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-

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Bibhisen Mohanta-V- Lilamani Mohanta And Ors.
A.H.O. NO. 6 OF 2001
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Bibhisen Mohanta-V- Lilamani Mohanta And Ors.
A.H.O. NO. 6 OF 2001
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Chiranjib Biswal & Ors.-V- Commissioner of Income Tax, Orissa.
S.J.C. NOS.120, 121 AND 122 OF 1997
(I.A. NOS. 4,5,AND 6 OF 2019)
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INCOME TAX ACT, 1961 – Income from the Commercial complex – Whether to be treated as business income? – Held, it is to be treated as income from house property not as business income.

Chiranjib Biswal & Ors.-V- Commissioner of Income Tax, Orissa.
S.J.C. NOS.120, 121 AND 122 OF 1997
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Kalyan Ranjan Sahoo ***-V-*** *Union Of India & Ors.*
W.P.(C) NO. 489 OF 2015
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INDIAN PENAL CODE, 1860 – Section 107 and 109 – Abetment – Meaning and ingredients thereof – Held, Section 107 of the Indian Penal Code defines abetment of a thing to mean that a person abets the doing of a thing if he firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission

takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing – So far as the first two clauses are concerned, it is not necessary that the offence instigated should have been committed – Under the third clause, when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence – In other words, unlike the first two clauses, the third clause applies to a case where the offence is committed – Therefore, abetment can be by instigation, conspiracy or intentional aid – In order to decide whether a person has abetted by instigation the commission of an offence or not, the act of abetment has to be judged in the conspectus of the entire evidence in the case – The act of abetment attributed to an accused is not to be viewed or tested in isolation – On a careful analysis of the evidence on record, no evidence of abetment of commission of offence against the appellant no.2 as such the conviction of the appellant no.2 set aside.

Sridhar Swain -V- State of Odisha
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Sridhar Swain -V- State of Odisha.
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Nirmal Chandra Panigrahi & Ors. -V- State of Odisha & Ors.
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Kalyani Maternity Hospital Pvt. Ltd., Bhubaneswar Municipal-V- Bhubaneswar Municipal Corporation (BMC) W.P.(C) NO. 6590 OF 2012
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ORISSA MUNICIPAL CORPORATION ACT, 2003 – Sections 692, 693 and 694 read with provisions of Orissa Municipal Act, 1950 – Provisions under – Hike in the rate of holding tax by utilizing the transitional provisions – 'Transitional provision' – Meaning and scope of applicability – Indicated.

Kalyani Maternity Hospital Pvt. Ltd., Bhubaneswar Municipal -V- Bhubaneswar Municipal Corporation (BMC)
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M/s. Shree Durga Rice MIll -V- State of Orissa.
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Runi Jena -V- State of Odisha & Ors.
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under Section 21 of the RDB Act is mandatory and the DRAT has no power to dilute the requirement.

M/s. Ambica Cold Storage (Pvt.) Ltd. & Anr.-V- State Bank of India & Ors.

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Suresh Agarwal -V- M/s. Ores Enterprises Pvt. Ltd. & Ors.

W.P.(C) NO. 30466 OF 2020
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Kalyan Ranjan Sahoo **-V-** *Union of India & Ors.*

W.P.(C) NO. 489 OF 2015
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SERVICE LAW – Compassionate appointment under OCS (Rehabilitation Assistance) Rules 1990 – Rule 5 and 9 read with Articles 309 of the Constitution of India, – Compassionate appointment under Board of Secondary Education, Odisha – By a resolution, although the BSE has made applicable the provisions of the 1990 Rules, at the same time it has resolved to have a test for

appointment in Class III category – Whether such resolution is legal and justified? – Held, no – Reasons indicated.

Sabyasachi Nayak-V- Secretary, Board of Secondary Education, Odisha & Ors. W.P.(C) NO. 13257 OF 2013
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SERVICE LAW – Termination – Principles to be followed when the appointment is made contrary to Act, Rules, Statutes and Regulations or otherwise – Held, in order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations etc. a finding has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act, rules etc. – To arrive at such a finding, necessarily, enquiry will have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued a notice to him – If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable.

State of Odisha & Ors. -V- Kamalini Khilar & Anr.
CIVIL APPEAL NO. 1694 OF 2021
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WORD AND PHRASES – 'The doctrine of strict liability' – Applicability – Held, 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 of carelessness on that 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".

Parameswar Sahu & Anr. -V- Rupeswari Sahu & Ors.
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2021 (II) ILR - CUT- 1

THE SUPREME COURT OF INDIA

UDAY UMESH LALIT, J & K.M. JOSEPH, J.

CIVIL APPEAL NO. 1694 OF 2021
(ARISING OUT OF SLP (CIVIL NO.) 6623 OF 2021)

STATE OF ODISHA & ORS. ………Appellant(S)

.V.

KAMALINI KHILAR & ANR. ……….Respondent(S)

SERVICE LAW – Termination – Principles to be followed when the appointment is made contrary to Act, Rules, Statutes and Regulations or otherwise – Held, in order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations etc. a finding has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act, rules etc. – To arrive at such a finding, necessarily, enquiry will have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued a notice to him – If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable. (Para 21)

Case Laws Relied on and Referred to :-

1. AIR1998 SC 3261 : Basudeo Tiwari .Vs. Sido Kandhu University & Ors.
2. (2009) 7 SCC 251 : Union of India and Ors. Vs. Dalbir Singh and Ors.
3. AIR 1991 SC 101 : Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Ors.
4. (1980) 4 SCC 443 : Surendra Kumar Verma and Ors. Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Ors.
5. (2013) 10 SCC 324 : Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Ors.
6. (1979) 2 SCC 80 : Reliance is also sought to be placed on the judgements of this Court in Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Ors.
7. AIR 1998 SC 3261 : Basudeo Tiwary Vs. Sido Kanhu University and Ors.

For the Appellant : Gaurav Khanna
For the Respondent : Pranaya Kumar Mohapatra(R-1)
Satish Kumar (R-2)

JUDGMENT Date of Judgment : 28. 04. 2021

K.M. JOSEPH, J.

1. There is a delay of 247 days in filing the SLP. Having considered the matter, we are inclined to condone delay but on condition that a sum of Rs. 50,000 is paid as costs to the Respondent No. 1. Accordingly, the application to condone delay is allowed subject to payment of Rs. 50,000 to the Respondent No. 1 by the Appellant depositing the same in the Registry within 4 weeks from today. Leave granted.

2. The Appellant No. 1, namely the State of Odisha, passed a resolution dated 12.03.1996 prescribing the procedure for recruitment of Government teachers in primary schools. The Appellant No.3 namely the District Inspector of Schools, Bhadrak-II, Bhadrak had to determine the number of vacancies to be filled up through direct recruitment. Appellant No. 3 had to also determine the number of vacancies which were required to be reserved for each reserved category. It is the case of the Appellants that based on the same, on 29.07.1996 by letter dated 29.07.1996, it was communicated to the Respondent No. 1 that her name was sponsored by the District Employment Exchange for the post of primary school teacher. She was called upon to submit her application along with her documents. The Respondent No. 1 was directed to attend the viva-voce examination. A merit list was made. The Respondent No. 1 secured the 22nd position in the SEBC (Women) Category. There were only 16 vacancies which were to be filled by SEBC (Women) Category candidates. Respondent No.1 was favoured with an order of appointment dated 04.04.1998. She was issued such appointment according to the Appellants on the basis that one of the successful candidates, namely the Respondent No. 2 who secured the 16th position could not join within time. The Respondent No. 1 joined based on the joining letter dated 20.04.1998.

3. While so complaining that she was not served with the appointment order and that order was issued in a wrong name, Respondent No. 2 filed representation which based on an order in an application before the Tribunal was disposed of with certain directions by the 1st Appellant O.A No. 650 of 2000 was thereafter filed by Respondent No. 2 before the Hon'ble Orissa Administrative Tribunal. The Tribunal allowed the O.A. by order dated 21.09.2001.

The operative part reads as follows:-

"For the reasons indicated above, we allow the Original Application with the direction to the State Respondent in General and D.I of Schools (O.P. No. 3) in particular to issue appointment order in favour of the applicant within one month from the date of receipt of the copy of this order and if the post has been filled up by the D.I of Schools is to carry out direction issued by Respondent No. 1 under Annexure-6 in dispensing with the service of the candidate who had been appointed in place of Minati Pradhan, the applicant."

4. This led to order dated 16.04.2002 which was an order of appointment of Respondent No. 2 by the Appellant No. 3 and another order of the same date by which the services of the Respondent No. 1 came to be terminated. This led to the present round of litigation, namely O.A. No. 917 (C) of 2002 filed by the Respondent No. 1 before the tribunal. The Tribunal after exchange of pleadings allowed the application filed by the Respondent No.1.

5. We may refer to the following part of the order:-

"In so far as, it is obvious that Smt. Snehalata Nayak who has secured less marks and did not figure in the physically handicapped list, has been given appointment under the "physically handicapped" quota and has been allowed to continue along with several others, including S.E.B.C (male) and General (male) candidates who have secured less mark than the applicant, (Ref. Letter No. 3235 dtd. 22.10.2001 or D.I. of Schools, Bhadrak-II). Moreover, at least a show-cause notice should have been issued and an opportunity to show-cause before discharge allowed to the applicant even if for argument sake only it is accepted that her service can be terminated, as decided by the Hon'ble Apex Court in the case on ***Basudeo Tiwari-Vrs-Sido Kandhu University and others*** (**AIR,1998 SC 3261**). As no show-cause notice was issued and no opportunity to be heard was allowed and the principle of 'Audi alteram partum' was not observed, even if the applicant is deemed to be the junior most in the S.E.B.C (Women) list, her termination is illegal. Hence, Annexure-6, i.e., her termination order vide office No. 981 dtd. 14.4.2002, is quashed. The applicant be reinstated in service immediately with all attendant service benefits by creating another supernumerary post if necessary, as termination of her service was not as per the prescribed procedure or in accordance with the law of the land."

6. It is this order, which led to the passing of the impugned order by the High Court. By the impugned judgment, the High Court quashed the direction of the Tribunal to reinstate the Respondent No. 1 by creating a supernumerary post. Thereafter, it was however ordered as follows:-

"However, since the vacancy is available, the petitioners will give appointment to opposite party No. 1 Smt. Kamalini Khilar against one of such vacancies available in Bhadrak district within a period of four weeks hence, the writ petition is allowed the aforesaid extent."

7. It is feeling aggrieved by the judgment that the present appeal has been filed. We heard Learned Counsel for the Appellants and Respondents No. 1 and 2 as well.

Submission of Appellants

8. The Learned Counsel for the Appellants would complain that the High Court while granting limited relief of quashing the direction to create a supernumerary post, erred in the issuance of the direction to appoint the Respondent No. 1 in the vacancy. This is after having interfered with the order of the Tribunal as noted. The Respondent No. 1 came to be appointed only on the basis that Respondent No. 2 who admittedly had secured higher rank than the Respondent No. 1 had not reported for joining. It was only in compliance with the order of the Tribunal, that the services of Respondent No. 1 had to be terminated. It is further contended that as things stand there is no provision for making any appointment as the method of appointment has been altered to absorption from trained junior teachers.

9. Reliance was placed on the terms of the Resolution dated 12th March, 1996. It is contended that the selection was made based on the same. The Employment Exchange sponsored eligible candidates separately for general vacancies and for each reserved categories. It is contended that the sports person or physically handicapped person from any Category could apply as much. Reference is made to clause 8 of the Resolution. It is contended that the maximum age as on the 1st of January of the year of requisition was fixed as 32 years. Relaxation was however given by 5 years for women candidates interalia. Separate list was to be prepared for each of the reserved categories. Separate select list of the candidates had to be prepared for the vacancies notified in respect of that category of candidates under clause 16 of the

Resolution. Clause 17a provided that the District Inspector was to make appointment against the sanctioned posts strictly in the order in which the names occurred in the respective select lists. 16 vacancies were notified for the category of S.E.B.C. (Women). It is pointed out that the Respondent was born on 15.07.1961. She was 34 years, 5 months and 17 days as on 01.01.1996. She therefore, got the relaxation as she had applied as S.E.B.C (Women) in the Category. She secured the 22nd rank and the Respondent No.2 was at S.no. 16.

10. There is no challenge at any point to the resolution dated 12.03.1996 or the selection procedure. The last person to get an appointment from the list of S.E.B.C (Women) Category was Respondent No.1. In order to comply with the directions of the Tribunal in O.A. No. 650 of 2000, the services of the Respondent No. 1 were dispensed with. It was only the Respondent No. 1 who got the appointment against one of the vacancies notified for S.E.B.C (Women) Category because the Respondent No.2 was not served the appointment order. If the Respondent No.2 had been served the appointment letter, then the Respondent no. 1 would not have been given an appointment based on her position in her merit list for S.E.B.C (Women) Category. The Respondent No. 1 never objected to the method of preparing the select lists and is therefore not entitled to raise objection now to the preparation of the separate list. Reference is made to judgment of this Court in ***Union of India and Ors. vs. Dalbir Singh and Ors***[1]. The Respondent No.1 was always aware of the separate list for each Category. She got the benefit of relaxation of age by applying as a S.E.B.C (Women) candidate. Her non-inclusion in any other list or the selection procedure interalia was never challenged by her. It is pointed out that in the written submission of the Respondent No. 1, a misleading statement is made that the vacancy occurred prior to 03.06.1996 which is why the government proceeded to fill up the vacancy by calling upon the Respondent No. 1. It is pointed out that the letter written by the 3rd Appellant to the 2nd Appellant was about complying with the order of the Tribunal in the application filed by the Respondent No. 2. The 3rd Appellant refers to the vacancy having being filled by his predecessor. All the vacancies covered by the selection process in question occurred prior to 30.06.1996. It is also further contended that the none of the decisions relied upon by the Respondent No.1 are relevant having regard to the circumstances surrounding the appointment of the Respondent No.1 and the specific directions issued by the Tribunal.

1. (2009) 7 SCC 251

The Case of Respondent No.1.

11. There is a violation of principles of natural justice. The termination of her services is wholly illegal arbitrary and capricious. The Appellants delayed the matter. The Respondent No.1 was a permanent employee having impeccable four years of continuous service record. The finding that her services was terminated in view of the order dated 21.09.2001 is erroneous and not sustainable having regard to the following aspects.

The Respondent No. 1 was not a party in the O.A. filed by the Respondent No. 2. Secondly, the Tribunal had not directed removal of the Respondent No. 1 but only directed the removal of the person who had taken the place of the Respondent No. 2. It is pointed out that at Page no. 64 of the SLP Paper Book which is the letter dt. 22.01.2001 written by the 3rd Appellant and also referring to the list of junior most candidates of different categories appointed as primary school teachers at S.No. 3 the candidate is a general category male who had secured 109.10 marks. S.No. 5 is candidate from SEBC (Male) who secured 110.75 marks.

At S.No. 7 Jagatanand Panigrahi is specifically earmarked as Physical Handicapped Category but S.No. 8 named as Snehalata Nayak who is specifically earmarked at S.no.31 of SEBC Category and secured only 110.36 marks but is given appointment as PH illegally whereas she belongs to SEBC Category. The Respondent No. 1 belongs to SEBC Category had secured 112.75 marks which was more than what the above persons obtained.

Therefore, the Respondent No. 1 was not the person whose services was to be terminated in terms of the order of the tribunal in the earlier proceedings, it is contended.

12. It is contended that the Respondent No. 1 was not party to the earlier proceeding. The order adversely affecting the Respondent No. 1 should not have been passed and the government should have challenged the order passed in the earlier proceeding. There is the bar under Section 115 of the Indian Evidence Act, 1872. In other words, there is estoppel. Reliance is placed on the judgements of this court in ***Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and Ors.***[2]***, Surendra Kumar Verma and Ors. vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Ors.***[3]

2. AIR 1991 SC 101, **3.** (1980) 4 SCC 443

and ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Ors.***[4] . Reliance is also sought to be placed on the judgements of this Court in ***Hindustan Tin Works Pvt. Ltd. vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Ors.***[5] ***and Basudeo Tiwary vs. Sido Kanhu University and Ors.***[6]

There were persons who secured lesser marks than the Respondent No.1 who are allowed to be retained in service and it was the Respondent No. 1 who was harassed and victimised. The delay in litigation is solely attributed to the government. There is a delay of almost 7 years in filing reply by the government. After the passing of the order by the Tribunal to reinstate the Respondent No. 1 with all service benefit it woke up only when contempt proceeding was initiated and the order was challenged only after a lapse of two years. The career of the Respondent No. 1 was spoiled due to the illegal termination. She could not properly bring up her children and spent the entire period of litigation in distress and financial hardship. Had she been continued she would have become head mistress now. She being a lady and married woman residing in rural area she could not get any employment elsewhere due to want of the same in the locality and affidavit is also filed indicating that she could not get suitable employment elsewhere.

FINDINGS

13. The Order of the Tribunal passed in O.A. No. 650 of 2000 was binding on the department. We cannot at this stage sit in judgment over the correctness of the order passed in the said O.A. Apparently, though the Respondent No. 2 having obtained higher rank than the Respondent No. 1 in the Category of S.E.B.C (Women) had been favoured with an appointment letter, it was not delivered to her as it was addressed wrongly. The Respondent No. 2, therefore did not join as apparently, she did not receive the appointment order. At least these are the findings of the Tribunal.

In fact, the matter had engaged the attention of the 1st Appellant (govt) and it took a decision dated 24.02.2000 therein. The decision of the Government as extracted in the order of the Tribunal reads as follows:-

"I am desired to invite a reference to the Order Memo No. 106/OAT, dated 07.01.2000 of the Hon'ble OAT, Bhubaneswar on the subject noted

4 (2013) 10 SCC 324, **5**. (1979) 2 SCC 80, **6** AIR 1998 SC 3261

above. It had been reported by the D.I. of Schools, Bhadrak-II in his letter No. 388, dated 31.01.2000 with copy to you in Memo No. 389, dated 31.01.2000 that though one Minati Pradhan was selected and is to be appointed, but the appointment order was dispatched in the name of Minakhi Pradhan. Hence, before taking steps to comply with the order of the Tribunal to appoint Minati Pradhan, please check the fact in the Office of D.I. of Schools, Bhadrak-II to ascertain whether any other person named Minakhi Pradhan has been appointed on the basis of incorrectly addressed letter. If yes, the applicant in the writ petition will join in her place if not the junior most candidate will be removed to let her join unless if Government decides to permit the applicant to join in a post subsequently fallen vacant."

The Tribunal directed as already noted that if the post had been filled up the District Inspector of schools was to carry out the direction of the Respondent No. 1 which we have extracted that is dispense with the service of the candidate who had been appointed in place of Respondent No. 2. Interestingly, we may notice that the Government had directed that the junior most candidate will be removed in order to enable the Respondent No. 2 to join. The direction of the Tribunal has become final.

14. While it may be true the Respondent No. 2 was not a party to the O.A. in law nothing prevented her from challenging the said order. It may not be open to her to contend that as she was not a party, the said order cannot be and should not be implemented in letter and spirit. It is an order passed by a Tribunal which had jurisdiction in the matter. The finding that the Respondent No. 2 could not join because of the letter of appointment being issued in the wrong name cannot be open to challenge. The Tribunal was therefore, setting right an illegality and injustice caused to Respondent No. 2. There is no dispute that there were only 16 vacancies to be filled up of the category of S.E.B.C. (Women). For complying with the order of the Tribunal the Appellants had to dispense with the service of the person appointed in place of Respondent No. 2. Therefore, the only question which survived for consideration is whether it is the Respondent No. 1 who was appointed in place of the Respondent No. 2.

15. It would appear to be clear that under the resolution and procedure adopted, separate lists were prepared for various categories. Vacancies were earmarked for different groups. Merit list was also based on this classification. The Respondent No. 1 figured in the merit list at S.no. 22 for

the category S.E.B.C. Women. The surest way to find out whether the termination of service of Respondent No. 1 was in tune with the direction issued by the tribunal in the earlier O.A. filed by the Respondent No. 2 is to find out as to whether the Respondent No. 1 would have secured the appointment, if the appointment letter was issued in the name correctly of the Respondent No. 2 and she had joined on the said basis. If the Respondent No. 1 would not secure the appointment if the Respondent No. 2 had so joined and in other words, the appointment of the Respondent No. 1 was only because of the non-joining of the Respondent No.2, then it is the Respondent No. 1 who is the person who was appointed in place of the Respondent No. 2 within the meaning of the order passed in O.A. No. 650 of 2000.

This is not a case involving disciplinary proceedings against Respondent No. 1. No stigma is attached to the Respondent No. 1. The whole exercise was necessitated no doubt as a result of a mistake committed by the Appellants in not sending the appointment letter at the correct address to Respondent No. 2. In view of the fact that order O.A. No. 650 of 2000 had become final the Appellants were obliged to comply with the order. If they had nothing to offer by explanation to the case of the Respondent No. 2 that she was not served with the letter of appointment, the Respondent No. 1 would not be justified in contending that the Appellant should have challenged the order of the Tribunal.

16. We find merit also in the contention of the Appellants that having regard to the Resolution under which the entire appointment were carried out, the matter is to be governed by the separate merit lists which were prepared. In the nature of the facts which make up the dispute in this case, it only means that the Respondent No. 1 was the junior most in the category of S.E.B.C (Women). The order of the Tribunal to be complied with contemplated dispensing the service of the candidate who was appointed in place of the Respondent No. 2.

17. It may not be possible to find that any person other than the Respondent No. 1 was the candidate who was appointed in place of the Respondent No. 2. Both the Respondent No. 2 and the Respondent No. 1 were considered for appointment from the Category of S.E.B.C (Women) for which Category, 16 vacancies were earmarked. The merit list of SEBC (female) (page 49) shows that the Respondent No. 2 with 117.46 marks was at the 16th position. Snehalata Nayak is no doubt at Serial No. 31 of SEBC

(Women) list. But she is shown in the category of P.H in the list of junior most of different categories in letter dt. 22.11.2001 sent by the Appellant No. 3. The person at Serial No.7 Jagatanand Panigrahi is shown P.H. has secured lesser marks than Snehalata Nayak. It is not clear how in the letter dt. 22.11.2001, persons at Serial No. 7, and 8 are both mentioned under the category as P.H. and as being the junior most candidates. No doubt under the name of Snehalata Nayak, it is shown S.no. 31 of SEBC Category. Does it mean that Snehalata was appointed from SEBC but under the category of physically handicapped? The office order terminating the service of the Respondent No.1 refers to the letter no. 7119 dated 16.03.2002 sent by the 2nd Appellant Director. It is not produced. However, what is clear is that the person appointed in place of the Respondent No.2 was the Respondent No. 1.

18. In such circumstances we cannot possibly hold that other candidates who may have secured lesser marks but who it must be noted were treated as falling in different categories for which separate list were prepared, should have been shown the door to comply with the order of the Tribunal. The Respondent No. 1 was considered under the SEBC (Women) as being a woman, she could aspire with the age relaxation.

19. We may incidentally notice that the Respondent No. 1 has only a few months for attaining the age of superannuation. It may be true that she has not secured any alternative employment as stated in her affidavit and also projected in the written submissions. She has also not been able to work based on the direction of the Tribunal or of the High Court.

20. The decisions relied upon by the Respondent No. 1 may not assist her.

As far as the decision in the Delhi Transport Corporation (supra) is concerned, the Court was dealing with constitutionality of the power under the regulation to dispense with the service of a permanent employee without holding any enquiry. This Court took the view that dispensing with the service of the permanent and confirmed employee by merely issuing a notice without assigning reasons could not be countenanced. The decision clearly cannot apply in a situation where the Appellants being under the legal obligation to implement the order of the Tribunal dispensed with the services of the employee in accordance with the directions. The decisions in Hindustan Tin Works Pvt. Ltd. (supra) and Surendra Kumar Verma (supra) relate to Industrial Law and the effect of illegal termination of a workman. An order which is passed pursuant to a direction which is binding on the

employer cannot possibly be described as illegal. Therefore, the said case law cannot advance the case of the Respondent.

21. In Basudeo Tiwary (supra) the services of the Appellant had been terminated. The Appellant was appointed as a lecturer. The college was taken over by the University. The services was terminated on the basis that the appointment was not made validly. One of the contentions taken was there was violation of principles of natural justice. Though reliance was undoubtedly placed on Section 35 (3) of the Bihar University Act, 1951, and the same purported to provide that any appointment interalia contrary to the act statutes rules or regulation or in any regular or unauthorised manner shall be terminated at any time without any notice, we do notice para 12 of the said judgment: -

"The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner. The condition precedent for exercise of this power is that an appointment had been made contrary to Act, Rules, Statutes and Regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations etc. a finding has to be recorded and unless such a finding is recorded, the termination cannot be made but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued to him. If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in D.T.C. Mazdoor Sabha's case. In such an event, we have to hold that in the provision there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, statute, rule or regulation eta and it is only on such a conclusion being drawn, the services of the person could be terminated without further notice. That is how Section 35(3) in this case will have to be read."

22. Finding that there was no notice issued to the Appellant therein and further noticing that the Appellant, had died during the pendency of the proceedings it was to be deemed that the Appellant had died in harness. He was allowed the benefit of payment of arrears of salary from the date of termination of the service till the date of his death.

23. We may notice the decision would appear to the distinguishable in terms of the facts in this case. It is no doubt true that the Respondent No. 1 was offered appointment and was appointed. However, the Appellants suffered an order by a competent Tribunal which it was duty bound to implement. We would be remiss if we were to discard the principles of natural justice as inapplicable. No doubt there was no need to hold any enquiry as the termination was not on disciplinary grounds. No stigma is attached to Respondent No. 1. But a notice given to the Respondent No. 1 as to why in terms of the order of the Tribunal the Respondent No. 1 should be treated as the person whose services was to be dispensed with should have been issued. However, we would think that on the materials placed before the Court, with 16 vacancies alone earmarked for S.E.B.C (Women), and the Respondent No. 2 being the 16th and the last of the candidates entitled in the said Category, not joining in the circumstances resulting in the Respondent No. 1 being appointed and the order of the Tribunal being binding on the Appellants, we would think that in the present case, the failure to afford an opportunity to the Respondent No.1 to show cause as to why her services should not be terminated cannot be held to be fatal. We also cannot loose sight of the fact nearly two decades have gone by and only for the reason that the Respondent was not offered an opportunity of being heard in the facts of this case, we cannot support the order of the High Court in directing the appointment of the Respondent No. 1. It is not as if the High Court has found that the termination of the service of the Respondent No. 1 was ab initio void or illegal as such. The Court in fact set aside the direction of the Tribunal to reinstate by creating a supernumerary post. This is not challenged by Respondent No. 1. It directed only that the appointment of the Respondent No. 1 be made in the vacancy. Therefore, the claim of Respondent No. 1 for back wages from the date of termination is at any rate clearly untenable.

24. Deepali Gundu Surwase (supra), the matter arose under the Maharashtra Employees of Private Schools (condition of service) Regulation Act, 1977. This Court undoubtedly laid down that in the case of wrongful termination of service reinstatement with the continuity of service and back

wages is the normal rule. It was subject to the qualification that the Court may interalia take into consideration the length of service and the nature of misconduct if any proved, the financial condition of the employer and similar other factors. For the reasons which we have indicated in the facts of this case Respondent No. 1 cannot be permitted to draw any benefit from the said pronouncement.

The High Court rightly set aside the direction for creation of the supernumerary post. We find that there is no basis for the High Court to have thereafter directed the appointment of the Respondent No. 1 in any vacancy available.

25. The upshot of the above discussion is that the termination of the service of the Respondent No. 1 was unavoidable in the light of the binding order of the Tribunal in O.A. No. 650 of 2000. Consequently, the order of the High Court to the extent impugned is to be set aside. Resultantly, we allow the appeal and the order of the High Court impugned is set aside and the order passed in the O.A. no. 917 of 2002 filed by the Respondent No. 1 will stand set aside.

26. No order as to costs in the appeal. We make it clear that if the cost of Rs. 50,000 ordered as condition to condone delay in filing the SLP is not paid as aforesaid the impugned judgment will stand, the application for condoning delay will stand dismissed and the leave granted will stand revoked and this judgment will stand recalled. If the cost is deposited, the same can be withdrawn by the Respondent No. 1.

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2021 (II) ILR - CUT- 13

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

PRATIMA MOHANTY ....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the change of policy by the Govt. in respect of allotment of land to landless Jawans, who have served in the forward areas during 26th October 1962 to 31st January, 1964 – Policy changed to the effect that in lieu of land monetary compensation would be provided as there is scarcity of land – Plea that an accrued right in favour of the Jawan cannot be sought to be taken away by changing the policy and that it was the fault of the Opposite Parties that the Petitioner could not be allotted land although he was found eligible way back in 1966 – Records show otherwise – Held, the change in policy with sound reasoning cannot be interfered with.

For the Petitioner : Mr.S.P.Mishra, Sr.Adv.
For the Opp. Parties : Mr.M.S.Sahu, A.G.A.

ORDER Date of Order : 12.04.2021

BY THE BENCH:

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

2. The Petitioner, whose late husband was working in the Navy between 1955 to 1966, has filed the present petition for a mandamus to issue to the Opposite Parties to allot Ac.5.00 land at Bidanasi or Bidyadharpur area of Cuttack. She also seeks quashing of a Gazette Notification dated 19th February, 2014 in the matter of monetary grant in lieu of agricultural land to landless Jawans, who have served in the forward areas during 26th October 1962 to 31st January, 1964.

3. The background facts are that the husband of the Petitioner was recommended by the Home Department by an order dated 13th January, 1966 for concession in terms of the Home Department Resolution dated 14th May, 1963 and subsequent resolution dated 11th April, 1964. After her husband's death in 1983, the Petitioner is stated to have approached the State Government. By letter dated 1st May, 1989, the Under Secretary, Home Department, Government of Odisha wrote to the Collector for taking suitable steps for allotment of the land in favour of the Petitioner an early date.

4. It appears that thereafter for a long time the Petitioner did not approach the Collector. She submitted a grievance petition on 23rd December, 2006 for allotment of five acres of Government land. In a letter dated 20th January 2007 by the Joint Secretary, Revenue and Disaster Management

Department (RDMD), Government of Odisha addressed to the Collector, Cuttack wherein it was stated that the Petitioner had submitted the aforementioned grievance petition and that she had alleged that she had been running to the office of the Collector, Cuttack and Tashil "for last twenty five years". The Collector, Cuttack was requested to furnish a report on the action taken on the Petitioner's grievance.

5. A separate letter was sent to the Principal Secretary to the Government of Odisha, RDMD by the Secretary, Rajya Sainik Board, Odisha requesting intervention of the Revenue Department to address the grievance of the Petitioner. On 7th April, 2010 another letter was written to the Collector, Cuttack by the Under Secretary, RDMB enclosing the Petitioner's grievance petitioner 20th February, 2010 and requesting the Collector to please examine the grievance of Smt. Mohanty for settlement of land in respect of Plot No.1436 under Khata No.351 of village Poparada as per the kind orders of Commissioner-cum-Secretary. On its part the Collector wrote the Tahasildar on 14th May, 2013 asking for action taken report.

6. On 19th February, 2014 the Government published a resolution in the Odisha Gazette whereby the policy of allotting land to Jawans, who had been engaged between the period from 26th October, 1962 to 31st January, 1964 was reviewed and substituted by the policy of monetary grant in lieu of land. Following this, the case of the Petitioner was examined afresh and an order passed on 18th March, 2017 by the Tahasildar Sadar, Cuttack recommending to the Home Department sanction of a money grant of Rs.50,000/- in favour of the Petitioner.

7. Prior to 19th June, 2013, the Tahasildar Sadar, Cuttack informed the Additional Magistrate (Rev), Cuttack pointing out that the Petitioner had sought allotment of Government land pertaining to Plot No.33, Area Ac.5.000 in Khata No.156 in Mouza-Bidyadharpur "which comes under the Cuttack Urban Area" and therefore no land can be considered in the said land schedule for allotment. In the same letter, the Tahasildar informed the ADM as under:

> "Besides another patch of land was also shown to her, by the undersigned of Mouza-Urali but it was not accepted by her on the plea that the same is not suitable as per her version. Further Smt. Mohanty had applied earlier for a piece of Govt. land pertaining to plot No.527, area Ac.5.035 under Khata-698 in Mouza Gateirout

> Patana, which was registered as Lease Case No.18(R)/2011. Proclamation as per rule 5(5) of the O.G.L.S. Rules, 1983 was issued inviting public objections. In response to the proclamation, the villagers of Gateirout Patna filed objections protesting to such lease. It was heard at length and the application/case was dropped on 16.04.2012."

8. In the counter affidavit filed on behalf of Opposite Parties 4 and 5, it is pointed out that the Petitioner had been insisting of allotment of five acres of cultiviable land in the Bidanasi area, which could not be acceded to, since it fell within the urban area of Cuttack. Subsequently, the Petitioner applied for allotment of land in mouza Unit No.5, Dakshina Deula Sahi. But that area too was within the urban area and the Petitioner's application was rejected by letter dated 13th January, 2004 itself.

9. A third petition was filed by the Petitioner on 4th March, 2006 again for allotment of land in the Bidanasi area. In reply to a letter dated 4th May, 2007 from the A.D.M.(Rev) and 29th November, 2008 from the Dy.Collector (Rev), the Tahasildar, Sadar replied that no cultiviable land is available under Cuttack Sadar Tahasil for settlement. Even in 2012, a Lease Case No.18(R) of 2011 was instituted for allotment of land in Mouza Gatieroutpatna. However, on account of objections from the villagers, the Tahasildar, Cuttack dropped the lease case.

10. It appears that on 24th July, 2013 the Petitioner again applied for seven Ac.7.200 dec. in mouza Uttampur under R.I.Circle, Gopalpur, which is also found within the urban limits of Cuttack city.

11. In the rejoinder filed by the Petitioner, it stated that under the RTI Act, the Petitioner ascertained the availability of several plots in Gopalpur mouza, which are of goacher and patita kissam. The tenor of the rejoinder affidavit is therefore reflective of the Petitioner's insistence on allotment of land within agricultural land in the Bidanasi or Bidyadhar area in the heart of the Cuttack city.

12. An additional counter affidavit was filed on 18th April, 2019 stating that the Petitioner was insisting on allotment of five acres of land in the heart of Cuttack city and no such land is available for settlement in favour of the Petitioner. Reference has also been made to the policy change brought about by the resolution dated 19th February, 2014.

13. Shri Mishra, learned Senior Counsel appearing for the Petitioner, submitted that an accrued right in favour of the Petitioner cannot be sought to be taken away by changing the policy. He submitted that it was the fault of the Opposite Parties that the Petitioner could not be allotted land although her husband was found eligible for that purpose way back in 1966. He submitted that any delay in approaching the Court is attributable only to the inaction of the Opposite Parties. It was only when on 19th February, 2014 there was a change in the policy of the Government of Odisha whereby allotment of land as Jawan lease case was replaced by grant of monetary relief that the Petitioner decided to challenge it. According to him, therefore the Petitioner's prayer cannot be rejected on the ground of laches.

14. Mr.Sahu, learned A.G.A. on the other hand, pointed out that throughout the Petitioner has been insisting that five acres of agricultural land should be allotted in the heart of Cuttack city and such a demand could not be acceded to. He pointed out that because of the Petitioner's reluctance on more than one occasion to accept the land offered to her that there has in fact been no allotment made in her favour thus far although her husband had been found eligible way back in 1966. He submitted that it was on account of the Petitioner's intransigence that she could not be allotted the land prior to the change in policy brought about on 19th February, 2014.

15. The above submissions have been considered. It appears to the Court that this is not one of the cases where the Opposite Parties have completely failed to address the grievance of the Petitioner regarding allotment of land after her late husband was found eligible for such allotment. From the facts narrated above, it is not clear that as to the steps were taken by him during his lifetime to follow up on his being found eligible. After his death 1983, the documents do show that the Petitioner applied to the Opposite Parties only some time in 1989 for allotment. A request was made to the Collector, Cuttack to allot land in her favour "at an early date". Nevertheless, viewed from point of the Petitioner, it appears that there was a large gap twenty five years from the date her husband was found eligible till the date when the Petitioner decided to follow up on the case.

16. Be that as it may, what emerges clearly from the pleadings is that prior to the change in policy on 19th February, 2014, the Petitioner had indeed been offered lands for allotment on at least two occasions even though it was not the location of her choice.

17. Although Mr. Mishra submitted that at this stage the Petitioner would be happy with land anywhere in Odisha being allotted in her favour, the fact remains that one more than one occasion the Petitioner was offered land for allotment, may be not within the Cuttack city, she refused and insisted that she needed to be allotted land for agricultural purposes within the limits of Cuttack city. Such demand not being found acceptable by the Opposite Parties, and the consequential refusal to allot such land, cannot be said to be arbitrary or irrational. Indeed the Petitioner appears to have forgone, of her own volition, the allotment of valuable Government land pursuant to her husband being found eligible to it, on at least three occasions. The Court, therefore, finds that this is not a case of inaction by the Opposite Parties.

18. The second obvious difficulty for the Petitioner is of course the policy change brought about by the Opposite Parties on 19th February, 2014. At this point in time i.e., 2021, it is not possible to the Court, in the circumstances explained hereinbefore, to issue any mandamus to the Opposite Parties to allot land in favour of the Petitioner notwithstanding the change in policy.

19. It is not possible to accept the plea of Mr. Mishra that the Petitioner had a vested right for allotment and that the resolution dated 19th February, 2014 which envisages only grant of monetary compensation in lieu of allotment of land, does not apply to the Petitioner's case. Having missed the opportunity of allotment of land more than two occasions prior thereto, the Petitioner cannot be heard to say that despite her refusal of such offers made earlier, she had a vested right in the land being allotted in her favour notwithstanding the policy change.

20. For the aforementioned reason, the Court is unable to accede to the prayer of the Petitioner that a mandamus should be issued to the Opposite Parties to allot five acres of land in her favour within the Cuttack urban limits.

21. As regards the challenge to the policy dated 19th February, 2014, the Court finds that there is sufficient indication in the resolution of that date why the State Government had to resolve to the change in policy. In para-2 of the said resolution, it is stated as under:

> "2. Now, the situation with regard to availability of land has further worsened with passage of time. It is has become difficult to find Government land for

> implementation of projects even for developmental purposes funded from the State exchequer. In many occasions, land reserved for specific purposes in RoR are now required to be dereserved for other public purposes. Because Revenue & D.M. Department has not been able to meet the requirement of land for Administrative Departments, policy for direct purchase of private land for social development projects has, meanwhile, been formulated and communicated in Revenue & D.M. Department Letter No.26223/R & D.M., dated the 6th July 2013."

22. Indeed with the scarcity of land available for allotment, the Government is constrained to review the earlier policy and this per se cannot be said to be arbitrary or irrational. Viewed from any angle, it is not possible to agree with Mr.Mishra that there is a deliberate failure on the part of the Opposite Parties to adhere to the assurance given to the Petitioner's husband that he would be allotted land after he was found eligible way back in 1966. The ingredients for applying the doctrine of legitimate expectation do not exist in the present case since the Petitioner who had repeatedly refused the offers for allotment of land by insisting that the land which would be allotted in a particular location within Cuttack city when in fact at the same time she was insisting she needs the land for agricultural purposes.

23. Finally, Mr.Mishra, learned Senior Counsel for the Petitioner states that since in terms of new policy the Petitioner has been found legible and has been granted monetary compensation by an order dated 18th March, 2017.

24. It is, accordingly directed that the Opposite Parties will now proceed to pay to the Petitioner the monetary grant of Rs.50,000/- (fifty thousand) sanctioned in her favour by the order dated 18th March, 2017 not later than four weeks from today.

25. The petition is disposed of in the above terms but in the circumstances, with no order as to costs.

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

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2021 (II) ILR - CUT- 20

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

W.P.(C) NO. 30466 OF 2020

SURESH AGARWAL ………Petitioner

.V.

M/S. ORES ENTERPRISES PVT. LTD. & ORS. …….Opp. Parties

RECOVERY OF DEBTS AND BANKRUPTCY ACT,1993 – Section 30 – Provisions under for filing of appeal – Delay in filing appeal – The question that arises as to whether the DRAT can permit to file an appeal against the order of the RO before the DRT by condoning the delay? – Held, no – Reasons explained.

> *"That being the position, the question of the DRAT permitting Opposite Party No.1 to file an appeal by the impugned order passed on 6th October 2020, long after the expiry of the 30 day period within which such appeal had to be filed, does not arise. In other words, after the judgment of the Supreme Court in International Asset Reconstruction Company of India Limited (supra), the DRT did not have the power to condone the delay in filing the appeal beyond 30 days from the date of the order of the RO. It is inconceivable that the DRAT which is again a body limited by statute, could have the power to condone the delay in filing the appeal before the DRT. It should be noted here that unlike the High Court under Article 226 of the Constitution, the DRAT is a statutory body, whose powers are prescribed by the statute. While it can condone the delay in the filing of an appeal before itself by virtue of the proviso to Section 20 (3) of the RDB Act, the DRAT has no power to condone the delay in filing of the appeal before the DRT against an order of an RO. That being the position, by the impugned order, the DRAT could not have possibly permitted the Petitioner to file an appeal against the order of the RO before the DRT long after the expiry of 30 days after knowledge of the order of the RO. This is in addition to the fact that with Opposite Party No.1 not having chosen to challenge the order dated 13th May 2019 of the RO in the first place by filing an appeal before the DRT, it could not have at the stage of an appeal against the order of the DRT rejecting its offer to pay the reserve price, permitted Opposite Party No.1 to file such appeal."* *(Paras 22 to 24)*

<u>Case Laws Relied on and Referred to</u> :-

1. (2017) 16 SCC 137 : International Asset Reconstruction Company of India Limited Vs. Official Liquidator of Aldrich Pharmaceuticals Limited & Anr.

For the Petitioner : Mr. Subrat Mishra
Opp. the Parties : Mr. S.R. Pattnaik, Mr. P.Pattnaik & Mr. Tuna Sahu

JUDGMENT Date of Judgment : 15.04.2021

BY THE BENCH:

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

2. This is a petition challenging an order dated 6th October 2020 of the Debts Recovery Appellate Tribunal (DRAT), Kolkata whereby an order dated 28th June 2019 of the Debts Recovery Tribunal (DRT), Cuttack in MA No.89 of 2019 arising out of OA No.381 of 2011 was set aside and Opposite Party No.1-M/s. Ores Enterprises Pvt. Ltd was permitted to file an appeal against the proceedings of the Recovery Officer (RO), DRT, Cuttack before the DRT for disposal of such appeal within four weeks from the date of filing of the appeal.

3. On 18th November 2020, while directing notice to be issued in this case, the following order was passed:

> *"The Court is convened through Video Conferencing mode.*
>
> *Heard learned counsel for the petitioner.*
>
> *The contention of learned counsel for the petitioner is that the Debt Recovery Appellate Tribunal, Kolkata in the impugned order dated 06.10.2020 was not justified in directing that the time spent by the opposite party-M/s. Ores Enterprises (P) Ltd. in the DRT and DRAT shall be exempted for the purpose of hearing of the appeal before the learned Presiding Officer, DRT, Cuttack. Learned counsel for the petitioner citing a decision in the case of International Asset Reconstruction Company of India Limited vs. Official Liquidator of Aldrich Pharmaceuticals Limited and Another, reported in (2017) 16 SCC 137, argued that the Hon'ble Supreme Court has held that the prescribed period of 30 days for preferring appeal against order of Recovery officer under Sections 25 to 28 cannot be condoned by application of Section 5 of the Limitation Act for the reason that there is no power with the Recovery Officer for condonation of delay. Delay in the present case, according to the petitioner, is more than one year.*
>
> *Issue notice.*
>
> *Notice be issued to the opposite parties by Speed Post with A.D. returnable by 13.01.2021. Requisites for such notice be filed within a week.*
>
> *List this matter on 13.01.2021.*
>
> *It is directed that in the meantime operation of the order dated 06.10.2020 (Annexure-14) passed by the Debt Recovery Appellate Tribunal, Kolkata in O.A. No.381 of 2011 shall remain stayed.*

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

4. The background facts are that M/s. Anmol International Pvt. Ltd. (Opposite Party No.2) had borrowed a loan from the Housing and Urban Development Corporation Limited (HUDCO) (Opposite Party No.5) creating an equitable mortgage of the property situated at Udit Nagar, Khata No.365/388, Plot No.554/1886, area Ac.0.255 Decimal (property in question). Upon Opposite Party No.2 defaulting in payment of the loan, proceedings were initiated against it, which culminated in a decree by the DRT, Cuttack on 9th November 2016 in O.A. No.381 of 2011 (HUDCO v. M/s.Anmol International Pvt. Ltd. and others).

5. In the above proceedings, the present Opposite Party No.1 i.e. M/s. Ores Enterprises Pvt. Ltd. was Opposite Party No.5, as a guarantor for the loan availed of by Opposite Party No.2.

6. Pursuant to the said decree, the RO, DRT, Cuttack issued a proclamation of sale in R.P. No.87/2016/CTC putting up the property in question for auction sale with a reserve price of Rs.5,77,82,000/-. In that notice, it was stated that the outstanding dues as far as Opposite Party No.2 is concerned was Rs.10,22,30,746.00 with p&fi interest @ 11.25 % per annum from 5th February, 2019 till realization of the dues.

7. When the public auction was held on 4th February 2019, the RO, DRT, Cuttack finalized the sale in favour of the present Petitioner, who was the highest bidder with an amount of Rs.5,83,32,000/-, which was above the reserve price.

8. According to the Petitioner, Opposite Party No.2 filed MA No.8 of 2019 before the RO to set aside the sale. By an order dated 25th April 2019, the RO directed Opposite Party No.2 to deposit the recoverable amount by 30th April 2019, and listed the application on that date. Opposite Party No.2 challenged the said order of the RO by filing W.P.(C) No.8614 of 2019 in this Court. The said writ petition was disposed of by this Court on 30th April 2019, directing Opposite Party No.2 to avail the alternative remedy of appeal before the DRT, Cuttack and directing for maintaining status quo for ten days.

9. Thereafter, Opposite Party No.2 filed an appeal under Section 30 of the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act). In absence of any interim order passed by the DRT, Cuttack, the RO proceeded to issue a sale confirmation and sale certificate in favour of the present Petitioner on 13th May 2019, with the Petitioner having deposited the entire sale amount before the RO. Thereafter, a registered sale deed was executed on 24th May 2019, in favour of the Petitioner.

10. As far as Opposite Party No.1 is concerned, it filed W.P.(C) No.3165 of 2019 in this Court. The said writ petition was disposed of on 7th February 2019, noting that the interim order of this Court had not been complied with and further that the DRT, Cuttack was already seized of the auction. A second writ petition, W.P.(C) No.10105 of 2019, was filed by Opposite Party No.1 challenging the order dated 13th May 2019 of the RO confirming the sale in favour of the present Petitioner. This was disposed of by the Court on 18th June 2019, with liberty to Opposite Party No.1 to move the DRT, Cuttack.

11. Yet another writ petition i.e. W.P.(C) No.9631 of 2019 was filed by Opposite Party No.2 challenging the action of the Sub-Registrar, Panposh in not considering the objection raised by it. By an order dated 29th May 2019, this Court dismissed the said writ petition.

12. Opposite Party No.2 thereafter filed an appeal under Section 30 of the RDB Act before the DRT, Cuttack challenging the order dated 25th April 2019 of the RO. M.A. No. 1416 of 2019 filed by Opposite Party No.2 for setting aside the order dated 13th May 2019 of the RO settling the sale and issuing sale certificate in favour of the Petitioner was dismissed by the DRT, Cuttack on 3rd June, 2019. The appeal under Diary No.1263 of 2019 was subsequently dismissed on 26th October, 2020.

13. Opposite Party No.1 filed MA No.89 of 2019 before the DRT, Cuttack in the disposed of O.A. No.381 of 2011 with a prayer offering to pay the reserve price of the e-auction. Thereafter, Opposite Party No.1 filed W.P.(C) No.6837 of 2019, which was disposed of by this Court on 27th March 2019, with a direction to the DRT Cuttack to consider MA No.89 of 2019. Pursuant to the above direction, the DRT, Cuttack passed an order dated 28th June 2019, dismissing the MA 89 of 2019.

14. The next set of proceedings what are relevant as far as the present petition is concerned is that , aggrieved by the order dated 28th June 2019 of the DRT rejecting its MA No.89 of 2019, Opposite Party No.1 filed an appeal before the DRAT, Kolkata. It appears that the said appeal was filed on 19th September, 2019. An application No.324 of 2019 was also filed seeking condonation of delay of 58 days in filing the appeal. The reason given therein was that the copy of the order of the DRT was not supplied to Opposite Party No.1 and it became aware of the order only on 29th August, 2019 in CONTC No.1057 of 2019 in the High Court.

15. Affidavits were filed both by the present Petitioner and HUDCO, specifically taking a plea that the appeal was barred by limitation.

16. It is stated the appeal was heard by the DRAT, Kolkata on 11th October 2019, 9th December 2019, 28th January 2020 and 10th February, 2020. According to the Petitioner, it is only when he received notice in Appeal No.1 of 2020 in the DRT, Cuttack that he realized that the appeal of Opposite Party No.1 had been disposed of by the DRAT, Kolkata on 6th October, 2020.

17. The impugned order dated 6th October 2020 of the DRAT, Kolkata reads as under:

> *"The Auction Sale in this case has already taken place when M.A. No.89 of 2019 was pending before the Learned Presiding Officer, DRT, Cuttack. The Appellant has a right to file an appeal before the Learned P.O. DRT against the proceedings of the Recovery Officer of DRT and such being the case, the appellant may exercise its right to file an appeal before the Learned P.O. of DRT.*
>
> *Therefore, it is made clear that the Appellant may file an appeal against the proceedings of the Learned Recovery Officer, DRT, Cuttack before the Learned P.O. and if an appeal is filed the Learned Presiding Officer is directed to hear the appeal and dispose of the same within a period of four weeks from the date filing of the appeal. The time spent in the DRT and this Tribunal shall be exempted for the purpose of hearing of the appeal before the Learned Presiding Officer, DRT, Cuttack.*
>
> *The appellant and the Respondents shall co-operate with the Tribunal below to enable the Learned Presiding Officer, DRT, Cuttack to pass orders in the appeal under Section 30 of the RDB Act, 1993 within the stipulated time."*

18. Thereafter, the present petition was filed in which the order as noted above was passed by this Court on 18th November, 2020.

19. The issue highlighted in the above order passed by this Court is that after the judgment of the Supreme Court in ***International Asset Reconstruction Company of India Limited vs. Official Liquidator of Aldrich Pharmaceuticals Limited and Another (2017) 16 SCC 137***, the legal position is clear that Section 5 of the Limitation Act does not apply to an appeal under Section 30 of the RDB Act. In other words, the DRT has no power to condone the delay in filing the appeal beyond the period of 30 days from date of which a copy of the order of the RO is issued to the Party.

20. The question that arises as far as the present case is concerned is whether the DRAT would have permitted the Petitioner to file an appeal against the order of the RO before the DRT by condoning the delay in filing such appeal and stating that time spent in the DRT and DRAT would be exempt for the purposes of hearing of the appeal by the DRT ?

21. In the present case, it must be noted that to begin with the Petitioner had not even challenged the order of the RO before the DRT. What Opposite Party No.1 had done was to file MA No. 89 of 2019 before the DRT with a prayer to make the payment of reserve price of the e-auction conducted by the RO in RP No.87 of 2016. In other words, the order dated 13th May 2019 of the RO settling the sale in favour of the present Petitioner was never challenged to begin with by Opposite Party No.1. It must be recalled here that under Section 30 of the RDB Act such an appeal would have to be filed within 30days from the date of order of the R.O. i.e. 13th May 2019. Even if it is taken that such limitation will begin to run from the date the party aggrieved becomes aware of the order, clearly on the date that Opposite Party No.1 filed MA No.89 of 2019 before the DRT, it was already aware of the order of the RO. By that date, Opposite Party No.1 had not filed any appeal in the DRT. In other words, it gives up the right to file an appeal on the date it filed MA No.89 of 2019 in the DRT.

22. That being the position, the question of the DRAT permitting Opposite Party No.1 to file an appeal by the impugned order passed on 6th October 2020, long after the expiry of the 30 day period within which such appeal had to be filed, does not arise. In other words, after the judgment of the Supreme Court in ***International Asset Reconstruction Company of India Limited*** (supra), the DRT did not have the power to condone the delay in filing the appeal beyond 30 days from the date of the order of the RO. It is inconceivable that the DRAT which is again a body limited by statute, could have the power to condone the delay in filing the appeal before the DRT.

23. It should be noted here that unlike the High Court under Article 226 of the Constitution, the DRAT is a statutory body, whose powers are prescribed by the statute. While it can condone the delay in the filing of an appeal before itself by virtue of the proviso to Section 20 (3) of the RDB Act, the DRAT has no power to condone the delay in filing of the appeal before the DRT against an order of an RO.

24. That being the position, by the impugned order, the DRAT could not have possibly permitted the Petitioner to file an appeal against the order of the RO before the DRT long after the expiry of 30 days after knowledge of the order of the RO. This is in addition to the fact that with Opposite Party No.1 not having chosen to challenge the order dated 13th May 2019 of the RO in the first place by filing an appeal before the DRT, it could not have at the stage of an appeal against the order of the DRT rejecting its offer to pay the reserve price, permitted Opposite Party No.1 to file such appeal.

25. Viewed from any angle, the impugned order of the DRAT, Kolkata is unsustainable in law and is accordingly hereby set aside. Consequently, the Appeal No.1 of 2020 pending before the DRT, Cuttack shall not continue and stand disposed of.

26. The writ petition is accordingly allowed, but in the circumstances, no order as to costs.

27. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 27

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

STREV NO. 80 OF 2006

M/S. SHREE DURGA RICE MILL ....Petitioner

.V.

STATE OF ORISSA ....Opp. Party

ORISSA SALES TAX ACT, 1947 – Section 5(1) – Levy of sales tax – Gunny bags sold along with rice to Food Corporation of India – Tax imposed by the department on the gunny bags separately – In the revision filed by the Assessee, a question was raised as to whether the gunny bags are taxable? – Held, Yes.

> *"In the considered view of the Court, in the present case the Tribunal was right in applying the law explained by the Supreme Court in Raj Sheel v. State of Andhra Pradesh (supra), and concluding that the question had to be answered against the assessee and in favour of the Department. Factually, since it has been shown by the Department, on perusing the books of account of the Petitioner that the aforementioned new gunny bags were separately sold and paid for by the FCI, the question framed by this Court is required to be answered in favour of the Department by holding that in the facts and circumstances of the case, the gunny bags sold along with the rice to the FCI is exigible to tax @ 8% as held by the Tribunal."*
>
> *(Paras 9 & 10)*

Case Laws Relied on and Referred to :-

1. [1989] 3 SCR 305 : Raj Sheel Vs. State of Andhra Pradesh.
2. [1982] 51 STC 403 (Ori) : State of Orissa Vs. Habib Rahimtullah & Co.
3. [1998] 108 STC 599 (SC) : Premium Breweries Vs. State of Kerala.
4. [1991] 82 STC 71 (Ker) : Seven Seas Distillery Vs. State of Kerala.
5. [1995] 97 STC 479 (Ker) : Mcdowel & Co. Vs. State of Kerala.

For the Petitioner : Ms. Kajal Sahoo
For the Opp. Party : Mr. Sunil Mishra, Addl. Standing Counsel.

ORDER Date of Judgment : 19.04.2021

BY THE BENCH:

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

2. While admitting this revision petition on 5th February 2007, the following question of law was framed by this Court:

"Whether in the fact and circumstances of the case, gunny bags sold along with rice to Food Corporation of India is exigible to tax @4% or @8% as held by the Tribunal?

3. The background facts are that the Petitioner is a registered dealer under the Orissa Sales Tax Act, 1947 (OST Act). It owns a rice mill and it is carrying on the business of purchasing paddy and converting it into rice. In terms of the Government guidelines, the Petitioner was required to procure paddy at a specified rate and sell a specified percentage thereof to the Food Corporation of India (FCI) as levy rice. In terms of the contract with the FCI, the Petitioner was required to sell the levy rice with its container i.e. gunny bags. The Petitioner accordingly paid sales tax at the rate prescribed under Section 5 (1) of the OST Act.

4. The question that arose for consideration before the Sales Tax Officer (STO) for the assessment year in question i.e. 1990-91 was whether in respect of 24,442 Nos. of "empty new gunny bags" which had been utilized by the dealer while supplying rice to the FCI, sales tax had to be paid at the rate applicable to rice or at the rate applicable to 'jute products'? Relying on the decision of the Supreme Court in ***Raj Sheel v. State of Andhra Pradesh [1989] 3 SCR 305*** which involved the interpretation of Section 6-C of the Andhra Pradesh General Sales Tax Act, the STO concluded that since the FCI had paid separately towards the price of empty new gunny bags, the sales tax in respect of said sale had to be at the rate applicable to 'jute product'.

5. On this issue, the Petitioner-assessee succeeded in its appeal before the Assistant Commissioner of Sales Tax (ACST), Sambalpur Range, who by an order dated 19th January 1995, held that the rate at which sales tax had to be levied and collected on the sale of the aforementioned jute bag could not be separate from that applicable to the sale of rice itself.

6. Aggrieved by the above decision of the ACST, the Department went in appeal before the Tribunal which allowed it by the impugned order dated 27th September, 2006.

7. Ms. Kajal Sahoo, learned counsel appearing for the Petitioner, seeks to place reliance on the decisions in ***State of Orissa v. Habib Rahimtullah & Co [1982] 51 STC 403 (Ori)***; ***Premium Breweries v. State of Kerala [1998] 108 STC 599 (SC)***; ***Seven Seas Distillery v. State of Kerala [1991] 82 STC 71 (Ker)*** and ***Mcdowel & Co. v. State of Kerala [1995] 97 STC 479 (Ker)*** to

urge that when the goods are sold in containers or sold after being packed in packing materials, the containers and the packing materials will have to be taxed at the same rate as the goods themselves.

8. Indeed the ratio of the above decisions supports the contention of learned counsel for the Petitioner. In fact in ***Premium Breweries v. State of Kerala*** (*supra*), the Supreme Court did consider its earlier decision in ***Raj Sheel v. State of Andhra Pradesh*** (*supra*). Nevertheless, the facts of the case in ***Premium Breweries v. State of Kerala*** (*supra*) were such that the ratio of ***Raj Sheel v. State of Andhra Pradesh*** (*supra*) was found to be not applicable. The distinguishing factor, which was noticed by the Supreme Court in ***Raj Sheel v. State of Andhra Pradesh*** (*supra*) is whether the packing material has been separately billed and paid for.

9. An added feature as far as the present case is concerned is that packing material was in fact sold as "new unused gunny bags" and separately paid for by the FCI. In ***Raj Sheel v. State of Andhra Pradesh*** (*supra*), the Supreme Court has observed as under:

> *"It is therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing but where any packing material is of significant value it may imply an intention to sell the packing materials. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on it own footing Whether a transaction for sale of packing material is an independent transaction will depend upon several factors some of them being:*
>
> *1. The packing material is commodity having its own identity and is separately classified in the Schedule.*
>
> *2. There is no change, chemical or physical in the packing either at the time packing or at the time of using the content;*
>
> *3. The packing is capable of being reused after the contents have been consumed.*
>
> *4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing;*
>
> *5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product."*

10. In the considered view of the Court, in the present case the Tribunal was right in applying the law explained by the Supreme Court in ***Raj Sheel v. State of Andhra Pradesh*** (*supra*), and concluding that the question had to be answered against the assessee and in favour of the Department. Factually, since it has been shown by the Department, on perusing the books of account of the Petitioner that the aforementioned new gunny bags were separately sold and paid for by the FCI, the question framed by this Court is required to be answered in favour of the Department by holding that in the facts and circumstances of the case, the gunny bags sold along with the rice to the FCI is exigible to tax @ 8% as held by the Tribunal.

11. The revision petition is dismissed accordingly.

12. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 30

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

W.P.(C) NO. 6590 OF 2012

KALYANI MATERNITY HOSPITAL PVT. LTD., BHUBANESWAR MUNICIPAL ……..Petitioners

.V.

BHUBANESWAR MUNICIPAL CORPORATION (BMC) ……..Opp.Parties

(A) ORISSA MUNICIPAL CORPORATION ACT, 2003 – Sections 692, 693 and 694 read with provisions of Orissa Municipal Act, 1950 – Provisions under – BMC, by taking the aid of the provisions of OMC Act,2003 raised the rate of holding tax imposed under the OM Act,1950 – Plea of the petitioner was that neither Section 693 nor Section 694 of

the OMC Act can be invoked to raise the rate of 'holding tax' that was leviable under the OM Act after its repeal and there being no concept of 'holding tax' in OMC Act, the demand was entirely without the authority of law – Plea examined – Held, a careful perusal of the above provision reveals that the legislative intent, engrafted in the OMC Act, was only to preserve the right of BMC to collect tax which were leviable "immediately before commencement of the OMC Act" and which were being imposed. It by no means permits BMC to raise the rate of a tax that was leviable for a period prior to the coming into force of the BMC Act – In other words, any fresh levy of tax after the enactment of the OMC Act had to be only under the substantive provisions of the OMC Act and not its transitional provisions. (Paras 11 to 14)

(B) ORISSA MUNICIPAL CORPORATION ACT, 2003 – Sections 692, 693 and 694 read with provisions of Orissa Municipal Act, 1950 – Provisions under – Hike in the rate of holding tax by utilizing the transitional provisions – 'Transitional provision' – Meaning and scope of applicability – Indicated.

> *"The very nature of a transitional provision is temporary. As explained by Francis Bennion in his classical treatise on Statutory Interpretation, Third Edition, (page 233-234): "transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the instruments are to take effect. They serve a very useful purpose, since merely to say that an enactment comes into force on a specified date is often insufficient to produce a clear meaning. Lord Bridge said that the purpose of a transitional provision is 'to facilitate the change from one statutory regime to another', citing Thornton's statement that 'The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force'. He further explains that "one feature of a transitional provision is that 'its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with'.Thus the transitional provision viz., Section 694 (3) of the OMC Act cannot be invoked by BMC to justify either the raising of the rate of 'holding tax' or to continue to levy and collect it for a period subsequent to the repeal of the OM Act. The question of BMC resorting to the procedure under the OM Act, after its repreal, is to no avail since under the OMC Act, there is no concept of holding tax at all." (Paras 15 to 18)*

<u>Case Laws Relied on and Referred to</u> :-

1. (1997) 7 SCC 339 : New Delhi Municipal Council Vs. State of Punjab & Ors.

For the Petitioners : Mr. G.M. Rath.
For the Opp.Parties : Mrs. M. Padhi.

ORDER Date of Order : 22.04.2021

BY THE BENCH:

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

2. The present writ petition has been filed seeking to challenge the demand notice dated 9th February, 2012 issued by the Bhubaneswar Municipal Corporation (BMC), whereby the Petitioner has been asked to pay the sum of Rs.4,49,440/- as "holding tax, latrine tax and lighting tax".

3. Earlier the Confederation of Citizens' Association, Bhubaneswar had filed W.P.(C) No.11764 of 2011 challenging BMC's notification dated 15th December, 2010 enhancing 'holding tax' on the basis of the erstwhile Orissa Municipal Act, 1950 (OM Act) with the aid of Sections 693 and 694 of the Orissa Municipal Corporation Act, 2003 (OMC Act).

4. The grievance of the Petitioner in that case was that the Commissioner intended to impose a new rate at a much higher rate than the mandate under the OM Act as well as the OMC Act. Further it was contended that a notification had been issued without following procedure under Chapter-13 of the OMC Act or the *pari materia* provision in the OM Act. The said writ petition was disposed of on 12th August, 2011 by this Court with the following order:

> "Learned Govt. Advocate is directed to take notice on behalf of Opposite Party No.1. An extra copy of the writ petitioner be served on him by tomorrow. Notice issued to opposite party no.2 by Registered post with A.D. requisites for which shall be filled by Tuesday (16.8.2011).
>
> Pending consideration of the misc. case, the revision of rent is stayed under the Old Act as per Annexure-2, but the holding tax must be paid as was being paid earlier. It is open for the municipal Corporation to revise the tax in accordance with the provisions of Sections 694(3) read with Sections 205, 208, 209 and 210 and other relevant provisions of Chapter-XIII.
>
> Urgent certified copy of this order be granted as per rule."

5. Based on the same notification dated 15th December 2010, the impugned demand dated 9th February, 2012 was raised on the Petitioner by BMC leading to the filing of the present petition in which the prayer is for a

direction to issue to the BMC to receive the holding tax as earlier paid by the Petitioner.

6. On 20th April, 2015 while directing to issue notice to the Opposite Party, the following interim order was passed:

> "As an interim measure, we direct that the holding tax as was being paid earlier shall be paid but the revision thereof shall remain in abeyance until further orders."

7. Mr. G.M. Rath, learned counsel appearing for the Petitioner submits that neither Section 693 nor Section 694 of the OMC Act can be invoked to raise the rate of 'holding tax' that was leviable under the OM Act after its repeal. He points out that under the OMC Act the concept of 'holding tax' does not exist. Therefore, the demand is entirely without the authority of law. In support of this submission, he referred to the decision of the Constitution Bench of the Supreme Court in ***New Delhi Municipal Council v. State of Punjab and Others, (1997) 7 SCC 339.***

8. Mrs. Padhi, learned counsel appearing for the Opposite Party (BMC), first submitted that against the impugned demand notice, the Petitioner has an alternative remedy under the OMC Act and therefore, this Court should not interfere. Secondly, she submitted that the procedure envisaged under the OM Act for enhancing the rate of 'holding tax' has in fact been followed and therefore, in the light of the transitional provision contained in Section 694(3) of the OMC Act, the BMC was entitled to raise the 'holding tax' and recover it from the Petitioner. She referred to the affidavits filed by the BMC in the present case on 6th August, 2019 and 5th December, 2019.

9. The above submission of learned counsel for the parties have been considered.

10. The Court finds no merit in the preliminary submission of the BMC that the Petitioner has an alternative remedy against the demand notice. Here the very authority of the BMC to raise such a demand in terms of the OMC Act is being challenged. This has to be dealt with only by this Court and not a statutory authority which is tasked with enforcing the demand.

11. On the central issue that arises for consideration, Mr. Rath has rightly contended that no tax can be levied and collected by BMC without the authority of law. In other words, without there being a law passed by the

State legislature specifically authorizing the Municipal Corporation to levy and collect taxes, it cannot do so. This has been succinctly explained by the Constitution Bench of the Supreme Court in ***New Delhi Municipal Council*** *(supra)* thus:

> "97. …Article 265 of the Constitution emphatically mandates that "no tax shall be levied or collected except by authority of law". Under the framework of the Constitution there are two principal bodies which have been vested with plenary powers to make laws, these being the Union Legislature, which is described by Article 79 as "Parliament for the Union" and the State Legislatures, which are described by Article 168 in the singular as "Legislature of a State". While certain other bodies have been vested with legislative power, including the power of levying taxes, by the Constitution for specific purposes, as in the case of District Committees and Regional Councils constituted under the aegis of the Sixth Schedule to the Constitution, the plenary power to legislate, especially in matters relating to revenue, still vests with the Union and the State Legislatures. Even if the submission that Municipalities now possess, under Part IXA of the Constitution, a higher juridical status is correct, the extension of that logic to the proposition that they have plenary powers to levy taxes is not, as is clear from a perusal of the relevant part of Article 243X of the Constitution which reads as under:
>
> *"243X. Power to impose taxes by, and Funds of, the Municipalities.-* The Legislature of a State may, by law,-
>
> (a) authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;
>
> (b) –(d)
>
> as may be specified in law."
>
> 98. Article 243ZB provides that this provision will be applicable to Union Territories and the reference to the legislature of a State would apply, in relation to a Union Territory having a Legislative Assembly, to that Legislative Assembly.
>
> 99. It is, therefore, clear that even under the new scheme, Municipalities do not have an independent power to levy taxes. Although they can now be granted more substantial powers than ever before, they continue to be dependent upon their parent Legislatures for the bestowal of such privileges. In the case of Municipalities within States, they have to be specifically delegated the power to tax by the concerned State Legislature. In Union Territories which do not have Legislative Assemblies of their own, such a power would have to be delegated by Parliament. Of the rest, those which have Legislative Assemblies of their own would have to specifically empower Municipalities within them with the power to levy taxes."

12. Conscious of the above limitation, BMC has sought to argue in the present case that it can raise the rate of holding tax with the aid of under

Sections 693 and 694 of the OMC Act. Section 693(2) saves the previous operation of the OM Act in respect of any right, privilege and obligation or liability accrued or incurred thereunder or any penalty, forfeiture or punishment incurred or in respect of any offence or any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy in respect thereof. This provision, therefore, does not specifically empower the BMC to levy or collect tax. Even Section 693 (2) of the OMC Act exclusively preserves all rules, bye-law, notifications, orders, directions and powers, made, issued or conferred under the OM Act and in force before the commencement of the OMC Act cannot be invoked to enhance the rate of holding tax. In fact under the OMC Act, there is no concept of 'holding tax' at all.

13. Section 694 of the OMC Act which is a transitional provision against seeks to continue liability against the BMC prior to commencement of the OMC Act. Section 694 (2) and (3), which are relevant in the present context, read as under:

> "694. Transitional provisions. –
>
> (1) xx xx
>
> (2) All arrear of taxes or other payment by way of composition of a tax, or dues for expenses or compensation or otherwise and all sums of money otherwise due to the Municipal Corporations at the commencement of this Act may be recovered as if they had accrued to the respective Corporations under the provisions of this Act.
>
> (3) All taxes, fees and duties, which immediately before the commencement of this Act, were being imposed by the Municipal Corporations shall be deemed to have been imposed by the respective Corporations under the provisions of this act and shall continue to be in force accordingly until such taxes, fees and duties are revised, cancelled or superseded by anything done of any action, taken under this Act."

14. A careful perusal of the above provision reveals that the legislative intent, engrafted in the OMC Act, was only to preserve the right of BMC to collect tax which were leviable "immediately before commencement of the OMC Act" and which were being imposed. It by no means permits BMC to raise the rate of a tax that was leviable for a period prior to the coming into force of the BMC act. In other words, any fresh levy of tax after the enactment of the OMC Act had to be only under the substantive provisions of the BMC Act and not its transitional provisions.

15. The very nature of a transitional provision is temporary. As explained by Francis Bennion in his classical treatise on Statutory Interpretation, Third Edition, (page 233-234):

> "transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the instruments are to take effect. They serve a very useful purpose, since merely to say that an enactment comes into force on a specified date is often insufficient to produce a clear meaning. Lord Bridge said that the purpose of a transitional provision is 'to facilitate the change from one statutory regime to another', citing Thornton's statement that 'The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force'.

16. He further explains that "one feature of a transitional provision is that 'its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with'.

17. Thus the transitional provision viz., Section 694 (3) of the OMC Act cannot be invoked by BMC to justify either the raising of the rate of ‘holding tax’ or to continue to levy and collect it for a period subsequent to the repeal of the OM Act. The question of BMC resorting to the procedure under the Om Act, after its repreal, is to no avail since under the OMC Act, there is no concept of holding tax at all. So the question of legitimizing such demand by following the procedure under the Om Act, after its repeal by the OMC act, does not arise.

18. Consequently, the Court finds merit in the contention of Mr. Rath, learned counsel for the Petitioner that the impugned demand notice in so far as the BMC seeks to collect the holding tax from the Petitioner for a period after the commencement of the OMC Act, and at a rate higher than that prevalent when the OM Act was in force, is unsustainable in law. The impugned demand notice to that extent is hereby quashed.

19. Mrs. Padhi, learned counsel for the Opposite Party submits that although by the interim order dated 28th April, 2015 the Petitioner was directed to continue to pay the holding tax prior as it was doing prior to the repeal of the OM Act, it in fact did not do so.

20. It is directed that, if not already paid, the Petitioner shall pay for the period prior to commencement of the OMC Act, the holding tax at the same rate at which it was paying when the OM act was repealed, without fail within a period of four weeks from today.

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

22. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 37

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

W.P.(C) NO.15491 OF 2018

M/S. AMBICA COLD STORAGE (PVT.) LTD. & ANR. ……..Petitioners

.V.

STATE BANK OF INDIA & ORS. …….Opp.Parties

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993 – Section 21 – Provisions under – Pre-deposit for appeal – The Petitioners filed Appeal along with an application for exemption from making the pre-deposit – The DRAT by an order accepted the submission of the Petitioners that they should be permitted to have the mortgaged property sold and the sale proceeds to be treated as deposit for the purpose of Section 21 – Effect of such order – Held, the settled proposition that the requirement under Section 21 of the RDB Act is mandatory and the DRAT has no power to dilute the requirement. (Para 18)

For the Petitioners : Mr. S.S.Rao, Sr. Adv.
For the Opp.Parties : Mr. D.P. Sarangi.

JUDGMENT Date of Judgment : 29.04.2021

BY THE BENCH:

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

2. The challenge in the present petition is to an order dated 14th July 2017 passed by the Debts Recovery Appellate Tribunal (DRAT) at Kolkata whereby an earlier order dated 5th May 2008 passed by the DRAT was recalled. The writ petition also challenges the consequential order dated 5th September 2017 passed by the DRAT dismissing the Petitioners' waiver application No.29 of 2007 in Appeal No.53 of 2013 and the order dated 30th November 2017 of the DRAT dismissing the Appeal No.53 of 2013 on the ground of non-compliance with the order dated 5th September, 2017.

3. The background facts are that Petitioner No.1 is a private limited company having its factory and unit at Bhubaneswar. Petitioner No.2 is its Managing Director (MD).

4. The State Bank of India (SBI)-Opposite Party No.1 filed a suit bearing T.M.S. No.246 of 1992 in the court of the Civil Judge (Senior Division) against the Petitioners for recovery of Rs.22,60,938/- with interest and other reliefs. The suit was filed after the Petitioners defaulted in the repayment of the loan of Rs.20,00,000/- sanctioned by the SBI to finance the cold storage unit of Petitioner No.1.

5. After the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) was enacted the said suit stood transferred to the Debts Recovery Tribunal (DRT), Patna and later, to DRT, Cuttack and was registered as T.C. No.241 of 2001.

6. Before the DRT, a counter-claim was filed by the Petitioners claiming damages for deficiency in service of the SBI. Against an order of the DRT directing the Petitioners to pay court fees on the counter claim, the Petitioners

filed W.P.(C) No.8446 of 2003 in this Court. By an order dated 22nd June 2004, this Court directed the DRT to take up the Petitioners' counter claim on merits without insisting of payment of court fee.

7. By its judgment dated 9th December, 2005, the DRT allowed the claim of the SBI and directed recovery of the amount by sale of the mortgaged property. The Petitioners then filed Appeal No.53 of 2007 before the DRAT, Kolkata along with an application under Section 21 of the RDB Act for exemption from making the pre-deposit.

8. The said application came for hearing on 5th May, 2008. The DRAT by an order passed on that date accepted the submission of the Petitioners that they should be permitted to have the mortgaged property sold and the sale proceeds to be treated as deposit for the purpose of Section 21 of the RDB Act.

9. According to the Petitioners despite the aforementioned order of the DRAT, the SBI did not take steps to put the property to sale by auction. Later on 21st September, 2012, while the matter was taken up by the DRAT, the SBI sought time. Again on 10th April 2013, the case was listed when the DRAT directed the Recovery Officer (RO) of the DRT to submit an explanation for not taking steps pursuant to the order dated 5th May, 2008.

10. It is stated that on 24th June 2013, the DRAT directed the RO to comply with the earlier direction dated 5th May 2008 and report compliance by 29th July, 2013. Thereafter, the matter was listed before the DRAT on twelve dates between 26th November 2013, and 14th September, 2016 without any progress.

11. The SBI informed the DRAT that on 31st January 2011, it had issued a notice under Section 13(2) of the SARFAESI Act to the Petitioners followed by a notice under Section 13 (4) of the SARFAESI Act on 26th August 2011, and that possession of the mortgaged property had been taken over by the SBI. The DRAT appears to have passed an order dated 14th September 2016 requiring the RO to personally appear to explain why the mortgaged property had not been sold.

12. Thereafter, the DRAT passed the first impugned order dated 14th July 2017, in which it noted *inter alia* that despite the efforts by the SBI and the

RO, the mortgaged property could not be sold for the various reasons as a result of which the condition of pre-deposit as required under Section 21 of the RDB Act was not satisfied. In the circumstances, the DRAT held that it could not keep the matter pending for an indefinite period waiting for the sale of the property and since the order dated 5th May 2008 was not workable, it was recalled.

13. The application for waiver was listed on 5th September 2017 on which date, the DRAT passed an order noting that the original recovery certificate for Rs.22,60,938/ with interest @ 12% per annum in terms of the DRT's order dated 9th December, 2005 had worked out to around Rs.90,000,00/-. The DRAT directed that the Petitioners should deposit 25% of that amount as pre-deposit within one month from that date.

14. With the Petitioners unable to make the pre-deposit as directed by the DRAT, on 30th November 2017, the third impugned order was passed the DRAT dismissing the appeal for non-compliance of the condition of pre-deposit.

15. This Court has heard the submissions of Mr. S.S. Rao, learned Senior Advocate for the Petitioners and Mr. Debi Prasad Sarangi, learned counsel appearing for Opposite Party No.1-SBI.

16. Mr. S.S. Rao, learned Senior Advocate for the Petitioners submitted that the DRAT was not justified in recalling its order dated 5th May 2008, since the Petitioners indeed had no financial resources and therefore had sought permission for the mortgaged property to be sold and the sale proceeds adjusted towards the pre-deposit under Section 21 of the RDB Act. In other words, unless the Petitioners sold the mortgaged property they were in no position to fulfil the condition of pre-deposit. The Petitioners ought not to be made to suffer for the failure by the RO to put the mortgaged property to sale to recover the money which was to satisfy the requirement of the condition of pre-deposit.

17. The Court is not able to accept the above submissions for the simple reasons that under Section 21 of the RDB Act there was no scope for the DRAT to accept the plea of the Petitioners that the mortgaged property should be sold to satisfy the condition of pre-deposit. There was no power in the DRAT to pass such an order. Section 21 of the RDB Act reads as under:

> 21. Deposit of amount of debt due, on filing appeal.—Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19: Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

18. The settled proposition that the above requirement under Section 21 of the RDB Act is mandatory and the DRAT has no power to dilute the requirement. In other words, the DRAT which is creature of the statute cannot deviate from the requirement of Section 21 of the RDB Act, which clearly envisages the deposit of money as pre-deposit and order that the mortgaged property to be sold to satisfy that requirement. The order dated 5th May 2008, was entirely without any jurisdiction and in exercise of the power of the DRAT.

19. Therefore, notwithstanding that the DRAT by the first impugned order dated 14th July 2017 found the earlier order to be unworkable, the fact remained that the said order was entirely without jurisdiction and could not be sustained in law. Therefore, the Court is unable to find any error committed by the DRAT in recalling the said order dated 5th May 2008, by the first impugned order 14th July, 2017. As regards the second impugned order, again the DRAT had no option, but to require compliance with Section 21 of the RDB Act which is what it did by that order. Again inevitably the failure by the Petitioners to make the pre-deposit as ordered by the DRAT resulted in dismissal of the appeal itself by the third impugned order.

20. The Court is unable to find any error committed by the DRAT in passing any of the aforementioned three impugned orders. Consequently, there is no merit in the writ petition and it is accordingly dismissed.

21. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 42

Dr. S. MURALIDHAR, C.J & K.R. MOHAPATRA, J.

S.J.C. NOS.120, 121 AND 122 OF 1997
(I.A. NOS. 4,5 AND 6 OF 2019)

CHIRANJIB BISWAL & ORS. …….Petitioners

COMMISSIONER OF INCOME TAX, ORISSA ……..Opp. Party

(A) INCOME TAX ACT, 1961 – Section 55-A, 131(1) and 136(6) – Whether the Authorized Officer (A.O) has power to refer the matter concerning valuation of cost of construction of house property to the valuation officer? – Held, No.

(B) INCOME TAX ACT, 1961 – Income from the Commercial complex – Whether to be treated as business income? – Held, it is to be treated as income from house property not as business income.

Case Laws Relied on and Referred to :-

1. AIR 2003 SC 2702 : Amiya Bala Paul Vs. Commissioner of Income Tax, Shillong.
2. [2004] 269 ITR 251 (P & H) :Commissioner of Income Tax Vs. Harchand Palace.
3. [1993]200 ITR785 (Orissa) :Hotel Amar Vs. Commissioner of Income Tax & Ors.

For the Petitioners : Mr. S. Ray.
For the Opp.Parties : Mr. R. Chimanka, Sr. Standing Counsel.

ORDER Date of Judgment : 12.05.2021

BY THE BENCH:

1. This matter is taken up by video conferencing mode, in the Vacation Court.

2. These three I.As. have been filed in SJC Nos.120, 121 and 122 of 1997 respectively for amendment of the main applications by adding Question No.3 as mentioned in the scheduled of the I.As.

3. For the reasons stated, the I.As. are allowed. The amendment as sought is allowed. Consequently, Question No.3 as mentioned in the scheduled of the I.As. is added in the main applications for consideration.

S.J.C. Nos.120, 121 and 122 of 1997

1. These three applications under Section 256 (2) of the Income Tax Act, 1961 (IT Act) are directed against a common order dated 22nd March

1996 passed by the Income Tax Appellate Tribunal (ITAT), Cuttack Bench, Cuttack in ITA Nos.93, 94 and 95/CTK/95 for the assessment years (AY) 1988-89, 1989-90 and 1990-91 respectively.

2. The applications are admitted and the following common Questions of Law are framed for consideration.

> *i. Whether on the facts and in the circumstances of the case, the Tribunal is legally justified to deny that rules of natural justice was not violated by the CIT (A) Orissa, Cuttack while he made use of materials available to him through the departmental valuer; and whether non-confrontation of the material did not vitiate the proceedings?*
>
> *ii. Whether on the facts and in the circumstances of the case the commercial complex as was constructed on the basis of the terms attached to the agreement and integrally and directly connected to the property itself should not have been held as income from business."*
>
> *iii. Whether the Assessing Officer was justified in referring the valuation of the construction of the multi storied building to the D.V.O. under Section 55A of the Income Tax Act?*

3. The background facts are that Sri Khetra Mohan Biswal, the original Assessee, constructed a property known as "market complex' in Bhubaneswar on a leasehold land obtained from the State Government for a period of sixty years. According to the Assessee, his main source of income prior thereto was from agricultural resources and interest on deposits. For the AY 1988-89, the Assessee did not file his return. After notice was issued to him under Section 148 of the IT Act, he filed a return in which while disclosing the income from the agricultural resources and pisciculture, he claimed loss from the market complex. It may be mentioned here that the Assessee declared the cost of construction of the commercial complex, which construction started in 1987-88 and was completed during AY 1990-91, as Rs.18,11,500/-. According to the Assessee, he supported his claim with the valuation report of the registered valuer (RV). He sought to spread the investment over the three AYs.

4. The Assessing Officer (AO) did not accept the Assessee's claim regarding valuation of the cost of construction. He then referred it to the District Valuation Officer (DVO) of the IT Department, who initially estimated the cost of construction at Rs.28,11,600/-. However, after considering the objections of the Assessee, the DVO reduced the estimated cost to Rs.24,65,659/-.

5. The Assessee then filed a report dated 26th February 1994 of the RV, who placed the cost of construction at Rs.19,14,196/-.

6. The AO considered the valuation by the DVO as well as the report of the RV engaged by the Assessee. The AO held that some reduction is required on account of self supervision charges. The cost of construction was accordingly determined as Rs.24,06,309/-. Further, rejecting the Assessee's contention that the income earned from the commercial complex should be treated as business income, the AO proceeded to treat it as "income from house property".

7. While the assessment order for the year 1988-89 dated 31st March 1988, an order of the same line was passed by the AO for the following two AYs 1989-90 and 1990-91.

8. Aggrieved by the above assessment orders, the Assessee filed appeals before the Commissioner of Income Tax (Appeals) Orissa, Cuttack [CIT (A)].

9. Before the CIT (A), the Assessee produced a fresh valuation report and other relevant documents. The CIT (A) accepted the cost of the construction as determined by the AO and allowed some reduction on ad hoc basis. The CIT (A) also agreed with the AO that the income would be treated as income from house property.

10. Aggrieved by the common order of the CIT (A) for the three AYs, the Assessee filed the aforementioned three appeals i.e. ITA Nos.93, 94 and 95/CTK/95 before the ITAT. The ITAT by the impugned order has upheld the order of the AO and CIT(A).

11. The Assessee filed Reference Applications under Section 256 (1) of the IT Act before the ITAT. The said Reference Applications Nos.37, 38 and 39/CTK/96, by an order dated 12th March 1997, were dismissed by the ITAT holding that no questions of law arose from the common orders passed in the three appeals by the ITAT.

12. During the pendency of the present applications, the original Assessee expired, and by an order dated 18th July 2001, he was substituted by Sri Basanta Kumar Biswal. Subsequently, Sri Basanta Kumar Biswal expired and

by an order dated 14th August 2019, he was substituted by his legal heirs Chiranjib Biswal, Ranjib Biswal and Anuradha Biswal.

13. The Court has heard the submissions of Mr. S. Ray, learned counsel for the Assessee and Mr. R. Chimanka, learned Senior Standing Counsel for the Income Tax Department.

14. Mr. S. Ray, learned counsel for the Petitioners has placed reliance on the judgment of the Supreme Court in ***Amiya Bala Paul v. Commissioner of Income Tax, Shillong AIR 2003 SC 2702*** as well as on the decision of the Punjab and Haryana High Court in ***Commissioner of Income Tax v. Harchand Palace [2004] 269 ITR 251 (P & H)*** and the decision of this Court in ***Hotel Amar v. Commissioner of Income Tax and Ors [1993]200ITR785 (Orissa).***

15. In ***Amiya Bala Paul*** (supra), the question that arose for consideration was as under:

> *"Whether on the facts and in the circumstances of the case, the Tribunal erred in law by holding that the Assessing Officer cannot refer the matter to the Valuation Cell (sic) for estimating the cost of construction of the house property."*

16. In the above case, the ITAT had held that AO cannot refer the matter to the valuation officer for estimating the cost of construction of the house property. The High Court had reversed the order of the ITAT which led to the filing of the appeal in the Supreme Court.

17. The Supreme Court in ***Amiya Bala Paul*** (*supra*) came to the conclusion that under Section 55A of the IT Act, an AO could not refer the matter concerning valuation of cost of construction of house property to the valuation officer. It held that the powers available to a valuation officer under the Wealth Tax Act, 1957, was not available to an AO under the IT Act. It was held categorically that the power of the AO under Sections 131 (1) and 133 (6) of the IT Act is "distinct from and does not include the power to refer the matter to the valuation officer under Section 55A. Not even the third Section i.e. Section 142 (2) of the Act on which reliance had been placed by the Respondent allows him to do so." Accordingly, while upholding the order of the ITAT, the Supreme Court reversed the order of the High Court and answered the question in the negative.

18. Following the above decision in ***Amiya Bala Paul*** (*supra*), the High Court of Punjab and Haryana held in ***Commissioner of Income Tax v. Harchand Palace*** (*supra*) that no reference could be made to the DVO for ascertaining the cost of construction of the building. Even prior to the decision in ***Amiya Bala Paul*** (*supra*), this Court had in ***Hotel Amar*** (*supra*) held that the AO could not, under Section 55A of the IT Act, make a reference to the DVO to determine the cost of the construction.

19. In view of the settled legal position, Question No.3 referred to above is answered in the negative by holding that the AO in the present case was not justified in referring the valuation of the construction of the commercial complex to the DVO under Section 55A of the IT Act. In other words, the Question No.3 is answered in favour of the Assessee and against the Revenue.

20. Once it is clear that the report of the DVO could not be called for, that report necessary has to be cast aside. The last report of the RV as placed on record by the Assessee before the CIT (A) has to be accepted as correct.

21. Consequently, Question No.1 referred to above has been rendered academic and need not be answered. As regards Question No.2, in view of the consistent concurrent findings of the AO, CIT (A) and the ITAT and not being persuaded to take a different view, the Court concurs with those views that the income from the commercial complex constructed has to be treated as income from house property and not business income.

22. The impugned orders of the AO, CIT (A) as well as ITAT stand modified accordingly and the tax demand shall worked out on that basis for the three AYs in question.

23. The applications are disposed of in the above terms.

24. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 47

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

CRLA NO. 36 OF 2011

DAMA PRADHANI ………Appellant

.V.

STATE OF ORISSA ………Respondent

(A) CRIMINAL TRIAL – Offence under section 302 and 201 of Indian Penal Code – Extra judicial confession – Evidentiary value – Held, the position of law regarding extra judicial confessions as per the judgment of the Hon'ble Supreme Court in the case of Tejinder Singh v. State of Punjab is that the extra judicial confessions constitute a weak form of evidence and based on such evidence no conviction can be sustained. (Para 8)

(B) CRIMINAL TRIAL – Offence under section 302 and 201 of Indian Penal Code – Recovery of dead body – Appreciation of evidence in terms of sections 25,26 and 27 of the Evidence Act – Principles – Discussed. (Paras 13 to 17)

(C) CRIMINAL TRIAL – Offence under section 302 and 201 of Indian Penal Code – Motive behind such incident not clearly established – No eye witness to the occurrence – Conviction, in absence of eye witness, whether can be based on the basis of circumstantial evidence and when? – Principles – Discussed.

> *"the Hon'ble Supreme Court has laid down indicative parameters to keep in mind while dealing with cases where the prosecution version is based solely on the basis of circumstantial evidence. It has held that the following conditions must be fulfilled before a case against the accused can be said to be fully established. Namely, (a) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned `must' or `should' and not `may be' established; (b) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;(c) the circumstances should be of a conclusive nature and tendency;(d) they should exclude every possible hypothesis except the one to be proved; and (e) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. The Hon'ble Supreme Court has held these five golden principles as the "panscheel" of the proof of a case based on circumstantial evidence."*
> *(Para 20)*

Case Laws Relied on and Referred to :-

1. (2013) 12 SCC 503 : Tejinder Singh Vs. State of Punjab.
2. (2011) 10 SCC 165 : Pancho Vs. State of Haryana.
3. *(2012) 6 SCC 403 :* Sahadevan Vs. State of Tamil Nadu.
4. (1969) 2 SCC 872 : Jaffar Hussain Dastagir Vs. State of Maharashtra.
5. AIR 1984 SC 1622 : Sharad Birdhichand Sarda Vs. State of Maharashtra.
6. (1996) 10 SCC 193 : Chenga Reddy and Ors. Vs. State of A.P.
7. 1952 SCR 1091 : Hanumant Vs. State of Madhya Pradesh.
8. ((1838) 2 Lew. 227 : Reg Vs. Hodge.
9. (1989) Supp 2 SCC 706 : Padala Veera Reddy Vs. State of Andhra Pradesh.
10. (2006) 10 SCC 172 : Ramreddy Rajesh Khanna Reddy Vs. State of Andhra Pradesh.

For the Appellant : M/s. B.S. Das, D. Marandi, L.C. Behera & S. Sahoo.

For the Respondent : Mr. Sk. Zafarulla, Addl. Standing Counsel

JUDGMENT Date of Hearing : 16.03.2021: Date of Judgment : 12.04.2021

S. K. PANIGRAHI, J.

1. The present appeal has been directed against the judgment of conviction and order of sentence dated 08.07.2010 passed by the learned Adhoc Additional Sessions Judge (Fast Track Court), Balangir at Patnagarh in Sessions Case No.80/33 of 2009, whereby the appellant has been convicted for commission of offences punishable under Sections 302/201 of the I.P.C. and sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/-and in default further to undergo R.I. for a period of six months under Section 302 of I.P.C. and to undergo R.I. for two years and to pay a fine of Rs.1,000/-. Upon further default, to undergo R.I. for three months under Section 201 of the I.P.C.

2. Shorn of unnecessary details, the substratum of the matter presented before us remain that one Rama Dharua's (informant) niece Ghulikhai @ Nidra Majhi was staying with him after the death of her mother for the last eight years. On 01.12.2008, the family had dinner and retired to bed. Early in the morning, to the utter dismay of the family, they found that their niece was missing. They searched in the village and inquired with their relatives, but failed to trace the whereabouts of their niece. Accordingly, on 02.12.2008 the informant reported the same to the police and an FIR was registered. On the night of 3.12.2008 his son-in-law one Dullabha Majhi who was living with the informant due to the harvesting season, confided him that one Dama Pradhani (appellant) of his village had confessed before him that he had

committed the murder of the deceased and concealed the dead body. The informant therefore suspected Dama Pradhani to have murdered the deceased and passed on the information to the Police. Premised on the above written report of the informant, the I.I.C., Patnagarh P.S. registered the P.S. Case No.239/2008 under Section 302 read with Section 201 of the I.P.C. During the course of investigation, the Investigating Officer proceeded to the village and took the appellant into his custody. While in police custody, the appellant allegedly confessed to have committed the crime by strangulating the deceased and having concealed the dead body in Gadiajore Nala. Upon arrival at the Gadiajore Nala, the body of the deceased was found floating and the same was immediately recovered. Inquest was conducted. The body of the deceased along with a lungi that was found tied around her neck was sent for post mortem examination. The appellant was also sent for medical examination where a sample of his semen was seized. The appellant was then arrested and forwarded to the court. The Investigating Officer also effected seizure of items of clothing of the deceased along with other articles and the lungi. After completion of investigation, charge sheet was submitted against the accused.

3. The trial court thereafter framed three issues. Further, to bring home the charges the prosecution examined as many as eighteen witnesses. Succinctly, P.Ws.1, 4, and 5 are the co-villagers and witnesses to the disclosure statement of accused under Section 27 of the Evidence Act made to the Investigating Officer as well as witnesses to the inquest. P.Ws.2, 3 and 6 are the co-villagers present at the time of recovery of the dead body from the Gadiajore Nala. Thus, P.W.1 to P.W.6 are co-villagers and witnesses to either the disclosure statement of the accused or to the recovery of the deceased's body from the Gadiajore Nala. The said P.Ws.2 and 6 brought out the dead body from inside the water of the Nala on the instruction of the police. P.W.7 is the informant who is the uncle of the deceased. P.W.9 is the son-in-law of the informant and witness to extra judicial confession of the accused. P.W.8 is the Medical Officer who conducted the post mortem examination of the dead body. P.Ws.11 and 12 are two independent witnesses who were declared hostile. P.Ws.10 and 13 are the police officers and witnesses to the seizure of S.D. Entry No.39 of 2008 and M.M.R. No.19/08 of Patnagarh P.S. P.W.14 is the scribe of the report (Ext-3). P.Ws.15 and 16 are the two Constables of Patnagarh P.S. and witnesses to seizure of sample semen of the accused vide seizure list Ext-8. P.W.16 is a witness to seizure list vide Exhibit-9 in respect of the seizure of clothing and articles of

deceased as well as of the lungi tied around the neck of the deceased. P.Ws.17 and 18 are the two Investigating Officers charged with the investigation of the case. The prosecution also proved the documents vide Exts.1 to 19 and the material objects as M.Os. I to XI which includes the seized lungi exhibited as M.O. IX. On the other hand, one Durga Charan Bhoi had been examined as D.W.1 on behalf of the defence.

4. Mr. B.S. Das, learned counsel for the appellant submits that there is no eye witness to the occurrence and the case of prosecution is solely based on circumstantial evidence. It is submitted that although the extra-judicial confession has led to the discovery of the dead body, however, the prosecution has failed to adduce cogent and trust-worthy evidence to prove the circumstances beyond reasonable doubt. According to him, P.W.9 before whom it is alleged that the accused made the extra judicial confession is related to the deceased. The place from where the dead body was recovered, is an open place, accessible to all. Hence, the evidence adduced on the above score loses its significance. Lastly, it is submitted by him that prosecution has also failed to prove the motive behind crime. In view of the above, he urged that the accused be entitled to benefit of doubt as the prosecution has failed to prove the case against him beyond all reasonable doubt.

5. Per contra, the learned Counsel for the State has submitted that the report of the Medical Officer vide Exhibits 5 and 6 reveals that the deceased suffered homicidal death due to strangulation by means of lungi (M.O.IX). Further, he relied upon the evidence of P.W.9 before whom the accused allegedly confessed. He also submits that the recovery of dead body from the place of concealment along with the M.O.IX in terms of Section 27 of the Evidence Act fully corroborates the case of prosecution leaving no manner of doubt that it is the accused who is the author of the crime. Further, he also relied on the evidence of the I.O. P.W.17 and P.Ws.1, 4 and 5 before whom the accused confessed while in police custody to have committed the murder of the deceased by strangulating her by means of M.O. IX. He states that as far as the evidence on record regarding the love affair between accused and deceased, the same has been lent credibility from the evidence of D.W.1 that the marriage of the accused was arranged with another girl which caused an altercation between the deceased and accused on the fateful night and the accused strangulated her by means of a lungi as deposed to by P.Ws.1, 4, and 5. Hence, he submits that the prosecution has sufficiently proved the motive of the accused in committing such a heinous crime. Having made the

aforesaid submissions, the learned Counsel for the State submits that the prosecution has been successful in establishing beyond reasonable doubt that the appellant herein is the author of the crime and that the present appeal ought to be dismissed being devoid of merit.

6. Heard learned Counsel for the parties. It can be summarised that the learned Court below, in order to bring home the culpability of the appellant, has relied upon the following circumstances namely (I) Extra judicial concession made by the accused before P.W.9. (II) Recovery of dead body of deceased along with lungi (M.O.IX) by means of which the deceased was strangulated, on the information furnished by the accused while in custody; (III) Evidence of P.W.1 that the seized lungi belongs to accused so also the evidence of the I.O. P.W.17 that accused disclosed the lungi belongs to him; (IV) Motive. While doing so, the trial court has proceeded to hold that these circumstances establish a complete chain of circumstances which prove beyond reasonable doubt that the appellant has committed the murder of the deceased.

7. Upon perusal of the evidence produced before the trial court, with regard to the first circumstance, i.e., the extra judicial confession indicated hereinabove, the evidence of P.W.9 has been relied upon. It is observed that P.W.9 states that he being the son-in-law of the informant happened to be present in the house of the informant for the purpose of harvesting paddy since more man power is required during such harvesting season. According to him, the deceased was missing from the house since the morning of 02.12.2008. On 03.12.2008 at the evening time while he was sitting in the verandah, he saw the appellant coming towards him. He chit-chatted with the appellant about household affairs and then asked about the deceased. The appellant then disclosed to him that after committing her murder he had concealed the dead body. P.W.9 also states that the appellant confessed that he had love affair with the deceased. On the same night, after dinner, P.W.9 disclosed the above information before his mother. According to P.W.9 the brother of appellant is a sworn friend of his father-in-law (the informant) and he addressed him as uncle. During cross-examination, this witness has stated that since eight days prior to the incident he was at the house of his father-in-law and he knows the appellant since the date of his marriage as the appellant used to visit the house of his father-in-law. When the appellant had visited P.W.9, the witness was admittedly alone. In a similar light P.W.7, the informant, who is the father-in-law of P.W.9, reveals that on 2.12.2008 he

had lodged a missing report at Patnagarh P.S. regarding the missing of deceased. On the night of 03.12.2008, P.W.9 told him regarding the extra judicial confession made by the appellant before him. His evidence further reveals that on the morning of 04.12.2008 they searched for the dead body of the deceased and could not recover the same. P.W.7 further deposed that the appellant had love affairs with the deceased.

8. Upon examining the position of law regarding extra – judicial confessions, it is relevant to take note of the judgment of the Hon'ble Supreme Court in the case of ***Tejinder Singh v. State of Punjab***[1] wherein, the Court has held that extra judicial confessions constitute a weak form of evidence and based on such evidence no conviction can be sustained. In support of this proposition, the Hon'ble Supreme Court has relied upon its earlier judgement in the case of ***Pancho v. State of Haryana***[2] which is extracted hereunder:

> *"16. The extra-judicial confession made by A-1, Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In Gopal Sah v. State of Bihar this Court while dealing with an extrajudicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of a chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether the extra-judicial confession of A-1, Pratham inspires confidence and then find out whether there are other cogent circumstances on record to support it."*

9. In ***Sahadevan v. State of Tamil Nadu***[3]**,** the Hon'ble Supreme Court when posed with a question pertaining to the reliability of extra judicial confessions, also held as under:

> *"14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.*

1. (2013) 12 SCC 503, **2**. (2011) 10 SCC 165, **3.** (2012) 6 SCC 403

16. Upon a proper analysis of the above referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extrajudicial confession alleged to have been made by the accused:

(i) The extra-judicial confession is weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

10. From the above evidence of P.Ws.9 and 7 it is noticed that the appellant was known to P.W.9 since the date of his marriage and on 3.12.2009 evening the accused had come to meet him. Another fact that needs to be borne in mind is that P.W.9 is related to deceased. So, it does not seem plausible that the appellant would have made such an extra judicial confession before him and such doubts upon the reliability of the evidence of P.W.9 cannot be dispensed with. As a corollary, the evidence of P.W.7 who is a hearsay witness would consequentially loose credence. This extra judicial confession does not inspire any confidence and therefore cannot be relied upon. Given the fact that there was no enmity between the appellant and neither P.W.9 nor the appellant had any inimical term with the family member of the informant. So, in such circumstances, the fact that the appellant made an extra judicial confession made before P.W.9 seems improbable and any corroboration thereof would have to be tested on the anvil of "complete chain of circumstances", which must be examined very cautiously.

11. The next circumstance relied upon by the learned Trial Court is the recovery of the dead body of deceased and M.O. IX (the Lungi tied round her neck) on the basis of the information furnished by the appellant while in custody.

12. On perusal of record, it is found that Ext.2 is the statement of appellant, which was recorded by P.W.17 the I.O. in presence of P.Ws.4 and 5, i.e., co-villagers while the appellant was in his custody. In the said statement the appellant has narrated that he had an affair with the deceased and they had made a plan to elope from their respective houses on the fateful night. He also states that he committed the murder by strangulating the deceased by means of a lungi and carried the dead body to Gadiajore Nala and concealed it there. Ext.1 is the inquest report which was prepared by the I.O. in presence of witnesses P.Ws.1,3, 4, 5 and 6. In the said report it has been mentioned that a green colour check lungi was tied around the neck of the deceased and there was injury/ligature mark encircling the neck. Ext-9 is the seizure list in respect of seizure of the wearing apparels and other articles including the green black check lungi.

13. In ***Jaffar Hussain Dastagir v. State of Maharashtra*[4]*,*** the Hon'ble Supreme Court held that under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 of the Evidence Act which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 of the Evidence Act is a proviso to Section 26 of the Evidence Act and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the Section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. Section 27 of the Evidence Act provides that no such information which leads to discovery of fact in consequence of information received from a person who is not only an accused of the offence but also while in the custody of the police officer can become a relevant fact which can be proved. It is trite in law that the confessional part of a crime incorporated in a statement even if recorded in the statement under Section 27 of the Evidence Act, such confessional part has to be discarded due to being barred by the provision in Section 25 of the Evidence Act.

4. (1969) 2 SCC 872

14. Therefore, even if it can be accepted that the statement of the appellant led to the discovery of the body of the deceased and hence might be admissible, it is important to note that only that part of the statement which led to the discovery of the body of the deceased can be admitted. Every other information presented in the statement which are inculpatory and confessional including the confession of allegedly committing the offence, the alleged usage of the lungi to commit said offence, the existence of the love affair have to be completely barred and cannot be relied upon under any circumstances. That being the position of law from Exhibits-2, 1 and 9 only the fact leading to discovery of dead body is to be read in evidence.

15. It is further seen that doubt is casted upon the usage of the lungi as the means by which the deceased was strangulated upon examination of P.W.8's testimony. P.W.8 is the doctor who conducted the post mortem examination of the dead body of the deceased on 05.12.2008 upon police requisition. He has deposed that the deceased was a young female whose both pinna were eaten by aquatic animals. The deceased's face was conjected with petechia haemorrhage. A lungi of length 5.7" and width 42" was made into a rope and found tied around the neck. The knot of the lungi was on the back side of the neck. A ligature mark of width 2 C.M. was found below the thyroid cartilage encircling the entire neck horizontally. There was ecchymosis around the mark and the subcutaneous tissue was also with ecchymosis. There was no fracture present on the body. The viscera were preserved. He has opined that the death was due to strangulation by lungi resulting in asphyxia and venus congestion. He has further opined that as the vagina allowed two fingers, the same indicates that the deceased had regular sexual intercourse. He states that the time since death was within 72 to 96 hours prior from the time of post mortem examination. He also deposed that the ligature mark found in the neck was ante-mortem in nature and the strangulation was a homicidal one. However, this witness during the cross-examination has presented an entirely different picture. During his cross-examination P.W.8 has ruled out the death of deceased to be caused due to hanging. Rather he reiterated his opinion that the death of the deceased is due to strangulation. Also he has stated that the lungi which was allegedly found on the neck of dead body at the time of post mortem examination was sent back to the Police. What is taken note of by us is that he states in his cross-examination that there was no identifying mark affixed to the lungi in question with regard to which he states that he had endorsed on a piece of paper after signing on the lungi. In his cross-examination P.W.8 also states that it is possible that the ligature mark found

on the neck could also be inflicted by some other cloth having a length similar to the lungi which was examined. He further reveals that the type of injury in question can be caused by shaping any cloth into a rope, all of which will leave a ligature mark.

16. While it is not disputed that the body of the deceased was found with a green check lungi tied around the neck. There exists sufficient doubt as to whether it was this particular lungi that caused the death. Moreover, it becomes even more important to examine whether the lungi can be linked to the appellant, which has been examined threadbare.

17. Coming to the next circumstance regarding identification of lungi tied around the neck of the dead body (deceased) is concerned, it is the evidence of P.W.1 wherein he says the lungi tied round the neck of the deceased belonged to the appellant. P.W.17 was the Investigating Officer in the case and states during his cross-examination that at the time of interrogation the appellant had made a disclosure to having concealed the dead body after strangulating the deceased. Having received such a statement, P.W.17 thereafter proceeded to the place as disclosed by the accused, i.e., Gadiajore Nala. He noticed that there were no marks of violence at the place of occurrence, the threshing floor. Noticeably, the place of occurrence has been said to be a public place which is accessible to all. The dead body was floating at the time of arrival of the Investigating Officer in the Gadiajore Nala. He further deposed that M.O.IX is a green lungi which was found shaped like a rope and tied around the neck of the deceased. He states that the appellant disclosed to him during interrogation that the green lungi belonged to him which has been exhibited as M.O. IX and it was being used by the appellant prior to the date of the incident. P.W.8 reveals in his testimony that when the dead body was recovered a green check lungi was found tied around the neck of the deceased. Apart from the prosecution’s version that the accused has admitted that the lungi in question belonged to him, a statement which, as has been established above, cannot be admitted as evidence and thus cannot be relied upon, sufficient evidence has not been led whatsoever to establish or link the lungi with the appellant.

18. As regards the motive of the appellant behind the crime, it is the case of the prosecution as disclosed by P.W.7 that the appellant and deceased had a love affair and when marriage of the appellant was arranged with another girl, ire was caused between them, due to which the appellant killed the

deceased. P.W.1 deposed attesting to the same. However, upon perusal of the defence witness in this case, D.W.1, who is a co-villager who states that the P.W.1 told him that there was a love affair between the deceased and the appellant which he had informed the police about. However, in his cross-examination he states that there was no such marriage proposal being canvassed. It is also material to note that P.W.1 has stated in his cross examination that he was not aware about the relationship of the appellant with the deceased prior to the incident which is a material discrepancy which has not been gone into by the court below. P.W.4, Chandrama Majhi has also categorically stated in her cross examination that she was not aware about any love affair between the appellant and the deceased.

19. The prosecution had relied on the report of chemical examiner marked as Ext-19, wherein it is noted that the seized undergarment of the deceased indicated presence of blood and semen which was deemed to be indicative of a physical relationship being present between the appellant and the deceased. The prosecution then attempted to spin a story wherein, it was alleged that the deceased was unhappy with the talks of marriage of the appellant with another girl, given their physical relationship, which led to the scuffle and ultimately to her death. However, the trial court has ignored that P.W.17 as the Investigating Officer of the present case also wrote a letter to the forensic laboratory dated 4.12.2008, suggesting therein that the appellant had sexual intercourse with the deceased on the way, at the threshing floor of Buthi Dharua of the village, and thereafter the appellant had tied the lungi on the neck of the deceased strangulating her causing death. Based on that suspicion, the Investigating Officer had sent the underwear of the accused for forensic examination. However, the forensic laboratory through their report dated 2.4.2009 have opined that an examination of the underwear of the accused shows the absence of semen stains on it and therefore the possibility of any intercourse was ruled out.

20. In the instant case there are no eye-witness to the occurrence and prosecution case solely rests on the circumstantial evidence. In the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***[5], the Hon'ble Supreme Court had laid down indicative parameters to keep in mind while dealing with cases where the prosecution version is based solely on the basis of circumstantial evidence. It has held that the following conditions must be fulfilled before a case against the accused can be said to be fully established.

5. AIR 1984 SC 1622

Namely, (a) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned `must' or `should' and not `may be' established; (b) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;(c) the circumstances should be of a conclusive nature and tendency;(d) they should exclude every possible hypothesis except the one to be proved; and (e) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. The Hon'ble Supreme Court has held these five golden principles as the "***panscheel***" of the proof of a case based on circumstantial evidence. Although the court below has relied upon the aforesaid judgement however while dealing with the evidence on record as discussed hereinabove, has ignored and misapplied the aforesaid principles laid down by the Hon'ble Supreme Court.

21. The Hon'ble Apex Court In the case of ***Chenga Reddy and Ors. v. State of A.P.***[6] has dealt with a case where suspicion has been allowed to take the place of reason and has held in no uncertain terms that:

> *"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."*

22. In the oft quoted and relied upon landmark decision of ***Hanumant v. State of Madhya Pradesh***[7] the Hon'ble Supreme Court while dealing with circumstantial evidence said that the rules especially applicable to such evidence must be borne in mind. It held that in such cases there is always the danger that conjecture or suspicion may take the place of legal proof. It warned of the dangers of such a practice by recalling the warning addressed by Baron Alderson, to the jury in ***Reg v. Hodge***[8], where he submitted that :-

6. (1996) 10 SCC 193, **7**. 1952 SCR 1091 **8**. ((1838) 2 Lew. 227

> *"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to from parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."*

23. In ***Hanumant Singh's case*** (supra) the Hon'ble Supreme Court has held that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

24. In the case of ***Padala Veera Reddy v. State of Andhra Pradesh***[9] the Hon'ble Supreme Court has held that:

> *"10. Before adverting to the arguments advanced by the learned Counsel we shall at the threshold point out that in the present case here is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. this Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests :*
>
> *(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
>
> *(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
>
> *(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
>
> *(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

9. (1989) Supp 2 SCC 706

25. In the case of ***Ramreddy Rajesh Khanna Reddy v. State of Andhra Pradesh***[10] the Hon'ble Supreme Court has held that-

> *"26. It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence."*

26. P.W.9 was the son-in-law of the informant and also related to the deceased. He has also stated that he knew the appellant well and for a long time. P.W.9's statement pertaining to the extra judicial confession made by the appellant does not inspire any confidence as it is highly unlikely that the appellant would make such a statement to a relative of the deceased. Furthermore, if such information had a ring of truth to it, or if the P.W.9 had assumed it to be true, then he would have immediately confided in the informant or another member of the family upon receiving the same instead of waiting till post dinner. Furthermore, in the absence of credible and cogent proof of a love relationship between the appellant and the deceased, the intent and motive of the appellant to commit the murder of the deceased is not clear or proven beyond reasonable doubt. Doubt is also cast upon the means of causing death of the deceased when the cross examination of P.W.8 is referred to. The Doctor conducting the post mortem examination of the deceased has not definitively indicated that the death of the deceased was caused by the lungi that was recovered itself, instead he has said that any cloth could have caused the death. The lungi in itself has also not been linked to the appellant. The trial court has also erred by not considering that despite the viscera being preserved according to the evidence of P.W.8, the same was not sent for chemical examination and no reason has been assigned for the same.

27. With the above backdrop and discussion, this Court comes to an irresistible conclusion that the prosecution has not been successful in bringing home the charges against the appellant beyond reasonable doubt and that the Court below has grossly failed to deal with the evidence in proper perspective.

10. (2006) 10 SCC 172

28. In view of the discussion made hereinabove, especially in the absence of eye-witnesses and the weak chain of circumstantial evidence, the order of conviction and sentence impugned herein are liable to be set aside.

29. Accordingly, the Criminal Appeal filed by the appellant is allowed. The judgment of conviction and order of sentence dated 08.07.2010 passed by the learned Adhoc Additional Sessions Judge (Fast Track Court), Balangir at Patnagarh in Sessions Case No.80/33 of 2009 is hereby set aside. The appellant be set at liberty forthwith if his detention is not required in connection with any other case. The LCR be returned forthwith to the court from which it was received.

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2021 (II) ILR - CUT- 61

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

A.H.O. NO. 6 OF 2001

BIBHISEN MOHANTA ………Appellant.

.V.

LILAMANI MOHANTA AND ORS. ……….Respondents.

(A) HINDU LAW – 'Custom and usage' – Validity thereof – Principles and definition – Held, Clause (a) of Section 3 of the Hindu Marriage Act provides for the definition of customs or usage – In order to establish a particular custom, which was resorted to by the parties, as claimed by the defendant in this case, the parties relying on such customs most specifically plead that such customs signifying any rule, having continuously and uniformly observed for a long time has obtained the force of law among Hindus of a particular tribe, community etc. – So, in order to bring home a case of a particular caste custom, the following ingredients are necessary to be established.

(i) There has to be a specific pleading regarding existence of such a custom;

(ii) It must be proved by preponderance of evidence that such custom were being followed continuously and uniformly from time immemorial;

(iii) The said custom is certain;

(iv) Such customs is not unreasonable and finally it is not opposed to public policy.

(B) HINDU LAW – Plea of Divorce by following custom – When can be accepted? – Held, Section 13 in the Hindu Marriage Act provides that any marriage solemnised, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground stated in that section – In order to establish a case of divorce by custom the parties seeking such a finding on the facts of the case has to establish the custom or the other requirements.

Case Laws Relied on and Referred to :-

1. AIR 1966 SC 614 : Kanwal Ram and Ors. Vs. Himachal Pradesh Administration.

For Appellant : Mr. S.P. Mishra, Sr. Adv.
For Respondents : None.

ORDER Date of Order : 15.04.2021

BY THE BENCH:

This matter is taken up through Video Conferencing mode.

Heard learned counsel for the appellants and learned counsel appearing for the respondents.

2. In this intra Court appeal, the defendant no.3 being the appellant in First Appeal No.130 of 1985, decided on 07.08.1998, assails the finding of the learned Single Judge, dismissing the appeal of the defendant no.3 and upholding the judgment dated 24.04.1985 and decree dated 01.05.1985 passed by the learned Subordinate Judge, Rairangpur in T.S. No.13 of 1981.

3. A suit for partition was filed by one Chanchala Bewa, plaintiff No.1 for herself and her minor daughter plaintiff no.2 against the defendant nos.1 to 4 with a prayer to partition the land described in the Schedules to the plaint.

Undisputedly the parties are Kurmis by caste and are guided by Venaras School of Mitaskhara, the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956. One Chamtu had about 10 Manas of land in village

Ramapahadi describing Schedule 'B' of the plaint. After his demise, lands were jointly recorded in the names of his sons, namely, Jaihari, Maheswar, Jala, Raghu and Sanatan during the settlement of 1927. While the five sons of Chamtu were possessing these lands Raghu died issueless and Jala died leaving a daughter. Thereafter, the rest of the three brothers effected an amicable partition amongst themselves and divided 'B' Schedule property. They possessed their respective share separately. After the said partition Sanatan and Jaihari jointly acquired some lands describing in lot no.3 of Schedule 'C' to the plaint. As such the plaintiffs claim that they are entitled to ½ share of the Schedule 'C' land. Sanatan father of plaintiff no.1 acquired about 9 Manas of land in village Kanipur under Khata No.177 as described in Schedule 'D' to the plaint and possessed the same. After the death of Sanatan his four sons, namely, Dubraj, Ugresen, Dusasan and Bibhisana inherited and possessed the same with their widow mother Dura Bewa.

Under some previous arrangement Dubraj, husband of plaintiff no.1 got a share from his brother and possessed it and as such plaintiff no.1, the widow of Dubraj and plaintiff no.2, minor daughter of Dubraj, filed the suit for partition.

Proforma Defendant No.5 supported the case of plaintiffs.

4. Defendants nos.1 to 4 filed a joint written statement challenging the maintainability of the suit on various grounds and alleged that after birth of plaintiff no.2, Dubraj and plaintiff no.1 did not pull on well and as such plaintiff no.1 did not like to remain with Dubraj as his wife. The matter was put before some village gentlemen of Singala. As per their decision, Dubraj divorced plaintiff no.1 according to caste custom which was also reduced to writing on 22.04.1969. Such written document has not been produced and proved in this case.

Thereafter, plaintiff no.1 stayed in her father's house with plaintiff no.2. She remarried one Sanatan Mohanta of village Badra. He died and thereafter plaintiff no.1 was staying in her father's house at village Bagdega. After the divorce Dubraj married for the second time to one Chitra, the proforma defendant no.5 and by the time Dubraj died, proforma defendant no.5 had conceived. A daughter was born, who also died. Defendant no.5, as per the defendant nos.1 to 4, has lost her mental balance and she has not regained her mental balance. Their positive case is that since plaintiff no.1 was divorced they are not entitled to any share from the property of Dubraj.

5. Though five issues were cast by the learned Subordinate Judge, Rairangpur, the issue relating to the divorce of plaintiff no.1 and her remarriage gained importance in this case.

The learned Trial Judge having taken into consideration, the materials placed before him that the defendant has not established that plaintiff no.1 actually divorced Dubraj as there is not enough evidence regarding the same and alleged divorce was not proved during the trial.

6. In assailing the findings recorded by the learned Trial Judge, the defendant nos.1 to 4 assailed it before this Court which was disposed of by the learned Single Judge in the first appeal, particulars of which is reflected in the paragraph 1 of this order. The learned Single Judge also came to the conclusion that there are no materials on record to show that plaintiff no.1 had actually divorced late Dubraj and that she is not entitled to property of her husband. Thereafter, learned Single Judge dismissed the appeal.

7. In assailing the findings on factual aspects, Mr. S.P. Mishra, learned Senior Advocate appearing for the appellants draws attention of the Court to certain portion of the evidence led in this case. For the proper appreciation it s quoted below:-

> "P.W.2- In his cross-examination has stated Dubaraj Mother Dura did not like Chanchala. Then Chanchala left the house of Dubraj with Lalmani to her father's house at Bagadga. About 2 years thereafter, Dubraj married to Chitra. Chanchala again came and demanded maintenance during life time of Dubraj when Dubraj died, Chanchala did not come.

Hence, it is argued by Mr. Mishra, learned counsel for the appellant that this statement of P.W.2 clearly show in as much as P.W.2 in his statement has admitted the dispute and it shows that there was no relationship between Chanchala and Dubraj. Thus no doubt can be caste that Chanchala is a divorcee.

D.W.1 (defendant no.3, brother of Dubraj) in his examination in chief has stated:

> "During the life time of Dubraj, Chanchala was not pulling on well with Dubraj for which she left the house and there was a caste meeting in which Dubraj divorced Chanchala. Then Chanchala married Sanatan Mohanta of Badala in 'Sanga' form. Dubraj brought the second wife. Chitra is the second wife of my brother. As

> Chanchala has married elsewhere, if share would be given to her, she would dispose of the same, we have no objection if share would be given to Chitra and Lalmani".
>
> In Cross-examination :
>
> "After divorce Lalmoni was not taken by Chanchala. It is not a fact that Lalmoni did not stay in our house after divorce. It is not a fact that she (Chanchala) did not marry Sanatan in Sanga form".

The learned counsel for the appellant would argue that the statement of defendant no.3 and D.W.1 and the statement of PW.2 in his cross-examination prima facie establish that as Dubraj had divorced Chanchala, she is not entitled to any share in the dependent's family property. Moreover, he further relies on the following statement of D.W.2, which is quoted below:

> P.W.2- brother of Sanatan Mohanta (To whom Chanchala remarried) has stated in his examination in chief as follows:
>
> "I, know Sanatan Mohanta. He is related to me as cousin brother. I know Chanchala. She had married Sanatan in Sanga form. We took her from Bagadega village. As Chanchala had married earlier and she had left her husband, we took her in Sanga form. Chanchala is having son and daughter through Sanatan. Chanchala had no issue through First husband".
>
> In her cross-examination:-
>
> "It is not a fact that no sanga form of marriage took place and I do not know anything about the parties".

Having considered the material available before us, we are of the opinion that there is no clear, cogent and reliable evidence on the record to show that actually Chanchala and Dubraj were divorced. Evidence on these aspects is squarely lacking. Moreover, it is the case of the defendants that an agreement or deed of divorce was prepared before the gentlemen of the village. Such document has not been proved in this case. No explanation is forthcoming, why such document, if executed, has not been produced and proved in this case. So, factually this aspect cannot be disturbed.

8. Moreover, the contention of the learned Senior counsel for the appellant is also not legally tenable. Even, if there was a divorce as per the customs, then also it cannot be held to be a valid divorce extinguishing the right of Chanchala in the property of her husband. In this connection, we

take note of certain provisions of the Hindu Marriage Act, 1955, (hereinafter referred as the 'Act', for brevity). It is admitted by Shri S.P. Mishra, learned Senior Advocate that parties are governed by the aforesaid Act. Clause (a) of Section 3 of the Hindu Marriage Act provides for the definition of customs or usage. The same is quoted below for proper appreciation:-

> "(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in an local area, tribe, community, group or family".

So, in order to establish a particular custom, which was resorted to by the parties, as claimed by the defendant in this case, the parties relying on such customs most specifically plead that such customs signifying any rule, having continuously and uniformly observed for a long time has obtained the force of law among Hindus of a particular tribe, community etc. So, in order to bring home a case of a particular caste custom, the following ingredience are necessary to be established. They are enumerated below:

(i) There has to be a specific pleading regarding existence of such a custom;

(ii) It must be proved by preponderance of evidence that such custom were being followed continuously and uniformly from time immemorial;

(iii) The said custom is certain;

(iv) Such customs is not unreasonable and finally it is not opposed to public policy.

In this case, there are no pleadings about any such prevalent custom. Mr. Mishra, learned Senior Advocate took us to the written statement filed by the defendant nos.1 to 4 in the Court and he is not able to make out any pleading regarding existence of any such custom which is certain, being followed from time immemorial and that it is not against the public policy or unreasonable.

9. We are also examined the case in its applicability and as per provision Section 2 of the Hindu Marriage Act is applicable to all Hindus. Section 4 in the Hindu Marriage Act provides for overriding effect of the Act and laid down that save as otherwise expressly provided in the Act, any text rule or interpretation of Hindu law or any custom or usage as part of law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in the Act. Similarly, any law and force immediately before the commencement of the Act shall

cease to have effect in so far as it is inconsistent with any of the provisions the Act.

Section 13 in the Hindu Marriage Act provides that any marriage solemnised, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground stated in that section.

By necessary implication Section 13 of the Hindu Marriage Act provided that marriage can only be dissolved by a decree of divorce on the ground available under Section 13 of the Act. In order to establish a case of divorce by custom the parties seeking such a finding on the facts of the case has to establish the custom or the other requirements as narrated and discussed in the proceeding paragraph. In this case, as there is no such evidence on record or pleadings to that effect, we are of the opinion that this is not a case, where the Court should come to a conclusion that Chanchala, the plaintiff no.1, by resorting to the caste custom, divorced her husband Dubraj.

The defendant nos.1 to 4 also pleads that plaintiff no.1 has married another person as per 'Sanga' custom. The same principles i.e. applicable to divorce by caste custom, applies to second marriage also. In this case, since there is no material on record to show that in fact there was a custom amongst the kurmis called Sanga custom for solemnize marriage. Such a plea cannot be accepted and has not been accepted by learned Trial Judge as well as the learned Appellate Judge. Moreover, Section 7 of the Act provides for ceremonies for a valid Hindu Marriage. A Hindu marriage may be solemnized in accordance with the customary Rites and ceremonies of either party. Sub-section-(2) provides that where such Rites and ceremonies include the saptpadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. In the case of ***Kanwal Ram and Ors vs. Himachal Pradesh Administration***, AIR 1966 SC 614, the Hon'ble Supreme Court has held that a marriage is not proved unless the essential ceremonies required for its solemnization are proved to have been performed. In this case, admittedly, there is no evidence regarding the solemnization between the plaintiff no.1 and Sanatan. So, this Court is unable to accept the argument of Mr. S.P. Mishra, learned Senior Advocate for the appellant that Chanchala had married Sanatan and therefore, lost her right to said land in the property of Dubraj.

10. In view of the aforesaid discussions, we are of the opinion that there is no merit in the Intra Court appeal and the same is dismissed being devoid of merit. There shall be no order as to costs.

The T.C.Rs. be returned back to the trial court forthwith.

As the restrictions due to resurgence of COVID-19 are continuing, learned counsel for the parties may utilize the soft copy / downloaded copy of this order available in the High Court's website or print out thereof at par with certified copies, subject to attestation by Mr. S.P. Mishra, learned Senior Counsel for the appellant, in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020 as modified by Court's Notice No.4798 dated 15.04.2021.

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2021 (II) ILR - CUT- 68

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

W.P.(C) NO. 489 OF 2015

KALYAN RANJAN SAHOO ………Petitioner

.V.

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

(A) INDIAN LIMITATION ACT, 1963 – Section 5 – Provision under – Condonation of delay – Principles and guidelines to be followed – Indicated.

At the outset, we would like to take note of the reported and off-quoted judgment passed in the case of ***Collector, Land Acquisition, Anantnag and another –vrs.- Mst. Katiji and others:*** *AIR 1987 SC 1353, wherein the Hon'ble Supreme Court has laid down the guidelines for considering the application for condonation of delay under Section 5 of the Limitation Act,*

1963. The Hon'ble Supreme Court has laid down that: legislature has conferred the power to condone the delay by enacting Section 5 of the Indian Limitation Act, 1963 in enabling the court to do substantial justice to the parties by disposing of the matters on merit. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the court to apply the law in a meaningful manner, which subserves the ends of justice that being the life purpose for the existence of the institution of the courts. The Hon'ble Supreme Court further observed that it has been making a justifiably liberal approach in matters instituted before it, but observed that the message does not appear to have percolated down to all other courts in a hierarchy. Such a liberal approach is adopted on principle as it is realized that:

"xx xx xx.

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal.
xx xx xx." *(Para 9)*

(B) THE GENERAL CLAUSES ACT,1897 – Section 27 – Provisions under – Meaning of service by post – Respondents have not annexed any document to show that the notices were sent to the Applicant/ Petitioner through post but have made a bald assertion that they had

sent the documents which were returned un-served – Effect of such statement – Held, in order to have a service effected properly, the parties asserting the same must show that the notice through post was properly addressed, pre-paid and posted by Registered Post, a letter containing the document – Mere assertion will not establish that the service of notices by post was effected properly. (Paras 14 to 16)

(C) THE RAILWAY SERVANTS (DISCIPLINE AND APPEAL) RULES, 1968 – Rule 9 read with Article 311 of the Constitution of India, 1950 – Proceeding under for imposition of major penalty – Notice sent to the delinquent returned un-served – Duty of the Disciplinary Authority – Held, in such a situation, the duty of the Disciplinary Authority or the Enquiring Officer is to see that the notices were published in a local Newspaper which must be in a vernacular language which the delinquent understands – No such step taken – Effect of – Held, it amounts to violation of natural justice – Order of punishment set aside – Direction to reinstatement with service benefits.

> *"Applying these principles to the case in hand, it is apparent from the record that the Respondents/ Opposite Party Nos.1 to 3 have not established the fact that notices were sent to the Applicant/ Petitioner. It could have been done by filing the documents or copies thereof as Annexures to the counter affidavit. The Respondents/ Opposite Party Nos.1 to 3 have not taken any step to make a public proclamation by publishing in a Newspaper when the notices sent to the Applicant/ Petitioner were allegedly returned unserved. The same principle should be applied to the second show cause notice and the final order of punishment. So, this Court is of the opinion that there are gross violations of principles of natural justice as enshrined under Article 311 of the Constitution of India. This is a constitutional obligation on the part of the Railways Authorities and it cannot be abdicated. Hence, we are of the opinion that the writ petition should be allowed by quashing the final report of the Inquiring Officer, the consequent second show cause and the final order of dismissal. Mr. Avijit Pal, learned counsel for the Opposite Party Nos.2 and 3- Railways submits that the matter should be remanded back to the Disciplinary Authority for de novo hearing of the Disciplinary Proceeding. We are of the opinion that since in this case order of punishment has been passed in the year 2004 and in the meantime, almost two decades have already passed, the interest of justice will not be sub-served, if the matter is remanded back to the Disciplinary Authority. We are also of the opinion that the Applicant/ Petitioner who was aged about 49 years at the time of filing of the Original Application before the Tribunal is near the age of superannuation and there is hardly one or two years left of his active service. In such facts situation, setting aside the order of punishment and remanding the matter back to the Disciplinary Authority will render all his*

efforts fruitless. Hence, the writ petition is allowed by issuing a writ of certiorari. The impugned order dated 11th August, 2014 passed by the Tribunal in O.A. No.437 of 2012 is hereby quashed. The order of finding of guilt, second show cause and final order of dismissal are hereby quashed. We further direct that the Applicant/ Petitioner should be re-instated in his post as Junior Clerk within a period of forty-five days from today with the salary which the other Junior Clerks are receiving at present in the same cadre. We also direct that the period from 12.05.2003 till his joining shall be considered for the purpose of his service benefits. But, the Applicant/ Petitioner is not entitled to receive any financial benefit for that period."

(Paras 21 to 26)

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 2276 : P.K. Ramachandran Vs. State of Kerala and Another.
2. AIR 2014 SC 746 : Basawaraj & Another Vs. Spl. Land Acquisition Officer.
3. AIR 2014 SC 1141 : Chennai Metropolitan Water Supply and Sewerage Board and Others Vs. T.T. Murali Babu.
4. AIR 2014 SC 1612 : Brijesh Kumar and Others Vs. State of Haryana and Ors.
5. AIR 1987 SC 1353 : Collector, Land Acquisition, Anantnag & Anr Vs. Mst. Katiji & Ors:
6. (2013) 1 SCC 353 : Tukaram Kana Joshi Vs. Maharashtra Industrial Development Corporation.

For Petitioner : Mr. P.K. Bhuyan, P.K. Samal &C.P. Sahani
For Opp. Parties: Mr. Avijit Pal (for O.Ps.2 and 3)

JUDGMENT Date of Hearing : 06.04.2021 & 26.04.2021 & Date of Judgment :26.04.2021

S. K. MISHRA, J.

Admit.

02. By filing this writ petition, the Applicant/ Petitioner, a former employee of the East Cost Railways, assails the final order dated 11th August, 2014 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the Tribunal" for brevity) dismissing his Original Application i.e. O.A. No.437 of 2012 mainly on the ground of delay and being barred by law of limitation.

In the aforesaid Original Application, the Applicant/ Petitioner being the Applicant had assailed the order of punishment dated 04.02.2004 imposing punishment of removal from service passed by the Respondent/ Opposite Party No.3- Production Engineer and Disciplinary Authority, Office of the Chief Workshop Manager, Carriage Repair Workshop, East Coast

Railway, Mancheswar, Bhubaneswar, District- Khurda (hereinafter referred to as "the Disciplinary Authority" for brevity) on the ground of gross violation of Rules, violation of principle of nature justice and the punishment being highly disproportionate to the gravity of the charge. The charge against the Applicant/ Petitioner was that he remained unauthorizedly absent from duties for about 2 ½ years i.e. from 12.12.2000 to 12.05.2003.

03. The facts, mostly undisputed in this case, are as follows:

The Applicant/ Petitioner was appointed as a Khalasi by the Respondents/ Opposite Party Nos.1 to 3 on 04.04.1983. In the year 1985, he was promoted to the post of Junior Clerk. While continuing as such, it is alleged that he remained absent unauthorizedly, without any intimation to the authorities regarding his whereabouts with effect from 12.12.2000 to 12.05.2003. Accordingly, charge-sheet under Section 9 of the Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to as "the Rules" for brevity), vide Memorandum No.Mesw/M/D&A/KRS-74/1571 dated 12.05.2003 was issued to the Applicant/ Petitioner. He submitted his written statement of defence denying the allegations leveled against him. But, the Disciplinary Authority without giving much weightage to the said written statement of defence, appointed the Inquiring Officer to conduct a domestic inquiry into the matter. The Inquiring Officer without giving any notice to the Applicant/ Petitioner, concluded the enquiry and submitted his report holding him guilty. The Disciplinary Authority without supplying him a copy of the report of the Inquiring Officer, as required under the Rules, vide order dated 04.02.2004 imposed the punishment of removal from service.

The Applicant/ Petitioner preferred an appeal on 18.03.2004, but no decision was communicated to him. He sent several reminders, but, it did not yield any result. He submitted the last reminder on 12.09.2010, but no order was communicated to him. Finally, he filed Original Application No.437 of 2012 before the Tribunal on 30.05.2012.

04. The Respondents/ Opposite Party Nos.1 to 3 submitted that after taking resort to initiate a Disciplinary Proceeding, Memorandum of charge under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to as "the Rules" for brevity), was framed and sent to the applicant in his address available in the service record but the same was returned undelivered. As such, as per the Rules, in presence of witnesses the same was pasted in the notice board.

Thereafter, the Inquiring Officer was appointed to enquire into the matter and letter was sent to the applicant in that regard but the same was returned undelivered with postal remark that "addressee always absent". As notices were returned unserved repeatedly, the Inquiring Officer proceeded with the enquiry and submitted its report holding the charge as proved. The same was sent to the applicant but again it was returned unserved.

In view of the above, as there was no other option for the Disciplinary Authority, he considered the report and other materials available on record and vide order dated 04.02.2004 imposed the punishment of removal from service with immediate effect.

The Respondents/ Opposite Party Nos.1 to 3 denied to have received any appeal dated 18.03.2004, but have stated that one mercy appeal dated 01.12.2007 was submitted by the Applicant/ Petitioner which was duly considered, but the same was rejected and communicated to the Applicant/ Petitioner by registered post with AD vide letter dated 21.03.2008.

The Respondents/ Opposite Party Nos.1 to 3 claimed that there was delay and laches on the part of the Applicant/ Petitioner. Hence, they prayed to dismiss the Original Application.

05. The Applicant/ Petitioner filed a rejoinder denying the allegations made by the Respondents/ Opposite Party Nos.1 to 3. He specifically stated that except bald assertions, no material has been placed in support of the averments that notices were returned unserved. He further stated that the order imposing punishment of removal from service has been passed behind his back which is not sustainable in the eye of law.

06. The Tribunal taking into consideration the reported judgments of the Hon'ble Supreme Court in the cases of **P.K. Ramachandran –vrs.- State of Kerala and Another**: reported in AIR 1998 SC 2276, **Basawaraj & Another –vrs.- Spl. Land Acquisition Officer**: reported in AIR 2014 SC 746, **Chennai Metropolitan Water Supply and Sewerage Board and Others –vrs.- T.T. Murali Babu**: reported in AIR 2014 SC 1141 and **Brijesh Kumar and Others –vrs.- State of Haryana and Others**: reported in AIR 2014 SC 1612, held that the Original Application is time barred and, therefore, dismissed it on the ground of delay and laches.

07. Mr. P.K. Bhuyan, learned counsel for the Applicant/ Petitioner submits that the impugned order passed by the Tribunal is erroneous and is liable to be set aside on the ground that the delay caused in this case can be attributed to the inaction of the Respondents/ Opposite Party Nos.1 to 3-authorities for not having considered his appeal. He also submits that the Court and Tribunal should do substantive justice instead of hiding behind technicalities. Learned counsel for the Applicant/ Petitioner further submits that the Respondents/ Opposite Party Nos.1 to 3 have admitted in their counter affidavit that notices were not served on the Applicant/ Petitioner because of his long absence. In such situation, Mr. P.K. Bhuyan, learned counsel for the Applicant/ Petitioner would argue that a public proclamation in the shape of a Newspaper notification or proclamation should have been issued. Moreover, he further points out that no document has been annexed to the counter affidavit before the Tribunal and the Tribunal has not relied on any such document to come to the conclusion that notices were sent to him as claimed by the Respondents/ Opposite Party Nos.1 to 3 in their counter affidavit. Learned counsel for the Applicant/ Petitioner, therefore, prays that since the Applicant/ Petitioner has been dismissed from service with effect from 04.02.2004, no useful purpose will be served by remanding the matter to the Tribunal and substantive justice can only be done if this Court in exercise of its jurisdiction issues a writ of certiorari under Articles 226 and 227 of the Constitution of India and disposes of the writ petition on merit.

08. Mr. A. Pal, learned counsel for the Railways appearing on behalf of the Opposite Party Nos.2 and 3 would submit that the delay in filing the Original Application is fatal to the case of the Applicant/ Petitioner and, therefore, the writ petition should be dismissed only on that ground. He also submits that even if it is pleaded by the Respondents/ Opposite Party Nos.1 to 3 before the Tribunal that notices were not served upon the Applicant/ Petitioner, as the postal notices were returned unserved, still there cannot be any violation of natural justice. He would further submit that even if there is a violation of natural justice, the writ petition should not be allowed quashing the order of punishment and the basis of such punishment as there is an enquiry report, but the matter should be remanded back to the Disciplinary Authority and the Enquiring Authority to afford reasonable opportunity of hearing to the Applicant/ Petitioner to participate in the Disciplinary Proceeding.

09. At the outset, we would like to take note of the reported and off-quoted judgment passed in the case of **Collector, Land Acquisition, Anantnag and another –vrs.- Mst. Katiji and others:** AIR 1987 SC 1353, wherein the Hon'ble Supreme Court has laid down the guidelines for considering the application for condonation of delay under Section 5 of the Limitation Act, 1963. The Hon'ble Supreme Court has laid down that: legislature has conferred the power to condone the delay by enacting Section 5 of the Indian Limitation Act, 1963 in enabling the court to do substantial justice to the parties by disposing of the matters on merit. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the court to apply the law in a meaningful manner, which subserves the ends of justice that being the life purpose for the existence of the institution of the courts. The Hon'ble Supreme Court further observed that it has been making a justifiably liberal approach in matters instituted before it, but observed that the message does not appear to have percolated down to all other courts in a hierarchy. Such a liberal approach is adopted on principle as it is realized that:

"xx xx xx.

> 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
>
> 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
>
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
>
> 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
>
> 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.
>
> Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. xx xx xx."

10. We particularly rely upon the principle no.6 wherein the Hon'ble Supreme Court very categorically held that the Court exists for their authority to dispense justice to the litigant and not for hiding behind technicalities. As our discussion in the succeeding paragraphs would demonstrate, this is a classic case of pure and simple violation of principle of natural justice by a very big organization like Indian Railways. The Indian Railways is stated to be the 3rd biggest employer in the whole world. An entity of such a large magnitude is awe aspiring so far as it employees are concerned and a single employee who was appointed as a Khalasi and promoted to the rank of Junior Clerk has hardly any bargaining capacity with such a big employer.

11. We also take note of the off-quoted judgment passed in the case of **Tukaram Kana Joshi –vrs.- Maharashtra Industrial Development Corporation**: reported in (2013) 1 SCC 353, wherein the Hon'ble Supreme Court has held as follows:

> "No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non- deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Applicant/ Petitioners."

12. So, in spite of all delay in this case, we are inclined to condone the same and hold that there is justification for the Applicant/ Petitioner to file the Original Application at a belated stage. Moreover, the Respondents/ Opposite Party Nos.1 to 3 have remained evasive regarding filing of the appeal by the Applicant/ Petitioner against the order of removal from service on 18.03.2004. The Applicant/ Petitioner has submitted his last reminder on 12.09.2010. However, it appears that no document in support of sending notices through post or any communication to the Applicant/ Petitioner about dismissal of his appeal has been filed in the counter affidavit. Moreover, the Tribunal in its order has not mentioned any of these documents at paragraph 2 of the order as Annexures, though such Annexures have been noted while the case of the Applicant/ Petitioner was discussed in the first paragraph of the impugned order. Therefore, we are led to believe that in this case, the

Respondents/ Opposite Party Nos.1 to 3 have not established that notices were sent to the Applicant/ Petitioner as claimed by them.

13. We take into consideration the very case of the Respondents/ Opposite Party Nos.1 to 3 raised before the Tribunal. It has been pleaded that xx xx xx "*Memorandum of Charge under Rule 9 of the Rules was framed and sent to the Applicant/ Petitioner in his address available in the service record, but the same was returned un-delivered. As such, as per Rules, the same was pasted in the notice board. The Inquiring Officer was appointed to enquire into the matter. Letter was sent to the Applicant/ Petitioner this regard but the same was returned un-delivered with postal remark that "addressee always absent". As notices sent repeatedly were returned unserved, the Inquiring Officer proceeded with the enquiry and submitted his report holding the charge as proved. The same then was sent to the Applicant/ Petitioner. But it was again returned unserved. In that view of the matter, there being no other option, the Disciplinary Authority, considered the report and other materials available on record and vide order dated 04.02.2004 imposed the punishment of removal from service with immediate effect" xx xx xx*.

14. Section 27 of the General Clauses Act, 1897 provides as follows:

> "**Meaning of service by post**.—Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

15. As observed earlier, the Respondents/ Opposite Party Nos.1 to 3 have not annexed any document to show that the notices were sent to the Applicant/ Petitioner through post. In order to have a service effected properly, the parties asserting the same must show that the notice through post was properly addressed, pre-paid and posted by Registered Post, a letter containing the document.

16. In this case, bald assertion made by the Respondents/ Opposite Party Nos.1 to 3 that they have sent the documents to the Applicant/ Petitioner

which were returned unserved will not establish that the service of notices by post is effected properly.

17. Moreover, it is the case of the Respondents/ Opposite Party Nos.1 to 3 that notices were sent to the Applicant/ Petitioner which were returned unserved. In such situation, the duty of the Disciplinary Authority or the Enquiring Officer is to see that the notices were published in a local Newspaper which must be in a vernacular language which the Applicant/ Petitioner understands. It is not the case of the Respondents/ Opposite Party Nos.1 to 3 that they proclaimed notices to the Applicant/ Petitioner through any paper proclamation. As per their own case that such notices were pasted in the notice board. Such a plea is conspicuously absent in their pleading. This is important more so because the Respondents/ Opposite Party Nos.1 to 3 themselves have stated that on their framing of charge against the Applicant/ Petitioner they sent the notices and the notices returned unserved, and as per the Rules, the notices were pasted in the notice board. However, there is no such pleading or averment by the Respondents/ Opposite Party Nos.1 to 3 regarding pasting of notices of the Inquiring Officer and the second show cause.

18. Section 9 of the RS (D & A) Rules provides procedure for imposing major penalties. The relevant portions are quoted below:-

> "9. **Procedure for imposing Major Penalties** - (1) No order imposing any of the penalties specified in clauses (v) to (ix) of Rule 6 shall be made except after an inquiry held, as far as may be, in the manner provided in this rule and Rule 10, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850) where such inquiry is held under that Act.
>
> (2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Railway servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, a Board of Inquiry or other authority to inquire into the truth thereof.
>
> (3) Where a Board of Inquiry is appointed under sub-rule (2) it shall consist of not less than two members, each of whom shall be higher in rank than the Railway servant against whom the inquiry is being held and none of whom shall be subordinate to the other member or members as the case may be, of such Board.
>
> (4) xx xx xx xx xx xx
>
> (5) xx xx xx xx xx xx

Explanation - Where the disciplinary authority itself holds the inquiry, any reference in sub-rule (12) and in sub-rules (14) to (25), to the inquiring authority shall be construed as a reference to the disciplinary authority.

(6) Where it is proposed to hold an inquiry against a Railway servant under this rule and Rule 10, the disciplinary authority shall draw up or cause to be drawn up –

(i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;

(ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge which shall contain –

(a) a statement of all relevant facts including any admission or confession made by the Railway servant;

(b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.

(7) The <u>disciplinary authority shall deliver or cause to be delivered to the Railway servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained</u> and shall require the Railway servant to submit a written statement of his defence within ten days or such further time as the disciplinary authority may allow.

Note: - If copies of documents have not been delivered to the Railway servant along with the articles of charge and if he desires to inspect the same for the preparation of his defence, he may do so, within 10 days from the date of receipt of the articles of charge by him and complete inspection within ten days thereafter and shall state whether he desires to be heard in person.

(8) xx xx xx xx xx

(9) xx xx xx xx xx

(10) The disciplinary authority shall, where it is not the inquiring authority, forward to the inquiring authority –

(i) a copy of the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(ii) a copy of the written statement of defence, if any, submitted by the Railway servant;

(iii) a copy of the statement of witnesses, if any, referred to in sub-rule (6);

(iv) evidence proving the delivery of the documents referred to in sub-rule (6) to the Railway servant;

(v) a copy of the order appointing the Presenting Officer, if any; and

(vi) a copy of the list of witnesses, if any, furnished by the Railway servant.

(11) The Railway servant shall appear in person before the inquiring authority on such day and at such time within ten working days from the date of receipt by the inquiring authority of the order appointing him as such, as the inquiring authority may, by a notice in writing, specify in this behalf, or within such further time not exceeding ten days, as the inquiring authority may allow.

(12) The inquiring authority shall, if the Railway servant fails to appear within the specified time, or refuses or omits to plead, require the Presenting Officer if any, to produce the evidence by which he proposes to prove the articles of charge and shall adjourn the case to a later date not exceeding thirty days, after recording an order that the Railway servant may for the purpose of preparing his defence, give a notice within ten days of the order or within such further time not exceeding ten days as the inquiring authority may allow for the discovery or production of any documents which are in possession of Railway Administration but not mentioned in the list referred to in sub-rule (6).

Note: The Railway servant shall indicate the relevance of the documents required by him to be discovered or produced by the Railway Administration.

(13)(a) The Railway servant may represent his case with the assistance of any other Railway servant (including a Railway servant on leave preparatory to retirement) working under the same Railway Administration, subject to whose jurisdiction and control he is working. He cannot engage a legal practitioner for the purpose, unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner or the disciplinary authority having regard to the circumstances of the case, so permits. If the Railway servant is employed in the office of the Railway Board, its attached office or subordinate office, he may present his case with the assistance of any other Railway servant (including a Railway servant on leave preparatory to retirement), employed in the office of the Railway Board, attached office or subordinate office, as the case may be, in which he is working.

(b) The Railway servant may also present his case with the assistance of a retired Railway servant, subject to such conditions as may be specified by the President from time-to-time by general or special order in this behalf.

Note: (1) A non-gazetted Railway servant may take the assistance of an official of a Railway Trade Union, recognized by the Railway Administration under which the Railway servant is employed, to present his case before an inquiring authority but shall not engage a legal practitioner for the above purpose except in the circumstances brought out in clause (a). An official of a Railway Trade Union shall not be allowed to appear on behalf of an alleged delinquent railway official in connection with a disciplinary case pending against that official, to present his case favourably before an inquiring authority unless he has worked as such in a recognized Railway Trade Union for a period of at least one year continuously

prior to his appearance before an inquiring authority for the above purpose and subject to the condition that he takes no fees.

(2) (i) Nomination of an assisting railway servant or an official of a recognized Railway Trade Union, who is a full time union worker, shall be made within twenty days from the date of appointment of the inquiring authority.

(ii) The nomination shall not be accepted if the person assisting has three pending disciplinary cases on hand in which he has to assist.

Provided that an official of a recognized Railway trade Union may assist in more than three pending disciplinary cases.

(14) After the nomination of the assisting Railway servant or the official of a Railway Trade Union and other necessary steps preliminary to the inquiry are completed, a date, ordinarily not exceeding one month from the date of appointment of the inquiring authority, shall be fixed for the inquiry and the Railway servant informed accordingly.

(15) xx xx xx xx xx

(16) xx xx xx xx xx

(17) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved, shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer, if any, and may be cross-examined by or on behalf of the Railway servant. The Presenting Officer, if any, shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit.

(18) xx xx xx xx xx

(19) xx xx xx xx xx

(20) xx xx xx xx xx

(21) xx xx xx xx xx

(22) The inquiring authority may, after the completion of the production of evidence, hear the Presenting Officer, if any, and the Railway servant, or permit them to file written briefs of their respective cases, if they so desire.

(23) If the Railway servant, to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of this rule, the inquiring authority may hold the inquiry *ex parte*.

(24) xx xx xx xx xx

(25)(i) After the conclusion of the inquiry, a report shall be prepared and it shall contain –

(a) the articles of charge and the statement of imputations of misconduct or misbehaviour;

(b) the defence of the Railway servant in respect of each article of charge;

(c) an assessment of the evidence in respect of each article of charge; and (d) the findings on each article of charge and the reasons therefor.

Explanation - If in the opinion of the inquiring authority the proceedings of the inquiry establish any article of charge different from the original articles of charge, it may record its findings on such article of charge:

Provided that the findings on such article of charge shall not be recorded unless the Railway servant has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(ii) The inquiring authority, where it is not itself the disciplinary authority, shall forward to the disciplinary authority the records of inquiry which shall include -

(a) the report prepared by it under clause (i);

(b) the written statement of defence, if any, submitted by the Railway servant;

(c) the oral and documentary evidence produced in the course of the inquiry;

(d) written briefs, if any, filed by the Presenting Officer, if any, or the Railway servant or both during the course of the enquiry; and

(e) the orders, if any, made by the disciplinary authority in regard to the inquiry."

18.1. In this case though it is averred by the Railways that notices were sent through registered post, the same were not delivered to the Petitioner i.e. the delinquent employee and were returned. In such situation, the deeming provision of Section 27 of the General Clauses Act, 1897 which is quoted at paragraph 14 will not raise a presumption of delivery of the notices.

18.2. It is clear from a plain reading of Rule 9 of the RS (D & A) Rules that the Authorities especially the Disciplinary Authority and the Enquiring Authority are saddled with the duty to serve notice i.e. "shall deliver or cause to be delivered to the Railway servant". The Rules do not provide the manner of delivery of such notice or copy of the article of charge and the statement of imputation of misconduct or misbehavior, date of enquiry etc. So, the

general law, equity and good conscience shall govern the matter. In such cases, when it was not possible to deliver a notice on the delinquent employee through regular mode i.e. service of notice through post, a public proclamation is necessary. Though such public proclamation is not mentioned in the Rules itself, it does not also prohibit such delivery. The expression "shall deliver or cause to be delivered to the Railway servant" appearing the articles of charge, the notices regarding appointment of the Enquiring Officer, the date of enquiry, the result of enquiry and the second show cause, makes it imperative that there should be delivery of the notices or there should be substituted delivery of the same. In this case neither has been followed. Therefore, the entire process becomes vulnerable for interference.

19. Article 311 of the Constitution of India provides for the procedures to be followed for dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State which read as follows:

> "**Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.-**(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed.
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.
>
> [Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:
>
> Provided further that this clause shall not apply-]
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (b) where the authority empowered to dismiss or remove a person or to reduce him in rank in satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
>
> (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

> (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]"

20. The expression "an employee cannot be dismissed or removed from service etc." "except after an enquiry in which he has been informed about the charge against him and given a reasonable opportunity of being heard……" makes imperative on the part of the authorities to serve a notice of charge levelled against the employee. There is also obligation on the authorities created by the Constitution to give reasonable opportunity of being heard. This reasonable opportunity of being heard not only means a notice to him, but in cases where he is unable to defend the charge against him because of his lack of knowledge in such matter, it is the duty of the authorities to render meaningful and effective assistance to the Applicant/Petitioner. Even in a case where the delinquent employee does not appear, it shall be proper on the part of the authorities to appoint a defending assistant or a friend, so that the Inquiring Officer will not pass an unreasonable or arbitrary order on the basis of material not available on record or by taking a perverse view thereof.

21. Applying these principles to the case in hand, it is apparent from the record that the Respondents/ Opposite Party Nos.1 to 3 have not established the fact that notices were sent to the Applicant/ Petitioner. It could have been done by filing the documents or copies thereof as Annexures to the counter affidavit. The Respondents/ Opposite Party Nos.1 to 3 have not taken any step to make a public proclamation by publishing in a Newspaper when the notices sent to the Applicant/ Petitioner were allegedly returned unserved. The same principle should be applied to the second show cause notice and the final order of punishment.

22. So, this Court is of the opinion that there are gross violations of principles of natural justice as enshrined under Article 311 of the Constitution of India. This is a constitutional obligation on the part of the Railways Authorities and it cannot be abdicated.

23. Hence, we are of the opinion that the writ petition should be allowed by quashing the final report of the Inquiring Officer, the consequent second show cause and the final order of dismissal.

24. Mr. Avijit Pal, learned counsel for the Opposite Party Nos.2 and 3-Railways submits that the matter should be remanded back to the Disciplinary Authority for *de novo* hearing of the Disciplinary Proceeding.

25. We are of the opinion that since in this case order of punishment has been passed in the year 2004 and in the meantime, almost two decades have already passed, the interest of justice will not be sub-served, if the matter is remanded back to the Disciplinary Authority. We are also of the opinion that the Applicant/ Petitioner who was aged about 49 years at the time of filing of the Original Application before the Tribunal is near the age of superannuation and there is hardly one or two years left of his active service. In such facts situation, setting aside the order of punishment and remanding the matter back to the Disciplinary Authority will render all his efforts fruitless.

26. Hence, the writ petition is allowed by issuing a writ of certiorari. The impugned order dated 11th August, 2014 passed by the Tribunal in O.A. No.437 of 2012 is hereby quashed. The order of finding of guilt, second show cause and final order of dismissal are hereby quashed. We further direct that the Applicant/ Petitioner should be re-instated in his post as Junior Clerk within a period of forty-five days from today with the salary which the other Junior Clerks are receiving at present in the same cadre. We also direct that the period from 12.05.2003 till his joining shall be considered for the purpose of his service benefits. But, the Applicant/ Petitioner is not entitled to receive any financial benefit for that period.

27. With such observations, this writ petition is disposed of.

28. As the restrictions due to resurgence of Covid-19 are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by Mr. P.K. Bhuyan, learned Advocate or/and by Mr. Avijit Pal, learned 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.

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2021 (II) ILR - CUT- 86

CHITTA RANJAN DASH, J & PRAMATH PATNAIK, J.

W.P.(C) NOS. 17009 AND 17110 OF 2019

BANSHIDHAR BAUG ……….Petitioner

.V.

ORISSA HIGH COURT, THROUGH REGISTRAR GENERAL & ORS. ……….Opp. Parties

IN W.P.(C) NO.17110 OF 2019
KARUNAKAR JENA & ORS. ………Petitioners

.V.

ORISSA HIGH COURT, THROUGH REGISTRAR GENERAL & ORS. ………Opp. Parties

HIGH COURT OF ORISSA (DESIGNATION OF SENIOR ADVOCATE) Rules, 2019 – Rule 6 – Designation of Senior Advocate – Writ petition by an Applicant challenging the decision declaring certain Advocates as Senior Advocates – Various questions of law raised – The following questions were formulated by the court for adjudication.

(I) Whether the petitioners have locus standi to maintain the writ petition ?

(II) Whether the Orissa High Court could have framed Rule in the form of "2019 Rules" incorporating sub-rule (9) of Rule- 6, which runs contrary to the guidelines/norms of Hon'ble the Supreme Court for framing Rules as contained in paragraph- 73 of Indira Jaising case ? (Annexure – 1)

(III) Whether the direction of Hon'ble the Supreme Court in Indira Jaising case is binding on this Court, in view of Article- 141 of the Constitution of India?

(IV) Whether beginning of sub-rule (9) of Rule-6 with a non-obstante clause takes away the effect of "2019 Rules" from sub-rule (3) to sub-rule (8) of Rule-6?

(V) Whether the Opposite Party Nos.5 to 9, who had applied as per the "2019 Rules" along with the petitioners and others could have been picked by the Permanent Committee prior to the stage of sub-rule (3) of Rule- 6 of the "2019 Rules" and could their names have been recommended for designation as "Senior Advocates" ?

(VI) Whether the Hon'ble Full Court for exercising the power under sub-rule (9) of Rule- 6 could have accepted the recommendation of the Permanent Committee before the stage of sub-rule (3) of Rule-6 to declare Opposite Party Nos.5 to 9 as "Senior Advocates" without forming any independent opinion?

All the questions were considered and the court held the following:

Taking into consideration our discussion (supra), in fine, we hold thus:-

(I) sub-rule (9) of Rule- 6 of the High Court of Orissa (Designation of Senior Advocate) Rules, 2019 is declared as ultravires of the guidelines/norms framed in paragraph- 73 of ***Indira Jaising*** *case.*

(II) The Notification dated 04.09.2019 calling fresh applications from the eligible Advocates for being designated as "Senior Advocate" is quashed and the applications received in response to the said Notification are not to be taken into consideration.

(III) The Notification No.1378, dated 19.08.2019 shall have effect till fresh decision by the Hon'ble Full Court is taken regarding designation of "Senior Advocate" on consideration of all 48 applications including that of Opposite Party Nos.5 to 9.

Case Laws Relied on and Referred to :-

1. (2017) 9 SCC 766 : Indira Jaising Vs. Supreme Court of India.
2. AIR 2000 Allahabad 300 : Democratic Bar Association, Allahabad & Ors. Vs. High Court of Judicature at Allahabad & Ors.
3. (1992) 4 SCC 305 : Janata Dal Vs. Choudhury HS.
4. (2016) 1 SCC 454 : Madras Institute of Development Studies & Anr. Vs. K. Sivasubramaniyan & Ors.
5. (2008) 3 SCC 655 : State of Himachal Pradesh Vs. Paras Ram & Ors.
6. 2008 AIR SCW 619 :Chandramohan Pandurang Kajbaje Vs. State of Maharashtra & Ors.
7. (2004) 6 SCC 719 : Kalyani Packaging Industry Vs. Union of India & Anr.
8. AIR 2002 SC 681 : Suganthi Suresh Kumar Vs. Jagdeeshan.
9. 2019 (5) SCALE : 588 : National Lawyers' Campaign for Judicial Transparency.

IN W.P.(C) NO.17009 OF 2019

For Petitioner : M/s. Bansidhar Baug (In person)

For Opp. Party Nos.1 and 3 : M/s. Sanjit Mohanty, Sr. Adv. & I.A. Acharya

For Opp. Party No.5 : M/s. S.P.Mishra, Sr. Adv. Gouri Mohan Rath, A.C. Panda, M. Agarwal, S.S. Padhi, S.D. Ray, P.P. Behera & A. Mishra.

For Opp. Party No.6 : M/s. P. Ramakrishna Patro & A.K. Samal.

For Opp. Party Nos.7, 8 & 9: M/s. S.P.Mishra, Sr. Adv., Debasis Nayak, A. Mishra, M. Agarwal & P.P. Behera.

IN W.P.(C) NO.17110 OF 2019

For Petitioners : M/s. S.S. Rao, B.K. Mohanty and R.R. Jethi

For Opp. Party No.1 and 3 : M/s. I.A. Acharya

For Opp. Party No.5 : M/s. Gouri Mohan Rath, A.C. Panda, M.Agarwal, S.S.Padhi, S.D.Ray,P.P.Behera & A.Mishra.

For Opp. Party No.6 : M/s. P.Ramakrishna Patro and A.K. Samal

For Opp. Party Nos.7 to 9 : M/s. S.P.Mishra, Sr. Adv., Debasis Nayak, A.Mishra,M. Agrawal & P.P.Behera.

JUDGMENT Date of Hearing: 30.03.2021 : Date of Judgment: 10.05.2021

C.R. DASH, J.

Both these writ petitions have been filed by four Advocates. They have put in several years of practice in the High Court and other Courts. They aspire to be conferred with the designation of "Senior Advocate". While the process of conferring designation of "Senior Advocate" was on in accordance with Rule-6 of High Court of Orissa (Designation of Senior Advocate) Rules, 2019 ("2019 Rules" for short), the Hon'ble Full Court conferred designation of "Senior Advocate" on five Advocates, who are Opposite Party Nos. 5 to 9.

2. Being aggrieved by such action of the Hon'ble Full Court, both these writ petitions have been filed with the following prayers ;

> ***(I)*** *to quash the Notification No.1378, dated 19.08.2019 vide Annexure-8 declaring Opposite Party Nos.5 to 9 as "Senior Advocates" ;*
>
> ***(II)*** *to quash sub-rule-(9) of Rule-6 of "2019 Rules";*
>
> ***(III)*** *to issue direction to the Permanent Committee as well as the Hon'ble Full Court of the High Court to consider the applications of Opposite Party Nos.5 to 9 along with other applicants named in the Notice dated 09.08.2019 vide Annexure-7 for being designated as "Senior Advocates";*
>
> ***(IV)*** *In W.P.(C) No.17110 of 2019, one more prayer is added to quash the Notification dated 04.09.2019, which calls applications from eligible advocates for being designated as "Senior Advocates".*

3. Brief fact of the case is as follows :-

(a) Hon'ble the Supreme Court on 12.10.2017 delivered the Judgment in the case of ***Indira Jaising vs. Supreme Court of India***, **(2017) 9 SCC 766 (Annexure-1)**. The Orissa High Court, in exercise of the power under Section-16(2) read with Section-34 of the Advocates Act, 1961 and the guidelines framed by Hon'ble the Supreme Court in the aforesaid Judgment vide Annexure-1, notified "2019 Rules" on 13.02.2019. **(Annexure – 2)**

The Orissa High Court thereafter through the Registrar (Judicial) issued an Advertisement inviting applications from the eligible Advocates to be conferred with the designation of "Senior Advocates". **(Annexure – 3)**

In response to the aforesaid advertisement, 50 applications were received, out of whom, Mr. P.K. Routray, Advocate has expired in the meantime and Mr. S.S. Rao has withdrawn his application.

On scrutiny and perusal of the applications, the Permanent Committee (which includes Hon'ble the Chief Justice and two Senior-most Hon'ble Judges of the Court) placed names of Opposite Party Nos.5 to 9 before the Hon'ble Full Court for consideration of conferring them with designation of "Senior Advocate" by invoking it's suo motu power under sub-rule (9) of Rule-6 of "2019 Rules".

The Orissa High Court thereafter through the Registrar (Judicial) invited suggestions and views on 45 remaining applicants. **(Annexure- 7)**

(b) The Hon'ble Full Court on 17.08.2019, unanimously Resolved to designate Opposite Party Nos. 5 to 9 as "Senior Advocates" in exercise of it's suo motu power under sub-rule (9) of Rule-6 of "2019 Rules".

Notification was issued on 19.08.2019 by the Orissa High Court designating Opposite Party Nos.5 to 9 as "Senior Advocates". **(Annexure- 8)**

After this stage, Mr. P.K. Routray expired and Mr. S.S. Rao withdrew his application. So there remained 43 advocates excluding opposite party Nos.5 to 9 to be considered for conferring designation of "Senior Advocate" on them.

On 04.09.2019, the Orissa High Court through the Registrar (Judicial) issued a fresh advertisement inviting applications from the eligible Advocates to be designated as "Senior Advocates". **(Annexure -9)**

(Annexures cited above are as per W.P.(C) No.17009 of 2019).

(C) Impugning conferment of the designation of "Senior Advocate" on Opposite Party Nos.5 to 9 and issuance of Notification dated 04.09.2019 which calls for applications afresh from the eligible Advocates after conferring designation of "Senior Advocates" on Opposite Party Nos.5 to 9, the present writ petitions have been filed with the prayers as delineated in paragraph-2 (supra).

4. Briefly stated, the counter affidavit filed by the Orissa High Court questions the locus standi of the petitioners to file the writ petition and its maintainability.

4.1. It is further asserted that the designation of "Senior Advocate", being not a "bounty", "title" or "office" and the applications of the petitioners for being designated as "Senior Advocate" being still pending as per the procedure enshrined in Rule- 6 of "2019 Rules", and the lis between the parties not being a Public Interest Litigation (PIL) or an adversarial litigation, the writ petition is not maintainable being premature and the petitioners have no locus standi to call in question the action of the Hon'ble Full Court.

4.2. It is further asserted that the Hon'ble Full Court has rightly declared Opposite Party Nos.5 to 9 as "Senior Advocates", in exercise of their suo motu power under sub-rule (9) of Rule- 6 of the "2019 Rules" read with Section- 16(2) of the Advocates Act. Hence, the writ petition should be dismissed.

4.3. Except Opposite Party No.6, no other private Opposite Party has filed counter affidavit. The Opposite Party No.6 in his counter affidavit has laid stress on the length of his practice in the High Court and his standing in the Bar.

5. From the rival pleadings filed by the parties, the following points emerge for determination :

(I) Whether the petitioners have locus standi to maintain the writ petition ?

(II) Whether the Orissa High Court could have framed Rule in the form of "2019 Rules" incorporating sub-rule (9) of Rule- 6, which runs contrary to the guidelines/norms of Hon'ble the Supreme Court for framing Rules as contained in paragraph- 73 of Indira Jaising case ? (Annexure – 1)

(III) Whether the direction of Hon'ble the Supreme Court in Indira Jaising case is binding on this Court, in view of Article- 141 of the Constitution of India ?

(IV) Whether beginning of sub-rule (9) of Rule-6 with a non-obstante clause takes away the effect of "2019 Rules" from sub-rule (3) to sub-rule (8) of Rule-6 ?

(V) Whether the Opposite Party Nos.5 to 9, who had applied as per the "2019 Rules" along with the petitioners and others could have been picked by the Permanent Committee prior to the stage of sub-rule (3) of Rule- 6 of the "2019 Rules" and could their names have been recommended for designation as "Senior Advocates" ?

(VI) Whether the Hon'ble Full Court for exercising the power under sub-rule (9) of Rule- 6 could have accepted the recommendation of the Permanent Committee before the stage of sub-rule (3) of Rule-6 to declare Opposite Party Nos.5 to 9 as "Senior Advocates" without forming any independent opinion ?

6. Broaching the question of "locus standi", Mr. Sanjit Mohanty, learned Senior Counsel appearing for the Orissa High Court submits that, the designation of "Senior Advocate" is not an "office" or "post", in which position only a limited number of persons can be accommodated. Relying on the case of ***Indira Jaising (2017) 9 SCC 766*** (paragraph- 57), Mr. Mohanty submits that the designation "Senior Advocate" is hardly a "title", it is a "Distinction"; a "Recognition". Relying on paragraph- 70 of the said Judgment, Mr. Mohanty submits that, only the most deserving and very best, who would be bestowed with the Honour and Dignity, can be designated as "Senior Advocate".

6.1. Relying on the case of ***National Lawyers' Campaign for Judicial Transparency and Reforms vs. Union of India, 2019 (5) SCALE: 588*** (para-15), Mr. Mohanty, further submits that, designation as a "Senior Advocate" is neither a "bounty" nor a "right".

6.2. Mr. Mohanty further goes to submit that the petitioners cannot be termed as being aggrieved or having any locus standi to maintain the writ petition with regard to designation of Opposite Party Nos.5 to 9 as "Senior Advocates" because:

(I) the applications of the petitioners for being designated as “Senior Advocates” are still pending.

(II) the impugned Notification dated 19.08.2019 designating the Opposite Party Nos.5 to 9 as “Senior Advocates” does not operate as a decision against the petitioners, much less affects them.

(III) each applicant has their own interest which cannot be termed as rivals to each other.

(IV) there has been no discrimination.

(V) there is no inter-se seniority among the “Senior Advocates”.

6.3. Mr. S.P. Mishra, learned Senior Counsel who appears for the Opposite Party Nos.5 to 9 has the same submissions.

7. Mr. Banshidhar Baug, appearing in person, submits that, he has put in 40 years of practice as Advocate of the High Court and different other Courts since 28.02.1981. He had the desire to be considered along with other Advocates as “Senior Advocate”, but the Permanent Committee as well as the Hon’ble Full Court had arbitrarily, malafidely and illegally designated the Opposite Party Nos.5 to 9 as “Senior Advocates” by adopting pick and choose method and completely discriminated against the petitioner. It is submitted by him that the action of the Permanent Committee and the Hon’ble Full Court is violative of Article- 14 of the Constitution of India, “2019 Rules” and Section- 16(2) of the Advocates Act. As the petitioner has called in question the method of selection of Opposite Party Nos.5 to 9 as “Senior Advocates”, when his and others’ applications are still pending, he has locus standi to question such method and the writ petition filed by him and other three Advocates are maintainable.

Mr. S.S. Rao, learned counsel, who appears for the petitioners in another writ petition, has also adopted the same stand.

8. Mr. Baug relies on the case of ***Democratic Bar Association, Allahabad and others vs. High Court of Judicature at Allahabad and others***, **AIR 2000 Allahabad 300** and the case reported in **(2014) 14 SCALE: 141** in order to drive to home his points. The case of “Democratic Bar Association”, Allahabad (Supra) was a Public Interest Litigation (PIL). In the said case, locus standi of the petitioner was challenged. The said writ

petition was filed challenging the validity of amendment of Designation of Senior Advocates Rules, 1999 and Procedure evolved by such Rules for consideration of Advocates for being designated as "Senior Advocates" under the Advocates Act. The writ petition was filed by the Lawyers practising in the High Court.

8.1. Hon'ble Allahabad High Court held that, the writ petition is maintainable because such Lawyers practising in the High Court cannot be termed as busy bodies and intermeddlers, as they have vital interest in the subject matter of the writ petition, more so, when it was not shown that, the petitioner had filed writ petition for any personal gain or private profit or political motive or any such other oblique consideration.

8.2. In the case reported in ***2014 (14) SCALE: 141***, an interim order was passed by the Hon'ble Karnataka High Court at Bangalore holding that, the appellant does not have locus standi to file writ petition in public interest. Hon'ble the Supreme Court had held that, the petitioner has locus standi, as some issues are to be considered by the High Court in the writ petition regarding the Rules, Regulation, and guideline of conferring the designation of "Senior Advocates". This case also was a PIL filed by an Advocate wherein, main prayer was issuance of a writ of mandamus for framing new norms strictly in consonance with the provisions of Section- 16(2) of the Advocates Act, 1961 in the matter of designation of "Senior Advocates" and a writ of certiorari was also sought for quashing the Notifications dated 30.06.2014 and 14.07.2014 whereby 15 nos. of Advocates had been designated as "Senior Advocates" by the High Court of Karnataka.

9. The decisions relied on by Mr. Baug (Petitioner in W.P.(C) No.17009 of 2019) in the case of "*Democratic Bar Association", Allahabad and others* and *(2014) 14 SCALE: 141* are not applicable to the facts of the present case, as the writ petitions in both the aforesaid cases were PILs and it is settled law that, no rigid rule of locus standi can be applied to a Public Interest Litigation. Hon'ble the Supreme Court, in the case of ***Janata Dal vs. Choudhury HS***, **(1992) 4 SCC 305,** has permitted any person acting bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion. However, only a person acting bona fide and having sufficient interest in the proceeding of Public Interest Litigation will alone have a locus standi. A person prompted

by personal gain or private profit or political motive or any oblique consideration has no locus standi.

9.1. In the first case relied on by Mr. Baug, an Advocate Body was the petitioner in the writ petition and in the second case, an Advocate was the petitioner in the writ petition and in both the cases, public interest of the Advocates at large were espoused by the petitioners and question of locus standi was decided accordingly. In the present case, however, the petitioners in both the writ petitions are espousing their private cause.

10. The petitioners in both the writ petitions are aggrieved by the fact that opposite party Nos.5 to 9 were picked for designating them as "Senior Advocates", when the process under Rule-6 of "2019 Rules" was on. The petitioners might be in know of the rule i.e., "2019 Rules", but they did not have any expectation that in the midst of the process under Rule-6, the Opposite Party Nos.5 to 9 shall be conferred with the designation of "Senior Advocates" before opening of the process under sub-rule (3) of Rule- 6 and such action shall be taken up by invoking sub-rule (9) of Rule-6 of "2019 Rules". Such an action was a surprise to them and lacks transparency.

10.1. We thoroughly agree with Mr. Sanjit Mohanty, learned Senior Counsel appearing for the Orissa High Court that whatever he has submitted as enumerated in paragraphs-6, 6.1 and 6.2 of this order are true and the present writ petitions are not usual adversarial litigations, but the petitioners being Advocates and being applicants for being conferred with the designation of "Senior Advocates", have an existing right to call the rule, i.e. "2019 Rules" in question, though they have applied for being designated as "Senior Advocates". Designation as a "Senior Advocate" is not a "title" or "office" as ruled by Hon'ble the Supreme Court. But it adds to the prestige of an advocate both in the Bar and society. It gives him an exalted position in the eyes of the Court before whom he appears. It gives him a self-satisfaction about his achievement in the profession and in life. It adds a distinct feather to his cap already feathered. Even after his death, he is remembered with adulation. The designation may not be a "title" but from the perspective of those on whom the designation of "Senior Advocate" is conferred, it is more than a "title" in the trapping of a "designation".

10.2. We agree that the petitioners and the Opposite Party Nos.5 to 9 are not rivals so far as their claim is concerned. The petitioners may be conferred

with the designation of “Senior Advocates” tomorrow after the process under Rule-6 of “2019 Rules” is over. But being advocates they have a vested and existing right to call in question the rule which creates a separate group within a particular group, more so, when such creation of group by invoking a particular rule is not in consonance with the guidelines of Hon’ble the Supreme Court according to their study and wisdom. The question of validity of sub-rule(9) of Rule-6 of “2019 Rules” being the subject matter of litigation now and the petitioners being alleged to have been discriminated by that rule, it is not to be seen now as to whether a fundamental right of the petitioners has been violated. Only because the petitioners are applicants for their private cause, the doctrine of aprobate and reprobate cannot be applied strictly to the facts of the case especially in view of the nature of the lis. Only and only the validity of sub-rule (9) of Rule-6 of “2019 Rules” has to be examined to find out whether the same is in consonance with the guidelines of Hon’ble the Supreme Court framed in **Indira Jaising** case irrespective of the fact who brought the matter before the Court. In our considered view, therefore, the petitioners have the locus standi to maintain the writ petitions.

11. Mr. S.P. Mishra, learned Senior Counsel appearing for Opposite Party Nos.5 & 7 to 9 raises the question of waiver on the part of the present petitioner on the ground that the petitioners in both these writ petitions are precluded from challenging sub-rule (9) of Rule- 6 of the “2019 Rules”, in view of their participation in the process of selection.

11.1. In this regard, Mr. Mishra, relied on the case of ***Madras Institute of Development Studies and another vs. K. Sivasubramaniyan and others***, **(2016) 1 SCC 454**. In the aforesaid case, the selection process was challenged by the unsuccessful candidates after participating in the selection process. Relying on a catena of decisions of its own, Hon’ble the Supreme Court held that, such a stand by the petitioners after participating in the selection process acts against them and is hit by waiver and estoppel.

11.2. The case in hand is however different. The petitioners might be knowing the Rule, i.e. “2019 Rules”, but they are aggrieved by the action of the High Court in the midst of the selection process under Rule-6 of “2019 Rules” and they have an existing right to challenge sub-rule (9) of Rule-6 as being violative of the guidelines enumerated by Hon’ble the Supreme Court in paragraph- 73 of the **Indira Jaising** case. In view of our discussion supra

and the nature of the lis, we do not think strict rule of "Doctrine of waiver" applies to the facts of the case.

12. Out of the points for determination that have been enumerated in paragraph-5 supra, point Nos.2 & 3 are important and basic. Those points are whether sub-rule(9) of Rule-6 of "2019 Rules" is in consonance with the guidelines/norms framed by Hon'ble the Supreme Court in paragraph- 73 of **Indira Jaising** case and whether those guidelines/norms are binding in view of Article-141 of the Constitution of India.

13. Mr. Baug, appearing in person and Mr. S.S. Rao, learned counsel appearing for the petitioners in another writ petition submit that, sub-rule (9) of Rule-6 giving suo motu power to the Court is contrary to the guidelines framed by Hon'ble the Supreme Court in paragraph-73 of the Judgment in **Indira Jaising** case. They relied on paragraphs- 56, 57, 64, 66, 69, 70, 73 & 74 of the said Judgment to substantiate their contention.

13.1. It is further submitted by Mr. Baug and Mr. Rao that the Judgment of Hon'ble the Supreme Court in the case of **Indira Jaising** being positive and mandatory direction, the same is binding on all Courts, in view of Article-141 of the Constitution of India. To substantiate this point, they relied on the cases of ***State of Himachal Pradesh vs. Paras Ram and others***, **(2008) 3 SCC 655**, ***Chandramohan Pandurang Kajbaje vs. State of Maharashtra and others***, **2008 AIR SCW 619**, ***Kalyani Packaging Industry vs. Union of India and another***, **(2004) 6 SCC 719** and ***Suganthi Suresh Kumar vs. Jagdeeshan***, **AIR 2002 SC 681**.

14. Relying on paragraphs- 58, 62 & 70 of the Judgment in **Indira Jaising** case, Mr. Sanjit Mohanty, learned Senior Counsel appearing for the Orissa High Court submits that sub-rule (9) of Rule-6 of "2019 Rules" is valid and it is not contrary to the guidelines framed by Hon'ble the Supreme Court in the said Judgment, inasmuch as Hon'ble the Supreme Court in paragraph-58 of the **Indira Jaising** case and paragraph-15 of the Judgment of ***National Lawyers' Campaign for Judicial Transparency***, **2019 (5) SCALE : 588** has held that, designation of advocates as "Senior Advocate" as provided in Section-16 of the Advocates Act, 1961 is valid and Constitutional.

14.1. It is further submitted by Mr. Mohanty, learned Senior Counsel that, in paragraph- 66 of the **Indira Jaising** case, it is stated that no reasons are recorded either for designation as "Senior Advocate" or rejection. Mr. Mohanty, learned Senior Counsel is vehement on the point that paragraph- 73 of the said Judgment cannot be read in isolation and it must be read along with paragraphs- 58, 62 & 70. The suo motu power of the High Court has not been taken away in any sense and the suo motu power is a power vested by Section- 16(2) of the Advocates Act, 1961. According to him, the impugned rule is a valid rule and it is not at all contrary to the guidelines framed by Hon'ble the Supreme Court in the said case.

15. Mr. S.P. Mishra, learned Senior Counsel, who appears for Opposite Party Nos.5 & 7 to 9 has the same answer. He also relies on paragraphs- 58, 62 & 70 of the Judgment in **Indira Jaising** case and also relies on the Rule of Punjab & Haryana High Court, which provides for exercise of suo motu power.

16. We read the Judgment in **Indira Jaising** case in its entirety more than once. We found that earlier there were no uniform rules for conferring designation of "Senior Advocates". Different High Courts were following different rules. There was also no proper rule on the subject for Hon'ble the Supreme Court of India. All the aforesaid rules of different High Courts including the rule of this Court being followed prior to the Judgment in **Indira Jaising** case have been quoted by Hon'ble the Supreme Court in the said Judgment. Hon'ble the Supreme Court, after taking into consideration different rules of different High Courts as well as that of Hon'ble the Supreme Court in paragraph-55 of the Judgment in **Indira Jaising** case, **(2017) 9 SCC 766**, took into consideration the ingredients of Section- 16(2) of the Advocates Act, 1961. In paragraph- 56 towards the end, it is observed by Hon'ble the Supreme Court as thus :-

> ***56.*** *"xxxxxxxx So long as the basis of the classification is founded on reasonable parameters which can be introduced by way of uniform guidelines/ norms to be laid down by this Court, we do not see how the power of designation conferred by Section 16 of the Act can be said to be constitutionally impermissible."*

16.1. In paragraph- 57, it is held that, designation of "Senior Advocate" is only a distinction and a recognition. In paragraph- 58, it is held thus :-

58. *"We, therefore, take the view that the designation of "Advocates" as "Senior Advocates" as provided for in Section 16 of the Act would pass the test of constitutionality and the endeavour should be to lay down norms/guidelines/ parameters to make the exercise conform to the three requirements of the statute already enumerated hereinabove, i.e., namely, (1) ability of the advocate concerned; (2) his/her standing at the Bar; and (3) his/her special knowledge or experience in law."*

16.2. In paragraph- 62 of the said Judgment, it is held thus :-

62. "*The power of designating any person as a Senior Advocate is always vested in the Full Court either of the Supreme Court or of any High Court. If an extraordinary situation arises requiring the Full Court of a High Court to depart from the usual practice of designating an advocate who has practiced in that High Court or in a court subordinate to that High Court, it may always be open to the Full Court to so act unless* ***the norms expressly prohibit such a course of action****..........."*

16.3. Paragraph- 66 of the Judgment of the said case reads as follows :-

66. *"Both Section 16(2) of the Act and Order 4 Rule 2 of the Supreme Court Rules, 2013 are significant in the use of the expression "is of opinion" and "in their opinion", respectively which controls the power of the Full Court to designate an advocate as a Senior Advocate. It is a subjective exercise that is to be performed by the Full Court inasmuch as a person affected by the refusal of such designation is not heard; nor are reasons recorded either for conferring the designation or refusing the same. But the opinion, though subjective, has to be founded on objective materials. There has to be a full and effective consideration of the criteria prescribed, namely, ability; standing at the Bar, special knowledge or experience in law in the light of materials which necessarily have to be ascertainable and verifiable facts."*

16.4. Paragraph- 68 of the said Judgment reads as follows :-

68. *"What is merit? Is it the academic qualification or brilliance or is it something more? The matter has been considered earlier by this Court in K.K. Parmar v. High Court of Gujarat. Placing reliance on an earlier view in Guman Singh v. State of Rajasthan it has been held that : (K.K. Parmar case, SCC pp. 801-02, paras 27-28)*

"27. Merit of a candidate is not his academic qualification. It is sum total of various qualities. It reflects the attributes of an employee. It may be his academic qualification. He might have achieved certain distinction in the university. It may involve the character, integrity and devotion to duty of the employee. The manner in which he discharges his final duties would also be a relevant factor. (See Guman Singh v. State of Rajasthan)

28. For the purpose of judging the merit, thus, past performance was a relevant factor. There was no reason as to why the same had been kept out of consideration by the Selection Committee. If a selection is based on the merit and suitability, seniority may have to be given due weightage but it would only be one of the several factors affecting assessment of merit as comparative experience in service should be."

16.5. Paragraph- 69 of the said Judgment reads as follows :-

69. *"The guidelines governing the exercise of designation by the Supreme Court have already been noticed so also the guidelines in force in the various High Courts. Though steps have been taken to bring in some objective parameters,* ***we are of the view that the same must be more comprehensively considered by this Court to ensure conformity of the actions/ decisions taken under Section 16 of the Act with the requirement of constitutional necessities, particularly, in the domain of a fair, transparent and reasonable exercise of a statutory dispensation on which touchstone alone the exercise of designation under Section 16 of the Act can be justified.*** *We have also noticed the fact that until the enactment of the Advocates Act, 1961 and the Supreme Court Rules, 1966 the option to be designated as a Senior Advocate or not was left to the advocate concerned, with the Full Court having no role to play in this regard. We have also noticed that in other jurisdictions spread across the Globe, where the practice continues to be in vogue in one form or the other, participation in the decision-making process of other stakeholders has been introduced in the light of experience gained."*

(Emphasis supplied by us)

16.6. Paragraph- 70 of the said Judgment reads as follows :-

70. *"We are, therefore, of the view that the framework that we would be introducing by the present order to regulate the system of designation of Senior Advocates must provide representation to the community of advocates though in a limited manner. That apart, we are also of the view that time has come when uniform parameters/ guidelines should govern the exercise of designation of Senior Advocates by all courts of the country including the Supreme Court.* ***The sole yardstick by which we propose to introduce a set of guidelines to govern the matter is the need for maximum objectivity in the process so as to ensure that it is only and only the most deserving and the very best who would be bestowed the honour and dignity. The credentials of every advocate who seeks to be designated as Senior Advocate or whom the Full Court suo motu decides to confer the honour must be subject to an utmost strict process of scrutiny leaving no scope for any doubt or dissatisfaction in the matter****."*

(Emphasis supplied by us)

17. We thought it proper to quote the aforesaid paragraphs relied on by learned counsels for the parties not to leave any doubt in their mind and our

mind so far as the understanding of the Judgment is concerned. It is settled in law that, a Judgment is never interpreted or in other words, a meaning is never attributed to a Judgment by interpreting it in one's own way. From the reading of the Judgment, we have understood that before framing the guidelines/norms in paragraph- 73, Hon'ble the Supreme Court has taken into consideration at length the power of the Supreme Court and other High Courts under Section- 16 of the Advocates Act and the practice of other Courts across the Globe. They have also taken into consideration in paragraph- 70 **the exercise of suo motu power of the Full Court, but such exercise of power has also been subjected to an utmost strict process of scrutiny leaving no scope for any doubt or dissatisfaction in the matter**.

18. "2019 Rules" is to be examined in the touchstone of the guideline formulated in paragraph- 73 of the said Judgment. While framing the guideline, Hon'ble the Supreme Court has specifically held that the norms/ guidelines, in existence, shall be suitably modified so as to be in accord with the present. For brevity, we are not quoting here the entire guideline. But we feel it beneficial to say that the power of any addition, deletion from the guidelines formulated in paragraph- 73 in the light of the experience to be gained over a period of time is left open for consideration by Hon'ble the Supreme Court alone at such point of time that the same becomes necessary. It clearly indicates that any modification in the guideline to suit a particular High Court is to be in accord with the guidelines framed in paragraph- 73 and except the Supreme Court, no other High Court has any power to add or delete from the guideline.

19. A thorough reading of the entire Judgment along with the guideline framed in paragraph- 73 of the Judgment makes it clear that Hon'ble the Supreme Court in paragraph- 73.4 of the Judgment has recognized two sources for drawing advocates for being designated as "Senior Advocate". One is written proposal by the Hon'ble Judges and second source is the application by the advocate concerned. There is no third source of picking an advocate by exercise of suo motu power, though exercise of suo motu power has been discussed in paragraph- 70 of the Judgment. These sources, we think have been inserted in the guidelines after a conscious thought by Hon'ble the Supreme Court. Hon'ble the Supreme Court has not thought it proper to include exercise of suo motu power by either the Supreme Court or other High Courts so far as designation of "Senior Advocate" is concerned.

20. Relevant portion of "2019 Rules" which is impugned here is reproduced below for ready reference :-

"6. Procedure for Designation:-

(1) All the written proposals or applications for designation of an Advocate as a Senior Advocate shall be submitted to the Secretariat.

Provided further that in case the proposal emanates from a Judge the Secretariat shall request such Advocate to submit Form No.2 duly filled in within such time as directed by the Committee.

(2) On receipt of an application or proposal for designation of an Advocate as a Senior Advocate, the Secretariat shall compile the relevant data and the information with regard to the reputation, conduct, integrity of the Advocate concerned and on the matters covered by Sl. Nos. 2 & 3 of Appendix-B covering a period of last 5 years.

(3) The Secretariat will notify the proposed names of the Advocates to be designated as Senior Advocates on the official website of the High Court of Orissa, inviting suggestions and views within such time as may be fixed by the Committee.

(4) After the material in terms of the above is complied and all such information, as may be specifically required by the Committee to be obtained in respect of any particular candidate, has been obtained and the suggestions and views have been received, the Secretariat shall put up the case before the Committee for scrutiny.

(5) Upon submission of the case by the Secretariat, the Committee shall examine the same in the light of the material provided and, if it so desires, may also interact with the concerned Advocate(s) and thereafter make its overall assessment on the basis of the point based format provided in **APPENDIX-B** to these Rules.

(6) After the overall assessment by the Committee, all the names listed before it will be submitted to the Full Court along with its Assessment Report.

(7) Normally voting by ballot shall not be resorted to unless unavoidable. The motion shall be carried out by consensus, failing which voting by ballot may be resorted to. In the event of voting by ballot, the views of the majority of the Judges present and voting shall constitute the decision of the Full Court. However the Seniormost Judge or Chief Justice as the case may be present in the Full Court shall not cast his vote. In case the Judges present be equally divided, the Chief Justice or in his absence the Seniormost Judge present shall have the casting vote.

(8) The cases that have not been favorably considered by the Full Court may be reviewed/ reconsidered after the expiry of a period of two years, following the same procedure as prescribed above as if the proposal is being considered afresh.

(9) Notwithstanding the above noted procedure for designation of an Advocate as Senior Advocate, Full Court on its own can designate an Advocate as Senior Advocate even without any proposal from Hon'ble Judges or application from the Advocate if it is of the opinion that by virtue of his/her ability or standing at the Bar said Advocate deserves such designation."

20.1. A cursory reading of the aforesaid Rule makes it clear that sub-rules-(1) & (2) correspond to paragraph-73.4 of the Judgment in **Indira Jaising** case. Sub-rule (3) corresponds to paragraph- 73.5, sub-rule (4) corresponds to paragraph-73.6, sub-rule (5) corresponds to paragraph- 73.7, sub-rule (6) corresponds to paragraph-73.8, sub-rule (7) corresponds to paragraph-73.9 and sub-rule (8) corresponds to paragraph- 73.10 of the said Judgment. Sub-rule (9) according to Mr. Mohanty, learned Senior Counsel appearing for the Orissa High Court and Mr. S.P. Mishra, learned Senior Counsel appearing for Opposite Party Nos.5 & 7 to 9 corresponds to paragraph-70 of the said Judgment, which speaks of exercise of suo motu power and Section- 16(2) of the Advocates Act, 1961.

21. It is alleged that, after the stage of sub-rule (2), Opposite Party Nos.5 to 9 were picked by the Permanent Committee and the matter was placed before the Hon'ble Full Court for exercise of their suo motu power under sub-rule (9). It is argued that, all the objective data and information with regard to the reputation, conduct and integrity of Opposite Party Nos.5 to 9 were there on record after the stage of sub-rule (2) and the Hon'ble Full Court had the occasion to apply their mind to such data and information with regard to the reputation, conduct and integrity of Opposite Party Nos.5 to 9 at the time of consideration of conferring designation of "Senior Advocate" on them (Opposite Party Nos.5 to 9). Mr. S.P. Mishra, learned Senior Counsel appearing for Opposite Party Nos.5 & 7 to 9 cites before us the Rule of Punjab & Haryana High Court, which has provision similar to sub-rule (9) of our High Court though couched in different manner. We are, however, not concerned with the Rule of Punjab & Haryana High Court for the present.

22. In sub-rule (9), the word "even" after the word "advocate" and before the word "without" has been used as an adverb. Literally, it is used as an intensive to emphasize the identity and character of something and that something here is without any proposal from the Hon'ble Judges or application from the Advocate. Sub-rule (9), therefore, includes three sources:-

(1) Proposal from the Hon'ble Judges;

(2) Application from the Advocate concerned and

(3) Exercise of suo motu power in respect of an Advocate even without any proposal from the Hon'ble Judges or application from the Advocate concerned, if the Hon'ble Full Court is of the opinion that, by virtue of his/her ability or standing at the Bar, the said Advocate deserves such designation.

23. So far as the third source is concerned, we have discussed in detail that, Hon'ble the Supreme Court in the Judgment in **Indira Jaising** case has consciously not included the third source in the guideline framed in paragraph-73. In paragraph- 70, Hon'ble the Supreme Court has referred to exercise of suo motu power, but has specifically held thus:-

> *"xxxxxxxx The credentials of every Advocate who seeks to be designated as Senior Advocate **or** whom the Full Court suo motu decides to confer the honour must be subject to an utmost strict process of scrutiny leaving no scope for any doubt or dissatisfaction in the matter."*

Aforesaid quotation so couched is so clear in its meaning that, an advocate who seeks to be designated means an advocate who files an application for being designated, stands apart, from him on whom the Hon'ble Full Court suo motu decides to confer the honour. The word "or" in between the words "Advocate" and "whom" has been used as a conjunction, which is a function word to indicate an alternative. Having discussed this suo motu power in paragraph- 70, Hon'ble the Supreme Court in paragraph- 73.4 has ipse dixit not stated anything about the pick through suo motu source. Such silence in paragraph-73.4, according to our understanding is a conscious silence.

24. Paragraph- 73 of the said Judgment reads thus:-

> ***73.*** *"It is in the above backdrop that we proceed to venture into the exercise and lay down the following norms/guidelines which henceforth would govern the exercise of designation of Senior Advocates by the Supreme Court and all High Courts in the Country. The norms/guidelines, in existence, shall be suitably modified so as to be in accord with the present".*

and Paragraph-74 of the Judgment reads thus:-

> ***74.*** *"We are not oblivious of the fact that the guidelines enumerated above may not be exhaustive of the matter and may require reconsideration by suitable addition/deletion in the light of the experience to be gained over a period of time. This is a course of action that we leave open for consideration by this Court at such point of time that the same becomes necessary."*

After reading the entire Judgment and especially paragraphs-73 and 74, we are of the view that sub-rule(9) of Rule- 6 of "2019 Rules" is an addition beyond the scope of the guidelines/norms framed in paragraph-73 of the Judgment in **Indira Jaising** case. Therefore, sub-rule(9) of Rule- 6 of "2019 Rules" is not in consonance with the said Judgment and ultravires of the guidelines/norms in our considered view.

25. In view of Article- 141 of the Constitution of India, the said guideline is binding on all the Courts of the Country including this Hon'ble Court and no citation is necessary to substantiate this point. It is not out of place to mention here that, in the past, such guidelines were issued in the cases of Vishakha and others, A.R. Antuley, Arnesh Kumar, D.K. Basu, Lalita Kumari and Prabin Singh Saini to cite a few and some have been crystallized into law subsequently.

26. Assuming arguenda sub-rule (9) of Rule- 6 of "2019 Rules" to be valid, it is to be examined whether conferment of designation of "Senior Advocate" on Opposite Party Nos.5 to 9 is above reproach.

Opposite Party Nos. 5 to 9 were applicants for being designated as "Senior Advocates" along with other applicants. They were picked for being conferred with the designation after sub-rule (2) of Rule- 6 stage of "2019 Rules", leaving other applicants to suffer the grind of the processing mill under the said Rules. There is no material before us to reach a conclusion that applications received from all the applicants were examined in detail or the compilation made by the Secretariat containing relevant data and information with regard to the reputation, conduct and integrity of the advocates concerned of all the advocates was examined in detail to pick Opposite Party Nos.5 to 9 for conferring them with the designation of "Senior Advocate" in exercise of power under sub-rule (9) of Rule- 6. There is also nothing on record to suggest that the datas and materials were placed before the Full Court to apply it's mind. Furthermore, Opposite Party Nos.5 to 9 only and none else were adjudged suitable for exercise of power under sub-rule (9) of

Rule- 6, when Opposite Party Nos.5 to 9 were also applicants and being the applicants, they were in readiness to suffer the grind of the processing mill entirely under Rule- 6 of "2019 Rules". Suo motu power is not a power to be exercised ordinarily. It is a power to be exercised sparingly with circumspection in rare cases. We do not find any such rarity in the present case for exercise of power under sub-rule (9) of Rule- 6 of "2019 Rules". We are, therefore, constrained to hold that the entire process of conferring designation of "Senior Advocate" on Opposite Party Nos.5 to 9 is discriminatory.

27. We have no doubt in our mind that Opposite Party Nos.5 to 9 deserve to be designated as "Senior Advocates" and in the process, they shall be designated as "Senior Advocates". We are, however, pained by the argument and submission of Mr. Baug, alleging malafide on the Hon'ble Full Court. He having applied for being designated as "Senior Advocate", he should have the character becoming of a "Senior Advocate". There should be sobriety in his submission. We fail to understand how Mr. Baug forgot that the Hon'ble Full Court with consensus took a decision in plurality and in such a case he could not have attributed malafide to each and every Hon'ble Judge of the Court.

28. After our findings (supra), discussion on other points of determination becomes mere academic in nature. Therefore, for brevity, we desist from such discussion.

29. In W.P.(C) No.17110 of 2019, there is an additional prayer to quash the Notification dated 04.09.2019 calling for applications from the eligible advocates for being designated as "Senior Advocates".

From the facts of the case, it is found that first such notification was issued vide Annexure-3 dated 22.04.2019. In response to the aforesaid advertisement vide Annexure-3, fifty (50) applications were received. The Hon'ble Full Court on 17.08.2019 unanimously resolved to designate Opposite Party Nos.5 to 9 as "Senior Advocates" in exercise of the power under sub-rule (9) of Rule- 6 of "2019 Rules". On 19.08.2019, necessary notification was issued designating Opposite Party Nos.5 to 9 as "Senior Advocates". After the aforesaid exercise was over, the impugned Notification dated 04.09.2019 was issued calling fresh applications from the eligible advocates to be designated as "Senior Advocates". In our considered view,

after the first notification vide Annexure- 3, when the process under Rule- 6 was on, it was irregular on the part of the High Court to issue the Notification dated 04.09.2019. Instead of expanding the ambit of selection process, it put the selection process into more confusion. We are, therefore, of the view that issuance of Notification dated 04.09.2019 is not valid in the eye of law.

30. Before parting with the Judgment, we propose to think aloud on the following aspects:

> (I) He is an Advocate with towering personality. He is suave and gentle. His disposition towards the Court and his fellow counsels is impressive. He is known for his ready wit. Ask him any question on any law, he has an answer with reasonings. His standing in the Bar is remarkable. He is a social factor in the society, he lives. He is humble, dignified, kind and a person with sobriety. He would however not come to stand in a queue to file an application for being designated as "Senior Advocate". Such a person being an asset to the profession, suo motu power should be reserved to be exercised for such a person only and such power should be given to the High Courts, as in our understanding, such power has not been given to the High Courts in the guidelines/norms framed in **Indira Jaising** case.
>
> (II) Designation of "Senior Advocate" is a coveted position from the point of view of the Bar and the society. There should not be crowd in such a coveted position. Every Tom, Dick & Harry should not be brought to this position by whatever means permissible. Certain percentage of the total strength of a particular Bar should only be allowed to enter into this coveted position.

31. Opposite Party Nos.5 to 9 having been graced by the Hon'ble Full Court with the designation of "Senior Advocate", we do not want to disgrace them at present by withdrawing the designation, as there is no fault on their part in the entire exercise. Tomorrow, the Hon'ble Full Court may rethink after exhausting the process under Rule-6 of "2019 Rules" to designate them again as "Senior Advocates", as according to our view, they are deserving, but there may be contrary decision also. Though we have declared sub-rule (9) of Rule-6 ultravires, we do not propose to strike down the Notification No.1378, dated 19.08.2019 for the present. It would only cease to be after a decision is taken by the Hon'ble Full Court on the matter regarding designation of "Senior Advocate" is placed before it after exhausting the entire process under Rule-6 in which process applications of Opposite Party Nos.5 to 9 shall also be taken into consideration.

32. Taking into consideration our discussion (supra), in fine, we hold thus:-

> (I) sub-rule (9) of Rule- 6 of the High Court of Orissa (Designation of Senior Advocate) Rules, 2019 is declared as ultravires of the guidelines/norms framed in paragraph- 73 of **Indira Jaising** case.
>
> (II) The Notification dated 04.09.2019 calling fresh applications from the eligible Advocates for being designated as "Senior Advocate" is quashed and the applications received in response to the said Notification are not to be taken into consideration.
>
> (III) The Notification No.1378, dated 19.08.2019 shall have effect till fresh decision by the Hon'ble Full Court is taken regarding designation of "Senior Advocate" on consideration of all 48 applications including that of Opposite Party Nos.5 to 9.

33. The process of designating "Senior Advocates" be completed by end of July, 2021.

34. Both the writ petitions are disposed of accordingly.

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2021 (II) ILR - CUT- 107

Dr. B.R. SARANGI, J.

W.P.(C) NO. 13257 OF 2013

SABYASACHI NAYAK ....Petitioner

.V.

SECRETARY, BOARD OF SECONDARY EDUCATION, ODISHA & ORS. ....Opp. Parties

SERVICE LAW – Compassionate appointment under OCS (Rehabilitation Assistance) Rules 1990 – Rule 5 and 9 read with Articles 309 of the Constitution of India, – Compassionate appointment under Board of Secondary Education, Odisha – By a resolution, although the

BSE has made applicable the provisions of the 1990 Rules, at the same time it has resolved to have a test for appointment in Class III category – Whether such resolution is legal and justified? – Held, No – Reasons indicated.

> "*On perusal of the aforesaid resolution, it appears that the Board has adopted the OCS (RA) Rules, 1990 for Class-IV employees, but it has passed further resolution in the case of Class-III employees to the extent that a test shall be conducted by the Board to assess the suitability of the legal heirs of the deceased employee who seek appointment against Class-III post for quality service. As it appears, the resolution to the extent conducting the suitability of the legal heirs of the deceased employee against Class-III post is in gross violation of the provisions contained in Rule-5 of the OCA (RA) Rules, 1990. Rule-5 specifically excludes even the statutory rules framed under the proviso to Article 309 of the Constitution of India for consideration of giving compassionate appointment under rehabilitation assistance scheme. If the aforesaid resolution is critically analyzed, it would be evident that by virtue of the said resolution the Board of Secondary Education Orissa in one hand is accepting the OCS (RA) Rules 1990, but in other hand states that for Class-III posts the legal heirs of the deceased employees have to undergo a test, which is contrary to the spirit of Rule-5 of OCS (RA) Rules, 1990. The resolution to that extent for holding examination for Class-III post, being violative of Rule-5 of OCS (RA) Rules, 1990, cannot sustain in the eye of law. The Rules framed under Article 309 of the Constitution of India are statutory and, thereby, the benefits which have been extended under the said Rules cannot be taken away in passing a resolution by the opposite party no.1. Therefore, the resolution dated 11.10.2010 to the extent to hold examination for Class-III posts in order to find out suitability, being contrary to the provisions of law, cannot be allowed to stand." (Para 8)*

Case Laws Relied on and Referred to :-

1. 2017 (Supp.I) OLR 674 : Dipti Ranjan Mishra Vs. State of Orissa.
2. (1997) 8 SCC 85 : Haryana State Electricity Board Vs. Hakim Singh.
3. (1998) 2 SCC 412 : State of U.P. Vs. Paras Nath.
4. (2005) 7 SCC 206 : Commissioner of Public Instructions Vs. K.R. Vishwanath
5. (1989) 4 SCC 468 : Sushma Gosain Vs. Union of India.
6. (1998) 5 SCC 192 : Director of Education Vs. Pushpendra Kumar.
7. AIR 2000 SC 1596: Balbir Kaur & Anr Vs. Steel Authority of India Ltd. & Ors.
8. (1994) 4 SCC 138 : Umesh Kumar Nagpal Vs. State of Haryana.
9. (2005) 10 SCC 289 : Govind Prakash Verma Vs. LIC of India.

For Petitioner : M/s. P.K. Rath, R.N. Parija, A.K. Rout, S.K. Pattnayak, A.Behera, S. Singh and P.K. Sahoo.

For Opp. Parties : M/s H.K. Mohanty, D.K. Pradhan and B.M. Biswal.

JUDGMENT	Date of Judgment 15.04.2021

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks direction to opposite party no.1-Board of Secondary Education, Orissa to appoint him under the Rehabilitation Assistance Scheme, as per his qualification, and not to insist him to appear in any examination for recruitment as per Annexure-1 dated 14.05.2013.

2. The factual matrix of the case, in brief, is that the petitioner is the youngest son of late Jambeswar Nayak, who, while serving under the Board of Secondary Education, Odisha, died in harness on 17.01.2009. The petitioner has an elder sister, who is married, besides his ailing grand-mother and mother, who is a house wife, and living with him as per the legal heir certificate issued by the authority concerned. After the premature death of his father, responsibility came to the petitioner to maintain the family. Pursuant thereto, the petitioner submitted an application on 25.05.2009 for appointment under Rehabilitation Assistance Scheme evolved by the Board of Secondary Education, Orissa. His mother and grand-mother also filed an affidavit indicating no objection with regard to consideration of his case for compassionate appointment. Thereafter, the petitioner was communicated, vide letter dated 07.07.2009, to submit the certificates pertaining to educational qualification, which he complied on 08.07.2009. Though he was waiting for compassionate appointment, the authority did not extend such benefit. Thereafter, the opposite party no.1, vide letter dated 21.07.2011, directed the petitioner to submit certain duly attested documents for taking follow up action. In compliance thereof, the petitioner furnished all the documents on 02.08.2011.

2.1 Thereafter, Under Secretary to the Government of Odisha in School and Mass Education Department, vide letter dated 12.07.2012, directed opposite party no.1 to give appointment to four numbers of legal heirs of the deceased employees of Board of Secondary Education, Orissa, as per their qualification vis-à-vis date of death of the employees, after observance of due formalities as framed by the Finance Department vide circular no.54447 dated 05.12.2005 and G.A. Department under OSC (RA) Rules, 1990. In the said letter, the name of the petitioner found place at serial no.3. When the petitioner was waiting for compassionate appointment, vide letter dated

14.05.2013 under Annexure-1, Board of Secondary Education, Orissa intimated the petitioner to appear a test for appointment as Junior Assistant in the Board, which is the subject matter of challenge in the present writ petition.

3. Mr. P.K. Rath, learned counsel for the petitioner contended that since the petitioner seeks compassionate appointment, the general rules for recruitment, i.e., due procedure of selection by conducting recruitment test, cannot be applicable to him. More so, when the State Government has already directed, vide letter dated 12.07.2012 under Annexure-2, to the Board to give appointment to four numbers of legal heirs of the deceased employees of Board of Secondary Education, Orissa, Cuttack, including the petitioner, as per their qualification vis-à-vis date of death of the employees after observance of due formalities as framed by the Finance Department vide circular no.54447 dated 05.12.2005 and G.A. Department under OSC (RA) Rules, 1990, there is no other option but to give appointment to the petitioner. Thereby, the action taken by opposite party no.1 vide Annexure-1, calling upon the petitioner to appear the test for appointment as Junior Assistant, is contrary to the settled provisions of law and legally not tenable. To substantiate his contention, he has relied upon the judgment of this Court in ***Dipti Ranjan Mishra v. State of Orissa***, 2017 (Supp.I) OLR 674.

4. Mr. H.K. Mohanty, learned counsel appearing for opposite party no.1, referring to the counter affidavit, vehemently contended that on the request made by the Board for extending permission to appoint under Rehabilitation Assistance Scheme in favour of dependants of some of its deceased employees, the Government of Odisha in School and Mass Education Department, vide letter dated 30.12.2009, intimated the Secretary, Board of Secondary Education, Orissa that the G.A. Department has clarified that the facility of appointment under the said scheme is not extended to the Board and, as such, the same may be decided by the Board in consultation with the School and Mass Education Department. It was also requested to intimate whether the Board has resolved that the Rehabilitation Assistance Scheme is to be made applicable to its employees. In the proceedings of the executive committee meeting, which was held on 11.10.2010 to consider the applicability of the provisions laid down in the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 and its amendment Rules till date to the families of employees of the B.S.E., Orissa, Cuttack, it was resolved that the board adopts the OCS (R.A.) Scheme with Rules, 1990 for Class-IV

employees and in case of Class-III recruits, a special test shall be conducted by the Board to assess suitability of the legal heirs of the deceased employees against Class-III post for quality service. Pursuant to resolution dated 11.10.2010 of the executive committee, since the petitioner seeks an employment as Junior Assistant, which belongs to Class-III category, he has been called upon to appear a test on 30.05.2013 vide Annexure-1 dated 14.05.2013. Thereby, no illegality or irregularity has been committed by the authority in calling upon the petitioner to appear the said examination. More so, compassionate appointment cannot be claimed as a matter of right. Therefore, if the petitioner seeks employment against a Class-III post, in order to assess suitability, if he has been called upon to appear a test, no fault can be found with the authority concerned. As such, the action so taken is well justified. Consequentially, the writ petition is liable to be dismissed.

5. This Court heard Mr. P.K. Rath, learned counsel for the petitioner and Mr. H.K. Mohanty, learned counsel appearing for the opposite party no.1-Board of Secondary Education, Orissa; and perused the record. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. It is the admitted case of both the parties that the petitioner seeks compassionate appointment due to premature death of his father late Jambeswar Nayak, who was working as Sr. Assistant in Board of Secondary Education, Orissa, Cuttack. It is also admitted that Board of Secondary Education, Orissa has not framed any guidelines, rules or regulations for giving compassionate appointment to the legal heirs of its deceased employees. Therefore, in exercise of power conferred by proviso to Article 309 of the Constitution of India, the Governor of Orissa has made the rules to regulate recruitment to the State Civil Services and posts as a measure of rehabilitation assistance called "Orissa Civil Service (Rehabilitation Assistance) Rules, 1990. It is also not in dispute that such OCS (R.A.) Rules, 1990 are applicable to the employees of Board of Secondary Education, Orissa.

7. For effective adjudication of the issue involved in this case, some of the relevant rules of OCS (R.A.) Rules, 1990 are quoted below:-

"4. The rehabilitation assistance is conceived as a compassionate measure of saving the family of a government servant from immediate distress when the Government servant suddenly dies or is permanently incapacitated. The concept is based on the premises that in case of sudden incapacitation or death, the government servant or his family would not face starvation. The scheme has a direct relationship, therefore, with the economic condition of the family of the Government servant. Appointment of the family member of the Government servant under these rules shall be subject to the provisions contained in rule 9 and cannot be claimed as a matter of right.

5. In deserving cases, a member of the family of a Government servant who is permanently incapacitated or who dies while in service may be appointed to any Class III or Class IV post by the appointing authority of that Government servant provided he/she possesses the requisite minimum educational qualification prescribed for the post without following the procedure prescribed for recruitment to the post either by statutory rules framed under the proviso to Article 309 of the Constitution or otherwise irrespective of the fact that recruitment is made by notification of vacancies to the Employment Exchange or through recruitment examination under relevant cadre rules. At the time of notifying such vacancies to the Employment Exchange or the examining authority, the employer shall clearly mention that the vacancy is proposed to be filled up under rehabilitation assistance scheme and so, sponsoring of candidates by the Employment Exchange or the examining authority is not necessary.

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9.(1) Appointment under these rules can be made only against the posts required to be filled up by direct recruitment and not against promotional posts,

(2) Subject to the provisions contained in sub-rule (3) applicants for appointment to a particular post under the rehabilitation assistance scheme must have the requisite educational qualifications as prescribed in the relevant recruitment rules/orders etc.

(3) Where a widow of the deceased or disabled Government servant appointed on compassionate ground against a Class IV post, she is not required to satisfy the educational qualification, provided the duties of the post can be satisfactorily performed without having the requisite educational qualification.

(4) Family of a Government servant who dies or becomes incapacitated during reemployment or extension of service shall not be eligible for such assistance.

(5) The family of a Government servant who has sought for retirement on the ground of invalidness within the last 5 years of his service before the date of his normal superannuation shall not be eligible for rehabilitation employment under these rules.

(6) Application for appointment under these rules shall be considered if it is received within one year from the date of death or disability of the Government servant.

(7) If at the time of death or invalid retirement of the employee there is a word who is minor and who alone is available for employment, he/she shall apply for a job under these rules as soon as he attains the age of eighteen years and in no case beyond one year, from such date.

(8) The assistance shall not be available to the families of Government servants who died or retired before issue of Labour & Employment Department Resolution No.17188, dated the 9th September 1976, in respect of post which are filled up by reference to the Employment Exchange and before issue of G.A. Department Resolution No.21684-Gen., dated the 9th September 1982, in respect of posts filled up in pursuance of provisions in the relevant service rules.

(9) In exceptional cases, the maximum age limit may be relaxed by the competent authority in accordance with the provisions of the Orissa Service Code.

(10) Before issue of appointment order the appointing authority shall ensure the production of the following documents:-

(i) Submission of Medical Certificate of Health.

(ii) Verification of Character and antecedents in respect of appointments in Departments of government and Heads of Departments.

(iii) Character Certificate from two Gazetted Officers.

(iv) Submissions of undertaking that he/she has only one spouse living, if he/she is married.

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(11) "Notwithstanding the period of limitation prescribed in sub-rules (6) and (7) delay not exceeding twelve months in submission of application for appointment under these rules may be condoned by the Administrative Department. The Chief Minister may condone delay exceeding 12 months beyond the normal time limit."

8. On perusal of the above quoted rules, it is made clear that the purpose of giving rehabilitation assistance is conceived as a compassionate measure of saving the family of a government servant from immediate distress when the government servant suddenly dies or is permanently incapacitated. The rehabilitation assistance scheme has a direct relationship with the economic condition of the family of the government servant. As such, the appointment of the family member of the government servant under the said scheme is

subject to the provisions contained in Rule-9, as mentioned above. Under Rule-5 it is made clear that in deserving cases a member of the family of a government servant, who is permanently incapacitated or who dies while in service, may be appointed to any Class-III or Class-IV post by the appointing authority of that government servant, provided he/she possesses the requisite minimum educational qualification prescribed for the post, without following the procedure prescribed for recruitment to the post either by statutory rules framed under the proviso to Article 309 of the Constitution or otherwise irrespective of the fact that recruitment is made by notification of vacancies to the employment exchange or through recruitment examination under relevant cadre rules. As such, the condition of service, as has been prescribed under Rule-9, has to be fulfilled while giving such compassionate appointment to a candidate.

9. The reliance placed by Mr. H.K. Mohanty, learned counsel for Board of Secondary Education, Orissa on the letter dated 30.12.2009 issued by the Government of Odisha in School and Mass Education Department shows that the Board has to resolve that rehabilitation assistance scheme is to applicable to its employee. The proceeding of the executive committee meeting held on 11.10.2010, on which Mr. Mohanty has heavily relied upon, is extracted hereunder:-

> *"To consider the question of applicability of the provisions laid down in the Orissa Civil Service (Rehabilitation Assistance) Rules-1990 and its amendment Rules till date to the families of employees of the B.S.E., Orissa, Cuttack.*
>
> *RESOLVED that the Board adopts the O.C.S. (R.A) Scheme with Rules-1990 for Class-IV employees and it was further resolved that in case of Class-III recruits, a special test shall be conducted by the Board to assess suitability of the Legal heirs of the deceased employees against Class-III post for qualify service."*

On perusal of the aforesaid resolution, it appears that the Board has adopted the OCS (RA) Rules, 1990 for Class-IV employees, but it has passed further resolution in the case of Class-III employees to the extent that a test shall be conducted by the Board to assess the suitability of the legal heirs of the deceased employee who seek appointment against Class-III post for quality service. As it appears, the resolution to the extent conducting the suitability of the legal heirs of the deceased employee against Class-III post is in gross violation of the provisions contained in Rule-5 of the OCA (RA) Rules, 1990. Rule-5 specifically excludes even the statutory rules framed under the

proviso to Article 309 of the Constitution of India for consideration of giving compassionate appointment under rehabilitation assistance scheme. If the aforesaid resolution is critically analyzed, it would be evident that by virtue of the said resolution the Board of Secondary Education Orissa in one hand is accepting the OCS (RA) Rules 1990, but in other hand states that for Class-III posts the legal heirs of the deceased employees have to undergo a test, which is contrary to the spirit of Rule-5 of OCS (RA) Rules, 1990. The resolution to that extent for holding examination for Class-III post, being violative of Rule-5 of OCS (RA) Rules, 1990, cannot sustain in the eye of law. The Rules framed under Article 309 of the Constitution of India are statutory and, thereby, the benefits which have been extended under the said Rules cannot be taken away in passing a resolution by the opposite party no.1. Therefore, the resolution dated 11.10.2010 to the extent to hold examination for Class-III posts in order to find out suitability, being contrary to the provisions of law, cannot be allowed to stand. More so, the resolution dated 11.10.2010, on which reliance has been placed by opposite party no.1, was passed prior to the letter issued by the Government in School and Mass Education Department on 12.07.2012 where the Government of Orissa in School and Mass Education Department communicated the Secretary, Board of Secondary Education, Orissa, Cuttack to give engagement to four numbers of legal heirs of the deceased employee of Board of Secondary Education, Orissa as per their qualification vis-à-vis date of death of the employees after observance of due formalities as framed by the Finance Department vide circular no.54447 dated 05.12.2005 and G.A. Department under OSC (RA) Rules, 1990, as amended from time to time and, as such, in the said letter, the name of the petitioner finds place at serial no.3. Such letter has been communicated taking into account the statutory rules governing in the field. Therefore, there is no occasion on the part of the opposite party no.1 to call upon the petitioner to face a test for recruitment in Class-III post, as because the appointment of the petitioner was to be made as a candidate under rehabilitation assistance scheme, which is always commensurate with requisite minimum educational qualification prescribed for the post, without following due procedure prescribed for the recruitment of the post either by the statutory rules framed under the proviso to Article 309 of the Constitution of India or otherwise. Therefore, the letter dated 14.05.2013, whereby the petitioner has been called upon for appearing in the written test for appointment as Junior Assistant, is contrary to the provisions contained under OCS (RA) Rules, 1990, which is statutory one, and thus cannot sustain in the eye of law.

10. No doubt, compassionate appointment is an exception to the general rule that appointment to public service should be on merits and through open invitation. In such cases, the appointment is given to a member of the family of the deceased employee by accommodating him in a suitable vacancy. Compassionate appointment must be in consonance with the constitutional scheme of equality enshrined in Articles 14 and 16 of Constitution of India.

11. In ***Haryana State Electricity Board v. Hakim Singh***, (1997) 8 SCC 85, the apex Court explained the rationale of the rule relating to compassionate appointment, which is reproduced below:

> *"The rule of appointments to public service is that they should be on merits and through open invitation. It is the normal route through which one can get into a public employment. However, as every rule can have exceptions, there are a few exceptions to the said rule also which have been evolved to meet certain contingencies As per one such exception relief is provided to the bereaved family of a deceased employee by accommodating one of his dependants in a vacancy. The object is to give succor to the family which has been suddenly plunged into penury due to the untimely death of its sole breadwinner. This Court has observed time and again that the object of providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment."*

Similar view has also been taken by the apex Court in ***State of U.P. v. Paras Nath,*** (1998) 2 SCC 412, and ***Commissioner of Public Instructions v. K.R. Vishwanath,*** (2005) 7 SCC 206.

12. In ***Sushma Gosain v. Union of India***, (1989) 4 SCC 468, the apex Court pointed out that the purpose of providing appointment on compassionate grounds is to mitigate the hardship due to death of the bread earner in the family and that such appointment should, therefore, be provided immediately to redeem the family in distress.

13. In ***Director of Education v. Pushpendra Kumar***, (1998) 5 SCC 192, the apex Court explained the purpose of compassionate appointment and pointed out its exceptional nature and the need to take care that its application did not interfere with the right of other persons who are eligible to seek employment.

14. In ***Balbir Kaur and another v. Steel Authority of India Ltd. and others,*** AIR 2000 SC 1596 it is categorically held that sudden jerk in the family by reason of the death of the bread earner can only be absorbed by

some lump sum amount being made available to the family. This is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the bread earner and insecurity thereafter reigns and it is at that juncture if some lump sum amount is made available with a compassionate appointment, the grief stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. This being the reasons assigned, compassionate appointment can be granted to a member of the deceased family.

15. In ***Umesh Kumar Nagpal v. State of Haryana***, (1994) 4 SCC 138, the apex Court laid down the principles relating to compassionate appointment in clear and emphatic language, which is reproduced below:-

> *"The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependents of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Class III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public*

> *authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule make in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."*

16. In ***Govind Prakash Verma v. LIC of India,*** (2005) 10 SCC 289, the apex Court held that compassionate appointment is recompense over and above whatever is admissible to the legal representatives of deceased employee as benefits of service which they get on death of the employee.

17. The aforesaid judgment has been referred in ***Dipti Ranjan Mishra*** mentioned supra. Thereby, non-extension of the benefit to the petitioner is in gross violation of mandate of law and, as such, the condition imposed that unless the petitioner goes for a test for giving appointment under Class-III post is absolutely misconceived one. Thereby, the restriction so imposed by the authority concerned, cannot sustain in the eye of law.

18. Consequence thereof, the letter issued on 14.05.2013 in Annexure-1 intimating the petitioner to appear at a test for appointment to the post of Junior Assistant cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. Further, the resolution passed on 10.11.2010 to the extent to conduct such test for Class-III recruits by the Board to assess the suitability of the legal heirs of the deceased employee, also cannot sustain, as the same is contrary to Rule-5 of OCS (R.A.) Rules, 1990. Thereby, the same is liable to be quashed and is hereby quashed.

19. In such view of the matter, the opposite party no.1-Board of Secondary Education, Orissa is directed to consider the case of the petitioner for appointment on compassionate ground against any available vacancy in Class-III post, in consonance with the OCS (RA) Rules, 1990, in order to meet the hardship of the family, of which he is the sole bread earner. The entire exercise of consideration and appointment of the petitioner shall be completed within a period of three months from the date of passing of this judgment.

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

2021 (II) ILR - CUT- 119

Dr. B.R. SARANGI, J.

W.P.(C) NO. 10149 OF 2013

RUNI JENA ..….....Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner challenges the order passed by the Collector allowing the Asha appeal filed by OP No.5 – Petitioner selected as Asha worker and continuing as such – Order in appeal was passed in absence of the petitioner directing disengagement – No opportunity of hearing provided to petitioner – Held, there has been violation of the principles of natural justice – Order of the Collector set aside.

(Paras 8 to 15)

(B) PROMISSORY ESTOPPEL – Petitioner was selected as Asha worker by relaxing the age limit by the selection committee – Petitioner joined and is working – Subsequently the said relaxation cannot be withdrawn as the same would hit by the principles of esstoppel.

> *"Applying the above principle to the present context, the petitioner neither has suppressed any facts nor has given any falsehood so as to disentitle her to claim the equitable relief. As required, she had produced all the documents before the authority for selection and the selection committee, having condoned the age deficiency, selected and engaged her as Asha Worker, pursuant to which she has been discharging her duty. Subsequently, the authority cannot turn around and say that she suffers disqualification on the ground of insufficient age. Thereby, cancellation of her selection on the basis of appeal preferred by opposite party no.5 is hit by doctrine of promissory estoppels, as has been held by the Full Bench of this Court in Miss Reeta (supra)"* *(Paras 16 & 17)*

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1075 : Sanatan Gauda Vs. Berhampur University.
2. AIR 1993 ORISSA 27 : Miss Reeta Vs. Berhampur University.
3. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. Vs. Secy of State for Environment.
4. 1977 3 All ER 452 (DC & CA) : R. Vs. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ.
5. AIR 1970 SC 150 : (1969) 2 SCC 262 : A.K. Kraipak & Ors Vs. Union of India.
6. AIR 1978 SC 597 : (1978) 1 SCC 248 : Maneka Gandhi Vs. Union of India.
7. AIR 1981 SC 818 : Swadeshi Cotton Mills Vs. Union of India.
8. (1998) 8 SCC 194 : Basudeo Tiwary Vs. Sido Kanhu University and Ors.

9. (2008) 16 SCC 276 : Nagarjuna Construction Company Ltd Vs. Government of Andhra Pradesh,
10. AIR 2009 SC 2375 : Uma Nath Panday and others Vs. State of U.P. and others.
11. AIR 1985 SC 1416 : Union of India Vs. Tulsiram Patel.

For Petitioner : Mr. S.K. Rath & Ms. M. Behera.

For Opp. parties : Mr. S.K. Samal,Addl. Standing Counsel (O.Ps. No.1 to 4)
M/s. A.K. Mishra-2 & B.C. Pradhan, (O.P. No.5)

JUDGMENT Date of Judgment : 06.04.2021

Dr. B.R. SARANGI,J.

The petitioner, who is continuing as "Asha Worker" in respect of Baradang-II Anganwadi Centre, has filed this writ petition to quash the order dated 18.08.2012 under Annexure-2, whereby the Collector, Kendrapara in Asha Appeal No.1 of 2012 has set aside the selection and engagement of the petitioner as Asha Worker and directed for fresh selection; as well as the order dated 27.02.2013 passed by the Collector, Kendrapara rejecting Misc. Case No.31 of 2012 filed by the petitioner for recalling the order dated 18.08.2012.

2. The factual matrix of the case, in hand, is that pursuant to notice dated 04.04.2011 inviting applications from the female candidates of Baradang-II Anganwadi Centre for selection of Asha Worker, the petitioner applied for on 04.06.2011 by submitting relevant documents, such as, School Leaving Certificate of Class-VII from Languleswar U.P.M.E. School showing that she had secured 336 marks, Transfer Certificate of Jagmohan High School, Baradang showing that she had studied up to Class-X, mark sheet issued by the Board of Secondary Education showing appearance in the Annual H.S.C. Examination, 2002 and certificate of the Headmaster of Jagmohan High School certifying that she had studied in U.P.M.E. School and acquired 336 marks. On consideration of such application and documents, the petitioner was selected and engaged on 08.09.2011 as Asha Worker in respect of Baradang-II Anganwadi Centre in which she is continuing till date.

2.1 Challenging the selection and engagement of the petitioner as Asha Worker, opposite party no.5 filed Asha Appeal No.1 of 2012 before the Collector, Kendrapara alleging that the petitioner had not studied Class-VIII and produced forged certificate showing 336 marks of Languleswar U.P.M.E. School and the said school was not in existence. She further pleaded that she

had studied up to Class-IX and the petitioner had not fulfilled the age criteria. Though opposite party no.5 preferred appeal at a belated stage, the same was entertained by the Collector, Kendrapara and notice was issued to the petitioner. The petitioner could not appear before the Collector, Kendrapara, but the Collector, Kendrapara, upon hearing the appellant (opposite party no.5), by the impugned order dated 18.08.2012 in Annexure-2, allowed the appeal and set aside the selection and engagement of the petitioner as Asha Worker in respect of Baradang-II Anganwadi Centre, also directed the Child Development Project Officer (CDPO), Kendrapara to issue necessary instructions to the selection committee for fresh selection, by holding that the petitioner was absent on repeated call, and that there was doubt about the validity of the certificate issued by Languleswar U.P.M.E. School, and that the petitioner was below 25 years of age on the date of application.

2.2 The petitioner, having come to know the order dated 18.08.2012 passed by the Collector, Kendrapara in Asha Appeal No.1 of 2012, filed Misc. Case No.31 of 2012 for recalling of the said order, but the said misc. case was dismissed by order dated 27.02.2013 holding that the order dated 18.08.2012 was passed after taking into consideration all the documents/papers filed by both the parties. Hence this application.

3. Mr. S.K. Rath, learned counsel appearing for the petitioner argued with vehemence that the order impugned has been passed ex parte without giving opportunity of hearing to the petitioner. As such, she was deprived of place the documents and participating in the proceeding while appeal was heard. The appeal suffered from delay and laches, because the selection was held on 08.09.2011 and the appeal was preferred in the year 2012 beyond the reasonable period of 30 days. Without condoning the delay, the ex parte order has been passed on 18.08.2012. More so, the said order is hit by the principle of promissory estoppels, as envisaged under Section 115 of the Evidence Act, 1872. It is further contended that the selection committee on verification of documents found that the date of birth of the petitioner is 05.05.1987 and by the time advertisement was issued on 04.04.2011, she was aged 24 years and 29 days. The minimum requirement of age being 25 years, the selection committee had condoned the age and permitted the petitioner to participate in the selection and subsequently, she was found suitable and issued with engagement order. Thereby, the order dated 18.08.2012 passed by the Collector-Kendrapara cannot sustain in the eye of law. It is further contended that this Court, while entertaining the writ petition, vide order dated 01.05.2013 in Misc. Case No.9586 of 2013 passed an interim order, pursuant

to which the petitioner is continuing in the post of Asha Worker. In the meantime, 10 years have been passed. If any order is passed, it will unsettle the settled position. It is further contended that the petitioner is a landless lady and her husband is a daily labourer, she is leading her life on consolidated salary of Rs.3500/- per month. In the event the order dated 18.08.2012 passed by the Collector, Kendrapara in Asha Appeal No.1 of 2012 is given effect to, it will prejudice to the petitioner.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgment of the apex Court in ***Sanatan Gauda v. Berhampur University***, AIR 1990 SC 1075 and Full Bench judgment of this Court in ***Miss Reeta v. Berhampur University***, AIR 1993 ORISSA 27.

4. Mr. S.K. Samal, learned Additional Standing Counsel for the State opposite parties, justifying the order dated 18.08.2012 passed by the Collector, Kendrapara in Asha Appeal No.1 of 2012 in Annexure-2, contended that as per information obtained by opposite party no.5 under Right to Information Act, 2005, Languleswar U.P.M.E. School, where the petitioner was allegedly studying, was abolished more than 10 years ago. It is further contended that the fact that petitioner was below 25 years of age, she herself admitted in her affidavit dated 09.06.2011 showing her age as 24 years, and not only that, the certificate produced by her in support of her educational qualification shows that she was less than 25 years of age at the time of submission of application to get herself selected as Asha Worker. Thereby, he contended that the Collector, Kendrapara is well justified in passing the order impugned dated 18.08.2012, which does not warrant interference by this Court.

5. Although Mr. A.K. Mishra-2, learned counsel has entered appearance for opposite party no.5, but he is not present when the matter is taken up, nor has he filed counter affidavit. It is opposite party no.5, who preferred appeal before the Collector, Kendrapara challenging the selection and engagement of the petitioner as Asha Worker and the order impugned has been passed at her behest. Her contention before the appellate authority was that minimum educational qualification for Asha Worker was Class-VII pass and minimum age should be 25 years and maximum age 45 years. Even though she (opposite party no.5) was aged about 30 years and studied up to Class-IX and secured 204 marks in Class-VII examination, she was not selected, but the petitioner was selected on the basis of forged school leaving certificate

obtained by her from Languleswar U.P.M.E. School showing to have passed Class-VII securing 336 marks. It was further contended that the petitioner had incurred disqualification because she was below 25 years of age, which is apparent from the affidavit dated 09.06.2011 showing her age as 24 years. Thereby, the selection made has to be cancelled.

6. This Court heard Mr. S.K. Rath, learned counsel for the petitioner and Mr. S.K. Samal, learned Additional Standing Counsel for the State opposite parties. Though Mr. A.K. Mishra-2, learned counsel entered appearance for opposite party no.5, he was not present at the time of call nor has he filed counter affidavit. Since this is a case of the year 2013, this Court, instead of granting adjournment, proceeded to dispose it of taking into consideration the grounds taken by opposite party no.5 in the appeal, out of which the order impugned dated 18.08.2012 has been passed by the Collector, Kendrapara.

7. On the basis of factual matrix, as discussed above, admittedly the petitioner has been selected as Asha Worker in respect of Baradanga-II Anganwadi Centre on the basis of certificates produced by her. She has relied upon School Leaving Certificate of Class-VII pass obtained from Languleswar U.P.M.E. School showing that she has secured 336 marks, Transfer Certificate of Jagmohan High School, Baradang showing that the petitioner has studied up to Class-X, mark sheet issued by the Board of Secondary Education showing appearance in the Annual H.S.C. Examination, 2002 and certificate of the Headmaster of Jagmohan High School certifying that the petitioner has studied in Languleswar U.P.M.E. School and acquired 336 marks. The petitioner, being qualified in all respect, was selected and engaged as Asha Worker and has been discharging her duty at Baradang-II Anganwadi Centre. Opposite party no.5 preferred Asha Appeal No.1 of 2012 challenging the selection and engagement of the petitioner. Though the said appeal was barred by time, the Collector, Kendrapara entertained the same and without affording opportunity of hearing to the petitioner passed the order impugned dated 18.08.2012, which is evident on the face of the order itself wherein in the 1st line of second paragraph a mention has been made that "the learned advocate for the appellant is present, O.Ps. are absent on call". The petitioner, being opposite party in the said appeal, was not present and, as such, the appeal was decided by the Collector, Kendrapara behind her back without giving opportunity of hearing, which amounts to violation of principles of natural justice.

8. The soul of natural justice is '*fair play in action'*

In ***HK (An Infant) in re***, 1967 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as '*a duty to act fairly'*.

In ***Fairmount Investments Ltd. v. Secy of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as '*a fair crack of the whip'*

In ***R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ***, 1977 3 All ER 452 (DC & CA), preferred the homely phrase '*common fairness'* in defining natural justice.

9. **A.K. Kraipak and others v. Union of India, AIR 1970 SC 150= (1969) 2 SCC 262,** is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde,J. observed thus:

> *"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry".*

In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 = (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

10. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of 'natural justice' came for consideration before the apex Court and the apex Court observed as follows:-

> *"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self evident and urarguable truth". "Natural justice" by Paul Jackson, 2nd Ed., page-1. In course of time, judges nurtured in the traditions of British jurispruduence, often invoked it in conjuction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction*

> *between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice."*

11. In **Basudeo Tiwary v Sido Kanhu University** *and others (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.*

12. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held as follows:

> *"The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration."*

13. The apex Court in **Uma Nath Panday and others v State of U.P**. *and others, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.*

14. In ***Union of India v. Tulsiram Patel***, AIR 1985 SC 1416, the apex Court held as follows:

> *"Though the two rules of natural justice, namely, nemo judes in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait jacket. They are not immutable but flexible."*

15. By passing the order impugned dated 18.08.2012, the petitioner is grossly prejudiced as because by virtue of the same she may lose her job. Since there is gross violation of principles of natural justice, as discussed above, the order dated 18.08.2012 passed by the Collector, Kendrapara in

Asha Appeal No.1 of 2012 cannot sustain in the eye of law. Even though the petitioner filed Misc. Case No.31 of 2012 for recalling of the order dated 18.08.2012, the Collector, Kendrapara also dismissed the same vide order dated 27.02.2013 without application of mind.

16. If it is considered from other angle, undoubtedly the petitioner applied for the post of Asha Worker by furnishing relevant documents and, as such, the school leaving certificate produced by the petitioner indicates that by the time she made application, she was aged 24 years and 29 days, but the minimum age requirement was 25 years. But as a matter of fact the selection committee has condoned such deficiency and considered her application for selection to the post of Asha Worker. She having secured highest mark, i.e. 336, she was selected and engaged by the authority, pursuant to which the petitioner joined as Asha Worker and is continuing as such. It is no doubt true that condonation of the age deficiency and consideration of the application of the petitioner by the selection committee was to give benefit of engagement to the petitioner. If any action is taken against the petitioner on the basis of the appeal preferred by opposite party no.5, the same will hit the principle of promissory estoppels. As the doctrine of promissory estoppels has been evolved by equity to avoid injustice, one who demands equity must do equity and must come with clean hands. Suppression of facts and recourse to falsehood would disentitle a person to claim this equitable relief.

17. Applying the above principle to the present context, the petitioner neither has suppressed any facts nor has given any falsehood so as to disentitle her to claim the equitable relief. As required, she had produced all the documents before the authority for selection and the selection committee, having condoned the age deficiency, selected and engaged her as Asha Worker, pursuant to which she has been discharging her duty. Subsequently, the authority cannot turn around and say that she suffers disqualification on the ground of insufficient age. Thereby, cancellation of her selection on the basis of appeal preferred by opposite party no.5 is hit by doctrine of promissory estoppels, as has been held by the Full Bench of this Court in ***Miss Reeta*** (supra).

18. In ***Sanatan Gauda*** (supra), even though the petitioner was admitted to law course by the law college and permitted by the University to appear in pre-law and intermediate law examinations and was also admitted to final year course, but subsequently the University refused to declare results of

examinations of the petitioner on the ground of ineligibility to be admitted to law course. In that case, the apex Court held that such action of the University is barred by estoppels.

19. On the touchstone of the above principle, if the background facts of the instant case are examined, it would be seen that on the basis of documents furnished by the petitioner, if the petitioner had incurred disqualification for not attaining the required age, her case should not have been taken for consideration. But the selection committee, being well aware of such deficiency of age, condoned the same and selected the petitioner to be engaged as Asha Worker, pursuant to which order of engagement was issued and she was allowed to continue. That itself cannot disentitle her to continue in the post and her selection and engagement should not have been set aside at the instance of opposite party no.5 without giving opportunity of hearing to the petitioner. Thereby, the order impugned dated 18.08.2012 passed by the Collector, Kendrapara in Asha Appeal No.1 of 2012 in Annexure-2 also cannot sustain in the eye of law.

20. Needless to say that this Court, while entertaining this writ petition, vide interim order dated 01.05.2013 passed in Misc. Case No.9586 of 2013, directed that the operation of order dated 18.08.2012 passed by the Collector, Kendrapara in Asha Appeal No.1 of 2012 shall remain stayed till the next date. Pursuant to said order, the petitioner is continuing in the post. In the meantime more than 8 years have been passed. Thereby, this Court does not want to unsettle the settled position.

21. In view of the foregoing discussions, the impugned order dated 18.08.2012 passed by the Collector, Kendrapara in Asha Appeal No.1 of 2012 is liable to be quashed and the same is hereby quashed.

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

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2021 (II) ILR - CUT- 127

Dr. B.R. SARANGI, J & K.R. MOHAPATRA, J.

W.P.(C) NO. 15300 OF 2019

NIRMAL CHANDRA PANIGRAHI & ORS. ....Petitioners
.V.
STATE OF ODISHA & ORS. ....Opp. Parties

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 3(4) read with Rule-5-B of the OGSL Rules, 1983 and Rule 3(a) of the Schedule-V of OGLS Rules, 1983 – Provisions under – Claim of settlement of Khasmahal land – Lease holder of khasmahal land sold a portion to another person – The purchaser applied for permanent lease – Whether can be accepted? – Held, yes as the leasehold estate of the Khasmahal land is heritable and transferable with a right of renewal, the Collector, should have approved the leasehold land for permanent settlement in accordance with the legal provisions.

Case Laws Relied on and Referred to :-

1. ILR 1976 CUT-1392 : Republic of India Vs. Prafulla Samal,
2. 98(2004) CLT 397 : 2004 (II) OLR 332 : Sourindra Narayan Bhanja Deo Vs. Member, Board of Revenue, Orissa.
3. 59(1985) CLT 407 : Satyapriya Mohapatra Vs. Ashok Pandit.

41993 (I) OLR 183 : Bidulata Das Vs. Braja Behari Palit.

5. 2018(I) OLR 31 : Vishnu Deo Roy Vs. Rajesh Kumar Tiwari.
6. (1956) S.C.R. 325 : Karnapura Development Co. Vs. Kamakshya Narain.
7. AIR 1952 SC 16 : Commissioner of Police, Bombay Vs. Gordhandas Bhanji.
8. AIR 1973 SC 855 : Sirsi Municipaity Vs. Cecelia Kom Francis Tellis.
9. (1986) 2 SCC 679 : AIR 1987 SC 537 : Comptroller and Auditor-General of India Vs. K.S. Jagannathan.

For Petitioners : Mr. Nirmal Chandra Panigrahi-in person
Mr. Budhadev Routray, Sr. Adv.
M/s. N.K. Tripathy, D. Dhal, J. Biswal & S.D. Routray.

For Opp.Parties: Mr. Ashok Kumar Parija, Advocate General, Odisha

JUDGMENT Date of Judgment : 17.05.2021

Dr. B.R. SARANGI, J.

The petitioners, by means of this writ petition, seek to quash the letter dated 02.08.2018 issued by the Assistant Collector, Office of the Sub-Collector, Sadar, Cuttack in Annexure-8, whereby Khasmahal Lease Case No. 1211/2002 has been returned to the Tahasildar, Sadar, Cuttack, and to issue direction to the Collector, Cuttack-opposite party no.2 to grant approval to the recommendation made by the Tahasildar, Sadar, Cuttack-opposite party no.3 in KLC No. 1210/2002, KLC No. 1211/2002 and KLC No. 1212/2002, and further direction to the opposite parties to permanently settle the leasehold lands in favour of the petitioners within a period to be fixed by this Court.

2. The factual matrix of the case, in a nutshell, is that one Late Bira Kishore Kar, son of Late Krushna Chandra Kar was the original lessee of the land appertaining to J. No. 66/1, Khata No. 414, Plot No. 389 (P), Area Ac. 0.172 dec. of Mouza- Ramagarh, Bholamia Bazar, Tahasil- Cuttack Sadar. The said lease was granted in his favour for a period of 30 years w.e.f. 01.04.1973 valid up to 01.04.2003. Late Bira Kishore Kar sold the aforesaid land to the present petitioners vide registered sale deeds executed on 04.11.1985 with due consideration, and since then all the petitioners are residing on the homestead land having constructed residential houses thereon and are in peaceful possession over the same. The petitioners are also paying holding tax as well as rent in respect of the suit land.

2.1 The petitioner no.1 purchased an area of Ac.0.068 dec. of plot no. 866/3657, holding no. 623, petitioner no.2 purchased an area of Ac.0.062 dec. of plot no. 866 of holding no. 623/A/1 and petitioner no.3 purchased an area of Ac.0.045 dec. of plot no. 866/3658 of village Ramgarh, Bholamia Bazar. Late Bira Kishore Kar, the vendor of the petitioners, had also his residential house over the said land, before it was purchased by the petitioners. After purchase of the land, the same was separately mutated in the name of the petitioners and Records of Rights were also published separately in favour of each of the petitioners.

2.2 Before expiry of the period of Khasmahal lease, the petitioners no.1, 2 and 3 applied for renewal of the lease permanently in KLC No. 1210/2002, KLC No. 1211/2002 and KLC No. 1212/2002 respectively in accordance with the rules to the Tahasildar, Sadar, Cuttack. After registering such Khas Mahal cases filed by the respective petitioners, due enquiry was conducted by the Amin, who submitted a report on 20.02.2008 to the Tahasildar stating that the petitioners are in peaceful possession over their respective land having constructed residential houses thereon. On receipt of such report from the Amin, the Tahasildar, Sadar, Cuttack, vide its order dated 08.06.2009, recommended the case of the petitioner no.1 for permanent settlement and submitted the case records to the Collector, Cuttack for favour of approval as required under Rule 3(a) of Orissa Government Land Settlement Rules, 1983 (for short "OGLS Rules, 1983"). Same and similar recommendations were also made by the Tahasildar, Sadar, Cuttack separately in favour of the petitioners no. 2 and 3 vide order dated 26.06.2009 and their cases were forwarded to the Collector, Cuttack for approval.

2.3 As per the provisions contained under Orissa Government Land Settlement Act, 1962 (for short "OGLS Act, 1962") and the Rules framed thereunder, the Collector was to accord approval for settlement of the leasehold property permanently, but on flimsy grounds and without application of mind all the three cases were several times returned to the office of the Tahasildar, Sadar, Cuttack and finally, vide letter dated 08.08.2016, the Tahasildar, Sadar, Cuttack clarified all the points raised in the objections from the office of the Collector and further gave a recommendation in favour of the petitioners. Though the case of the petitioners no.1 and 2 had come back from the office of the Collector for clarification, so far as petitioner no.3 is concerned, her case was kept pending on the file of the Collector without any approval for settlement. After submission of the above clarification, no approval was accorded by the Collector, Cuttack and the matter was kept pending for years together.

2.4 Further, the petitioners being in possession of the leasehold land with residential houses with demarcation boundary for more than five years by the appointed date, the Tahasildar, Sadar, Cuttack, having recommended the case of the petitioners for permanent settlement, in view of the provision of law that the leasehold estate of Khasmahal land is heritable and transferable with the right of renewal, the Collector therefore should have approved the leasehold land for permanent settlement in accordance with law. Though such recommendation had been made by the Tahasildar, Sadar, Cuttack way back in the year 2009, the matter is still pending in the office of the Collector for approval, even though the unnecessary queries made from the office of the Collector in the year 2015 were clarified by the Tahasildar, Sadar, Cuttack, vide letter no. 11644 dated 22.01.2016. Due to such inaction on the part of the Collector in the matter of according approval for permanent settlement of the above noted leasehold lands in favour of the petitioners, the present writ petition has been filed.

3. Mr. B. Routray, learned Senior Counsel, along with his associates, was appearing for the petitioners, but unfortunately due to suffering from COVID-19 he could not participate in the proceeding today. Therefore, petitioner no.1-Mr.N.C. Panigrahi, who is none else but a Senior Counsel of this Court and has been duly authorized by petitioners no.2 and 3, argued the matter in person with vehemence contending that the petitioners are in possession of the leasehold land, by constructing their residential houses over the same, for more than five years as on the appointed date and the

Tahasildar, Sadar, Cuttack having recommended the case of the petitioners for permanent settlement, in view of position of law that the leasehold estate of the Khasmahal land is heritable and transferable with a right of renewal, the Collector, Cuttack should have approved the leasehold land for permanent settlement in accordance with the provisions contained in Section 3(4)(c) of the OGLS Act, 1962 read with Rule-5-B of the OGSL Rules, 1983 read with Rule 3(a) of the Schedule-V of OGLS Rules, 1983. It is further contended that even though statutory provisions have been complied with, for the reasons best known to the Collector, Cuttack, who is to make approval, is sitting tight over the matter without any rhyme and reason, though the petitioners have moved from pillar to post due to pendency of such approval. More so, the Tahasildar, Sadar, Cuttack is not accepting the rent of the leasehold land of the petitioners from the year 2005, though the petitioners are paying holding tax to the Municipality. It is therefore contended that the direction may be issued to the Collector, Cuttack for approval of the recommendation made by the Tahasildar, Sadar, Cuttack for permanent settlement of the leasehold property within a stipulated time.

To substantiate his contentions, he has relied upon ***Republic of India v. Prafulla Samal***, ILR 1976 CUT-1392; ***Sourindra Narayan Bhanja Deo v. Member, Board of Revenue, Orissa***, 98(2004) CLT 397 : 2004 (II) OLR 332; ***Satyapriya Mohapatra v. Ashok Pandit***, 59(1985) CLT 407; ***Bidulata Das v. Braja Behari Palit***, 1993 (I) OLR 183; ***Vishnu Deo Roy v. Rajesh Kumar Tiwari****,* 2018(I) OLR 31 and ***Rajat Kumar Rath v. Collector, Cuttack*** (W.P.(C) No.3674 of 2005 disposed of on 18.04.2005).

4. Mr. Ashok Kumar Parija, learned Advocate General appearing for the State opposite parties contended that the issue involved in this case no more remains res integra to be considered by this Court, as it is well settled in ***Rajat Kumar Rath*** (supra). Therefore, the matter can be disposed of directing the Collector, Cuttack to make approval in accordance with the provisions contained in the OGLS Act, 1962 and Rules framed thereunder within a stipulated time. He also declined to file counter affidavit in the matter, though several adjournments were granted to the State in that regard.

5. This Court heard Mr. N.C. Panigrahi, petitioner no.1 in person for himself as well as on behalf of petitioners no.2 & 3; and Mr. A.K. Parija, learned Advocate General for the State opposite parties by virtual mode; perused the records and with the consent of the parties, the matter is being disposed of finally at the stage of admission.

6. In view of the facts delineated above, which are not in dispute, is it the bounden duty of the statutory authority, viz., the Collector, Cuttack to discharge his responsibility in conformity with the provisions of law in the matter of granting approval on the recommendation of the Tahasildar, Sadar, Cuttack. This is the short question that arises for consideration in this writ petition.

7. For settlement of government land in the State of Orissa an Act was enacted by the Legislature of the State called "The Orissa Government Land Settlement Act, 1962". By Act 1 of 1991, the OGLS Act, 1962 was amended and the proviso (c) to sub-section (4) of Section-3 of the said Act was incorporated, which reads as follows:

> ***3. Reservation and settlement of Government land-***
>
> *xx xx xx*
>
> *(c) any Khasmahal land, Nazul land, Gramakantha Parambok land or Abadi land, which is used and in occupation by any person as homestead in any urban area for not less than five years as on the appointed date, shall, subject to the payment of compensation in the case of Khasmahal and Nazul land as mentioned in the proviso to Clause (a), be settled*
>
> *(i) in the case of Khasmahal or Nazul land, with the person lawfully holding such land on and from the date the compensation is paid; and*
>
> *(ii) in the case of Gramakantha Parambok and Abadi land with the person in occupation of such land on and from the appointed date, on permanent basis with heritable and transferable rights.*
>
> *xx xx xx"*

8. Section 8-A of the OGLS Act, 1962 deals with "Power to make Rules". The Government by notification in the Official Gazette and after previous publication made Rules for carrying out the provisions of the Act, called "The Orissa Government Land Settlement Rules, 1983". Rule-5-B framed in the said Rules reads as follows:

> *"**Rule-5-B**. Notwithstanding anything contained in Rule 3, 5, 5-A, 8, 11, 12, 13 settlement of Khasmahal and Nazul land, "Gramakantha Parambok and Abadi landleased out prior to the 9th day of January, 1001 shall be made in the manner prescribed in Schedule-V."*

9. On perusal of the above Rule-5-B it is evident that the settlement of Khasmahal and Nazul land leased out prior to 9th day of January, 1991 shall

be settled in the manner prescribed in Schedule-V. Rule -3(a) of Schedule-V of OGLS (Amendment) Rules, 1993 reads as follows:

> *"**Rule-3(a)**.The Tahasildar on being satisfied after enquiry that any nazul/Khas Mahal land is used and in occupation by any person as homestead for a period of not less than 5 years as on the appointed day shall settle the said land in favour of the person holding such land, on execution of lease deed in Form-IV. In case of sub-sease and subsequent sub-lease such settlement shall take effect on production of the stamped receipt in Form-1 from the date of payment of such compensation to the person immediately under whom they held the land. Provided that on each such settlement, approval of the Collector shall be obtained.*
>
> *(b) The amount of compensation shall be equal to 10 times of the annual rent as provided in the lease deed."*

From the above mentioned provisions, it is made clear that the Tahasildar, on being satisfied after causing enquiry that a Nazul/Khasmahal land has been used and occupied by any person as homestead for a period of not less than 5 years as on the appointed date, shall settle the said land in favour of the person holding such land, provided that for such settlement approval of the Collector shall be obtained.

10. There is no dispute that the petitioners are in possession of a Khasmahal land by constructing houses over the same and using the same as homestead land for a period not less than five years as on the appointed date and, more so, their vendor was in possession of the said land w.e.f. 01.04.1973, pursuant to a Khasmahal lease granted for a period of 30 years, which was valid up to 01.04.2003. The vendor was also staying thereon and using the same as homestead land by constructing a house over the same. The petitioners purchased the said land on 04.11.1985 by way of registered sale deeds. Therefore, there is no iota of doubt that the petitioners are in possession of the Khasmahal land and utilizing the same for homestead purpose and such possession is prior to five years of the appointed date. Therefore, the Tahasildar on enquiry having satisfied that the petitioners are residing on the said leasehold property and utilizing the same as homestead land, recommended the case of the petitioners for approval to the Collector in the year 2009, but due to some plea or other the matter has been delayed putting the petitioners to run from pillar to post. As a matter of fact, the Collector had to discharge his duty and responsibility assigned to him statutorily and more than ten years had passed by the time the writ petition was filed and, as such, there was no reason on the part of the Collector not to

accord approval for settlement of the Khasmahal land in favour of the petitioners in accordance with law. Such inaction on the part of the Collector is in gross violation of the statutory rules governing the field. The contention raised by the petitioners are also backed by the judgment of this Court in ***Prafulla Samal*** (supra), wherein it has been held as follows:

> *"It is well established that a lease hold estate in the Khasmahal land is heritable and transferable with a right of renewal."*

11. In ***Satyapriya Mohapatra*** mentioned supra, referring to ***Prafulla Kumar Samal*** (supra), a Division Bench of this Court held as follows:-

> *"4. ………………. It has been held therein that a leasehold estate in the Khasmahal land is heritable and transferable with a right of renewal. It has also been held that the right of lease in respect of such land is in no way different from that which one has in his own private land. The lessee's right in the Khasmahal land being heritable and transferable, the lessee can create a permanent right of tenancy in his holding. ……………."*

12. In ***Shankarlal Verma*** mentioned supra, a Division Bench of this Court in para-4 of the said judgment held as under:-

> *"4. Law is well settled that interest of a lessee in a Khasmahal land is both hereditary and transferable. His rights are similar to those of owner of a private land. His interest is regulated by the terms of lease between him and the Khasmahal authorities and the parties to the lease are governed by the provisions of the Transfer of Property Act. It has been so stated in Janab Begum Sahib v. State of Orissa, 28 (1962) Cuttack Law Times 209 and in Republic of India v. Prafulla Kumar Samal, ILR 1976 Cuttack series 1392."*

13. In ***Sourindra Narayan Bhanja Deo*** mentioned supra, learned Single Judge of this Court in para-9 of the said judgment held as under:-

> *"9. So far as the law regarding the Khasmahal land is concerned, such land shall be treated as the private land of the lessee, which is both heritable and transferable. In this context, reference may be made to a decision of this Court in the case of Republic of India v. Prafulla Kumar Samal and another, ILR 1976 Cuttack 1392, in paragraph-4 whereof it has observed thus:*
>
> *"xxx Rights of a lessee in Khasmahal lands are in no way different from those which one has in his own private land. The lessee's right in the Khasmahal land being heritable and transferable the lessee can create a permanent right of tenancy in his holding. Thus in all respects the rights of a lessee are just similar to those of an owner of a private land (See 1935 CLT 43,* ***Munshi Abdul Kadir***

> ***Khan v. Munshi Abdul Latif Khan** and 1937 CLT 67 **Madhusudan Swain v. Durga Prasad Bhagat**)".*

In para-10 of the said judgment, the learned Single Judge further held as follows:-

> *"……………….. From the decisions as cited in cases of **Sankarlal Verma and others v. Smt. Uma Sahu and others**, 1993 (I) OLR 187 and **Satyapriya Mohapatra v. Ashok Pandi and others**, 59 (1985) CLT 407, it is crystal clear that the Khasmahal land is heritable and transferable with a right of renewal and right of lessee in respect of such land is in no way different from that which one has in his own private land. …………."*

Similar view has also been taken in ***Vishnu Deo Roy*** and ***Rajat Kumar Rath*** (supra).

14. On perusal of the statutory provisions, it is made clear that as provided in Schedule-V of the OGLS (Amendment) Rules, 1993 the Tahasildar, on being satisfied after enquiry that any Khasmahal land in occupation by any person as homestead for a period of not less than 5 years as on the "appointed date", shall settle the said land in favour of the person holding such land on execution of the lease deed in form-IV subject to approval of the Collector. Basing upon such provisions of law and applying the same to the present context, by calculating the period of five years, for which a person is required to be in occupation over Khasmahal land as homestead in urban area as required under the OGLS Act, 1962 the period for which the predecessor-in-interest of the applicants was in possession should also be clubbed with the period of possession of the applicants. Therefore, even though the petitioners had purchased the land on 04.11.1985 by way of registered sale deeds, their vendor was in occupation of the same w.e.f. 01.04.1973 on being granted lease for a period of 30 years, which expired on 01.04.2003. Meaning thereby, after purchase of the land, the petitioners are in possession of the same and using it as homestead land w.e.f. 01.04.1973, as because possession of the petitioners' for the purpose of grant of permanent lease under the above provisions shall include the possession of their vendor. Taking into consideration the same and also the intention of the Legislature for amending the above section of the OGLS Act, 1962 and Rules thereunder to eliminate temporary lease requiring renewal from time to time and to simplify the process of collection of rent/premium, this Court is of the considered view that when the Tahasildar was satisfied that the petitioners are in possession of the land in question for more than 5 years and utilizing the same for

homestead purpose by constructing houses thereon, the Collector should have acted upon the recommendation made by the Tahasildar, Sadar, Cuttack without causing any hindrance thereon.

15. In ***Westminster Corpn. V. L. & N. Ry., (***1905) A.C. 426 it was held that it is a condition of any statutory power that it must be exercised reasonably, and without negligence.

16. In ***Cf. Karnapura Development Co. v. Kamakshya Narain***, (1956) S.C.R. 325, the apex Court held that it is a condition of any statutory power that it must be exercised bona fide.

17. In ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16, the apex Court observed as follows:

> "10. … … Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order. … xx xx 28. … …An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled… ."

18. In ***Sirsi Municipaity v. Cecelia Kom Francis Tellis***, AIR 1973 SC 855, the apex Court observed that "*the ratio is that the rules or the regulations are binding on the authorities*".

19. The issue of writ of mandamus is a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directing to any person, corporation, requiring him or them to do some particular thing specified in it which appertains to his or their office and is in the nature of a public duty.

20. In ***Comptroller and Auditor-General of India v. K.S. Jagannathan***, (1986) 2 SCC 679 : AIR 1987 SC 537, the apex Court observed:

> "20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy

> decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such direction or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

21. In view of the proposition of law, as discussed above, it is made clear that the Collector, Cuttack, who is a public authority, has failed to exercise its power vested under the statute. Thereby, in exercise of power under Article 226 of the Constitution of India, this Court can issue a writ of mandamus giving direction to compel performance in an appropriate and lawful manner conferred on such authority, namely, the Collector in order to prevent injustice to the petitioners.

22. In view of such position, letter dated 02.08.2018 issued by the Assistant Collector, Office of the Sub-Collector, Sadar, Cuttack in Annexure-8, whereby Khas Mahal Lease Case No. 1211 of 2002 has been returned to the Tahasildar, Sadar, Cuttack, is to be quashed and hereby quashed. The Collector, Cuttack is directed to grant approval to the recommendation made by the Tahasildar, Sadar, Cuttack, as required for permanent settlement of the leasehold land in favour of the petitioners under Rule-3(a) of OGLS Rules, in respect of KLC No.1210 of 2002, KLC No.1211 of 2002 and KLC No.1212 of 2002, vide orders dated 08.06.2009, 26.06.2009 and 26.06.2009 respectively pursuant to Annexure-5 series, within a period of four weeks from the date of receipt of an authenticated copy of this judgment. On such approval being made by the Collector, Cuttack, the Tahasildar, Sadar, Cuttack-opposite party no.3 is directed to execute the lease deeds in favour of the petitioners for permanent settlement on making deposit of the amount as per law, to be calculated by the Tahasildar, within a period of two weeks from the date of making of such payment/fulfilling the legal requirements by the petitioners.

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

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 138

D. DASH, J.

W.P.(C) NO. 3440 OF 2009

CENTRAL ELECTRICITY SUPPLY UTILITY OF ODISHA,TPCODL. (As Amended) ....Petitioner.

.V.

PARADEEP PHOSPHATES LTD. & ANR. ....Opp Parties

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – The Petitioner, Tata Power Central Odisha Distribution Limited Company (TPCODL) has prayed for issuance of a writ in the nature of Mandamus/Certiorari or any other appropriate writ or order by quashing the letter dated 05.01.2009 issued by the Opposite Party No.1, Paradeep Phosphates Limited (PPL) a wholly public sector undertaking to the extent that it affects the Petitioner – Plea of Opposite party that the writ petition not maintainable as alternative remedy available – Effect of such plea – Held, writ petition not entertainable – Reasons indicated.

"The letter dated 05.01.2009 issued by the Opposite Party No.1 (PPL) is based upon the order dated 02.09.2008 passed by the BIFR. It is not in dispute that the order like the one under Annexure-3 passed by the BIFR is appealable under section 25 of SICA and any party aggrieved by the said order within 45 days from the date of issuance of an order may prefer Appeal before the AAIFR. The AAIFR in deciding the Appeal has the power to confirm/modify or set aside the order appealed against or remand the matter to the BIFR for fresh consideration. The AAIFR has all the power to rule upon the jurisdictional aspects as are raised by the Petitioner. With the above statutory provision providing of right to Appeal to any aggrieved person which the Petitioner claims to be so, in my considered view this writ application is not entertainable. In that view of the matter, there arises no further need to address the rival contentions on merit." *(Para 7)*

For Petitioner : Mr.N.C.Panigrahi, Sr. Adv, S.R. Panigrahi, G.S.Dash, N.K.Tripathy and N.C.Nayak.

For Opp Parties : Mr.Asok Mohanty, Sr. Adv. S.P.Sarangi, D.C.Das, P.K.Das, A. Das & S.Satyakam.

JUDGMENT Date of Hearing:22.03.2021: Date of Judgment: 06.04.2021

D.DASH, J.

The Petitioner-Tata Power Central Odisha Distribution Limited Company (TPCODL) has prayed for issuance of a writ in the nature of Mandamus/Certiorari or any other appropriate writ or order by quashing the letter dated 05.01.2009 issued by the Opposite Party No.1-Paradeep Phosphates Limited (PPL) a wholly public sector undertaking to the extent that it affects the Petitioner.

It is pertinent to state here that the Central Electricity Supply Utility Odisha (CESU) created in pursuance to a Scheme framed by the Odisha Electricity Regulatory Commission (OERC) in accordance with Section 26 of Section 22 of the Electricity Act engaged in the business of retail supply of electricity in the Central Zone of Odisha and was the original writ-Petitioner.

In view of the order of vesting dated 26th may, 2020 passed by the Odisha Electricity Regulatory Commission (OERC), the TPCODL (present Petitioner) has taken over the powers, assets, managements and liabilities subject to the limitations from the CESU for the purpose of distribution of electricity in the area in the State of Odisha in which CESU was carrying out all said activities.

By order dated 4.12.2020 passed by this Court in I.A. No.13986 of 2020, the TPCODL has come to stand as the Petitioner and has been pursuing the same.

2. Facts as are necessary for the purpose are as under:-

(a) The Opposite Party No.1 (PPL), a wholly owned Public Sector Undertaking of the Government of India, being a Sick Industrial Undertaking made a reference to the Board for Industrial and Financial Reconstruction (in short, 'the BIFR') as established under section-4 of the said Act for determination of the measures which shall be adopted with respect to the Company. The BIFR then undertook necessary enquiry under section 16 of the SICA. Having conducted the enquiry as

contemplated under the said provision arrived at a satisfaction that the Company has become a Sick Industrial Company in terms of clause (o) of the sub-section 1 of section 3 of the Sick Industrial Companies (Special Provision) Act, 1985 (for short, hereinafter, referred to as 'the SICA') and then considering all the relevant facts and circumstances of the case and hearing all concerned having come to conclude that the revival of the Company (PPL) with the potential for generation of profit and providing employment of 923 persons should not be hampered, prepared and sanctioned the Scheme as under section-18 of the SICA.

Sub-item-1 of item no.20 of the said sanctioned Scheme under the heading of "Reliefs and Concessions from Various Other Agencies and Concerns" is the subject matter of the present proceeding. The relevant portions are reproduced hereunder:-

"20. The Reliefs and Concessions and Various Agencies and Concerns.

xx xx xx

(i) From the State Government of Orissa Sales Tax

(a) xx xx
(b) xx xx

Electricity

(c) To exempt the Company from the levy of 20 paise per unit on self-generation of electricity;

(d) To exempt the Company from the charge of "Minimum Demand Charges" in case of under utilization of contract - load for a period of seven years from the cut-off date.

General
(e) xx xx xx

(f) xx xx xx

(g) xx xx xx"

The Petitioner for filing this writ application have first of all assigned the reasons for not resorting to the alternative remedy by carrying an Appeal against the order passed and the Scheme sanctioned by the BIFR so far as it affects it as provided under section 25 of the SICA.

The first grounds taken in support of the same is that the order of the BIFR followed by the Scheme as sanctioned, particularly as to the reliefs and concessions with which the Petitioner is concerned which have been impugned in this writ application is without jurisdiction and has been passed in violation of the principles of natural justice and otherwise void and nonest in the eye of law. Next, it is stated

that the BIFR lacks jurisdiction to sanction the Scheme in passing the directions providing relief or concessions against the Petitioner so as to be binding on them. With the above grounds of challenge to the order passed and the Scheme sanctioned, according to the Petitioner, the writ jurisdiction of this Court is invokable.

Pursuant to the order and the Scheme that has been passed / sanctioned by the BIFR, the Opposite Party No.1 (PPL) requested the Petitioner to give the said reliefs as provided in the Scheme finally sanctioned by the BIFR in that proceeding before it. In terms of the Scheme, the Opposite Party No.1(PPL) approached the Petitioner seeking compliance of the followings:-

"(i) Refund of Rs.3,62,000/- for the period 1.4.2007 to 30.11.2007 towards the shortfall of minimum demand charges as per the following breakups:-

Actual demand for September, 2008-9390 kva

Payment made for September, 2008-11200 kva

Request for refund of differential - 1810 kva X @ Rs.200 per kva coming to Rs.3,62,000/-.

(ii) Issue exemption order in favour of the Company from the charge of minimum demand charges with effect from 1.12.2008 to 31.03.2004 in case of under utilization of contract load."

(c) It is the case of the Petitioner that the Opposite Party No.1 (PPL) had executed an agreement on 13.05.2007 with GRIDCO for availing power supply with contract demand of 14 MVA at 132 KV. It is stated that in pursuance of the distribution license issued by the Odisha Electricity Regulatory Commission (OERC) in favour of the then Central Electricity Supply Corporation (CESCO) was the consumer under CESCO which thereafter was substituted by CESU, the Petitioner. According to the agreement, there was no outstanding against the Opposite Party No.1(PPL)-consumer up to January, 2009. Therefore, receipt of letter sent by the Opposite Party No.1 caused surprise to the Petitioner as for the first time there from, it was known that such an order has been passed by the BIFR and pursuant to the same, the Scheme has been sanctioned which contained financial relief and concession from the side of CESU i.e, the Petitioner. The Petitioner claims that said order has been passed by the BIFR and the Scheme has been sanctioned without any notice to the Petitioner so as to have their say in said matters which was mandatory.

(c) In the second limb of challenge, the Petitioner claims that the Petitioner was not a State Level Financial Institution in consonance with the provisions of sub-section-(1) of section 19 of SICA, which refers to Central Government, a State Government, only Scheduled Bank or other Bank, a public Financial Institution or State Level Institution or any Institution or other Authority (any Government, Bank, Institution or other Authority) can be required by a Scheme to provide for such financial assistance.

It is, therefore, stated that the BIFR had no jurisdiction in sanctioning the Scheme of rehabilitation of concerned Sick Industry by providing financial relief or concession in the Scheme by the Petitioner, thereby placing financial burden upon the Petitioner either regarding the old, current or future dues/demand towards supply of electricity arising from the agreement in that regard.

3. The Opposite Party No.1 (PPL) in the Counter Affidavit have raised an objection as to the maintainability of the writ application on the face of the statutory provision as to Appeal as provided under section 25 of SICA as against an order of the BIPR by the person aggrieved. In reply to the non-service of notice upon the Petitioner in relation to the proceeding pending before the BIFR, relying on the letter dated 10.09.2008 of the Petitioner to the BIFR as at Annexure-4 of the writ application, it is stated therein that the Petitioner have admitted about the receipt of the notice. Having received the notice of the proceeding, a request had been made thereunder (Annexure-4) in response to that notice that it ought to be addressed to the Chief Executive Officer, of the Petitioner and not the Chairman.

According to the Opposite Party No.1 (PPL), the Petitioner thus had been served with the notice and for proper response; they had requested to address it to one of its Officers. Referring to paragraph-2 of the said letter as at Annexure-4, it has been placed that the Petitioner knew about the existence of the Scheme on 10.09.2008 and the petition averment in asserting that it was learnt on 5.1.2009 only when it was so communicated by the Opposite Party No.1(PPL) is false and untrue.

In support of their case as to the knowledge of the Petitioner about the proceeding, the Opposite Party No.1 has also relied upon the notice published in English daily, “The Indian Express” and local Odia daily “Dharitri” on 27.03.2008 under Annexures-D and E respectively. It is further stated that the case being heard by BIFR on 15.05.2008, the proceeding was circulated to all the parties including the Petitioner vide letter dated 23.05.2008. In the said letter, the next date of hearing was intimated to 05.06.2008. The BIFR’s forwarding letter dated 23.5.2008 along with the order dated 15.5.2008 have been filed under Annexure-F. It is further stated that on 05.06.2008, after hearing, the matter was again fixed to 05.08.2008. The proceeding of the BIFR again was sent to all the parties including the Petitioner on 13.06.2008 under Annexure-G. On 10.07.2007, the BIFR sent notice to all the concerned including the Petitioner intimating the next date of hearing to be 05.08.2008 for the Petitioner to do the needful. On 05.08.2008,

the BIFR heard the parties and next posted the matter to 2.9.2008. Said proceeding was also communicated to the parties including the Petitioner on 13.08.2008. In support of the same, reliance is placed upon the documents under Annexure-H and I. On 12.08.2008, the BIFR issued notice to all concerned communicating that the matter will be next heard on 2.9.2008 and accordingly on 2.9.2008, the case being heard, taking into account the suggestions etc. and considering the matter from all relevant angle; the prior circulated Scheme with some amendments was sanctioned for implementation by all concerned giving direction to the Petitioner to the extent as found mention therein. Reliance for the purpose is placed upon the documents as at Annexure-J, K/1 and K/2.

It is stated that the Petitioner had received the notice of the proceeding before the BIFR and it is not correct to state that behind the back of the Petitioner all such developments in the proceeding took place and ultimately the rehabilitation Scheme was sanctioned.

According to them, the Petitioner having chosen not to participate therein, therefore, at such belated stage cannot complain against the sanction plan.

As regard the jurisdiction of the BIFR in sanctioning the Scheme and passing directions against the Petitioner; it is stated that such a claim is fallacious. Referring to the provisions of section 19(1) of SICA, it is stated that the BIFR has all the jurisdiction to sanction the Scheme of rehabilitation and the directions/reliefs/concessions/as contained therein have the binding effect not only on the State Level Institutions but also any Authority and the Petitioner falls with the scope and ambit.

4. Mr.S.R. Panigrahi, learned Counsel for the Petitioner submitted that the final order sanctioning the Scheme for rehabilitation of a Sick Industry by the BIFR even though is appellable as per section 25 of the SICA, yet here said objection as to non-availing of alternate remedy does not merit acceptance since the challenge to the order followed by the Scheme is on the ground of non-service of notice of the proceeding upon the Petitioner and as to the lack of jurisdiction of the BIFR in directing the Petitioner to provide the reliefs/concessions having financial implications concession towards the services provided in the terms of the agreement between the Parties. He submitted that the order of the BIFR is thus nonest, void and without jurisdiction, firstly because this Petitioner was never noticed in that

proceeding before the BIFR and everything right from the beginning till the sanction of the Scheme have been made keeping the Petitioner at dark and secondly, that the BIFR had no jurisdiction to give any direction/observations in the said Sanctioned plan in so far as the reliefs/concessions to be so provided by the Petitioner arising from the contractual relationship between the Petitioner and the Opposite Party No.1 (PPL) which thus cannot bind the Petitioner. He, therefore, urged that the writ application with the prayer as advanced be allowed.

5. Mr.Asok Mohanty, learned Senior Advocate being assisted by Mr. S. Satyakam, learned Counsel for the Opposite Party No.1 submitted that on the face of the overwhelming documentary evidence on record showing service of notice of the proceeding before the BIFR upon the Petitioner from time to time; the final order in sanctioning the Scheme passed by the BIFR ought to have been questioned by carrying an Appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) as provided in section 25 of the SICA.

It was submitted that the Petitioner, without availing the right of statutory Appeal, could not have approached this Court seeking invocation of the extra ordinary jurisdiction under Article 226 of the Constitution. He, therefore, submitted that the writ application is not entertainable.

Coming to the question of jurisdiction of the BIFR in passing the direction against the Petitioner, placing the provision of section 19 of SICA, it was submitted that said ground is untenable. He, thus, submitted that the writ application is liable to be dismissed.

6. The Petitioner and the Opposite Party No.1 (PPL) have also filed their respective notes of submissions which have been taken on record.

I have perused the same.

7. The Petitioner here in this writ application has prayed quashing the letter dated 05.01.2009 (Annexure-2) issued by the Opposite Party No.1 (PPL) to the Petitioner in terms of the order dated 02.09.2008 (Annexure-2) passed by the BIFR and the sanctioned Scheme to the extent it affects the Petitioner.

The letter dated 05.01.2009 issued by the Opposite Party No.1 (PPL) is based upon the order dated 02.09.2008 passed by the BIFR. It is not in

dispute that the order like the one under Annexure-3 passed by the BIFR is appealable under section 25 of SICA and any party aggrieved by the said order within 45 days from the date of issuance of an order may prefer Appeal before the AAIFR. The AAIFR in deciding the Appeal has the power to confirm/modify or set aside the order appealed against or remand the matter to the BIFR for fresh consideration. The AAIFR has all the power to rule upon the jurisdictional aspects as are raised by the Petitioner. With the above statutory provision providing of right to Appeal to any aggrieved person which the Petitioner claims to be so, in my considered view this writ application is not entertainable. In that view of the matter, there arises no further need to address the rival contentions on merit.

However, the fact remains that this writ application being filed on 02.03.2009 on the grounds of attack to the order and sanctioned Scheme being two fold; one as to non-service of notice of the proceeding which is the mandatory requirement under the SICA and the second one is the lack of jurisdiction of BIFR to pass the directions as to financial concessions against the Petitioner has been remaining on Board since then, i.e, more than a decade. In such state of things keeping in view the grounds taken in the writ application for quashment of the order passed by the BIFR touching upon the jurisdiction of the BIFR in passing the order and sanctioning the Scheme, financially burdening the Petitioner instead of putting a halt to the proceeding in view of what has been said in proceeding para; this Court deems it apposite to address the challenges to the subject matter also on their merit.

9. Coming to the first ground of attack as to service of notice, the correspondence made by the Petitioner in response to the letter of the BIFR under Annexure-4 reveals that notice had been received by the Petitioner and it had been addressed to their Chairman. The response is to the effect that the same be addressed to Chief Executive Officer (CEO). The notice being received in the Office of the Chairman it has not been made over to the CEO for needful action as is the normal course to be followed and that having not been done, by simply posting a response indicating the proper person to be addressed, does not give a premium to the Petitioner at a belated stage to say that there was no service of notice.

Furthermore, as is seen from the documents as at Annexure-C to K series that the Petitioner was being apprised of the developments of the

proceeding before the BIFR from time to time. All these documents on record are not disputed from the side of the Petitioner and in fact these are all the records of the proceeding of the Statutory Authority. With all these above developments right from the commencement of the said proceeding till conclusion, the Petitioner having chosen not to participate in the proceeding before the BIFR, the objection as to the non-service of the notice of the proceeding in contending that the orders have been passed and the Scheme has been sanctioned behind their back, is to be whittled down.

10. In order to address the next ground of attack, it would be profitable to first place the provision of 19 of SICA which runs as under:-

> "**19. Rehabilitation by giving financial assistance:—**
>
> (1) Where the Scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the Scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution *or any institution or other authority* (any Government, bank, institution or ***other authority required by a Scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the Scheme to provide financial assistance***) to the sick industrial company.
>
> (emphasis supplied)
>
> (2) Every Scheme referred to in sub-section (1) shall be circulated to every person required by the Scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation [or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given].
>
> (3) Where in respect of any Scheme the consent referred to in sub-section (2) is given by every person required by the Scheme to provide financial assistance, the Board may, as soon as may be, sanction the Scheme and on and from the date of such sanction the Scheme shall be binding on all concerned.
>
> (3A) On the sanction of the Scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the Scheme on behalf of all financial institutions and banks concerned.

> (3B) The financial institution and the bank designated under sub-section (3A) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.]
>
> (4) Where in respect of any Scheme consent under sub-section (2) is not given by any person required by the Scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."

A close and careful reading of the above, leads to say that a Scheme as sanctioned by the BIFR may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or scarifies from the Central Government, a State Government, any Scheduled Bank or other Bank, a Public Financial Institutions or State Level Institution or any Institution or other Authority.

This 'other Authority' preceeding the bracket portion as finds mentioned in sub-section 1 of section 19 of SICA has been further clarified under the bracketed portion that it may include any Government Bank, Institution or other Authority required by a Scheme to provide for such financial assistance being then referred to as the person required by the Scheme to provide financial assistance. (emphasis supplied) The bracketed part in sub-section-1 of section-19 of the Act, after the word 'other Authority' provides greater emphasis and rather stresses upon such as not to leave any room of doubt to sit over to interpret further. The jurisdiction of the BIFR thus under the above provision is broad with the clear legislative intent as to provide all such reliefs etc. to the Sick Industry under the Scheme prevailing over all such Government, Institutions, Authorities etc. which have their contribution in some way or other as to the existence, running of the Sick Industry and rehabilitation as otherwise the whole exercise by the BIFR at the expense of time and energy of all concerned in the direction of serving the objective of the legislation would be futile rendering no result in reality.

This has been so made with the purpose of achieving the goal set forth in bringing the legislation in the public interest to succeed in reviving the Sick Industry so as to prevent loss of production, loss of employment, loss of revenue, lacking of invisible funds affecting the society at large. Any other interpretation including the one as submitted by the learned counsel for the Petitioner as to curtailment of the jurisdiction of BIFR to give direction to the Authority like Petitioner providing one of the important services to the

Sick Industry to make concession/relief/sacrifices etc. thus in my considered view would be wholly non-purposive and the effort of the BIFR in that exercise may not be wholesome with the aim of revival of the Sick Industry. Thus I find that this ground of attack has no merit and falls flat.

11. In the wake of aforesaid, this Writ Application is hereby dismissed. No order as to cost.

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2021 (II) ILR - CUT-148

D. DASH, J.

R.F.A. NO. 60 & 124 OF 2006

PARAMESWAR SAHU & ANR. ……..Appellants.
.V.
RUPESWARI SAHU & ORS. ……...Respondents.

R.F.A. NO.124 OF 2006
THE WESCO LTD. & ANR. …….. Appellants.
.V.
RUPESWARI SAHU & ORS. ……..Respondents.

WORD AND PHRASES – 'The doctrine of strict liability' – Applicability – Held, 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 of carelessness on that 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". (Para 12)

R.F.A. NO. 60 OF 2006

For Appellants : M/s. G. Mukherji, P.Mukherji, A.C. Panda, S.D.Ray, S.Sahu and S. Priyadarsani

For Respondents: M/s. Trilochan Nanda B.K. Panda, (for Respondetns.1 to 4)

M/s. Rajeet Ray, S.K. Singh, N. Hota, A. Pradhan & S. Sourav (Advocates for Respondents 6 & 7)

R.F.A. NO.124 OF 2006

For Appellants : M/s. Rajeet Ray, S.K.Singh, N. Hota, A. Pradhan & S. Saurav, (for Appellant No.1)

For Respondents : M/s. Trilochan Nanda & B.K. Panda
(Advocates for Respondetns.1 to 4)

M/s. G. Mukherji, P.Mukherji, A.C. Panda, N. Barai
& S. Patra, (for Respondent Nos. 6 & 7)

JUDGMENT Date of Hearing: 16.04.2021 Date of Judgment : 22.04.2021

D. DASH, J.

Since both these Appeals as at Item No.I and II arise out of the judgment and decree passed by the learned Additional District Judge (F.T.C.), Bolangir in Money Suit No.2/21 of 2002-03, those had been heard together for their disposal by this common judgment to be followed by the decree.

2. The Appellants in the Appeal under Item No.I are the Defendant Nos.3 and 4 in the suit whereas Respondent Nos.1 to 5 are the Plaintiffs and Respondent Nos.6 and 7 had been arraigned as Defendant Nos.1 and 2 before the Trial Court.

The Appellants in the Appeal Under Item No.II are the Defendant Nos.1 and 2 whereas the Respondents No.1 to 5 are the Plaintiffs and Respondent Nos.6 and 7 had been arraigned as the Defendant Nos.3 and 4 in the suit. The parties hereinafter for the sake of convenience and avoid confusion in brining clarity have been referred to as per their placement in the suit before the Trial Court.

3. Plaintiffs have filed the suit claiming compensation of Rs.5,75,000/- from the Defendants for the death of Balgopal Sahu by electrocution alleging that it was on account of negligence on the part of the Defendants in maintaining the electric connections and supply of electricity in the area where the unfortunate incident took place. Plaintiff No.1 is the wife and Plaintiff Nos.2 to 4 are the daughters and son whereas Plaintiff No.5 is the mother of deceased Balgopal. Plaintiff's case is that on 05.06.2001 around 11 A.M. Balgoapl saw one she calf near the bari of Defendant Nos.2 and 4 in a gasping condition struggling for life. So to save that she-calf, when he pulled it, he came in contact with live snapped electric wire. The brother of the deceased being present there, immediately disconnected the supply of electricity by cutting the line from the pole. Having sustained severe burn injuries in the said incident, the deceased was taken to hospital where he was declared dead. A criminal case had been initiated at the Police Station within whose jurisdiction the place of incident is situated. It is stated that the Defendant Nos.3 and 4 had taken unauthorized electric connection to their lift

irrigation point and that was in connivance with the local lineman working under the Defendant No.1 , i.e., The Western Electricity Supply Company in charge of that area for maintenance of the electric lines and other connections and supply of electricity. It is alleged that no such care was taken by those Defendants in properly repairing and marinating the electrical connection for supply of electricity so as to prevent any such untoward incident. So, they stated that the incident had taken place on account of negligence on the part of the Defendants, who are liable to compensate the Plaintiffs for the said death.

As per the case of the Plaintiffs, the deceased was a cultivator and also running an utensil shop at Loisingha Bus Stand and his monthly income was around Rs.6,000/- It is their case that at the time of the death, he was aged about 40 years. He died leaving these Plaintiffs as his legal heirs, who are all his dependants.

4. The Defendant Nos.1 to 2 in their written statement denied the factum of death of Balgopal by coming in contact with snapped live electric wire. It is their case that Defendant Nos.3 and 4 had taken unauthorized electric connection to their Lift Irrigation Point in connivance with the local Lineman working under them and, therefore, the burden as to payment of compensation to the Plaintiffs, if any, is upon those Defendant Nos.3 and 4. They have also challenged the age and income of the deceased as pleaded in the plaint.

5. Defendant Nos.3 and 4 while traversing the plaint averments have stated that Balgopal had not died by coming into contact with the snapped live electric wire. They claimed to have never taken any unauthorized electric connection by drawing line to their Lift Irrigation Point. Thus, it is said that they had absolutely no involvement in the said incident.

6. On the above rival pleadings, the Trial Court has framed in total five issues. Answering Issue Nos.2 and 3, which are crucial as to the cause of death of Balgopal and the negligence of the Defendants in the matter of resulting the death of Balgopal as alleged, on detail analysis of evidence on record in the backdrop of the pleadings, the Trial Court has recorded the answers on those two issues in favour of the Plaintiffs and against the Defendants.

Next taking up the exercise as to determination of quantum of compensation payable for the death of Balgopal, holding the age of the deceased to be 40 years and on assessment of evidence having found the income of the deceased to be Rs.1500/- per month by deducing 1/3rd thereform towards the personal expenses of the deceased, it has assessed the compensation payable at Rs.1,75,000/-.

The Trial Court has then held that the Defendant Nos.1 and 2 jointly on one hand and the Defendant Nos.3 and 4on the other are to share equally in paying the compensation. With that, in the ordering portion however all the Defendants have been directed as jointly liable to pay the compensation of Rs.1,75,000/- with interest @ 6% from the date
of institution of the Suit till realization.

7. The above being the result of the Suit, the Defendant Nos.3 and 4 have filed the Appeal under Item No.I before this Court in questioning the saddling of the liability as to payment of compensation being fixed on them to the extent of fifty percent i.e. Rs.87,500/-. Similarly, the Defendant Nos.1 and 2 have filed the Appeal under Item No.II in assailing the judgment and decree passed by the Trial Court in holding their negligence in the incident as also their liability to pay the compensation to that extent of fifty percent i.e. Rs.87,500/-.

I have heard Mr.Gautam Mukherji, learned Senior Counsel for the Defendant Nos. 3 and 4. Mr. Trilochan Nanda, learned Counsel for the Plaintiffs advanced his submission.

Mr. S. Saurav, on behalf of Mr. Rajeet Ray, learned Counsel for the Defendant Nos. 1 and 2 was heard at great length.

8. Mr. Mukherji, learned Senior Counsel for the Defendant Nos.3 and 4 during hearing has confined his submission as to the liability of the Defendant Nos.3 and 4 in the matter of payment of compensation. In support of the said contention, he has invited the attention of this Court to Paragraph-4 of the written statement filed by the Defendant Nos.1 an 2 as also the evidence of D.W. 1, who is the Junior Engineer, Electrical, Loisingha, in charge for the area during the relevant period. Placing critical analysis of said evidence in the touchstone of the pleadings, he contended that there can be no finding that Defendant Nos.3 and 4 had taken the electric connection to their Lift Irrigation Point (LI point) unauthorizedly and, therefore, they being bona

fide consumers under Defendant Nos.1 and 2 and had been paying the electricity charges; they had nothing to do with the maintenance of the electric wires and other accessories as to the supply of the electricity to their LI Point which is solely within the domain of Defendant Nos.1 and 2. He thus submitted that the Defendant Nos.3 and 4 ought not to have been saddled with any such liability as to payment of compensation to the Plaintiffs on account of death of Balgopal. He submitted that although the Trial Court was cognizant of all these evidence on record has ultimately fallen in error by holding that these Defendant Nos.3 and 4 are liable to pay half of the determined compensation and the reason so assigned on the score is unacceptable being based on mere conjunctures and surmises. He submitted that here is a case where the Trial Court ought to have exonerated the Defendant Nos.3 and 4 in the matter of payment of compensation.

9. Mr. S. Saurav, learned counsel on behalf of Defendant Nos. 1 and 2 contended that the evidence on record being wholly insufficient for arriving at a conclusion as to the negligence on the part of the employees of the Defendant Nos.1 and 2 in maintaining the electric lines and supply of electricity and as no nexus between that and the death of the deceased has been established, further when the incident has taken place near the LI Point of Defendant Nos.3 and 4, the Trial Court committed grave error in saddling the liability of compensation to the extent as indicated upon these Defendant Nos.1 and 2 and the liability in the matter if any ought to have been saddled entirety upon the shoulder of the Defendant Nos. 3 and 4. He also submitted that the determination of the quantum of compensation is not based on proper appreciation of evidence on record.

10. Mr. Trilochan Nanda, learned counsel for the Plaintiffs submitted all in favour of the findings recorded by the Trial Court in holding the Defendants liable to pay the compensation on account of death of Balgopal for their negligence which has resulted the death of Balgoapl. He also submitted that the determination of compensation is just and proper.

11. In order to address the above submissions, I have carefully perused the judgment of Trial Court and have read the evidence of four P.Ws. (P.W.1 to 4) examined on behalf of Plaintiffs, one D.W. (D.W.1) examined from the side of Defendant Nos.1 and 2 as well as the two D.Ws. examined on behalf of the Defendant Nos.3 and 4. The documents admitted in evidence and marked Exts.1 to 6 from the side of the Plaintiffs and Exts.A to C on behalf of the Defendants have been also glanced at.

The death of Balgopal on account of electrocution is found to have been amply proved not only through oral evidence but also through the documents such as Post Mortem Report, the F.I.R. and the charge-sheet of G.R. Case No.71 of 2001 marked Exts.1 to 3. D.W.1 the Junior ngineer, Electrical, Loisingha at the relevant point of time was in charge of the area where the incident took place. He has clearly stated that the Defendant Nos.3 and 4 have not taken electric line to their Lift Irrigation Point unauthorisedly and he never received any report/complain to that effect either from their staff in charge of taking care as to the maintenance of the electrical lines and other accessories in the matter of supply of electricity to the consumers in that area and thus was not in know of things about such unauthorized connection. He has assertively stated on oath to have not known if Defendant Nos.3 and 4 were running their Lift Irrigation Point through any unauthorised line being taken for the purpose in connivance with the Lineman. Therefore, the Trial Court is right in holding that the evidence of D.W.1 shows that the Defendant Nos.3 and 4 are bona fide consumers under Defendant No.1. The electric bills marked Exts.A and B indicate the demand of outstanding dues of electricity charges for payment by Defendant Nos.3 and 4 and Ext. A/1 is the receipt dated 08.06.2021 which shows payment of part electricity dues and its receipt which the Defendant No.2 has proved oath in the Trial. As per the evidence of D.W.2 the electrical connection had been taken in the year 1988 to that Lift Irrigation Point. In view of such evidence on record, the Defendant Nos.3 and 4 cannot be said to have been unauthorizedly using the electricity for running their Lift Irrigation Point. The non-payment of electricity charges as per the demand of Defendant Nos.1 and 2 cannot place the Defendant Nos.3 and 4 as to have taken the electric connection unauthorisedly. With such evidence on record for the reason that for a long time the electricity dues has not been paid with the evidence of D.W.1 that he has not received the report relating to the unauthorized user of electricity by Defendant Nos.3 and 4 for running the Lift Irrigation Point the view establish a case that the Defendant Nos.3 and 4 are unauthorized consumer cannot be sustained. Even accepting the evidence that the deceased seeing the she-calf struggling for life had pulled it to save it from death; the same being the natural instinct of every human sensitive at that moment and being, under the circumstances, can neither be taken to be an adventurous or negligent act on the part of the deceased. Thus, the evidence on record show that the deceased died due to electrocution and the electric line was the line which was connecting from the pole to the Lift Irrigation point of Defendant Nos.3 and 4, the maintenance of the said live electric wire and the supply of the

electricity was within the domain of the employees of Defendant Nos.1 and 2 who were deployed in the area for the purpose. It being not born out from the evidence that it is the deceased who was responsible in bringing down the overhead electric wire which came in contact with the she-calf which was struggling for life, he cannot be attributed with any negligence in the matter to say that he had contributed to that incident.

12. With the above discussion of evidence, the settled principles of law holding the field now need to be touched upon.

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 of carelessness on that 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:

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 unforceable 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 decisiosn 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 Gujurat State Road Transport Corporation V. Ramanbhai Prabhatbhaim, 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.

13. 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 23.08.1997 riding on a bicycle. There was rain and hence the road was partially inundated with water. The cycle did not notice

the live were on the road and hence he rode the vehicle over the wire which twitched and snatched him and he was instantaneously electrocuted. He fall 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 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 mangers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live were 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 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 others 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 Erie, 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 to 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 plaintiffs 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."

14. The discussion of evidence in the forgoing paragraph 10 being tested in the touchstone of the above principles of law holding the field, this Court finds no hesitation in holding the Defendant Nos.1 and 2 as liable to pay the compensation to the Plaintiffs for the death of Balgopal. The Trial Court's finding as well as the answer and order to the said extent as to the saddling of liability in the matter of payment of compensation upon Defendant Nos.3 and 4 thus cannot be sustained and is liable to be set aside which is hereby done.

The evidence on record being examined, it is seen that the Trial Court having made elaborate discussion of evidence has arrived at the finding as regards the monthly income and the age of the deceased at the time of death. No such material is found to be surfacing to conclude that those conclusions are the outcome of improper appreciation of evidence. Those conclusions are accordingly held to be well in order. The determination of compensation payable to the Plaintiffs on account of death of Balgopal is also found to be based on proper evaluation of the facts and circumstances emanating from the evidence on record and thus free from any such infirmity warranting redetermination in this Appeal.

15. In the wake of aforesaid, the judgment and decree passed by the Trial Court stand modified only to the extent that the Defendant Nos. 1 and 2 are liable to pay the compensation as has been determined with the stipulation as to the interest to the Plaintiffs.

The First Appeals under Item Nos.I and II are accordingly disposed of. However, there shall be no order as to costs.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the 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.

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2021 (II) ILR - CUT- 157

BISWANATH RATH, J.

TRP(C) NO.179 OF 2020

ANISHA JAIN ....Petitioner

.V.

SANDEEP JAIN ....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – Transfer of case from Sambalpur to Bhawanipatna – Husband filed divorced petition before family court Sambalpur – Wife with four year kid resides at Kesinga, about 300 kms away from Sambalpur – Petition considered and keeping in view the inconvenience that may be faced by wife because of the distance, the case was transferred to Family court Bhawanipatna.

Case Laws Relied on and Referred to :-

1. (2005) 11 SCC 535 : Preeti Sharma Vs. Manjit Sharma.
2. (Civil) No.2401 of 2017 Sumit Kaur Vs. Gurvinder Singh.
3. (2006) 9 SCC 197 : Anindita Das Vs. Srijit Das.

For Petitioner : M/s.M.Chand, R.R.Mishra & K.Manshingh
For Opp.Party : M/s.S.K.Acharya, S.Pholgu, K.Jethi, R.P.Mohapatra, M.Swain, A.K.Dey & S.Mohapatra.

JUDGMENT Date of Hearing & Judgment :10.03.2021

BISWANATH RATH, J.

This is a Petition at the instance of the Wife, who is deserted and unemployed, under Section 24 read with 151 of the Civil Procedure Code seeking transfer of C.P. Case No.87 of 2020 pending on the file of Family Court, Sambalpur to the Family Court, Bhawanipatna at Kalahandi.

2. Background involving the case is that both the parties entered into marriage on 23.1.2011 at Durga Mangalam in the district of Sambalpur according to Hindu Rites and Customs. Wife pleaded that during marriage following demand by the Opposite Party and his family members, cash worth of Rs.4.00 lakh towards principal dowry, Rs.2.00 lakh towards purchase of dress materials for all family members, gold chain etc. besides a further sum of Rs.2.00 lakh towards household articles and other utensils was also given to them. It is asserted that there was financial assistance to the Husband on different occasions. While both Husband and Wife continuing as such, they were blessed with a male child on 3.9.2016. It is alleged that to satisfy the greediness of the Opposite Party, the father of the Petitioner has given gold ornament of 55 Grams and cash of Rs.50,000/- for dress materials for the Husband and his family members. Through Paragraph-6 of the Transfer Petition, it is alleged that the reason unknown to the Wife, at the instance of the mother-in-law of the Petitioner, the Opposite Party started abusing the Petitioner on the premises of not bringing further dowry of Rs.20.00 lakh. There was also taking place assault on her in many of the nights. When the Wife took up the issue with her parents and other relatives, attempts were taken to sort out by holding meetings, which ended in strange proposal intimating that the Husband was not interested to lead life with the Wife and a request was made to hand over the son staying with her. In the meantime, on reaching consensus, a written agreement was executed endorsing not to ill-treat or torture the Petitioner resulting in joining with the Husband at Sambalpur. Unfortunately on 23.4.2020 for trifle issue the Petitioner was again severely assaulted by her Husband, Mother-in-law, Brother-in-law and Sister-in-law combinedly to take away the life of the Petitioner. It is alleged that there was no medical treatment given to her. It is at this stage, brother of the Petitioner somehow reached the house of the Husband and requested the Husband to leave the Petitioner to her parents' house. Though it was not agreed at the initial stage but on condition to sign on blank paper, she was allowed to go back to her parents' house with her son.

3. In the meantime, finding no resolution to the dispute between the Parties and Husband not showing any interest towards the Wife, surprisingly the Husband filed a Petition under Section 13(1)(ia) of the Hindu Marriage Act before the Family Court, Sambalpur praying for decree of divorce, vide C.P. Case No.87 of 2020. Summons being issued for appearance and to file show cause, the Case was posted to 25.11.2020 for appearance and filing Written Statement. Under the premises that the Petitioner being deserted by

the Husband since was residing with her parents at Kesinga in the district of Kalahandi, almost three hundred kilometers away Sambalpur where the litigation was initiated and for no income of the Petitioner, she became unable to conduct her case at Sambalpur resulting in filing the present Case for transfer of the Civil Proceeding from Sambalpur to the Family Court, Bhawanipatna, which is situated 25 kilometres away from the parental residence of the Petitioner.

4. Sri M.Chand, learned counsel for the Petitioner referring to the pleadings herein submitted that the Petitioner is not only a deserted wife but also having no income to conduct the case at Sambalpur, which is 300 kilometers away from Kesinga, the Petitioner-Wife is also having a small child of four years in her custody. In these premises, Sri Chand submitted that it is impossible on the part of the Wife to attend the Court at Sambalpur at the distance of 300 kilometers and thus prayed for transfer of the Civil Proceeding to Bhawanipatna.

5. In response to notice, counter affidavit has been filed by the Husband denying the allegations in Paragraphs-3 to 7. There is also an attempt to take help of some of the decisions of the Hon'ble Supreme Court in ***Preeti Sharma vrs. Manjit Sharma*** **: (2005) 11 SCC 535,** ***Sumit Kaur vrs. Gurvinder Singh*** *:* Transfer Petition (Civil) No.2401 of 2017 and ***Anindita Das vrs. Srijit Das*** **: (2006) 9 SCC 197** to block the transfer of the Civil Proceeding. In the counter, the Husband has also attempted to demonstrate that the Wife is an employed one. To satisfy such allegation, the Husband also filed certain documents appearing to be Income Tax assessment for different years involving the Wife.

Sri S.K. Acharya, learned counsel for the Opposite Party reiterated the plea taken in the counter affidavit of the Husband in a frantic endeavour at least for transfer of the Civil Proceeding to a third place to avoid risk to the Husband. It is also alleged that for the Opposite Party likely to face life risk and has to attend the Court at a distance place leaving his elderly parents, made, an endeavour may be made to at least transfer of the Civil Proceeding to a middle place. Sri Acharya, learned counsel for the Husband submitted that the Husband is agreeable for meeting with the required expenses of the Wife for attending the Court at Sambalpur.

6. This Court first made an endeavour to have a consented place for continuance of the litigation to avoid any inconvenience to either side, which

failed. This Court accordingly proceeded to decide on the request of the Petitioner. Taking into consideration the rival contentions of the Parties, this Court finds, there is no dispute with regard to marriage between the Parties as well as their relationship as Husband and Wife. From Section 13 Petition at the instance of the Husband-Opposite Party bearing C.P. Case No.87 of 2020 on the file of Family Court, Sambalpur, this Court finds, this is a Petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955. The Husband has also made an allegation in the Section 13 Petition that the Petitioner-Wife used to quarrel with the Husband in silly matters and was refusing to take care of his old parents. On the own submission of the Husband in the Civil Proceeding, the wife being deserted is admittedly residing in her parents' house under Kesinga Police Station in the district of Kalahandi, which is 25 kilometers away from Bhawanipatna. Husband in his attempt to serve the notice in the Civil Proceeding has given the address of the Wife at P.S.-Kesinga, Dist.-Kalahandi. Therefore, it remains undisputed that the Wife is leading a deserted life even assuming the Income Tax Return, the Tax Return even does not show the income at reasonable time. The Wife is also living with her four years minor child that too in her parental residence, whereas the Husband is an able-bodied man. There is also no dispute that there is long distance between Sambalpur and Kesinga. It is at this stage, taking into account the Wife's travelling to attend the case with her minor child at Sambalpur, she is to cover minimum a distance of 500 kilometers up and down, it is not a matter of single day affair. Again the Wife is also required to take shelter somewhere in the litigation place at Sambalpur to attend the Court in the first hour of the fixed date. Looking to the distance she is required to cover, this Court here finds, there is already a suggestion by the learned counsel for the Husband at least to bring the case to a third place at Bolangir, which is at a distance of 100 kilometers plus from Husband's side and 150 kilometers from Wife's side. Therefore, there is no resistance for shifting of the case from Sambalpur by the Husband. If the Husband is already prepared to move 100 kilometers plus for a middle place, there cannot be any difficulty for the Husband's moving for another 100 kilometers. Looking to the distance from Kesinga to Sambalpur even accepting the plea of the learned counsel for the Opposite Party undertaking the travelling expenses for at least 250 kilometers, even if the Wife starts at 6.30 A.M. morning, she will not be in a position to reach the destination by the start of the Court. In such event, a person has to proceed on the previous day and take shelter in a hotel, which may not be also that easy on the part of a deserted wife, also keeping in view the law and order situation involving a woman presently.

7. This Court here taking into consideration the citations, vide (205) 11 SCC 535 finds, the proceeding therein involves Section 9 of the Hindu Marriage Act, whereas the case at hand involves Section 13 of the Act, which will take several proceedings for concluding such dispute. Therefore, the citation does not fit to the case at hand. Again for different factual position, the citations, vide (2006) 9 SCC 197 and (2004) 13 SCC 411, do not apply to the case at hand.

8. In the circumstance, looking to the position of Parties and the discussions herein above, for the better interest of the Parties, it is better if the C.P.Case No.87 of 2020 gets transferred to the Family Court, Bhawanipatna with target for disposal of the Proceeding within a time frame.

In this view of the matter, this Court while acceding to the prayer of the Wife allows the Transfer Petition thereby directing transfer of C.P.Case No.87 of 2020 from the Family Court, Sambalpur to the Family Court, Bhawanipatna. For transferring the matter keeping in view the request of the Petitioner-Wife, this Court restrains both the Husband and Wife from taking unnecessary adjournments in the Proceeding before the Family Court, Bhawanipatna. The Case Records involving C.P. Case No.87 of 2020 may be transmitted to the Family Court, Bhawanipatna, within one week from the date of receipt of this order. The Petitioner is directed to file requisites for communication of this order to the Family Court, Sambalpur and process, if any, within three working days.

9. Considering the further request of Sri S.K.Acharya, learned counsel for the Opposite Party, on the threat on Husband, in the event he is directed to attend the Court at Bhawanipatna, this Court while observing that the Case is taken up at a third place and completely away from both Husband's and Wife's residence and there is no foundation in the allegation of threat on Husband, this Court, however, permits the Husband in the event of any threat perception in continuation of the Proceeding on the Husband, it will be open to the Husband to file appropriate application seeking police protection for consideration of the Family Court, Bhawanipatna.

10. On the Case Records being received, the Family Court, Bhawanipatna shall first undertake the exercise of conciliation at least for two dates and if conciliation fails, to complete entire exercise involving C.P.Case No.87 of 2020 within a further period of four months.

11. The TRP(C) succeeds. No cost.

2021 (II) ILR - CUT- 162

BISWANATH RATH, J.

MACA NOS. 593 & 774 OF 2016

S. DIVYA & ORS. …….Appellant

.V.

P.RAMALINGESWAR RAO & ANR. ….....Respondents

MOTOR VEHICLES ACT, 1988 – Section 173 – Appeals filed by both, the claimant and Insurance Company – When Claimants claim increase in the compensation on the head of consortium, litigation expenses and loss of estate, the Insurance Company claims interference in the award, firstly on the ground of high grant of compensation on future loss aspect and also on the ground of mode of calculation by the Tribunal taking into consideration the salary and expenditure on the family members by the deceased and illegal inclusion of certain amount should have been excluded, further on the ground that the Tribunal has not taken into account the fact that Wife of the deceased getting into a compassionate appointment – All the pleas considered with reference to the settled laws reported in several judgments of the apex court – Both the appeals dismissed. (Para 21)

Case Laws Relied on and Referred to :-

1. AIR 2018 SC 5034 : Sebastiani Lakra & Ors. Vs. National Insurance Company Ltd. & Anr.
2. 2013(3) TAC 6 (SC) : Vimal Kanwar & Ors. Vs. Kishore Dan & Ors.
3. (2016) 9 SCC 627 : Reliance General Insurance Company Ltd. Vs. Shashi Sharma & Ors.
4. (2017) 13 SCC 547 : National Insurance Company Ltd. Vs. Rekhaben & Ors.
5. (2019) 17 SCC 465 : Sebastiani Lakra & Ors Vs. National Insurance Company Ltd. & Anr.
6. (2017) 16 SCC 680 : National Insurance Company Vs. Pranaya Sethi & Ors.
7. (2020) 9 SCC 644 : New India Assurance Company Vs. Somwati & Ors.
8. 2014(1) TAC 369 (SC) : Syed Sadiq, etc. Vs. Divisional Manager, United India Insurance Co.
9. (1999) 1 SCC 90 : Helen C. Rebello (Mrs.) & Ors. Vs. Maharashtra State Road Transport Corporation & Anr.
10. (2020) 11 SCC 356 : National Insurance Company Ltd. Vs. Birender & Ors.
11. 2020 SCC Online SC 601 : Erudhaya Priya Vs. State Express Transport Corporation Ltd.

IN MACA NO.593/2016

For Appellants : M/s.K.K.Das & P.K.Pradhan

For Respondent No.1 : None

For Respondent No.2 : M/s.G.Mishra, Sr.Adv, D.K.Patra, A.Dash, J.Biswal & J.R.Deo

IN MACA NO.774/2016

NATIONAL INSURANCE COMPANY LTD. & ORS. ……… Appellant

.V.

S. DIVYA & ORS. ………Respondents

For Appellant : M/s.G.Mishra, Sr.Adv, D.K.Patra, A.Dash, J.Biswal & J.R.Deo

For Respondent Nos.1 to 4 : M/s.K.K.Das & P.K.Pradhan

For Respondent No.5 : None

JUDGMENT Date of Hearing : 19.03.2021 & Date of Judgment : 05.04.2021

BISWANATH RATH, J.

MACA No.593 of 2016 is at the instance of the Claimants seeking enhancement of the award amount involving judgment in MAC No.113 of 2011, whereas MACA No.774 of 2016 is at the instance of the Insurance Company involved herein involving the same judgment involving both computation aspect as well as calculation of future prospects.

2. For the common facts involving both the Appeals, on single hearing of both sides further on consent of both learned counsel for the Parties, the same are decided by this common judgment.

3. Background involving the case is that the Claimants being the legal heirs claimed compensation to the tune of Rs.32,00,000/- on account of death of the deceased on a vehicular accident caused by the offending Truck bearing Regn. No.AP-05-TT- 5665 on 15.12.2010 on N.H.5 in the Balugaon Bazaar. The Claimants further pleaded that on 15.12.2010 at about 8 P.M. when the deceased was proceeding to perform his duty by a bicycle on left side of the road near Balugaon Bazaar on N.H.5 the offending Truck came in high speed also in rash and negligent manner and dashed against the deceased from his backside. Said vehicle ran over him resulting death of the deceased at the spot itself. Postmortem was also conducted. There is material that the cause of death was accident. On the premises that the deceased was hardly 39 years of age and being engaged as a Technician, Grade-I (Elect/Traction Distribution) under the East Coast Railways, Khurda Road and was earning salary of Rs.24,315/- per month at the relevant point of time, the claim petition was put up claiming Rs.32,00,000/-. The Owner of the registered vehicle did not contest the proceeding and set ex parte. Opposite Party No.2, the Insurance Company therein contested the case by filing objection and asking the Claimants to prove the case through documents. The Insurance

Company also contested the case on the premises that they are not liable to pay compensation.

4. Based on the pleading, the Tribunal framed the following Issues :-

I) Whether due to rash and (or) negligent driving of the driver of the offending vehicle bearing registration no.AP-05-TT-5665 the accident took place and in that accident the deceased, Late S.Jagadeswara Achary, succumbed to injuries ?

II) Whether the petitioners are entitled to get the compensation. If so, what would be the extent ?

III) Whether both the Opposite Parties or either of them are/is liable to pay the compensation ? and

IV) To what relief(s), if any, the petitioners are entitled to ?"

5. The Claimants to satisfy their case examined two witnesses. Opposite Party No.2 examined none. Claimants exhibited Exts.1 to 18 to support their case, whereas the Insurance Company, Opposite Party No.2 therein exhibited Exts.A to F. Based on the pleading, the evidence as well as the material support and the submissions of both the Claimants and the Insurance Company, the 1st Additional District Judge-cum-1st M.A.C.T., Cuttack (herein after called as "Tribunal") after holding all the Issues in favour of the Claimants allowed the Claim Case ex parte against Opposite Party No.1 therein and on contest against Opposite Party No.2, the Appellant herein thereby directing the Insurance Company to pay compensation of Rs.49,83,355/- with simple interest @ 7% per annum with effect from the date of filing of the claim application, i.e., 5.3.2011 along with cost of Rs.1000/-, however giving right to recover from the registered owner of the offending vehicle.

In the said order, the Tribunal also adopted a pattern to utilize the compensation amount in a manner keeping in view the best interest of the Claimants. It is needless to submit here answering Issue Nos.II to IV, the Tribunal has come to hold that there was valid insurance covering the accident but there remains a doubt on the validity of the Driving Licence on the date of accident for non-cooperation of the Driver and thus the direction also contained a scope for right to recovery.

6. Contesting the judgment, the Insurance Company assailed the judgment primarily on the question of quantum and has taken the following ground :

"C. For that the quantum of compensation has been computed on the basis of monthly salary of deceased of Rs.24,115/- (excluding P.T. of Rs.200/-) by completely ignoring that the said gross salary includes certain allowances amounting to Rs.4,600/- per month like transport allowances, travelling allowance etc. which are purely personal in nature and not meant for the benefit of family of the deceased. Thus, the learned tribunal failed to take into account the aforesaid aspect and as such the impugned award deserves to be modified.

D. For that the learned Court below failed to appreciate Indira Srivastava's case and has illegally taken into account the perks of the deceased while awarding a bonanza in favour of the claimant.

F. For that since there is absolutely no evidence to show that the deceased had any permanent job/occupation and fixed income, the decision of the learned Tribunal to make further addition of 50% to the income on the head of future prospects is erroneous and not in consonance with the settled position of law and as such the impugned award is liable to be set aside. G. For that the learned court below failed to appreciate that the wife of the deceased has subsequently got compassionate appointment in a similar post and thus the awarded amount is liable to be substantially reduced keeping in mind the decision in the case of Vimal Kanwar.

H. For that the learned tribunal failed to appreciate that compensation awarded must be reasonable compensation and the same should not be a bonanza in favour of the claimants. In the instant case the compensation awarded is grossly high and thus the impugned award is liable to be set aside. The Hon'ble Supreme Court in the case of **State of Haryana V. Jasbir Kaur** reported in (2003) 7 SCC 484 has held that compensation awarded should not be a bonanza."

7. Similarly Claimants in their Appeal for enhancement of the compensation on different score alleged that the Tribunal committed error in not granting compensation on the head of loss of estate and took help of the decision of the Hon'ble apex Court in 2015 (1) TAC 337. Through Ground No.III, the claimants taking support of the decision in 2015(1) TAC 673 SC, 2013(3) TAC 697 SC etc. again claimed on the head of loss of love and affection. Through Ground No.IV, the Claimants also claimed towards loss of consortium of Rs.1,00,000/-. The Claimants also taking reference to the decisions of the Hon'ble apex Court in 2014 (I) TAC 369 SC and 2014(I) TAC 727 contended that the Tribunal also failed in not granting cost of litigation.

8. Advancing his submission, Sri G.Mishra, learned senior counsel for the Insurance Company taking this Court to Ground Nos.C, F & H attempted to take help of the decisions of the Hon'ble apex Court in ***Sebastiani Lakra***

& others vrs. National Insurance Company Ltd. & another : AIR 2018 SC 5034. Taking this Court to Paragraph-21 of the said decision, Sri Mishra, learned senior counsel claimed that there should be at least some deduction on the head of future prospects taking into account the high rate of compensation already granted by the Tribunal and further taking into consideration the development during pendency of the Case to the effect that during pendency of the Case, Wife of the deceased has been provided with an appointment under the Rehabilitation Assistance Scheme. Sri Mishra, learned senior counsel, therefore contended that the fact of future gain to the family on account of death of the deceased by way of service should have also been kept in mind of the Tribunal while granting compensation and future prospects. It is in this view of the matter, Sri Mishra prayed for interference in the impugned award in respect of compensation as well as future prospects and the award should be modified accordingly.

9. Similarly, while opposing the contention of Sri G.Misra, learned senior counsel for the Appellant on the head of future prospects and took help of some decisions of Hon'ble apex Court in ***Vimal Kanwar & Others vrs. Kishore Dan & Others*** : 2013(3) TAC 6 (SC) (Paragraph-20), ***Reliance General Insurance Company Ltd. vrs. Shashi Sharma & Others*** : (2016) 9 SCC 627, ***National Insurance Company Ltd. vrs. Rekhaben & Others*** : (2017) 13 SCC 547 (Paragraphs-22 & 23) and also took aid of the decision in ***Sebastiani Lakra & Others vrs. National Insurance Company Ltd. & another*** : (2019) 17 SCC 465 (Paragraphs-12 to 18), Sri K.K.Das, learned counsel for the Claimants on reiteration of the Grounds as indicated herein above in the Claimants' Appeal bearing MACA No.593 of 2016 contested the impugned judgment on the premises that widow's compassionate appointment and getting salary/some benefits on the death of her husband not to be deducted from gross income while calculating compensation. Similarly on the challenge of the Insurance Company on the aspect of future prospects taking aid of the decision of the Hon'ble apex Court in ***National Insurance Company vrs. Pranaya Sethi & Others*** : (2017) 16 SCC 680 (Paragraph-59.3), Sri Das, learned counsel for the Claimants submitted that there is just consideration by the Tribunal and such judgment should not be interfered with. Coming to claimants' Appeal making a claim on account of consortium taking help of a decision of the Hon'ble apex Court in ***New India Assurance Company vs. Somwati & Others*** : (2020) 9 SCC 644 (Paragraphs-40 & 41), Sri Das, learned counsel for the Claimants attempted to justify his claim on loss of consortium. Taking help of the decision in ***Syed Sadiq, etc. vrs.***

Divisional Manager, United India Insurance Co.: 2014(1) TAC 369 (SC) (Paragraph-18), Sri Das also attempted to justify his claim on litigation expenses. It is in the above legal positions, Sri Das attempted to justify the balance claim of the Claimants and also to satisfy that there is no legality in the claim of the Insurance Company, and thus contended on interfering with the impugned award, this Court should only increase and or grant the compensation on the above head in favour of the Claimants.

10. Considering the rival contentions of the Parties, this Court finds, there is no dispute with regard to the accident causing death of the deceased. There is also no dispute with regard to the wage aspect involving the deceased, further there also remains no dispute with regard to the offending vehicle causing accident resulting in death of the deceased and the offending vehicle has the valid Insurance at the time of accident. The Claimants side when claiming increase in the compensation on the head of consortium, litigation expenses and loss of estate, the Insurance Company is claiming interference in the award, firstly on the ground of high grant of compensation on future loss aspect and also on the ground of mode of calculation by the Tribunal taking into consideration the salary and expenditure on the family members by the deceased and illegal inclusion of certain amount should have been excluded, further on the ground that the Tribunal has not taken into account the fact of Wife of the deceased getting into a compassionate appointment, particularly through Ground No.G. Here the Insurance Company against Ground No.G is also taking help of the decision in *Vimal Kanwar*(supra).

At this stage, taking into consideration the citations cited at bar by both the sides, this Court finds the Hon'ble apex Court in the case of ***Helen C. Rebello (Mrs.) and others v. Maharashtra State Road Transport Corporation & Anr.***: (1999) 1 SCC 90, while dealing with the concept of pecuniary advantage, the Hon'ble apex Court has come to hold that Provident Fund, Pension, Insurance and similarly any cash, bank balance, shares, fixed deposits etc. are all a "pecuniary advantage" receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction. This Court takes into account paragraph-35 of the aforesaid judgment, which reads as herein below :

"35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event viz., accident which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No co-relation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which insured contributes in the form of premium. It is receivable even by the insured, if he lives till maturity after paying all the premiums, in the case of death insurer indemnifies to pay the sum to the heirs, again in terms of the contracts for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any case, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no co-relation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction. When we seek the principle of loss and gain, it has to be on similar and same plane having nexus inter so between them and not to which, there is no semblance of any co-relation. The insured (deceased) contributes his own money for which he receives the amount has no co-relation to the compensation computed as against tort feasor for his negligence on account of accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury of death without making any contribution towards it then how can fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act, he receives without any contribution. As we have said the compensation payable under the Motor Vehicles Act is statutory while the amount received under the life insurance policy is contractual."

11. Similarly, in the case of *Vimal Kanwar* (supra), through paragraphs-20 and 29 to 33, the Hon'ble apex Court held that:

"20. The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction".

"Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the service leaving behind the dependents, one of the dependents may request for compassionate appointment to maintain the family of the deceased employee dies in harness. This cannot be stated

to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependents may be entitled for compassionate appointment but that cannot be termed as "Pecuniary Advantage" that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor vehicles Act.

29. Admittedly, the date of birth of deceased Sajjan Singh being 1st February, 1968; the submission that he would have continued in service up to 1st February, 2026, if 58 years is the age of retirement or 1st February, 2028, if 60 years is the age of retirement is accepted. He was only 28 years 7½ months old at the time of death. In normal course, he would have served the State Government minimum for about 30 years. Even if we do not take into consideration the future prospect of promotion which the deceased was otherwise entitled and the actual pay revisions taken effect from 1st January, 1996 and 1st January, 2006, it cannot be denied that the pay of the deceased would have doubled if he would continued in services of the State till the date of retirement. Hence, this was a fit case in which 100% increase in the future income of the deceased have been allowed by the Tribunal and the High Court, which they failed to do.

30. Having regard to the facts and evidence on record, we estimate the monthly income of the deceased Sajjan Singh at Rs.9,000 × 2 = Rs.18,000/- per month. From this his personal living expenses, which should be ⅓rd, there being three dependants has to be deducted. Thereby, the 'actual salary' will come to Rs.18,000/– - Rs.6,000/- = Rs.12,000/- per month or Rs.12,000/- × 12 = Rs.1,44,000/- per annum. As the deceased was 28½ years old at the time of death the multiplier of 17 is applied, which is appropriate to the age of the deceased. The normal compensation would then work out to be Rs 1,44,000/- × 17 = Rs.24,48,000/- to which we add the usual award for loss of consortium and loss of the estate by providing a conventional sum of Rs.1,00,000/-; loss of love and affection for the daughter Rs.2,00,000/-, loss of love and affection for the widow and the mother at Rs.1,00,000/- each i.e. Rs.2,00,000/- and funeral expenses of Rs.25,000/-.

31. Thus, according to us, in all a sum of Rs.29,73,000/- would be a fair, just and reasonable award in the circumstances of this case.

32. The rate of interest of 12% is allowed from the date of the petition filed before the Tribunal till payment is made.

33. RespondentNo.3 is directed to pay the total award with interest minus the amount (if already paid) within three months. The appellant No.2 daughter who was aged about 2 years at the time of accident of the deceased has already attained majority; money may be required for her education and marriage. In the

circumstances, we direct respondent No.3 to deposit 25% of the due amount in the account of appellant No.1 the wife. Out of the rest 75% of the due amount, 35% of the amount be invested in a Nationalized Bank by fixed deposit for a period of one year n the name of the daughter-appellant No.2. Out of the rest 40% of the due amount, 20% each be invested in a Nationalized Bank by fixed deposit for a period of one year in the name of the appellant Nos.1 and 3, the wife and the mother respectively."

It is apt to note here that this decision is also already reported in (2013) 7 SCC 476.

12. In the case of *Reliance General Insurance Company Ltd.* (supra), through Paragraph-14, the Hon'ble apex Court while taking note of observations in Paragraph-35 of the decision in Helen C. Rebello (supra) in Paragraphs-15, 17 and 18 observed as follows :

"15. The principle expounded in this decision in Helen C. Rebello case [Helen C. Rebello v. Maharashtra SRTC, (1999) 1 SCC 90 : 1999 SCC (Cri) 197] that the application of general principles under the common law to estimate damages cannot be invoked for computing compensation under the Motor Vehicles Act. Further, the "pecuniary advantage" from whatever source must correlate to the injury or death caused on account of motor accident. The view so taken is the correct analysis and interpretation of the relevant provisions of the Motor Vehicles Act of 1939, and must apply proprio vigore to the corresponding provisions of the Motor Vehicles Act, 1988. This principle has been restated in the subsequent decision of the two-Judge Bench in Patricia Jean Mahajan case [United India Insurance Co. Ltd. v. Patricia Jean Mahajan, (2002) 6 SCC 281 : 2002 SCC (Cri) 1294] , to reject the argument of the Insurance Company to deduct the amount receivable by the dependants of the deceased by way of "social security compensation" and "life insurance policy".

17. Be that as it may, the term "compensation" has not been defined in the 1988 Act. By interpretative process, it has been understood to mean to recompense the claimants for the possible loss suffered or likely to be suffered due to sudden and *untimely* death of their family member as a result of motor accident. Two cardinal principles run through the provisions of the Motor Vehicles Act of 1988 in the matter of determination of compensation. Firstly, the measure of compensation must be just and adequate; and secondly, no double benefit should be passed on to the claimants in the matter of award of compensation. Section 168 of the 1988 Act makes the first principle explicit. Subsection (1) of that provision makes it clear that the amount of compensation must be just. The word "just" means - fair, adequate, and reasonable. It has been derived from the Latin word "justus", connoting right and fair. In para 7 of *State of Haryana* v. *Jasbir Kaur* [*State of Haryana* v. *Jasbir Kaur*, (2003) 7 SCC 484 : 2003 SCC (Cri) 1671] , it has been held that the expression "just" denotes that the amount must be equitable, fair, reasonable and not arbitrary. In para 16 of *Sarla Verma* v. *DTC* [*Sarla Verma* v. *DTC*, (2009) 6 SCC

121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , this Court has observed that the compensation "is not intended to be a bonanza, largesse or source of profit". That, however, may depend upon the facts and circumstances of each case, as to what amount would be a just compensation.

18. *The* principle discernible from the exposition in *Helen C. Rebello* case [*Helen C. Rebello* v. *Maharashtra SRTC*, (1999) 1 SCC 90 : 1999 SCC (Cri) 197] is that if the amount "would be due to the dependants of the deceased even otherwise", the same shall not be deductible from the compensation amount payable under the 1988 Act. At the same time, it must be borne in mind that loss of income is a significant head under which compensation is claimed in terms of the 1988 Act. The component of quantum of "loss of income", inter alia, can be "pay and wages" which otherwise would have been earned by the deceased employee if he had survived the injury caused to him due to motor accident. If the dependants of the deceased employee, however, were to be compensated by the employer in that behalf, as is predicated by the 2006 Rules—to grant compassionate assistance by way of ex gratia financial assistance on compassionate grounds to the dependants of the deceased government employee who dies in harness, it is unfathomable that the dependants can still be permitted to claim the same amount as a possible or likely loss of income to be suffered by them to maintain a claim for compensation under the 1988 Act."

13. There is further reiteration of the above view in the case of *National Insurance Company Ltd.*(supra), through Paragraphs- 13 to 23 has come to observe as follows :

"13. In these cases, compensation is claimed against the tortfeasor who may be the driver or owner of the vehicle or the insurer. In respect of an accident in which the tortfeasor is found to be *liable*, the owner or the driver of the vehicle or the insurer, as the case may be, may alone be held responsible for the payment of such compensation since the accident has resulted in the injury or death which gives rise to the claim of the claimants. No other party is involved in it. And certainly not the employer who may offer compassionate appointment to the dependants of the injured/deceased.

14. While awarding compensation, amongst other things, the Tribunal takes into account the income of the deceased and calculates the loss of such income after making permissible deductions to compensate the injured claimant for the loss of earning capacity in case of an injury, and to compensate the claimants dependent on him in case of death. Thus, the income of the deceased or the injured, which the claimants have lost due to the inability of the deceased or the injured to earn or to provide for them is a relevant factor which is always taken into consideration. The salary or the income of the claimant in case of death is generally not a relevant factor in determining compensation primarily because the law takes no cognizance of the claimant's situation. Though in case of an injury, the income of the claimant who is injured is relevant. In other words, compensation is awarded on the basis of

the entire loss of income of the deceased or in a case of injury, for the loss of income due to the injury. What needs to be considered is whether compassionate appointment offered to the dependants of the deceased or the injured, by the employer of the deceased/injured, who is not the tortfeasor, can be deducted from the compensation receivable by him on account of the accident from the tortfeasor. Certainly, it cannot be that the one liable to compensate the claimants for the loss of income due to the accident, can have his liability reduced by the amount which the claimants earn as a result of compassionate appointment offered by another viz. the employer.

15. The submission on behalf of the appellant in these cases is that *the* salary of the claimants receivable on account of compassionate appointment must be deducted from the compensation awarded to them. Reliance is placed in this regard on the judgment of this Court in *Bhakra Beas Management Board* v. *Kanta Aggarwal* [*Bhakra Beas Management Board* v. *Kanta Aggarwal*, (2008) 11 SCC 366 : (2009) 1 SCC (Cri) 154] in which compensation was claimed against the employer of the deceased who was also the owner of the offending vehicle i.e. the tortfeasor. The tortfeasor offered employment on compassionate grounds to the widow of the deceased i.e. the claimant. In the facts and circumstances of the case, this Court took the view that the salary which flowed from the compassionate appointment offered by the tortfeasor, was liable to be deducted from the compensation which was payable by the same employer in his capacity as the owner of the offending vehicle. We find this decision as being of no assistance to the appellant in the cases before us. In the present cases, the owner of the offending vehicle is not the employer who offered the compassionate appointment. As observed earlier, it is difficult to see how the owner can contend that the compensation which he is liable to pay for causing the death or disability should be reduced because of compassionate employment offered by another. In any case, it is difficult to determine how much the person offered compassionate appointment would earn over the period of employment which is not certain, and deduct that amount from the compensation.

16. At this juncture, it would be apposite to refer to some of the decisions rendered by this Court. In *Helen C. Rebello* v. *Maharashtra SRTC*[*Helen C. Rebello* v. *Maharashtra SRTC*, (1999) 1 SCC 90 : 1999 SCC (Cri) 197] , the insurance company had claimed that the amount which was received by the claimant on account of life insurance was liable to be deducted from the compensation which is payable to the claimants. This contention was rejected by this Court in the following words: (SCC pp. 112-13, paras 36-37)

"*36.* As we have observed, the whole scheme of the Act, in relation to the payment of compensation to the claimant, is a beneficial legislation. The intention of the legislature is made more clear by the change of language from what was in the Fatal Accidents Act, 1855 and what is brought under Section 110-B of the 1939 Act. This is also visible through the provision of Section 168(1) under the Motor Vehicles Act, 1988 and Section 92-A of the 1939 Act which fixes the liability on the owner of the vehicle even on no fault. It provides that where the death or

permanent disablement of any person has resulted from an accident in spite of no fault of the owner of the vehicle, an amount of compensation fixed therein is payable to the claimant by such owner of the vehicle. Section 92-B ensures that the claim for compensation under Section 92-A is in addition to any other right to claim compensation in respect whereof (sic thereof) under any other provision of this Act or of any other law for the time being in force. This clearly indicates the intention of the legislature which is conferring larger benefit on the claimant. Interpretation of such beneficial legislation is also well settled. Whenever there be two possible interpretations in such statute, then the one which subserves the object of legislation viz. benefit to the subject should be accepted. In the present case, two interpretations have been given of this statute, evidenced by two distinct sets of decisions of the various High Courts. We have no hesitation to conclude that the set of decisions, which applied the principle of no deduction of the life insurance amount, should be accepted and the other set, which interpreted to deduct, is to be rejected. For all these considerations, we have no hesitation to hold that such High Courts were wrong in deducting the amount paid or payable under the life insurance by giving a restricted meaning to the provisions of the Motor Vehicles Act basing mostly on the language of English statutes and not taking into consideration the changed language and intents of the legislature under various provisions of the Motor Vehicles Act, 1939.

37. Accordingly, we set aside the impugned judgment dated 9-9-1985 and restore the judgment of the Tribunal dated 29-9-1980 and hold that the amount received by the claimant on the life insurance of the deceased is not deductible from the compensation computed under the Motor Vehicles Act. The respondent concerned shall make the payment accordingly, if not already paid in terms thereof."

17. Similarly, in *United India Insurance Co. Ltd.* v. *Patricia Jean* Mahajan [*United India Insurance Co. Ltd.* v. *Patricia Jean Mahajan*, (2002) 6 SCC 281 : 2002 SCC (Cri) 1294] , this Court held that the amount received by the claimants on account of social security from an employer must have a nexus or relation with the accidental injury or death, in order to be deductible from the amount of compensation. Hence, this Court refused to deduct the said amount from the amount of compensation receivable on account of the motor accident.

18. The facts of the case in *Vimal Kanwar* v. *Kishore Dan* [*Vimal Kanwar* v. *Kishore Dan*, (2013) 7 SCC 476 : (2013) 3 SCC (Civ) 564 : (2013) 3 SCC (Cri) 583 : (2013) 2 SCC (L&S) 759] are similar to the facts of the cases in hand. The contention in the said case was that the amount of salary receivable by the claimant appointed on compassionate ground was deductible from the amount of compensation which the claimant was entitled to receive under Section 168 of the Motor Vehicles Act, 1988. This Court rejected the said contention and observed as follows: (SCC p. 485, para 21)

"*21.* "Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependants, one of

the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and has no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as "pecuniary advantage" that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

19. In *Reliance General Insurance Co. Ltd.* v. *Shashi Sharma* [*Reliance General Insurance Co. Ltd.* v. *Shashi Sharma*, (2016) 9 SCC 627 : (2016) 3 SCC (Cri) 713 : (2017) 1 SCC (L&S) 90] , this Court permitted the deduction of the amount receivable by the claimant under the scheme of the 2006 Rules framed by the State of Haryana which provided a grant of compassionate assistance by way of ex gratia financial assistance on compassionate grounds to the members of the family of a deceased government employee who died while in service/missing government employee.

20. The financial assistance was a sum equal to the pay and other allowances that were last drawn by the deceased employee in the normal course without raising a specific claim for periods up to 15 years from the date of the death of the employee if the employee had not attained the age of 35 years, and lesser periods of 12 years and 7 years depending on the age of the employee at the time of death. The family was eligible to receive family pension only after the period of financial assistance was completed. The Court held that ex gratia financial assistance was liable to be deducted on the ground that the claimant was eligible to it on account of the same event in which the compensation was claimed under the Motor Vehicles Act, 1988 i.e. the death of the employee.

21. This case seems to superficially support the case of the appellant Insurance Company before us. However, on a deeper consideration, it does not. In *Reliance General Insurance* [*Reliance General Insurance Co. Ltd.* v. *Shashi Sharma*, (2016) 9 SCC 627 : (2016) 3 SCC (Cri) 713 : (2017) 1 SCC (L&S) 90] , the family of the deceased employee became entitled to financial assistance of a sum equal to the pay and other allowances that were last drawn by the deceased for a certain period after his death, even without raising a specific claim. In other words the family became entitled to the pay and allowances that the deceased would have received if he would have not died, for a certain period of time. This financial scheme resulted in paying the family the same pay and allowances for a certain period and thus in effect clearly offsetting the loss of income on account of the death of the deceased. Thus, the amount of financial assistance had to be excluded from the loss of income, as to that extent there was no loss of income, and the compensation receivable by the family had to be reduced from the amount receivable under the Motor Vehicles Act.

> 22. In the present cases, the claimants were offered compassionate employment. The claimants were not offered any sum of money equal to the income of the deceased. In fact, they were not offered any sum of money at all. They were offered employment and the money they receive in the form of their salary, would be earned from such employment. The loss of *income* in such cases cannot be said to be set off because the claimants would be earning their living. Therefore, we are of the view that the amount earned by the claimants from compassionate appointments cannot be deducted from the quantum of compensation receivable by them under the Act.
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> 23. In the cases before us, compensation is claimed from the owner of the offending vehicle who is different from the employer who has offered employment on compassionate grounds to the dependants of the deceased/injured. The source from which compensation on account of the accident is claimed and *the* source from which the compassionate employment is offered, are completely separate and there is no co-relation between these two sources. Since the tortfeasor has not offered the compassionate appointment, we are of the view that an amount which a claimant earns by his labour or by offering his services, whether by reason of compassionate appointment or otherwise is not liable to be deducted from the compensation which the claimant is entitled to receive from a tortfeasor under the Act. In such a situation, we are of the view that the financial benefit of the compassionate employment is not liable to be deducted at all from the compensation amount which is liable to be paid either by the owner/the driver of the offending vehicle or the insurer."

14. In the case of *Sebastiani Lakra & others* (supra), through Paragraph-12 therein has come to observe as follows :

> "12. The law is well-settled that deductions cannot be allowed from the amount of compensation either on account insurance, or on account of pensionary benefits or gratuity *or* grant of employment to a kin of the deceased. The main reason is that all these amounts are earned by the deceased on account of contractual relations entered into by him with others. It cannot be said that these amounts accrued to the dependants or the legal heirs of the deceased on account of his death in a motor vehicle accident. The claimants/dependents are entitled to 'just compensation' under the Motor Vehicles Act as a result of the death of the deceased in a motor vehicle accident. Therefore, the natural corollary is that the advantage which accrues to the estate of the deceased or to his dependents as a result of some contract or act which the deceased performed in his life time cannot be said to be the outcome or result of the death of the deceased even though these amounts may go into the hands of the dependents only after his death."

15. In *New India Assurance Company* (supra), through Paragraphs-40 and 41 dealing with loss of consortium, i.e. spousal consortium, parental consortium, filial consortium has come to observe as follows:

"40. We may also notice the three-Judge Bench judgment of this Court relied upon by the learned counsel for the appellant i.e. *Sangita Arya* v. *Oriental Insurance Co. Ltd.* [*Sangita Arya* v. *Oriental Insurance Co. Ltd.*, (2020) 5 SCC *327* : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] The counsel for the appellant submits that this Court has granted only Rs 40,000 towards "loss of consortium" which is an indication that "consortium" cannot be granted to children. In the above case, Motor Accidents Claims Tribunal has awarded Rs 20,000 to the widow towards loss of consortium and Rs 10,000 to the minor daughter towards "loss of love and affection". The High Court has reduced [*Oriental Insurance Company Ltd.* v. *Sangita Arya*, 2016 SCC OnLine Utt 970] the amount of consortium from Rs 20,000 to Rs 10,000. Para 16 of the judgment is to the following effect: (*Sangita Arya case* [*Sangita Arya* v. *Oriental Insurance Co. Ltd.*, (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905], SCC p. 330, para 10)

"*10*. The consortium payable to the widow was reduced [*Oriental Insurance Company Ltd.* v. *Sangita Arya*, 2016 SCC OnLine Utt 970] by the High Court from Rs 20,000 (as awarded by MACT) to Rs 10,000; the amount awarded towards loss of love and affection to the minor daughters was reduced from Rs 10,000 to Rs 5000. However, the amount of Rs 5000 awarded by MACT towards funeral expenses was maintained."

41. This Court in the above case confined its consideration towards the income of the deceased and there was neither any claim nor any consideration that the consortium should have been paid to other legal heirs also. There being no claim for payment of consortium to other legal heirs, this Court awarded Rs 40,000 towards consortium. No such ratio can be deciphered from the above judgment that this Court held that consortium is only payable as a spousal consortium and consortium is not payable to children and parents."

16. In the case of ***National Insurance Company Ltd. Vrs. Birender and others*** : (2020) 11 SCC 356 through Paragraphs-19 and 21, while taking into account deduction of the amounts from compensation held only tax amount can be deducted. This Court takes note of the observation of the Hon'ble apex Court through paragraphs-19 and 21, which reads as follows :

19. Reverting to the determination of compensation amount, it is noticed that the Tribunal proceeded to determine the compensation amount on the basis of net salary drawn by the deceased for the relevant period as Rs.16,918/- per month, while taking note of the fact that her gross salary was Rs.23,123/- per month (presumably below taxable income). Concededly, any deduction from the gross salary other than tax amount cannot be reckoned. In that, the actual salary less tax amount ought to have been taken into consideration by the Tribunal for determining the compensation amount, in light of the dictum of the Constitution Bench of this Court in para 59.3 of *Pranay Sethi* [*National Insurance Co. Ltd.* v. *Pranay Sethi*, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205].

> 21. Be that as it may, the Tribunal, for excluding the amount received by the deceased as family pension due to demise of her husband, had noted in para 26, as under:
>
> "26. The learned counsel for the claimants further requested that about to family pension being drawn by the deceased also be calculated for the purpose of assessing the compensation. This contention and assertion of the learned counsel for the claimants does not carry any conviction with the Tribunal because the deceased was getting family pension in her own right as the widow of the deceased and cannot be termed as her income for the purpose of computing the amount of compensation."
>
> The High Court, without reversing the said finding, proceeded to include the amount of Rs 7000 per month received by the deceased as pension amount after the demise of her husband. We are in agreement with the view taken by the Tribunal and for the same reason, have to reverse the conclusion recorded by the High Court to include the said amount as loss of dependency. That could not have been taken into account, as the same was payable only to the deceased being widow and not her income as such for the purpose of computing the amount of compensation."

17. In another recent decision in the case of ***Erudhaya Priya Vrs. State Express Transport Corporation Ltd.*** : 2020 SCC Online SC 601, dealing with even in the case of permanent disability in paragraph-14 has come to hold as follows:

> "We are, thus, unequivocally of the view that there is merit in the contention of the appellant and the aforesaid principles with regard to future prospects must also be applied in the case of the appellant taking the permanent disability as 31.1%. The quantification of the same on the basis of the judgment in National Insurance Co. Ltd. case (supra), more specifically para 59.3, considering the age of the appellant, would be 50% of the actual salary in the present case.
>
> (c) The third and the last aspect is the interest rate claimed as 12%"

18. Now coming to decide on the claim of the Insurance Company in their challenge to grant of compensation @50% of future prospect in spite of a service being provided to the family members of the deceased through a catena of decisions taken note hereinabove, this Court finds the settled position remain to be employment under the provisions of compassionate appointment scheme since provided by virtue of an agreement between an employee and employer remain excluded from the compartment of compensation and there cannot be any deduction on this head. Be it stated here that even though Insurance Company has filed appeal on the above ground based on their objection in the written statement neither the Insurance Company choose to ask the Tribunal to frame any issue on such aspect nor as

it appears, they led any evidence on this aspect. Consequently reading of the judgment also discloses that there is no submission even on this aspect, thus this Court observes, a pleading not asked to be considered through framing of issue and in absence of at least evidence on such scoring amounting to abandonment of such aspect and cannot be taken into consideration even otherwise. Be that as it may, for the settled position of law, this Court negative the plea of the Insurance Company to reduce the compensation amount taking into consideration the compensation amount through future prospect by taking into account the employment of one of the family members of the deceased through rehabilitation assistance scheme.

19. Similarly, coming to claim of Insurance Company for deduction on other accounts, for the catena of decisions of the Hon'ble apex Court reproduced hereinabove, this Court finds none of the grounds agitated by the Insurance Company remains sustainable in the eye of law. This Court therefore observes the appeal at the instance of the Insurance Company, i.e. MACA No.774 of 2016 has to be simply dismissed and as such, MACA No.774 of 2016 stands dismissed.

20. Coming to the claim of the learned counsel for the claimant involving appeal, i.e. MACA No.593 of 2016, this Court finds even though the claimant party is entitled to compensation under the head of loss of estate, loss of love and affection, loss of consortium as well as some amount towards litigation expenses, from the discussions in the judgment, learned Tribunal while computing the compensation even though discussed the compensation towards funeral expenses and granted a sum of Rs.1,00,000/- (Rupees one lakh), for the opinion of this Court, taking into account the grant of compensation of Rs.48,83,355/- (Rupees Forty eight lakhs eighty three thousand three hundred fifty five) only, apart from the bereaved family got the premature superannuation benefits on the head of the deceased and also an employment under rehabilitation assistance scheme, this Court observes grant of Rs.1,00,000/- towards funeral expenses be considered as compensation towards funeral expenses, loss of estate as well as loss of love and affection. In the above view, this Court is not inclined to grant any further amount on the above heads except directing to treat grant of Rs.1,00,000/- (Rupees one lakh) only towards funeral expenses as expenses on the head of loss of estate and for loss of love and affection as well as loss of consortium.

21. It is in this view of the matter, this Court dismisses both the appeals thereby confirming the judgment of the First Additional District Judge-cum-1st Motor Accident Claims Tribunal, Cuttack involving MAC No.113 of 2011. Before parting with the judgment, this Court likes to observe, since the Insurance Appeal was mostly involving an attempt to reduce the compensation while entertaining such appeals, the High Court should remain careful and looking to the limited challenge issue direction for at least release of 75% of the compensation amount along with interest to protect the interest of the bereaved family. Release of balance amount may be subject to final outcome involving litigation in this Court.

22. For the dismissal of both Appeals, this Court directs the Insurance Company to deposit the whole amount along with interest as awarded by the Tribunal within a period of one and half months from the date of judgment and considering that Claimant nos.2 to 4 have already gone major in the meantime, the Tribunal is directed keeping in view that the award was passed in the year 2016 and the Claimants are entitled to interest @7% p.a. from 05.03.2011, the matter is remitted back to the Tribunal for modifying its order on the aspect of manner of release in favour of Claimant no.1 and the amount required to be kept under Fixed Deposit in respect of all the respondents and also the amount now to be released in favour of Claimant no.1, wife of the deceased by undertaking the entire exercise within a period of three weeks from the date of receipt of copy of the judgment. The matter is remitted back only for the purpose of recalculation of the whole compensation and for determination of the mode of release and Fixed Deposit in respect of the Claimants.

23. With the above direction, both the Appeals are dismissed. There shall be no order as to cost.

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S. K. SAHOO, J.

CRIMINAL APPEAL NO. 331 OF 1989

1. **SRIDHAR SWAIN**
2. **MAHESWAR BEHERA** ....Appellants

.V.

STATE OF ODISHA ....Respondent

(A) LEGAL MAXIM – 'Justice delayed is justice denied' – Definition thereof – Delayed justice is the deadliest form of denial of justice.

"This case has proceeded at a snail's pace since the first information report was registered on 05.01.1983 and on completion of investigation charge sheet was submitted on 31.12.1984. The learned trial Court framed the charges on 07.07.1986, delivered the impugned judgment on 26.10.1989 whereafter this criminal appeal was presented on 10.11.1989 and admitted on 17.11.1989 and the appellants were directed to be released on bail. More than thirty one years after the presentation of the appeal, the judgment is being delivered today. When such type of year old criminal appeal comes for adjudication, few questions strike to mind, "Why so much of delay was caused to adjudicate the appeal? How it happened? Who is responsible for the delay?" The answers are not very difficult to find. The order sheet indicates that after the admission of the appeal, it was listed before various Benches for hearing but in spite of filing of paper books, the learned counsel for the appellants showed no interest to argue the appeal, for which the bail order granted to the appellants at the time of admission of the appeal was recalled on 06.02.2008. However, on the application filed by the appellants, they were directed to be released on bail on surrender before the learned trial Court as per order dated 12.05.2008. Again the same thing continued and when the matter was taken up on 13.03.2013 for hearing, none appeared for the appellants to argue the case for which the bail order dated 12.05.2008 was recalled and the appellant no.2 Maheswar Behera was arrested on 10.04.2013 and he was directed to be released on bail by this Court on 18.04.2013 and on the same day, an order was passed to recall the order dated 13.03.2013 so far as appellant no.1 Sridhar Swain is concerned. Another co-accused namely M.K. Raghaban who along with the appellants faced trial and convicted by virtue of the impugned judgment, preferred a separate appeal in Criminal Appeal No.332 of 1989 and was on bail, expired on 26.08.2000 for which the said appeal stood abetted as per order dated 17.04.2013. Finally, this appeal was listed before me on 06.08.2020 and again on that day, none appeared for the appellants and on the request of learned Senior Standing Counsel for the Vigilance Department, the matter was adjourned awaiting the report of Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur for giving intimation to the appellants for taking up the matter for hearing. In spite of due intimation, Mr. Jugal Kishore Panda, Advocate though filed vakalatnama for appellant no.2 Maheswar Behera but since none appeared on behalf of the appellant no.1 Sridhar Swain, the learned counsel Mr. Jugal Kishore Panda was appointed as Amicus Curiae to place the case of appellant no.1 also and time was granted to him to prepare the case. The matter was ultimately taken up every week on Thursday which was fixed for hearing of criminal appeal starting from 05.11.2020 and after the hearing was concluded, the judgment was reserved and the learned counsel for the appellants took time to file written note of submissions, which he filed on 24.11.2020.

It is said that slow and steady wins the race, but when the world is changing very fast, if one does not take pace then the fast would beat the slow. This case is a glaring example to show as to how the true import of the legal maxim 'justice delayed is justice denied' has yet not been appreciated properly. Delayed justice is the deadliest form of denial of justice. Discipline, commitment, thorough preparation, active cooperation from the learned members of the Bar and their able assistance can save a lot of valuable time of the Court and will pave way for early disposal of the old criminal appeals which are hanging over the head of judiciary like the sword of Damocles, otherwise all the planning, mechanism and infrastructure development would fail to yield the desired result in docket management. All concerned must realise that 'Rome was not built in a day' and for that continuous effort for doing something good and important is necessary though it may take time." *(Para 1)*

(B) CRIMINAL TRIAL – Offences are under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act, 1947 read with sections 465,472 and 34 of the Indian Penal Code –The appellant No.2 faced trial for the offences punishable under section 5(2) read with section 5(1)(d) of the 1947 Act read with section 109 of the Indian Penal Code – Appreciation of evidence – No evidence as to who committed forgery of documents – There is also no evidence that the appellant No.1 has got any role in the interpolation in the tender papers of the appellant no.2 and there is also lack of clinching evidence against him that he had knowledge or reason to believe those documents to be forged and in spite of that he used the forged documents as genuine – Therefore, the conviction of the appellant no.1 Sridhar Swain under section 5(2) of the 1947 Act read with section 34 of the Indian Penal Code and sections 465 and 471 read with section 34 of the Indian Penal Code is not sustainable in the eye of law. (Para 12)

(C) INDIAN PENAL CODE, 1860 – Section 107 and 109 – Abetment – Meaning and ingredients thereof – Held, Section 107 of the Indian Penal Code defines abetment of a thing to mean that a person abets the doing of a thing if he firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing – So far as the first two clauses are concerned, it is not necessary that the offence instigated should have been committed – Under the third clause, when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence – In other words, unlike the first two clauses, the third clause

applies to a case where the offence is committed – Therefore, abetment can be by instigation, conspiracy or intentional aid – In order to decide whether a person has abetted by instigation the commission of an offence or not, the act of abetment has to be judged in the conspectus of the entire evidence in the case – The act of abetment attributed to an accused is not to be viewed or tested in isolation – On a careful analysis of the evidence on record, no evidence of abetment of commission of offence against the appellant no.2 as such the conviction of the appellant no.2 set aside. (Para 13)

For Appellants : Mr. Jugal Kishore Panda

For State of Odisha (Vig.) : Mr. Sanjay Kumar Dash (Sr. Standing Counsel)

JUDGMENT Date of Judgment: 04.01.2021

S. K. SAHOO, J.

This case has proceeded at a snail's pace since the first information report was registered on 05.01.1983 and on completion of investigation charge sheet was submitted on 31.12.1984. The learned trial Court framed the charges on 07.07.1986, delivered the impugned judgment on 26.10.1989 whereafter this criminal appeal was presented on 10.11.1989 and admitted on 17.11.1989 and the appellants were directed to be released on bail. More than thirty one years after the presentation of the appeal, the judgment is being delivered today. When such type of year old criminal appeal comes for adjudication, few questions strike to mind, "Why so much of delay was caused to adjudicate the appeal? How it happened? Who is responsible for the delay?" The answers are not very difficult to find. The order sheet indicates that after the admission of the appeal, it was listed before various Benches for hearing but in spite of filing of paper books, the learned counsel for the appellants showed no interest to argue the appeal, for which the bail order granted to the appellants at the time of admission of the appeal was recalled on 06.02.2008. However, on the application filed by the appellants, they were directed to be released on bail on surrender before the learned trial Court as per order dated 12.05.2008. Again the same thing continued and when the matter was taken up on 13.03.2013 for hearing, none appeared for the appellants to argue the case for which the bail order dated 12.05.2008 was recalled and the appellant no.2 Maheswar Behera was arrested on 10.04.2013 and he was directed to be released on bail by this Court on 18.04.2013 and on the same day, an order was passed to recall the order dated 13.03.2013 so far as appellant no.1 Sridhar Swain is concerned. Another co-accused namely

M.K. Raghaban who along with the appellants faced trial and convicted by virtue of the impugned judgment, preferred a separate appeal in Criminal Appeal No.332 of 1989 and was on bail, expired on 26.08.2000 for which the said appeal stood abetted as per order dated 17.04.2013. Finally, this appeal was listed before me on 06.08.2020 and again on that day, none appeared for the appellants and on the request of learned Senior Standing Counsel for the Vigilance Department, the matter was adjourned awaiting the report of Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur for giving intimation to the appellants for taking up the matter for hearing. In spite of due intimation, Mr. Jugal Kishore Panda, Advocate though filed vakalatnama for appellant no.2 Maheswar Behera but since none appeared on behalf of the appellant no.1 Sridhar Swain, the learned counsel Mr. Jugal Kishore Panda was appointed as Amicus Curiae to place the case of appellant no.1 also and time was granted to him to prepare the case. The matter was ultimately taken up every week on Thursday which was fixed for hearing of criminal appeal starting from 05.11.2020 and after the hearing was concluded, the judgment was reserved and the learned counsel for the appellants took time to file written note of submissions, which he filed on 24.11.2020.

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2. The appellant no.1 Sridhar Swain along with co-accused M.K. Raghaban faced trial in the Court of learned Special Judge (Vigilance), Sambalpur in T.R. Case No. 12 of 1985 for offences punishable under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act, 1947 (hereafter ‘1947 Act’) read with section 34 of the Indian Penal Code and

sections 465, 471 read with section 34 of the Indian Penal Code. The appellant no.2 Maheswar Behera faced trial along with them but for the offences punishable under section 5(2) read with section 5(1)(d) of the 1947 Act read with section 109 of the Indian Penal Code and sections 465, 471 read with section 109 of the Indian Penal Code.

The learned trial Court vide impugned judgment and order dated 26.10.1989, found the appellant no.1 along with co-accused M.K. Raghaban guilty of the offences under section 5(2) of the 1947 Act read with section 34 of the Indian Penal Code and sections 465 and 471 read with section 34 of the Indian Penal Code and the appellant no.2 was found guilty of the offences under section 5(2) of the 1947 Act, sections 465 and 471 read with section 109 of the Indian Penal Code and all the three were sentenced to undergo rigorous imprisonment for three months on each count with a further direction that the sentences are to run concurrently.

3. The prosecution case as per the F.I.R. (Ext.27), in short, is that Subas Chandra Patnaik (P.W.7), Deputy Superintendent of Police, Vigilance, Rourkela in course of enquiry found that the appellant no.1 was working as Municipal Engineer in N.A.C.(C.T.), Rourkela during the period from 30.07.1979 to 01.07.1982 and the co-accused M.K. Raghaban was working as Sub-Assistant Engineer in N.A.C.(C.T.), Rourkela from 07.08.1980 till the lodging of the first information report and they committed criminal misconduct in respect of Municipal fund in execution of the work relating to **(a)** special repair to 40 feet wide road in Madhusudan market; **(b)** special repair to Taxi and Tempo stand at Madhusudan market area and **(c)** special repair to private and transport bus stand at Madhusudan market area. The appellant no.1 prepared the estimate for the above three work and after getting necessary approval from the Executive Officer and Chairman N.A.C.(C.T.), Rourkela, quotations were invited as per tender notice vide no.5238 dated 31.12.1981. The appellant no.2 along with others submitted tender for the above three work in pursuance of such notice and the tender papers were opened on 23.01.1982 in presence of the appellant no.1 and the Executive Officer Rajendranath Jena (P.W.5) who made endorsement in the quotations of appellant no.2 to the effect that there was only one cutting and no over writing and it referred to other items of work and not to the cost of MAXphalt. The appellant no.2 quoted the cost of MAXphalt at Rs.2,021/- per metric ton. Entries were also made in the tender register showing the rate of MAXphalt at the rate of Rs.2,021/- in respect of quotation of the appellant

no.2. Subsequently, the price of MAXphalt was changed from Rs.2,021/- to Rs.2,621/- by interpolation and overwriting both in figures and words in the quotation of the appellant no.2 and also in the tender register and as per the prosecution case, it was the co-accused M.K. Raghaban who made such interpolation in respect of the price of MAXphalt. It appears from the note sheet of the relevant files relating to the above work that the figures mentioned therein differs from the figures indicated on the body of comparative statements of all the three work. The said co-accused though correctly prepared the comparative statements at the first instance showing the price of MAXphalt at the rate of Rs.2,021/-, yet he subsequently changed those to a higher rate and prepared comparative statement showing the price of MAXphalt at Rs.2,621/- per metric ton and thereby helping the appellant no.2 to take excess amount of Rs.600/- per metric ton of MAXphalt after getting the approval of the Executive Officer and Chairman through the appellant no.1 who did not point out the discrepancies in the note sheet and comparative statement regarding the price of MAXphalt when the matter was placed before the Executive Officer and Chairman for approval. After completion of the work, the co-accused M.K. Raghaban noted the measurement of the work in the measurement book showing price of MAXphalt at Rs.2,621/- per metric ton and got the bill passed for payment as per voucher no.39 dated 23.04.1982 giving the benefit of Rs.1,289.60 to the appellant no.2. It is the further prosecution case as per the F.I.R. that the appellant no.1 and the co-accused M.K. Raghaban quoted false measurement in the measurement book in respect of grouting item of all the three works and thereby gave pecuniary benefit to the appellant no.2.

4. The Superintendent of Police, Vigilance, Northern Division, Sambalpur on receipt of the first information report, directed for registration of the case on 05.01.1983 and accordingly, Sambalpur Vigilance P.S. Case No.01 of 1983 was registered under section 5(2) read with section 5(1)(d) of 1947 Act and section 471 of the Indian Penal Code and the informant (P.W.7) was directed to investigate the matter.

During course of investigation, P.W.7 examined the witnesses and recorded their statements, seized the relevant documents from the Executive Officer, N.A.C. (C.T.), Rourkela, moved the Executive Engineer (Vigilance) for inspection of the work in question, got the report of the Executive Engineer (Vigilance) and on completion of investigation, he submitted the consolidated report of investigation through his higher authorities before the

sanctioning authority, who after perusal of the documents, accorded sanction for prosecution of the appellant no.1 as well as the co-accused M.K. Raghaban. After receiving the sanction orders, P.W.7 submitted charge sheet on 31.12.1984 against the appellant no.1 and co-accused M.K. Raghaban for the offences under section 5(2) read with section 5(1)(d) of the 1947 Act and section 471 of the Indian Penal Code and against the appellant no.2 for the offences 5(2) read with section 5(1)(d) of the 1947 Act and section 471 read with section 109 of the Indian Penal Code.

5. The learned trial Court framed the charges as aforesaid on 07.07.1986 and the appellants refuted the charges and pleaded not guilty and claimed to be tried.

6. The defence plea of the appellant no.1 was that in the tender paper, though the rate of MAXphalt per metric ton was mentioned in figure as Rs.2021/- but in words, it was mentioned as Rs.2621/- and as per P.W.D. Code, the rate mentioned in words was valid and accordingly, he instructed the co-accused M.K. Raghaban to prepare the comparative statement.

The defence plea of the appellant no.2 was that he had quoted the rate of MAXphalt at Rs.2621/- per metric ton in his tender paper and that he was not aware of any interpolation or correction in his tender papers submitted for the three work. The appellants denied about the inflated measurement of the work.

7. In order to prove its case, the prosecution examined eight witnesses.

P.W.1 Chandramani Narayan Swamy was the Special Secretary in G.A. Department, Government of Orissa who issued the sanction order (Ext.1) dated 20.06.1984 for prosecution of appellant no.1 Sridhar Swain as per the order of the Chief Minister. She stated that the investigation report of the Vigilance D.S.P. marked as Ext.2 along with legal opinion were placed before the Chief Minister who after going through the same passed the order marked as Ext.3/2 and on the basis of the said order, she issued the sanction order (Ext.1).

P.W.2 Baman Charan Behera was the Accountant in N.A.C. (C.T.) Office, Rourkela who stated that he checked the bill (Ext.4) which relates to the work executed by the appellant no.2 Maheswar Behera with reference to the M.B. Book and the rate as mentioned in the agreement. He further stated

that after he checked the bill, it was placed before the Executive Officer for sanction and after necessary sanction, the bill amount of Rs.37,560/- was paid to the appellant no.2.

P.W.3 B.K. Dash was the Executive Engineer attached to Vigilance Directorate who received requisition from the Deputy Superintendent of Police, Vigilance, Rourkela through the Superintendent of Police, Vigilance, Sambalpur to offer technical opinion regarding the extent of work in question executed in this case and he stated to have inspected the work in presence of the appellant no.1 Sridhar Swain and co-accused M.K. Raghaban and prepared his report (Ext.12) and calculation sheet (Ext.13). He observed that there was an inflation of measurement to the extent of 698.56 sq. meter.

P.W.4 Shyam Sundar Beuria was working as Junior Engineer attached to N.A.C. (C.T.), Rourkela, who proved the estimates prepared by co-accused M.K. Raghaban relating to the three work in question, floating of tenders for such work. He proved three tender papers for the three work submitted by appellant no.2 Maheswar Behera vide Exts.15, 16 and 17. He stated that the rates quoted by the appellant no.2 was Rs.2,021/- which was mentioned both in letters as well as in words but the same has been changed to Rs.2,621/-. He further stated that co-accused M.K. Raghaban took his pen which was used by him in writing the tender register. He further stated that the tender register and the tender papers were tampered with subsequently.

P.W.5 Rajendranath Jena was working as Executive Officer, N.A.C. (C.T.), Rourkela and also one of the members of the tender committee. He stated that all the tenders for the three work were opened in his presence and in all the tenders, the appellant no.2 had quoted the price of MAXphalt at Rs.2,021/- for each metric ton. He further stated that in the tender papers submitted by the appellant no.2, there has been subsequent interpolation to the rate of MAXphalt and Rs.2,021/- has been changed to Rs.2,621/- in all the three work. He further stated that co-accused M.K. Raghaban prepared the notes in the corresponding file to be placed before the Chairman for approval and appellant no.1 Sridhar Swain whose duty is to verify the comparative statements and note of the co-accused before placing the note for his approval did not point out the discrepancy in the price of MAXphalt in the tender of the appellant no.2 and accordingly, the tender committee on good faith approved the note. He further stated that the interpolation of the

rate of MAXphalt and excess drawal by appellant no.2 were brought to his notice subsequently.

P.W.6 Bijay Kumar Sahu was working as U.D. Clerk in the N.A.C. (C.T.), Rourkela and he was the custodian of the tender register and tender files. He proved the tender call notice issued by the appellant no.1 Sridhar Swain on behalf of the Executive Officer in respect of all the three work in question. He further stated that co-accused M.K. Raghaban prepared the comparative statements of the tender papers and further stated about the procedure relating to the approval of the tender and issuance of work order in favour of the person whose tender is accepted. He further stated about the payment of subsequent bills of appellant no.2 with the cost of MAXphalt at the rate of Rs.2,021/- as per the entry in the measurement book.

P.W.7 Subas Chandra Patnaik was the Deputy Superintendent of Police (Vigilance), Rourkela who lodged the F.I.R. (Ext.27) and took up investigation of the case and ultimately submitted charge sheet against the accused persons.

P.W.8 Gourahari Pradhan was working as Head Clerk in Jharsuguda Municipality who proved the original sanction order (Ext.30) issued by Shri B.C. Pandey, Chairman of Jharsuguda Municipality against co-accused M.K. Raghaban for his prosecution.

The prosecution exhibited thirty three documents. Ext.1 is the sanction order for the prosecution of appellant no.1, Ext.2 is the investigation report of Vigilance D.S.P., Ext.3 is the notes of scrutiny made by P.W.1, Ext.4 is the bill relating to special repair of road, Ext.5 is the agreement, Ext.6 is the measurement book, Ext.7 is the notes of P.W.2, Ext.8 is the requisition issued by Vigilance D.S.P. for technical opinion, Ext.9 is the measurement book, Ext.10 is the file relating to Special repair of 40 feet wide road, Ext.11 is the details of measurement, Ext.12 is the report of P.W.3, Ext.13 is the calculation sheet, Ext.14 is the tender register, Ext.15 is the tender paper of the appellant no.2 relating to S.R. to 40 ft. road, Ext.16 is the tender paper of the appellant no.2 relating to repair of private bus stand, Ext.17 is the tender paper of the appellant no.2 relating to repair of taxi and tempo stand, Exts.18, 20, 22 are the comparative statements of tender papers, Ext.19 is the note sheet in the file Ext.10/1, Ext.21 is the note sheet in the file Ext.10/2, Exts.23, 24 and 25 are the tender committee resolutions, Exts.26 to

26/2 are the draft work order for approval, Ext.27 is the F.I.R., Ext.28 is the seizure list, Ext.29 is the note sheet of sanction order, Ext.30 is the sanction order, Ext.31 is the letter of Director of Municipal Administration, Ext.32 is the letter of S.P., Vigilance and Ext.33 is the endorsement and signature of Inspector of Vigilance.

The defence has examined one witness. D.W.1 Abhay Kumar Nanda was the Junior Assistant in Rourkela N.A.C. who proved the personal file of co-accused M.K. Raghaban. The defence exhibited five documents. Ext.A is the C.L. application of co-accused M.K. Raghaban, Ext.B is the telegram of co-accused M.K. Raghaban for extension of leave, Ext.C is the order passed by Additional Executive Officer sanctioning leave, Ext.D is the note sheet of dealing Assistant regarding leave and Ext.E is the joining report of co-accused M.K. Raghaban.

8. The learned trial Court after assessing the oral as well as the documentary evidence has been pleased to hold that the spot verification report of P.W.3 is unsatisfactory and unreliable and that the prosecution has failed to prove the charge of misconduct in respect of cash of Rs.9402.29 paisa by way of inflated measurement. About the interpolations made in tender papers submitted by the appellant no.2 vide Exts.15, 16 and 17 as well as tender register (Ext.14), the learned trial Court held that the price of MAXphalt was subsequently changed to Rs.2621/- although it was originally Rs.2021/- in the tender paper of the appellant no.2. It was further held that the price of MAXphalt was originally Rs.2021/- at the time of submission of tender and it was forged and enhanced from Rs.2021/- to Rs.2621/- in the tender paper as well as in the tender register subsequently. The learned trial Court further held that nothing has been brought out in the cross-examination of P.W.5 to discredit his testimony regarding the interpolation, overwriting and subsequent correction in the price of MAXphalt to Rs.2621/- from its original price of Rs.2021/-. Similarly, the learned trial Court found the evidence of P.W.6 has not been discredited in the cross-examination. It was further held that there was commission of forgery by way of overwriting, cutting and interpolation in the price of MAXphalt in the tender paper and tender register increasing the original amount of Rs.2021/- to Rs.2621/- per metric ton subsequently even though there is no evidence as to who committed the forgery but fact remains that the appellant no.2 derived pecuniary benefits due to commission of forgery. The learned trial Court held that the defence plea taken by the appellant no.2 was false for which adverse

inference is to be drawn against him. The appellant no.1 and co-accused M.K. Raghaban knowingly used the forged documents as genuine regarding the price of MAXphalt and helped the appellant no.2 for which he derived pecuniary advantage out of it though temporarily. The learned trial Court also did not accept the plea taken by the appellant no.1 and co-accused M.K. Raghaban and further held that the sanction for prosecution of the appellant no.2 is not imperative even though he is a public servant as per the provisions of Orissa Municipal Act. The learned trial Court ultimately came to the conclusion that the appellant no.1 and the co-accused M.K. Raghaban being public servants committed criminal misconduct and by corrupt and illegal means, they obtained pecuniary advantage for the appellant no.2 by enhancing the price of MAXhalt from Rs.2,021/- to Rs.2,621/- by way of overwriting and interpolation in the tender papers and tender register and used the same as genuine knowing those to be forged documents with the help of appellant no.2 in furtherance of their common intention and accordingly convicted the appellants as well as the co-accused M.K. Raghaban as already indicated.

9. Mr. Jugal Kishore Panda, learned counsel for the appellant no.2 and engaged as Amicus Curiae for the appellant no.1 contended that the learned trial Court has not appreciated the evidence on record in its proper perspective and the findings are mainly based on surmises. He argued that the appellant no.2 is a public servant as per the provisions of Orissa Municipal Act, 1950 but no sanction has been obtained for prosecuting him which is illegal. It is further argued that there is no clinching evidence adduced from the side of the prosecution as to who made the endorsement or correction in the tender papers or tender register and the signatures appearing thereon were also not sent to the handwriting expert for opinion to prove the interpolation in the tender papers and tender register. It is further argued that in absence of any evidence as to who forged the documents or that the appellants used the forged document as genuine and more particularly when the files were not in the custody of the appellants, the conviction of the appellants under sections 465 and 471 of the Indian Penal Code are not sustainable in the eye of law. While concluding his argument, Mr. Panda submitted that both the appellants are now more than seventy five years of age and about thirty seven years have passed since the date of registration of the case and the appellants have suffered sufficient mental agony and depression and at this stage, it would not be proper to send them to judicial custody again.

Mr. Sanjay Kumar Das, learned Senior Standing Counsel for the Vigilance Department on the other hand supported the impugned judgment and contended that in view of the oral and documentary evidence available on record, it cannot be said that any illegality has been committed by the learned trial Court in convicting the appellants for the offences charged and therefore, the appeal should be dismissed.

10. Now, let me deal with the first point raised by the learned counsel for the appellants regarding absence of sanction for prosecuting the appellant no.2 Maheswar Behera.

Section 378 of the Orissa Municipal Act, 1950 (hereafter '1950 Act') states, inter alia, that any person with whom the Councillor or its Executive Officer, has entered into a contract on behalf of the council in the performance of their duty or of anything which they are empowered or required to do by virtue or in consequence of the 1950 Act, or of any bye-law, rule, regulation or order made under it, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code. From a plain reading of the aforesaid provision, it is evident that by the aforesaid section, the legislature has created a fiction that a contractor with whom the Councillor or its Executive Officer, has entered into a contract on behalf of the council, shall be deemed to be a 'public servant' within the meaning of section 21 of the Indian Penal Code. It is well settled that the legislature is competent to create a legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the Court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. Thus, the legislature, while enacting section 378 has created a legal fiction for the purpose of assuming that the contractor, otherwise, may not be public servant within the meaning of section 21 of the Indian Penal Code but shall be assumed to be so in view of the legal fiction so created. However, section 376 of the 1950 Act states that when the Chairman, Vice-Chairman or any councillor of a municipal council or any officer of Government whose service are lent to the council is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the State Government. Section 376 of the 1950 Act does not include a contractor. Therefore, a

conjoint reading of section 378 and section 376 of the 1950 Act shows that if anyone commits an offence voluntarily against a contractor to deter him from discharging his lawful duty which was entrusted to him by virtue of a contract executed under the 1950 Act, shall be prosecuted as if he has committed an offence against a public servant. However, if a contractor is alleged to have committed any offence while acting or purporting to act in the discharge of his duty entrusted to him by virtue of a contract executed the under the 1950 Act, he can be prosecuted without any sanction of any authority. The purpose of obtaining sanction is to protect the public servant from harassment by frivolous or vexatious prosecution and not to shield the corrupt. Therefore, no sanction is necessary from any authority for prosecuting a contractor with whom the Councillor or its Executive Officer has entered into a contract on behalf of the council. In other words, a Court can take cognizance of offences and proceed against a contractor without any sanction order, if he is accused of any offence alleged to have been committed by him in the performance of his duty which was entrusted to him by virtue of a contract. Thus, I am of the humble view that though a contractor shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code by virtue of section 378 of the 1950 Act but no sanction is necessary for his prosecution in view of section 376 of the 1950 Act and as such absence of sanction for prosecuting the appellant no.2 Maheswar Behera is not illegal.

The learned counsel for the appellants has not advanced any argument regarding any illegality in the sanction order (Ext.1) issued by P.W.1 for prosecution of the appellant no.1.

11. The defence plea of the appellant no.2 that he had quoted the rate of MAXphalt at Rs.2,621/- per each metric ton in his tender papers cannot be accepted inasmuch as had he quoted such price, he would not have been declared as the lowest bidder to get the work orders rather one M.C. Agarwal who had quoted the rate of MAXphalt at Rs.2,400/- per each metric ton would have been the successful bidder. P.W.5, the Executive Officer stated that he himself and the appellant no.1 were the members of tender committee and all the tenders of the three projects were opened in their presence and in all the tenders, the appellant no.2 had quoted the price of MAXphalt at Rs.2,021/- per each metric ton. Nothing has been brought out in the cross-examination to disbelieve the evidence of P.W.5 in that respect. Therefore,

the defence plea taken by the appellant no.2 regarding his quoted rate of MAXphalt to be Rs.2,621/- per each metric ton cannot be accepted.

The learned trial Court held that an adverse inference is to be drawn against the appellant no.2 for deliberately taking a false plea. Law is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court. Therefore, even though the appellant no.2 has taken a false plea regarding quotation of rate of MAXphalt in his tender papers but all the same, it is to be seen how far the prosecution has established the charges against the appellants.

12. Now, let me discuss about the interpolation, cutting and overwriting in the price of MAXphalt in the tender papers of the appellant no.2 and also in the tender register.

P.W.5, the Executive Officer has stated that in all the tenders, the appellant no.2 had quoted the price of MAXphalt at Rs.2021/- for each metric ton. About the tender paper (Ext.15) of the appellant no.2 relating to special repair to 40 feet wide road in Madhusudan market, he stated that he himself and the appellant no.1 made endorsement (Ext.15/1) that there was only one cutting but no overwriting and the cutting (Ext.15/2) was initialed by the appellants. He further stated that the interpolation, cutting and overwriting in the price of MAXphalt in Ext.15 were made long after opening of the tender which were not in existence at the time of opening of the tender. The quotation price of Rs.2,021/- in the tender paper in item no.7 in Ext.15 was subsequently changed to Rs.2,621/- and the cutting and interpolation in the changed price in Ext.15 were not initialed either by him or by the appellant no.1 and those were made in different ink from the other writings of Ext.15. He then stated about the similar interpolation made in the tender register (Ext.14) maintained by the Sub-Asst. Engineer Behuria in the price of MAXphalt in the special repair to 40 feet wide road. He further stated that a comparative statement (Ext.18) was prepared in the hands of co-accused M.K. Raghaban relating to this work in which he had recorded the tender amount of the appellant no.2 to be Rs.40,808.35 paisa which was 11.33% below the scheduled rate though in the note for this work vide Ext.10/3, he mentioned the tender amount of the appellant no.2 was Rs.35,204.35 paisa

which was 23.51% below the scheduled rate. He further stated that Ext.18 was prepared after the interpolation in the tender paper (Ext.15) and tender register (Ext.14).

About the tender paper (Ext.16) of the appellant no.2 relating to special repair of private and transport bus stand in Madhusudan Market, P.W.15 stated that there was only one cutting and no overwriting which was endorsed by him and the appellant no.1 as per Ext.16/1. He further stated that the appellants have initialed the cutting as per Ext.16/2 and the MAXphalt price which was quoted @ Rs.2,021/- per metric ton was subsequently changed by way of interpolation and overwriting in a different ink to Rs.2,621/- which was not initialed either by him or by the appellant no.1 or by the appellant no.2. In the tender register (Ext.14), the price of MAXphalt so far as this work is concerned was converted by way of interpolation from Rs.2,021/- to Rx.2,621/-. He further stated that in the comparative statement (Ext.22), the co-accused M.K. Raghaban recorded the tender amount of the appellant no.2 to be Rs.33,338.77 paisa which was 11.59% below the scheduled rate though in the note (Ext.21) prepared by the said co-accused in respect of that work, the tender amount of the appellant no.2 was mentioned as Rs.29,859.65 paisa and in that note, 19.92% has been scored through and in its place, 10.59% has been noted.

About the tender paper (Ext.17) which relates to special repair of taxi and tempo stand of Madhusudan market, P.W.5 stated that the price of MAXphalt per metric ton was quoted at Rs.2,021/- but subsequently it was converted by way of interpolation to Rs.2,621/- and though the co-accused M.K. Raghaban placed the note (Ext.19) in respect of this work that the tender amount of the appellant no.2 was Rs.26,087.10 paisa which was 19.44% below the scheduled rate but in the comparative statement (Ext.20), it was mentioned by him to be Rs.30,047.10 paisa which was 9.87% below the scheduled rate and the increase in the tender amount was due to subsequent interpolation in the quoted price of MAXphalt in the tender paper (Ext.17) and tender register (Ext.14).

P.W.5 further stated that before placing the note before him for his approval, it was the duty of the appellant no.1 as Municipal Engineer to verify the comparative statement and note prepared by the co-accused M.K. Raghaban and then to place the same for obtaining approval of the Chairman. However, the appellant no.1 did not point out the discrepancies in the price of

MAXphalt in the tender of the appellant no.2. He further stated that believing in good faith, the note of the appellant no.1 about the tender work in Exts.15, 16 and 17 was approved as per resolution in the committee vide Exts.23, 24 and 25 respectively. He further stated that subsequently it came to his notice regarding interpolation and excess drawal by appellant no.2 so far as the price of MAXphalt @ Rs.2,621/- per metric ton instead of Rs.2,021/- per metric ton.

In the cross-examination, P.W.5 has stated that the tender committee consisted of the Chairman, he himself and the appellant no.1. He further stated that the tender of the appellant no.2 in respect of all the three items of work were accepted which was also communicated to the appellant no.2. He further stated that the dealing assistant Bijay Kumar Sahu (P.W.6) was the custodian of the files relating to all the three work entrusted to the appellant no.2 and he placed the draft before the appellant no.1 to approve the same and then it was placed before him (P.W.5) for approval. He further stated that there was no discussion between him, the Chairman, the appellant no.1 as Municipal Engineer and the dealing assistant before acceptance of the tender paper. The members of the tender committee were to scrutinize the relevant documents before accepting the tender. He further stated that all the three tenders submitted by the appellant no.2 were accepted as per the decisions (Exts.23, 24 and 25) taken by the members of the committee consisting of the appellant no.1 as Municipal Engineer, he himself as Executive Officer and the Chairman on 20.02.1982.

P.W.6 Bijay Kumar Sahu who was the U.D. Clerk in the NAC (C.T.), Rourkela also stated about the interpolation in the tender papers of the appellant no.2 and tender register and that he gave the notes that the overwriting were made by co-accused M.K. Raghaban in the tender papers and tender register relating to the appellant no.2. He further stated though he was the custodian of the tender register and tender files but co-accused M.K. Raghaban prepared comparative statements vide Exts.18, 20 and 22. He further stated that the files of tender papers used to be taken by co-accused M.K. Raghaban, the appellant no.1, P.W.5 and also by the Chairman whenever those were required. In the cross-examination, P.W.6 however stated that the manipulations were not in existence on and prior to 26.02.1982 and the interpolations were not made in his presence. He further stated that the manipulations were made during his leave period from 01.03.1982 to 08.03.1982 and that he entertained doubt and concluded that the

manipulations were made by co-accused M.K. Raghaban and accordingly, he made the endorsement in the note sheet vide Ext.21/3 and 19/3. He further stated the work orders were issued to the appellant no.2 on 05.03.1982 under the signature of the Executive Officer (P.W.5).

The conjoint reading of the evidence of P.W.5 and P.W.6 indicate that the appellant no.2 quoted the price of MAXphalt at Rs.2,021/- per metric ton for all the three work and he became the lowest bidder and got the work orders in his favour. It also appears that not only in the tender register but also in the tender papers of the appellant no.2, the rate of MAXphalt was interpolated and Rs.2,021/- was made Rs.2,621/- and in the running bill, the cost of MAXphalt was shown to be Rs.2,621/- per metric ton and in that process, excess payment was made to appellant no.2. The evidence of P.W.6 further indicates that he doubted that the interpolations were made by co-accused M.K. Raghaban. According to P.W.5, it was the duty of the appellant no.1 to verify the comparative statements and the notes prepared by the co-accused M.K. Raghaban but he did not point out the discrepancies in the price of MAXphalt in the tender work of appellant no.2 at the time of placing the notes before him. The note of the appellant no.1 for each item of work is there below the note of co-accused M.K. Raghaban and it seems from the note of the appellant no.1 that on good faith, he has relied upon the note of the co-accused without verification of the comparative statement and passed the same for approval by Chairman like P.W.5 who on good faith passed the note of the appellant no.1. In my humble view, it may be a case of dereliction of duty on the part of the appellant no.1 but that would not ipso facto attract the ingredients of the offences against him.

On perusal of the relevant tender papers of the appellant no.2 and the tender register, it is apparent that there has been interpolations, cutting and overwriting in different ink and the original price of MAXphalt in the tender papers and tender register was increased from Rs.2,021/- to Rs.2,621/- per metric ton subsequently. Though the evidence of P.W.6 is that he entertained doubt that the manipulations were made by co-accused M.K. Raghaban and accordingly, he made the endorsement in the note sheet but law is well settled that supposition, surmise, speculation and subjective beliefs are no substitute for fact findings based on evidence. In absence of any clinching evidence as to who made the cuttings, overwriting and interpolations in the relevant documents and when and particularly when the files containing tender papers and also the tender register were being handled by different persons as stated

by P.W.6, the learned trial Court is quite justified in its observation that there is no specific evidence as to who committed the forgery.

The learned trial Court held that the appellant no.1 as well as co-accused M.K. Raghaban was the technical persons and dealing with the matter and instead of detecting the forgery, they acted on the basis of such forged documents and did not point out the same to the authority and in that process, the appellant no.2 derived pecuniary benefits. Even though it is evident that interpolation, overwriting and cutting in the figures and words of the price of MAXphalt were made in the tender papers at a subsequent stage which were not in existence at the time of its opening and so also in the tender register but there is no evidence that the appellants had any preconcert of mind with the co-accused M.K. Raghaban or they were hand in gloves or in furtherance of their common intention, forgery was committed in the tender papers of the appellant no.2 and also in the tender register. Though there is material that the appellant no.2 derived temporary pecuniary benefits by getting excess payment than which was legally admissible to him in the first running bill but the same was subsequently deducted from his subsequent running bills as stated by P.W.6.

On the basis of the oral and documentary evidence adduced by the prosecution, even though it is held that false plea has been taken by the appellants but it cannot be said that there are enough materials to hold that the appellant no.1 abused his position as a public servant and obtained temporary pecuniary benefits in favour of the appellant no.2 particularly when there is no evidence as to who committed forgery of documents and when and there is also no evidence that the appellant no.1 has got any role in the interpolation in the tender papers of the appellant no.2 and the tender register maintained in the office of N.A.C., Civil Township, Rourkela and there is also lack of clinching evidence against him that he had knowledge or reason to believe those documents to be forged and in spite of that he used the forged documents as genuine. Therefore, the conviction of the appellant no.1 Sridhar Swain under section 5(2) of the 1947 Act read with section 34 of the Indian Penal Code and sections 465 and 471 read with section 34 of the Indian Penal Code is not sustainable in the eye of law.

13. Charges were framed against the appellant no.2 Maheswar Behera that he abetted the commission of the offences by the appellant no.1 as well as co-accused M.K. Raghaban. Section 107 of the Indian Penal Code defines

abetment of a thing to mean that a person abets the doing of a thing if he firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. So far as the first two clauses are concerned, it is not necessary that the offence instigated should have been committed. Under the third clause, when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence. In other words, unlike the first two clauses, the third clause applies to a case where the offence is committed. Therefore, abetment can be by instigation, conspiracy or intentional aid. In order to decide whether a person has abetted by instigation the commission of an offence or not, the act of abetment has to be judged in the conspectus of the entire evidence in the case. The act of abetment attributed to an accused is not to be viewed or tested in isolation.

On a careful analysis of the evidence on record, I find no evidence of abetment of commission of offence against the appellant no.2. After he submitted his tender papers and got the work orders, till he received the payment for the work executed, there is no evidence that he got access to any forged documents. Even if it is held that he got the temporary pecuniary benefits, but the said amount was subsequently deducted from his subsequent running bills. Taking of a false plea regarding quotation of rate of MAXphalt in his tender papers, by itself would not be sufficient to hold that he abetted commission of any offence. Therefore, the conviction of the appellant no.2 Maheswar Behera for the offences under section 5(2) of the 1947 Act, sections 465 and 471 read with section 109 of the Indian Penal Code is not sustainable in the eye of law and is hereby set aside.

14. In the result, the criminal appeal is allowed. The impugned judgment and order of conviction of the appellants passed by the learned trial Court and the sentence passed thereunder is hereby set aside. The appellants are acquitted of all the charges. The appellants are on bail by virtue of the order of this Court. They are discharged from liability of their bail bonds. The personal bonds and the surety bonds stand cancelled.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Jugal Kishore Panda, engaged as learned Amicus Curiae for the appellant no.1 for rendering his valuable help and assistance in deciding this year old criminal appeal. The hearing fees is assessed to Rs.5,000/- (rupees five thousand) in toto which would be paid to the learned Amicus Curiae immediately.

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2021 (II) ILR - CUT- 199

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 52 OF 1993

LALIT MOHAN PATNAIK ....Appellant

.V.

SADASIBA MOHAPATRA & ORS. ....Respondents

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 203 – Dismissal of complaint – The Magistrate can dismiss the complaint under section 203 of Cr.P.C., inter alia, on any of the following grounds:- (a) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused; (b) The complaint does not disclose the essential ingredients of an offence which is alleged against the accused; (c) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can come to the conclusion that there is sufficient ground for proceeding against the accused; (d) Where the complaint suffers from fundamental illegal effects; and (e) Where the complaint is not by competent authority only empowered to make a complaint.
(Para 8)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 203 – Dismissal of complaint – Leave to appeal is sought for under section 378 (4) of Cr. P. C – Held, not the correct mode to challenge the order of dismissal of a complaint under section 203 – The correct mode is, a revision petition is maintainable against an order dismissing the

complaint under section 203 of Cr.P.C. – Special leave to prefer an appeal is sought for under section 378(4) of Cr.P.C. against an order of acquittal in any case instituted upon a complaint and dismissal of a complaint is not an acquittal as per explanation provided under section 300 of Cr.P.C.

The dismissal of complaint by the Magistrate under section 203 of Cr.P.C. although it is at preliminary stage nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. Once a challenge is laid to such order at the instance of a complainant in a revision petition before the High Court or Sessions Judge, by virtue of section 401 (2) of the Code, the suspects get right of hearing before revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under section 401 (2) of being heard before the revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in section 401 (2) of the Code. The stage is not important whether it is pre process stage or post process stage. In other words, where complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401 (2) of the Code. (Para 9)

Case Laws Relied on and Referred to :-

1. (1992)5 OCR 410 : M/s. Rourkela Construction Private Ltd. .Vs .Ravindra Kumar Goyal
2. 2004 SCC (Criminal) 341 : State of Punjab Vs. Bhag Singh.
3. A.I.R. 1963 S.C. 1430 : Chandra Deo Singh Vs. Prokash Chandra Bose.
4. 2013 (I) OCR 234 : Dhruba Charan Behera Vs. State of Orissa
5. Vol.74 (1992) CLT 136 : Chudamani Sahoo Vrs. Bhojaraj Behera

For Appellant : None
For Respondents : None
For State of Odisha : Mr. Dipak Ranjan Parida Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment: 07.01.2021

S. K. SAHOO, J.

The matter is taken up through Video Conferencing.

This appeal has been filed by the appellant Lalit Mohan Patnaik challenging the impugned order dated 13.09.1984 passed by the learned S.D.J.M., Khurda in 1.C.C. Case No.74 of 1984 in refusing to take cognizance of the offences under sections 143, 382, 451, 504, 395 read with section 109 of the Indian Penal Code and also in dismissing the complaint petition.

2. The appellant filed an application under section 378(4) of Cr.P.C. seeking for special leave to prefer an appeal against the aforesaid impugned order dated 13.09.1984 vide Criminal Misc. Case No.796 of 1984 and special leave was granted as per order dated 18.01.1993, whereafter this appeal was preferred which was admitted on 11.03.1993.

3. None appears on behalf of the appellant so also on behalf of the respondents.

4. Mr. Dipak Ranjan Parida, learned Additional Standing Counsel in absence of the learned counsel for the appellant as well as learned counsel for the respondents placed the complaint petition, the statements of the witnesses and the impugned order.

5. On perusal of the order sheet of this Court dated 11.10.1993 and the consequential order dated 05.04.1994, it reveals that this appeal has been dismissed as against respondents nos.9 to 12.

6. The appellant Lalit Mohan Patnaik is the complainant in I.C.C. Case No.74 of 1984, which was filed in the Court of learned S.D.J.M., Khurda. In the said complaint petition, it is alleged that Satyabadi Pattnaik and Trailokyanath Pattnaik are two brothers and they were separated by metes and bounds since long and their possession was also separately recorded in the C.S. R.O.R. The residential rooms of the appellant in village Anda were in his exclusive physical possession, where all the properties given in the schedule of the complaint petition were kept under his possession. The appellant was serving as an Art Instructor under the State Institute for Rural Development at Bhubaneswar and was staying at Bhubaneswar with his wife whereas his mother and sister’s son Atulya Kumar Patnaik were residing in the village house. On 06.06.1984 the appellant got information that the respondents entered inside his house and removed all the movable properties worth of Rs.50,595/- (rupees fifty thousand five hundred ninety five) from his

house by force and immediately thereafter, he came to the village and ascertained that on 05.06.1984 after sunset, the respondents came to his village in three jeeps and got down in front of his house and knocked at his door. When his sister's son Atulya Kumar Patnaik opened the door, the respondents, namely, Sadasiba Mahapatra, Rabindranath Mishra, Debidutta Mohanty and Basant Kumar Panda told him that they had come to attach the movable properties from the house of the appellant. Atulya Kumar Patnaik told them that the owner of the house being absent and he is at Bhubaneswar, he would not allow the attachment and removal of properties from the house. At this, Atulya Kumar Patnaik was forcibly dragged by the respondents to the village road and under their orders, respondent Bhagaban Mohanty, S.I. of Police kept him under wrongful restraint and confinement through the help of A.P.R. constables whose names were not known to him. Thereafter, the respondents nos.1 to 9 along with twenty other persons, who were armed with lathis, forcibly entered inside the house of the appellant. When the mother of the appellant and others cried out loudly in fear against the illegal action of the accused persons, they were abused in filthy language and were threatened with assault and were also driven out of the house. Thereafter, the respondents removed all the valuable properties as per the list given in the schedule of the complaint petition by breaking open his trunks, which were five in number, almirah and locks of the rooms. While removing the articles from the almirah, the cups, plates and other articles of China clay and glasses were also broken to pieces. They put those articles in a gunny bag and removed the same. The pad locks of the trunks and of the rooms were broken by the accused persons and those were also taken away. The accused persons also removed the papers and documents regarding the landed properties, the certificates and five almirah containing photographs besides the properties as given in the list. It is the case of the appellant that the respondents had no right or authority to enter inside his house and to forcibly remove all the valuable properties in his absence. When on hearing the alarm raised by the mother of the appellant and Atulya Kumar Patnaik, the villagers gathered near his house and asked the reason for such highhanded action of the respondents, they were scared away by A.P.R. forces and threatened to be assaulted. The respondents namely Sadasiba Mohapatra, Chandrasekhar Tripathy, Debudutta Mohanty and some others told them that since the appellant defaulted in making payment of the dues of the co-operative societies, his properties were being attached for satisfaction of the loan dues.

It is the further case of the appellant that he had not incurred any loan from the co-operative societies nor he was a defaulter nor any certificate proceeding or E.P. case had been initiated against him for recovery of any outstanding loan amount. Hence, the forcible and wrongful entry of the respondents inside his house and forcibly removing all his valuables as per the list keeping his sister's son under wrongful restraint and fear of assault is highly illegal and done with malafide intention to make personal gains of the respondents. On getting information, the appellant came to the village on the next day in the afternoon and ascertained the facts from the inmates of his house and other villagers and went to Khurda police station on 07.06.1984 to lodge the F.I.R., but the officer in charge of the police station did not accept the F.I.R. and therefore, the appellant sent the copies of the F.I.R. to the Superintendent of Police, Puri; Collector, Puri; Registrar and Deputy Registrar of the Co-operative Societies, Bhubaneswar and Puri respectively and the Director General of Police, Orissa, Cuttack and other public authorities for redressal of his grievance and for return of his articles by registered post. Since no action was taken, he filed the complaint petition.

7. After filing of the complaint petition, the initial statement of the complainant was recorded and inquiry contemplated under section 202 of Cr.P.C. was conducted and during course of which, complainant examined five witnesses namely P.W.1 Minaketan Misra, P.W.2 Indrajit Baral, P.W.3 Atulya Kr. Patnaik, who is the nephew of the appellant, P.W.4 Rajkishore Baliarsingh and P.W.5 Natabar Das.

After the conclusion of the inquiry, learned S.D.J.M., passed the impugned order which is as follows:-

> "Perused the complaint petition, initial statement and statement of four witnesses examined on behalf of the complainant under section 202 Cr.P.C. The complaint petition as well as the initial statement of the complainant Lalit Mohan Patnaik reveals that on the alleged date and time of occurrence while he was at the place of his service at Bhubaneswar and his own mother and nephew Atulya Kumar Patnaik were present in his house, accused persons came to his house and informed his nephew to remove his movables in connection with an Execution Case. The same was objected by Atulya but the accused persons being armed with lathis forcibly entered inside his house and removed different articles which according to him, the accused persons committed dacoity in his house.
>
> The statement of P.W.1 reveals that in his presence the accused persons removed movables from the house of the complainant in his absence. According to him, the

accused persons had nothing in their hands and they attached the properties of the complainant without applying force and causing hurt to his family members. The version of P.W.2 supports the case of the complainant, but according to him the accused persons were armed with lathis and forcibly removed the movables of the complainant. His evidence also reveals that the accused persons neither threatened the mother, nephew nor assaulted them. He has also stated that he has not seen any Bank employees, Magistrate and A.P.R. force committing dacoity in the house of an innocent person. P.W.3, the nephew of the complainant has supported the version of the complainant in toto. According to him, the accused persons committed dacoity in the house of the complainant. Similarly, P.W.4 has supported the case of the complainant and has stated that the accused persons committed dacoity in the house of the complainant, but has stated that he has not seen any dacoity in the evening in presence of Magistrate, Police Officers and A.P.R. force.

Therefore, such statement of prosecution witnesses and the facts stated in the complaint petition, no human being in this world can conceive for a moment that the responsible Bank officers can commit dacoity in the evening in presence of villagers of Anda in presence of one Magistrate, one Police Officer and A.P.R. force. Besides that the complaint petition as well as the statement of the complainant reveals that the alleged occurrence took place on 05.06.1984, but the complainant has come to the Court for redress only on 26.06.1984. The complainant has stated in his initial statement that on the next day morning he went to the police, but police refused to accept his F.I.R. No doubt, if police had refused to accept his F.I.R., certainly the complainant should have come to Court for redress immediately on the same day or at least on 7th of June. But coming to Court after a long concoct a story of this nature against responsible Bank Officer as well as the responsible Government servants like that of accused nos.10, 11 and 13.

The sum total of my above discussion does not inspire any confidence in my mind that any offence has been committed by the accused persons under Indian Penal Code. In the worst the statement of the witnesses for the complainant reveals that accused nos.10, 11 and the A.P.R. force were at the spot being government servants in discharging of their legal duties. As such sanction to prosecute them is necessary from the State Government and as no sanction has been obtained from the State Government by the complainant, the present complaint is also not maintainable.

Summing up the sum-total of the facts and law involved in this case, I find that there is no material before me to take cognizance against the accused persons and as such the petition for complaint stands dismissed."

8. Section 203 of Cr.P.C. deals with the dismissal of the complaint, in which it is stated that if, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202 of Cr.P.C., the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the

complaint, and in every such case he shall briefly record his reasons for so doing.

A Magistrate may dismiss the complaint under section 203 of Cr.P.C. on three grounds. In the first place, if he, upon the statements made by the complainant and his witnesses, reduced to writing under section 200 of Cr.P.C., finds that no offence has been committed; in the second place, if he distrusts the complainant and his witnesses' statements; and in the third place, if he conducts an inquiry or direct for investigation under section 202 of Cr.P.C. and considering the result of the inquiry or investigation coupled with the statements of the complainant and his witnesses, he is not satisfied that there is sufficient ground for proceeding against the accused, the Magistrate may dismiss the complaint. The words "sufficient ground" used in section 203 of Cr.P.C. mean the satisfaction of the Magistrate that a prima facie case is made out against the person sought to be summoned as accused. It does not mean sufficient ground for the purpose of conviction. The determination of sufficient ground for conviction or acquittal comes only at the end of the trial and not when Court considers whether process is to be issued or the complaint petition is to be dismissed. Section 203 of Cr.P.C. is not a regular stage for adjudicating the truth but where existence of prima facie case is to be looked into. The test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. The Court cannot be utilized for any oblique purpose. That is the reason why the Court has been given ample power to dismiss the complaint petition at the threshold if it finds lack of sufficient ground for proceeding.

In section 203 of Cr.P.C., the phrase 'if any' is included within brackets. The reason is that when the public servant acting or purporting to act in the discharge of his official duties or a Court makes the complaint in writing, there may not be statements of the complainant and the witnesses on oath in view of the proviso to section 200 of Cr.P.C. but only the statements on the complaint. In such cases, there may not also be any inquiry or investigation under section 202 of Cr.P.C. Similarly a Magistrate is not bound to examine the witnesses cited by the complainant in his complaint petition. The inquiry or investigation under section 202 of Cr.P.C. is discretionary one and it can be so conducted or directed if the Magistrate thinks fit to postpone the issue of process.

The Magistrate can dismiss the complaint under section 203 of Cr.P.C., inter alia, on any of the following grounds:-

(a) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused;

(b) The complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(c) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can come to the conclusion that there is sufficient ground for proceeding against the accused;

(d) Where the complaint suffers from fundamental illegal effects; and

(e) Where the complaint is not by competent authority only empowered to make a complaint.

(Ref:- Vol.74 (1992) Cuttack Law Times 136, Chudamani Sahoo Vrs. Bhojaraj Behera)

In case of **M/s. Rourkela Construction Private Ltd. -Vrs.- Ravindra Kumar Goyal reported in (1992)5 Orissa Criminal Reports 410**, it is held that under section 203 of the Cr.P.C., the Magistrate gets jurisdiction to dismiss a complaint, if on perusal of the complaint and the evidence recorded U/s. 202, he finds that the essential ingredients of the offence alleged are absent or that the dispute is only of a civil nature or that there are such patent absurdities in the complaint or in the evidence that it would be a wastage of time to proceed further.

The section clearly indicates that at the time of dismissing the complaint petition, the Magistrate shall briefly record his reasons for so doing. Thus, the recording of reasons is mandatory. It may not be an elaborate one but it should reflect the minimum reasons for passing such an order. Reasons are live links between the minds of the decision maker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the “inscrutable face of sphinx”, it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudicating the validity of the decision. Right to reasons is an indispensable part of a sound judicial

system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. (**Ref: 2004 Supreme Court Cases (Criminal) 341, State of Punjab -Vrs.- Bhag Singh**).

In case of **Chandra Deo Singh -Vrs.- Prokash Chandra Bose reported in A.I.R. 1963 S.C. 1430,** it is held that if the Magistrate has dismissed the complaint without giving reasons, the error is of a kind which goes to the root of the matter. Absence of the reasons would make the order a nullity. The complainant is entitled to know why his complaint has been dismissed with a view to consider an approach to a revisional Court. Being kept in ignorance of the reasons clearly prejudices his right to move the revisional Court.

Section 203 Cr.P.C. consists of two parts, the first part lays down the materials which the Magistrate must consider, and the second part states that if after considering those materials, there is no sufficient ground for proceeding; the Magistrate may dismiss the complaint. While exercising such power under section 203 of the Code, it is incumbent upon the Magistrate to reflect in his order the basis for arriving at the conclusion that there are no sufficient grounds to proceed with the complaint case. While arriving at his judgment, the Magistrate is not fettered in any way except by judicial considerations. He is not bound to accept what the inquiring officer says, nor is he precluded from accepting a plea; provided always that there are satisfactory and reliable material on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not. If the Magistrate has not misdirected himself as to the scope of inquiry under section 202 of Cr.P.C. and has applied his mind judicially to the materials on record, it would be erroneous in law to hold that he should not consider or discuss the materials available and the statements recorded. A Magistrate is empowered to hold an inquiry into a complaint as to commission of certain offence in order to ascertain whether there was sufficient foundation for it to issue process against the person or persons complained against and such order under Section 203 Cr.P.C. should be a speaking one. In other words, when a Magistrate intends to dismiss a complaint petition, he has to give

reasons. **(Ref: 2013 (I) Orissa Law Reviews 234, Dhruba Charan Behera -Vrs.- State of Orissa).**

9. In view of the law laid down and after carefully going through the impugned order and the materials available on record, I do not find any illegality or irregularity or perversity in the order. Moreover, a revision petition is maintainable against an order dismissing the compliant under section 203 of Cr.P.C. Special leave to prefer an appeal is sought for under section 378(4) of Cr.P.C. against an order of acquittal in any case instituted upon a complaint and dismissal of a complaint is not an acquittal as per explanation provided under section 300 of Cr.P.C.

The dismissal of complaint by the Magistrate under section 203 of Cr.P.C. although it is at preliminary stage nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. Once a challenge is laid to such order at the instance of a complainant in a revision petition before the High Court or Sessions Judge, by virtue of section 401 (2) of the Code, the suspects get right of hearing before revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under section 401 (2) of being heard before the revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in section 401 (2) of the Code. The stage is not important whether it is pre process stage or post process stage. In other words, where complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401 (2) of the Code.

For the reasons afore-stated, I am not inclined to interfere with the impugned order. Accordingly, the Criminal Appeal stands dismissed.

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2021 (II) ILR - CUT- 209

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 54 OF 1993

SUDARSAN @ AIBAN NAIK AND ORS. ....Appellants

.V.

STATE OF ORISSA ....Respondent

CRIMINAL TRIAL – Offence of attempt to murder – Injuries on the person of accused not explained – Effect thereof – Held, its affects the genesis of prosecution case.

In the case in hand, one of injuries sustained by the appellant no.2 Saheba Naik was on his head and two of the injuries were caused by sharp cutting weapon and in such a scenario, in my humble view, the non-explanation of injuries by the prosecution witnesses affects the prosecution case which shows that the prosecution has suppressed the genesis of the case and the true story and the evidence of the witnesses cannot be said to be trustworthy. *(Para 8)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1976 S.C. 2263 : Lakshmi Singh -Vrs.- State of Bihar.

For Appellants : Mr. Smruti Ranjan Mohapatra (Amicus Curiae)

For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 25.03.2021

S.K. SAHOO, J.

The matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Three appellants, namely, Sudarsan @ Aiban Naik, Saheba Naik and Bhagaban Rout along with one Babu @ Baijendra Naik faced trial in the Court of learned Additional Sessions Judge, Sambalpur in S.T. Case No.67/5 of 1989-92 for offence punishable under section 307 of the Indian Penal Code. The learned trial Court vide impugned judgment and order dated 28.01.1993 though acquitted accused Babu @ Baijendra Naik and appellants nos.2 and 3 namely, Saheba Naik and Bhagaban Rout of the charge under section 307 of the Indian Penal Code but found the appellants nos.2 and 3 guilty under section 323 of the Indian Penal Code and sentenced them to undergo R.I. for three months. Similarly, the appellant no.1 Sudarsan @

Aiban Naik was found guilty under section 307 of the Indian Penal Code as well as under section 323 of the Indian Penal Code and sentenced to undergo R.I. for a period of three years and R.I. for three months respectively with a further direction that the sentences are to run concurrently.

The learned counsel for the State produced a letter dated 21.09.2020 of the Inspector in-charge of Kisinda police station in the district of Sambalpur which indicates that the appellant no.1 Sudarsan @ Aiban Naik died on 19.12.2014 and the appellant no.3 Bhagaban Rout died about seven years back. In view of section 394(2) of Cr.P.C., this appeal so far as appellant no.1 and appellant no.3 stands abetted.

2. The prosecution case, in short, is that Dwaru Rout (P.W.1) was the owner in possession of a piece of cultivable land locally known as Majhimunda, which was situated in village Ghodadian. In the year 1988, he had raised paddy crops thereon and on 14.11.1988 morning, while he was reaping the standing crops with his labourers namely, Keshaba Rout (P.W.2), Rajan Sahu (P.W.3) and Palau Naik (P.W.4), the appellants along with the co-accused Babu @ Baijendra Naik entered into the said land being armed with lathies and axe, challenged them and assaulted them. On account of such assault, Keshaba Rout (P.W.2) received serious injuries and was hospitalized and P.Ws.1, 2 and 3 also sustained some minor injuries.

On the basis of the first information report lodged by P.W.1 before officer in charge of Kisinda police station on 14.11.1988, Kisinda P.S. Case No.22 of 1988 was registered under sections447/323/307/34 of the Indian Penal Code. P.W.10 Dhabaleswar Bibhar, who was the officer in charge of Kisinda police station, took up investigation of the case, visited the spot, examined the witnesses, sent the injured persons for medical examination, seized the lathies, arrested the accused persons and forwarded them to Court, made a query to the Medical Officer relating to the injuries sustained by P.W.2 Keshaba Rout and also recorded the dying declaration of Keshaba Rout (P.W.2) and on completion of investigation, submitted charge sheet against the appellants and co-accused Babu @ Baijendra Naik under sections 447, 323, 307/34 of the Indian Penal Code on 28.01.1989.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court framed the charge against the appellants and the co-

accused Babu @ Baijendra Naik for the offence under section 307 of the Indian Penal Code on 20.09.1989. Since they refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

4. During course of trial, the prosecution examined ten witnesses.

P.W.1 Dwaru Rout is the informant in the case and he is an eye witness to the occurrence. He stated that while he along with P.Ws.2, 3 and 4 were cutting paddy from his land, all the four accused persons came being armed with lathies and axe and assaulted them.

P.W.2 Keshaba Rout, P.W.3 Rajan Sahu and P.W.4 Palau Naik are the injured eye witnesses to the occurrence.

P.W.5 Durjodhan Behera is the ward member of the village Godadhia of Giripur ward, who is a post-occurrence witness and stated that on being informed by the informant (P.W.1) about the occurrence, he came to the spot where he found Keshaba Rout (P.W.2) was lying in an unconscious state on the disputed land and he also saw bleeding injury on the head of P.W.2.

P.W.6 Kantharu Pera is also an eye witness to the occurrence and he stated that the accused persons came to the spot being armed with lathies, where there was some exchange of words between them and the accused persons assaulted P.W.1 and his labourers.

P.W.7 Chhabi Mahananda is a seizure witness vide seizure list Ext.5.

P.W.8 Raghunath Pradhan is the Sarpanch of Girishchandrapur Gram Panchayat, in whose presence, the ‘panch faisala’ (Ext.3) was executed.

P.W.9 Dr. Jayakrushna Sahu attached to Girishchandrapur Dispensary examined P.Ws.1 to 4 on police requisition and also the appellants Sudarsan @ Aiban Naik and Saheba Naik and proved the medical reports.

P.W.10 Dhabaleswar Bibhar was the officer in charge of Kisinda police station who is also the investigating officer in the case.

The prosecution proved eleven documents. Ext.1 is the F.I.R., Exts.2 and 5 are the seizure lists, Exts.3 and 4 are the Panch Faisalas, Exts.6 to 9 are

the reports of P.W.9, Ext.10 is the opinion of P.W.9 and Ext.11 is the dying declaration.

The prosecution also proved four material objects. M.Os.I to IV are the lathies.

5. The defence plea of the appellants is that the land belonged to appellant Bhagaban Rout which was transferred in favour of appellant Saheba Naik, who was his son-in-law and Saheba Naik was in possession of the land and on the date of occurrence, while the appellants were harvesting the paddy crops raised by them, the prosecution party members arrived at the scene of the occurrence and assaulted them, as a result of which, appellants Sudarsan @ Aiban Naik and Saheba Naik sustained injuries. It is pleaded by the appellant Bhagaban Rout and one Babu @ Baijendra Naik that they were not present at the spot.

The defence examined two witnesses. D.W.1 Bipina Dehury is an attesting witness to the sale deed (Ext.A) and D.W.2 Sambhunath Behera is a co-villager who is a post occurrence witness.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that the appellant no.2 Saheba Naik had not sustained injuries during course of the occurrence and therefore, no duty was cast upon the prosecution to explain the injuries sustained by him. It is further held that the evidence adduced by the prosecution falls short of proof of any intention on the part of any of the accused to cause the death of any prosecution witnesses and that the accused persons had no common intention to cause the injuries on P.Ws.1, 2, 3 and 4 and each of the accused shall be liable for his own individual act. Since injuries caused to P.Ws.1, 3 and 4 were simple injuries, it was held that the accused persons are liable for the offence under section 323 of the Indian Penal Code and not under section 307 of the Indian Penal Code. It was further held that so far injury caused to Keshaba Rout (P.W.2), the appellant Sudarsan @ Aiban Naik attempted to commit his murder and accordingly, he was found guilty under section 307 of the Indian Penal Code. The accused Babu @ Baijendra Naik was not found guilty of the charge under section 307 of the Indian Penal Code and he was acquitted. So far as the appellants Saheba Naik and Bhagaban Rout are concerned, though they were found not guilty under section 307 of the Indian Penal Code but they were found guilty under section 323 of the Indian Penal Code. So far as

the appellant Sudarsan @ Aiban Naik is concerned, he was found guilty under section 307 of the Indian Penal Code as well as under section 323 of the Indian Penal Code.

7. Since the appeal remains to be decided only for the appellant no.2 Saheb Naik and no one appeared for him to argue the matter and it is a twenty eight years old appeal, Mr. Smruti Ranjan Mohapatra, Advocate was appointed as Amicus Curiae to argue the case for the said appellant. He was supplied with the paper book and given time to prepare the case. He placed the evidence of the witnesses and also the impugned judgment. While assailing the impugned judgment and order of conviction, learned Amicus Curiae raised a very vital contention that it is the prosecution case that the appellant no.2 only assaulted Dwaru Rout (P.W.1) for which he has been found guilty under section 323 of the Indian Penal Code but the statements of prosecution witnesses relating to such assault on P.W.1 are discrepant in nature. He argued that the appellant no.2 was sent for medical examination on police requisition and the doctor (P.W.9) examined him and noticed three injuries on his person i.e. one incised wound on the scalp, another incised wound on the left wrist joint and a bruise on the back side of the forearm and he opined that the injuries nos.1 and 2 might have been caused by heavy sharp cutting weapon like tangia and injury no.3 by blunt weapon like lathi and the prosecution has not explained as to how the appellant no.2 sustained those injuries which indicates that they have suppressed the genesis of the case and they have not come forward with clean hand. It is further argued that the learned trial Court has not given due importance to this aspect on a flimsy ground that the injuries which were sustained by appellant no.2 were fresh injuries and therefore, those were not caused during course of the same occurrence and therefore, no duty was cast on the prosecution to explain any such injuries. According to Mr. Mohapatra, it is a fit case where the appellant no.2 Saheb Naik should be given benefit of doubt.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel for the State, on the other hand, supported the impugned judgment and order of conviction and sentence imposed by the learned trial Court.

8. Adverting to the contention raised by the learned counsel for the respective parties, since the appellant no.2 has been found guilty under section 323 of the Indian Penal Code for causing simple injury on Dwaru

Rout (P.W.1), it is to be seen how far the prosecution evidence is consistent in that respect.

P.W.1 has stated that appellant Saheba Naik gave him three lathi blows i.e. on his head (left side), shoulder and left wrist. He has not stated that any other accused persons assaulted him. However, P.W.2 Keshaba Rout, who is an injured eye witness, stated that all the accused persons reached at the spot being armed with axe and lathi and assaulted P.W.1. P.W.3 Rajan Sahu, another injured eye witness has not stated about any assault on P.W.1, whereas P.W.4 has stated that it was appellant Sudarsan @ Aiban Naik who assaulted P.W.1. P.W.6 stated that all the accused persons assaulted to P.W.1. Thus, if the evidence of these five eye witnesses is analyzed, it appears that whereas P.W.3 is completely silent as to who assaulted P.W.1, the evidence of P.Ws.1, 2, 4 and 6 are discrepant with each other so far as assault on P.W.1 is concerned. P.W.1 implicated appellant no.2 only in his assault, P.W.2 and P.W.6 have implicated all the accused persons in the assault of P.W.1, whereas P.W.4 implicated appellant Sudarsan @ Aiban Naik in the assault of P.W.1. In my humble view, the offence alleged against the appellant no.2 being minor in nature, such discrepancies cannot be ignored and be held to be inconsequential.

The investigating officer being examined as P.W.10 stated that a counter case was filed from the side of the appellants on the accusation that witnesses Dwaru Rout P.W.1), Keshaba Rout (P.W.2), Rajan Sahu (P.W.3) and Palau Naik (P.W.4) assaulted the appellants Sudarsan Naik and Saheba Naik and those appellants sustained injuries and were sent for medical examination. The doctor (P.W.9) has stated that on 14.11.1988, on police requisition, he examined the appellant Saheba Naik and found one incised wound of size 1½" x 1/6" x skin deep on the scalp of the front part of the head, another incised wound 1½" x 16" placed on the back of the left wrist joint and a bruise with abrasion 6" x 1" was found on the back side of the forearm and the injuries were fresh. He further opined that the injury nos.1 and 2 might have been caused by heavy sharp cutting weapon like tangia and injury no.3 by blunt weapon like lathi. When P.W.1 was questioned about the assault on the accused persons in the cross-examination, he simply denied that they have not assaulted the accused persons and further stated that the accused persons had not sustained any injuries.

In the case of **Lakshmi Singh -Vrs.- State of Bihar reported in A.I.R. 1976 S.C. 2263**, the Hon'ble Supreme Court held that there might be cases where the non-explanation of the injuries by the prosecution might not affect the prosecution case, however, this principle apply only to cases where the injuries sustained by the accused are minor and superficial in nature or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. In the case in hand, one of injuries sustained by the appellant no.2 Saheba Naik was on his head and two of the injuries were caused by sharp cutting weapon and in such a scenario, in my humble view, the non-explanation of injuries by the prosecution witnesses affects the prosecution case which shows that the prosecution has suppressed the genesis of the case and the true story and the evidence of the witnesses cannot be said to be trustworthy.

The learned trial Court was not justified in not giving due importance to this particular aspect mainly on the ground that the wounds were fresh. When immediately after the occurrence, both the parties have approached the police, lodged the first information reports and in the counter case instituted against the prosecution party members, on police requisition, the appellant no.2 was sent for medical examination and similarly, appellant no.1 namely Sudarsan @ Aiban Naik (dead) was also found to have sustained injuries on his person by the doctor (P.W.9), in my humble opinion when the medical evidence has not completely ruled out the possibility of the injuries at the time of occurrence giving specific opinion on the age of injuries, the non-explanation of such injuries particularly in the facts and circumstances of the case when there was civil dispute between the parties, is a serious infirmity in the prosecution case.

9. It view of the foregoing discussions, when the evidence of the prosecution witnesses are discrepant relating to the assault on P.W.1 whose injuries are also simple in nature as opined by the doctor (P.W.9) and when the prosecution witnesses have failed to explain the injuries sustained by the appellant no.2, in my humble opinion, the impugned judgment and order of conviction of the appellant no.2 cannot be sustained in the eye of law which is hereby set aside.

In the result, the Criminal Appeal is allowed. The appellant no.2 Saheba Naik is acquitted of the charge under section 323 of the Indian Penal

Code. He was granted bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Trial Court records with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Smruti Ranjan Mohapatra, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only).

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2021 (I) ILR - CUT- 216

K.R. MOHAPATRA, J.

CMP NO. 1082 OF 2019

SATRUGHANA GIRI ....Petitioner

.V.

HARAMANI GIRI & ANR. ....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 17, Rules 2 and 3 read with Order 9 Rule 13 – Suit for Partition – Defendant appeared but not filed written statement and remained absent on the date fixed for hearing – Ex parte judgment and decree passed – Subsequently filed petition under Order 9 Rule 13 seeking setting aside ex parte judgment – Petition rejected by trial court holding the petition not maintainable – Confirmed in appeal – Writ petition challenging such order – Plea that the petition under Order 9 Rule 13 was maintainable and in order to maintain such a petition a specific order setting the Petitioner ex parte is not required – Law on the issue was examined with reference to earlier judgments in the case of Murali Patra –v- Sunaram Singh, reported in 72 (1991) CLT 244, and Prakash Chander Manchanda and another -v- Smt. Janki Manchanda, reported in AIR 1987 SC 42,and was held that the petition under order 9 Rule 13 was maintainable.

Case Laws Relied on and Referred to :-

1. 72 (1991) CLT 244 : Murali Patra .Vs. Sunaram Singh.
2. AIR 1987 SC 42 : Prakash Chander Manchanda and another .Vs. Smt. Janki Manchanda.

For Petitioner : M/s. G.N. Mishra,P. Mohanty, J.K. Pradhan & B.R. Swain

For Opp. Parties : None

ORDER Date of Order : 06.04.2021

K.R. MOHAPATRA, J.

This matter is taken up through video conferencing mode.

2. Heard Mr. G.N. Mishra, learned counsel for the Petitioner. None appears for the Opposite Parties in spite of valid service of notice as per office note dated 07.01.2021.

3. The Petitioner in this writ petition seeks to assail the order dated 17.08. 2019 (Annexure-2) passed by learned Addl. District Judge-II, Baripada in FAO No. 1 of 2016, whereby she confirmed the order dated 13.10.2015 (Annexure-1) passed by learned Civil Judge (Senior Division), Baripada in CMA No. 115 of 2014 (arising out of C.S. No. 304 of 2007) dismissing an application under Order IX Rule 13 C.P.C. filed by him.

4. Mr. Mishra, learned counsel for the Petitioner submits that the Petitioner as Defendant No.1 could not appear on the date of hearing of the suit due to his illness for which the suit for partition proceeded in his absence. *Ex parte* judgment was also passed on the very same day, i.e. on 26th June, 2013 and the decree was passed on 5th July, 2013 by learned Civil Judge (Senior Division), Baripada. The Petitioner thereafter filed CMA No. 115 of 2014 under Order IX Rule 13 C.P.C. for setting aside the *ex parte* decree, which was rejected on the ground that since the Petitioner was never set ex parte, the provision of Order IX Rule 13 C.P.C. is not applicable. Learned trial court further held that the medical certificate filed by the Petitioner in support of his illness was not proved by the treating physician. Accordingly, she dismissed the petition under Order IX Rule 13 C.P.C. vide judgment dated 13th October, 2015. Assailing the same, the Petitioner preferred FAO No. 1 of 2016, which was also dismissed vide order dated

17th August, 2019 holding that since the Petitioner was never set *ex parte*, the question of exercising power under Order IX Rule 13 C.P.C. does not arise.

5. Mr. Mishra, learned counsel for the Petitioner further submits that since the judgment in C.S. No. 304 of 2007 was passed *ex parte* against the Petitioner, the petition under Order IX Rule 13 C.P.C. is maintainable and in order to maintain a petition under Order IX Rule 13 C.P.C., a specific order setting the Petitioner *ex parte* is not required to be passed. In support of his case, he relied upon the decision of this Court in the case of ***Murali Patra –v- Sunaram Singh***, reported in 72 (1991) CLT 244, wherein it has been held at paragraph-3 as follows:

> "*3. As indicated, at the outset the scope and ambit of Order 17, Rules 2 and 3 fall for consideration in this case. If on a date fixed one of the parties to the suit remains absent and for that party no evidence has been led up to that date, the Court has no option but to dispose of the matter in accordance with Order 17, Rule 2 in any one of the modes prescribed under Order 9 of the Code. After the amendment in 1976 to Order 17, Rules 2 and 3, in a case where the party is absent, the only course available is to proceed under Rule 2 in the manner prescribed in Order 17, Rule 3(b). Therefore, in the absence of defendant, the Court had no option but to proceed under Rule 2. The language of Rule 2 as stands presently clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes prescribed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3, even if a party is absent; but the same discretion is conditional, and is applicable in a case where a party which is absent has led some evidence or part of its evidence. In such a case the Court has to proceed to dispose of the suit on merits in one of the modes under Order 9. This view of mine gets countenance from a decision of the Supreme Court reported in (1986) 4 SCC 699: A.I.R. 1987 S.C. 42 Prakash Chandar Manchanda v. Janki Manchanda. That being the position, the learned Munsif was not justified in holding that the suit was disposed of in terms of Explanation to Rules 2, and Rule 3 of Order 17, and/or that the petition under Order 9, Rule 13, of the Code was not maintainable. The impugned order is, set aside. The learned Munsif shall now decide the merits of the application under Order 9, Rule 13 of the Code.*"

Hence, he prays for setting aside the impugned judgments under Annexures-1 and 2 and to remit the matter back to the learned Civil Judge (Senior Division), Baripada for consideration of the application of the Petitioner afresh keeping in view the ratio decided in the case of *Murali Patra* (supra).

6. On perusal of the materials available on record, it is apparent that although the Petitioner (Defendant No.1) appeared in C.S. No. 304 of 2007, but he had neither filed written statement nor entered into the witness box to lead evidence. The judgment in C.S. No. 304 of 2007 was also passed *ex parte* against the Defendants allotting 1/3rd share to each of the parties to the suit. The ratio decided in the case of ***Murali Patra* (supra)** makes it abundantly clear that when on the date to which the suit is adjourned for hearing any of the parties

fails to appear the Court has the discretion to dispose of the suit in any of the modes provided under Order IX. Thus, there is no impediment for the Court to proceed with hearing of the suit without recording a formal order setting the Petitioner *ex parte*. In other words, an order setting the defendant *ex parte* is not *sine qua non* for entertaining an application under Order IX Rule 13 C.P.C. The nature of the judgment and decree is determinative in taking a decision with regard to maintainability of a petition under Order IX Rule 13 C.P.C.

7. In view of the language and tenor of Order XVII Rule 2 C.P.C., it can be safely said that the Court can dispose of the suit *ex parte* when the Defendant fails to appear on the date of hearing of the suit. In the case at hand, the Court, in fact, proceeded *ex parte* and passed the impugned judgment in C.S. No. 304 of 2007 ex parte. Thus, a petition under Order IX Rule 13 C.P.C. is maintainable.

8. In the case of ***Prakash Chander Manchanda and another –v- Smt. Janki Manchanda***, reported in **AIR 1987 SC 42**, the Hon'ble Supreme Court has made it clear that if the Defendant fails to appear on the date of hearing and no evidence is led on its behalf, the Court can proceed *ex parte* under Order IX C.P.C.. When an *ex parte* judgment and decree is passed in C.S. No. 304 of 2007, it hardly makes any difference, if a formal order setting the Petitioner *ex parte* has been passed or not. Rule 13 of Order IX C.P.C. relates to an *ex parte* decree and not an order.

9. In that view of the matter, the impugned judgments under Annexures-1 and 2 are not sustainable in law. Accordingly, the same are set aside. The matter is remitted back to the learned Civil Judge (Senior Division), Baripada to consider the CMA No. 115 of 2014 afresh on its own merit in accordance with law giving opportunity of hearing to the parties concerned keeping in mind the discussions made above.

10. With the aforesaid observation and direction, the CMP is disposed of.

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

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2021 (II) ILR - CUT- 220

K.R. MOHAPATRA, J.

CMP NO. 138 OF 2021

BISHNU CHARAN MOHANTY & ANR ………Petitioners

.V.

SMT. MANJU @ MANJUSA MOHANTY & ORS. ……….Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 21 Rule 22 – Provisions under – Notice in execution proceeding – Who are to be noticed? – Held, party against whom the execution is applied for is only to be noticed in the execution proceeding – Plea of J. Drs that notice should be served to all parties to the suit – Whether can be accepted? – Held, No.

*"Perusal of Rule 22 of Order XXI CPC (Odisha Amendment) makes it abundantly clear that party against whom the execution is applied for is only to be noticed in the execution proceeding. The petitioners being the J. Drs in the execution case, were only served with the notice and they are diligently participating in the execution proceeding. Since the opposite party Nos.1 to 3- D.Hrs are not seeking execution against other parties to the suit, and they have no conflicting interest with them, they need not be made parties and be noticed in the execution proceeding. There is no dispute to the ratio decided in the case of **Labanya Devi (supra)** and **Chaitan Das (supra),** relied upon by Mr. Mohanty, learned Senior Advocate. Both the case laws are relating to demarcation under Order XXVI Rule 9 CPC in a suit. Thus, the parties to the said suit were required to be noticed to have their say in demarcation of the suit land. Applying the principle settled therein, the J.Drs., who are parties to the execution proceeding have been noticed and are participating in the said proceeding. The intent and object of Rule 22 is to serve notice on the J.Dr. to have his say in the matter. In the instant case, the J.Drs. having been noticed, the requirement of Rule 22 is satisfied."* *(Para 20)*

Case Laws Relied on and Referred to :-

1. AIR 1972 SC 1371 : Bhavan Vaja & Ors. Vs. Solanki Hanuji Khodaji Mansang**.**
2. 1959 (25) CLT 532 **:** Labanya Devi & Ors. Vs. Govind Malik & Ors.
3. 63 (1987) CLT 680 : Chaitan Das Vs. Smt. Purnabasi Pattnayak & Ors.
4. (2015) 5 SCC 423 : Radhey Shyam and Anr**.** Vs. Chhabi Nath & Ors.
5. (2013) 9 SCC 491 : Satyawati Vs. Rajinder Singh and Anr**.**

For Petitioners : Mr. Ramakanta Mohanty (Sr. Adv.)
Imran Khan, I. Khan & A.K. Mohanty

For Opp. Parties : M/s. Prafulla Kumar Rath, Behera, S.K. Behera,
P. Nayak, S. Das & S.B. Rath (Caveator)

M/s. B.K. Sharma & S. Palei (Intervenor)

JUDGMENT Heard & Disposed of on : 06.04.2021

K.R. MOHAPATRA, J.

Heard Mr. Ramakanta Mohanty, learned Senior Advocate being assisted by Mr. Imran Khan, learned counsel for the petitioners and Mr. Prafulla Kumar Rath, learned counsel for the decree holders-opposite party Nos.1 to 3.

2. This CMP has been filed assailing the order dated 01.03.2021 (Annexure-1) passed by learned Civil Judge (Senior Division), 2nd Court, Cuttack in Execution Case No.11 of 2016 (arising out of CS No.2 of 2007).

3. Short narration of facts necessary for proper adjudication of the CMP are as follows:-

3.1 Civil Suit No.2 of 2007 was filed with a prayer for declaration that the plaintiffs along with the defendants have community interest and unity of possession over the suit land as well as for permanent and mandatory injunction. The suit was decreed in part vide judgment dated 22nd December, 2012 directing as under:-

> *"The suit be and the same is decreed in-part on contest against the defendants No.1 to 8 but with no cost. It is hereby declared that, the plaintiffs and defendants No.1 to 6 have community of interest and unity of possession over the suit land. The defendants No.1 and 2, their servants and agents are permanently restrained from raising any kind of construction and blocking the common passage. The defendants No.1 and 2 are directed to remove the construction made over the suit land within a period of two months failing which the same will be done by the Court and the cost will be realised from them. Further the defendants No.1 and 2 are directed to allow the plaintiffs to use the suit land as passage for approaching the main road."*

4. Assailing the above judgment and decree, the defendants filed RFA No.13 of 2013 under Section 96 of CPC. The said appeal was allowed vide judgment dated 30.07.2015. Accordingly, the judgment and decree passed in the suit was set aside. Being aggrieved, the plaintiffs preferred RSA No.327 of 2015, which was allowed restoring the judgment and decree passed in the Civil Suit. Although the defendants moved the Hon'ble Supreme Court in SLP(Civil) No.11522 of 2016, but the same was dismissed. Accordingly, the plaintiffs-decree holders filed a petition for execution of the decree in CS No.2 of 2007, which was registered as Execution Case No.11 of 2016. The Execution Petition was filed against the present petitioners for removal of construction over the suit land, which is a passage. The said proceeding has a

chequered career. Earlier, the plaintiffs-DHrs. had moved this Court in CMP No.1304 of 2016 against the order passed under Section 47 CPC. The said CMP was disposed of directing the Executing Court to proceed with the execution case keeping in mind the observation made by the Hon'ble Supreme Court in the case of ***Bhavan Vaja and others –vs.- Solanki Hanuji Khodaji Mansang***, reported in ***AIR 1972 SC 1371***. When the matter stood thus, learned Executing Court passed an order carving out 50% share of the petitioners-JDrs. in the suit property, against which the DHrs.-opposite party Nos. 1 to 3 filed CMP No.1180 of 2017, which was disposed of on 22.12.2019 with the following direction as under:-

> *"In such view of the matter and looking to the clear direction in C.M.P. No.1304 of 2016 read with the nature of direction involving the suit sought to be executed, this Court finds the deputation of Commissioner should confine only to demarcate the passage to be enjoyed by both the parties herein following the decree in C.S. No.2/2007. As a consequence, this Court interferes with the order at Annexure-1 which is modified to the extent that Commissioner if at sent will confine to measure and identify the common passage to be utilized by both parties. Accordingly sets aside. Commissioner shall be deputed forthwith who will submit his report within a period of one month and the execution proceeding may also be concluded within a period of one month thereafter.*
>
> *The C.M.P. stands disposed of with the above interfere and direction made hereinabove."*

Accordingly, learned Executing Court deputed a Amin Commissioner to carve out the suit passage, who accordingly submitted his report. The JDrs-petitioners filed an application to cross-examine the Amin Commissioner, which was allowed and the Amin Commissioner was cross-examined at length by the Petitioners-J.Drs. At the time of argument on acceptability of the report of the Amin Commissioner, the petitioners raised three contentions by filing their written note of submission, which are as follows:-

> *1) All the parties to the suit have not been noticed;*
>
> *2) The Amin Commissioner has taken the fixed point as pointed out by the parties without finding out a fixed point of his own;*
>
> *3) Although the writ was issued for measurement of the passage of 100 links x 7 ½ links. Amin Commissioner measured 330 links x 7 ½ links, which has vitiated the entire report.*

5. Learned Executing Court, while taking into consideration the argument with regard to issuance of notice to the parties, held that since the

JDrs have been noticed and they have participated in the demarcation process of the passage, they are in no way prejudiced. Thus, notice to all the parties to the suit was not required to be issued.

6. Learned Executing Court answering the contention that although a fixed point, namely, 'Mustkil Chhanda' (fixed point) was available in the village, but the Commissioner has not taken measurement from the said fixed point and measured the passage by taking fixed point as identified by the parties, held that when both parties (JDrs and DHrs) have identified the fixed point, the Commissioner has done no mistake in measuring the suit passage.

7. So far as the contention raised by the Petitioners with regard to measurement of excess land for which the Commissioner was not authorised, learned Executing Court held that although the Amin Commissioner has measured the area more than the decreed passage, but there is no impediment in executing a decree for 100 links x 7 ½ links out of 330 links x 7½ links.

8. Thus, the objections raised by the petitioners-JDrs at the time of argument were overruled and the impugned order has been passed.

9. Mr. Mohanty, learned Senior Advocate relying upon the case law in ***Labanya Devi and others Vs. Govind Malik and others,*** reported in ***1959 (25) CLT 532*** submitted that all the parties to the suit should have been noticed when a measurement is undertaken by the Commissioner under Order XXVI Rule 9 CPC. In paragraph-4 of the said judgment in ***Labanya Devi*** (supra), it has been observed as under:-

> *4. …… Besides, on the facts of this particular case, it is apparent that though all the defendants have the common interest of resisting the claim of Golak Behera but their interests inter se were different in that they each were interested in getting from the Commissioner correct identification of their own respective plots and the measurement thereof. This separate interest of each of the defendants could not be served by the presence of Lahanya'a father alone. Mr. G. G. Das contended that this point, not having been taken at an earlier stage of the proceedings before the lower court and no question having been put to the witnesses in cross-examination suggesting their alleged grievances for alleged non-intimation by the Commissioner, this point cannot be taken in revision before this Court. In my opinion, the petitioners can rightly make, a grievance of the fact of the Commissioner not giving sufficient opportunity to the parties to present their respective cases."*

He also relied upon the decision of this Court in the case of ***Chaitan Das Vs. Smt. Purnabasi Pattnayak and others***, reported in ***63 (1987) CLT 680***, paragraph-4 of which reads as follows:-

4. Rule 9 of Order 26 empowers a court to depute a eivil court commissioner for local investigation in a suit if he deems it requisite or proper for the purpose of elucidating any matter in dispute. Rule 18(1) of Order 26, which is relevant for the purpose of discussion is quoted below for easy reference :--

"Where a commission is issued under this Order, the court shall direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders."

This rule has been interpreted in several decisions of different High Courts. In AIR 1934 Mad 548, Modalvalasam Latchan Naidu v. Rama Krishna Ranga Rao Bahadur Bobbili Samasthnam, Cornish, J. held that Rule 38 is mandatory, and is intended to ensure that the parties have notice of the appointment of the commissioner and that they must attend his investigation. In AIR 1953 Mad 717, In Re P. Moosa Kutty, Ramaswami, J. held that Rule 18 of Order 26 enjoins upon the court at the time the commission is issued to direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders. In AIR 1959 Andh Pra 64, Mahant Narayana Dossjee Varu v. The Board of Trustees, The Tirumalai Tirupati Devasthanamas, K. Subba Rao, C.J. speaking for the court held that the information gathered by the commissioner behind the back of the parties is not evidence in the case. In AIR 1960 Orissa 66, Labanya Debi v. Govinda Malik Barman, J. held that according to Rule 18 of Order 26, all the parties must be given individually an opportunity to make representation of their respective cases by issuing notices to them. In AIR 1962 Andh Pra) 84, Pedda Seetharamappa v. Pedda Appaiah, Manohar Pershad, J. held that it is mandatory by reason of Order 26, Rule 18 on the court after issue of the commission to direct the parties to appear before the commissioner. He went to the extent of observing that notice issued by the commissioner is not sufficient compliance with Rule 18 and where local investigation is made behind the back of the defendant, no reliance can be placed on the report given by the commissioner. In AIR 1962 Pat 213, Sm. Mandera Mukherjee v. Sachindra Chandra Mukherjee, Anant Singh, J. went to the extent of holding that where the court has not directed the parties to appear before the commissioner, any notice by the commissioner himself to the defendant would not validate the appointment of the commissioner. The order of the court appointing a commissioner without notice to the defendant is obviously without jurisdiction. In AIR 1968 Ker 28, Maroli Achuthan v. Kunhipathamma, a Division Bench held that the presence of parties is imperative under Order 26, Rule 18. Hence there must be a direction by the court of which notice has to he given to the parties or, at least the commissioner should issue notice to the parties calling upon them to appear for investigation. In AIR 1970 Delhi 205, Jamil Ahmed Taban v. Must. Khair-Ul-Nisa, a Division Bench observed that in case of non-compliance of mandatory provisions of Rule 18 of Order 26, the appointment of the local commissioner is without

> *jurisdiction and the report resulting from his inspection cannot be read as evidence. In AIR 1973 All 148, Suraj Pal v. Smt. Meera alias Merhia, an identical view was taken and it was held that even if the court does not give notice to the parties in terms of Rule 18 of Order 26, if the commissioner issues notice to them, it would be deemed to be sufficient compliance. In view of the principle enunciated in these decisions, law is well settled that Rule 18 of Order 26 is mandatory. It is the duty of the court to direct that the parties to the suit shall appear before the survey knowing commissioner in person or by their agents or pleaders at the time of local investigation. In the absence of notice by the court, notice issued by the commissioner to the parties shall be deemed to be sufficient compliance. If no notice is served on any of the parties to the suit to appear before the survey knowing commissioner at the time of local investigation, the result of such local investigation, namely, the report and the map, cannot be accepted as evidence."*

He, therefore, submitted that admittedly notice to all the parties to the suit being not issued at the time of identification of decreed passage the measurement is *per se* illegal and is vitiated.

10. He further submits that it is the duty of the Amin Commissioner to find out the fixed point of the village and measure the land from the fixed point only. In the instant case, a fixed point is available in the village which is known as "Mustkil Chhanda", but the Commissioner without taking the same to be the fixed point, took another point, i.e., 'A'-'B' ('Trimedha' and 'Choumedha') of the field report as identified by the parties to the execution case. The parties to the execution case are not technical persons. Since the measurement was done by a technical person, he should not have been swayed away by the suggestions made by parties to the execution case and should have found out a fixed point of his own to measure the passage. That having not been done, the measurement and identification of the decreed passage cannot be held to be proper and justified.

11. He further submits that the Commissioner has exceeded his jurisdiction by measuring a larger area than of the suit passage by measuring an area of 330 links x 7½ link, when he was required to measure and indentify only 100 links x 7½ link, i.e. the suit passage. Thus, the Commissioner has exceeded his jurisdiction.

12. These materials aspects were not taken into consideration by learned Executing Court, which makes the impugned order vulnerable being vitiated. As such, the impugned order under Annexure-1 is liable to be set aside.

13. Mr. Rath, learned counsel for the DHrs–opposite party Nos.1 to 3 submits that Odisha Amendment of Order XXI Rule 22 CPC prescribes as follows:-

> *"**22. Notice to show cause against execution in certain cases***
>
> *(1) "Where an application for execution is made in writing under Rule 11 (2), the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him."*
>
> *(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.*
>
> *"(3) Proceedings held in execution of decree shall not be invalid solely by reason of any omission to issue or failure to serve a notice under sub-rule (1) or to record reasons where such notice is dispensed with under sub-rule (2) unless the judgment-debtor has sustained injury thereby."*

14. Thus, the parties to the execution proceedings are only to be noticed. It is not in dispute that the petitioners-J.Drs. having encroached the suit passage have only been directed to be evicted in the decree put to execution. Thus, they are only made parties to the execution case and have been noticed. They have also participated all throughout in the measurement of the suit passage. As such, there is no requirement to issue notice to all the parties to the suit for measurement of the suit passage, more particularly when they are not parties to the execution proceeding. All other parties to the suit have common interest with that of the plaintiffs. As such, the petitioners-J.Drs. can no way be aggrieved by non-issuance of notice to other parties to the suit, which is not otherwise required.

14. Refuting the submission of Mr. Mohanty, learned Senior Advocate with regard to fixation of the fixed point, Mr. Rath, learned counsel submits that although the Commissioner has taken the fixed point as per the suggestion made by the parties to the execution proceeding, but he had followed all technical formalities and by making a field verification and comparing with the settlement map, treated the same to be the fixed point for identification of the suit passage. Since the petitioners-J.Drs. have pointed out the fixed point and have never raised any objection during the course of measurement and identification of the suit passage with regard to the fixed point, they cannot

raise any objection to the same subsequently. It is his submission that even no objection to the report of the Amin Commissioner has been filed disputing the fixed point.

15. He, further submits that the Commissioner has not committed any error or exceeded his jurisdiction as alleged, by measuring an area of 333 link x 7 ½ link. In order to find out the exact topography of the suit passage, it was necessary for the Commissioner to measure 330 link x 7½ link. The Commissioner being a technical person is better equipped with techniques to identify the suit passage and no objection to the same can possibly be raised by a common man, more particularly when no dispute with regard to identification of the suit passage has been raised.

16. It is his submission that this Court, while exercising jurisdiction under Article 227 of the Constitution of India, should be slow in interfering with the orders passed by the civil court, unless it satisfies the requirements laid down the case of ***Radhey Shyam and another -v- Chhabi Nath and others***, reported in ***(2015) 5 SCC 423***, wherein, at paragraph-24, the Hon'ble Supreme Court held as follows**:-**

> "2*4. The difference between Articles 226 and 227 of the Constitution was well brought out in Umaji Keshao Meshram v. Radhikabai [1986 Supp. SCC 401]. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction."*

17. It is submitted that the suit was filed in the year 2007 and the decree was passed in the year 2012. Thereafter, the plaintiffs-D.Hrs. are fighting out litigation in different courts of law for asserting their right, but due to the unnecessary objections raised by the petitioners-J.Drs., who are encroaching upon the decreed passage, the decree could not be executed, as yet. He relied

upon a decision in the case of ***Satyawati –v- Rajinder Singh and another***, reported in ***(2013) 9 SCC 491***, wherein at paragraphs-12 and 13, the Hon'ble Supreme Court held as follows:

> *"12. It is really agonizing to learn that the appellant- decree holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant- plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of The General Manager of the Raj Durbhnga under the Court of Wards vs. Maharajah Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in the case of Kuer Jang Bahadur vs. Bank of Upper India Ltd., Lucknow [AIR 1925 Oudh 448], the Court was constrained to observe that:*
>
> *"Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights."*
>
> *13. In spite of the aforestated observation made in 1925, this Court was again constrained to observe in* **Babu Lal vs. M/s. Hazari Lal Kishori Lal & Ors***. [(1982) 1 SCC 525] in para 29 that:*
>
> *"Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections……"*

18. He, therefore, submits that raising a dispute with regard to the description and identification of the suit schedule property or a dispute with regard to the boundary of the suit schedule property is an abuse of process of Court and to delay the eviction, which has been adopted by the petitioners-J.Drs. Hence, he prays for dismissal of the CMP being devoid of any merits.

19. Heard learned counsel for the parties and perused the materials on record. Perusal of Rule 22 of Order XXI CPC (Odisha Amendment) makes it abundantly clear that party against whom the execution is applied for is only to be noticed in the execution proceeding. The petitioners being the J.Drs in the execution case, were only served with the notice and they are diligently participating in the execution proceeding. Since the opposite party Nos.1 to 3-D.Hrs are not seeking execution against other parties to the suit, and they have no conflicting interest with them, they need not be made parties and be noticed in the execution proceeding. There is no dispute to the ratio decided

in the case of **Labanya Devi** ***(supra)*** and ***Chaitan Das (supra),*** relied upon by Mr. Mohanty, learned Senior Advocate. Both the case laws are relating to demarcation under Order XXVI Rule 9 CPC in a suit. Thus, the parties to the said suit were required to be noticed to have their say in demarcation of the suit land. Applying the principle settled therein, the J.Drs., who are parties to the execution proceeding have been noticed and are participating in the said proceeding. The intent and object of Rule 22 is to serve notice on the J.Dr. to have his say in the matter. In the instant case, the J.Drs. having been noticed, the requirement of Rule 22 is satisfied.

20. Fixation of a fixed point is a technical issue and is within the domain of the Commissioner to take a decision in that regard. In this case, although the parties have suggested a fixed point, the Commissioner did not accept it blindly. On the other hand, he made a field inquiry following the technical procedure and compared it with the settlement map and thereafter accepted the same to be the fixed point. Parties to the said demarcation have also signed on the demarcation sheet without any objection. No written objection to the report of the Commissioner has been filed in spite of opportunity provided to the petitioners-J.Drs. On the other hand, the petitioners filed petition to cross-examine the Commissioner, which was allowed. No material could be brought out from the mouth of the Commissioner to doubt the correctness of the report. This being the factual position, the J.Drs. cannot possibly raise any objection to the fixation of the fixed point by the Commissioner. It also appears from the case record that the Commissioner has taken all possible precautions while measuring the decreed passage. In that view of the matter, the objection raised by Mr. Mohanty, learned Senior Advocate with regard to fixation of fixed point holds no water.

21. Measurement of a larger area by the Commissioner while identifying the suit passage has been taken exception by the J.Drs. Mr. Mohanty, learned Senior Advocate submits that the Commissioner has exceeded his jurisdiction by measuring an area beyond the writ issued to him. Thus, the measurement is without jurisdiction and is vitiated. For identification of a particular area or to find out the topography of the suit passage, the Commissioner being a technical person may adopt procedure to make his report flawless. In the instant case, although an objection has been raised with regard to measurement of a larger area by the Commissioner, the petitioners-J.Drs. have not pointed out as to how the identification of the suit passage has become erroneous or ambiguous adopting such procedure. On the other hand,

by measuring a larger area of which this suit passage is a portion, the Commissioner has discharged his duties vis-à-vis direction issued to him by the executing court in identifying the decreed passage.

22. In that view of the matter, I find no infirmity in the impugned order under Annexure-1. Resultantly, the CMP being devoid of any merit stands dismissed.

23. This being an execution proceeding of 2016, learned executing court shall do well to give a logical end to it as expeditiously as possible, preferably within a period of three months from the date of production of an authenticated copy of this order, following due procedure of law.

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

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2021 (II) ILR - CUT- 230

K.R. MOHAPATRA, J.

CMP NO. 128 OF 2021

MANOJ MANJARI MOHAPATRA & ANR. ....Petitioner

.V.

SRI KAPILA @ KAPILENDRA MOHAPATRA & ANR. ....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 151 and Order XXXIX Rule 2-A – Application U/O-39 Rule 2-A filed alleging violation of status-quo order – Again application U/S 151 filed – Maintainability of application U/s. 151 questioned in view of application U/O- 39 Rule 2-A – Held, the Court has also the power to restore possession in exercise of power under Section 151 C.P.C in the event a party is dispossessed in utter violation of order of injunction/status quo – But, while exercising discretion under section 151 C.P.C, the Court must be extremely careful and circumspect and only when the court is satisfied that the remedy under order 39 rule 2-A C.P.C will not be sufficient to maintain the order passed or remedy the prejudice caused to the applicant, it may exercise such discretion.

For Petitioners : M/s. Soubhagya Kumar Dash, D. Sethi & S.K. Tripathy.

For Opp. Parties : M/s. P.K. Rath, A. Behera, S.K. Soren, P. Nayak, S. Das & S. Rath.

JUDGMENT Date of Judgment: 09.04.2021

K.R.MOHAPATRA, J.

This matter is taken up through video conferencing mode.

2. Heard Mr. Digambar Sethi, learned counsel for the Petitioners and Mr. P.K. Rath, learned counsel for the contesting Opposite Party No.1.

3. The Petitioners in this CMP seek to assail the order dated 28th January, 2021 (Annexure-5) passed by learned Civil Judge (Senior Division), Bhadrak in CMA No. 226 of 2020 (arising out of C.S. No. 178- I of 2017) filed under Section 151 C.P.C.

4. Mr. Sethi, learned counsel for the Petitioners submits that C.S. No. 178-I of 2017 has been filed for partition. During pendency of the suit, learned Civil Judge (Senior Division), Bhadrak vide order on 15th January, 2018 in I.A. No. 563 of 2017 directed both the parties to maintain status quo over Lot No. 5 of Schedule 'GA' property pertaining to Khata No.150, Plot No.307 to an extent of Ac.0.10 decimals, Plot No.308 to an extent of Ac.0.04 decimals and Plot No.309 to an extent of Ac.0.06 decimals under Barapada mouza in the district of Bhadrak (for short 'the suit land'). Subsequently, alleging that the Petitioners Defendants have violated the order of status quo on 13th March, 2020, an application in CMA No. 226 of 2020 was filed and learned Civil Judge vide his order dated 28th January, 2021 directed the I.I.C., Bhadrak Rural P.S. to implement the order dated 15th January, 2018 passed in I.A. No. 563 of 2017. It is his submission that when the Plaintiff-Opposite Party No.1 has already filed an application under Order XXXIX Rule 2-A C.P.C. alleging violation of the aforesaid order of status quo by the Defendants-Petitioners, a petition under Section 151 C.P.C. is not maintainable. He further submits that implementation of order of injunction/status quo with police assistance is foreign to the provisions of the C.P.C. and cannot be resorted to in a petition under Section 151 C.P.C. It is his submission that hearing of the suit has not yet commenced and at this stage, in order to harass the Defendants-Petitioners, a petition under Section

151 C.P.C. has been filed and the impugned order has been passed. Hence, he prays for setting aside the impugned order.

5. Mr. Rath, learned counsel appearing for the contesting Opposite Party No.1 relying upon the decision of this Court in the case of Subal Kumar Dey –v- Purna Chandra Giri, reported in 1989 (I) OLR 398, submits that a petition under Section 151 C.P.C. is maintainable for implementation of the order of injunction/status quo. It is his submission that when learned trial Court has exercised its judicial discretion in granting a relief for implementation of the order of status quo, the same should not be interfered with by this Court when there is no illegality and irregularity in the same. He, therefore, prays for dismissal of the CMP.

6. Upon hearing learned counsel for the parties and on perusal of the impugned order, it appears that learned Civil Judge (Senior Division), Bhadrak vide his order dated 15.01.2018 has directed the parties to maintain status quo in respect of the suit land. The said order is still in force. There is an allegation by the Plaintiff-Opposite Party No.1 that the Defendants-Petitioners on 13.03.2020 in utter disrespect to the order of status quo tried to shut down all the shop rooms existing over the suit land and evict the tenants. The matter was informed to the police and due to intervention the police, the Defendants-Petitioners could not evict them. They are, however, constantly trying to evict the shopkeepers by using muscle power. The Plaintiff-Opposite Party No.1, however, has filed an application under Order XXXIX Rule 2-A C.P.C. alleging violation of the order of status quo. But, since the Defendants-Petitioners are allegedly making constant attempts to violate the order of status quo, the relief under Order XXXIX Rule 2-A C.P.C. may not be sufficient to maintain the order passed. The Court in the guise of exercising power under Order XXXIX Rule 2-A C.P.C. cannot be a mute spectator to its order being violated. It is the duty and also has the power to see that the order passed by it is respected.

7. This Court in the case of Subal Kumar Dey –v- Purna Chandra Giri, reported in 1989 (I) OLR 398 in paragraph-9 held as follows:

> "9. Next question of consideration relates to the validity of direction of the trial court to the officer-incharge. Baliapal P.S. to render assistance for implementation of the order of injunction. As has been held in the decisions reported in AIR 1971 Andh Pra 33 (Rayapati Audemma v. Pothineni Narasimham) and AIR 1983 Cal 266 (Sunil Kumar Halder v. Nishikanta Bhandari), direction to the police for

> implementation of order of temporary injunction is given by a Court in exercise of the inherent powers under Section 151, C.P.C. Inherent power is wide in its nature to protect the interest of the parties in a given case. It is not a power to be exercised for implementation of an order of the Court. Where violation of the order would be so prejudicial to a party that remedies or penalty for violation of the order available under the statute would not be sufficient, inherent power may be exercised. Therefore, a Court is to be careful before taking external help of police for implementation of the order……."

8. Thus, the Court has ample power to exercise its discretion under Section 151 C.P.C., when the remedy under Order XXXIX Rule 2-A C.P.C. will not be sufficient to remedy the prejudice caused to the applicant. The Hon'ble Supreme Court in the case of Meera Chauhan – v- Harsh Bishnoi and another, reported in (2007) 12 SCC 201 in paragraphs- 16, 17 and 18 held as follows:

> "16. The power of Section 151 to pass order of injunction in the form of restoration of possession of the code is not res integra now,
>
> 17. In Manohar vs. Hira Lal [AIR 1962 SC 527] while dealing with the power of the Court to pass orders for the ends of justice or to prevent the abuse of the process of the Court, this Court held that the courts have inherent jurisdiction to issue temporary order of injunction in the circumstances which are not covered under the provisions of Order 39 of the Code of Civil Procedure. However, it was held by this Court in the aforesaid decision that the inherent power under Section 151 of the Code of Civil Procedure must be exercised only in exceptional circumstances for which the Code lays down no procedure.
>
> 18. At the same time, it is also well settled that when parties violate order of injunction or stay order or act in violation of the said order the Court can, by exercising its inherent power, put back the parties in the same position as they stood prior to issuance of the injunction order or give appropriate direction to the police authority to render aid to the aggrieved parties for the due and proper implementation of the orders passed in the suit and also order police protection for implementation of such order."

9. Thus, the Court has also the power to restore possession in exercise of power under Section 151 C.P.C. in the event a party is dispossessed in utter violation of order of injunction/status quo. But, while exercising discretion under Section 151 C.P.C., the Court must be extremely careful and circumspect and only when the Court is satisfied that the remedy under Order XXXIX Rule 2-A C.P.C. will not be sufficient to maintain the order passed or remedy the prejudice caused to the applicant, it may exercise such discretion. If necessary, the Court may also direct the police authority to

render aid and assistance for implementation of the restraint order. It is the duty of the Court to see that the order of injunction/status quo is respected and maintained during pendency of the suit and suit property is protected. The Court has also the power to put back the parties in the same position as they stood prior to issuance of the restraint order or give appropriate direction to the police authority to render aid to the aggrieved parties for the due and proper implementation of the orders passed in the suit.

10. In the instant case, there is no dispute to the fact that the Plaintiff-Opposite Party No.1 has approached the local police to restrain the shop owners from being evicted forcibly. Learned Civil Judge taking the same into consideration and to prevent a situation from recurrence exercised its judicial discretion in directing the I.I.C., Bhadrak Rural P.S. to implement the order dated 15th January, 2018 passed in I.A. No. 563 of 2017.

11. Hence, I find no infirmity in the impugned order as no ground is made out to establish that learned trial Court has exercised its jurisdiction illegally or with material irregularity. Accordingly, this CMP being devoid of any merit stands dismissed.

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

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2021 (II) ILR - CUT- 234

S. K. PANIGRAHI, J.

ABLAPL NO. 5283 OF 2021

MITU DAS AND ORS. ……..Petitioners

STATE OF ODISHA ……....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Grant of bail to a person apprehending arrest – Concurrent jurisdiction of Sessions as well as High Court – Whether the petition under Section 438 Cr. P.C.

is maintainable before High Court without exhausting remedy under the said provision before the Court of Sessions which has concurrent jurisdiction – Held, No.

> *"In view of the above discussion, the applicants should approach the Sessions Court first then to the High Court like that is adopted in Section 439 of the Cr. P.C. The reasons for approaching the Court of Sessions first may be due to the following:*
>
> ***i)*** *Whenever concurrent jurisdiction is provided under the statute simultaneously in two courts of which one is superior to the other, then it is appropriate that the party should apply to the subordinate Court first, then he/she may seek his/her remedy in the High Court.*
>
> ***ii)*** *The Sessions Court will always be nearer and accessible court to the parties. Moreover, considering the work load of the High Courts in the country and the cases of this nature are nothing but contributing to heavy pendency of cases. The applications under Section 439 of Cr.P.C often fail to get the required attention because of the docket arising out of such applications filed under Section 438 of Cr.P.C. directly in the High Court bypassing the Courts of Sessions.*
>
> ***iii)*** *The grant of anticipatory bail or regular bail requires appreciation, scrutiny of facts and perusal of the entire materials on record. In this context, if the Sessions Court has already applied its mind and passed the appropriate order, it would be easy for the High Court to look into or have a cursory glance of the observation made by the Sessions Court and dispose of the case with expedition."* *(Paras 14 & 15)*

Case Laws Relied on and Referred to :-

1. A.I.R.1933 Alld.678 : Shailbala Devi Vs. Emperor.
2. 1960 A.L.J. 880 : S.P. Dubey Vs. Narsingh Bahadur.
3. 1976 Cri L.J 1658 : Hajialisher Vs. The State of Rajasthan.
4. 1988 Cri L.J 210 : Rameshchandra Kashiram Vora Vs. State of Gujarat.

For the Petitioners : Mr.G.Muduli.
For the Opp. Party : Mr. J.Katikia, Addl. Govt.

ORDER Date of Order : 26.04.2021

S. K. PANIGRAHI, J.

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

2. This is an application under Section 438 of the Cr. P.C..

3. Heard learned counsel for the petitioners and learned counsel for the State.

4. The petitioners herein are apprehending arrest in G.R. Case No. 85 of 2021 arising out of Bhuban P.S. Case No.91 of 2021 on the file of learned J.M.F.C., Bhuban for commission of offences under Sections 341/294/323/379/ 506/ 34 of the Indian Penal Code.

5. Without going into the merits of the present petition filed by the petitioners under Section 438, Cr. P.C. seeking direction for pre-arrest bail, this Court is to observe first that whether the petition under Section 438 Cr. P.C. is maintainable before this Court without exhausting remedy under the said provision before the Court of Sessions which has concurrent jurisdiction.

6. The provisions of bail create a balance between the personal liberty of an accused and the interest of the society. Bail is a matter of right in bailable offences as provided under Section 436 of the Cr. P.C. and a matter of judicial discretion in non-bailable offences under Sections 437 and 439 of Cr.P.C. Where bail under Sections 436, 437 and 439 Cr. P.C. can be granted only after an arrest. On the other hand Section 438 Cr. P.C. provides for a pre-arrest bail which is commonly known as Anticipatory Bail.

7. A plain reading of Section 438 Cr.P.C. necessitates an immediate conclusion that the jurisdiction conferred on the High Court and the Sessions Court for entertaining prayer for anticipatory bail is concurrent in nature. However, the controversy as to whether the application would be maintainable before the High Court only after exhaustion of the remedy before the Sessions Court has been posed before different High Courts in plethora of cases.

8. A bare perusal of the Section 438 of Cr. P.C. which reads as follows:

> "**438**. Direction for grant of bail to person apprehending arrest-(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely-
>
> (i) the nature and gravity of the accusation:

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offences;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail."

The rest of the provision is not necessary for the purpose of considering the present question.

9. Upon a plain reading of the provision under Section 438 of Cr. P.C., it is crystal clear that it confers concurrent jurisdiction on the High Court as well as on the Court of Sessions. The wide discretion has been entrusted on the Court of Sessions as well as on the High Court to enlarge such person who comes to the Court, on anticipatory bail. Both the Courts have got jurisdiction to enlarge the applicant on anticipatory bail, considering the relevant guidelines in the said provision. As it is seen in the provisions itself, there is no embargo or any rider incorporated under the provision that the person who approaches the High Court must first exhaust the said remedy before the Court of Sessions.

10. Though such remedy, cannot be whittled down by imposing any extraordinary condition, still the Court can refuse to entertain the bail petition and direct the party to approach the Court of Sessions first because Section 438 of Cr. P.C. is purely a discretionary power of the Court to exercise power depending upon the facts and circumstances of each case. Therefore, the High Court can direct the party to go first before the court of Sessions and then come to the High Court. It is true that there is no embargo under the statute, but the Court can do so on the basis of various factors arising for its consideration.

11. The law Commission of India had to confront with this issue**,** 203rd *Law Commission Report (December, 2007)* succinctly analyses that concurrent jurisdiction of the Court of Sessions and the High Court under Section 438 has generated much litigation. The Code has not prescribed any specific order in which the two alternative forums are to be approached. It is left to the option of the applicant to move either to the Court of Sessions or to the High Court for anticipatory bail, one after another or otherwise. There

is a conflict of opinion amongst various High Courts as to whether the Court of Sessions should originally be approached in the first instance or the High Court can be straightway approached for grant of anticipatory bail without first taking recourse to the Court of Sessions. It may be noted that both the Court of Sessions and the High Court exercises original jurisdiction under Section 438 Cr. P.C.. However, when the High Court is moved after the anticipatory bail application has been dismissed by the Court of Sessions, the petition for anticipatory bail in the High Court is required to be accompanied with a copy of the Session Court's order, from which, reason(s) for dismissal of anticipatory bail application can be ascertained. In such a case, the High Court essentially exercises revisionary powers over the order of the Court at the first instance i.e. Sessions Court though it is purporting to be exercising original jurisdiction under Section 438 Cr. P.C.. On the other hand, it has been held in some cases that where the applicant moves the High Court for anticipatory bail which is rejected, then the Court of Sessions should not grant anticipatory bail to the applicant on the same facts and material, as otherwise, it would be an act of judicial impropriety.

12. As a matter of propriety and policy, should the applicant move to the higher judicial forum instead of a lower one in such cases as is done in cases of the applicant under Section 439 Cr. P.C. It is inherent in the scheme of things that when two alternative forums are provided in law for seeking directions for anticipatory bail, one lower and another higher, then it is prudent to approach the lower first then the higher. Except in some exceptional cases where the applicant should mention in the preambulary paragraphs of the application about the reason(s) for such direct approach. Some of the precedents do enlighten this issue at hand.

In case of **Shailbala Devi v. Emperor,**[1] it is held as follows:

> " It is quite clear that a practice has grown up in this Court to refuse to entertain applications direct, until the District Magistrate or the Sessions Judge has been approached. This practice is based largely on convenience and seems to me to be sound. The District Magistrate or the Sessions Judge is on the spot and easily accessible and the record can be locally called for promptly without any loss of time and without the necessity of sending it through the post. The proceedings are also likely to be less expensive. The High Court is a superior Court and its time would not be unnecessarily spend in examining the record and in some cases even considering the evidence, when a subordinate court has already considered the matter and made its report.

1 A.I.R.1933 Alld.678

Similarly, in the case of **S.P. Dubey v. Narsingh Bahadur**[2] it is held that:

> **"**Accordingly it was held that though the normal practice for the High Court is to refuse to entertain application where the applicant did not approach the Sessions Judge first, but there is no hard and fast rule and in suitable cases the High Court has been known to depart from this practice and to accept revisions that have not been previously considered by a Sessions Judge."

Further in the case of **Hajialisher v. The State of Rajasthan,**[3] the Rajasthan High Court observed that:

> **"**choice of Court for moving an application under Section 438 of the Cr. P.C. cannot be left completely to the option of the accused as for the decision of this question no distinction can be made between an application under Section 438 and one under Section 439 of the Cr. P.C. and if it is accepted that under Section 438 of the Cr. P.C. an accused person has a right to have his prayer for bail considered in the first instance by the High Court, the same argument can very well be pressed into service with respect to applications under Section 439 of the Cr. P.C. The Court held that it is desirable that the ordinary practice should be that the lower court should be first move in the matter, though in exceptional cases or special circumstances, the High Court may entertain and decide an application for bail either under Section 438 or under Section 439 of the Cr. P.C. directly before the High Court.

In case of **Rameshchandra Kashiram Vora v. State of Gujarat**[4] **,** it is held as follows:

> "10…. I am of the opinion that it would be a sound exercise of judicial discretion not to entertain each and every application for anticipatory bail directly by-passing the Court of Session. Ordinarily, the Sessions Court is nearer to the accused and easily accessible and remedy of anticipatory bail is same and under same section and there is no reason to believe that Sessions Court will not act according to law and pass appropriate orders. In a given case, if any accused is grieved, his further remedy to approach the High Court is not barred and he may prefer a substantive application for anticipatory bail under Section 438 or revision application under 397 of the Cr. P.C. to the High Court and the High Court would have the benefit of the reasons given by the Sessions Court. It would be only in exceptional cases or special circumstances that the High Court may entertain such an application directly and these exceptional and special circumstances must really be exceptional and should have valid and cogent reasons for by-passing the Sessions Court and approaching the High Court.

2. 1960 A.L.J. 880, **3.** 1976 Cri L.J 1658, **4.** 1988 Cri L.J 210

13. Even the Legislature in its wisdom has conferred concurrent jurisdiction on the Court of Sessions perhaps bearing those very reasons in mind. The barriers of access to justice like the distance, time, expense of litigation etc. are all relevant factors which appear to have guided the Legislature in clothing the Court of Sessions with contemporaneous jurisdiction.

14. In view of the above discussion, the applicants should approach the Sessions Court first then to the High Court like that is adopted in Section 439 of the Cr. P.C. The reasons for approaching the Court of Sessions first may be due to the following:

> **i)** Whenever concurrent jurisdiction is provided under the statute simultaneously in two courts of which one is superior to the other, then it is appropriate that the party should apply to the subordinate Court first, then he/she may seek his/her remedy in the High Court.
>
> **ii)** The Sessions Court will always be nearer and accessible court to the parties. Moreover, considering the work load of the High Courts in the country and the cases of this nature are nothing but contributing to heavy pendency of cases. The applications under Section 439 of Cr.P.C often fail to get the required attention because of the docket arising out of such applications filed under Section 438 of Cr.P.C. directly in the High Court bypassing the Courts of Sessions.
>
> **iii)** The grant of anticipatory bail or regular bail requires appreciation, scrutiny of facts and perusal of the entire materials on record. In this context, if the Sessions Court has already applied its mind and passed the appropriate order, it would be easy for the High Court to look into or have a cursory glance of the observation made by the Sessions Court and dispose of the case with expedition.

15. In view of the above, the petitioners are granted interim protection for a period of three weeks to approach the Court of Sessions for seeking similar relief and the Court of Sessions shall list this matter as early as possible before the expiry of three weeks of protection granted to the petitioners.

16. Accordingly, the ABLAPL is disposed of.

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

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