P) Ltd.* [(1996) 5 SCC 550] , *State of A.P.* v. *T. Suryachandra Rao* [(2005) 6 SCC 149 : AIR 2005 SC 3110] , *K.D. Sharma* v. *SAIL* [(2008) 12 SCC 481] and *Central Bank of India* v. *Madhulika Guruprasad Dahir* [(2008) 13 SCC 170 : (2009) 1 SCC (L&S) 272] .]

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (*i*) knowingly, or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide *S.P. Chengalvaraya Naidu* [(1994) 1 SCC 1 : AIR 1994 SC 853] , *Gowrishankar* v. *Joshi Amba Shankar Family Trust* [(1996) 3 SCC 310 : AIR 1996 SC 2202] , *Ram Chandra Singh* v. *Savitri Devi* [(2003) 8 SCC 319] , *Roshan*

Deen v. *Preeti Lal* [(2002) 1 SCC 100 : 2002 SCC (L&S) 97 : AIR 2002 SC 33] , *Ram Preeti Yadav* v. *U.P. Board of High School & Intermediate Education* [(2003) 8 SCC 311 : AIR 2003 SC 4268] and *Ashok Leyland Ltd.* v. *State of T.N.* [(2004) 3 SCC 1 : AIR 2004 SC 2836])

35. In *Kinch* v. *Walcott* [1929 AC 482 : 1929 All ER Rep 720 (PC)] it has been held that:

"… mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury".

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

19. For the findings of this Court supporting the case of the Review Petitioner and the catena of decisions taken note hereinabove, this Court has no hesitation in entertaining the Review Petition and allowing the same.

20. As a result, this Court interfering with the judgment dated 27.06.2012 and the decree involved in Miscellaneous Appeal No.994 of 2001 sets aside the same and for the detailed discussions made hereinabove, dismissing the Miscellaneous Appeal No.994 of 2001 thereby confirming the judgment involving T.A. No.4/17 of 2001/1992, directs the Parties to appear before the Trial Court in the O.S. No.203 of 1988-I on 19.04.2021. Keeping in view the direction in T.A. No.4/17 of 2001/1992 the Review Petitioner is directed to file the additional written statement and additional documents on the date of appearance itself with service of a copy on the other side the Plaintiffs. Considering that there is sufficient delay in the meantime, the Trial Court is also directed to conclude the suit vide O.S. No.203 of 1988-I as expeditiously as possible, but not later than six months from the date of this judgment, but however, with opportunity of further evidence to both sides.

21. The RVWPET Petition succeeds. However, there is no order as to the cost.

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2021 (I) ILR - CUT- 858

BISWANATH RATH, J.

F.A.O. NO. 556 OF 2015

VICE CHANCELLOR, RABINDRA BHARATI BISWABIDYALAYA, KOLKATA & ANR. .....Appellants

.V.

JAGANNATH PATRA & ANR. ..... Respondents

THE FACTORIES ACT, 1948 – Section 2(K) – Cooking & Preparation of food – Whether it is coming under the definition of manufacturing – Held, Yes.

Case Laws Relied on and Referred to :-

1. 1982, AIR (SC) 127 : Idandas Vs. Anant Ramchandra Phadke (Dead) by Lrs.
2. (1965) 58 ITR 811 : Commissioner of Income Tax, Gujarat Vs. Ajay Printery Pvt. Ltd.
3. (2009) 9 SCC 61 : Bombay Anand Bhavan Restaurent Vs. Deputy Director, Employees' State Insurance Corporation & Anr.
4. (2005) 118 DLT 759 : Kanwarji Bhagirathmal Vs. Employees State Insurance Corporation.

For Appellants : Mr.Ashok Mohanty, (Sr. Adv.),M/s. P.Choudhury, P.Sinha, B.Mekap, M.K.Samantray, S.B.Mohanty & S.S.Mohapatra.

For Respondents : Mr. S.Das.

JUDGMENT Date of Hearing : 01.03.2021 Date of Judgment : 16.03.2021

BISWANATH RATH, J.

This is an appeal at the instance of the employer under Section 30 of the Workmen's Compensation Act, 1923 arising out of judgment passed by the Asst. Labour Commissioner-cum-Commissioner for Workmen's Compensation, Bhubaneswar in W.C. Case No.134 of 2014.

2. Short background involving the case is that legal heirs of the deceased employee filed a case under Employees Compensation Act claiming appropriate compensation for death of the deceased Susanta Patra in course of his duty as a cook in Dr.B.R.Ambedkar Boys Hostel at about 6 P.M on 18.05.2015. It is claimed that while the deceased was pouring hot dal, suddenly his leg slept and he fell down on the Dal Karai and got burnt.

Immediately after the accident, he was shifted to the R.G. Kar Hospital for treatment by the help of the students and staff of the Hospital. After 7 days of the incident, on 25.05.2013 at about 10.45 P.M. the treating physician declared him to be dead. A criminal case was instituted by Tala Police Station vide No.525 dtd. 26.05.2013 and P.S. G.D.E. No.2066 dtd.26.05.2013 and Baranagar P.S. G.D.E. No.2345 dtd. 26.05.2013. Vide P.M.No.944 dtd.26.5.2013, postmortem was also conducted on the dead body. The claimants claiming the deceased was 31 years old and was the only earning member of their family, for them sustaining heavy and irreparable loss due to sudden and unexpected death of their sole bread earner, the applicants under the premises that the deceased was getting a sum of Rs.6,000/- per month from the Hostel Superintendent working as a cook in the hostel under the employment of the University, claimed Rs.8,00,000/- as compensation.

2. On receipt of notice, the opposite parties, the present appellants appeared and filed their written statement stating that the deceased was never an employee of Rabindra Bharati Biswabidyalaya in any capacity either as a full time worker or part time or casual or on daily basis or in any other capacity. It is rather claimed by the appellants that the hostel of Rabindra Bharati Biswabidyalaya for boys was running by different vendors, who are given contract to run the hostel from time to time on contractual basis and the Biswabidyalaya is only the signatory in the contract with the vendors and therefore it is claimed that they have no liability in such issue.

3. To establish their case, the claimants have filed the copies of the investigation report regarding the particulars of employment of the deceased, nature of work and circumstances leading to the death of the deceased. Postmortem report, salary slip and some medicine bills were also filed. This apart, the claimants have also examined P.W.1 as one of the witnesses appearing to be father of the deceased. Entering into contest, the appellants-respondents therein contested the case by filing written statement. They also adduced evidence by producing one Balaram Majumdar, who was claimed to be working in the said hostel as Hostel Superintendent and was present at the time of such occurrence as OPW.1. On the basis of claim and counter claim, the Commissioner framed the following issues:

1. Whether the deceased was an employee within the meaning of E.C. Act and working under the Opp. Parties at the time of his accident?
2. Whether the accident arose out of and in course of the applicants employment?

3. Whether the amount of compensation as claimed by the applicants is due, or any part thereof?

4. Whether the Opp. Parties are liable to pay such compensation as is due? If yes, by whom payable.

4. Basing on the materials available on record, the Commissioner came to hold all the issues in favour of the claimants and as a consequence by the final judgment directed the opposite parties, the present appellants to pay compensation a sum of Rs.6,17,850.00 in lump sum and without any interest. It was also directed that failure of deposit of the awarded sum within 30 days from the date of receipt of the order, penalty and interest @ 12% shall also be imposed.

5. Challenging the judgment passed by the Asst. Labour Commissioner-cum-Commissioner for Workmen's Compensation, Odisha, Bhubaneswar in W.C. Case No.134 of 2014, Sri Asok Mohanty, learned Senior Advocate while reiterating the grounds of challenge in the memorandum of appeal submitted that for the employee involved herein was engaged by the contractor, there was no liability with the institution. For there being no establishment by the claimants as to under which contractor the deceased was working, Sri Mohanty, learned Senior Advocate contended that the judgment impugned becomes bad. Sri Mohanty, learned Senior Advocate also challenging the impugned judgment on the premises that there was no employer & employee relationship. It is also claimed that the deceased cannot be considered as a workman for his nature of work. The impugned judgment was also contested on the premises that the award is not only excess but also exorbitant and therefore computation without any basis. Mr. Mohanty, learned Senior Advocate during course of submission also raised a legal point taking resort to the definition of Manufacturing Process under the Factories Act, 1948 and claimed that the definition having not been extended to the State of West Bengal, where the accident occurred, the impugned judgment also suffers for the claim of the petitioner not being covered under the definition of Manufacturing Process under Section 2 k of the Act, 1948. Taking this Court to the definition of the amendment submitted definition not covering the State of West Bengal involving cause of action involved herein, Sri Mohanty, learned Senior Advocate contended that the impugned judgment remains otherwise bad in law.

6. Sri S.Das, learned counsel appearing for the Claimant Nos.1 and 2 while reiterating the plea of the claimants before the Commissioner, referring

to Section 2 (1) (dd) of the Employee's Compensation Act, 1923 contended that the claim was made on the premises of the deceased being an employee and therefore it remains immaterial whether he was a cook or anything else. For the word workman has the definite meaning under the Act, 1923, the case of the claimants is well covered. Adverting to the claim of Sri Mohanty, learned Senior Counsel that the deceased does not satisfy to be involved in a Manufacturing Process as defined under (k) of the Section 2 of the Factories Act, 1948, referring to two decisions in the cases of ***Idandas Vs. Anant Ramchandra Phadke (Dead) by Lrs***., *1982, AIR (SC) 127* and ***Commissioner of Income Tax, Gujarat Vs. Ajay Printery Private Ltd***.,(*1965) 58 ITR 811*, Sri Das, learned counsel however attempted to extend the coverage of the judgment referred to hereinabove to the case of the claimants.

7. Considering the rival contentions of the parties and going through the materials available on record, this Court finds there is no dispute that there is an accident involving the death of the cook-the deceased here while working in a hostel involving food preparation. He was also at the age of 31 years hardly on the date of incident. This Court noticed here through the evidence of OPW.1 functioning as Hostel Superintendent at the relevant point of time, who in his deposition, while admitting to be the Superintendent of Dr.B.R. Ambedkar Boys Hostel where the deceased was working as a cook since last four and half years. He admitted that the deceased was working in the hostel in the capacity of cook. He also admitted that on 18.05.2013 the deceased after cooking the Dal while keeping the Dal Karai on the floor, he got slept on the floor and suddenly fell down into the Dal Karai. The Superintendent has also admitted the death of the deceased in such process. In the cross examination the Superintendent by the appellants also appears to have stated that he had also admitted that the deceased Sri Patra was working since last 5 years. It is in the premises, there remains no doubt that the deceased was a worker in an University and there also remains master & servant relationship between the both. It is in this contest of the matter, this Court has no hesitation to conclude that the deceased was a worker at the relevant point of time and is well covered by the provisions under the Employees Compensation Act, 1923. For Sri Mohanty, learned Senior Advocate concentrating on the death of employee not involving in any manufacturing process under the definition of Factories Act, 1948, this Court on scan of the judgment referred to by the counsel for the respondents though finds both the judgment stand on different footing but however finds through the decision in the case of ***Bombay Anand Bhavan Restaurent Vs. Deputy Director,***

Employees' State Insurance Corporation & another, with another similar case, (*2009) 9 SCC 61*, the Hon'ble Apex Court held cooking and preparation of food item clarifies manufacturing process. Similarly, through the decision involving *1994 LIC 1213*, it has been observed supply of food and breveries to a cricket club must be a sale to its guest and well covered by definition of manufacturing process. In case of ***Kanwarji Bhagirathmal Vs. Employees State Insurance Corporation***, (2005) 118 DLT 759, it has been observed that the act of Halwai in making of sweetmeats and salted eatables in his shop also involves manufacturing process. For the argument of the claimants that the deceased died while working under the University, being clearly corroborated by the University's own witness OPW 1, who is none else than the Superintendent working at the relevant date in the Hostel, this Court finds, there is right consideration of the issue involved by the Commissioner in deciding W.C. Case No.134 of 2014 leaving no scope for this Court to interfere in the impugned judgment, which is hereby confirmed. For the amount already kept in fixed deposit by order dated 14.10.2015 passed in Misc. Case No.795 of 2015, the deposited amount along with accrued interest be released in favour of the claimants forthwith. Further, this Court since finds the impugned judgment was passed on 31.7.2015 with a direction to deposit the amount within 30 days provided the compensation has not been deposited within 30 days from 31st July, 2015, the claimants are entitled to penalty and interest @ 12% per annum from expiry of 30 days i.e. from 31st July, 2015 till 30th September, 2015.

8. Appeal fails but, however, no costs.

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2021 (I) ILR - CUT- 862

S. K. SAHOO, J.

CRLA NO. 580 OF 2013

SIBARAM SWAIN .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRLA NO. 44 OF 2014
RATNAKAR SWAIN ……..Appellant
.V.
STATE OF ORISSA ……Respondent

(A) THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) read with Section 25 – Offence under – Punishment for allowing premises, etc., to be used for commission of an offence – Being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for commission of an offence – The word 'knowingly permits' – Effect and scope for punishment – Held, mere ownership of the vehicle in which transportation of contraband articles was found is by itself not an offence – The words 'knowingly permits' are significant – The expression 'knowingly' has to be given due weight – It is not enough if the evidence establishes that the person has reason to suspect or even to believe that a particular state of affairs existed – When these words are used, something more than suspicion or reason to believe is required – Thus, it is for the prosecution to establish that with the owner's or driver's knowledge, the vehicle was used for commission of an offence – It would be a travesty of justice to prosecute the owner or driver of a vehicle and to hold them guilty for the act committed by a passenger travelling in the vehicle who was found to be carrying contraband articles in his luggage without even any semblance of material that the vehicle was knowingly permitted to be used for the commission of the offence. (Para 10)

(B) THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 35 – Culpable mental state – Definition – Ingredients required for establishing the mental link – Held, Section 43(b) of the N.D.P.S. Act states that any officer of any of the departments mentioned in section 42 of the said Act, can detain and search any person whom he has reason to believe to have committed an offence punishable under the said Act and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company – Merely because a person is arrested being in the company of another person against whom reasonable belief arises to have committed the offence under the N.D.P.S. Act, that would not ipso facto prove his culpable mental state as required under section 35 of the N.D.P.S. Act particularly in view of the definition of the term 'culpable mental state' as appearing in the explanation to section 35(1) of the said Act. (Para 10)

CRLA NO. 580 OF 2013

For Appellant : Mr. V. Narasingh
For Respondent: Mr. P.K. Mohanty, Addl. Standing Counsel

CRLA NO. 44 OF 2014

For Appellant : Mr. V. Narasingh (Amicus Curiae)
For Respondent : Mr. P.K. Mohanty, Addl. Standing Counsel

JUDGMENT Date of Hearing: 18.02.2021: Date of Judgment: 15.03.2021

S. K. SAHOO, J.

The appellants Sibaram Swain (CRLA No.580 of 2013) and Ratnakar Swain (CRLA No.44 of 2014) faced trial in the Court of learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur in 2(a) C.C. No.11 of 2011(N) for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act'). They were found guilty by the learned trial Court of the offence charged and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for a period of one year vide impugned judgment and order dated 27.11.2013.

Since both the criminal appeals arise out of one common judgment and order of conviction, with the consent of learned counsel for the respective parties, those were heard analogously and disposed of by this common judgment.

2. The prosecution case, in short, is that Sri Sarat Chandra Bhanja (P.W.3), Sub-Inspector of Excise, E.I. & E.B., Unit-II (S.D.), Berhampur received a credible telephonic information on 04.07.2011 at about 6.00 a.m. about transportation of Ganja in an auto rickshaw near Ambapua and Gopalpur junction area and on getting such information, he reduced the information into writing and informed his superior authority i.e. the I.I.C. of Excise Sri S.P. Gantayat vide Ext.7 and as per the direction of Sri Gantayat, P.W.3 proceeded to the spot to verify the correctness of the information. Four excise constables including P.W.2 and one A.S.I. of Excise also accompanied him. The prosecution case further reveals that near Gopalpur junction area, when they were performing patrolling duty, around 11.00 a.m. an auto rickshaw bearing registration no.OR-07N-1450 was found coming towards Berhampur town from Ambapua side. On suspicion, the said auto rickshaw

was detained in which one person was found on the rear seat and another person was found driving the vehicle. On being asked, the driver disclosed his name as Sibaram Swain (appellant in CRLA No.580 of 2013) whereas the other person sitting on the rear seat gave his identity as Ratnakar Swain (appellant in CRLA No.44 of 2014). It is the further case of the prosecution that the auto rickshaw being detained was found to be carrying four airbags on the rear seat, which were by the side of the appellant Ratnakar Swain and one jerry basta was found on the foot rest of the rear seat. Both the appellants, on being asked by P.W.3 about the contents of airbags and jerry basta, kept mum. On suspicion, P.W.3 disclosed his intention to search the airbags and jerry basta. P.W.1, an independent witness was then called to remain present during the proposed search and seizure. It is the further case of the prosecution that the appellants were then asked by P.W.3 as to whether they wanted the search to be conducted in presence of an Executive Magistrate or Gazetted Officer. The appellants opted to be searched by P.W.3 and such options were given in writing vide Exts.3/1 and 4/1. Thereafter, on observing other formalities such as giving of personal search etc. to the appellants and others, when no incriminating item was found from the possession of P.W.3, the airbags and jerry basta were searched by bringing those from the auto rickshaw. All the four airbags and jerry basta being opened were found to be containing Ganja. P.W.3 conducted preliminary tests such as by rubbing on the palm and burning a little portion out of the contents found inside the airbags and jerry basta and from his experience, he could ascertain that it was ganja. Weighment being made, four airbags were found to contain 14 Kgs., 16 Kgs., 17 Kgs. and 13 Kgs. of ganja whereas the jerry basta was found to be containing 10 Kgs. of ganja. The airbags and basta were then sealed by using paper slips and the brass seal of P.W.3 obtaining the signatures of others including the appellants. The said brass seal was then given in zima of P.W.2 under proper zimanama (Ext.5/1). P.W.3 next prepared the seizure list (Ext.1/1) to that effect. The appellants being arrested were directly produced before the Court of learned Special Judge, Berhampur on the same day. P.W.3 made a prayer before the Court for collection of samples from the airbags and jerry basta and for their onward dispatch to DECTL, Berhampur at Chatrapur, which being allowed, learned S.D.J.M., Berhampur collected samples from airbags and jerry basta and those were forwarded for chemical examination. The report came to the same effect as was the finding of preliminary test of P.W.3 so far as the contraband items are concerned. P.W.3 also ascertained the ownership of the vehicle standing to be in the name of the appellant Sibaram Swain. P.W.3 thereafter submitted a preliminary report

describing the details of such seizure and other follow up action in that regard. Thereafter, on completion of investigation, P.W.3 submitted prosecution report against the appellants to stand their trial.

3. The appellants on being charged under section 20(b)(ii)(C) of the N.D.P.S. Act for unlawful possession of 70 Kgs. of contraband ganja, refuted the charge, pleaded not guilty and claimed to be tried.

4. During course of trial, in order to prove its case, the prosecution examined three witnesses.

P.W.1 Kalu Charan Sethi is an independent witness to the seizure who was a betel shop owner, did not support the prosecution case, rather he stated that on being asked by some excise officials, he put his signatures on some written papers ten to fifteen in numbers and proved Exts.1 to 6 as his signatures.

P.W.2 Antaryami Sahu was the Constable of Excise attached to E.I. & E.B., Southern Division, Berhampur who accompanied P.W.3 for patrolling duty and stated about search and seizure of ganja from the possession of the appellants. On being asked by P.W.3, he called P.W.1 in whose presence the airbags and basta were searched. He is also a witness to the seizure of bags containing ganja and other contemporaneous documents such as zimanama.

P.W.3 Sarat Chandra Bhanja was the S.I. of Excise, E.I. & E.B., Berhampur who not only detained the auto rickshaw, seized the contraband ganja, produced the seized ganja and the appellants in Court after their arrest but on completion of investigation, submitted the prosecution report.

5. The prosecution exhibited eight documents. Ext.1/1 is the seizure list, Ext.2/1 is the spot map, Ext.3/1 is the option given to the appellant Sibaram Swain, Ext.4/1 is the option given to the appellant Ratnakar Swain, Ext.5/1 is the zimanama, Ext.6/1 is the preliminary test report, Ext.7 is the intimation given to I.I.C. and Ext.8 is the chemical examination report.

The prosecution proved twelve material objects. M.O.I is the brass seal, M.Os.II to VI are the packets containing second part of sample, M.O.VII is the packet containing residue ganja, M.Os.VIII to XI are the airbags containing residue ganja and M.O.XII is the jerry basta.

6. The defence plea of the appellant Ratnakar Swain was that at the relevant point of time, he had alighted from a bus near the first gate, when the Excise Constable (P.W.2) called him and brought him to the Excise Office in a vehicle, where his signatures were obtained in different documents and thereafter he was falsely implicated in the case.

The defence plea of the appellant Sibaram Swain was that when he was coming driving his auto rickshaw, the appellant Ratnakar Swain requested him to take him to Berhampur and sat on the rear seat. It was his further plea that he had no connection with the airbags and basta and he was also not aware about its contents.

The defence exhibited the arrest memo of the appellant Ratnakar Swain as Ext.A.

7. The learned trial Court after assessing the evidence on record has been pleased to hold that the prosecution is found to have established by clear and cogent evidence that the auto rickshaw bearing registration no. OR-07N-1450 was detained at the relevant place and time. It was further held that the evidence of P.Ws.2 and 3 cannot be disbelieved even without P.W.1's supporting evidence with regard to the fact that the appellant Ratnakar Swain was coming in the auto rickshaw sitting on the rear seat. While dealing with the provision of section 35 of the N.D.P.S. Act regarding culpable mental state of the appellants, the learned trial Court held that the prosecution has established the presence of the appellants in the auto rickshaw followed by recovery of M.Os. VII to XII beyond reasonable doubt and therefore, the presumption as to the culpable mental state of both the appellants got raised pushing the onus on them to prove the non-existence of such mental state for the same offence by proving their absence of intention, motive, knowledge of a fact and belief in or having any reason to believe as per the required mode with the standard of proof beyond a reasonable doubt. With regard to non-compliance of the provision of section 50 of the N.D.P.S. Act, the learned trial Court has held that for search of vehicle, this provision did not require mandatory compliance in view of the decision of the Hon'ble Supreme Court in the case of **State of H.P. -Vrs.- Pawan Kumar reported in (2005)4 Supreme Court Cases 350**. It was further held that there was hardly any time lag between seizure, production and also chemical examination and considering the quantity of contraband seized in the case, the possibility of planting looks an impossibility. It was further held that the samples were

taken from what were seized and were also having been chemically examined and accordingly, the appellants were found guilty of the offence charged.

8. Mr. V. Narasingh, learned counsel appearing for the appellant Sibaram Swain in CRLA No.580 of 2013 who was also appointed as Amicus Curiae in CRLA No.44 of 2014 for the appellant Ratnakar Swain, placed the impugned judgment, the evidence of the witnesses, the exhibited documents and contended that it is the specific plea of the appellant Sibaram Swain that he was the auto rickshaw driver and he was taking the appellant Ratnakar Swain to Berhampur on rental basis who was sitting on the back seat. The appellant further pleaded that he had got no connection with the air bags as well as jerry bag found in the auto rickshaw and he was not even aware of its contents. He argued that the plea taken by appellant Sibaram Swain gets corroboration from the evidence of the prosecution witnesses who stated that on being asked about the contents of the air bags and jerry basta, the appellant Sibaram Swain told that he had no knowledge about its contents as those were kept by the appellant Ratnakar Swain and he was carrying appellant Ratnakar Swain as well as the bags on payment of hire charges. He further argued that there is no material on record about any previous acquaintance between the two appellants or any such contract between them to carry the bags with an exorbitant price taking risk or that the appellant Sibaram Swain knowingly permitted his auto rickshaw to be used as a conveyance for commission of the offence. He further argued that the conduct of the appellant Sibaram Swain in not trying to flee away when he was asked to stop the auto rickshaw is a very relevant factor under section 8 of the Evidence Act and it shows that he was not aware of the contents of the bags and also absence of culpable mental state. He further argued that the learned trial Court has committed certain error of record which has resulted in perverse finding and therefore, the appellant Sibaram Swain should be given benefit of doubt.

Arguing for the appellant Ratnakar Swain, Mr. V. Narasingh, learned Amicus Curiae urged that there is statutory infraction of the provision under section 42 of the N.D.P.S. Act which is mandatory in nature so also the provision under section 57 of the N.D.P.S. Act which though directory in nature but cannot be totally ignored by the Investigating Officer. Such failure, according to the learned counsel will have a bearing on the appreciation of evidence regarding arrest of the accused and seizure of the articles. The brass seal given in the zima of P.W.2 was not produced at the time of production of

seized ganja in Court for drawal of sample for comparison and the tampering of seal cannot be ruled out and since P.W.3 who detected and seized contraband ganja is himself the investigating officer, who on completion of investigation submitted the prosecution report, serious prejudice has been caused to the appellants and therefore, benefit of doubt should also be extended in favour of the appellant Ratnakar Swain. He placed reliance on the decisions of the Hon'ble Supreme Court in the cases of **Abdul Rashid Ibrahim Mansuri -Vrs.- State of Gujarat reported in (2000) 18 Orissa Criminal Reports (SC) 512**, **Bhola Singh -Vrs.- State of Punjab reported in 2011 (I) Orissa Law Reviews (SC) 1043**, **Manoj Kumar Panigrahi -Vrs.- State of Orissa reported in (2019) 75 Orissa Criminal Reports 761** and **Herasha Majhi -Vrs.- State of Odisha reported in (2019) 76 Orissa Criminal Reports 728**.

9. Mr. P.K. Mohanty, learned Additional Standing Counsel appearing for the State on the other hand supported the impugned judgment and contended that appellant Sibaram Swain has failed to prove that he had no such culpable mental state even though he was carrying the airbags and jerry basta containing ganja in his auto rickshaw. He argued that since the confessional statement of an accused before the Excise Officials is inadmissible in view of the provisions of Section 25 of the Evidence Act, the said statement made cannot be utilised in support of defence plea. The manner in which the ganja was being transported and the presence of both the appellants inside the auto rickshaw at the time of detention and the prevaricating statements made by the appellants after their arrest relating to the ganja bags and also in their accused statements proves the offence. Placing reliance on the ratio laid down in the cases of **Amar @ Amarnath Nayak -Vrs.- State of Orissa reported in 2018 (I) Orissa Law Reviews 562**, **Surinder Kumar -Vrs.- State of Punjab reported in (2020)2 Supreme Court Cases 563**, **Sajan Abraham -Vrs.- State of Kerala reported in (2001)6 Supreme Court Cases 692** and **Karnail Singh -Vrs.- State of Haryana reported in (2009)8 Supreme Court Cases 539**, he argued that the appeals should be dismissed.

10. Let me now first deal with the contentions raised by the learned counsel for the respective parties so far as the appellant Sibaram Swain is concerned.

Out of three witnesses examined on behalf of the prosecution, P.W.1 has not supported the prosecution case and P.Ws.2 and 3, who are the official

witnesses have stated about the detention of the auto rickshaw, search and seizure of contraband ganja from it. Law is well settled as held in the case of **Surinder Kumar** (supra) that the evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

P.W.2 has stated that when they detained the auto rickshaw while performing their patrolling duty, the appellant Sibaram Swain was driving the vehicle and on being asked, he disclosed his name. Appellant Ratnakar Swain was sitting on the rear seat and he also disclosed his name. When they noticed four numbers of air bags and one jerry bag lying on the backside of the rear seat and asked about the contents of those bags, appellant Sibaram Swain told them that he had no knowledge about the contents of the bags as those bags were kept by appellant Ratnakar Swain and he was carrying him as well as the bags on payment of hire charges. When the appellant Ratnakar Swain was asked about the contents of those bags, he admitted that the bags were kept by him in the auto rickshaw and that he was travelling on payment of hire charges but he also maintained silent with regard to the contents of those bags. In the cross-examination, P.W.2 further stated that appellant Sibaram Swain produced relevant documents concerning the auto rickshaw and appellant Ratnakar Swain disclosed that he was carrying the bags in the auto rickshaw having hired it for the purpose. P.W.2 further stated that no sooner did they give signal to the driver of the auto rickshaw i.e. appellant Sibaram Swain, he stopped the vehicle.

P.W.3 stated that when he noticed the auto rickshaw coming towards Berhampur town from Ambapua side during patrolling, on suspicion, he detained the same and found that the appellant Sibaram Swain was driving the auto rickshaw and appellant Ratnakar Swain was sitting on the rear seat of auto rickshaw keeping four air bags by his side and one jerry basta near his legs. He further stated that when he asked about the contents of the air bags and the jerry basta to both the appellants, they remained silent. In the cross-examination, P.W.3 stated that the auto rickshaw is a public carrier one and he had verified the R.C. book and appellant Ratnakar Swain had claimed the ownership of the air bags and jerry basta before him. He further stated that he had not directed his investigation to find out if there was any relationship between the two appellants and he had also not directed his investigation as regards the starting point of the auto rickshaw.

At this juncture, the accused statement of the appellant Sibaram Swain needs consideration. The appellant pleaded that when he was coming driving

his auto rickshaw, appellant Ratnakar Swain requested him to take him to Berhampur and sat on the rear seat. It was further pleaded that he had no connection with the air bags and basta and he was also not aware about its contents.

Thus, the cumulative effect of the evidence of the P.Ws.2 and 3 as well as the defence plea of the appellant Sibaram Swain is as follows:-

(i) The appellant Sibaram Swain was coming driving the auto rickshaw from Ambapua side and going towards Berhampur town when it was detained by the excise staff;

(ii) No sooner P.W.3 and his team gave signal to the driver of the auto rickshaw to stop the vehicle, the appellant Sibaram Swain stopped the vehicle;

(iii) Appellant Sibaram Swain produced the documents of the auto rickshaw and told that he was carrying appellant Ratnakar Swain as well as the bags on payment of hire charges and that he had no knowledge about the contents of the bags which were kept by the appellant Ratnakar Swain;

(iv) Appellant Ratnakar Swain claimed ownership of the air bags and jerry basta before the excise officials at the spot.

At this juncture, three sections of the N.D.P.S. Act i.e. sections 25, 35 and 54 need consideration. The aforesaid three sections are extracted herein below:-

> **25. Punishment for allowing premises, etc., to be used for commission of an offence.**-
>
> Whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act, shall be punishable with the punishment provided for that offence.
>
> **35. Presumption of culpable mental state.-**
>
> (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

> **54. Presumption from possession of illicit articles.-** In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-
>
> (a) any narcotic drug or psychotropic substance or controlled substance;
>
> (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
>
> (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
>
> (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.

The basic ingredients of section 25 of the N.D.P.S. Act thus appear to be as follows:-

> (i) The accused must be either the owner, or occupier or he must have the control or use of the house, room, enclosure, space, place, animal or conveyance;
>
> (ii) He must have knowingly permitted such house, conveyance etc. to be used for the commission of an offence punishable under any provision of N.D.P.S. Act by any other person.

Mere ownership of the vehicle in which transportation of contraband articles was found is by itself not an offence. The words 'knowingly permits' are significant. The expression 'knowingly' has to be given due weight. As per the Chambers Dictionary, 12th Edition, 'knowingly' means in a knowing manner, consciously, intentionally. In the case of **Raghunath Singh -Vrs.- State of Madhya Pradesh reported in 1967 Maharashtra Law Journal 575**, a three-Judge Bench of the Hon'ble Supreme Court has held that the words 'knowing' or 'knowingly' are used to indicate that knowledge as such must be proved either by positive evidence or circumstantially before mens rea can be established. The words, 'knowing' or 'knowingly' are obviously more forceful than the words 'has reason to believe', because those words insist on a greater degree of certitude in the mind of the person who is set to know or to do the act knowingly. It is not enough if the evidence establishes that the person has reason to suspect or even to believe that a particular state of affairs existed. When these words are used, something more than suspicion or reason to believe is required.

Thus, it is for the prosecution to establish that with the owner's or driver's knowledge, the vehicle was used for commission of an offence under the N.D.P.S. Act. However, once the prosecution establishes the ownership as well as grant of permission by the accused to use his house or vehicle etc. by another person for commission of any offence under the N.D.P.S. Act, the burden shifts to the accused and he has to give rebuttal evidence to disprove such aspects. It is not always expected of an owner of a commercial vehicle to know what luggage the passenger of his vehicle was carrying with him/her particularly when the owner has engaged a driver for running of the vehicle. At best, the owner cautions his driver not to carry any suspected person or suspected article in the vehicle. Similarly, it would be too much to expect of a driver of the vehicle to enquire into details regarding the contents of the luggage carried by the passenger as he is mainly concerned with the hire charges. Therefore, there is possibility that without knowing the contents of the luggage, the owner or driver of the vehicle may permit the passenger to carry the luggage in which contraband articles are secretly kept and in such a scenario, it would not be proper and justified to hold the owner or the driver guilty of commission of offence under the N.D.P.S. Act merely for the illegal act of the passenger without any material to show that it was knowingly permitted. It would depend on the nature of evidence adduced in the case to case basis, the facts and circumstances of the case, the nature and quantity of contraband articles transported, the immediate conduct of the driver and the passenger of the vehicle at the time when the vehicle was intercepted or asked to be stopped. The statements made by the driver and the passenger relating to the contraband articles immediately after the detention was made, how and when the contract was made to carry the passenger with luggage, the previous acquaintance if any between the owner/driver of the vehicle with the passenger and the amount of hire charges settled for carrying the luggage are certain relevant factors for consideration. It would be a travesty of justice to prosecute the owner or driver of a vehicle and to hold them guilty for the act committed by a passenger travelling in the vehicle who was found to be carrying contraband articles in his luggage without even any semblance of material that the vehicle was knowingly permitted to be used for the commission of the offence.

Sections 35 and 54 of the N.D.P.S. Act raise presumptions with regard to the culpable mental state on the part of the accused and also place the burden of proof in this behalf on the accused. However, the presumption would operate in the trial of the accused only in the event the circumstances

contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. If the prosecution fails to prove the fundamental facts so as to attract the rigours of section 35 of the N.D.P.S. Act, the actus reus cannot be said to have been established. It would be profitable to refer to a few cases and appreciate the ratio laid down in it.

In the case of **Abdul Rashid Ibrahim Mansuri** (supra), while analysing the provision under section 35 of the N.D.P.S. Act, the Hon'ble Supreme Court held as follows:-

> "21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in Sub-section (2) as "beyond a reasonable doubt". If the Court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the Court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.
>
> 22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

In the case of **Bhola Singh** (supra), the Hon'ble Supreme Court held as follows:-

> "While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in **Noor Aga -Vrs.- State of Punjab and Anr. (2008)16 Supreme Court Cases 417** while upholding the constitutional validity of Section 35 observed that as this Section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that

> Section 35 would come into play. Applying the facts of the present case to the cited one, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant, no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him, with the knowledge of its misuse by the driver and others."

In the case of **Amar @ Amarnath Nayak** (supra), this Court has been pleased to hold as follows:-

> "Section 35 of the N.D.P.S. Act deals with presumption of 'culpable mental state' and it provides that in any prosecution for an offence under N.D.P.S. Act which requires a 'culpable mental state' of the accused, the Court shall presume the existence of such mental state. The 'culpable mental state' includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. However, it is for the defence to prove that the accused had no such mental state with respect to the act charged as an offence in that prosecution. The accused is to prove that he was not in conscious possession of the contraband if it is proved by the prosecution that he was in possession thereof and he is also to prove that he had no such mental state with respect to the act charged as an offence.
>
> xxx xxx xxx
>
> Law is well settled that the prosecution has to prove its case beyond all reasonable doubt whereas the accused can prove its defence by preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstance upon which the accused relies. Section 106 of the Evidence Act clearly enjoins that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Section 35(2) of the N.D.P.S. Act requires the accused to prove beyond a reasonable doubt that he had no culpable mental state with respect to the act charged. The general principle regarding the discharge of burden by preponderance of probability is not applicable. The burden can be discharged by an accused adducing cogent and reliable evidence which must appear to be believable or by bringing out answers from the prosecution witnesses or showing circumstances which might lead the Court to draw a different inference."

The Hon'ble Supreme Court in the case of **Hanif Khan -Vrs.- Central Bureau of Narcotics reported in 2019 SCC OnLine SC 1810** held as follows:-

> "8....The prosecution under the N.D.P.S. Act carries a reverse burden of proof with a culpable mental state of the accused. He is presumed to be guilty consequent to recovery of contraband from him and it is for the accused to establish his innocence unlike the normal rule of criminal jurisprudence that an accused is presumed to be innocent unless proved guilty. But that does not absolve the prosecution from establishing a prima facie case only whereafter the burden shifts to the accused. In **Noor Aga -Vrs.- State of Punjab reported in (2008)16 Supreme Court Cases 417**, it was observed as follows:
>
> "58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused and also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is 'beyond all reasonable doubt' but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."
>
> 9. Because there is a reverse burden of proof, the prosecution shall be put to a stricter test for compliance with statutory provisions. If at any stage, the accused is able to create a reasonable doubt, as a part of his defence, to rebut the presumption of his guilt, the benefit will naturally have to go to him."

The Hon'ble Supreme Court in the case of **Mohan Lal -Vrs.- The State of Punjab reported in 2018 (II) Orissa Law Reviews 485** held as follows:-

> "10. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the N.D.P.S. Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the N.D.P.S.

> Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities."

In the case of **Naresh Kumar -Vrs.- State of Himachal Pradesh reported in (2017)15 Supreme Court Cases 684**, it is held as follows:-

> "9. The presumption against the accused of culpability under Section 35 and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability."

In the case of **Union of India (UOI) -Vrs.- Sanjeev V. Deshpande reported in 2014 (II) Orissa Law Reviews (SC) 707**, it is held as follows:-

> "Section 35 stipulates that in any prosecution for an offence under the Act which requires a culpable mental state of the accused, the Court trying offence is mandated to assume the existence of such mental state, though it is open for the accused to prove that he had no such mental state."

In the case of **Dehal Singh -Vrs.- State of Himachal Pradesh reported in (2010)9 Supreme Court Cases 85**, it is held as follows:-

> "Section 35 of the Act recognizes that once possession is established, the Court can presume that the accused had a culpable mental state, meaning thereby conscious possession. Further the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband."

In the case of **Madan Lal and Anr. -Vrs.- State of H.P. reported in (2003)7 Supreme Court Cases 465**, wherein it has been held as follows:-

> "22. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.: 1979 Cri.L.J. 1390, to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes.

> 23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.
>
> 24. As noted in Gunwantlal v. The State of M.P.: 1972 CriLJ 1187 possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.
>
> 25. The word 'possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561). In an interesting case, it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See: Sullivan v. Earl of Caithness, 1976 (1) All ER 844).
>
> 26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

Mr. V. Narasingh, learned counsel appearing for the appellants placed paragraph 11 of the impugned judgment and submitted that the observation made therein that the evidence of P.W.3 that the appellant Ratnakar Swain claimed the bags to be of his own, has not been corroborated by P.W.2 is an error of record inasmuch as P.W.2 has specifically stated in cross-examination that the appellant Ratnakar Swain disclosed before him that he was carrying the bags in the said auto rickshaw having hired it for the purpose. I find substantial force in the argument of the learned counsel for the appellants that the learned trial Court has committed an error of record in the aforesaid aspect.

The learned counsel for the appellants further drew the attention of the Court to the observation made in paragraph 11 of the impugned judgment, wherein it has been observed that in the present case when all proved and attending circumstances are cumulatively viewed, provision of section 43(b) of the N.D.P.S. Act also got attracted to say that one was the companion of another or in company and that also leads to drawal of presumption under section 54 of the N.D.P.S. Act, which has not been satisfactorily accounted for.

Section 43(b) of the N.D.P.S. Act states that any officer of any of the departments mentioned in section 42 of the said Act, can detain and search

any person whom he has reason to believe to have committed an offence punishable under the said Act and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. Merely because a person is arrested being in the company of another person against whom reasonable belief arises to have committed the offence under the N.D.P.S. Act, that would not ipso facto prove his culpable mental state as required under section 35 of the N.D.P.S. Act particularly in view of the definition of the term 'culpable mental state' as appearing in the explanation to section 35(1) of the said Act. Section 54 of the N.D.P.S. Act no doubt raises presumption from possession of illicit articles, but again it states that such presumption can be raised only when the person in possession fails to account such possession satisfactorily.

Adverting to the contention raised by the learned counsel for the State that confessional statement of appellant Sibaram Swain made to Excise Officials at the spot cannot be utilised in support of defence plea, few decisions would be suffice to deal with the same. The majority view in the case of **Tofan Singh -Vrs.- State of Tamil Nadu reported in (2020) 80 Orissa Criminal Reports (SC) 641** (Para 155) is that the officers who are invested with powers under Section 53 of the N.D.P.S. Act are 'police officers' within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an Accused under the N.D.P.S. Act.

In the case of **Madaiah -Vrs.- State reported in 1992 Criminal Law Journal 502**, a Division Bench of Madras High Court held as follows:-

> "8. Reverting now to the argument of learned counsel, it is pointed out that neither u/s. 25 nor u/s. 26 of the Evidence Act, there is any prohibition for the accused to make use of his own confession or to rely upon the said confession for his benefit although the sections make it very evident that a confession made to a Police Officer by the accused in detention if it is u/s. 25, it is totally inadmissible, whereas u/s. 26, it is admissible provided it is made before a Magistrate. In either event, it is pointed out and in our opinion rightly too, the controversy herein is not covered either by S. 25 or 26 of the Act and there is no other provision occurring on this point. In reality we think, there is no bar in law precluding the accused from relying upon his own confession for his purposes. That such is certainly the position as the provisions of the Evidence Act stand is not disputed by the learned Public Prosecutor.

9. It is relevant at this stage to point out that u/s. 8 of the Evidence Act, the conduct of the accused subsequent to the occurrence is very relevant. Taking that aspect of the matter into consideration, the fact of the accused going straight to the Police Station and making a statement explaining his conduct in that behalf would be clearly admissible but for the fact that his conduct is demonstrated by the statement of the accused admitting the commission of a crime.

10. Be that as it may, there is nothing in the Evidence Act that precluded an accused from relying upon his confession for his own purpose. This advantage, no doubt, the prosecution does not have because of the total ban enacted u/s. 25 in making use of the confession in any manner barring the limited user, the prosecution can make of it u/s. 26 provided the confession is made in the presence of a Magistrate. The accused is not untrammeled by either of these sections in case he desires to rely on the confession. This appears to be the considered view of the Lahore and the Madras High Courts in Lal Khan's case (1949 Cri LJ 977) and in In Re Mottai Thevar's case (1952 Cri LJ 1210). The dictum of the Lahore High Court in Lal Khan's case (1949 Cri LJ 977) is as follows:

"Where an accused person himself makes a statement which is taken down as a first information report, the statement is inadmissible against the accused as it amounts to a confession to a Police Officer. But there is no bar to using such a confession in favour of the accused."

11. Although this decision was not referred to by the later decision of the Madras High Court in **Mottai Thevar's** case: **AIR 1952 Mad 586** , the ratio therein is no different. The Bench consisting of their Lordships Mack and Somasundaram JJ. indeed a very eminent one laid down that :

"Where the accused immediately after killing the deceased goes to the police station and makes a clean breast of the offence, and the statement forms the first information of the offence, though the statement cannot be used against the accused, S. 25, Evidence Act does not bar its use in his favour."

Of course there was some difference between the two learned judges touching the need to retain or abrogate Ss. 25, 26 and 27 of the Evidence Act. The brief highlights of the stand taken by Mack J. in that behalf is in para 8 of the decision whereas the contrary stand taken by Somasundaram, J. is at para 9. Notwithstanding the ideological difference in the stands taken by the two judges, touching the amendment and repeal of Ss. 25, 26 and 27 of the Evidence Act, both fully agreed that the confession made to a Police Officer in custody while it could be used against the accused u/S. 27 of the Act, the ban aforesaid, however, did not preclude the accused from making use of the confession itself. Para 11 of the judgment which features the brief reasoning of Somasundaram, J. makes that aspect of the matter very clear. His Lordship observes:

"If it is to be used against the accused, then S. 25 is a bar and it cannot be admitted but it is to be used in favour of the accused, I do not think that S. 25 is a bar and the confession can well be admitted." (underline is by me to add emphasis).

A Division Bench of Madras High Court in the case of **Sudalaimani - Vrs.- State reported in 2014-2-LW (Crl) 372: 2014 (4) CTC 593**, while distinguishing the ratio laid down in **Mottai Thevar's** case (supra), held that if a confession is given to the police officer before the start of investigation, then it can be used in favour of the accused as held in **Mottai Thevar's** case. If confession is made after the commencement of the investigation, it cannot be used to give any benefit or advantage to the accused in the light of the ban imposed by section 162 of Cr.P.C.

P.W.3 in his evidence stated that he made correspondence to the R.T.O., Ganjam, Chatrapur to ascertain the ownership of the auto rickshaw bearing registration no.OR-07-N-1450 and it was reported to him that the name of the registered owner of the vehicle is appellant Sibaram Swain. Since in the case in hand, the immediate statement made by the appellant Sibaram Swain, the owner -cum- driver of the auto rickshaw after the vehicle was detained was before the start of investigation, in my humble view, he is not precluded from relying upon his confession for his own purpose or in support of his defence plea. The immediate statement was that he had no knowledge about the contents of the bags as the bags had been kept by the appellant Ratnakar Swain and that he was carrying him as well as the bags on payment of hire charges as stated by P.W.2, which is also the defence plea taken by the appellant Sibaram Swain in his accused statement coupled with the statements of both P.W.2 and P.W.3 that appellant Ratnakar Swain claimed ownership of the air bags and jerry basta is admissible under section 6 of the Evidence Act as *res gestae* as it is simultaneous with the incident or substantial contemporaneous that was made immediately after the occurrence. The essence of the doctrine of the *res gestae* is that fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. From the very beginning, the appellant Sibaram Swain had expressed his ignorance about the contents of the airbags as well as the jerry bag. Add to it, his conduct in stopping the vehicle when signal was given by the Excise officials to stop and in not trying to flee away from the spot is also another factor which goes against culpable state of mind. Subsequent conduct is

relevant and can be considered under section 8 of the Indian Evidence Act. This section lays down that the conduct of any party in reference to any fact in issue and conduct of any person, an offence against whom is the subject of any proceeding is relevant, whether it was previous or subsequent. The subsequent conduct of accused may be definite counter to his culpability totally inconsistent with innocence. I find no material on record about any previous acquaintance between the two appellants and even P.W.3 has stated that he had not directed his investigation to find out if there remained any relationship between the appellants. There is also no material that any such contract between the appellants to carry the bags with an exorbitant price taking risk. There is also no evidence that any such smell was coming out of the air bags or jerry basta to create suspicion in the mind of the driver. The circumstances appearing in the prosecution evidence are not of such a nature so as to give reasonable assurance to this Court that appellant had the knowledge or the required intention to carry the contraband articles. The prosecution has failed to discharge the initial burden to prove that the appellant had the knowledge that the vehicle he was driving was being used for transporting contraband articles. The evidence of the two official witnesses, the answers elicited from them in the cross-examination and from the circumstances, this Court entertains strong doubt regarding appellant's awareness about the nature of substance in the air bags and jerry basta found in his auto rickshaw and in my considered opinion, the appellant is successfully able to create a reasonable doubt, as part of his defence, to rebut the presumption of his guilt.

Thus, I am of the humble view that it cannot be said that the appellant Sibaram Swain had any knowledge of the nature of substance in the air bags and jerry basta and that he knowingly permitted his vehicle to be used for the commission of offence and it also cannot be said that he failed to account satisfactorily the possession of the contraband ganja found in the vehicle. In view of the foregoing discussion, the impugned judgment and order of conviction of the appellant Sibaram Swain cannot be sustained in the eye of law and accordingly, the same is hereby set aside.

11. Now coming to the contentions raised by the learned Amicus Curiae so far as appellant Ratnakar Swain is concerned, those are enumerated herein below:-

(i) There is statutory infraction of the provision under section 42 of the N.D.P.S Act which is mandatory in nature;

(ii) P.W.3 has not followed the provision under section 57 of the N.D.P.S. Act, which though directory in nature but cannot be totally ignored by the Investigating Officer inasmuch as such failure will have a bearing on the appreciation of evidence regarding arrest of the appellant and seizure of the contraband articles;

(iii) The brass seal given in the zima of P.W.2 was not produced at the time of production of seized ganja in Court for drawal of sample for comparison and the tampering of seal cannot be ruled out;

(iv) Serious prejudice has been caused to the appellants as P.W.3 who detected and seized contraband ganja, himself investigated the case and submitted prosecution report.

P.W.2 has stated that the appellant Ratnakar Swain was sitting on the rear seat of the auto rickshaw and four numbers of airbags and one jerry bag were lying on the backside of the rear seat and when the appellant was asked about the contents of those bags, he admitted that the bags had been kept by him and that he was travelling on payment of hire charges but he maintained silent with regard to the contents of those bags. P.W.2 further stated that the bags were subsequently found to be containing ganja. P.W.3 has almost stated in a similar manner except to the extent that when he asked as regards the contents of the airbags and the jerry basta to both the appellants, they remained silent though he stated that appellant Ratnakar Swain claimed ownership of those bags and jerry basta before him.

Whether there was statutory infraction of the provision under section 42 of the N.D.P.S Act:

P.W.3 stated that while he was in his office, on receipt of a telephonic information about transportation of ganja near Ambapua and Gopalpur junction area, he reduced the information in writing and immediately informed his superior authority i.e. Sri S.P. Gantayat, IIC of Excise vide Ext.7.

Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused. Section 42(2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Under section 42(1), if the empowered

officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. The copy of information taken down in writing under sub-section (1) or the grounds of belief recorded under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act has to be sent to his immediate superior official within seventy-two hours.

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, it is held as follows:-

> "10. The proviso to Sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide Sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to Sub-section (1), shall forthwith send a copy of his belief under the proviso to Sub-section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

In the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports 183**, the Hon'ble Supreme Court has held that the material difference between the provisions of sections 42 and 43

of the N.D.P.S. Act is that section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, section 43 does not contain any such provision and as such while acting under section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

In the case in hand, the seizure of contraband article was made from one auto rickshaw which is also a public carrier one as stated by P.W.3. The time of detection was during day time around 11.00 a.m. and the vehicle was seized at the public place carrying contraband articles. Therefore, in my humble view, section 43 of the N.D.P.S. Act would be attracted in the case and recording of reasons for his belief and for taking down of information received in writing with regard to commission of an offence before conducting search and seizure was not required. However, it is not a case where P.W.3 suddenly carried out search at a public place and detected contraband ganja in the auto rickshaw but he had already received the telephonic information about transportation of ganja while he was in his office and he has also come up with a case of compliance of section 42 of the N.D.P.S. Act.

An endorsement on Ext.7 shows that it was received on 04.07.2011 at 6.00 a.m. from P.W.3 and direction was given to P.W.3 along with the staff to detect the case and I.I.C, E.I. and E.B., Berhampur has put his signature. The endorsement has been marked as Ext.7/2 which has been proved by none else than P.W.3. In Ext.7, it is mentioned that the details of information has been entered in the information register i.e. C.1 but the information register has not been proved during trial. Similarly, I.I.C, E.I. and E.B., Berhampur has not been examined in the case to prove Ext.7. Even P.W.2 who stated to have carried Ext.7 to I.I.C, E.I. and E.B. as per the version of P.W.3, has not stated anything in that respect. However, nothing further has been elicited in the cross-examination of P.W.3 to disbelieve his evidence and even no suggestion is given by the learned defence counsel that Ext.7 is a fabricated document. Though P.W.3 admits that he had not noted the name of the person who had informed him over telephone in his C.D., but since he was required to maintain confidentiality in that respect, no fault can be found with P.W.3. Therefore, the contention regarding statutory infraction of the provision under section 42 of the N.D.P.S Act is not acceptable.

Whether P.W.3 has followed the provision under section 57 of the N.D.P.S Act:

In the case of **Sajan Abraham** (supra), it is held that section 57 of the N.D.P.S. Act is not mandatory in nature. When substantial compliance has been made, it would not vitiate the prosecution case.

In the case of **Manoj Kumar Panigrahi** (supra), the Hon'ble Supreme Court held as follows:-

> "12. Section 57 of the N.D.P.S. Act states that if an officer makes any arrest or seizure under this Act then he has to make a full report of all the particulars of such arrest and seizure to his immediate official superior within forty-eight hours next after such arrest or seizure..... Even though section 57 of the N.D.P.S. Act is held not be mandatory but the official conducting search and seizure cannot totally ignore such a provision which is directory in nature as the same has got a salutary purpose and if he ignores such a provision then adverse inference should be drawn against the prosecution."

P.W.3 has stated that on 05.07.2011 he submitted a report containing the details of search, recovery and seizure. He further stated that he had sent such detailed report to his superior officer through Dak book. Though P.W.3 could not recollect the name of the persons who carried the detailed report for delivery or the time of exact dispatch but that would not falsify the compliance of section 57 of the N.D.P.S. Act. In that view of the matter, it cannot be said that P.W.3 has ignored the provision under section 57 of the N.D.P.S. Act.

Whether the seal on seized contraband articles was tampered with:

Law is well settled as held in the case of **Herasha Majhi** (supra) that the prosecution has to prove that the contraband articles produced before the Court were the very articles which were seized and the entire path has to be proved by adducing reliable, cogent, unimpeachable and trustworthy evidence. Since the punishment is stringent in nature, any deviation from it would create suspicion which would result in giving benefit of doubt to the accused.

P.W.3 has stated that he sealed the air bags and also the jerry basta by using paper slip with his own brass seal under his signature and obtained signatures of the appellants and the witnesses and thereafter, handed over the brass seal in the zima of P.W.2. He proved the zimanama Ext.5/1. He further stated that after preparation of the seizure list in presence of witnesses and members of his party vide Ext.1/1, he had put a specimen impression of the brass seal used for sealing the seized materials on the seizure list and a copy of the seizure list was handed over to each of the appellants and the appellants put their signatures in token up the said receipt. He further stated that from the spot, he

directly came to the Court of Special Judge, Berhampur and made a prayer for collection of samples from the air bags and jerry bag for their onward transmission to DECTL, Berhampur at Chatrapur and his prayer was allowed and S.D.J.M., Berhampur collected the samples from each of the air bags and jerry basta and those were properly sealed by him. He further stated that P.W.2 received those sample packets and forwarding letter from learned S.D.J.M., Berhampur for carrying those to the laboratory.

P.W.2 has also stated that the bags were paper sealed and the brass seal of P.W.3 was put on the paper seal and the brass seal used for sealing was given in his zima as per zimanama Ext.5/1. P.W.2 produced the brass seal which he had taken on zima in Court at the time of giving evidence and the same has been marked as M.O.I.

In view of the evidence of two official witnesses, it appears that the seized articles were sealed at the spot by using paper slip and brass seal of P.W.3 was used for the said purpose which was given to P.W.2 which he produced at the time of trial. The seized articles were directly produced in the Court of learned Special Judge, Berhampur on the very day and the order sheet dated 04.07.2011 of the learned Special Judge also indicates about the production of the accused along with forwarding report, seizure list, memo of arrest, option given by the accused persons, zimanama of the brass seal, spot map, mal challan, statements of the appellants, statements of witnesses, experience certificate of P.W.3, prayer for drawal of sample, disclosure of grounds of arrest, training certificate of P.W.3, drugs testing chart, original registration certificate of auto rickshaw along with seized ganja. The learned Special Judge considered the prayer of P.W.3 on the very day for drawal of samples for necessary chemical analysis at Chemical Testing Laboratory, Chatrapur and to keep the seized ganja in the Court malkhana and the prayer is allowed and direction was given to the learned S.D.J.M., Berhampur for drawing samples from the seized ganja for sending the same for chemical analysis. The Malkhana clerk was directed to receive the seized ganja to be kept in Court malkhana as per the mal challan. The seized auto rickshaw was directed to be kept with P.W.3 in safe custody until further orders.

It further appears that on 04.07.2011, on perusal of the order of the learned Special Judge, Berhampur and in obedience of the said order, when P.W.3 produced the seized property in four numbers of air bags and one jerry basta marked as Sl. No.1 to 5 under his seal, the learned S.D.J.M. noticed that the seized properties were properly sealed by P.W.3 and the seals were intact. The seals were opened by P.W.3 in presence of learned S.D.J.M., Berhampur and out of each seized properties mentioned vide Sl. No.1 to 5, fifty grams each in two separate packets (in total ten packets) were separately drawn as samples and those sample packets were marked as Ext.A, A/1, B, B/1, C, C/1, D, D/1, E and

E/1 respectively and those were sealed under the personal seal of the learned S.D.J.M. and the rest of the seized properties contained in item No.1 to 5 were again resealed under the personal seal of learned S.D.J.M. The broken seals of I.O. were kept in a separate packet and it was also sealed under the personal seal of learned S.D.J.M. The sealed sample packets marked as Ext.A, B, C, D and E and a forwarding report being kept in another packet which was also sealed under the personal seal of the learned S.D.J.M. were handed over to P.W.2 for its production before the Chemical Examiner. The rest of the seized properties i.e. Sl. No.1 to 5, the sealed sample packets Ext.A/1, B/1, C/1, D/1 and E/1 along with sealed packets containing broken seal of the I.O. were handed over to P.W.3 to give it to malkhana clerk of Sessions Court at Berhampur. The part file prepared for drawal of samples was sent by the learned S.D.J.M. to the learned Special Judge, Berhampur.

Learned Amicus Curiae argued that the brass seal was given in the zima of P.W.2 under zimanama but the brass seal was not produced by P.W.2 when the air bags and jerry bags containing Ganja were produced for the first time for drawing of sample to be sent for chemical analysis. It was further argued that P.W.2 produced the envelope containing the seal (M.O.I) only at the time when he came to give evidence but it was not in a sealed condition.

P.W.3 stated that he had put the specimen impression of the brass seal used for sealing the seized materials on the seizure list marked as Ext.1. The seizure list was placed before the learned Special Judge, Berhampur on the date of seizure itself with the seized ganja directly from the spot when the appellants were produced in Court. The learned S.D.J.M. in the order sheet dated 04.07.2011 has specifically mentioned that the seized articles were properly sealed by the Investigating Officer and the seals were intact. In view of the aforesaid materials on record, merely on account of non-production of brass seal by P.W.2 on the date the seized articles were produced for the first time in Court cannot be ground to hold that seal on seized contraband articles was tampered with.

Whether any prejudice was caused to the appellants as P.W.3 who conducted search and seizure also investigated the case:

Learned counsel for the appellants contended that it was unfair on the part of P.W.3 in conducting search and seizure as well as investigation of the case and in submitting the prosecution report on completion of investigation.

According to him, the prosecution has not come forward with any explanation as to why any other empowered officer did not carry out the investigation.

In the case of **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020)10 Supreme Court Cases 120**, it is held that in a case where the informant himself is the investigator, by that itself it cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, on the sole ground that the informant is the investigator, the accused is not entitled to acquittal.

Nothing has been brought out in the cross-examination and learned Amicus Curiae has failed to point out any kind of bias or enmity on the part of the Investigating Officer (P.W.3) with the appellants and whether any serious prejudice has been caused to the appellants on account of investigation by P.W.3 or that he conducted any kind of perfunctory investigation. Therefore, this ground is not sustainable in the facts and circumstances of the case.

The defence plea taken by the appellant Ratnakar Swain that he was brought to the Excise Office in a vehicle where his signatures were obtained in different documents is not acceptable since from the evidence of P.W.3, it appears that from the spot, he directly came to the Court of the Special Judge, Berhampur.

12. In view of the foregoing discussions, I am of the humble view that prosecution has successfully established the case against the appellant Ratnakar Swain for commission of offence under section 20(b)(ii)(C) of the N.D.P.S. Act and the learned trial Court is quite justified in convicting the appellant for the said offence. The awarded sentence is minimum for the offence committed and therefore, the impugned judgment so far as appellant Ratnakar Swain needs no interference.

Accordingly, CRLA No.580 of 2013 filed by appellant Sibaram Swain is allowed. The appellant Sibaram Swain shall be released from custody forthwith if his detention is not required in any other case. CRLA No.44 of 2014 filed by appellant Ratnakar Swain stands dismissed.

Before parting with the case, I would like to put on record my appreciation to Mr. V. Narasingh, the learned Amicus Curiae for rendering his valuable help and assistance in disposal of CRLA No.44 of 2014 as well as the connected appeal. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only). Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

2021 (I) ILR - CUT- 890

S. K. SAHOO, J.

CRLA NO. 126 OF 2015

AMRESH CHANDRA BARIK .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRLA NO. 161 OF 2015

PREMANANDA SAHU .....Appellant

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – Offences under the NDPS Act – Appreciation of evidence – Independent witnesses do not support the prosecution case – Corroboration by official witnesses – Whether conviction can be based on the evidence of official witnesses? – Held, if the statements of the official witnesses relating to search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon to adjudicate the guilt of the accused – The court will have to appreciate the relevant evidence and determine whether the evidence of the police officer/excise officer is believable after taking due care and caution in evaluating their evidence. (Para 8)

(B) CRIMINAL TRIAL – Offences under NDPS Act – Whether compliance of section 42 is always necessary? – Held, where search and recovery of contraband article was made from public place and that too during day time after receipt of reliable information, the compliance of section 42 is not necessary as it is coming under the provision of section 43 of the Act. (Para 9)

(C) CRIMINAL TRIAL – Offence under the NDPS Act – Non-production of brass seal or facsimile seal impression or personal seal in court – Whether it vitiates the prosecution case? – Held, Yes. – Principles Discussed. (Para 10)

(D) CRIMINAL TRIAL – Offence under the NDPS Act – Seized contraband articles were not kept in Malkhana though the same were produced before the court in trial – Whether it vitiates the prosecution case? – Held, Yes. (Para 11)

For Appellant : (in CRLA No. 126 of 2015)	M/s. Anirudha Das S.K. Mishra, A. Das, S.K. Rout, Abanindra DasS.Ch. Mishra, D. Mishra.
For Appellant : (in CRLA No. 161 of 2015)	M/s. Subrat Kumar Das Pradeep Kumar Das & Debasis Sahoo.
For Respondent :	Mr. Arupananda Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 25.03.2021: Date of Judgment: 05.04.2021

S. K. SAHOO, J.

The appellant Amresh Chandra Barik in CRLA No. 126 of 2015 and appellant Premananda Sahu in CRLA No.161 of 2015 faced trial in the Court of learned Additional Sessions Judge-cum-Special Judge, Phulbani in G.R. Case No. 07 of 2013 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 26.09.2013 at about 9.35 a.m., they were found to be in unlawful possession of 32 kgs. 550 grams and 34 kgs. 600 grams of contraband ganja respectively near Surkapata Ghat road at village Majhipada on Phiringia Gochhapada road.

The learned trial Court vide impugned judgment and order dated 12.02.2015 found both the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for period of one year.

Since both the appeals arise out of one common judgment, with the consent of learned counsel for both the parties, those were heard analogously and are disposed of by this common judgment.

2. The prosecution case, in short, is that on 26.09.2013 at about 9.35 a.m. Madan Mohan Pradhan (P.W.4), Inspector in charge of Phiringia police station got information from reliable sources that the appellants were in possession of huge quantity of ganja i.e. flowering and fruiting tops of cannabis plants and were standing near Surkapata Ghat on Phiringia Gochhapada road waiting for transportation of ganja. As it was not possible to obtain a search warrant, P.W.4 arranged a raiding party comprising of the P.S. staff with a view to proceed to the spot for detection of the offence. He also informed Mr. Pravat Chandra Panigrahi (P.W.12), S.D.P.O., Sadar,

Phulbani over telephone about the proposal to conduct raid and entered the ground of belief in the Station Diary vide Entry No. 450 dated 26.09.2013. Copies of the ground of belief along with extract of Station Diary Entry were sent to S.D.P.O., Sadar, Phulbani as well as Superintendent of Police, Kandhamal. P.W.4 along with the raiding party members thereafter proceeded to the spot in a police jeep and on arrival at the spot, they found two persons were standing by the road side with some plastic and gunny packets. On seeing the arrival of the police team, those two persons started running, but they were apprehended soon. On query, those persons disclosed their names as Amresh Chandra Barik (appellant in CRLA No. 126 of 2015) and Premananda Sahu (appellant in CRLA No. 161 of 2015) and admitted to have kept ganja inside the plastic and gunny packets and waiting for transportation of the same. The appellants denied to have got any license or authority in support of possession of ganja. After observing the formalities under section 50 of the N.D.P.S. Act, both the appellants were searched in presence of the Executive Magistrate Nabin Kumar Patel (P.W.9) and on personal search of appellant Amresh Chandra Barik, cash of Rs.9050/-, one original driving license, two nos. of Nokia mobile phones were recovered and two plastic packets containing ganja were also recovered from his exclusive and conscious possession. Similarly, on personal search of appellant Premananda Sahoo, cash of Rs.5,800/- and one Micromax mobile phone were recovered and two plastic packets and one gunny packet containing ganja were also recovered from his exclusive and conscious possession. On weighment of the ganja recovered from the possession of appellant Amresh Chandra Barik by weighman Bhabani Shankar Sahu (P.W.3), it was found to be 32 kg. 550 grams and similarly the weight of ganja recovered from the possession of appellant Premananda Sahu were found to be 34 kg. 600 grams. P.W.4 collected two samples of 50 grams from each bag. After collection of the samples, P.W.4 stitched, packed and sealed the sample packets and the bulk ganja packets in presence of the Executive Magistrate and witnesses by using his personal brass seal. He prepared the seizure lists showing seizure of ganja and other articles from the appellants and obtained signatures of the Executive Magistrate, the witnesses and the appellants on the seizure lists and also affixed the specimen brass seal used on the seizure lists. He also obtained signatures of the Executive Magistrate, witnesses and the appellants on the sample packets and the packets containing bulk quantity of ganja and also affixed specimen seal on the packets. He left the weighing apparatus in the zima of weighman (P.W.3) and also left his personal brass seal in the zima of Dolagobinda Sahu (P.W.2) by executing Zimanama. He drew up a

plain paper F.I.R. (Ext.9) and requested P.W.12, S.D.P.O., Sadar, Phulbani who arrived at the spot as per the orders of S.P., Phulbani to take up investigation. The appellants were arrested and they along with all the seized articles were handed over to P.W.12.

P.W.12 after taking over charge of investigation from P.W.4 verified the case records, prepared spot map (Ext.13). He examined the witnesses and recorded their statements, resealed the exhibits already seized and sealed by P.W.4 and kept the articles at Phiringia police station malkhana after due entry in the Malkhana register. P.W.12 forwarded the appellants to Court on 27.09.2013 along with the material objects with a prayer to the learned Special Judge, Phulbani to send the seized exhibits for chemical examination by S.F.S.L., Bhubaneswar. As per the direction of the learned Special Judge, Phulbani, the learned S.D.J.M., Phulbani forwarded the seized exhibits to S.F.S.L., Bhubaneswar for chemical examination. P.W.12 submitted a detail report (Ext.21) to S.P., Phulbani and the said detail report and intimation letter (Ext.5) submitted by P.W.4 at the office of the S.P., Phulbani were seized on 05.12.2013 as per seizure list (Ext.12). The chemical examination report (Ext.22) indicated that the exhibits marked as A-1, B-1, C-1, D-1 and E-1 were found to contain flowering and fruiting tops of cannabis plant i.e. Ganja. On completion of investigation, on 20.01.2014 P.W.12 submitted charge sheet under section 20(b)(ii)(C) of the N.D.P.S. Act against the two appellants.

3. The appellants were charged under section 20(b)(ii)(C) of the N.D.P.S. Act to which they pleaded not guilty and claimed to be tried.

4. During course of trial, the prosecution examined twelve witnesses.

P.W.1 Gobinda Chandra Patra and P.W.2 Dolagobinda Sahu are witness to the seizure, but they did not support the prosecution case, for which they were declared hostile by the prosecution. They stated to have signed on some white papers as per the instruction of the police.

P.W.3 Bhabani Shankar Sahoo is a witness to the seizure but he also did not support the prosecution case and stated to have no knowledge about the incident, but he admitted to have signed on seven packets.

P.W.4 Madan Mohan Pradhan was the I.I.C. of Phiringia police station, who not only detected the appellants carrying contraband Ganja at

Surkapata Ghat on Phiringia Gochhapada road, but also seized it and prepared the seizure lists after weighment of contraband ganja and collected samples. He is the informant of the case.

P.W.5 Kashyap Pradhan was the Havildar attached to Phiringia Police Station and he accompanied P.W.4 to the spot. He stated about the recovery of contraband ganja from the possession of the appellants in five bags, collection of the samples by P.W.4. He is also a witness to the seizure of contraband ganja packets and sealing of those packets.

P.W.6 Santosh Kumar Dalbehera was the Constable attached to Phiringia Police Station and he is also a witness to the seizure of the station diary as well as Malkhana register of the police station as per seizure list Ext.10 and he is also a witness to the seizure of command certificate vide seizure list Ext.11.

P.W.7 Asanta Pradhan was the Constable attached to Phiringia Police Station and he is a witness to the seizure of command certificate as per seizure list vide Ext.11.

P.W.8 Binod Bihari Jani was the Constable attached to Phiringia Police Station and he accompanied P.W.4 to the spot. He stated about the recovery of contraband ganja along with other articles from the possession of the appellants and he is a witness to the seizure of contraband ganja.

P.W.9 Nabin Kumar Patel was the Tahasildar, Phiringia in whose presence the contraband ganja was seized from both the appellants, weighed and sample packets were prepared and those were also seized.

P.W.10 Bharat Kanhar was the Home Guard attached to Phiringia Police Station in whose presence the Malkhana register and station diary book were seized as per seizure list Ext.10.

P.W.11 Brahmananda Pradhan was the constable at D.P.O., Kandhamal who is a witness to the seizure of intimation letter of P.W.4 and detail report of P.W.12 as per seizure list Ext.12.

P.W.12 Pravat Chandra Panigrahi was the S.D.P.O., Sadar, Phulbani, who on receipt of information from P.W.4 regarding detection of ganja, proceeded to the spot, took charge of investigation of the case from P.W.4 and on completion of investigation submitted charge sheet.

The prosecution exhibited twenty two documents. Ext.1/3 is the seizure list relating to seizure made from appellant Premananda Sahu, Ext.2/3 is the seizure list relating to seizure made from appellant Amresh Barik, Ext.3/1 is the zimanama of brass seal, Ext.4/1 is the zimanama of weighing machine, Ext.5 is the intimation letter to S.P., Kandhamal, Ext.6 is the notice to appellant Amresh Chandra Barik, Ext.7 is the notice to appellant Premananda Sahu, Ext.8 is the order dated 26.09.2013 of Sub-Divisional Magistrate, Phulbani, Ext.9 is the F.I.R., Ext.10 is the seizure list dated 08.11.2013, Ext.11 is the seizure list dated 30.09.2013, Ext.12 is the seizure list dated 05.12.2013, Ext.13 is the spot map, Ext.14 is the forwarding report of appellants, Ext.15 is the forwarding report of exhibits for chemical examination, Ext.16 is the command certificate, Ext.17 is the acknowledgement for receipt of M.O., Ext.18 is the relevant entry no.450 in Station Diary Book, Ext.19 is the relevant entry no.462 in Station Diary Book, Ext.20 is the relevant entry in Malkhana register of Phiringia P.S. vide page No.4 (Sl. No.27/13), Ext.21 is the detail report submitted by P.W.12 to S.P., Kandhamal and Ext.22 is the Chemical Examination report.

The prosecution also proved nineteen material objects. M.Os. I, II, X, XI and XII are the packets containing bulk quantity of ganja, M.Os.III and IV are the original containers (plastic bags), M.Os. V and VI are the sample packets seized from the appellant Amresh Chandra Barik, M.Os. VII and VIII are the mobile phones of the appellant Amresh Chandra Barik, M.O. IX is the D.L. of appellant Amresh Chandra Barik, M.Os. XIII and XIV are the original containers (two plastic bags), M.O. XV is the original container (one gunny bag), M.Os. XVI, XVII and XVIII are the samples of ganja and M.O. XIX is the mobile phone of appellant Premananda Sahu.

5. The defence plea of the appellant was one of denial and it was pleaded that they have been falsely implicated in the case.

6. The learned trial Court after analysing the evidence on record came to hold that since ganja was seized from the possession of the appellants in a public place which was by the side of road at Surkapata Ghat on Phiringia Gochhapada road, therefore, there was no need for compliance of the provision of section 42 of the N.D.P.S. Act. However, compliance of such provision by the informant can be said to be an additional precaution. It was further held that P.W.4 meticulously followed the provision of section 50 of the N.D.P.S. Act during search and seizure. It was further held that no

illegality has been committed either by the informant (P.W.4) or the investigating officer (P.W.12) during deposit of the seized material objects at P.S. malkhana or submission of the same to S.F.S.L., Bhubaneswar for test. Learned trial Court further held that merely because P.W.12 reached at the spot during search and seizure, it cannot be said that there was any prejudice to the appellants as he was entrusted with the investigation of the case and thus, the prosecution has succeeded in proving that both the appellants were in conscious possession of the contraband Ganja and they were attempting for transportation of the same. Accordingly, the learned trial Court found both the appellants guilty of the offence charged.

7. Mr. Anirudha Das, learned counsel appearing for the appellant Amresh Chandra Barik challenging the impugned judgment and order of conviction argued that independent witnesses like P.Ws.1, 2 and 3 have not supported the prosecution case of search and seizure and therefore, it would be too risky to rely on the version of the official witnesses only to convict the appellant of the offence charged. Though P.W.4 stated to have sent the written intimation regarding ground of belief and extract of Station Diary entry to P.W.12 as well as to S.P., Kandhamal through C/555 Bhagaban Sahoo but the said Constable was not examined during trial to substantiate such aspect and even no one from S.P.'s office has been examined to prove the receipt of any written intimation from P.W.4 and therefore, compliance of section 42 of the N.D.P.S. Act is a doubtful feature in the case. He argued that the brass seal used for sealing the seized bulk ganja packets and sample packets, though stated to have been left in the zima of P.W.2 but it was not produced in Court at the time of initial production of such packets in Court for comparison before being sent for chemical examination, even the brass seal was not produced during trial. Though in the forwarding report of the exhibits sent for chemical examination, it is indicated that facsimile seal impression of personal seal of P.W.4 taken on a separate sheet was sent for comparison but there is nothing on record regarding preparation of such a separate sheet or its production before the learned Special Judge or Magistrate for verification. He further argued that the evidence is lacking as to who received the seized contraband articles and kept it in P.S. Malkhana and all the articles seized were not kept in Malkhana and there is no material as to when it was taken out of Malkhana for being produced in Court and therefore, the safe custody of the articles is a doubtful feature and as such benefit of doubt should be extended in favour of the appellant.

Mr. Subrat Kumar Das, learned counsel appearing for the appellant Premananda Sahu adopted the argument advanced by Mr. Anirudha Das, but added that in view of stringent punishment prescribed for the offence, the prosecution is required to prove its case beyond all reasonable doubt with clinching material on every aspect, which is lacking in the case.

Mr. Arupananda Das, learned Additional Government Advocate, on the other hand, supported the impugned judgment and contended that merely because independent witnesses did not support the prosecution case, the appellants cannot be acquitted particularly when there is clinching evidence adduced that packets containing contraband ganja were recovered from the exclusive and conscious possession of the appellants and the defence has failed to establish any kind of bias or enmity on the part of the Investigating Officer with the appellants. It is further contended that since the search and seizure was made in a public place, therefore, section 43 of the N.D.P.S. Act and not section 42 of the N.D.P.S. Act is applicable in the case. It is further contended that even though the brass seal was not produced in Court at any point of time but when the packets containing contraband ganja were produced by P.W.12 in Court, those were found to be in sealed condition and there is no material that the seal had been tampered with, therefore, possibility of manipulation with the seized articles, cannot be accepted. It is further contended that the learned trial Court has discussed the evidence of witnesses carefully and also assessed the documents proved by the prosecution meticulously and has rightly came to the conclusion that the case against the appellants has been proved beyond all reasonable doubt and there is no illegality or infirmity in the impugned judgment and order of conviction and therefore, the appeals should be dismissed.

Independent witnesses not supporting prosecution case:

8. Adverting to the contentions raised by the learned counsel for the respective parties and coming to the first point canvassed by Mr. Das, learned counsel for the appellant Amaresh Chandra Barik relating to non-supporting of the prosecution case regarding search and seizure by the independent witnesses, it is true that the independent witnesses like P.Ws.1, 2 and 3 have not supported the prosecution case for which they have been declared hostile by the prosecution and allowed to be cross-examined by the learned Special Public Prosecutor under section 154 of the Indian Evidence Act, 1872, but merely because the independent witnesses have turned hostile, the evidence of the official witnesses on that score cannot be disbelieved. Conviction can

be based solely on the testimony of official witnesses in an N.D.P.S. Act case but the condition precedent is that the evidence of such witnesses must be reliable, trustworthy and must inspire confidence. There is no absolute command of law that the testimony of the official witnesses should always be viewed with suspicion. Of course, while scrutinising the evidence, if the Court finds the evidence of the police officials as unreliable and untrustworthy, the Court may disbelieve them but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is based on the principle that quality of the evidence weighs over the quantity of evidence. The rule of prudence requires a more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them. Absence of any corroboration from the independent witnesses does not in any way affect the creditworthiness of the prosecution case. Non-supporting of the prosecution case by independent witnesses in N.D.P.S. Act cases is a usual feature but the same cannot be a ground to discard the entire prosecution case. If the evidence of the official witnesses which is otherwise clear, cogent, trustworthy and above reproach is discarded in such cases just because the independent witnesses did not support the prosecution case, I am afraid that it would be an impossible task for the prosecution to succeed in a single case in establishing the guilt of the accused. Therefore, the Court has got an onerous duty to appreciate the relevant evidence of the official witnesses and determine whether the evidence of such witnesses is believable after taking due care and caution in evaluating their evidence. In case of **Prasanta Kumar Behera -Vrs.-State of Orissa reported in (2016) 64 Orissa Criminal Reports 40**, it is held as follows:-

> "However, it is the settled principle of law that even though the independent witnesses in such type of cases for one reason or the other do not support the prosecution case, that cannot be a ground to discard the prosecution case in toto. On the other hand, if the statements of the official witnesses relating to search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon to adjudicate the guilt of the accused. The Court will have to appreciate the relevant evidence and determine whether the evidence of the Police Officer/Excise Officer is believable after taking due care and caution in evaluating their evidence."

Therefore, the contentions raised that for non-supporting of the prosecution case relating to search and seizure by the independent witnesses, it is very risky to rely on the version of official witnesses cannot be accepted and hence discarded.

Whether compliance of section 42 of the N.D.P.S. Act was a necessity:

9. Under section 42(1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. Section 42(2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused.

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, it is held as follows:-

> "10. The proviso to Sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide Sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to Sub-section (1), shall forthwith send a copy of his belief under the proviso to Sub-section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the

> article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

In the case in hand, the search and recovery of contraband ganja was made in a public place and that to during day time after receipt of reliable information, therefore, in view of the aforesaid decision, recording of reasons for belief and taking down of information received in writing with regard to the commission of an offence before conducting search and seizure was not necessary as it falls under section 43 of the N.D.P.S. Act and not under section 42 of the N.D.P.S. Act.

However, P.W.4 has himself come up with a case of compliance of section 42 of the N.D.P.S. Act on receipt of reliable information and he stated to have made Station Diary entry no.450 dt. 26.09.2013 (Ext.18) and informed his authorities over telephone and also through Special Messenger. He proved the intimation letter to S.P., Kandhamal marked as Ext.5 regarding detection of the offence in which he enclosed the extract of Station Diary entry. The intimation letter is dated 26.09.2013 and it was received in the S.P.'s office on 27.09.2013 and the stamp of S.P., Kandhamal with date and signature in token of its receipt appears on Ext.5. P.W.12 seized Ext.5 from the office of S.P., Kandhamal under seizure list Ext.12. P.W.11 was the constable at D.P.O., Kandhamal who stated about the seizure of the intimation letter Ext.5 as per seizure list Ext.12. P.W.12 has also stated about the receipt of information from P.W.4. Of course, in the F.I.R., it is mentioned that written intimation regarding ground of belief along with the extract of Station Diary entry was sent through C/555 Bhagaban Sahoo, who was neither shown as a charge sheet witness nor examined during trial, but in my humble view, that by itself cannot be a ground to discard the entire ocular as well as documentary evidence adduced by the prosecution in that respect. Thus, even though compliance of provision under section 42 of the N.D.P.S. Act was not necessary in the case but it seems that P.W.4 has complied with the same and I find no infirmity in it.

Non-production of brass seal or facsimile seal impression of personal seal in Court:

10. In the F.I.R. (Ext.9), the informant (P.W.4) has mentioned that after all the exhibits were properly sealed by using his personal seal on wax, facsimile seal impression of his personal s eal was embossed on the seizure

lists and on two separate sheets of paper and then his brass seal was handed over to P.W.2.

In his evidence, P.W.4 has stated to have affixed specimen seal on the sample packets and packets containing bulk quantity of ganja and then left his personal brass seal in zima of P.W.2 by executing Zimanama (Ext.3/1). His evidence is silent with regard to taking of any facsimile seal impression of his personal seal on separate sheets of paper.

Though P.W.2 admitted his signature as Ext.3 in Zimanama but he did not support the prosecution case to have received the personal brass seal of P.W.4.

The evidence of official witnesses like P.Ws.5, 8, 9 is also silent with regard to taking of facsimile seal impression of personal seal of P.W.4 on separate sheets of paper and also handing over of his brass seal by P.W.4 to P.W.2.

Even though the brass seal impression appears on each of the seizure lists (Exts.1/3 & 2/3) and those seizure lists were proved by some official witnesses including P.W.9, the Tahasildar, Phiringia but in view of the evidence on record, it is too difficult to accept that facsimile seal impression of the personal brass seal of P.W.4 was taken on two separate sheets of paper and that brass seal of P.W.4 was handed over to P.W.2. Neither the brass seal stated to have been given to P.W.2 nor the facsimile seal impression of the personal brass seal of P.W.4 stated to have been taken on two separate sheets of paper was produced in Court when the seized articles along with the appellants were produced on 27.09.2013.

The order sheet of the learned Special Judge dated 27.09.2013 indicates as follows:-

> ".....The I.O. has produced material objects vide Exhibits A, B, C, D, E, A-1, B-1, C-1, D-1, E-1, A-2, B-2, C-2, D-2, E-2, A-3, B-3, C-3, D-3 and E-3 in sealed condition before this Court and also filed a petition praying to send the Exhibits A-1, B-1, C-1, D-1 and E-1 to the Director, S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and opinion and to keep the Exhibits A, B, C, D, E, A-2, B-2, C-2, D-2, E-2, A-3, B-3, C-3, D-3 and E-3 in the District Court Malkhana on the grounds stated therein. Heard. Verified A, B, C, D, E, A-1, B-1, C-1, D-1, E-1, A-2, B-2, C-2, D-2, E-2, A-3, B-3, C-3, D-3 and E-3 and found those to be in *sealed condition* and each of the exhibit contain signatures of witnesses Dolagobinda Sahu, Gobinda Chandra Patra, signature of weighman Bhabani sankar Sahu,

> signature of E.M., complainant and both the accused persons. Accordingly, the prayer is allowed. Two separate sealed packets are also filed by the I.O. The Malkhana Clerk is directed to receive and keep the exhibits A, B, C, D, E, A-2, B-2, C-2, D-2, E-2, A-3, B-3, C-3, D-3 and E-3 in the Court Malkhana alongwith two separate sealed packets.
>
> Send the case record to the S.D.J.M., Phulbani for sending the Exhibits A-1, B-1, C-1, D-1 and E-1 to the Director, S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and opinion and return the case record after sending the material object."

On the very day, the case record was received by the learned S.D.J.M., Phulbani and he has observed as follows:-

> ".....I.O. has produced the Exhibits A-1, B-1, C-1, D-1 and E-1 (sealed packets) before me. Verified the exhibits and the same are sent to the Director, S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and opinion vide this office L. No.1747(4) dt.27.09.2013. The case record is submitted to the Court of Sessions Judge –cum- Spl. Judge, Phulbani after sending material objects."

Production of sealed packets of seized contraband article or sealed sample packets of such article in Court in itself is not sufficient to prove its safe custody before production. Handing over the brass seal to an independent, reliable and respectable person and asking him to produce it before the Court at the time of production of the seized articles in Court for verification are not the empty formalities or rituals but is a necessity to eliminate the chance of tampering with such articles. The Court before which seized articles are produced is also required to insist on for the production of brass seal or at least verify the specimen seal impression with reference to the seals attached to the seized bags or the sample packets, if the samples are collected by the officer conducting search and seizure before its production in Court and such verification aspect should be specifically reflected by the Court in the order sheet. The prosecution is required to prove the proper sealing of seized articles and complete elimination of tampering with such articles during its retention by the investigating agency. In absence of such procedure being strictly followed, there is every chance of tampering with the articles or with the seal. The entire path of journey of the contraband articles from the point of its seizure till its arrival before the chemical examiner has to be proved by adducing cogent, reliable and unimpeachable evidence as in a case of this nature, the punishment is stringent in nature otherwise there would be every chance of prejudice being caused to the accused.

In the case in hand, no plausible explanation is coming forth from the side of the prosecution for non-production of the brass seal stated to have been given to P.W.2 or the facsimile seal impression of the personal brass seal of P.W.4 stated to have been taken on two separate sheets of paper at the time of production of seized articles in Court and even at the time of trial. In my humble view, it amounts to a serious lacuna in the prosecution case. Mere mentioning by the I.O. (P.W.12) in the forwarding report for chemical examination that the facsimile seal impression of the personal seal of P.W.4 taken in a separate sheet used for the purpose of sealing of the exhibits was also sent for comparison, is not sufficient.

Therefore, taking of facsimile seal of personal seal of P.W.4 on separate sheets of paper and also handing over of his brass seal to P.W.2 remains shrouded in mystery and liable to be discarded.

Retention of seized contraband articles in safe custody:

11. P.W.12 has stated that he received the exhibits already seized and sealed by P.W.4 and kept the articles at P.S. Malkhana after due entry in the Malkhana register vide Entry no.27/13. On 08.11.2013, he seized Malkhana register of Phiringia police station on production by IIC, Phiringia police station in presence of witnesses and prepared seizure list Ext.10. He also proved the relevant entry in the Malkhana register of Phiringia police station vide page no.04 (sl. no.27/13) as Ext.20.

P.W.10 Bharat Kanhar who was the Homeguard attached to Phiringia police station also proved the seizure of Malkhana register by P.W.12.

On the perusal of the true copy of the Malkhana register (Ext.20), the entry no.27/13 dated 26.09.2013 indicates in column no.3 regarding receipt of one Micro max mobile phone, cash of Rs.5,800/-, bulk quantity of ganja kept in a plastic pocket weighing 20 Kg. 450 gms. marked as Ext.C, original sample ganja of 50 gms. marked as Ext.C-1, duplicate sample ganja of 50 gms. marked as Ext.C-2, another plastic packet of bulk quantity ganja marked as Ext.C-3, another bulk quantity of ganja kept in plastic packet weighing 8 Kg. 850 gms. marked as Ext.D and original sample ganja of 50 gms. marked as Ext.D-2.

At this stage, on perusal of the evidence of P.W.4, it reveals that he has proved M.Os.I and II to be the packets containing bulk quantity of ganja,

M.Os. III & IV to be the original containers (plastic bags), M.Os. V & VI to be the sample packets seized from the possession of appellant Amresh Chandra Barik, M.Os. VII & M.O. VIII to be the mobile phones and M.O. IX to be the driving licence of Amresh Chandra Barik respectively. Similarly, he has proved M.Os. X, XI, XII to be the packets containing bulk quantity of ganja, M.Os. XIII, XIV & XV to be the original containers (two plastic bags & one gunny bag), M.Os. XVI, XVII, XVIII to be the sample containing ganja and M.O. XIX to be mobile phone seized from the possession of the appellant Premananda Sahoo.

Thus, it is clear that all the articles seized by P.W.4 on 26.09.2013 were not entered in the Malkhana register (Ext.20) nor kept in Malkhana of Phiringia police station on 26.09.2013. No explanation is coming forth from the side of the prosecution as to where the other articles were kept. Even though number of material objects which were marked as exhibits were produced in Court on 27.09.2013 as reveals from the order sheet of the Court as indicated in the preceding paragraph but very few exhibits were kept in Malkhana. Out of the sample packets marked as Exts.A-1, B-1, C-1, D-1 and E-1 which were sent for chemical examination as per the forwarding report Ext.15 and were examined as per the chemical examination report Ext.22, only Ext.C-1 was entered in Malkhana register and not the other exhibits. The column no.5 of the Malkhana register which relates to where, when, by whom and the circumstances under which found has been left blank. Column no.6 which relates to date of receipt at police station is also kept blank, Column no.7 which relates to date and manner of disposal etc. has also been left blank.

In the case of **Ramakrushna Sahoo –Vrs.- State of Odisha reported in (2018) 70 Orissa Criminal Reports 340**, it is held as follows:-

> "Rule 119 of the Orissa Police Rules which deals with malkhana register states, inter alia, that all the articles of which police take charge, shall be entered in detail, with a description of identifying marks on each article, in a register to be kept in P.M. form No. 18 in duplicate, and a receipt shall be obtained whenever any article or property of which the police take charge is made over to the owner or sent to the Court or disposed of in any other way and these receipt shall be numbered serially and filed, and the number of receipts shall be entered in column No. 7. Therefore, it is clear that whenever any article is seized and kept in police malkhana, details thereof should be entered in the malkhana register and while taking it out, the entry should also be made in such register. This would indicate the safe custody of the articles seized during investigation of a case before its production in Court."

No other staff of Phiringia police station including P.W.4, the Inspector in charge of Phiringia police station stated that all the articles seized under seizure lists Exts.1/3 and 2/3 were kept in the malkhana. Therefore, the keeping of the seized articles in safe custody before its production in Court is a doubtful feature.

12. In view of the foregoing discussions, when the brass seal of P.W.4 with which bulk quantity and sample packets of contraband ganja were sealed so also the specimen seal impression stated to have been taken in separate sheets were not produced in Court either at the time of production of the seized articles in Court for verification or during trial and when all the seized articles including four out of the five sample packets sent for chemical examination were not kept in the malkhana of Phiringia police station as is evident from Malkhana register and when the safe custody of the contraband articles seized before its production in Court on 27.09.2013 is a doubtful feature and tampering with the same during its retention by investigating agency is not completely ruled out, it cannot be said that the prosecution has successfully established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants beyond all reasonable doubt.

Therefore, the impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is not sustainable in the eye of law.

Accordingly, both the Criminal Appeals are allowed. The appellants Amresh Chandra Barik and Premananda Sahoo are acquitted of the charge under section 20(b)(ii)C) of the N.D.P.S. Act. The appellants who are now in jail custody be set at liberty forthwith, if their detention is not required in any other case.

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

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2021 (I) ILR - CUT- 906

P. PATNAIK, J.

CRLA NOS. 363, 389 & 390 OF 2018

TAPAN GARNAIK @ TAPAN KUMAR GARNAIK …….Appellant

.V.

STATE OF ORISSA …….Respondent

CRLA NO.389 OF 2018

MANOJ MOHAPATRA ……..Appellant

.V.

STATE OF ORISSA ……..Respondent

CRLA NO.390 OF 2018

NIRANJAN JENA ……Appellant

.V.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Offences under sections 120-B, 468,470 of Penal code read with 13 (1) (d) of the Prevention of Corruption Act – Allegation of misappropriations of public money through false voucher without constructing the public road – The D.D.O (Executive Engineer) neither has been arrayed as a accused nor as a charge sheet witness – Accused pleaded that, the executive engineer being the D.D.O has cleared the bill and also the wok was verified after two years of its completion that means after the end of two rainy seasons – Pleas of the accused considered – Held, when the execution of work was properly done under the supervision of the executive engineer, who has not been arrayed as an accused and the payment of bills made by the Executive Engineer cannot be presumed that excess amount was paid for the disputed work – The question of conspiracy or preparations of false vouchers by the accused persons are based on surmise and conjectures – Conviction set aside.

CRLA NO.363 OF 2018

For Appellant : Mr. Gourimohan Rath, S.S. Padhy & A.P. Rath
For Respondent : Mr. Sanjay Kumar Das,Standing Counsel (Vig.)

CRLA NO.389 OF 2018

For Appellant : Mr. Sidharth Sankar Padhy, A.P.Rath & M. Chinmayee.
For Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vig.)

CRLA NO.390 OF 2018

For Appellant : Mr. Gopal Krushana Mohanty
For Respondent: Mr. Sanjay Kumar Das,Standing Counsel (Vig.)

JUDGMENT Date of Hearing : 18.03.2021: Date of Judgment: 29.04.2021

P.PATNAIK, J.

The above mentioned three separate appeals have been preferred by the respective appellants challenging the common judgment dated 24.04.2018 passed by the learned Special Judge (Vigilance), Sundargarh in CTR Case No.20 of 2007 convicting and sentencing each of the above named appellants and to undergo R.I. for two years and to pay a fine of Rs.10,000/- (rupees ten thousand) in default of payment of fine to undergo a further period of rigorous imprisonment for three months under each of the offences under Section 120-B, 468/120-B, 471/120-B and 420/120-B of the Indian Penal Code (in short the 'I.P.C.')

Further the appellants in CRLA Nos.363 of 2018 and 390 of 2018 being the public servant were also sentenced to undergo R.I. for two years and to pay a fine of Rs.10,000/- in default on payment of fine amount to undergo further period of R.I. for three months on each of the offences under Section 477-A, I.P.C. and under Section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988.

All the above substantive sentences awarded to each of the convicts were directed to run concurrently with the benefit of set off.

02. The gravamen of the prosecution case, in a nut shell, is that on the basis of allegation of defalcation of Government money by recording inflated measurement in the execution of the road work "S/R to Lathikata-Timjore Road from RD 1/300 Mtrs. to 1/865 Mtrs. for the year 2001-2002, an enquiry was undertaken by the Vigilance Wing. During enquiry, it came to light that the said work was awarded to Contractor, Manoj Mohapatra vide Agreement no.308F/2 for value of Rs.1,99,857/- . Pursuant to the agreement, the items of the work were to be executed for metaling, earth work, surface dressing and seal coating. The work commenced on 09.01.2002 and completed before 31.03.2002. After completion of the work, appellant, Niranjan Jena, Junior Engineer took the measurement and the appellant, Tapan Kumar Garnaik, Assistant Executive Engineer conducted the check measurement and basing on their measurement and check measurement, final bill was prepared and appellant-Manoj Mohapatra, the Contractor was paid Rs.1,74,565/- after deducting Rs.25,068/- towards royalty, R.D., I.T. and O.S.T. The Technical Wing inspected the work on 11.01.2004 and 12.01.2004 in presence of

appellant Niranjan Jena and Tapan Kumar Garnaik and found that works were executed for 200 meters from RD 1300 meters to RD 1500 meters and there was no work from 1500 meters to 1865 meters and the inspection team calculated the value of work executed to be Rs.77,829/- and there was excess payment of Rs.96,736/- after deducting Rs.25,685/-. After inspection, a memorandum was prepared.

On the basis of enquiry, the DSP (Vigilance), Rourkela lodged a written report before the Superintendent of Police (Vigilance), Sambalpur, and Sambalpur Vigilance P.S. Case No.05 of 2005 was registered and on the direction of the Superintendent of Police (Vigilance), Sambalpur, he continued with the investigation. During the course of the investigation, the DSP Vigilance seized the relevant measurement book, Tender file, Agreement, Tender Paper, final bill, running account bill, files relating to disputed work and other documents. During investigation, it revealed that the accused persons have entered into a criminal conspiracy to cheat the Government and by corrupt illegal means obtained pecuniary advantage of Rs.96,736/- by creating false bills.

Sanction order was obtained against the appellant Niranjan Jena and Tapan Kumar Garnaik. On completion of investigation, charge sheet was submitted against all the accused persons, namely, Niranjan Jena, Tapan Kumar Garnaik and Manoj Mohapatra.

03. The learned Trial Court on the basis of allegation and enquiry decided the case on the following points:-

(i) Whether all the accused persons were a party to a criminal conspiracy by agreeing to do or caused to be done any illegal act to cheat the Govt. and to cause loss of Rs.96,736/- to the Govt. Exchequer by creating false vouchers and falsifying accounts?

(ii) Whether all the accused persons in pursuance to their conspiracy have cheated the Govt. inducing to deliver an amount of Rs.96,737/-?

(iii) Whether all the accused persons in pursuance to their conspiracy created false vouchers/bills intending to be used for the purpose of cheating the Govt.?

(iv) Whether all the accused persons in pursuance to their conspiracy fraudulently used the false bills as genuine which they knew at the time of use to be a forged bill?

(v) Whether the accused persons, namely, Niranjan Jena and Tapan Kumar Garnaik during their incumbency as Junior Engineer and Assistant Executive Engineer and being public servants, obtained pecuniary advantage?

(vi) Whether accused Niranjan Jena and Tapan Kumar Garnaik being Govt. servants willfully and with intent to defraud, falsified the accounts and vouchers?

04. During trial, the prosecution in order to bring home the charge examined altogether eight witnesses. On the other hand, the defence has examined two witnesses.

05. **P.W.1** was the Head clerk of the R.W. Division, Sundargarh. He proved the designation and employment of the appellant, Niranjan Jena, as Junior Engineer and Tapan Kumar Garnaik as Assistant Executive Engineer during the respective period.

P.W.2 who was working as Junior Clerk in R.W. Division, Sundargarh produced the running account bills being no.330 dated 30.03.2002 before the Deputy Superintendent of Police (Vigilance) Rourkela and the seizure list, which was marked as Ext.1 was prepared in his presence. Ext.1/1 is his endorsement with signature. P.W.2 further deposed that the bill submitted by him was prepared by the Junior Engineer, Niranjan Jena and after preparation of the Junior Engineer was to submit the same to Assistant Executive Engineer, R.W. Sub-division, Kuanrmunda and the Assistant Executive Engineer in his turn was to submit the same before the Executive Engineer R.W. Division, Sundargarh.

P.W.2 in his cross-examination deposed that he did not deal with the bill marked as Ext.2 and he had no knowledge as to how the bill was prepared and how it was passed for payment. P.W.2 had no personal knowledge regarding the contents of Ext.2. His statement regarding the bill is based on the procedure adopted in the department regarding the bill.

P.W.3 was the Divisional Accounts Officer, R.W. Division, Sundargarh, who deposed about execution of the work by the appellants. He further deposed regarding the position of employment of appellants, Niranjan Jena and Tapan Kumar Garnaik so also the Contractor Manoj Mohapatra, to whom he knew. He proved the Measurement Book, Ext.3, which was maintained by appellant Niranjan Jena, Junior Engineer regarding measurement of the aforesaid road work. He also proved the signature of the Junior Engineer and Assistant Executive Engineer (both the appellants) in the respective pages of the measurement book, which was noted by the Junior Engineer and check measured by the Assistant Executive Engineer. He also proved Ext.20 in receipt vide voucher no.73 dated 08.06.2002 regarding

release of payment of the withheld amount of Rs.80, 884/- to the appellant contractor Manoj Mohapatra.

P.W.4 was the Junior Assistant in the Office of the Rourkela Development Authority. He was a seizure witness to the seizure list marked as Ext.4.

P.W.5 was the Junior Engineer in Rourkela Municipality, who was on the direction of the Executive Officer of Rourkela Municipality pursuant to the requisition of the Vigilance authority had accompanied the team on 11.01.2004 to the spot of work as allegedly executed by the said contractor, Manoj Mohapatra. He vividly described the details in his deposition, besides proved his signature in the memorandum (Ext.5) and Bar Chart (Ext.6).

P.W.6 was the Assistant Engineer of M.I. Sub-division, Rourkela, who also accompanied the inspection team on 11.01.2004 to the spot of the work as executed by the Contractor, Manoj Mohapatra. He also corroborated the evidence of P.W.5.

P.W.7 was the informant-cum-First Investigating Officer, who described in detail about the enquiry, spot visit, lodging of F.I.R. and investigation of the matter as per the direction of the Superintendent of Police (Vigilance), Samblapur. He had neither any personal interest in the present case nor any enmity against the appellants. He has proved so many material documents which have been marked as Exhibits on behalf of the prosecution.

P.W.8 was the subsequent I.O., who after taking over the charge from P.W.7 on 09.08.2006 obtained sanction order from the competent authority and submitted charge-sheet.

06. On the other hand, defence has examined two witnesses. D.W.1 was the Junior Engineer, R.W. Division, Sundargarh from the year 2003 to 2006. He deposed that during his tenure he had executed the S/R work from RD 1/5 Kms. to 2/15 kms. Was repaired. Before it was repaired the entire road was of BT. D.W.2 was the Superintending Engineer in Works Department deposed about the defect liability clause in the Agreement. The defence has exhibited the document, Ext.-A.

07. After closure of the prosecution case, the appellants were put questions under Section 313, Cr.P.C. about the incriminating materials to which they denied.

08. Learned Special Judge(Vigilance), Sundargarh having placed implicit reliance on the evidences of P.Ws.5, 6 and 7 and being corroborated by P.W.3 and on the material documents, Exts.3, 5, 6, 7, 8, 10 and 20 has passed the impugned judgment dated 24.04.2018, which is under challenge.

09. Mr.Ashok Mohanty, learned senior counsel for the appellant in CRLA No.363 of 2018 has strenuously urged that the complainant (P.W.7) himself is the Investigator and proceeded with the investigation of the complaint. As such the investigation cannot be construed to be fair and impartial and has certainly prejudiced the accused. Learned senior counsel further submitted that the law mandates that for the purpose of fair and impartial investigation, it must be carried out by the person who is absolutely impartial and unbiased. In this respect, the learned senior counsel referred to the decision reported in AIR 1995 SC 2339 (Megha Singh-vrs.-State of Haryana) and (2017) Vol.68 OCR 156 (Sijiv.G.-vrs.-State of Orissa.)

Learned senior counsel further submitted that sanction order is not valid as P.W.7 in his cross-examination has failed to state which documents have been placed before the sanctioning authority to accord sanction. In this respect, learned senior counsel has referred to the decision reported in 1985 CRLJ 563 (Baikunthanath Mohanty-vrs.-State of Orissa). It has been further argued that there is absolutely no reason as to why the inspection was made on 12.01.2004 and memorandum (Ext.5) was prepared while the F.I.R. was filed more than a year after and there is no whisper in the prosecution evidence about any enquiry before or thereafter. Therefore, it creates doubt on the veracity of the prosecution case, particularly when such a long delay has not been explained. As per law, a preliminary enquiry should be made time bound and in any case, it should not exceed 7 days. The cause of such delay must be reflected in the General Diary Entry which is singularly absent in the prosecution case. In order to substantiate his submission, learned senior counsel has referred to the decision reported in (2014) 57 OCR (SC) 1 (***Lalita Kumari-vrs.-Government of U.P.)***

It has been further argued by the learned senior Counsel that after completion of the work, the appellant as Assistant Executive Engineer has taken measurement. For this the Measurement Book is pressed into service. Ext.3 is self contradictory, manipulated and can never be relied for the purpose of conviction. It purports to show a signature dated 08.02.2002 of the appellant in the MB to show that the appellant had check measured the work after its completion and therefore, the prosecution has implicated the

appellant. It is the admitted position of the prosecution case that the appellant was Assistant Executive Engineer from 19.05.2001 to 08.02.2002. Therefore, the entire allegations against the appellants have to be during this period and not beyond 08.02.2002, and there is absolutely no allegation against the appellant as Executive Engineer, more particularly when the prosecution has made out a positive case that the Executive Engineer who passed the bill for payment was not the appellant, but was one Basudev Bala as per the evidence of P.W.3. So, the appellant's implication can only be confined to his incumbency as Assistant Executive Engineer and that too during 09.01.2002 and 08.02.2002. For this reason, the prosecution is dragging Ext.3 to show that the appellant has signed on 08.02.2002. But as already stated this Ext.3 is a manipulated document on the face of it. Besides the fact that entries have been scored through and over written without any endorsement/signature, it can be clearly seen that the disclosure made therein is self contradictory inasmuch as the very documents show that the date of completion is 31.03.2002, which is also the prosecution case. So it belies logic as to how a check measurement was made before completion even by any authority, particularly when the prosecution has not made out a case that the appellant had allegedly made any part measurement before completion of work. On the contrary, it is the positive case of the prosecution that the appellant took measurement after completion of work as Assistant Executive Engineer which is contrary to records as per the own prosecution case.

Learned counsel has highlighted on the sustainability of the prosecution case by advancing argument that the evidence of P.W.5 who deposed that the calculation had been made on the bill extract as no Measurement Book was made available. So, when Ext.2 (bill) and Ext.3 (Measurement Book) are self contradictory, how a calculation arrived there from the basis of conviction. Besides P.W.5 has deposed that his allegation that no work has been done is based on suspicion though he states that the road could have been damaged after the Defect Liability (DL) period due to rain within a period of two years. He clearly admits that the bill does not contain the details of measurement which can only be ascertained from the Measurement Book which was admittedly not produced. Further it has been argued that the so-called spot visit was after two years of the DL period and the work done had suffered the vagaries of nature rudely in the meantime. Since the prosecution has not come up with any dereliction, conviction cannot be based on mere suspicion. P.W.6 admits that they have not measured the complained road distance from 1500 Mtrs. to 1865 Mtrs. His

evidence is relevant to demolish the prosecution case which positively claims that the offending portion was not laid at all. But this witness says that from 1300 Mtrs. to 1500 Mtrs. the road was in good condition, but from 1500 Mtrs. To 1865 Mtrs., the road was not intact condition. Therefore, the existence of the road cannot be disbelieved. The alleged deteriorating condition can be attributable to the long passage after the Defect Liability (DL) in short) period and passing of two rainy seasons, traffic and drainage condition. Longevity of the road depends on the soil because of the road which has not been done in the case. More so, P.W.5 clearly admits not to have mentioned the road condition, but has admitted that there was no drainage on the side of the road.

Learned senior counsel assailed the evidence of P.W.7, the I.O. by submitting that P.W.7, the I.O. cannot be believed on the face of it. The preamble of his allegation starts by accusing the appellant in making payment on the measurement done as Assistant Executive Engineer. The records, however, clearly show that the payment was made after the Executive Engineer passed the bill on 28.03.2002 on which date admittedly the appellant was not the Assistant Executive Engineer. The bill can only be paid after completion of work, and that too after the Executive Engineer was satisfied that the work has actually been done as per the agreement. From the records, it is clear that the bill was passed on 28.03.2002 and work was completed on the same day, but the prosecution has given two dates of completion by saying that it was 31.03.2002. This witness also deposed that inspection was done on 11.01.2004, but the memorandum was prepared in his office on 12.01.2004. To cover up the laches P.W.7 deposed that the rough calculation was prepared on 11.01.2004 from which Ext.5 was prepared, but the so-called rough calculation sheet did not see the light of the day. Apart from that P.W.7's evidence is quite contradictory to the evidence of P.W.6. On one hand, P.W.6 deposed that there is no work from 1500 Mtrs.to 1865 Mtrs.. On the other hand P.W.6 deposed that the said portion was not intact, but does not say that it does not exist. Further he admits not to have taken any photograph of the disputed portion. He also admitted that the appellant stated before him that the damage was due to heavy rain and flood in September, 2003 which statement has not been controverted. He also admits that he is the informant as well as the I.O. which is contrary to the decision of the Hon'ble Apex Court referred to supra.

Learned senior counsel further submitted that Ext.5 reveals that the so-called calculation done on 12.01.2004 in the Vigilance Office amounted to an excess payment of Rs.98,119/-, but the sanction order shows the amount to

be Rs.96,736/-. Therefore, the prosecution is not sure about the particular derelicted amount only for the reason that there was absolutely no calculation which the prosecution has admittedly arrived at an imaginary amount without measurement which was clearly borne out of records. Further it has been argued that the prosecution has admitted in evidence that they have not followed the I.R.C. guidelines to ascertain the quantity of the work. Besides the defence witnesses who are experts in the line and their evidence has not been controverted on such technical expertise, have clearly stated that in the absence of MB, the measurement cannot be calculated, particularly when the P.Ws have admitted not to have measured the length, depth and breadth of the work and in view of the long delay. In that respect, the decision reported in 2012 (2) ILR-CUT 1031 (***Birabar Sethi alias Birendra Sethi-vrs.-State of Orissa***) has been referred to. Learned senior counsel for the appellant further submitted that the prosecution has failed to establish that the appellant has abused his official position with dishonest intention causing pecuniary benefit to himself and there is no evidence to connect him with the criminal conspiracy. There is also not a single evidence to the effect that he has misappropriated any Government money particularly when all the witnesses have categorically stated that the agreement money including the alleged excess money have been paid to the Contractor through Voucher (Ext.20).

10. Mr.Gopal Krishna Mohanty and Mr.Gouri Mohan Rath, learned counsel for the appellants in CRLA Nos.389 of 2018 and 390 of 2018 have more or less adopted the argument advanced by the learned senior counsel for the appellant in CRLA No.363 of 2018.

11. As against the submission of the learned counsel for the appellant, Mr.Sanjay Kumar Das, learned counsel for the Vigilance Department have vociferously submitted that the prosecution has been able to prove its case beyond all reasonable doubt because of the following circumstances.

a) Learned counsel for the State Vigilance submitted with vehemence that according to P.Ws.5,6 and 7 on 11/12.01.2004 they inspected the work site and pursuant to their physical inspection, they arrived at a conclusion that in fact the special repair work to the S/R Road from Lathikata-Timjore from 1300 meters to 1500 meters (i.e. 200 meters) was done, but there was no work from 1500 meters to 1865 meters. The value of executed work was assessed at Rs.77,829/- only.

b) Learned counsel for the State Vigilance further submitted that in order to corroborate the evidence of P.Ws.5,6 and 7, the memorandum vide Ext.5 was prepared in which all the prosecution witnesses and the appellants in CRLA Nos.363 and 390 of 2018 who were physically present on the day of physical inspection of the disputed work, signed on the said Ext.5. Further a Bar Chart of the nature of work done vide Ext.6 was also prepared, in which it has been clearly mentioned that no work had been taken up from RD 1500 meters to 1865 meters.

c) Learned counsel for the State Vigilance further submitted that the vital document i.e., Agreement with the appellant in CRLA No.389 of 2018, Manoj Mohapatra was seized, proved and marked as Ext.8 bearing No.308/F/2 of 2001-2002 which was entrusted to the convicted Contractor for a total amount of Rs.1,99,857/-. So also the estimate of work document was seized, proved and marked as Ext.10. The main document which proved the case of the prosecution was the Measurement Book shortly known as M.B. marked as Ext.3 in which the details of execution of the disputed work have been reflected.

d) Learned counsel for the State Vigilance further submitted that according to the evidence of P.Ws.5,6 & 7 and also corroborated by P.W.3, the then Divisional Accounts Officer, R.W. Division, Sundargarh, prosecution has been able to well prove that the appellants have entered into conspiracy and without any execution of 365 meters of disputed work, there was excess payment of Rs.96,736/- made to the executants (appellant in CRLA No.389 of 2018) for which the appellants in CRLA no.363 of 2018 and 390 of 2018 being the public servants dishonesty cheated theGovernment by misutilising their official position and obtained pecuniary advantage of Rs.96,736/- by corrupt and illegal means for which both of them were found guilty of the alleged offences by the learned trial court.

e) Learned counsel for the State Vigilance further submitted that the learned trial court has elaborately discussed and assessed the evidence on record minutely and have also relied on material documents like Exts.3,5,6,7, 8,10 and 20 which helped the Court to arrive at the conclusion regarding the commission of the crime.

f) Learned counsel for the State Vigilance further submitted that the learned trial court has appreciated the oral as well as documentary evidence and has convicted and sentenced the appellants under different sections of the

Indian Penal Code as well as under the Prevention of Corruption Act, 2988 for which the appeals filed by all the appellants are liable to be dismissed by confirming the judgment dated 24.04.2018 passed by the learned trial Court in CTR Case no.20 of 2007.

Apart from the aforesaid submissions, Learned counsel for the State Vigilance in order to support his submissions has relied upon the decision reported in AIR 2005 SC. 119 (State of West Bengal-vrs.-Kailash Chandra Pandey wherein the Hon'ble Apex Court has been pleased to held that

> "It is needless to reiterate that the appellate Court should be slow in re-appreciating the evidence. This Court time and again has emphasized that the Trial Court which has the occasion to see the demeanour of the witnesses and it is in a better position to appreciate it, the Appellate Court should not lightly brush aside the appreciation done by the Trial Court except for cogent reasons."

Learned counsel for the State Vigilance has relied upon the decision reported in AIR 2004 STPL 5680 (S.C.) (**State represented by Inspector of Police, vigilance Anti-corruption, Tiruchirapalli, T.N.-vrs.-V.Jayapaul**) wherein the Hon'ble Apex Court has been pleased to held at para-10 that

> "We find no principle or binding authority to hold that the moment the competent Police Officer, on the basis of information received makes out an F.I.R. incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the Investigating Officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a board and unqualified proposition, in the manner, in which it has been done by the High Court that whenever a Police Officer proceeds to investigate after registering the F.I.R. on his own, the investigation would necessarily be unfair and biased."

Learned counsel for the State Vigilance has relied upon the decision reported in AIR 2015 S.C. 1206 (Vinod Kumar –vrs.- State of Punjab) wherein the Hon'ble Apex Court has been pleased to held at paras-27 & 28 that

> "27. xxxx xxx One of the contentions that was canvassed was that P.W.8, who lodged the F.I.R. had himself conducted the investigation and hence, the entire investigation was vitiated. The court referred to the decision in Jayapaul (AIR 2004 SC 2684) (supra) and opined that – "In the instant case P.W.9 conducted the search and recovered the contraband articles and registered the case and articles seized from the appellants was narcotic drug and the counsel for the

> appellants could not point out any circumstances by which the investigation caused prejudice or was biased against the appellants. P.W.8 in his official capacity gave the information, registered the case and as part of his official duty later investigated the case and filed a Charge Sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation.
>
> 28) In the instant case, P.W.8 who was a member of raiding party had sent the report to the Police Station and thereafter carried the formal investigation. In fact, nothing has been put to him to elicit that he was any way personally interested to get the appellant convicted. xxx xxx xxx"

Learned counsel for the State Vigilance has relied upon the decision reported in AIR 1960 SC 889 (***Jaikrishnadas M.Desai & another-vrs.-State of Bombay***) wherein the Hon'ble Apex Court has been pleased to held at para-6 that

> "6. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of Criminal breach of trust may not in all cases be founded merely on his failure to account for the property entrusted to him or over which he has dominion, even when a duty to account is imposed on him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made."

Learned counsel for the State Vigilance has relied upon the decision reported in AIR 2017 SC 3772 (**Rajiv Kumar-vrs.-State of U.P. & another**) wherein the Hon'ble Apex Court has been pleased to held at para-44 that

> "44 The essential ingredients of the offences of criminal conspiracy are : (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. It is extremely difficult to adduce direct evidence to prove conspiracy. Existence of conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. In some cases, indulgence in the illegal act or legal act by illegal means may be inferred from the knowledge itself."

12. In order to appreciate the rival contention, this Court feels expedient to scan the evidence as to whether any work has been done in respect of the portion of work from 1500 meters to 1865 meters of "S/R to Lathikata-Timjore Road. In order to determine the aforesaid aspect it would be apposite to go through the evidence of P.W.3, who is the then Divisional Accounts Officer, R.W.Division, Sundargarh. In his cross-examination he has admitted that the execution of work was commenced on 09.01.2002 and completed on 28.03.2002. during progress of the work, the Executive Engineer has inspected the work from time to time. He has also scrutinized the bill on the basis of Measurement Book and Agreement. That ultimately the Executive Engineer has passed the bill for payment after being satisfied about execution of the work.

It is also relevant to note that as such the Executive Engineer has expressed his satisfaction about the road work of the portion in question to the effect that the same has been honestly and physically done and accordingly the bills for payment of the same work has been passed by the Executive Engineer. But the said Executive Engineer has neither been made an accused nor has been made a charge sheeted witness in the case at hand. P.W.3 has further stated that the payment can only be made after the bill is passed by the Executive Engineer. The Executive Engineer is the drawing and disbursement officer of the division. Before passing of the bills the Executive Engineer must be satisfied that the work is actually executed in accordance with the detailed measurement. Further according to P.W.3, the defect period of liabilities of the Contractor was for six months and it was a special repair work. During the defect period of 6 (six) months, they had not received any complaint from any corner.

On perusal of the evidence of P.W.2, who was at the relevant time working as Junior Clerk in the Office of R.W. Division, Sundargarh has deposed that as per practice, after preparation of the bills by the junior Engineer, it is to be submitted to the Assistant Executive Engineer who is to submit the same before the Executive Engineer for payment.

On perusal of the evidence of P.W.5, it is evident that P.W.5 was a member of the joint inspection team, who on being requested by the Vigilance police has inspected the work in question. P.W.5 has stated in his cross-examination that he has shown excess payment of Rs.98,119/- to the Contractor but he has admitted that the excess amount was not calculated

item wise as no Measurement Book was available before them at the time of inspection. P.W.5 has also admitted that there is defect liability period in every agreement of work. He has also admitted that there may be damage to the road after repair due to rain.

In the instant case, he repairing work in question was completed on 31.03.2002 whereas the work was allegedly physically verified on 12.02.2004 and during the period the gap of two years the work has faced two rainy seasons and the fact of the rain damaging the road during the said two years after repair cannot be ruled out.

P.W.5 has further admitted during his cross-examination that during their physical verification they have found the part of the road i.e., from 1300 meters to 1500 meters, the road condition was good and they have not found the same condition of the road from 1500 meters to 1865 meters of the road as per the bill and for said reason the condition of the road from 1300 meters to 1500 meters and 1500 meters to 1865 meters was not same, they suspected that no work has been done on that portion.

As such there was no other reason or logic on the part of the inspecting team to come to a conclusion that there was no work on the road from 1500 meters to 1865 meters. But for the reason that the condition of the road from 1300 meters to 1500 meters was better than that of the condition of the road from 1500 meters to 1865meters, they have come to a conclusion that no work was done in the portion from 1500 meters to 1865 meters of the said road.

Simultaneously, P.W.5 has stated that the longevity of the road condition depends on the soil base of the road, but P.W.5 has not bothered to examine regarding the condition of the soil base in respect of the portion from 1300 meters to 1500 meters and 1500 meters to 1865 meters as to whether there is any difference between the soil base of those portion to conclude regarding the longevity of the particular portion of the road.

P.W.5 has further stated in the cross-examination that for check measurement of the road the Measurement Book and agreement are essential and unless and until the Measurement Book is referred the details of the length, width and thickness of the work executed cannot be ascertained. He has also admitted that they have neither measured the thickness of the road

work, repaired nor dug pit holes to ascertain thickness of the road. P.W.5 has further admitted that there was no drainage by the side of the road which necessarily means that in the event of a heavy rain the road in question is bound to be water logged for days together.

Therefore, the correctness and authenticity of the typed Memorandum, Ext.5 and the Bar Chart vide Ext.6 is questionable and doubtful and should not have been relied upon by the learned Special Judge (Vigilance) and for the same reason the Special Judge (Vigilance) ought not have relied upon the evidence of P.W.5 to come to a concrete conclusion that there was no work on the portion of the road from 1500 meters to 1865 meters of S/R to Lathikata-Timjor road. Moreover as per admission of P.W.5, it is seen that he was one of the stock witnesses of the Vigilance department and the learned Special Judge ought not have put much reliance on his evidence.

So far as the evidence of P.W.6 is concerned, the other member of the inspection team is also shaky and does not inspire much confidence regarding the admissibility of his evidence. P.W,6 who was working as Assistant Engineer in the Office of the M.I. Subdivision, Rourkela deposed that during inspection they found the road from 1300 meters to 1500 meters was in good condition and the rest of the road from 1500 meters to 1865 meters road was not intact. As per the own admission of p.w.6 they have only measured the road from 1300 meters to 1865 meters which means without measuring or inspecting the road from 1500 meters to 1865 meters, they have come to a conclusion that an excess amount of Rs.98,116/- was paid to the Contractor. He has also admitted during cross-examination that for exact valuation of the construction work the length, breadth, width are required to be taken and the Measurement Book contain the details of the measurement of the work done.

P.W.6 during his cross-examination has admitted that they have not referred the Measurement Book of the disputed work as it was not provided to them and they have only taken the measurement of the road from 1300 meters to 1500 meters. He has also admitted that there was defect liability in the work in question. He has also admitted that there may be wear and tear of the road depending on the traffic condition, drainage condition and soil condition. He has also admitted that they have calculated the excess amount without any measurement of the thickness and width of the road from 1500 meters to 1865 meters and the report has

been prepared on 12.01.2004 in the Vigilance Office at Rourkela. P.W.6 has also stated that his evidence has been utilized by the Vigilance Police in 6 to 7 other cases proving that he is also another stock witness of Vigilance department.

So far as the evidence of P.W.7 is concerned, it is evident that P.W.7 has stated in his cross-examination that during his interrogation co-accused Tapan Kumar Garnaik has raised that due to heavy rain there was flood in the month of September in the locality and it has damaged the repair work.

It is also apposite to refer to the evidence of D.W.2, who has deposed in his evidence that there is a defect liability clause in the agreement which bars the release of EMD and security money in case of any defect noticed in the work within stipulated liability period and the executants is to remove the defect to get back the E.M.D. In case defect is not noticed during defect liability period it is to be presumed that the work is executed as per the agreement. It is not possible to assess the detailed special repair work after lapse of two years of execution of work. To correctly assess the special repair work, the Measurement Book is to be referred and it cannot be calculated only from the extract of the bills. He admitted that without referring the Measurement Book it is not possible to calculate the exact amount of work executed and to assess the quantum of work one has to measure the length, depth and width of work executed and to compare it with the measurement referred in the Measurement Book.

The evidence of D.W.2 which has remained unassailed has not been properly dealt with by the learned Special Judge, Vigilance, Sundargarh. The learned Special judge, Vigilance has also lost sight of the fact that the work was also supervised by the Executive Engineer and the payment of the bill was made by the Executive Engineer himself.

In view of the aforesaid evidence and admission of the prosecution witnesses, it cannot be said with certitude that there was no work in respect of portion from 1500 meters to 1865 meters of the road of S/R to Lathikata-Timjor road.

When the execution of work was properly done under the supervision of the Executive Engineer himself has not been made as an accused in the present case and the payment of bills made by the Executive Engineer it cannot be presumed that the excess amount was paid for the disputed work. The question of conspiracy or preparation of false vouchers by the present appellant are based on surmises and conjectures. Therefore, the appellants in CRLA No.s363 of 2018 and 390 of 2018 ought not to have been convicted under section 13 of the Prevention of Corruption Act.

It is relevant to refer to the decision reported in 2012(53) OCR-319 (***Birabar Sethi @ Birendra Sethi-vrs.-State of Orissa***) this Court has been pleased to hold at paragraph-9 as follows:-

> "9. Judicial notice can very well be taken of the fact that the concrete road used by the villagers constructed over four years back, cannot have the same measurement and quality as it had on the date, when it constructed. Further, it being admitted by the then Assistant Engineer Sri Banerjee that the measurement done by the Petitioner was checkmeasured by him and was found to be correct and the Assistant Engineer, Shri Banerjee having not been arrayed as an accused, who was the higher authority over the Petitioner and checked the measurement done by the Petitioner and found the same to be correct, it is seen that no prima facie case for the offences of which cognizance has been taken, is made out and this Court further finds that for the above reasons, if the criminal case is allowed to continue, there can be no doubt that the same will end in acquittal of the Petitioner."

In the decision reported in 2017(68) OCR-836 (***Lambodar Pujarivrs.-State of Orissa***), this Court has been pleased to hold at paragraph-9 as follows:-

> "9. The learned trial Court has failed to appreciate that though the trench works in respect of three village sites forests were executed in the year 1986-87 but the trenches were measure after passing of four consecutive rainy seasons and therefore, the possibility of most part of the trenches being filled up due to soil erosion during those rainy seasons cannot be ruled out and it would be too difficult to ascertain the exact nature of work done by measurement at that stage. Merely because P.W.3 has stated that even after lapse of three and half years, the works done in respect of the trench can be ascertained is not sufficient to believe prosecution case that the trenches have been properly measured. In case of Barabar Sethi-Vrs.-State of Orissa reported in (2012) 53 Orissa Criminal

> Reports 319, it is held that judicial notice can very well be taken of the fact that the concrete road used by the villagers constructed over four years back, cannot have the same measurement and quality as it had on the date, when it constructed."

To sum up, in a case like the present one, there are material contradiction in the evidence of the prosecution witnesses and the prosecution witnesses have contradicted to each other on material aspect. Therefore, the appellants are entitled to the benefit of doubt.

To strengthen the view of this Court it is profitable to quote the relevant paragraph in the case of ***State of Punjabvrs. Jagir Singh, Baljit Singh and Karam Singh*** reported in 1974 3 SCC 277.

> "A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is 11 the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

In the light of the yardstick for scrutinizing and evaluating the evidence as indicated in Jagir Singh's case (supra), when this Court examined the witnesses led by the prosecution for sustaining the charge under Sections 120-B, 468/120-B, 471/120-B and 420/120-B, I.P.C. and Section 13(2) read Section 13(1)(d) of the P.C. Act against the appellants, this Court is of the considered view that the appellants are entitled for the benefit of doubt. Accordingly, it is held that the prosecution has failed to prove the charge under Sections 120-B, 468/120-B, 471/120-B and 420/120-B, I.P.C. against all the appellants and Section 13(2) read Section 13(1)(d) of the P.C. Act against the appellants in CRLA No.363 of 2018 and CRLA No.390 of 2018.

In the result, the judgment of conviction and order of sentence dated 24.04.2018 passed by the learned Special Judge, (Vigilance),

Sundargarh in CTR Case No.20 of 2007 are hereby quashed and set aside. The appellants, namely, Tapan Kumar Garayak, Niranjan Jena and Manoj Mohapatra be acquitted therefrom. The CRLAs stand allowed. Send back the L.C.Rs. forthwith.

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2020 (III) ILR - CUT- 924

K.R. MOHAPATRA, J.

W.P.(C) NO. 8734 OF 2012

ANANTADAN SUNA & ORS. .....Petitioners

.V.

JOINT COMMISSIONER, SETTLEMENT & CONSOLIDATION, BERHAMPUR & ORS. .....Opp. Parties

ORISSA SURVEY AND SETTLEMENT ACT, 1958 – Section 15 – Power of the Commissioner/Board of Revenue – Whether the commissioner can delegate the power to Tahasildar to correct the ROR after publication of the same under section 12-B of the Act? – Held, No, after publication of the ROR under section 12-B of the Act, the Tahasildar cannot sit over the correctness of recording of ROR and map – He can only act within the parameters and the contingencies mentioned in Rule 34 of the Rules – The Tahasildar can also make correction under Rule 34 of the rules as well as Section 41 of the Act, not beyond that – The commissioner is under legal obligation to take final decision in the revision and if necessary may issue direction to the concerned Tahasildar to give effect to the said order only – He has no jurisdiction to remit back to the Tahasildar to take final decision in the matter.

Case Laws Relied on and Referred to :-

1. 2000 Vol-II OLR 349 : Smt. Bijaya Chatterjee .Vs. Commissioner, Land Records and Settlement, Orissa & Ors.
2. 1998 (II) OLR 495 : Sarat Chandra Sahu (supra) and Harihar Mohapatra & Ors.Vs. Commissioner of Land Records and Settlement, Orissa, Cuttack.

3. 2014 (Supp.II) OLR 401 : (Smt.) Sailabala @ Krushnapriya Parida .Vs. State of Orissa & Ors.
4. 2001 (I) OLR-53 : Brundaban Patnaik .Vs. Commissioner, Land Records and Settlement & Ors.
5. 2007 (I) OLR- 595 : Santosh Kumar Mohanty & Ors.Vs. Revenue Divisional Commissioner, Central Division, Cuttack & Ors.

For Petitioners : M/s. Prafulla Kumar Rath,P.K. Satpathy, R.N. Parija & A.K. Rout & S.K. Pattnaik.

For Opp. Parties : Mr. Nilakantha Panda
Mr. Dillip Kumar Mishra (Addl. Govt. Adv.)

ORDER Heard and Disposed of on 10.03.2021

K.R. MOHAPATRA, J.

Heard Mr. Prafulla Kumar Rath, learned counsel for the petitioners, Mr. Neelakantha Panda, learned counsel for the opposite party No.4 and Mr. Dillip Kumar Mishra, learned Additional Government Advocate for the State-opposite party Nos.1 to 3.

2. The petitioners in this writ petition seek to assail the order dated 06.11.2007 (Annexure-1) passed by the Joint Commissioner, Settlement & Consolidation, Berhampur in S.R.P. No. 802 of 2006 filed by the opposite party No.4.

3. Mr. Rath, learned counsel for the petitioners submits that the opposite party No.4 filed the aforesaid revision to correct the final R.O.R. and the map in respect of Hal Plot No. 204, Holding No.198 to an extent of Ac.0.08 decimals situated in village Kurlughati under Nabarangpur Tahasil in the district of Nabarangpur (for short, 'the case land'), on the basis of his possession and succession. The revisional authority without condoning the delay proceeded with the matter. At the stage of final hearing, the Joint Commissioner without assigning any good reason condoned the delay in filing the revision petition holding that the land is recorded in the status of "Gramakantha" and remitted the matter back to the Tahasildar, Nabarangpur-opposite party No.3 to cause a field inspection and effect correction of the map and record the case land in favour of the Opp. Party No.4 (petitioner therein) on the basis of the possession and entitlement. It is his submission that Section 15 of the Orissa Survey and Settlement Act, 1958 (for short, 'the Act') confers a power on the Board of Revenue/Commissioner to correct the

R.O.R. He has no jurisdiction to delegate such power to the Tahasildar, Nabarangpur-Opposite Party No.3 to effect correction in the ROR or map without any specific direction thereto. The Tahasildar, Nabarangpur-opposite party No.3 while acting upon the direction of the Joint Commissioner under Section 15 of the Act, exercises power under Rule 34 of the Orissa Survey and Settlement Rules, 1962 (for short, 'the Rules') and cannot take a final decision with regard to entitlement of the party. He can only give effect to the correction, if any, in the R.O.R. pursuant to the direction of the Joint Commissioner under Section 15 of the Act. In support of his case, he relied upon the decision in the case of ***Sarat Chandra Sahu -v- Commissioner of Land Records & Settlement, Orissa, Cuttack,*** reported in 82 (1996) CLT-321, wherein it has been held at paragraph-10 as follows:

> *"10. While quashing the order passed by the Commissioner we also notice what the Commissioner has really not adjudicated the revision except giving a direction to the Tahasildar to cause an inquiry in respect of the genealogy. The revision was preferred as admitted, under Section 15 of the Act. Under Section 15(b) the Commissioner has been given the authority to decide the grievance of the parties in relation to final publication of record of rights. A statutory power by a statutory authority has to be exercised in a proper manner so that the litigants have a sense of satisfaction that their grievance, have been appropriately dealt with. The Commissioner should have done well to address himself on the merits of the case. But instead of doing so he passed the orders of remand. While we are of the view that the operative portion of the impugned order relating to remand is absolutely unsustainable, yet we feel in the interest of justice the claim of the revisionist should be considered by the revisional authority within the parameter of revisonal jurisdiction. As there has been no adjudication on that score we feel it is appropriate that the Commissioner should re-hear the matter and decide it afresh. To avoid delay, we direct the parties to appear before the revisional authority on 28.06.1996 on which date the Commissioner shall fix a date of hearing and dispose of the revision by the end of October, 1996."*

3.1 He further submits that relying upon the decision in the case of ***Smt. Bijaya Chatterjee -v- Commissioner, Land Records and Settlement, Orissa and others***, reported in 2000 Vol-II OLR 349, wherein this Court relying upon the ratio in ***Sarat Chandra Sahu (supra)*** and ***Harihar Mohapatra and others*** *–v-* ***Commissioner of Land Records and Settlement, Orissa, Cuttack***, reported in 1998 (II) OLR 495, held as follows:

> "*3…….The revision was remanded to the Tahasildar for final decision. It has been held in the decisions reported in 82 (1996) CLT 321* ***(Sarart Chandra Sahu v. Commissioner of Land Records and Settlement, Orissa, Cuttack and others.)*** *and 1998 (II) OLR 495 (****Harihar Mohapatra and Ors. v. Commissioner of Land Records and Settlement, Orissa and others****) that the Commissioner while deciding a revision under the Orissa Survey and Settlement Act cannot remand the matter to the Tahasildar for final decision. However, in the subsequent decision it has been clarified that though such remand is not contemplated, the Commissioner can call for a report from the Tahasildar. It appears that in the present case, the Commissioner has remanded the matter to the Tahasildar for fresh disposal and the Tahasildar without making any further inquiry has recorded the land in the names of present contesting opposite parties, merely on the basis of the observations made by the Commissioner. Since the procedure adopted by the Commissioner is contrary to the ratio of the two Division Bench decisions of this Court referred to above, which are otherwise binding on me and since the matter was disposed of ex parte by the Commissioner, I deem it just and proper in the interest of justice to quash the order passed by the Commissioner and the consequential order passed by the Tahasildar, and remand the matter to the Commissioner for fresh disposal. Both parties are directed to appear before the Commissioner on 21st August, 2000, who shall thereafter dispose of the matter as expeditiously as possible, preferably within a period of four months from the date of receipt of this order. It is made clear that no opinion has been expressed regarding the rival contentions made by the parties. This order shall be communicated to the Commissioner."*

4. In view of such submission, he prays for setting aside the impugned order and to remit the matter back to the Joint Commissioner for fresh adjudication on the issue of limitation as well as on merit, giving opportunity of hearing to the parties concerned.

5. Mr. Panda, learned counsel for the opposite party No.4, vehemently objected to the same and submits that in fact, the petitioners are not in possession over the case land as would be clear from the finding in C.S. No.25 of 2010, which was dismissed by learned Senior Civil Judge, Nabarangpur on 06.03.2012 (Annexure-2). In the said suit, it was categorically held that Ananda Suna was not in possession over the case land. He further submits that while considering the issue of limitation in filing the revision under Section 15(b) of the Act, the Court should have taken a liberal view as has been held in the case of ***(Smt.) Sailabala @ Krushnapriya Parida –v- State of Orissa and others***, reported in 2014 (Supp.II) OLR 401. The land being a "Gramkantha" land, delay should not stand on the way in

deciding the correctness of entries in the R.O.R. as well as map. He further submits that sabik R.O.R. was prepared in the name of common ancestor, namely, Jacob Suna, who divided the properties amongst his seven sons and the opposite party No.4 is one of his sons. Thus, he is entitled to a share in the properties as per his possession. As he was staying outside, he could not take steps in the settlement operation, taking advantage of which the petitioners and their predecessors managed to record the case land in their favour. Relying upon a decision in the case of ***Brundaban Patnaik -v- Commissioner, Land Records and Settlement and others***, reported in 2001 (I) OLR-53, Mr. Panda, learned counsel for the opposite party No.4 submits that the Tahasildar has ample power under paragraph-17(I) of the Mutation Manual to conduct a field inquiry and correct the map. Paragraphs-3 and 4 of ***Brundaban Patnaik*** (supra) read as follows:

> *"3. According to the petitioner, he has been in possession of land measuring Ac.0.050 decimals uninterruptedly without any hindrance from any quarter although in the registered sale deed No.8486 dated 6.10.1970, the extent of the land was noted as Ac.0.041 decimals. In support of the petitioner's stand that he has been in possession of land in excess of the land mentioned in the sale deed, the learned counsel for the petitioner brings to our notice the order of the Asst. Settlement Officer dated 2.09.1983 passed in objection Case No.187/330 which was filed at the instance of one Bijoy Kumar Pattnaik. In the said order, the Asst. Settlement Office has directed to record Ac.0.047 decimals in place of Ac.0.050 decimals. The Commissioners, as submitted by Shri Behuria, without taking into account the aforesaid order has illegally directed the Tahasildar to ignore petitioner's possession of excess area. Shri Panda appearing for Municipal Corporation submits that there are documents which would show the petitioner is in possession of land less than Ac.0.041 decimals.*
>
> *4. Considering the submission of the counsel for parties, we dispose of this writ application with an observation that the Tahasildar while taking up of the case under para 17(I) of the Mutation Manual, as indicated by the Commissioner, will consider the aforesaid order of the Assistant Settlement Officer and pass order*
> *according to law after hearing the parties concerned. It may be stated that we are not expressing any opinion on the merit of the claim of the petitioner.*
>
> *Urgent certified copy of the order, if applied for, may be granted by tomorrow."*

5.1 Thus, the Joint Commissioner has committed no error in issuing the impugned direction.

5.2 He further relied upon the case of ***Santosh Kumar Mohanty & others –v- Revenue Divisional Commissioner, Central Division, Cuttack & others,*** reported in 2007 (I) OLR- 595 and submitted that when the Joint Commissioner after verifying the record condoned the delay and directed to conduct a field inquiry, this Court in exercise of power under Articles 226 and 227 of the Constitution of India should not interfere with the same. Paragraphs-5 and 6 of the judgment in the case of ***Santosh Kumar Mohanty (supra)*** read as follows:

> *"5. After verifying all the records, the Commissioner has directed the Tahasildar for a field enquiry and called for a status report on 8.8.2006. Considering all the above materials and after hearing the parties he has condoned the delay and allowed the revision and directed for correction of the Hal settlement R.O.R. and map in respect of the disputed land in the name of the present opp. Party No. 4 along with his co-sharers.*
>
> *6. The Commissioner has considered all the materials on record and passed the order in accordance with law. This Court by exercising the jurisdiction under Article 226 and 227 does not exercise the powers of an appellate jurisdiction. It does not review or reweigh the evidence upon which the determination of the inferior Court purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own view. For the reason aforesaid as there is no illegality or infirmity in the said order to be interfered with by this Court. The R.O.R. neither create title nor extinguish title and as such this dismissal will not preclude the petitioner from availing any other remedy which they may have entitled.*
>
> *The writ application is accordingly dismissed."*

5.3 He, therefore, submits that the writ petition does not merit consideration and prays for dismissal of the same.

6. Mr. Mishra, learned Additional Government Advocate for the State referring to the judgment passed in Civil Suit No.25 of 2010 (Annexure-2) submitted that the predecessor of the petitioners was not in possession over the case land. Thus, no fruitful purpose will be served by setting aside the impugned order and remitting the matter back to the Joint Commissioner for fresh adjudication, as prayed for by learned counsel for the petitioners. He, therefore, prays for dismissal of the writ petition.

7. Heard learned counsel for the parties and perused the materials on record.

8. Taking into consideration the rival contentions of the parties, it is apparent that the properties were recorded in the name of common ancestor, Jacob Suna, who effected partition amongst his sons and allotted shares to each of them. The issue in the revision was with regard to possession and succession of the petitioners' vis-à-vis the opposite party No.1 in the said revision over the case land. The Joint Commissioner taking into consideration the rival contentions of the parties remitted the matter back to the Tahasildar, Nabarangpur-opposite party No.3 for a field enquiry and effect correction in the R.O.R. and map accordingly. In view of the ratio decided in ***Sarat Chandra Sahu*** and ***Smt. Bijaya Chatterjee (supra)***, the direction of the Joint Commissioner remitting the matter back to the Tahasildar, Nabarangpur-opposite party No.3 to take a final decision in the matter with regard to correctness of the R.O.R. and map cannot be sustained.

9. As held in ***Smt. Bijaya Chaterjee (supra)***, the Joint Commissioner could have called for a report from the Tahasildar, Nabarangpur-opposite party No.3 and considering the report with regard to possession of the parties together with rival contentions of the parties should have given a finality to the case and thereafter directed the Tahasildar, Nabarangpur opposite party No.3 to give effect to the same, if necessary.

10. After publication of the R.O.R. under Section 12-B of the Act, the Tahasildar cannot sit over the correctness of recording of the R.O.R. and map. He can only act within the parameters and the contingencies mentioned in Rule 34 of the Rules. The Tahasildar can also make correction of clerical or arithmetical error and omission in the finally published ROR and map as provided under Section 41 of the Act, but, not beyond that. He cannot take a final decision in respect of correctness of the entries in the R.O.R and the map. At the same time, the Commissioner while exercising power under Section 15 of the Act is under legal obligation to take a final decision in the revision and if necessary may issue direction to the concerned Tahasildar to give effect to the said order only. He has no jurisdiction to remit the matter back to the Tahasildar to take a final decision in the matter. Neither the Commissioner has the power to delegate his jurisdiction under Section 15 of the Act, nor does the Tahasildar have competence to exercise such power under the Act and Rules. ***Brundaban Patnaik*** **(supra)** has been decided on facts of the said case and does not lay down any principle of law. As such, the same has no application to this case.

10. In the instant case, therefore, the direction to the Tahasildar, Nabarangpur-opposite party No.3 to take a final decision with regard to possession and correction of map, is not sustainable and is, accordingly, set aside.

11. So far as the issue of condonation of delay is concerned, this Court is of the considered view that in view of the settled position of law in ***(Smt.) Sailabala @ Krushnapriya Parida (supra)***, the Revisional Court while exercising power under Section 15(b) of the Act, the Joint Commissioner should take a liberal view, taking into consideration the facts and circumstances of the case. In the instant case, the case land is a '*paramboka'* land. Further, it is the case of the opposite party No.4 that he was not in village during settlement operation. Thus, he could not participate in the settlement operation to assert his right and record the case land in his name. When the parties have contested the revision on merit and the Joint Commissioner on consideration of facts and circumstances of the case has condoned the delay, I am not inclined to interfere with the said finding at such a belated stage.

12. Thus, without interfering with the finding of the Joint Commissioner with regard to condonation of delay, this Court sets aside the impugned finding under Annexure-1 in remitting the matter to Tahasildar, Nabarangpur. Accordingly, the matter is remitted back to the Joint Commissioner, Settlement and Consolidation, Berhampur-opposite party No.1 to take a decision in the matter on merit, keeping in mind the discussions made above, after giving opportunity of hearing to the parties. If necessary, the Joint Commissioner may call for a report from the Tahasildar, Nabarangpur-opposite party No.3 with regard to field position and possession of the parties and upon receipt of the said report, he is free to consider the rival contentions of the parties along with the said report and take a final decision in the matter.

13. With the said observation and direction, the writ petition is disposed of.

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2021 (I) ILR - CUT- 932

K.R. MOHAPATRA, J.

R.S.A. NO. 217 OF 2018

DASARATH SHARMA & ORS. ……Appellants

.V.

STATE OF ODISHA ……Respondent

ADVERSE POSSESSION – Claim thereof – Plaintiffs have claimed right, title and interest over the suit land as occupancy rayats all throughout on the basis of a lease deed – At no place they have accepted the Government to be the true owner of the suit land – They further claimed title by adverse possession on the plea that their possession is open and continuous for more than thirty years in the same suit – Claim of right over the suit land as occupancy rayat and the claim of title by adverse possession in the same suit – Distinction – Held, both are mutually destructive claims and not permissible under law and the edifice of claim of title by adverse possession cannot stand on the foundation of denying the title of the true owner.

> *"Undisputedly, the plaintiffs have claimed right, title and interest over the suit land as occupancy rayats. All throughout, they have tried to assert their right through lease deed dated 12th October, 1944. At no place, in the body of the plaint, they have accepted the Government to be the true owner of the suit land. In order to establish the claim of title through adverse possession, the basic requirement is to accept the title of the true owner, namely, the Government of Odisha against whom they claim adverse possession. From the pleadings in the plaint, it is also apparent that the plaintiffs claim their title as occupancy rayats. Further, they claim title by adverse possession on the plea that their possession is open and continuous for more than thirty years. The edifice of claim of title by adverse possession cannot stand on the foundation of denying the title of the true owner. The plaint must contain specific pleadings of adverse possession satisfying the requirements as set out in Karnataka Board of Waqf (supra), which is conspicuously 18 absent in the pleadings of the plaint. Claiming title over the suit land on the basis of adverse possession, is based on the principle "nec vi, nec clam, nec precario". Thus, mere pleadings of open, continuous and long possession or enjoyment of the land without a specific assertion as to when the plaintiffs entered into possession and when the same became adverse to the true owner, will not by itself be sufficient to claim title by adverse possession."*
>
> *(Paras 14 & 15)*

Case Laws Relied on and Referred to :-

1. AIR 1951 SC 469 : Collector of Bombay Vs. Municipal Corporation of the City of Bombay & Ors.
2. (1970) 3 SCC 802 : State of West Bengal Vs. Dalhousie Institute Society.
3. Vol.33 (1991) O.J.D. 154 (Civil) : Champa Bati Bewa @ Kabi & Ors. Vs. Kanhu Mallik & Ors.
4. 2014) 11 SCC 316 : Praful Manohar Rele Vs. Krishnabai Narayan Ghosalkar & Ors.
5. 2004 (10) SCC 779 : Karnataka Board of Wakf Vs. Government of India & Ors.
6. 2017 SCC On Line Ori 714 : Ganesh Shankar Shukla (since dead) through L.Rs. Vs. State of Orissa & Anr.

For Appellants : Mr. S.P. Mishra (Sr. Adv.)
Mr. Gautam Mukherji (Sr. Adv.)
M/s. A.C. Panda, S.D. Ray, S. Sahoo, S. Priyadarsini & S. Panda.

For Respondent : Miss Samapika Mishra (Addl. Standing Counsel)

JUDGMENT Date of Judgment: 06.04.2021

K.R. MOHAPATRA, J.

This appeal under Section 100 of the Code of Civil Procedure, 1908 has been filed assailing the judgment and decree dated 16th January, 2018 passed by learned Additional District Judge, Jharsuguda in RFA No.07 of 2014 whereby he confirmed the judgment and decree dated 1st February, 2014 and 24th February, 2014 respectively passed by learned Civil Judge (Senior Division), Jharsuguda in TS No.220/100 of 1995-2004.

1.1 For the sake of convenience, the parties are described as per their status in the trial Court.

2. Plaint averments in short reveal that Suit land in HS Khata No.93 and HS Plot No.121 (Gochar) measuring an area Ac.14.70 decimal of mouza Ekatali, which corresponds to MS Khata Nos.499 and 497 of Jharsuguda town Unit-I (Ekatali) in the district of Jharsuguda, was situated under a Gountiahi village under un-divided district of Sambalpur. As per the documents of administration, i.e., Wazib-ul-urj of said village, Lambardar Gountia of the village was entitled to reclaim and cultivate it and also to lease out the same to rayats/tenants for reclamation and cultivation without charging any Nazarana or Salami. The deceased plaintiff No.1, namely, Brundabana Sharma requested the then Gountia, namely, Gokulananda Patel

@ Gountia to lease out the suit land for reclamation and cultivation by his joint family consisting of himself and his brother Banawarilal Sharma. Accordingly, on 12th October, 1944, said Gokulananda Gountia leased out the suit land to Brundabana Sharma. The family of Brundabana Sharma reclaimed the suit land and cultivated the same by raising different crops. They also constructed a house thereon and paid land revenue to Gountia. After abolition of the Gounti system with effect from 1st April, 1960, they continued to pay municipal taxes to Jharsuguda Municipality. By operation of law, the plaintiff No.1, namely, Brundabana Sharma became an occupancy rayat. Tahasildar, Jharsuguda, after due enquiry and verifying gounti patta granted in favour of Brundabana Sharma and also taking into consideration the possession of plaintiffs, settled the suit land in his favour in Revenue Case No.33/7-1 of 1962-63. The deceased plaintiff No.1 was also paying land revenue from 1960 till 1991. In Major Settlement, the suit land was recorded in the name of plaintiff No.1. There was a partition of the suit land in the family of the deceased plaintiff No.1, which was accepted by the Additional Tahasildar in OLR Ceiling Case No.2 of 1978.

3. After 27 years of order of Tahasildar in Misc. Case No.33/7-1 of 1962-63, the State of Odisha filed revision before Member, Board of Revenue, Odisha, Cuttack under Section 38-B of the Odisha Estates Abolition Act, 1951 (for short, 'the OEA Act') in OEA Revision Case No.37 of 1989 assailing order dated 24th December, 1962 passed by the Tahasildar, Jharsuguda in the aforesaid Misc. Case. The Member, Board of Revenue, allowed the said revision holding that the order passed by OEA Collector-cum-Tahasildar, Jharsuguda to be null and void. Being aggrieved, the plaintiff No.1-Brundabana Sharma filed OJC No.781 of 1993 before this Court. Taking into consideration that the Revision was filed 27 years after the land was settled in favour of the plaintiff No.1 and also other legal grounds, this Court set aside the order passed by learned Member, Board of Revenue. Assailing the said order passed in OJC No.781 of 1993, the State of Odisha moved the Hon'ble Supreme Court in SLP (Civil) No.15486 of 1993. Hon'ble Supreme Court set aside the order of this Court holding that Member, Board of Revenue has power to revise the order after 27 years. The plaintiff Nos. 2 to 4 were not parties to either the OEA Revision or in the writ petition before this Court or SLP filed

before the Hon'ble Supreme Court. Hence, it is contended that the said order is not binding on them. It is further contended that since possession of the plaintiffs is open, continuous and for a period of more than thirty years, they have perfected their title on the Schedule 'A' land by adverse possession. Accordingly, the suit was filed claiming right, title and interest over the suit land and for confirmation of possession.

4. The defendants filed written statement contending that Gokulananda Patel @ Gountia was neither Gountia nor landlord of the village in question and had got no right to lease out the 'Gochar' land. The alleged Patta dated 12th October, 1944 was forged one and the plaintiffs never possessed the suit land. Learned Member, Board of Revenue in OEA Revision Case No.37 of 1989 and the Hon'ble Supreme Court in SLP Nos.2838-15486 of 1993 arising out of said Revision, have categorically held that the Tahasildar had no power under Section 8(1) of the OEA Act to record the name of Brundabana Sharma in respect of the suit land. No sanction under Section 5(1) of the OEA Act being taken from the Member, Board of Revenue for confirmation of the lease in respect of the suit land the same is void. Further, the Hon'ble Supreme Court by order dated 28th January, 1994 passed in Civil Appeal Nos.827-828 of 1994 (arising out of SLP (Civil) Nos.2838 and 15486 of 1993, held that the lease of the land allegedly granted by the intermediary in favour of Brundabana Sharma prior to the date of vesting does not confer any tenancy right in his favour and confirmation of tenancy right by the Tahasildar without obtaining prior confirmation of Member, Board of Revenue is without jurisdiction. Payment of land revenue or rent being an administrative act does not confer any right, title or interest in the suit land in favour of plaintiff No.1. Hence, they pray for dismissal of the suit.

5. Learned Civil Judge, taking into consideration the rival contentions of the parties, framed as many as 19 issues for adjudication of the suit, which are as follows:-

> *1. Whether the lease patta granted by Gokulananda Patel in the year 1944 is a valid one?*
>
> *2. Whether Gokulananda Patel has right to grant lease patta?*
>
> *3. Whether Gokulananda Patel was the Lambardar Gountia of village Ekatali?*

4. Whether Brundabana Sharma has been possessing on the strength of patta dated 12.10.44?

5. Whether Burndaban Sharma had reclaimed the land?

6. Whether the house was constructed by the plaintiff?

7. Whether the plaintiffs have possessed the house?

8. Whether the plaintiffs became rayat under the Government automatically?

9. Whether the payment of malgujari to Gokulanda Patel or anybody else confer any title on Brundabana Sharma or any of his family members?

10. Whether the judgment of the Hon'ble Supreme Court passed in Civil Appeal No.827-28 of 1994 arising out of SLP (c) No.2838 and 15486 of 1993 operates as res-judicata in this world?

11. Whether the plaintiffs have been possessing the suit land from 1944 till now as occupancy rayat and also adversely against the entire world?

12. Whether the plaintiffs have perfected their title over the suitland more than 30 years adverse possession?

13. Whether by paying the land revenue will confer any right?

14. Whether the judgment of the Hon'ble Supreme Court of India is binding on all the plaintiffs?

15. Whether there is any cause of action for this suit?

16. Whether the plaintiffs are entitled to get any relief?

17. Whether the suit is maintainable?

18. To what relief the plaintiffs are entitled to, if any?

19. Whether the valuation of the suit land is Rs.1,05,000/- (Rupees one lac and five thousand) only?

6. Learned Civil Judge answering all the issues against the plaintiffs, dismissed the suit vide judgment dated 1st February, 2014 and decree dated 24th February, 2014. During pendency of the suit, plaintiff No.1-Brundabana Sharma died and was substituted by his legal heirs as plaintiffs Nos.1(a) to 1(g). Likewise, plaintiff No.2 also died and substituted by his legal heirs plaintiff Nos.2(a) to 2(g).

6.1 Assailing the judgment and decree passed in the suit, the plaintiffs preferred RFA No.07 of 2014, which was dismissed vide judgment and

decree dated 16th January, 2018 passed by learned Additional District Judge, Jharsuguda. Being aggrieved by the aforesaid judgment and decree, the plaintiffs have preferred this Second Appeal. Initially, the appellants in the memorandum of appeal proposed to frame the following questions of law for consideration.

> (i) *Whether the learned Original Court and the learned First Appellate Court committed manifest illegality in mechanically deciding the issues framed in the suit in view of the judgment under Exhibit C and without any discussion or reliance placed on the documentary evidence on record in view of the fact that Exhibit C is a judgment from summary proceeding questioning the validity of quasi-judicial order*
>
> *of the which is not binding on the learned original Court which was bound to decide right title and interest of the plaintiffs on the basis of evidence adduced by parties?*
>
> (ii) *Whether the plaintiffs who are all the representatives of a Hindu undivided joint family and enjoying joint tenancy and joint possession as yet (for the want of partition) bound by the judgment under Exhibit C where the other branches of the common ancestor of Brundabana Sharma were admittedly not parties and Brundabana Sharma was admittedly not a karta of the joint family?*
>
> (iii) *Whether the plaintiffs have perfected their title of Adverse Possession by possessing the suit land for 1944 to 1995 even till date*?

Subsequently, during course of argument, Mr. Mishra, learned Senior Advocate prays for consideration of following substantial questions of law.

> *Whether the Courts below have failed to take judicial notice of the conclusion of the Supreme Court judgment vide Exhibit 'C' that the possession of Brundabana Sharma is illegal and he was a wrongful and illegal occupant of the Government land, which otherwise justifies the claim of the plaintiff to have acquired the right, title and interest by way of adverse possession in view of their uninterrupted possession for more than the statutory period over the suit land from 12.10.1944 till date against the State Government on the basis of a void transaction?*

7. It is the submission of Mr. Mishra, learned Senior Advocate that in view of the verdict of Hon'ble Supreme Court vide Ext-'C', the possession of Brundabana Sharma over the suit land becomes illegal, which otherwise justify the claim of the plaintiffs to have acquired right,

title and interest by way of adverse possession in view of their open and un-interpreted possession for more than the statutory period with effect from 12th October, 1944 till date.

8. Taking into consideration the averments made in the plaint as well as written notes of submissions and scrutinising the materials on record, it can be safely said that the claim of the plaintiffs rests on the Patta granted by Gokulananda stated to be the erstwhile Gountia of the village in favour of Brundabana Sharma (plaintiff No.1) on 12th October, 1944. Plaintiff Nos.2 to 4 claimed right, title and interest over a portion of the suit land on the basis of either partition or gift made in their favour from out of the suit land allegedly leased out in favour of said Brundabana Sharma. Hon'ble Supreme Court in Civil Appeal Nos.827-828 of 1994 (***State of Orissa and others –v- Brundabana Sharma and another***, reported in ***1995 Supp (3) SCC 249)*** held as follows:

> "*19. So, we hold that the High Court is not right or justified in opining that the exercise of the power under Section 38-B is not warranted. It committed illegality in quashing the order of the Board of Revenue. The order of the High Court is set aside. The order of the Board of Revenue is restored. Consequently we hold that the Government, being the owner, need not acquire its own land and need not pay compensation to an illegal or wrongful occupant of the Government land. The direction or mandamus to acquire the land and to pay the compensation to the respondent is set aside.*
>
> *20. The appeals are accordingly allowed. But in the circumstances, the parties are directed to bear their own costs."*

9. Thus, in view of the findings of the Hon'ble Supreme Court in ***Brundabana Sharma*** **(supra)**, the claim of title by the plaintiffs over the suit land as occupancy rayats, is no more available to be raised in a subsequent suit.

10. The next question that remains to be adjudicated is as to whether the claim of plaintiffs to have acquired title by adverse possession can be adjudicated in this appeal as a substantial question of law.

11. Mr. Mishra, learned Senior Advocate appearing on behalf of the plaintiffs/appellants reiterating the averments made in the plaint,

strenuously argued, when the Hon'ble Supreme Court had declared the occupation of the plaintiffs to be illegal and wrongful, their possession becomes adverse from the date of their initial possession, i.e., 12th October, 1944. In support of his case, he relied upon the decision in the case of ***Collector of Bombay Vs. Municipal Corporation of the City of Bombay and others***, reported in ***AIR 1951 SC 469***, in paragraph-11 of which it is held as under:-

> *"11…….. Both parties acted on the basis of that Resolution and the predecessor in title of the respondent Corporation went into possession of the land in question pursuant to the Government Resolution of 1865 and, acting upon the said Resolution and the terms contained therein, the respondent Corporation and its predecessor in title spent considerable sums of money in leveling the site and erecting and maintaining the market buildings and have been in possession of the land for over 70 years. What, in the circumstances was the legal position of the respondent Corporation and its predecessor in title in relation to the land in question? They were in possession of the land to which they had no legal title at all. Therefore, the position of the respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the respondent Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the respondent Corporation has acquired the limited title it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government Resolution of 1865. The immunity from the liability to pay rent is just as much an integral part or an inserverable incident of the title so acquired as is the obligation to hold the land for the purposes of a market and for no other purpose. There is no question of acquisition by adverse possession of the Government prerogative right to levy assessment. What the respondent Corporation has acquired is the legal right to hold the land in perpetuity free of rent for the specific purpose of erecting and maintaining a market upon the terms of the Government Resolution as it a legal grant had been made to it……."*
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> (*emphasis supplied*)

He, therefore, submits that since the initial entry of the plaintiff No.1 to the suit land was not legal, the possession becomes adverse to the true owner, i.e., Government of Odisha. The plaintiffs are in possession of

the suit land till date. As such, they have perfected their title by adverse possession. He further relied upon the decision in the case of the ***State of West Bengal Vs. Dalhousie Institute Society***, reported in ***(1970) 3 SCC 802***, paragraphs-16 and 17 of which are relevant for discussion, which are as follows:-

> *"16. There is no material placed before us to show that the grant has been made in the manner required by law though as a fact a grant of the site has been made in favour of the Institute. The evidence relied on by the Special Land Acquisition Judge and the High Court also clearly establishes that the respondent has been in open, continuous and uninterrupted possession and enjoyment of the sit for over 60 years. In this respect the material documentary evidence referred to by the High Court clearly establishes that the respondent has been treated as owner of the site not only by the Corporation, but also by the Government. The possession of the respondent must have been on the basis of the grant made by the Government, which, no doubt, is invalid in law. As to what exactly is the legal effect of such possession has been considered by this Court in Collector of Bombay v. Municipal Corporation of the City of Bombay, 1952 SCR 43 : AIR 1951 SC 469 as follows:……*
>
> *17. The above extract establishes that a person in such possession clearly acquires title by adverse possession. In the case before us there are concurrent findings recorded by the High Court and Special Land Acquisition Judge in favour of the respondent on this point and we agree with those findings."*
>
> *(emphasis supplied)*

He, therefore, submitted that the plaintiffs have clearly acquired title over the suit land by adverse possession. It is his submission that in addition to the claim of the title by the plaintiffs as occupancy rayats, there is no bar under law to claim title by adverse possession. Hence, he prays for framing the aforesaid question(s) of law for adjudication of the appeal.

12. In order to take a decision with regard to framing of substantial question of law on the issue of adverse possession, this Court took assistance of Miss Samapika Mishra, learned Additional Standing Counsel, who also represents the defendant-State in this appeal.

13. Miss Mishra, learned Additional Standing Counsel submitted that the plaintiffs have all throughout in the plaint have contended that they have acquired title over the suit land as occupancy rayats. An occupancy right over the suit land cannot be acquired by adverse possession as held

by this Court in the case of ***Champa Bati Bewa @ Kabi and others Vs. Kanhu Mallik and others***, reported in ***Vol.33 (1991) O.J.D. 154 (Civil***), which is as follows:-

> *"9. The learned lower appellate court has held that defendant No.1 acquired occupancy right by adverse possession. The finding is against law because occupancy right cannot be acquired by adverse possession. It was alternatively held that defendant No.1 being settled raiyat of the village acquired occupancy right under Sections 24 and 25 read with Section 23 of the Orissa Tenancy Act by being in possession for more than 25 years. There is no pleading to that effect. Hence, the finding of the lower appellate court that defendant No.1 acquired occupancy right cannot be sustained. In Lachmllal and Ganesh Chamar, AIR 1932 Patna 259, it has been held that status of a tenant on notice to quit is that of a trespasser."*

13.1 It is her submission that issue of adverse possession is based on the principle of *nec vi nec clam nec precario*. Therefore, the claim of right over the suit land as occupancy rayat and the claim of title by adverse possession are mutually destructive and hence not permissible under law. In support of her submission, she relied upon the case of ***Praful Manohar Rele –v- Krishnabai Narayan Ghosalkar and others***, reported in ***(2014) 11 SCC 316***, in para-10 of which it is held as under:-

> *"10. Significantly, the decision rendered by the High Court rests entirely on the fourth question extracted above. The High Court has taken the view that while the plaintiff could indeed seeks relief in the alternative, the contentions raised by him were not in the alternative but contradictory, hence, could not be allowed to be urged. The High Court found that the plaintiff's case that the defendant was a gratuitous licensee was incompatible with the plea that he was a tenant and, therefore, could be evicted under the Rent Act. The High Court observed:*
>
> *"It is now well settled that a plaintiff may seek reliefs in the alternative but in fact the pleadings are mutually opposite, such pleas cannot be raised by the plaintiff. There is an essential difference between contradictory pleas and alternative pleas. When the plaintiff claims relief in the alternative, the cause of action for the reliefs claimed is the same. However, when contradictory pleas are raised, such as in the present case, the foundation for the contradictory pleas is not the same. When the plaintiff proceeds on the footing that the defendant is a gratuitous licensee, he would have to establish that no rent or consideration was paid for the premises. Whereas, if he seeks to evict the defendant under the Rent Act, the plaintiff accepts that the defendant is in possession of the premises as a tenant and liable to pay rent. Thus, the issue*

whether rent is being paid becomes fundamental to the decision. Therefore, in my opinion, ,the pleas that the defendant is occupying the suit premises gratuitously is not compatible with the plea that the defendant is a tenant and therefore can be evicted under the Rent Act."

(emphasis supplied)

She, therefore, submitted that the foundations of both the pleas taken by the plaintiffs being different and opposite to each other, are not permissible under law to be raised. She further submitted that the plaintiffs in order to claim title by adverse possession have to comply with the requirement of law as laid down in the case of ***Karnataka Board of Wakf -v- Government of India and others***, reported in ***2004 (10) SCC 779***, in paragraph-11 of which it is held as under:-

"11. In the eye of the law an owner would be deemed to be possession of a property so long as there is not intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario" that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayapa v. State of Karnataka). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has not equities in his favour. Since he is trying to defeat the rights of the truer owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession [Mahesh Chand Sharma (Dt.) v. Raj Kumar Sharma]."

(emphasis supplied)

14. Thus, party seeking title by adverse possession must specifically plead the date of entry into possession and on which date his possession, if any, becomes adverse to the true owner. She further relied upon the

decision in the case of ***Ganesh Shankar Shukla (since dead) through L.Rs. –v- State of Orissa & another,*** reported in ***2017 SCC On Line Ori 714*** and submitted that the issue of adverse possession is a mixed question of facts and law. Since the learned trial Court as well as the First Appellate Court came to a conclusion that the plaintiffs have not acquired any title by adverse possession, the same is not open to be raised in this Second Appeal. She, therefore, prayed for dismissal of the appeal as it involves no question of law much less any substantial question of law.

15. Heard learned counsel for the parties at length and perused the averments made in the plaint. Undisputedly, the plaintiffs have claimed right, title and interest over the suit land as occupancy rayats. All throughout, they have tried to assert their right through lease deed dated 12th October, 1944. At no place, in the body of the plaint, they have accepted the Government to be the true owner of the suit land. In order to establish the claim of title through adverse possession, the basic requirement is to accept the title of the true owner, namely, the Government of Odisha against whom they claim adverse possession. From the pleadings in the plaint, it is also apparent that the plaintiffs claim their title as occupancy rayats. Further, they claim title by adverse possession on the plea that their possession is open and continuous for more than thirty years. The edifice of claim of title by adverse possession cannot stand on the foundation of denying the title of the true owner. The plaint must contain specific pleadings of adverse possession satisfying the requirements as set out in ***Karnataka Board of Waqf (supra)***, which is conspicuously absent in the pleadings of the plaint. Claiming title over the suit land on the basis of adverse possession, is based on the principle "*nec vi, nec clam, nec precario"*. Thus, mere pleadings of open, continuous and long possession or enjoyment of the land without a specific assertion as to when the plaintiffs entered into possession and when the same became adverse to the true owner, will not by itself be sufficient to claim title by adverse possession.

16. Further, relief claimed in the plant is not clear as to whether the plaintiffs claim right, title and interest over the suit land as occupancy rayats or by adverse possession.

17. It is held by this Court in the case of ***Champa Bati Bewa (supra),*** an occupancy right cannot be claimed by adverse possession. It necessarily infers that the requirements for claim of title as an occupancy rayat and that of adverse possession are not one and the same and in fact are mutually opposite. Thus, in view of the ratio in the case of ***Praful Manohar Rele (supra),*** the claim of title by adverse possession cannot be raised as an alternative plea of occupancy rayat.

18. Mr. Mishra, learned Senior Advocate, in course of hearing, submitted that although issue No.12 has been framed with regard to the claim of the of title by adverse possession by the plaintiffs, but learned first Appellate Court has neither dealt with nor recorded any finding on the same, which itself is a matter for consideration in the Second Appeal. In view of the discussion made above, when this Court has come to a conclusion that plea of adverse possession is not available to be raised by the plaintiffs, the contention of Mr. Mishra, learned Senior Advocate loses its relevancy for consideration.

19. Taking into consideration the facts and circumstances stated above, I am of the considered opinion that this Appeal involves no substantial question of law for adjudication. Accordingly, the same stands dismissed. Photocopies of the LCR received by this Court be sent back immediately.

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