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understood nor examined the implication of such a prayer for the privacy of individuals – No attempt has been made to understand the legal position concerning the constitutional right to privacy – Held, although the High Court has vast powers to do justice under Article 226 of the Constitution, organizations such as the Petitioner coming forward to file PILs have the responsibility of gathering facts in an unbiased and objective manner, and placing them before the Court with the full understanding of the legal and factual dimensions of the problem being highlighted – It is unfortunate that on many occasions, without undertaking such exercise, copies of such petitions are handed over to the media even before they are listed before the Court and examined by it – Such an incomplete and half-hearted exercise of filing what can possibly be termed as a 'lazy' PIL, can cause more harm than good for the issue and the constituency concerned.

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CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Challenge is made to the decision of abolition of SAT – Several pleas were put forth before the court by all the parties – All the pleas were considered and the following issues formulated.

O.A.T. Bar Association, Cuttack -V- Union of India and Ors.
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CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Challenge is made to the Office Memorandum

dated 10th December, 2018 of the Finance Department prescribing guidelines for the implementation of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1st July, 2017, the Revised Schedule of Rates-2014 (Revised SoR-2014) – Petitioner makes a grievance that heavy financial burden in the form of differential tax amount falls on it as the rate quoted was according to pre-revised SoR-2014 prevailing at the time of inviting tender and such reduction in the cost of materials and labour charges in the revised SoR-2014 along with imposition of GST amount on the contract value imposes an extra financial burden – The State-Opposite Parties, including the Finance Department, pleads that under the GST law, works Contract is subject to tax liability with effect from 1st July, 2017 at the rate of 5% or 12% or 18% of the contract value depending on the nature of contract – For effective implementation of the tax liability, the contract value as determined in the pre-GST regime using SoR-2014, was required to be revised – Accordingly, the rates mentioned in SoR-2014 were also revised with effect from 1st July, 2017 since the earlier rates were inclusive of the tax components prevailing in the pre-GST era – The OM has only prescribed the mode and manner of calculation of GST in respect of works contract executed after 1st July, 2017, either partly or fully – Plea considered with reference to the various pronouncement – Held, in the instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute – The OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the transitional period of migration to GST Act with effect from 1st July, 2017 – Consequently, the Court finds no merit in the Petitioner's challenge to the said OM in law.

M/s. Harish Ch. Majhi -V- State of Odisha & Ors.

W.P.(C) NO.14924 OF 2020

CRIMINAL PROCEDURE CODE, 1973 – Section 125 – Maintenance – Grant of – On an application filed by wife the Family court granted Rs. 15,000/- as monthly maintenance – Husband challenges the quantum of maintenance – No material to show that the wife is earning – Held, the maintenance awarded is not in higher side keeping in view the minimum sustenance of a deserted lady in the present day society.

Kamalakanta Mishra -V- Sima Satpathy.

RPFAM NO. 235 OF 2019

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CRIMINAL PROCEDURE CODE, 1973 – Section 167 r/w Section 36-A of the NDPS Act – Statutory/mandatory bail – Offences under the NDPS Act – Incomplete of investigation within the statutory period – Application filed U/s.36-A of the Act seeking extension of another 90 days to file/submit final report – However the trial court granted the time without giving any opportunity to the accused although copy of the said application was served to the defence counsel – Plea of natural justice and prejudice to the accused raised – Held, the accused is entitled to be released on bail on account of default of the prosecution to file charge sheet within the prescribed period and extending the same without giving any opportunity to the accused.

Naresh Digal -V- State of Odisha.

BLAPL NO. 4652 OF 2020

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CRIMINAL PROCEDURE CODE, 1973 – Section 439 – Grant of bail in Economic offences – Principles to be followed – Discussed.

Akash Kumar Pathak -V- State of Odisha.
BLAPL NO. 502 OF 2021
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CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Appreciation of evidence by the higher court in appeal – Principles to be followed – Held, as a long judicial practice adopted by the higher Courts that the appreciation of evidence by a Trial Judge, who has the opportunity of observing the demeanour of witnesses while recording their evidence in the Court in presence of the accused and counsel, should not be lightly interfered with by the appellate court who do not have that advantage of observing the demeanour of witnesses.

Mohan Sabar & Ors. -V- State Of Orissa.
CRLA NO. 49 0F 2002
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CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Appreciation of evidence – Wife of the deceased is the sole eye witness – She has no axe to grind against the accused persons – Her evidence is quite trustworthy having ring of truth and duly corroborated by the objective determination of the spot, which is verandah of their house where from the I.O. seized blood stained earth etc – Her evidence also gets corroboration from the evidence of P.W.6, the Doctor who found incised injury on the dead body of the deceased, in course of post mortem examination, which could have been caused by the axes seized in this case – The recovery of one of the weapon of offence at the instance of the appellant, Mohan Sabar, admissible under Section 27 of the Indian Evidence Act, lends

further corroboration by principle of confirmation that the appellants did cause the death of the deceased – Conviction confirmed.

Mohan Sabar & Ors. -V- State Of Orissa.
CRLA NO. 49 0F 2002
2021 (II) ILR-Cut…… 357

INDUSTRIAL DISPUTES ACT, 1947 – Section 10 – Reference – Termination – Award directing reinstatement of the employee with further direction to pay 50% back wages – Termination held to be illegal and there has been violation of the principles of natural justice – Effect of – Held, the employee is entitled for 100% back wages – It is a settled principle of law that in case a workman was terminated illegally, he is entitled to the full back wages irrespective of whether he was engaged elsewhere during that particular time or not.

Sun Pharmaceutical Industries Ltd.-V- State of Odisha & Anr.
W.P.(C) NO. 6156 OF 2017
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INDIAN PENAL CODE, 1860 – Section 302 and 201/34 – Offence under – Conviction based on circumstantial evidence – Chain of circumstances not complete – Effect thereof – Held, on analysis of the entire materials available on record, we are of the firm opinion that the circumstances like the previous attempt of rape on P.W.7, last seeing of the deceased in the company of the appellant no.1, confession of the appellants and discovery of weapon of offence on the discovery statement made by the appellants are not established conclusively in this case – So, there is no chain of circumstances complete in all respect, unerringly pointing towards guilt of the appellants – The learned

Sessions Judge committed error on record by accepting prosecution case, convicting the appellants for the offence under Sections 302 and 201/34 of the Penal Code and awarding various sentences.

Ranjan Kumar Bisoi -V- State of Orissa.

CRLA NO. 29 OF 2002
2021 (II) ILR-Cut…… 347

INDIAN STAMP ACT, 1899 – Sections 31, 32(3) (b) r/w sections 29(2) & 5 of the Limitation Act – Certificate by the Collector – General Power of attorney executed before the Assistant Consular Officer, Consulate General of India at New York i.e. outside India – However it produce before the Collector after 3 months, from the date of its first receipt in India – The Collector denied to certify in view of the expiry of the period of the production – Order of the collector challenged – Question was raised that, whether the limitation Act apply to the Indian Stamp Act while condoning the delay – Held, Yes.

Pallishree Mohanty -V- State of Odisha and Ors.

W.P.(C) NO. 22426 OF 2019
2021 (II) ILR-Cut…… 446

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 – Section 12 – Grant of Bail – Conditions therein – Discussed – Held, Non consideration of the provisions of section 12 as well as mere repetition of the provisions without actually applying the same to the facts of the case with reference to the social investigation report renders these orders liable for interference – Bail granted.

Debasis @ Tapas Khuntia -V- State of Odisha.

CRLREV NO. 11 OF 2021
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MOTOR ACCIDENT CLAIM – Whether gratuitous passenger is entitled to get compensation? – Held, for a smooth and hassle free remittance of the compensation to the victim of a vehicular accident, which is the aim and object of the act, the insurance company should satisfy the impugned award and would be at liberty to recover the same from the owner of the offending vehicle.

New India Assurance Co. Ltd. -V- Matha Bewa & Ors.
MACA NO. 421 OF 2003
2021 (II) ILR-Cut…… 434

SERVICE LAW (EDUCATION) – Petitioner functioned as in-charge Headmaster without having the B.Ed degree with seven years teaching experience as trained graduate teacher – The question arose as to whether the petitioner is entitled for the salary of the Headmaster – Held, no, he is only entitled for charge allowance.

State of Odisha & Ors.-V- Purna Chandra Chand.
RVWPET NO. 255 OF 2013
2021 (II) ILR-Cut…… 318

SERVICE LAW – Regularization – Petitioners appointed on contractual basis against sanctioned posts by following due recruitment process – Subsequently Govt. Resolution came providing rule that the contractual persons will be regularized on completion of six years – The petitioners were regularized from a later date against which they filed original applications before

the SAT – SAT directed to regularized their services from the date when they completed six years – State filed writ petitions against such order which were dismissed – Order implemented – Then order was passed by Govt. directing cancellation of antedated regularization orders – The question thus arose as to whether such order can sustain in the eye of law? – Held, No.

Manas Ranjan Pattnaik and Ors. -V- State of Odisha and Ors .
W.P.(C) NO. 34606 OF 2020
2021 (II) ILR-Cut…… 366

SERVICE LAW – 'The word 'lien' – Meaning thereof – Held, while considering Rule-9 (13) of the Fundamental Rules, it provides that "Lien means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively" – "Lien" connotes the right of a civil servant to hold the post substantively to which he is appointed. It is an incident of substantive appointment to a post – It is basically a singular concept since in public services substantive appointment is made against a particular post.

Bamadev Sahoo -V- State of Orissa and Ors.
WPC(OAC) NO. 4118 OF 2012
2021 (II) ILR-Cut…… 384

THE WORKMEN'S COMPENSATION ACT, 1923 – Section 03 – Relationship between employer and employee – Establishment of such factor – In the present case a retired employee as per the oral instruction of authority/Junior Engineer, while working on the electricity pole came into contact of live wire and died – Claim of compensation due to

such death – The department raised the issue of non existence of such relationship and denied to give compensation – The issue of such relationship discussed and a wide meaning/connotation provided – Held, applying the doctrine of notional extension of the employment the claimant is entitled to get the compensation.

Geetanjali Jena & Ors. -V- Junior Engineer, Electrical, NESCO, Jajpur And Ors.

F.A.O. NO. 234 OF 2012
2021 (II) ILR-Cut…… 395

WORDS AND PHRASES – 'Mistake' – Meaning thereof – Held, "Mistake" is not mere forgetfulness; it is a slip "made, not by design but, by mischance" – Otherwise also the "mistake" includes an error in conduct consisting of an unintended failure to perform correctly and effectively a task intended to be duly performed – However, it is well settled in law that if a mistake is committed by the authority, the same can be corrected when it is brought to the notice.

Kaberi Behera -V- State of Orissa and Ors.

W.P.(C) NO. 7021 OF 2011
2021 (II) ILR-Cut…… 379

WORDS AND PHRASES – "obiter dicta" – Meaning thereof – Held, The expression "obiter" means 'by the way', 'in passing', 'incidentally' – Obiter dictum is the expression of opinion stated in the judgment by a Judge which is unnecessary of a particular case – Obiter dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue – Explained in detail.

State of Odisha & Ors.-V- Purna Chandra Chand.

RVWPET NO. 255 OF 2013
2021 (II) ILR-Cut…… 318

WORDS AND PHRASES – 'Promissory estoppel' – Meaning thereof – Held, the principle of 'Promissory estoppel' would estop a person from backing out of its obligation arising from a solemn promise made by it to the respondent.

Manas Ranjan Pattnaik and Ors. -V- State of Odisha and Ors .
W.P.(C) NO. 34606 OF 2020
2021 (II) ILR-Cut…… 366

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2021 (II) ILR - CUT- 241

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

W.P.(C) NO.10122 OF 2021

STATE OF ODISHA & ANR. .....Petitioners

.V.

MISS. SUMITRA DAS & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Filed after delay of three years – Limitation – Doctrine of latches – Applicability – Held, the present is one such case where the explanation offered for the inordinate delay of three years in filing the writ petition is totally unsatisfactory and unconvincing – Although there is no statutory period of limitation as such for filing a writ petition, the doctrine of latches is attracted – An inordinate delay of three years in filing the writ petition without offering a credible explanation for the delay would attract the doctrine of latches – Consequently, the writ petition is dismissed on the ground of delay and latches. (Para 8)

For the Petitioner : Mr.M.K. Khuntia, A.G.A

For Opp. Parties :

ORDER Date of Order : 12.05.2021

BY THE BENCH

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

2. Against an order of the Odisha Administrative Tribunal, Bhubaneswar Bench dated 1st February 2018 passed in O.A. No.987 of 2016, the present writ petition has been filed.

3. When asked why the present writ petition was filed only more than three years later i.e. on 9th March 2021, learned Additional Government Advocate for the Petitioners-State draws attention of this Court to paragraph-13 of the writ petition which reads as under:

> "*13. That, it is humbly submitted that the Law Department after considering the gravity of the matter, vide letter dated 24.08.2020 intimated the learned Advocate General, Odisha to take necessary steps to file a writ petition assailing the impugned order. Consequent thereto, the Cooperation Department was requested to*

contact the office of the learned Advocate General for filing of the writ petition and after necessary discussion in the matter, the State Counsel prepared the writ petition. Under such circumstances, the delay in filing the writ petition is not deliberate, but due to certain official procedures as well as the lockdown declared by the Government in view of COVID-19 which were beyond the control of the petitioners. There are no deliberate latches on the part of the petitioners in filing the writ petition and the delay is unintentional and bonafide."

4. In a whole series of orders, the Supreme Court has deprecated the failure by the Central or the State Governments in offering a reasonable explanation for the inordinate delay in filing the petitions and appeals challenging the orders that are adverse to them.

5. In ***State of Madhya Pradesh v. Bherulal*** **[**decision dated 15th October 2020 in SLP (C) Diary No. 9217/2020], the Supreme Court penned a detailed order as under:

"2. We are constrained to pen down a detailed order as it appears that all our counselling to Government authorities have fallen on deaf ears i.e., the Supreme Court of India cannot be a place for the Governments to walk in when they choose ignoring the period of limitation prescribed. We have raised the issue that if the Government machinery is so inefficient and incapable of filing appeals/petitions in time, the solution may lie in requesting the Legislature to expand the time period for filing limitation for Government authorities because of their gross incompetence. That is not so. Till the Statute subsists, the appeals/petitions have to be filed as per the Statues prescribed.

3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government (*Collector, Land Acquisition, Anantnag & Anr vs. Mst. Katiji & Ors. (1987) 2 SCC 107*). This position is more than elucidated by the judgment of this Court in *Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. (2012) 3 SCC 563* where the Court observed as under:

"12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal

concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red- tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

Eight years hence the judgment is still unheeded!

4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only "due to unavailability of the documents and the process of arranging the documents". In paragraph 4 a reference has been made to "bureaucratic process works, it is inadvertent that delay occurs".

5. A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.

6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsels appear to address on merits without referring even to the aspect of

limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.

7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible.

8. Looking to the period of delay and the casual manner in which the application has been worded, we consider appropriate to impose costs on the petitioner-State of Rs.25,000/- (Rupees twenty five thousand) to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in filing the special leave petition and a certificate of recovery of the said amount be also filed in this Court within the said period of time.

9. The special leave petition is dismissed as time barred in terms aforesaid."

6. Thereafter the aforementioned decision has been referred to and reiterated in a number of orders of the Supreme Court. A sampling of such orders is as under:

*(i) Order dated 13th January 2021 in SLP No.17559 of 2020 (**State of Gujarat v. Tushar Jagdish Chandra Vyas & Anr**.)*

*(ii) Order dated 22nd January 2021 in SLP No.11989 of 2020 (**The Commissioner of Public Instruction & Ors. v. Shamshuddin**)*

*(iii) Order dated 22nd January 2021 in SLP No.25743 of 2020 (**State of Uttar Pradesh & Ors v. Sabha Narain & Ors.**)*

*(iv) Order dated 4th February 2021 in SLP No.19846 of 2020 (**Union of India v. Central Tibetan Schools Admin & Ors**)*

*(v) Order dated 11th January 2021 in SLP No.22605 of 2020 (**The State of Odisha & Ors v. Sunanda Mahakuda**)*

7. It is seen that by the last order dated 11th January 2021 in SLP No.22605 of 2020 (*The State of Odisha & Ors v. Sunanda Mahakuda*) filed by the State of Odisha itself, the Supreme Court dismissed the SLP imposing cost of Rs.25,000/- for filing a belated SLP without offering any credible explanation.

8. The present is one such case where the explanation offered for the inordinate delay of three years in filing the writ petition is totally

unsatisfactory and unconvincing. Although there is no statutory period of limitation as such for filing a writ petition, the doctrine of laches is attracted. An inordinate delay of three years in filing the writ petition without offering a credible explanation for the delay, would attract the doctrine of laches. Consequently, the writ petition is dismissed on the ground of delay and laches.

9. 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-245

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

W.P.(C) NO.16600 OF 2021

BHARATIYA BIKASH PARISADA .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of PIL – Prayer seeking a direction for installation of CCTV cameras and display boards in all the COVID-19 hospitals "to make the treatment to Corona patients more transparent and accountable to public" – No homework done to gather the necessary facts that can form the foundation for such a prayer and the Petitioner and its counsel have neither understood nor examined the implication of such a prayer for the privacy of individuals – No attempt has been made to understand the legal position concerning the constitutional right to privacy – Held, although the High Court has vast powers to do justice under Article 226 of the Constitution, organizations such as the Petitioner coming forward to file PILs have the responsibility of gathering facts in an unbiased and objective manner and placing them before the Court with the full understanding of the legal and factual

dimensions of the problem being highlighted – It is unfortunate that on many occasions, without undertaking such exercise, copies of such petitions are handed over to the media even before they are listed before the Court and examined by it – Such an incomplete and half-hearted exercise of filing what can possibly be termed as a 'lazy' PIL, can cause more harm than good for the issue and the constituency concerned.

Case Law Relied on and Referred to :-

1. (2017) 10 SCC 1 : Justice K.S. Puttaswamy (Retd.) Vs. Union of India.

For the Petitioner : Mr. S.S. Padhi
For Opp. Parties : Mr. D.K. Mohanty, A.G.A

ORDER Date of Order : 10.06.2021

BY THE BENCH

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

2. The first prayer in the present petition is for installation of CCTV cameras and display boards in all the COVID-19 hospitals "to make the treatment to Corona patients more transparent and accountable to public".

3. The petition appears to have been filed only on the basis of a press clipping with absolutely no homework done to gather the necessary facts that can form the foundation for such a prayer. The Petitioner and its counsel have neither understood nor examined the implication of such a prayer for the privacy of individuals. No attempt has been made to understand the legal position concerning the constitutional right to privacy as explained in the judgment of the Supreme Court in ***Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1.***

4. No serious effort has been made by the Petitioner to ascertain which individuals may have been adversely affected by the circumstances complained of in the petition. Although the High Court has vast powers to do justice under Article 226 of the Constitution, organizations such as the Petitioner coming forward to file PILs have the responsibility of gathering facts in an unbiased and objective manner, and placing them before the Court with the full understanding of the legal and factual dimensions of the problem being highlighted. It is unfortunate that on many an occasion, without

undertaking such exercise, copies of such petitions are handed over to the media even before they are listed before the Court and examined by it. Such an incomplete and half-hearted exercise of filing what can possibly be termed as a 'lazy' PIL, can cause more harm than good for the issue and the constituency concerned.

5. Consequently, the Court is not inclined to entertain the present petition in the form and in the manner in which it has been presented. The petition is accordingly dismissed.

6. 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- 247

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

W.P.(C) NOS.13789, 16422, 24577,
5736, 6152 OF 2019 & 1626 OF 2020

O.A.T. BAR ASSOCIATION, CUTTACK ……..Petitioner
(Rep. by Secy. Sri Prakash Ku. Rout)
(W.P.(C) No.13789 of 2019)

.V.

UNION OF INDIA AND ORS. ……Opp. Parties

(W.P.(C) No.16422 of 2019)
JADUNATH DASH -V- STATE OF ODISHA & ORS.

(W.P.(C) No. 24577 of 2019)
THE ODISHA RETIRED POLICE OFFICERS' WELFARE ASSOCIATION
-V- UNION OF INDIA & ORS.

(W.P.(C) No. 5736 of 2019)
RAS BIHARI MOHAPATRA -V- UNION OF INDIA & ORS.

(W.P.(C) No. 6152 of 2019)
O.S.A.T. BAR ASSOCIATION,BHUBANESWAR -V- SECY.
TO GOVT. OF INDIA & ORS.

(W.P.(C) No.1626 of 2020)
SAROJ KUMAR SAHOO & ORS. -V- UNION OF INDIA & ORS.

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Challenge is made to the decision of abolition of SAT – Several pleas were put forth before the court by all the parties – All the pleas were considered and the following issues formulated.

Issues for consideration

On the basis of the above submissions, the following issues arise for consideration before this Court:

(i) Under Article 323-A (1) of the Constitution, is it mandatory for an SAT to be established?

(ii) Can the abolition of an SAT be brought about by a notification issued by the Government of India under Section 4

(2) of the AT Act read with Section 21 of the GC Act or does it require a specific provision in that regard both in Article 323A of the Constitution and in the AT Act?

(iii) In the context of (ii) above is the impugned notification in a nature of a quasi-judicial decision? Inasmuch as it has been made without affording the stakeholders a hearing, is it violative of the principles of natural justice?

(iv) Is the impugned notification abolishing the OAT arbitrary, irrational and unreasonable, inasmuch as, it is based on an incorrect understanding of the ratio of the decision of the Constitution Bench of the Supreme Court of India in ***L. Chandra Kumar*** *and in any event not based on relevant material but extraneous considerations? In other words, is it violative of Article 14 of the Constitution?*

(v) Given the huge pendency of the cases in the High Court, and there being no prospect of filling up of all the vacancies of Judges, and the fact that there would be in any event two tiers of litigation in High Court itself as a result of the transfer to the High Court of cases pending in the OAT upon its abolition, is not the impugned notification arbitrary, irrational and unsustainable in law as it does not subserve the object of speedy justice for Government servants?

(vi) Is the impugned notification dated 2nd August, 2019 issued by the DoPT, Government of India, bad in law since it is not a decision expressly stated to be in the name of the President of India in terms of Article 77 of the Constitution?

All issues were considered with reference to the several judicial pronouncements of the apex as well as other High Courts and the court held that for all of the aforementioned reasons, the Court is of the view that no ground has been made out for the Court to interfere with the impugned notification dated 2nd August 2019. Accordingly, all the writ petitions are dismissed.

Case Laws Relied on and Referred to :-

1. (1985) 4 SCC 458 : S.P. Sampath Kumar Vs. Union of India
2. AIR 1987 SC 386 : S.P. Sampath Kumar Vs. Union of India.
3. AIR 1997 SC 1125 : L. Chandra Kumar Vs. Union of India.
4. AIR 1987 SC 357J : B. Chopra Vs. Union of India.
5. AIR 1990 SC 2263 : M.B. Majumdar Vs. .Union of India.
6. 1991 (1) SCC 181 : Amulya Chandra Kalita Vs. Union of India.
7. (1994) 2 SCC 401 : Dr. Mahabal Ram V. Indian Council of Agriculture Research.

For Petitioner : Mr. Budhadeb Routray, Sr. Adv,
Mr. Asok Mohanty, Sr. Adv,
Mr. S.K. Pattanaik, Sr. Adv,
Mr. B.B. Mohanty,
Mr. Santosh Kumar Pattanaik, Sr. Adv.
Mr. Ras Bihari Mohapatra.

For Opp.Parties : Mr. P.K. Parhi, Assistant Solicitor General (O.P.1)
Mr. A.K. Parija, Advocate General,
Mr. M.S. Sahoo, A.G.A (O.P. 2 to 4)

For the Intervener : Mr. Ravi Iyer

JUDGMENT Date of Judgment : 07.06.2021

Dr. S. MURALIDHAR, C.J.

1. The abolition of the Odisha Administrative Tribunal (OAT) by a notification dated 2nd August, 2019 issued by the Department of Personnel and Training (DoPT), Ministry of Personnel, Public Grievances and Pension, Government of India has been challenged in these six writ petitions.

2. Two of these petitions i.e. W.P. (C) No.13789 of 2019 and W.P.(C) No. 6152 of 2019 are by the Bar Associations of the OAT in Cuttack and Bhubaneswar respectively, W.P.(C) No.24577 of 2019 is by the Odisha

Retired Police Officers' Welfare Association. The remaining three petitions are by individuals.

The Background

3. The background to these writ petitions is that by the Constitution (42nd Amendment) Act 1976, Article 323-A was inserted in the Constitution of India. Article 323-A (1) states that Parliament, by law, may provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Article 323-A (2) spells out what such a law made by the Parliament should provide for. Article 323-A (3) contains a *non obstante* clause that states that the said provision would have effect notwithstanding anything contained in any other provision in the Constitution, or in any other law, for the time being in force. The Statement of Object and Reasons (SOR) appended to the 42nd Amendment Bill explained the objects of the insertion of Article 323-A of the Constitution of India being, *inter alia*, the reduction of "mounting arrears in High Court" and "to secure the speedy disposal of service matters".

4. In terms of Article 323-A (1) and (2) of the Constitution of India, the Parliament enacted the Administrative Tribunals Act, 1985 (‘AT Act‘) and it came into effect on 27th February, 1985. The AT Act envisaged the creation of a Tribunal, both for the Centre and the States, which was expected to supplant/substitute the jurisdiction of the High Court under Article 226 of the Constitution. Against the decision of such Tribunal, the aggrieved party could file a Special Leave Petition in the Supreme Court of India under Article 136 of the Constitution.

5. While Section 4 (1) of the AT Act talks of the establishment of the Central Administrative Tribunal (CAT), Section 4 (2) provides for the establishment of the State Administrative Tribunal (SAT). In terms thereof, on the receipt of a request in that behalf from the State concerned, the Central Government may by notification establish an SAT, which would thereafter exercise ― the jurisdiction, powers and authority‖ conferred on it by the AT Act.

6. As far as the State of Odisha is concerned, the Central Government established the OAT, by a notification dated 4th July, 1986 published in the Gazette of India. The OAT began functioning as such with effect from 14th July, 1986.

7. Pursuant to the AT Act, five Benches of the CAT were established on 1st November, 1985. Even before the said Benches could be established, several writ petitions were filed in the High Court as well as the Supreme Court of India challenging the constitutional validity of Article 323-A as well as the provisions of AT Act.

8. By an interim order dated 31st October, 1985 reported in ***S.P. Sampath Kumar v. Union of India (1985) 4 SCC 458***, the Supreme Court directed certain amendments to be carried out in the AT Act with a view to ensuring the functioning of the CAT "along constitutionally sound principles". Pursuant to an undertaking given in that behalf by the then Attorney General for India (AG) to the Supreme Court at the interim stage, the Administrative Tribunal (Amendment) Act, 1986 was enacted to bring about the changes suggested by the Supreme Court. Thereafter when the cases were finally heard by the Supreme Court, it had before it the AT Act as amended by the Act of 1986. A Constitution Bench of the Supreme Court in its final judgment in ***S.P. Sampath Kumar v. Union of India AIR 1987 SC 386*** concluded that the AT Act, even after the amendment, did not measure up the requirement of an effective substitute to the High Courts and to achieving that end suggested further amendments to the provisions governing the form and content of the CAT. The amendments as suggested by the Supreme Court were given effect to by a further Administrative Tribunal (Amendment) Act, 1987 (Act 51 of 1987).

9. Between the amendment to AT Act in 1987 and the decision of the seven-Judge Constitution Bench of the Supreme Court delivered on 18th March, 1997 in ***L. Chandra Kumar v. Union of India AIR 1997 SC 1125***, several decisions had been rendered by different Division Benches (DBs) of the Supreme Court interpreting various aspects of the AT Act. These included ***J.B. Chopra v. Union of India AIR 1987 SC 357, M.B. Majumdar v.Union of India AIR 1990 SC 2263; Amulya Chandra Kalita v.Union of India, 1991 (1) SCC 181*** and ***Dr. Mahabal Ram v.Indian Council of Agriculture Research (1994) 2 SCC 401.***

10. Another development was that in the meanwhile eight States had set up SATs which were functioning on the date that the decision in ***L. Chandra Kumar*** was rendered. In para 21 of the judgment in ***L. Chandra Kumar*** the dates of the establishment of the SATs were noted as under:

> "Andhra Pradesh (1st November, 1989)
> Himachal Pradesh (1st November, 1986)
> Karnataka (6th October, 1986)
> Madhya Pradesh (2nd August 1988)
> Maharashtra (8th July 1989)
> Orissa (14th July, 1986)
> Tamil Nadu (12th December, 1988) and
> West Bengal (16th January, 1995)"

11. Yet another development, as has been noted in the judgment in ***L. Chandra Kumar*** was that a Full Bench of the Andhra Pradesh High Court in ***Sakinala Harinath v. State of Andhra Pradesh(1994 (1) APLJ (HC) 1*** declared Article 323A (2) (d) of the Constitution as unconstitutional to the extent it empowered Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution; additionally, Section 28 of the AT Act was held to be to unconstitutional to the extent it divested the High Courts of jurisdiction under Article 226 of the Constitution in relation to service matters. Additionally it was held that the Constitutional Courts i.e. the High Courts and the Supreme Court were alone competent to exercise the power of judicial review to pronounce upon the constitutional validity of statutory provisions and rules. Accordingly, the decision of the Supreme Court in ***S.P.Sampath Kumar*** *(supra)* was held to be *'per incuriam'* and not binding on the High Courts. The Full Bench of the AP High Court noted that in any event the issue of constitutionality of Article 323-A (2) (d) was not in question in ***Sampath Kumar*** *(supra)* and, therefore, the said decision could not be held to be an authority on that aspect. The Full Bench of the AP High Court in ***Sakinala Harinath*** *(supra)* further held that the remedy of an SLP under Article 136 to the Supreme Court was not a real safeguard and the jurisdiction of the Supreme Court under Article 32 of the Constitution was also not a help in such matters. Accordingly, the AP High Court held that although the judicial power could be vested in a Court or a Tribunal, the power of judicial review of the High Courts under Article 226 of the Constitution could not be excluded even by the Constitution.

12. As a result of the above post ***Sampath Kumar*** decisions of the Supreme Court and the A.P. High Court, a doubt arose as to the correctness of the decision in ***Sampath Kumar***. This issue was raised by a two-Judge DB of the Supreme Court in ***L. Chandra Kumar v. Union of India (1995) 1 SCC 4*** (order dated 2nd December, 1995) which *inter alia* included a challenge to the validity of Section 5 (6) of the AT Act.

13. The questions formulated for consideration by the seven-Judge Bench of the Supreme Court in ***L. Chandra Kumar*** were as under :

> (1) Whether the power conferred upon Parliament or the Stale Legislatures, as the case may be, by Subclause (d) of Clause (2) of Article 323-A or by Subclause (d) of Clause (3) of Article 323-B of the Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323-A or with regard to all or any of the matters specified in Clause (2) of Article 323-B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?
>
> (2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?
>
> (3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

14. By a unanimous judgment in ***L. Chandra Kumar*** (dated 18th March, 1987), the seven-Judge Constitution Bench of the Supreme Court concluded as under:

> "91. .....all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.
>
> xx xx xx
>
> 93. .....The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High

> Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

15. The other conclusion as regards the constitutional validity of Section 5 (6) of the AT Act was that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5 (6) would automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This would ensure that questions involving the vires of a statutory provision or rule would never be adjudicated by a single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5 (6) of the AT Act would no longer be susceptible to charges of unconstitutionality.

16. Ultimately, the Supreme Court in ***L. Chandra Kumar*** held that Clause 2(d) of Article 323-A and Clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution was held to be “part of the inviolable basic structure of our Constitution”. While the said jurisdiction could not be ousted, “other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution”.

Abolition of the MPAT

17. One fall out of the judgment in ***L. Chandra Kumar*** was that some of the SATs were abolished. As far as the Madhya Pradesh Administrative Tribunal (MPAT) is concerned, with the reorganization of State of Madhya Pradesh (M.P.) under the Madhya Pradesh Reorganization Act, 2000 (MPR Act), the State of M.P and the State of Chhatisgarh, under a mutual agreement in terms of Section 74 (1) of the MPR Act, decided to abolish the MPAT and a notification dated 25th July, 2001 was issued to that effect.

18. The writ petitions challenging the abolition of the MPAT were disposed of by the High Court of Madhya Pradesh by a judgment dated 14th May, 2002 in W.P.(C) No.3531 of 2001 ***(Madhya Pradesh High Court Bar Association v. Union of India).*** It was held that Section 74 (1) of the MPR Act empowered the States of MP and Chhatisgarh to abolish a Tribunal constituted under a Central Act. However, the State Governments would still have to request the Central Government to issue a notification to abolish the MPAT and the Central Government would be bound to do so. Sections 74 (2) and (3) of the MPR Act were held to be ultra vires Articles 14, 16 and 21 of the Constitution. One of the reasons put forth before the High Court by the State of M.P to abolish the MPAT was that after the decision of the Supreme Court in ***L.Chandra Kumar***, the MPAT remained only an "additional tier" in the administration of justice with there being no finality to its decision as was envisaged under the AT Act. The State of M.P. was of the view that the MPAT failed to fulfil the objects of its establishment since its decisions would be subject to the writ/supervisory jurisdiction of the High Court.

19. The decision of the High Court of MP was challenged before the Supreme Court. By a decision dated 17th December, 2004 in ***M.P. High Court Bar Association v. Union of India, (2004) 11SCC 766*** (hereafter 'the ***MPAT Abolition case'***) the Supreme Court affirmed the decision of the High Court of MP and held as under:

> "73..... from the record of the case, it is amply clear that relevant, germane, valid and proper considerations weighed with the State Government and keeping in view development of law and the decision of the larger Bench of this Court in *L. Chandra Kumar*, a policy decision has been taken by the State Government to abolish State Administrative Tribunal. Parliament also empowered the State Government to take an appropriate decision by enacting sub-section (1) of Section 74 of the Act of 2000 and in exercise of

such power, the State Government had taken a decision. The decision, in our opinion, cannot be regarded as illegal, unlawful or otherwise objectionable.

Abolition of the TNAT

20. In the meanwhile, as far as Tamil Nadu Administrative Tribunal (TNAT) is concerned, the Government of Tamil Nadu by its letters dated 10th June 1994, 12th June 2001 and 10th August, 2004 requested the Government of India to abolish the TNAT through an amendment. After the judgment of the Supreme Court in the ***MPAT Abolition case,*** the Chief Secretary, Government of Tamil Nadu sent another letter dated 11th February, 2005 requesting the Central Government for abolition of the TNAT through a notification.

21. It must be noted at this stage that even while the Union of India's appeal against the judgment of M.P. High Court was pending, the Government of India appears to have accepted the decision of M.P. High Court and issued a notification on 17th April, 2003 abolishing the MPAT.

22. According to the Government of Tamil Nadu, there was no option for the Central Government but to accept the request of the State government to issue such a notification. Accordingly, the Government of Tamil Nadu stopped appointing the Chairman and the Administrative Members of the TNAT after their retirements in 2002. Thereafter the TNAT was manned by the sole Vice Chairman, who also retried on 2nd June, 2004. Subsequently, no one was appointed and the TNAT became defunct with 30,000 cases pending for disposal.

23. It was in those circumstances that writ petitions were filed by the Tamil Nadu Government All Department Watchman and Basic Servants Association; the Administrative Tribunal's Bar Association and the Tamizhaga Village Administrative Officers' Association before the Madras High Court for a mandamus to the State of Tamil Nadu to fill up the vacancies in TNAT and allow it to function effectively until it stood abolished by the Central Government through a proper procedure which would take a long time.

24. The stand of the Central Government before the Madras High Court was that though the Government of Tamil Nadu had sent a proposal for abolition of the TNAT, it could not be done by a notification but only by a

law made by the Parliament. It was pointed out that Section 74 of the MPR Act provided for abolition through notification but such a provision was not available as far as the State of Tamil Nadu was concerned and therefore, a suitable Parliamentary amendment to the AT Act was necessary. It was stated that such a proposal was in fact contemplated.

25. A DB of the Madras High Court by a judgment dated 25th April 2005 in Writ Petition No.1724 of 2005 and batch (***Tamil Nadu Government All Department Watchman and Basic Servants Association v. Union of India***) dismissed the writ petitions holding that in light of the judgment of the Supreme Court in the ***MPAT Abolition case*** once a policy decision was taken by the Government of Tamil Nadu to abolish the TNAT, and the said policy decision was accepted by the Central Government, the latter was obliged to issue a notification rescinding the earlier notification by which the TNAT was established. Invoking Section 21 of the General Clauses Act, 1897 (GC Act), the Madras High Court concluded that since no mode to rescind the notification establishing the TNAT had been provided in the AT Act, Section 21 of the GC Act will have to be invoked for rescinding the notification earlier issued establishing the TNAT. The Madras High Court held that there was no necessity for the Central Government to await the amendment to the AT Act by the Parliament, and the mere issuance of the notification was sufficient to abolish the TNAT.

26. Upon this there were two developments. One was that a SLP(C) No.16449 of 2005 filed by the Tamizhaga Village Administrative Officer's Association in the Supreme Court against the above judgment of the Madras High Court was dismissed in limine by a three-Judge Bench of the Supreme Court on 16th August 2005, by a one-line order which read: "The Special Leave Petition is dismissed." The second development was that the Union of India filed a separate Special Leave Petition against the said judgment which came to be numbered as Civil Appeal No.951 of 2006, upon leave being granted by the Supreme Court. No interim order was passed therein by the Supreme Court staying the operation of the judgment of the Madras High Court.

27. The Government of India appeared to have accepted the judgment of the Madras High Court and issued a notification on 17th February 2006, abolishing the TNAT. In other words, by invoking Section 21 of the GC Act read with Section 4 (2) of the AT Act, the Central Government implicitly accepted the interpretation of those provisions by the Madras High Court and

rescinded the earlier notification establishing the TNAT without waiting for the amendment to the AT Act.

Bill to amend the AT Act

28. Nevertheless, consistent with the stand of the Central Government before the Madras High Court, the Administrative Tribunals (Amendment) Bill, 2006 was tabled in Parliament on 16th March, 2006. This also contemplated amendments to the AT Act consistent with the decision in ***L. Chandra Kumar.*** The S.O.R. appended to the Bill noted the fact that three of eight State Governments viz., Himachal Pradesh (H.P), M.P and Tamil Nadu had requested the Central Government for abolition of the respective SATs and that there was therefore a need for amendment of the AT Act "in order to provide for an enabling provision for abolition of the Tribunal and also for transfer of pending cases to some other authority after the Tribunal is abolished." The Bill proposed introduction of Chapter IV-A in the AT Act titled "Abolition of Tribunals" and Chapter IV-B titled "Appeal to the High Courts".

29. The said Bill was referred to the Rajya Sabha Standing Committee of Personnel, Public Grievances, Law and Justice. The Committee submitted its 17th report on 5th December, 2006 *inter alia* recommending that the power to abolish an SAT should not be granted to the executive and that the proposal for such abolition should invariably have the concurrence of the Parliament. The Committee further recommended that appeals from the order of the SAT should be provided only to the Supreme Court and not to the High Courts since "High Courts are already overburdened with a huge number of pending cases". It also recommended that "if statutory provisions of appeal to the Supreme Court cannot be envisaged, a clarifying amendment should be made that the order of a Tribunal finally disposing of an application will not be called in question in any Court, except by way of Special Leave Petition in the Supreme Court". Another recommendation of the Committee was that "when a legislation is made the Judicial Impact Statement and financial commitment should be anticipated and measured". It was further noted that the nodal Ministry for ATs should be the Ministry of Law and Justice and not the Ministry of Personnel, Public Grievances and Pensions. Specific to the TNAT, the Committee did not approve granting retrospective effect to the notification of the Government of India abolishing the TNAT "since it would not be proper to validate the notification till the judgment is given by the Apex Court in the SLP filed challenging the abolition".

Abolition of some SATs

30. For reasons that are not very clear, nothing further was heard of the aforementioned Bill. The proposed amendments to the AT Act, therefore, did not come about. On the other, hand the Central Government appears to have acceded to the requests by State Governments by issuing notifications abolishing the SATs. A pattern appears to have been established which involved the Central Government requiring the State Government to obtain the concurrence of the High Court concerned before making a request for abolition of the SAT. This fact was mentioned in the notification dated 8th July 2008 abolishing the HPAT, where the second paragraph states "And whereas the Government of Himachal Pradesh, after obtaining the concurrence of the High Court of the Himachal Pradesh, has now made a request for abolition of Himachal Pradesh Administrative Tribunal (HPAT)." The notification expressly stated that this was being done in exercise of power conferred under Section 4(2) of the ATA read with Section 21 of the GC Act. As regards the Andhra Pradesh Administrative Tribunal (APAT), an identically worded notification was issued by the Government of India on 14th January 2020 abolishing it.

31. In light of the above developments, when Civil Appeal No.951 of 2006 filed by the Union of India against the judgment of the Madras High Court upholding the decision to abolish the TNAT was taken up for hearing by the Supreme Court on 28th March 2017, it was informed that the appeal had been rendered infructuous. The appeal was disposed of as such leaving the question of law open.

32. It may be noted here that subsequently the HPAT was again established under Section 4(2) of the ATA by the Government of India by a notification dated 29th December 2014. Five years thereafter, for a second time, by another notification 26th July 2019, the Government of India again abolished the HPAT.

33. Thus, of the eight SATs that were functional as of 18th March 1997, when the Supreme Court delivered its judgment in ***L.Chandra Kumar***, five of them viz., the MPAT, the TNAT, the HPAT, the OAT and the APAT have since been abolished.

Abolition of the OAT

34. Now turning to the OAT, it had started functioning with effect from 14th July 1986 with one Chairman and three Members. An additional Bench was set up in Bhubaneswar, comprising a Vice Chairman and a Member, with effect from 1st July, 1994. On 15th January 2014, the State Government took a decision to create one more Bench of the OAT at Cuttack with two Members i.e. one Judicial and another Administrative, thus bringing the total number of Members including the Chairman to eight. By this time, there were two circuit Benches of the OAT, one at Sambalpur and the other at Berhampur.

35. It appears that on 17th July 2013, the State of Odisha Cabinet met to consider abolition of the OAT, but this was not considered expedient at that point in time. However, when it met on 9th September 2015, the State Cabinet approved in principle the proposal for abolition of the OAT with the following observations:

> *"(i) Since this proposal will lead to an increased work load for the High Court, it was decided in principle that the entire establishment of the Tribunal could be transferred to the High Court.*
>
> *(ii) Government of India will also be moved after discussing with the High Court for creating a few more judgeships in the High Court to deal with the extra work. The State Government will be totally supportive to the proposal for increasing judgeship of our High Court. Discussions will also be held with the High Court regarding the pending cases in the Tribunal."*

36. In a press release issued soon thereafter, the Government of Odisha gave its reasons for the decision as under:

> *"(1) Odisha Administrative Tribunal was established on 14th July, 1986 under the Administrative Tribunal Act, 1985 by Government of India on the request of Government of Odisha. The Tribunal under the Act was to have similar jurisdiction as the High Court. The objective of the formation of the Tribunal was to enable quick disposal of the grievances of the government employees.*
>
> *(2) However, with the decision of the Hon'ble Supreme Court in L. Chandra Kumar (1997) the provision of the Act that the aggrieved parties could appeal before the Supreme Court against the orders of the Tribunal was held unconstitutional, as it was deemed to be inconsistent with the basic structure of the Constitution. Hence the parties aggrieved with the orders of the Tribunal may approach the High Court first. Thus, the very objective of the establishment of the Tribunal to give quick justice to the government employees could not be achieved. Accordingly, the proposal for abolition of Odisha Administrative Tribunal was considered by the Cabinet and was approved in principle.*

> *(3) After approval of the Cabinet, the proposal will be sent to the Government of India for issue of the notification for abolition of the Odisha Administrative Tribunal. In view of increased workload for the High Court after approval of the proposal, it has been decided to move Government of India after discussion with the High Court for creating more Judgeships in the High Court if necessary, to discuss with High Court as to how the pending cases will be dealt."*

37. On 16th September 2015, the Chief Secretary, Government of Odisha wrote to the Secretary, DoPT, Government of India stating that as a result of the judgment in ***L. Chandra Kumar***, the very purpose of having an SAT for speedy redressal of the grievances of the employees of the State Government was not fulfilled as "any way the aggrieved parties have to approach Hon'ble High Court before approaching the Apex Court for final verdict." While enclosing a note explaining the reasons for the decision arrived at by the State Government, the Chief Secretary intimated the Central Government that "appropriate measures would be taken to deal with the pending cases and regarding redeployment of the staff and pending cases before the SAT so that the transition becomes smooth to the extent possible." The Chief Secretary accordingly requested the Central Government to issue the necessary notification under the AT Act for abolition of the OAT.

38. The enclosed note set out the statistics regarding the workload of the OAT and the pendency of cases. Set out in the note was a chart showing in a tabular form the institution, disposal and pendency of the cases before the OAT. At the end of 2014 there were 54, 334 pending cases. It was noted that during 2014 there were four Members of the OAT (including the Chairman) and the disposal per Member came to 8.91 cases per day and that "as an institutional mechanism it seemed the Tribunal was not able to provide a speedy decision to the aggrieved parties".

39. Conscious that there would be an additional load on the High Court Judges, the Government of Odisha in the aforesaid letter to the DoPT stated that it would take "appropriate action to further strengthen Hon'ble High Court of Orissa including increase in judgeships to deal with the additional workload at the level of the Hon'ble High Court after abolition of the OAT. It is stated that the arrangement has also been made regarding existing staff and resources provided to the OAT so that the High Court would be able to deal with cases presently pending before the OAT".

40. In response to the above letter of the Government of Odisha, the DoPT on 12th January 2016 wrote to the Chief Secretary, Government of Odisha stating that the matter had been considered in consultation with the Department of the Legal Affairs and that the Legal Adviser there had advised that prior to seeking the opinion of the AG, the following information/clarification were required:

> *"(i) "The views of the concerned High Court with regard to the proposal of abolition of OAT, transfer of cases of the OAT to the High Court and also the transfer of employees from the OAT to High Court.*
>
> *(ii) The Administrative Tribunal (AT) Act contemplates transfer of cases from the High Court to the Administrative Tribunals on its constitution vide Section 29 of the Act. However, there is no provision for transfer of cases to the High Court on abolition of the Administrative Tribunal. As such, we would like to know what will be the legal basis of transfer of the cases pending with OAT Odisha on its abolition to the High Court.*
>
> *(iii) Whether in the past there is any precedent regarding transfer of cases from OAT to High Court, if so, the same may be provided."*
>
> *2. In view of the above, it is requested to kindly obtain the views of Odisha High Court with regard to the proposal of abolition of OAT, transfer of cases of the OAT to the High Court and also the transfer of employees from the OAT to High Court and communicate the same to this Department within a week positively.*
>
> *3. As regards observations of Legal Adviser as at sub paras ii) and iii) of para 3 above, it is requested to kindly furnish the requisite information/clarification to this Department within a week positively.*
>
> *4. Further, necessary action on your proposal shall be taken on receipt of the above information/clarification from Government of Odisha and Hon'ble High Court. As such, the time-line of providing the requisite information/clarification within a week may kindly be adhered to."*

41. A copy of the above letter was sent to the Registrar General (RG) of the Orissa High Court as well as to the Registrar of the OAT along with the enclosures for information.

42. On the basis of the above letter of the DoPT, the Principal Secretary in the General Administration Department (GAD), Government of Odisha addressed a letter to the RG of this Court on 1st February, 2016 stating that the Government of Odisha was of the view that the OAT was not able to serve its objective particularly after the decision in ***L. Chandra Kumar*** and

that the purpose of having an SAT for speedy redressal of the grievances of the State Government employees was not fulfilled since the aggrieved parties had to approach the High Court before approaching the Apex Court for a final verdict. According to the Government of Odisha, as stated in its letter, the abolition of the OAT would reduce the burden of the litigation of the Government and also reduce the time for resolution of the disputes. The Government of Odisha stated that it would take appropriate action to further strengthen the High Court including increase of judgeship to deal with the additional workload at the level of the High Court after abolition of the OAT.

43. In its letter dated 1st February 2016, the Government of Odisha further pointed out that in response to its letter, the Government of India had sought the views of the High Court on the proposal to abolish the OAT, the transfer of the cases from the OAT to the High Court and transfer of the employees from the OAT to the High Court. The Secretary, GAD requested the RG to place before the High Court the issues on

> (i) arrangement for transfer of cases of the OAT to the High Court;
>
> (ii) transfer of employees from the OAT to High Court;
>
> (iii) modalities for disposal of service related cases in the High Court and
>
> (iv) creation of more judgeships to deal with the extra workload and further requested to communicate the views of the Hon'ble Court in the matter to the Department at an early date.

44. A communication dated 25th April 2018 was sent by the DoPT, Government of India to the Government of Odisha stating that the competent authority had "in principle" approved the proposal for abolition of the OAT subject to the following conditions:

> *"(i) Government of Odisha will suitably adjust the employees of the OAT as intimated by them;*
>
> (ii) *Decision with regard to disposal of pending cases will be left to the Government of Odisha."*

45. Thereafter it appears that by another letter dated 28th May, 2018 the DoPT informed the State Government that after receiving the comments on the points noted in its letter dated 25th April 2018, it would take three to four months time for the DoPT to finalise the abolition of the OAT.

46. The State Government then again wrote to the RG of this Court on 3rd July, 2018 for placing the matter before the High Court. On 5th July, 2018 the High Court sought the details of the assets and employees position in the OAT. The Deputy Registrar, OAT sent a request letter for information on 7th July, 2018 and this was placed before the RG of the High Court on 9th July, 2018.

47. On 5th February, 2019 the RG of this Court wrote a letter addressed to the DoPT, Government of India as well as the Principal Secretary, GAD, Government of Odisha stating as under:

> "In adverting to the Letters referred to above on the above subject, I am directed to say that the court after due deliberation have been pleased to resolve to accept the decision to be taken by the Central Government and State Government in this regard.
>
> This is for favour of information".

48. It may be noted at this stage, that after the decision of the Government of Odisha to abolish the OAT became public, it ceased to make appointments to fill up the vacancies in the OAT. This led to the OAT Bar Association, Cuttack filing W.P.(C) No.15693 of 2017 in this Court seeking a mandamus to the Government of Odisha to fill up the vacancies in the OAT. Another W.P.(C) No.22635 of 2017 was filed by the OSAT Bar Association, Bhubaneswar in this Court on 27th October, 2017 seeking a similar relief.

49. In response to both the writ petitions the Government of Odisha filed replies disclosing its proposal to abolish the OAT. It appears that in the said writ petitions an order was passed on 10th January, 2019 by this Court directing the State Government to appoint a Chairperson (Judicial), OAT on ad hoc basis for a period of one year. This order was challenged by the Government of Odisha by filing SLP (C) Nos.4701 and 4702 of 2019 in the Supreme Court. However, on 21st February, 2019 the Government of Odisha decided to implement the above order while simultaneously writing to the Government of India seeking abolition of the OAT.

50. In the meanwhile even before the notification was issued by the Central Government, W.P. (C) No.5362 of 2019 was filed by the OAT Bar Association, Cuttack in this Court questioning the decision dated 9th September, 2015 and the subsequent decisions of the Government of Odisha

and the 'in principle' approval of the proposal by the Government of India vide its letter dated 25th April, 2018 to abolish the OAT. In the said writ petition, notice was issued on 11th April, 2019 by this Court.

The impugned notification

51. While the said writ petitions were pending, the DoPT published in the Official gazette dated 2nd August, 2019 the impugned notification which reads as under:

> "G.S.R.552 (E)-Whereas, in exercise of the powers, conferred by sub-section (2) of section 4 of the Administrative Tribunals Act, 1985 (13 of 1985) and on receipt of the request from the Government of the State of Odisha in this behalf, the Central Government has established the Odisha Administrative Tribunal with effect from the 14th July, 1986 vide notification of the Government of India in the Ministry of Personnel, Public Grievance and Pensions (Department of Personnel and Training), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number GSR 934 (E), dated the 4th July, 1986.
>
> And whereas, the Government of the State of Odisha, after obtaining the concurrence of the High Court of Orissa, has now made a request for abolition of the said Odisha Administrative Tribunal;
>
> Now, therefore, in exercise of the powers conferred by sub-section (2) of section 4 of the Administrative Tribunals Act, 1985, read with section 21 of the General Clauses Act, 1897 (10 of 1897), the Central Government hereby rescinds the said notification number G.S.R. 934 (E), dated the 4th July, 1986, except as respects things done or omitted to be done before such rescission, with effect from the date of publication of this notification in the Gazette of India.
>
> (F.No.A-11014/10/2015-AT)
> SRINIVAS R. KATIKITHALA, Addl. Secy."

The present petitions

52. W.P. (C) No.13789 of 2019 was filed by the OAT Bar association at Cuttack challenging the constitutional validity of the above notification. The said writ petition was listed for hearing first on 7th August, 2019. The DB passed a detailed order noting the contentions of both the counsel for the Petitioners as well as the Advocate General appearing for the State of Odisha and directed notice to issue in the petition. This Court further while adjourning the case to 5th September, 2019 directed as under:

> "In the meantime, it is made clear that the State Government will not transfer any proceeding to any other authority or any other Court. The State Government will also file their response.

> However, it will be open for the applicant to move for transfer of his Original Application to this Court in case of exigency, which shall be subject to the result of the writ petition."

53. Thereafter apart from petitions filed to challenge the same notification, other writ petitions were filed in this Court praying that applications pending in the OAT be transferred to this Court. Many such writ petitions have been disposed of by this Court granting that relief.

54. Pursuant to the notice issued in the petitions challenging the abolition of the OAT, a reply was filed by the GAD, Government of Odisha on 28th August, 2019. An additional counter affidavit was filed on 23rd September, 2019. The Petitioners filed their rejoinder to the said counter affidavit to which again a reply was filed by the State of Odisha on 25th November, 2019. The Union of India filed a separate affidavit on 4th September, 2019, *inter alia,* adopting the same stand as the State of Odisha to the effect that in terms of Section 21 of the GC Act, the Central Government has the power to rescind the notification in terms of which the OAT had been established. The Petitioners filed a rejoinder to the said affidavit as well. The pleadings in the accompanying petitions are more or less on the same lines and are, therefore, not being discussed in detail here.

55. This Court heard the submissions of Mr. B. Routray, learned Senior counsel, Mr. Asok Mohanty, learned Senior counsel, Mr. S.K. Patnaik, learned Senior counsel, Mr. U.C. Mohanty, learned counsel, Mr. R.K. Sahoo, learned counsel, Mr. B.B. Mohanty, learned counsel, Mr. R.B. Mohapatra, learned counsel appearing in person for the Petitioners. They also filed detailed written submissions. Mr. R. Iyer, learned counsel, was allowed to intervene in W.P. (C) No.13789 of 2019 in his individual capacity. He made detailed oral arguments and also submitted a written note.

56. On behalf of the Opposite Parties, the Court heard the submissions of Mr. A.K. Parija, learned Advocate General for the State of Odisha, Mr. M.S. Sahoo, learned Additional Government Advocate and Mr. P.K. Parhi, learned Assistant Solicitor General on behalf of Union of India.

Submissions on behalf of the Petitioners

57. The submissions on behalf of the Petitioners and the intervener may be summarised thus:

(i) Having an SAT is an administrative necessity in terms of Article 323-A (1) of the Constitution of India given the object behind its insertion by the Constitution (42nd Amendment) Act and particularly in light of Clause 5 of the SOR accompanying its corresponding Bill. Adopting the rule of purposive construction, the word 'may' in Article 323-A (1) should be read as 'shall' in acknowledgment of the overflowing docket of the High Court as well as the Supreme Court. Reliance is placed on the decisions in ***Sampath Kumar***, ***L. Chandra Kumar***, ***Madras Bar Association v.Union of India (2014) 10 SCC 1***, ***Gujarat Urja Vikas Nigam Ltd.v. Union of India (2016) 9 SCC 103*** and ***Rojer Mathew v. Union of India (2020) 6 SCC 1***. Reference is also made to the decisions in ***Mahaluxmi Rice Mills v. State of U.P. (1998) 6 SCC 590, Smt. Bachahan Devi v. Nagar Nigam, Gorakhpur (2008) 12 SCC 372*** and ***Dillip Kumar Basu v. State of West Bengal (2015) 8 SCC 744***.

(ii) The impugned notification dated 2nd August, 2019 issued by the DoPT, Government of India is invalid as it is not expressly stated to have been taken in the name of the President of India. In other words it is not in compliance with the requirement of Articles 77 (1) and (2) of the Constitution of India. Reliance is placed on the decisions in ***State of Uttaranchal v. Sunil Kumar Vaish (2011) 8 SCC 670*** and ***Bachhittar Singh v. State of Punjab AIR 1963 SC 395***.

(iii) A mere noting in the file cannot be said to be the decision of the Government unless it is sanctified by issuing an order in accordance with Article 77 (1) and (2) or Articles 166 and 192 of the Constitution of India. The decision in the file culminates in an order affecting the rights of the parties only when it is expressed in the name of the President or the Governor. In the present case no material has been placed on record to show that the order dated 2nd August, 2019 has been expressed in the name of the President in the manner envisaged under Article 77 (2) of the Constitution of India. Reliance has placed in the decisions of ***State of Bihar v. Kripalu Shankar (1987) 3 SCC 34***, ***Rajasthan Housing Board v. Krishna Kumari 1993 (2) SCC 84***, ***M/s. Sethi Auto Service Station v. Delhi Development Authority (2009) 1 SCC 180***, ***Shanti Sports Club v. Union of India (2009) 15 SCC 705*** as well as ***Gulf Goans Hotels Co. Ltd. v. Union of India (2014) 10 SCC 673***.

(iv) Neither under Article 323-A (1) of the Constitution of India nor under the AT Act has the High Court been assigned any specific role in the matter of establishment or abolition of an SAT. Consequently, the so-called 'concurrence' obtained of the High Court for the decision to abolish the OAT is *non est*.

(v) Unlike Article 371-D of the Constitution, the Parliament has not provided in Article 323-A, for the abolition of an SAT and without such an express provision, the executive cannot by a mere notification abolish the OAT. Power has been granted to the Parliament to make a law only for 'establishing' an AT and not for its abolition. The impugned notification is therefore in excess of the powers granted to the executive and is illegal and unconstitutional.

(vi) With the impugned notification bringing to an end the disputes pending before the OAT, the litigants are left without a similar forum as mandated by the

Parliament to be established. In such circumstances, the power under Section 21 of the GC Act to rescind the notification establishing the OAT is not available either to the Government of Odisha or the Government of India. When viewed in light of the subject matter and the context of Section 4 (2) of the AT Act read with Article 323A (1) of the Constitution which contemplates only the establishing of a SAT, Section 21 of the GC Act cannot be invoked to bring to an end disputes pending in the OAT. Reliance is placed on the decisions in ***State of Bihar v. DN Ganguly AIR 1958 SC 1018***, ***Lt. Governor of Himanchal Pradesh v. Avinash Sharma AIR 1970 SC 1576*** and ***State of Madhya Pradesh v. Ajay Singh (1993) 1 SCC 302***.

(vii) In this context, it is further submitted that since the decision to establish an SAT is quasi-judicial in nature, in the absence of an express provision in that behalf in the AT Act, such a decision cannot be nullified by resorting to Section 21 of the GC Act. What cannot be done directly cannot be sought to be done indirectly. The decisions in ***Samundra Devi v. Narendra Kaur (2008) 9 SCC 100; Ram Chandra Singh v. Savitri Devi (2004) 12 SCC 713; Indian National Congress v. Institution of Social Welfare (2002) 5 SCC 685*** and ***Industrial Infrastructure v.CIT (2018) 4 SCC 494*** are referred to.

(viii) Once the Central Government took a decision to establish the OAT, it became *functus officio* and was incompetent to issue any further notification under Section 21 of the GC Act rescinding the earlier notification. Reference in this regard is made to the decisions in ***State Bank of India v. S.N. Goyal (2008) 8 SCC 92*** and ***Government of Uttar Pradesh v. Raja Mohammad Amir Ahmad Khan AIR 1961 SC 787.***

(ix) Since the impugned notification has adverse civil consequences for the concerned stakeholders, they were required to be heard before the decision was taken and, therefore, the impugned notification violates the principles of natural justice. Reliance is placed on the decisions in ***State of Orissa v. Dr. (Miss) Binapani Dei, AIR 1967 SC 1269, S. L. Kapoor v. Jagmohan, AIR 1981 SC 136, Sahara India v. CIT, (2008) 14 SCC 151 and Siemens Engineering v. Union of India, AIR 1976 SC 1785.***

(x) It is not open for the State Government or the Government of India to simply decide that the jurisdiction which has been vested by Parliament in the SAT should now vest in the High Court and that cases pending before the OAT could *ipso facto* stand transferred to the High Court. It is submitted that the power to create or enlarge jurisdiction is legislative in character so also the power to confer a right of appeal or to take away a right of appeal and that this can be done only by the Parliament. Reliance is placed on the decision in ***A.R. Antulay v. R.S. Nayak, AIR 1988 SC 1531.***

(xi) The decision to abolish the OAT on the basis of the decision in ***L. Chandra Kumar*** is attacked as being perverse, irrational, unreasonable and violative of Article 14 of the Constitution. It is stated that the ratio of ***L. Chandra Kumar*** which was concerned with reducing the workload of the Supreme Court of India has been wrongly understood by the Government of Odisha as providing the reason for

abolishing the OAT. Nowhere in the decision in ***L. Chandra Kumar*** is any opinion expressed by the Supreme Court that the SATs are redundant. On the contrary, the decision in ***Rojer Mathew*** *(supra)* reveals that the need for Tribunals is still felt. No judicial impact assessment as contemplated either by the Parliamentary Standing Committee or the decision of the Supreme Court in ***Rojer Mathew*** *(supra)* has been undertaken to justify the abolition of the OAT for the purpose of rendering speedy justice to Government servants. The report of the Parliamentary Standing Committee which has rejected the proposal to abolish the SATs through mere notifications of the government is admissible in evidence and can be relied upon. Reliance is placed on the decision in ***Kalpana Mehta v. Union of India, (2018) 7 SCC 1.***

(xii) The irrationality is writ large when it is understood that even after abolition of the OAT, there would be a three-tier litigation which a Government employee has to face - first before the Single Judge of the High Court, then before the DB and thereafter before the Supreme Court under Article 136 of the Constitution. This has been completely lost sight of both by the Government of Odisha as well as the Government of India.

(xiii) Morever, the OAT was functioning with two regular benches at Bhubaneswar and Cuttack and two circuit benches at Sambalpur and Berhampur. This provided easy, speedy and affordable access to the aggrieved Government servants. All these advantages would be lost if all of the Government servants had to approach only the High Court in Cuttack for redressal of their grievances.

(xiv) The figures of pendency of cases in the High Court and the number of unfilled vacancies of High Court Judges over the last 20 years make it clear that far from ensuring speedy disposal of the 70,000 and odd applications pending before the OAT which would stand transferred to the High Court as a result of the abolition of the OAT, the disposal of such pending cases, not to speak of the fresh ones, would get interminably delayed. The very rationale is questionable. The decision to abolish the OAT is, in the circumstances, against the larger interests of the Government employees and defeats their constitutional rights to speedy and fair justice under Articles 14, 21 read with 39A of the Constitution.

(xv) Out of the 70,000 odd cases, only 1453 have been transferred thus far and over the past 19 months not one of the transferred cases has been taken up for hearing in the High Court. In the absence of a provision like Section 29 of the AT Act, the transfer of the petition to the High Court is without legal basis. Mere creation of additional post of High Court Judges may not solve the problem given the delay in filling up even the existing vacancies.

(xvi) There has been no specific denial in the reply filed by the Government of Odisha to the averment in para 7 of the writ petition that the decision to abolish the OAT was triggered by the prospect of the top-ranking officials of the State of Odisha facing charges of contempt. The OAT was abolished only with a view to avoiding such proceedings. The principle of "non-traverse" is invoked in support of

the plea that the impugned notification is an instance of mala fide exercise of power for extraneous considerations. Reliance is placed on the decisions in ***Controller of Court of Ward v. G.N. Ghorpade (1973) 4 SCC 94*** and ***Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673.***

(xvii) There has been a deliberate misconstruing of the decisions of the Supreme Court in the ***L. Chandra Kumar*** and ***the MPAT Abolition case*** and the decision of the Madras High Court in ***TNAT Abolition case***. A case is an authority only for what it actually decides and not for what may logically follow from it. Reliance is placed on the decisions in ***State of Orissa v. Md. Illiyas AIR 2006 SC 258***, ***State of Haryana v. M.P. Mohla (2007) 1 SCC 457*** *and* ***Sreenivasa General Traders v. State of Andhra Pradesh AIR 1983 SC 1246.***

(xviii) The decision to abolish the OAT cannot be termed as a policy decision only to avoid judicial review. Reliance is placed on the decision in ***Centre for Public Interest v. Union of India, (2003) 7 SCC 532.***

Submissions on behalf of the Opposite Parties

58. The submissions on behalf of the Opposite Parties i.e. Union of India as well as the State of Odisha may be summarized as under:

(i) Article 323-A (1) is only an enabling provision. It vests the Parliament with the power to enact laws for the establishment of the CATs and the SATs for adjudication of disputes/complaints relating to recruitment and conditions of service of Government servants. Since the very procedure for establishing an SAT envisages a request being made by the State Government through the Central Government and only thereafter for the Central Government to issue a notification establishing an SAT, Article 323-A (1) is not a self-executing provision.

(ii) Even the law made by Parliament in terms of Article 323-A (1) by itself does not establish an SAT. It also only enables the establishing of an SAT. The word 'may' under Article 323-A (1) has therefore to be read in the above context. It cannot, therefore, be said to be mandatory in the sense that it gives no option to the Central or State Government on the establishing an Administrative Tribunal. It is only a permissive provision. Reliance is placed on the decision in the ***MPAT Abolition Case***

(iii) The establishment or abolition of an SAT is a decision in the domain of the respective Governments and is an essentially a policy decision. The scope of judicial review of such policy decision is extremely limited.

(iv) After the judgment in ***L. Chandra Kumar,*** one more tier of litigation has been added with all decisions of the OAT being reviewable judicially by the High Court under Articles 226 / 227 of the Constitution. Therefore, as a policy, it was decided by State of Odisha that no useful purpose would be served in continuing with the OAT since it no longer subserves the object of speedy justice. Such a policy decision cannot be said to be arbitrary or unreasonable or mala fide. As pointed out in the ***MPAT Abolition case,*** the question is not of advisability or propriety but the legality or rationality, reasonability and constitutionality thereof.

(v) The impugned policy decision was based on relevant germane and valid reasons, and does not call for interference by the High Court under Article 226 of the Constitution. Reference is made to both the ***L. Chandra Kumar*** and the ***MPAT Abolition case***.

(vi) All the relevant materials were taken into account by the Government of Odisha while deciding to abolish the OAT. In particular, the impact it was likely to have on the High Court was taken into account and therefore it was decided to support the move for increasing the judge strength in the High Court of Odisha. Simultaneously, it was decided to increase the strength of the administrative staff of the High Court by making the staff of the OAT available to the High Court to deal with the additional workload. The correspondence with the Central Government reveals that the factum of pendency of cases, the rate of disposal of such cases by the OAT and the time taken for disposal of cases generally were all taken into account. It cannot therefore be said that the decision is arbitrary or irrational.

(vii) The consultation with the High Court was in furtherance of the need to take into account the impact the decision to abolish the OAT would have on the functioning of the High Court. For the same reason, the Central Government also felt it necessary for the High Court to be consulted. If without consulting the High Court, the State and Central Government had unilaterally decided on the transfer of the cases pending in the OAT to the High Court that would have been improper and also would have rendered the decision arbitrary. Therefore, there is nothing illegal in such a procedure.

(viii) The power to rescind the notification flows from a reading of Section 4 (2) of the AT Act read with Section 21 of the GC Act. The establishment of the OAT was by a process of a request by the State Government to the Central Government, based on the State Government's assessment of the need for the OAT. On that basis a notification was issued by the Central

Government. At a subsequent stage, if the State Government for valid reasons decides as a policy to not continue with the OAT then it certainly has the power to withdraw the request and ask that the OAT be abolished. If it is conceded that the establishment of an SAT requires a subjective satisfaction of the concerned State government before proceeding to make a request to the Central Government under Section 4 (2) of the AT Act and then as a logical corollary, as is implicitly recognized in Section 21of the GC Act, due to a change in the circumstances the process can be reversed and upon the request of the State Government, the Central Government can rescind the earlier notification. There is no statutory or constitutional prohibition against such a procedure being adopted, particularly since it again involves a process of consultation between the State Government and the Central Government based on a policy decision. The power to rescind the notification is inherent to the power to issue it. Reliance is placed on the decision of Madras High Court in the ***TNAT Abolition case*** as well as the decision of the Supreme Court in the ***MPAT Abolition case***.

(ix) The Central Government has in any event accepted the legal proposition that for abolishing an SAT a mere notification by the Central Government is sufficient for the purpose of Section 4 (2) of the AT Act read with Section 21 of the GC Act and does not require an amendment by Parliament to the AT Act. The question of law left open by the Supreme Court therefore does not survive for consideration in view of the subsequent development where the SATs for M.P, H.P, A.P, and Tamil Nadu have been abolished by the Central Government by notifications invoking Section 21 of the GC Act read with Section 4 (2) of the AT Act. The decisions in ***D.N. Ganguli*** *(supra)* and ***Ajay Singh*** *(supra),* are distinguishable on facts and have no relevance in the context of the present case.

(x) Neither Article 166 nor Article 77, which requires orders to be expressly passed in the name of the Governor of a State or the President of India is a mandatory provision. Reliance is placed on the decision in ***R. Chitralekha v. State of Mysore 1964 (6) SCR 368***, which in turn relied upon on the decision in ***Dattatreya Moreshwar Pangarkar v. State of Bombay 1952 SCR 612.*** Reliance is also placed on the observations in ***Narmada Bachao Andolan v. State of M.P. (2011) 12 SCC 333.***

(xi) Article 371D inserted in the Constitution of India by the 32nd Amendment Act of 1974, confers a special status on Andhra Pradesh and is a

Code in itself. It provides both for the establishment and the abolition of the APAT by the President of India. This is very different from Article 323-A, which was inserted subsequently. In fact, after the enactment of the AT Act under Article 323A (1), the APAT was abolished and re-established under the AT Act with effect from 1st November, 1989. It was finally abolished by a notification of the Government of India on 14th January, 2020.

(xii) Although Section 29 of the AT Act does not envisage transfer of cases from the SAT to the High Court but only the other way around, the practice that has consistently been followed in abolition of the SATs is to transfer all the pending cases before the SATs to the corresponding High Courts. This is because with the abolition of the SATs, the position that was in existence prior to the establishment of the SATs would revive. So the pending cases before the SATs would naturally have to be adjudicated by the High Court. This is also reflected in the order dated 7th August, 2019 passed by the High Court in these cases.

(xiii) Moreover, the proposal put forth by the State Government in this regard has been accepted by the High Court on its administrative side. Though judicial orders passed by the High Court under Article 226 of the Constitution some of the pending OAs before the OAT have already been transferred to the High Court. Therefore, it is incorrect for the Petitioners to contend that there is no forum available for the adjudication of the cases pending before the OAT.

(xiv) It cannot possibly be contended that adjudication of a writ petition in the High Court is not preferable to adjudication in the first instance by the OAT. There is no empirical data to show that the cases in the OAT were being disposed of faster than similar cases by the High Court. The litigant is therefore in one sense better off with the abolition of the OAT.

Issues for consideration

59. On the basis of the above submissions, the following issues arise for consideration before this Court:

> (i) Under Article 323-A (1) of the Constitution, is it mandatory for an SAT to be established?
>
> (ii) Can the abolition of an SAT be brought about by a notification issued by the Government of India under Section 4 (2) of the AT Act read with Section 21 of the GC Act or does it require a specific provision in that regard both in Article 323A of the Constitution and in the AT Act?

(iii) In the context of (ii) above is the impugned notification in a nature of a quasi-judicial decision? In as much as it has been made without affording the stakeholders a hearing, is it violative of the principles of natural justice?

(iv) Is the impugned notification abolishing the OAT arbitrary, irrational and unreasonable, inasmuch as, it is based on an incorrect understanding of the ratio of the decision of the Constitution Bench of the Supreme Court of India in ***L. Chandra Kumar*** and in any event not based on relevant material but extraneous considerations? In other words, is it violative of Article 14 of the Constitution?

(v) Given the huge pendency of the cases in the High Court, and there being no prospect of filling up of all the vacancies of Judges, and the fact that there would be in any event two tiers of litigation in High Court itself as a result of the transfer to the High Court of cases pending in the OAT upon its abolition, is not the impugned notification arbitrary, irrational and unsustainable in law as it does not subserve the object of speedy justice for Government servants?

(vi) Is the impugned notification dated 2nd August, 2019 issued by the DoPT, Government of India, bad in law since it is not a decision expressly stated to be in the name of the President of India in terms of Article 77 of the Constitution?

Issue (i): Under Article 323-A (1) of the Constitution, is it mandatory for an SAT to be established?

60. When Parliament passed the Constitution (42nd Amendment) Bill, 1976 by which it introduced, *inter alia,* Articles 323-A and 323-B in the Constitution under Part XIV A titled 'Tribunals', the SOR appended to the Bill explained the reasons for its introduction as under:

> "5. To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under Article 226."

61. It can be seen straightaway that there are two types of Tribunals envisaged in Part XIV-A of the Constitution. Article 323-A (1) is exclusively for Administrative Tribunals i.e. Tribunals to deal with complaints and disputes with respective recruitment and conditions of service of persons appointed to public services and posts under the Union or State Government or any local authority. Article 323B deals with the Tribunals for "other matters".

62. Article 323-A (1) of the Constitution consciously uses the word 'may' while describing the power of the Parliament and it reads as under:

> "323A. Administrative Tribunals
>
> (1) Parliament **may**, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government." (emphasis supplied)

63. There is merit in the contention of the Opposite Parties that in the context in which it occurs, the word 'may' denotes that the power under Article 323-A (1) vested in the Parliament to make a law is an enabling one. In other words, the Court is unable to accept the plea put forth by learned counsel for the Petitioners that the word 'may' in the context in which it occurs in the provision has to be read as 'shall', thereby giving no option to the Governments of the Centre and the States to establish Administrative Tribunals.

64. This interpretation gets further strengthened when one examines Article 323-A (2), which talks of the contents of such a law made by Parliament and reads as under:

> "(2) A law made under clause (1) **may** —
>
> (a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;
>
> (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
>
> (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
>
> (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1);
>
> (e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

> (f) repeal or amend any order made by the President under clause (3) of article 371D;
>
> (g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals." (emphasis supplied)

65. Therefore, the word 'may' is used both in Articles 323A (1) as well as Article 323A (2), underscores the nature of the provision being directory and not mandatory. Again, this gets reflected in the wording of Sections 4 (1) and 4 (2) of the AT Act which read thus:

> "4. Establishment of Administrative Tribunals.—
>
> (1) The Central Government **shall**, by notification, establish an Administrative Tribunal, to be known as the Central Administrative Tribunal, to exercise the jurisdiction, powers and authority conferred on the Central Administrative Tribunal by or under this Act.
>
> (2) The Central Government **may**, on receipt of a request in this behalf from any State Government, establish, by notification, an Administrative Tribunal for the State to be known as the.....(name of the State) Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunal for the State by or under this Act." (emphasis supplied)

66. While Section 4 (1) of the AT Act, by using the modal verb "shall" gives no choice to the central government in setting up a CAT, Section 4 (2) of the AT Act uses another modal auxiliary verb 'may' to denote a discretion available to the central government in the matter of setting up an SAT. This also explains why it is not as if for every State in the Union of India there is an SAT. By 1997, i.e. roughly eleven ten years since the AT Act, as amended in 1986, became effective, only eight of the States had established SATs. This was taken note of by the Supreme Court in ***L. Chandra Kumar.*** As of date, five of the said SATs stand abolished. These are the MPAT, the TNAT, the HPAT, the OAT and the APAT. This is another indication of the legal position that the provisions of Article 323A (1) have not been understood as making it mandatory for an SAT to be established.

67. While the decisions in ***Sampath Kumar*** and ***L. Chandra Kumar*** do discuss the efficacy of the CAT and the SATs, there is nothing in those decisions to say that an SAT, once established, cannot be abolished. In other words, the decisions in ***Sampath Kumar*** and ***L. Chandra Kumar*** do not

suggest that a State Government, which may have initially felt the need to establish an SAT, cannot subsequently decide to re-visit that decision and ask for its abolition.

68. The other decisions cited by counsel for the Petitioners are also not supportive of the propositions advanced by them on the interpretation of Article 323-A (1) of the Constitution. The decision in ***Madras Bar Association*** *(supra)* focused on the independence and efficacy of the National Company Law Tribunal, as an adjudicatory body, insofar as it was expected to take over the jurisdiction and functions of a Company Court in the High Court in the matter of winding up of, and mergers and amalgamations of companies. The question whether a statutory Tribunal set up in terms of a law under Article 323-A (1) could be abolished was not an issue that arose there. The decisions in ***Gujarat Urja Vikas Nigam Limited*** *(supra)* or even ***Rojer Mathew*** *(supra)* are also not helpful in understanding the scope and ambit of Article 323A (1) of the Constitution of India vis-à-vis the issue of the abolition of the Tribunals established thereunder. The central question in the latter two decisions was whether it was desirable to have provisions in the statutes creating such Tribunals which envisage a direct appeal to the Supreme Court from the decisions of those Tribunals. The question there was not whether the word 'may' in Article 323A (1) was directory or mandatory or whether under Section 4 (2) of the AT Act a State Government which had requested the Central Government to establish an SAT could at a subsequent point in time withdraw such request and ask for rescinding the notification establishing the SAT.

69. The deployment of the device of 'purposive interpretation' to decide whether a particular provision is mandatory or directory has been explained in several decisions including ***Bachachan Devi v. Nagar Nigam, Gorakhpur*** *(supra)* and ***Dillip Kumar Basu*** *(supra)***.** The rule was explained in ***Bachachan Devi v. Nagar Nigam, Gorakhpur*** *(supra)* as under:

> "12. Mere use of word 'may' or 'shall' is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue."

70. Examining the scheme of Article 323-A (1) of the Constitution, the purpose and object underlying the provision and the consequences likely to ensue or the inconvenience likely to result if the word "may" occurring therein is to be read as 'shall', the Court is not persuaded that it should be so read. It cannot be said that merely because the High Courts are overburdened with pending cases that the word 'may' should be read as 'shall'. While the burden on the High Courts or the Supreme Court may be one factor informing the decision of the Central Government or the State Government to establish a Tribunal, it cannot be the only factor. As pointed out by the Supreme Court in the above decision there are "many more considerations relevant to the issue." These would include examining the data of institutions and disposal of cases by the Tribunal, the rate of such disposal, the quality of the decisions being rendered, how often they are overturned on appeal or review by a superior judicial forum and so on. It must be recalled here that the question of satisfaction about the quality of adjudication by the Tribunals generally was adverted to by the Supreme Court not only in ***L. Chandra Kumar*** but also in ***Madras Bar Association*** *(supra)* and ***Rojer Mathew*** *(supra).* This has also been extensively discussed in the reports of the Law Commission of India.

71. The experiment of creating Tribunals, to hive off many of the areas over which disputes are pending in the High Courts and civil Courts to alternative dispute resolution bodies, is a work in progress. Professor Marc Galanter felicitously refers to Tribunals as the 'bypasses' created to manage the case bottlenecks in the regular courts which he likens to the 'highways'. In a piece titled *'To the Listed Field…': The Myth of Litigious India* (2009) Vol. 1:65 *Jindal Global Law Review* (at 75) he notes:

> "For large sectors of society and large areas of conduct, courts afford no remedies or protections. When pressure builds up to provide useable remedies for a particular sort of grievance, the solution, understandably, is not to undertake the Sisyphean task of reforming the lower courts but to bypass them….The typical bypass is the establishment of a tribunal with exclusive jurisdiction over cases on a particular topic, such as those that deal with motor vehicle accidents, consumer complaints or labour disputes. The Central Administrative Tribunal, for example, has jurisdiction over 'service matters' including disputes about government employment, promotions, pensions and the like."

In the same piece Prof. Galanter notes that "many of these tribunals are plagued by overcrowded dockets, similar to those in the regular courts." Further he presciently notes that such tribunals "frequently display similar

deficiencies – crowding, excessive formalism, expense, delay and truncated remedies."

72. Then there are a host of other less-acknowledged factors that defeat the object for which the Tribunal is established in the first place. These include the failure to promptly fill the vacancies in the posts of Chairpersons, Vice Chairpersons and Members, both Judicial and Technical, in these Tribunals. The OAT was no exception to this as two of the companion petitions in this batch reveal. Then there is the problem of proper and complete staffing of the Tribunals.

73. The question of the independent functioning of some of the Tribunals, from the point of view of the tenure and conditions of service of their Members, is yet another issue that recently engaged the attention of the Supreme Court in ***Rojer Mathew*** (*supra*). Earlier, pursuant to the directions issued by the Supreme Court in ***Gujarat Urja Vikas Nigam*** (*supra*), the Law Commission of India (LCI) submitted its 272nd Report on 'Assessment of Statutory Frameworks of Tribunals in India' on 27th October, 2017. It recommended, *inter alia*, that if the possibility of every order of a statutory Tribunal being challenged in the High Court is to be avoided then an Appellate Tribunal, on par with the High Court, should be provided for in the statute under which a Tribunal is established.

74. The decision to continue a Tribunal which has failed to meet some or many of its objectives has to be informed by a variety of factors some of which have been discussed hereinbefore. Since it is a work in progress, India is to witness to both the creation of and dismantling of Tribunals for a variety of reasons. The most recent instance is the issuance of the Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021 which resulted in the dismantling, with effect from 4th April 2021, of nearly 11 Appellate Boards and Tribunals under various statutes including the Intellectual Property Appellate Board, the Copyright Appellate Board, the Film Certification Appellate Board and so on. One of the reasons cited by the government in bringing forth the Ordinance is empirical data which reveals that the Tribunals have not been able to ensure speedy justice and that they invariably constitute an 'additional tier' of litigation leading to costs and delays.

75. Tribunalisation is a work in progress also because of the degrees of specialisation that are required in niche areas and where the Tribunals have to necessarily comprise both technical and judicial members. The Telecom Disputes Settlement and Appellate Tribunal and the National Green Tribunal fall in this category. While some of the Tribunals may not be able to effectively discharge their adjudicatory functions without the participation of such technical members, the same may not hold true for certain other Tribunals, like for instance Administrative Tribunals. Further, attempts at getting the Tribunals to substitute the High Court is fraught with problems associated with ensuring the independence of such tribunals from the executive, as the decision in ***Rojer Mathew*** (*supra*) shows. The essential reason for this is that judicial review by the High Courts under Article 226 of the Constitution has been recognized as a basic feature of the Constitution by the decision in ***L. Chandra Kumar.***

76. In the above context, the abolition of an SAT, resulting in the revival in the High Court of the petition pending before the SAT, can hardly be said to contradict the original purpose and intent, which was to have High Courts adjudicate disputes involving Government servants in the area of their employment and service conditions. Further, considering that there are SATs still functioning only in three or four States in the country, the government employees in a majority of the States have to approach the concerned High Court in the first instance for redressal of their grievances. It cannot therefore be argued that the abolition of the OAT, resulting in either the transfer of the pending petitions to the High Court, or institution of fresh petitions there as a Court of first instance, undermines access to justice as was sought to be contended. In other words, a parallel cannot be drawn between pursuing a writ petition in the High Court before a Single Judge with pursuing an original application in the OAT. The former remedy would any day be the preferred one for a litigant. Therefore, the contention that by abolition of the OAT there will be denial of access to justice to the litigant is not an acceptable proposition.

77. All of the above factors have to be kept in view while interpreting the word 'may' occurring in Article 323A (1) of the Constitution. When viewed in that context it cannot be said that Article 323A (1) was intended to make it mandatory for either the Central Government or the State Government to establish an SAT irrespective of the actual need for such a tribunal and for it to be effective in achieving the object of securing fair and speedy justice.

Issue (ii): Can an SAT be abolished by a Central Government Notification issued under Section 21 GC Act?

Issue (iii): Is the impugned notification quasi-judicial in nature?

78. Issues (ii) and (iii) are in a sense inter-linked as will be noticed hereafter. They are accordingly being dealt with together. The central question that arises for consideration is whether there is an inherent power under Section 4 (2) of the AT Act read with Section 21 of the GC Act enabling a State Government or the Central Government to rescind a notification establishing an SAT? This question arises from the principal contention in these petitions that the impugned notification dated 2nd August 2019 could not have been issued by the DoPT, Government of India without an enabling provision in Article 323-A of the Constitution and the AT Act.

79. Since both sides have relied extensively upon the decisions in the ***MPAT Abolition Case*** and the ***TNAT Abolition Case***, the Court takes up those cases for an elaborate discussion.

80. As far as ***MPAT Abolition case*** is concerned, it is evident from a reading of the background facts set out in the decision that the decision to abolish the MPAT did not flow from Section 21 of the GC Act but Section 74 (1) of the MPR Act. It was the latter provision that envisaged both the Governments of Madhya Pradesh and Chhattisgarh by mutual agreement deciding to discontinue the MPAT even though it was established under the AT Act, a central Act. In other words, although Article 323A (1) itself did not expressly provide for abolishing an SAT, as far as the MPAT was concerned, the MPR Act, which was also a law made by Parliament empowered the M.P and Chhattisgarh Governments to decide to abolish the MPAT. This is an important distinction to be kept in view while examining this decision.

81. Importantly, the passage in the ***MPAT Abolition case,*** which is relied upon by the Opposite Parties in the present case acknowledges that Section 74 (1) was not in the nature of a "delegated legislation" but a ‘conditional legislation’. Referring to the decision in ***Hamdard Dawakhana (Wakf) Lal v. Union of India 1960 (2) SCR 671,*** the Supreme Court agreed with the conclusion of the High Court in that case that the power to abolish the MPAT could be validly traced to the legislative power flowing from Section 74 (1) of the MPR Act and not Section 4 (2) of the AT Act. There was no occasion

therefore in the ***MPAT Abolition Case*** to discuss whether on a collective reading of Section 4 (2) of the AT Act read with Section 21 of the GC Act, the abolition of the MPAT could be justified. In fact Section 74 (1) of the MPR Act opened with a non-obstante clause that allowed the States of M.P and Chhattisgarh, notwithstanding the absence of a provision to that effect in the AT Act to take a decision to continue with or abolish the MPAT. This explains the conclusion in para 34 of the judgment of the Supreme Court in the ***MPAT Abolition Case***, which reads as under:

> "34.xxx A conjoint reading of Article 323-A of the Constitution, Section 4 of the Administrative Tribunals Act, 1985 and Sections 74 (1) and 85 of the Act of 2000, in our considered opinion, leaves no room for doubt that ***Parliament authorised the State of Madhya Pradesh as well as the new State of Chhattisgarh to take an appropriate decision with regard to State Administrative Tribunals having jurisdiction over those States***. Parliament empowered both the successor States to take an appropriate decision to continue such Tribunals, to abolish them or to constitute separate Tribunals. It cannot be said that by enacting such a provision, Parliament had violated any mandate or the Act of 2000 is *ultra vires* Article 323-A or any other part of the Constitution." (emphasis supplied)

82. Therefore, learned counsel for the Petitioners are right in their contention that the ***MPAT Abolition case*** cannot support the proposition that there is an inherent power in the Central Government and the State Government under Section 4 (2) of the AT Act read with Article 323A (1) of the Constitution and Section 21 GC Act to abolish an SAT by rescinding a notification that was issued to establish it in the first place.

83. However, the decision in the ***MPAT Abolition case*** supports the case of the Opposite Parties as regards certain other propositions which will be discussed hereafter.

84. Turning now to the ***TNAT Abolition case***, it will be recalled there is no provision in the AT Act, parallel to Section 74 (1) of the MPR Act that enables the State Government to abolish an SAT. Specific to the TNAT, while the Government of Tamil Nadu kept writing to the Central Government to issue an appropriate notification for its abolition, the Central Government took the stand that till an amendment was made to the AT Act providing for such abolition, it could not be brought about by a mere notification. This stand of the Central Government is noted by the Madras High Court in its decision as under:

> "On the other hand, the stand taken by the Central Government, the first respondent herein, is that though the Government of Tamil Nadu has sent a proposal to the Central Government for abolition, this cannot be done through Notification. The appropriate legislation for this proposal has to be brought in the Parliament and the same is being contemplated by the Law Department which after due processing and approval will be brought before the Parliament. Mere Notification of the Central Government would not suffice in this case, since Section 74 of the Madhya Pradesh Reorganisation Act, 2000 would specifically provide for the abolition through Notification. But, such a provision is not available in this State. Therefore, suitable Parliamentary amendment to the Administrative Tribunal Act is necessary to consider such proposal. The necessary steps for the same are being taken by the Central Government."

85. It appears from the discussion that follows the above passage that the Madras High Court proceeded on the basis that after the decision of the Supreme Court in the ***MPAT Abolition case***, the Central Government could straightaway issue a notification rescinding the earlier notification establishing the TNAT. The Madras High Court also referred to the observations of the Division Bench of M.P High Court which were referred to by the Supreme Court in the ***MPAT Abolition Case***, which read thus:

> "35. It was then contended that once the power to constitute a Tribunal had been exercised, Parliament was denuded of any power to make any legislation providing for abolition of such Tribunal. The Division Bench negatived the contention and observed:
>
> "It is difficult to swallow that Parliament after enacting law on a particular subject shall have no power to amend, modify or repeal the same. The power of Parliament, in our opinion, does not exhaust by enactment of any law and we are of the considered opinion that Parliament can make law in relation to a subject for which it has as the legislative competence, notwithstanding the fact that law on a particular subject was enacted by Parliament earlier. The theory of exhaustion is unknown so far as the legislative powers are concerned. What Parliament has done, Parliament can undo."

86. It is necessary to bear in mind that the above passage draws a distinction between Parliament's power "to make legislation providing for abolition of such Tribunal", an example of which would be Section 74 (1) of the MPR Act, and the power of the central or state government to do so. The Madras High Court acknowledged that "the analogous provision of Section 74 (1) of the [MPR] Act was not available in the instant case" and that "similarly no specific procedure has been provided for abolition of a Tribunal in the Administrative Tribunals Act."

87. It is therefore not difficult to discern why the Madras High Court had to resort to Section 21 of the GC Act which reads thus:

> "Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws. Where, by any Central Act or Legislation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or byelaws so issued."

88. After discussing the provision, the Madras High Court held as under:

> "18. The above section would indicate that the power to create includes the power to destroy, and also the power to alter what is created. In other words, the power to rescind a notification is inherent in the power to issue the notification. As such, the specific provision regarding the power to vary, amend, or rescind notification etc. could also be made in the Act itself. It is also well settled that where the specific provision is made in the Act itself, the specific provision would prevail and in that case there is no need to invoke Section 21 of the General Clauses Act. Since there is no provision at all in the Administrative Tribunals Act regarding the mode of abolition of the Tribunal, in our opinion, the provisions of Section 21 of the General Clauses Act would apply. If any notification issued by the Government is to be rescinded by virtue of the powers given under Section 21 of the General Clauses Act, such power to rescind the notification must be exercised in like manner and subject to the like sanction and condition as in the case of issuing the notification.
>
> 19. In view of the above circumstances, we are of the considered opinion that since no mode to rescind the notification establishing the Tribunal has been provided in the Administrative Tribunals Act, the provisions of Section 21 of the General Clauses Act will have to be invoked for rescinding the Notification earlier issued establishing the Tribunal."

89. While it is true that the SLP filed by one of the Petitioners before the Madras High Court was dismissed by the Supreme Court *in limine* by a one-line order, clearly that cannot constitute an approval of the decision of the Madras High Court in the ***TNAT Abolition case***. This legal position has been explained by the Supreme Court in ***Kunhayammed v. State of Kerala (2000) 6 SCC 359*** which was recently re-affirmed by a three-Judge Bench of the Supreme Court in ***Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. (2019) 4 SCC 376***

90. Independent of the above SLP, a separate appeal was filed by the Union of India raising a question of law based obviously on its stand before the Madras High Court viz., that a suitable amendment to the AT Act is

necessary for the Central government to consider the State Government's proposal for abolition of the TNAT. It was on this aspect that leave appears to have been granted. However, as already noticed the Government of India issued a notification on 17th February 2006 abolishing the TNAT by invoking Section 21 of the GC Act. This was done even before a Bill was tabled in Parliament on 16th March, 2006 to amend the AT Act by insertingChapter-IVA titled: "Abolition of Tribunals". The SOR accompanying the Amendment Bill acknowledged the request made by the Government of Tamil Nadu as well as the Governments of H.P and M.P for similar of the corresponding SATs. It appears the Central Government was even at that stage of the view that without expressly amending the AT Act to provide for abolition of an SAT, that result could not be achieved merely by issuing a notification invoking Section 21 of the GC Act. This also appears to have had the endorsement of the Parliamentary Standing Committee of the Rajya Sabha which examined the said Bill and submitted its report in December, 2006. It is not necessary at this stage to discuss the decision in ***Kalpana Mehta*** *(supra)* for the proposition that reports of Parliamentary Standing Committees can be considered as evidence. However, at the same time such reports cannot be said to be binding on the government.

91. The fact remains that the proposed amendments to the AT Act did not come about. In the meanwhile, the Central Government proceeded to issue notifications abolishing the MPAT, the HPAT, and the TNAT even while its appeal was pending in the Supreme Court. In doing so the Central Government appears to have followed a uniform pattern by which it required the State Government to consult the concerned High Court and seek its concurrence for the proposal to abolish the SAT. This was with the express purpose of acknowledging the burden that would be cast on the High Court if the SATs were to be abolished since all cases pending before the SAT would stand transferred to the High Court.

92. This also explains why when the appeal of the Union of India against the decision of the Madras High Court the ***TNAT Abolition case*** was taken up by the Supreme Court in 2017, it was rightly submitted that the appeal has been rendered infructuous. In fact it was rendered infructuous only because in the meanwhile the Central Government had by invoking Section 21 of the GC Act issued notifications abolishing the SATs in the three States as noted hereinabove. Nevertheless the Supreme Court of India left the question of law open for decision. This is only meant that the decision of the Madras

High Court in the ***TNAT abolition case*** ought not to be treated as a precedent. To this extent, the submission of learned counsel for the Petitioners is well-founded.

93. The result of the above discussion is that neither the decision of the Supreme Court in the ***MP Abolition case*** nor of the Madras High Court in the ***TNAT Abolition case*** can be relied upon by the Opposite Parties as precedents in support of the proposition that even without an enabling provision in the AT Act, the abolition of an SAT can be brought about by a notification being issued by the Central Government rescinding an earlier notification by which it was established.

94. Accordingly the above question of law requires a detailed examination. The major premise on which Section 21 of the GC Act operates is that what can be done can also be undone. In this context, the Court takes up for discussion first the decision in the ***D.N. Ganguly case*** *(supra)*. It was held therein that the question whether or not Section 21 of the GC Act applies to the provisions of a particular statute "would depend upon the subject matter, context and the effect of the relevant provisions of the said statute". In that context, it was examined whether a notification referring an industrial dispute to an Industrial Tribunal for adjudication by the appropriate Government under Section 10 (1) of the Industrial Disputes Act, 1947 could be rescinded by the same Government? It was explained that once an order in writing is made by the appropriate Government referring the industrial dispute to the Tribunal for adjudication under Section 10 (1) of the I.D. Act, the proceedings before the Tribunal "are deemed to have commenced and deemed to have concluded on the day of the award made by the Tribunal becomes enforceable under Section 17(A)". It was noted by the Supreme Court that if the power claimed by the appellant is conceded to the appropriate Government, it would be open to the appropriate Government "to terminate the proceedings before the Tribunal at any stage and not refer the industrial dispute to any other industrial tribunal at all".

95. This appears to be a crucial distinguishing factor as far as the present case is concerned. While it could be argued that it would be possible for the State Government and the Central Government acting in tandem to bring an end to the adjudication of a particular dispute pending before the OAT by invoking Section 21 of the GC Act and abolishing the OAT itself, that is not what is sought to be done here. It is not as if on the abolition of the OAT,

the cases pending there are in limbo. The consequence of such abolition is that the cases pending before the OAT stand transferred to and would be heard by the High Court from the stage at which they were before the OAT. In that sense therefore, by invoking Section 21 of the GC Act, the Opposite Parties are not bringing all the disputes pending before the OAT for adjudication to an end. Consequently the decision in the ***D.N. Ganguly case*** *(supra)* does not quite help the case of the Petitioners.

96. In ***Ajay Singh*** *(supra),* the context was the reconstitution of the Commission set up under the Commission of Inquiries Act, 1952 by taking recourse to the power to amend under Section 21 of the GC Act. The Supreme Court negatived the contention by holding as under:

> "We have no doubt that the rule of construction embodied in Section 21 of the General Clauses Act cannot apply to the provisions of the Commissions of Inquiry Act 1952 relating to reconstitution of a Commission constituted thereunder since the subjectmatter, context and effect of such provisions are inconsistent with such application. Moreover, the construction made by us best harmonises with the subject of the enactment and the object of the legislation. Restoring public confidence by constituting a Commission of Inquiry to investigate into a 'definite matter of public importance' is the purpose of such an exercise. It is, therefore, the prime need that the Commission functions as an independent agency free from any governmental control after its constitution. It follows that after appointment, the tenure of members of the commission should not be dependent on the will of the Government, to secure their independence. A body not so independent is not likely to enjoy the requisite public confidence any may not attract men of quality and self-respect. In such a situation, the object of the enactment would be frustrated. This aspect suggests that the construction made by us, apart from harmonising the provisions of the statute, also promotes the object of the enactment while the construction suggested by the appellant frustrates both."

97. In the instant case, the Opposite Parties are right in contending that the invocation of Section 21 of the GC Act to rescind the notification establishing the OAT does not militate against the scheme of the AT Act and in particular, Section 4 (2) thereof. In fact it results in the pending disputes standing transferred to the High Court for adjudication. Far from bringing the case to an end, an even more efficacious forum viz., the High Court will deal with the case. From the point of view of the litigant, this should be viewed as furthering the cause of justice and not hindering it. Consequently, the decision in ***Ajaib Singh*** (*supra*) also is of no assistance to the Petitioners.

98. In ***Indian National Congress (I)*** (*supra*) the Supreme Court viewed the decision of the Election Commission of India under Section 29-A (7) of

the representation of the People Act, 1951 to be quasi-judicial in nature. Therefore, it was held that the registration could not be subsequently cancelled without a specific enabling provision in the RP Act itself. Recourse could not be taken to Section 21 GC Act for that purpose. In same vein in ***Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd. v. Commissioner of Income Tax AIR 2018 SC 3560*** the Supreme Court held that the order granting registration under Section 12-A of the Income Tax Act, 1961 was a quasi-judicial one and that, therefore, it could be withdrawn/cancelled only when there was an express power vested in the CIT under the Income Tax Act to do so. Since there was no such express power, resort could not be had to Section 21 of the GC Act to bring about that result.

99. The above decisions are distinguishable on facts and are inapplicable to the case on hand for the reason that the Court is unable to accept the proposition put forth by the Petitioners that the decision of the State Government to establish the OAT was a quasijudicial one. While the SAT by itself performs a judicial function, the decision of the State and Central Governments to either establish it under Article 323-A (1) read with Section 4 (2) of the AT Act, or to abolish it, cannot be said to be anything but an administrative one. The Court would hasten to add that this distinction becomes important only for the purpose of answering the question whether such a decision can be rescinded by invoking Section 21 of the GC Act.

100. The Court is at this stage not suggesting that because the decision may be an administrative one, it is not amenable to judicial review. After the decision in ***A.K. Kraipak v. Union of India AIR 1970 SC 150,*** the distinction between an administrative and a quasi-judicial power was obliterated in the context of the question whether an administrative order could also be tested on the touchstone of justness and fairness. The Supreme Court in the said decision explained:

> "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would

> lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

101. Thus, even if the act of rescinding a notification establishing the OAT is termed as an administrative order, it can still be judicially reviewed on the known parameters in the realm of administrative law. That is not to say however, that it is an order to which Section 21 of the GC Act cannot apply. For that purpose it will still have to be seen whether in fact, as the Petitioners suggest, the impugned notification is a quasi-judicial order.

102. The distinctions between administrative and quasi-judicial orders have been attempted to be drawn in the past. In ***Indian National Congress (I)*** (*supra*) the Supreme Court observed that :

> "the presence of a *lis* or contest between contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority is sufficient to hold that such a statutory authority is a quasi judicial authority. However, in the absence of a *lis* before a statutory authority, the authority would be quasi-judicial authority if it is required to act judicially."

103. A clear example of what could be termed as a purely administrative function was the decision in ***State of Bombay v. Kushaldas Advani AIR 1950 SC 222***. There, the Respondent was a tenant of a flat. On 26th February 1946, the Bombay Government requisitioned the flat under Section 3 of the Bombay Land Requisition Ordinance 1947, and allotted it to another refugee from Sind. On 4th March, 1946, the Petitioner filed a petition for a writ of certiorari. The Bombay High Court granted it upon which the Government went in appeal to the Supreme Court. Section 3 of the Ordinance read as follows:

> "Requisition of land—If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose:
>
> Provided that no land used for the purpose of public religious worship or for any purpose which the Provincial Government may specify by notification in the Official Gazette shall be requisitioned under this section".

104. The Supreme Court in ***State of Bombay v. Kushaldas Advani*** (*supra*) by a majority of 4:2 agreed with the contention of the Appellant State that under S. 3 of the Ordinance the decision of the Provincial Government to requisition certain premises was "clearly a matter of its opinion and therefore not liable to be tested by any objective standard." It was held that the decision as to whether the premises were required for a public purpose was also a matter for the opinion of the Provincial Government, and not a matter for judicial investigation, and therefore the making of the order was in no sense a quasi-judicial decision, but an administrative or ministerial order. Therefore, the High Court could not have issued a certiorari to interfere with the decision.

105. In the present case too, the decision to establish the OAT in terms of Section 4 (2) of the AT Act, or the decision to dismantle it subsequently, cannot be characterised as a quasi-judicial order. It did not involve any *lis* or dispute between parties that required to be decided applying the principles of natural justice. The decision whether or not to have an SAT was based on a subjective satisfaction of the governments and was of universal application, not tailored to the facts of a particular case.

106. Viewed objectively since the very process of establishing the OAT involved a proposal by the State Government, without which it could never have been established, it is difficult to accept the proposition put forth by the Petitioners that the State Government cannot be, at a subsequent point in time, for valid reasons, withdraw such request. In other words, it is difficult to countenance the proposition that once the State Government agrees to activate the proposal to establish an OAT, and that proposal is accepted by the Central Government culminating in its establishment by a notification, it can at no point in time thereafter be abolished even if the State Government feels that the circumstances do not warrant its continuation. Of course, the Court will have to ask whether the exercise of the power under Section 21 of the GC Act is inconsistent with the subject-matter, context and effect of the provisions of the AT Act? In this context, it requires to be observed that as long as the disputes which were pending adjudication before the OAT are not left in the lurch, and their continued adjudication by a competent judicial forum is ensured, there can be no legal objection to the exercise of the power under Section 21 of the GC Act to rescind the notification establishing the OAT.

107. To summarise the discussion thus far, the Court is of the view that the impugned decision to abolish the OAT not being a quasi-judicial one but an administrative decision, there is no bar on the State and Central Governments invoking Section 21 of the GC Act read with Section 4 (2) of the AT act to rescind the notification earlier issued establishing the OAT. The power to rescind the notification establishing the OAT is sustained also because no prejudice is being caused to the litigants whose cases are pending in the OAT. The pending cases, and the cases to be instituted hereafter, will be heard in the High Court. Therefore, the Court sustains the argument of the Opposite Parties in the instant case that the invocation of Section 21 of the GC Act does not result in either the extinguishment of the cases pending before the OAT without an alternative forum or any consequential denial of justice.

108. Tied to the argument of the Petitioners that the impugned notification is in the nature of a quasi-judicial order, are the incidental arguments that are required to be dealt with. In view of the conclusion reached by this Court hereinbefore that the impugned decision to abolish the OAT is administrative one and not quasi-judicial, the contention of the Petitioners that it had to be in compliance of the principles of natural justice requires to be rejected. With the litigants being assured of the continued adjudication of their cases by the High Court, there was no prejudice caused and therefore there was no requirement of the Governments of the State and the Centre having to afford a hearing to the 'stakeholders' before taking such decision. Consequently, the decisions in ***Dr. (Miss) Binapani Dei, S.L. Kapoor, Sahara India*** and ***Siemens Engineering*** *(supra)* have no applicability to the present case.

109. Equally, the proposition that what cannot be done directly, cannot be done indirectly does not have any applicability here nor do the decisions in ***Samundra Devi*** (*supra*) and ***Ram Chandra Singh*** (*supra*). For the reasons discussed elaborately it is plain that there is no prohibition in Article 323-A (1) of the Constitution or Section 4 (2) of the AT Act against the abolition of an SAT for reasons that are germane and valid once the continued need for it ceases to exist.

110. The contention that having once established the OAT, the Central Government was rendered '*functus officio*' and could not have further exercised the power to abolish it does not impress the Court. The doctrine of *functus officio* is generally associated with judicial and quasi-judicial

functions and not with administrative functions. For instance in ***Raja Mohammad Amir Ahmad Khan*** *(supra)* it was in the context of the Collector determining the duty as a quasi judicial body. Once he performed that function, he was rendered "functus officio". Likewise, in ***S.N. Goyal*** *(supra),* the conduct of disciplinary proceedings was a quasi-judicial function. In the present case, the decision to abolish the OAT was purely an administrative function.

111. The contention based on the decision in ***A.R. Antulay v. R.S. Nayak*** *(supra)* that the power to create or enlarge jurisdictions is legislative in character and Parliament alone can exercise it is inapposite in the context of the present case. Here, neither is the jurisdiction of the High Court being created nor enlarged. There is simply a revival of a jurisdiction that has always existed. In other words, the jurisdiction of the High Court to adjudicate disputes involving government servants has been revived by the Parliament by abolishing the OAT.

Issue (iv) and (v)

Is the impugned notification abolishing the OAT arbitrary, irrational, unreasonable and violative of Article 14?

112. The grounds of challenge to the impugned notification on the anvil of Article 14 are two-fold. One is that it is arbitrary, unreasonable and irrational inasmuch as it is based on an incorrect understanding of the decision in ***L. Chandra Kumar*** and there existed no material to arrive at the conclusion that the OAT required to be abolished. The second is that relevant facts concerning the impact the decision would have on the functioning of the High Court, defeating the object of speedy justice, were overlooked.

113. In examining if a decision by the Government, whether quasi-judicial or administrative, satisfies the test of non-arbitrariness the Court has to apply the principles of ***Wednesbury*** reasonableness i.e. the tests set out in ***Associated Provincial Picture Houses v. Wednesbury Corporation (1948) 1 KB 223***. The Court will examine if "the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken." In 1983, Lord Diplock in ***Council for Civil Services Union v. Minister of Civil Services, (1983) 1 AC 768*** (***the GCHQ case***) summarised the principles of judicial review of administrative action as based upon one or other of the following viz. illegality, procedural irregularity and irrationality.

114. The Supreme Court in ***Om Kumar v. union of India AIR 2000 SC 3689*** elaborated on the concept of 'proportionality' that was suggested as an additional factor to be accounted for by Lord Diplock in the ***GHCQ case***. Justice M. Jagannadha Rao writing for the Court in ***Om Kumar*** (*supra*) explained:

> "By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality."

115. The correspondence between the three main actors in the present case viz., the Government of Odisha, the Government of India and the High Court of Orissa reveals that several factors were taken into account in arriving at the conclusion that the OAT required to be abolished. The note dated 16th September, 1995 submitted by the Government of Odisha to the Central Government listed out the factors that were considered by the State Government. This included the effect of the decision in ***L. Chandra Kumar,*** the working of the OAT with reference to the expenditure incurred in the years 2014-15 and 2015-16 (both Plan and Non-Plan), the 'institution, Disposal and Pendency of cases for the year 2014', and the arrangements being contemplated to account for the impact the move would have on the functioning of the High Court. Therefore, there was sufficient material to support the view of the State Government that OAT was not served the purpose of delivery of speedy justice to the litigants.

116. On its part when the Central Government responded to the request by the letter dated 12th January, 2016 it sought to know the views of the High Court on the proposal for the abolition of the OAT and what the legal basis would be for the transfer of the cases pending before the OAT to the High Court.

117. The procedure adopted by the Central Government which required the State Government to elicit the views of the High Court on the proposal for abolishing the OAT may not be one contemplated by Article 323-A (1) of the

Constitution or Section 4 (2) of the AT Act. However, that does not make the procedure illegal or arbitrary. On the other hand, the failure to consult the High Court on a decision that would directly impact its functioning might have rendered the decision arbitrary and unreasonable. The prior consultation with the High Court on the administrative side was reflective of the fact that both the Central government and the State Government took into account a very relevant factor viz., the judicial impact the decision to abolish the OAT would have on the working of the High Court. Further, it is evident that the Central Government agreed to go ahead with notifying the rescinding of the earlier notification of the establishment of the OAT, thus bringing about its abolition, only after the High Court conveyed its concurrence and not otherwise. The Central Government appears to have followed a similar procedure in the matter of the abolition of the HPAT and the APAT as well. The Court is, therefore, unable to accept the submission of the Petitioners that this procedure was extra-legal and invalidated the decision to abolish the OAT.

118. Also, the Court finds no illegality or impropriety attaching to the decision to transfer all the cases pending in the OAT to this Court. This is nothing but a restoration of the status quo ante the date of the commencement of the OAT. With its abolition, the litigants waiting before the OAT for adjudication of their cases cannot obviously be left in the lurch. If there was no OAT, they would have filed their petitions in the High Court. It is that very position that is sought to be achieved by the move to transfer all pending cases to the High Court. Further, the Full Court of the High Court on its administrative side had before it all the correspondence between the Governments inter se and with the High Court. The High Court, after considering all of the materials, conveyed its concurrence to the proposal to abolish the OAT. This was a necessary step furthering the ends of justice and with a view to ensuring that the litigants before the OAT were not left high and dry.

119. The process involved in the decision making, which alone is the scope and ambit of the judicial review being undertaken by this Court in these petitions, satisfies the legal requirements spelt out in ***Wednesbury*** viz., that relevant materials have been accounted for and those not relevant have been eschewed. Further, the test of proportionality expounded in the ***GHCQ case*** viz., ensuring that a proper balance is maintained between the adverse effects which the "administrative order may have on the rights, liberties or interests

of persons keeping in mind the purpose which they were intended to serve" stands satisfied in the present case. The executive and judicial branches of the State have through active consultation ensured that the litigants before the OAT are not denied justice and that the pending cases stand transferred to the High Court to be heard by it.

120. The view taken by State Government that as a result of the decision of the Supreme Court in ***L. Chandra Kumar*** one more tier of litigation had been added thereby not subserving the need for speedy justice cannot be termed as being based on a misunderstanding of the said decision. It is interesting to note that this was a factor adverted to by the Law Commission of India (LCI) when it submitted to the Government of India in 1998 its 162nd Report on the 'Functioning of the CAT'. The LCI observed (at p. 112):

> "The Supreme Court has laid down in *L. Chandra Kumar's case* (supra) that an aggrieved party can have recourse to the jurisdiction of the respective High Court under Article 226/227 of the Constitution of India, against the decision of the Central Administrative Tribunal. The repercussions of this development of law have already been felt. The Karnataka Government has sought to abolish the Karnataka State Administrative Tribunal. In the news items in the recent past, it has appeared that even the Central Government is proposing to abolish CAT. The remedy of judicial review by the High Court provided against the decision of the Administrative Tribunal and a possible further appeal to the Supreme Court under Article 136 is not only timeconsuming but also expensive. Besides this, the various High Courts may interpret differently any statutory provision concerning the service conditions governing the employees. Thus the lack of uniformity in the High Court decisions and consequently in CAT benches will create confusion in the mind of the litigant. It will further make the public lose faith in seeking justice through the judiciary, and thus undermine the democratic norms. The Commission is of the considered view that a National Appellate Administrative Tribunal be constituted on the lines of the National Consumer Disputes Redressal Commission under section 20 of the Consumer Protection Act, 1986. It shall be manned by a retired Chief Justice of a High Court or a retired Judge of the Supreme Court of India. An appeal, on substantial questions of law and fact may lie to the proposed Appellate forum, against the decision of the Central Administrative Tribunal. The proposed forum may have branches all over the country to reduce the cost of litigation to the litigant. The decision of the proposed Appellate court will be binding on all benches of CAT. The proposed forum will be of status higher than a High Court but below the Supreme Court. An appeal may lie against the decision of the proposed appellate forum to the Supreme Court."

121. The impact of the decision in ***L. Chandra Kumar*** on the functioning of the ATs prompted the LCI to submit its 215th report in 2008 exclusively

on that topic. The report titled: "L. Chandra Kumar be revisited by Larger Bench of Supreme Court", made a strong pitch for establishing an Appellate Tribunal by amending the AT Act. It recommended, *inter alia*, that:

> "8.2 We feel that if there may be an impression that there has to be at least one appeal provided against the orders passed by the Tribunal before the matter may reach the Supreme Court, intra-tribunal appeal, similar to the one provided in every High Court either by way of letters patent appeal or a writ appeal, can be provided under the Act of 1985 itself. By way of suitable amendment thus brought about in the Act of 1985, a provision for intratribunal appeal can be made so that an order passed by a single Member Bench would be amenable to appeal before a Division Bench, and the decision of a Division Bench can be challenged before a Bench consisting of three or more Members. Four zones in the country, viz., North, East, West, and South, can be made where the appeals from various Benches may be filed. This may only involve creation of, at the most, eight to ten posts of Members in the Tribunal. After the decision recorded by an appellate Bench, the matter can be taken to the Supreme Court by way of special leave petition."

122. The above report was submitted in the wake of the report of the Parliamentary Standing Committee on the AT (Amendment) Bill 2006, which has been referred to earlier in this judgment. While these suggestions do not appear to have found favour with the Parliament, and the amendments did not see the light of the day, they do point to the fact that the ATs were being viewed as not subserving the object for which they were established viz., delivering speedy justice to the litigants whose cases were before them.

123. In this context, the observations of the Supreme Court in the ***MTAT Abolition case*** are relevant. There a similar contention put forth on behalf of the Appellant in that case viz., that the decision of the M.P and Chhatisgarh Governments was "illegal, irrelevant and ill-founded" was expressly negatived by the Supreme Court. After quoting the passages from ***L. Chandra Kumar*** the Supreme Court in the ***MPAT Abolition case*** observed as under:

> "57. From the discussion hereinabove, it is clear that after the Constitution (Forty-second Amendment) Act, 1976, the Administrative Tribunals Act, 1985 came to be enacted by Parliament. The position prevailed at that time was the law laid down by the Constitution Bench of this Court in *S.P. Sampath Kumar*. Invoking sub-section (2) of Section 4 of the Administrative Tribunals Act, 1985, the State of Madhya Pradesh requested the Central Government to constitute a Tribunal for civil servants in the State. It was also on the basis of pronouncement of law in *S.P. Sampath Kumar*. The notification was issued by the Central Government in 1988 and the State Administrative Tribunal was established for the State of Madhya Pradesh. At

> that time, as per well-settled legal position, decisions rendered by the Administrative Tribunals constituted under the Act of 1985 were "final" subject to jurisdiction of this Court under Article 136 of the Constitution. No person aggrieved by a decision of State Administrative Tribunal could approach the High Court of Madhya Pradesh in view of Clause (d) of Article 323-A (2) of the Constitution read with Section 28 of the Act of 1985 and the declaration of law in *S.P. Sampath Kumar*. If, in view of subsequent development of law in *L. Chandra Kumar*, the State of Madhya Pradesh felt that continuation of State Administrative Tribunal would be "one more tier" in the administration of justice inasmuch as after a decision is rendered by the State Administrative Tribunal, an aggrieved party could approach the High Court under Article 226/227 of the Constitution of India and, hence, it felt that such tribunal should not be continued further, in our opinion, it cannot be said that such a decision is arbitrary, irrational or unreasonable. From the correspondence between the State of Madhya Pradesh and Central Government as well as from the affidavit in reply, it is clear that the decision of this Court in L. Chandra Kumar had been considered by the State of Madhya Pradesh in arriving at a decision to abolish State Administrative Tribunal. Such a consideration, in our opinion, was relevant, germane and valid. It, therefore cannot be said that the decision was illegal, invalid or improper."

124. Further, the Supreme Court in the ***MPAT Abolition case*** observed as under:

> "71. Thus, from the correspondence between the State of Madhya Pradesh and the Central Government and from various letters and communications and also from the decision which has been taken by the Cabinet, it is clear that the State Government took into account a vital consideration that after the decision of this Court *in L. Chandra Kumar*, an aggrieved party could approach the High Court, the object for establishment of the Tribunal was defeated. In our opinion, in the light of the facts before the Court, it cannot be said that the decision to abolish State Administrative Tribunal taken by the State of Madhya Pradesh can be quashed and set aside as *mala fide*".

125. It was argued before the Supreme Court in the ***MPAT Abolition case*** that no survey had been conducted by the State Government and no reasons were recorded why the MPAT had been abolished. The Supreme Court in that context observed as under:

> "73. We are unable to uphold even this argument. In our judgment, if a decision is illegal, unconstitutional or ultra vires, it has to be set aside irrespective of laudable object behind it. But once we hold that it was within the power of the State Government to continue or not to continue State Administrative Tribunal and it was open to the State Government to take such a decision, it cannot be set aside merely on the ground that such a decision was not advisable in the facts of the case or that other decision could have been taken. While exercising power of judicial review, this Court cannot substitute its own decision for the decision of the Government."

126. The above observations are a complete answer to similar contentions advanced by the Petitioners before this Court. With there being sufficient materials on record to support the decision of the State of Odisha to seek the abolition of the OAT, it cannot be said that the said decision is arbitrary, irrational or violative of Articles 14, 19 and 21 of the Constitution. The submissions in this regard by the Petitioners are rejected.

127. Learned counsel for the parties have placed before this Court materials to demonstrate the mounting arrears in this Court over the past few years. At the same time, as against the sanctioned strength of twenty seven judges, the working strength has rarely exceeded twenty in the last twenty years. It is questioned therefore by the Petitioners, perhaps not without justification, whether the litigant before the High Court whose case has been transferred from the OAT can reasonably hope for a quicker disposal of her case? Further, it is pointed out that the transferred case is likely to be heard by a learned Single Judge of this Court with an appeal from that decision to the DB. Perhaps this was lost sight of by the State and Central governments when they concluded that by abolishing the OAT an additional tier of litigation could be avoided. There would in any event now be two tiers of litigation, in the High Court itself.

128. These are hard facts that cannot be disputed. At the same time, the question is whether the High Court can step into the shoes of the administrators and interfere with the decision only because another view is possible to be taken? To repeat the words of the Supreme Court in the ***MPAT Abolition case***: "it cannot be set aside merely on the ground that such a decision was not advisable in the facts of the case or that other decision could have been taken. While exercising power of judicial review, this Court cannot substitute its own decision for the decision of the Government."

129. The further fact is that the High Court was consulted on this issue and the Full Court of the High Court on the administrative side concurred with the proposal of the Central and State Government that the OAT was required to be abolished as it was not serving the purpose for which it was established. This was obviously with the expectation of the Bench strength increasing in due course. The performance of the Tribunals generally has come in for adverse comment by the Supreme Court in ***L. Chandra Kumar*** as well as ***Madras Bar Association*** (*supra*). From the point of view of the litigant, when presented with a choice of going with her case first before the OAT or

before the High Court, it would not be surprising if she opts for the latter course. If she is going to have to wait before the OAT, she might prefer waiting before the High Court even to begin with.

130. It appears that with passage of time in the experimental phase of ATs, a call had to be taken by many of the State Governments about the efficacy of continuing with the SATs based on their performance and the outcomes. They have tried the experiment for over three decades and feel the need for a change. It may not be proper for the High Court to decide to overturn that decision only because a different view is possible. Again from the point of view of the litigant unless the 'bypass' of a Tribunal is as good as the 'highway' of a High Court, the assurance of equal and fair justice may be rendered illusory. This is reflected in the following recommendations of the LCI in its 272nd report submitted in 2017:

> "8.21 The Commission is of the view that in order to achieve the goal for which the Tribunals have been established i.e., to reduce the burden of Courts, it is desirable that only in those cases where the Statute establishing the Tribunal does not have a provision for the establishment of an Appellate Tribunal for hearing an appeal from the decision of said Tribunal, the High Court may be allowed to be approached by way of an Appeal against the decision of a Tribunal. Every order emanating from the Tribunal or its Appellate Forum, wherever it exists, attains finality. Any such order may be challenged by the aggrieved party before the Division Bench of the High Court having territorial jurisdiction over the Tribunal or its Appellate Forum.
>
> 8.22 For the effective working of this idea, it will be necessary that the Appellate Tribunals established must act judiciously and that such Appellate Tribunals should be constituted at par with the High Courts and the members appointed in these Tribunals should possess the qualifications equivalent to that of the High Court Judges.
>
> 8.23 If appeals against the decision of Appellate Tribunals are brought before the concerned High Courts in a routine manner, then the entire purpose of establishing Tribunals will get frustrated. Therefore, the Commission is of the view that the aggrieved party against the decision of such Appellate Tribunal should be able to approach the Supreme Court on the grounds of Public or National importance and not before any other authority."

131. We appear to be far from elevating the status of the ATs to that of the High Courts by adopting the changes suggested by the LCI. The experiment that commenced in 1986, by establishment of the OAT, in the expectation of speeder justice for government servants, has stood belied by the passage of time. In the circumstances, the decision to discontinue the OAT in the expectation that revival of those cases before the High Court would offer a

better deal to the litigant, cannot be termed an arbitrary or unreasonable. One expectation is replaced by another. These are difficult choices with which beyond a point the High Court cannot interfere. This expectation cannot be said to be unfounded at this stage. Only the passage of time will tell us whether this expectation was justified. It is too early in the day to reject it as unreasonable.

132. The proposition of 'non-traverse' does not impress this Court. There is nothing in the pleadings that lays a factual foundation for the allegation, in para 7 of the petition, that the decision to abolish the OAT was motivated by Government servants wanting to avoid contempt proceedings before the OAT. In any event, all the cases would be transferred to be heard by the High Court and those Government servants cannot avoid facing the contempt proceedings there. When the averment itself stands on non-existent foundation, its non-traverse does not advance the case of the Petitioners that the impugned notification is an instance of malice in law or based on extraneous considerations. The reliance by the Petitioners on the decisions in ***Ghorpade*** *(supra)* or ***Sushil Kumar*** *(supra)* is, therefore, misplaced.

Issue (vi): Is the impugned notification bad in law since it is not expressly stated to be in the name of the President of India?

133. It was vehemently argued on behalf of the Petitioners that since the impugned notification dated 2nd August, 2019 is not expressed to be issued in the name of the President, it is invalid. Further, it was urged that a mere decision on the file, without it culminating in a properly issued order, was not a valid decision that could be acted upon.

134. The above submission overlooks the legal position that the requirement in Article 77 (1) [and correspondingly in Article 166] of the Constitution is not mandatory but directory. In ***Dattatreya Moreshwar Pangarkar*** (*supra*), Justice Das speaking for the majority explained as under:

> "Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore' all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under section 11(1)."

135. This was reiterated in ***State of Bombay v. Purushottam Jog Naik (1952) SCR 674*** and reaffirmed in ***Ghaio Mall and Sons v. State of Delhi (1959) SCR 1424.*** In ***R. Chitralekha*** (*supra*), a Constitution Bench of the Supreme Court reiterated the proposition that the provisions of Article 166 of the Constitution are only directory and not mandatory in character and, even if they are not complied with their validity is not impaired as long as it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor.

136. Again in ***Narmada Bachao Andolan*** *(supra),* it was held as under:

> "27. The decision of any Minister or officer under the Rules of Business made under Articles 77(3) and 166(3) of the Constitution is the decision of the President or the Governor respectively and these articles do not provide for "delegation". That is to say, that decisions made and actions taken by the Minister or officer under the Rules of Business cannot be treated as exercise of delegated power in real sense, but are deemed to be the actions of the President or Governor, as the case may be, that are taken or done by them on the aid and advice of the Council of Ministers."

137. Consequently, this Court is not persuaded that in the present case the failure to mention in the impugned notification that it has been issued on behalf of the President of India vitiates it.

Conclusion

138. For all of the aforementioned reasons, the Court is of the view that no ground has been made out for the Court to interfere with the impugned notification dated 2nd August 2019. Accordingly, all the writ petitions are dismissed. But in the circumstances, there shall be no order as to costs.

139. In light of the above conclusion, since all the pending cases before the OAT would automatically stand transferred to this Court, the interim order dated 7th August 2019 is no longer required to be continued. It is accordingly vacated.

140. 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.

2021 (II) ILR - CUT- 302

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

W.P.(C) NO.14924 OF 2020

M/S. HARISH CH. MAJHI .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Challenge is made to the Office Memorandum dated 10th December, 2018 of the Finance Department prescribing guidelines for the implementation of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1st July, 2017, the Revised Schedule of Rates-2014 (Revised SoR-2014) – Petitioner makes a grievance that heavy financial burden in the form of differential tax amount falls on it as the rate quoted was according to pre-revised SoR-2014 prevailing at the time of inviting tender and such reduction in the cost of materials and labour charges in the revised SoR-2014 along with imposition of GST amount on the contract value imposes an extra financial burden – The State-Opposite Parties, including the Finance Department, pleads that under the GST law, works Contract is subject to tax liability with effect from 1st July, 2017 at the rate of 5% or 12% or 18% of the contract value depending on the nature of contract – For effective implementation of the tax liability, the contract value as determined in the pre-GST regime using SoR-2014, was required to be revised – Accordingly, the rates mentioned in SoR-2014 were also revised with effect from 1st July, 2017 since the earlier rates were inclusive of the tax components prevailing in the pre-GST era – The OM has only prescribed the mode and manner of calculation of GST in respect of works contract executed after 1st July, 2017, either partly or fully – Plea considered with reference to the various pronouncement – Held, in the instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute – The OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the transitional period of migration to GST Act with effect from 1st July, 2017 – Consequently, the Court finds no merit in the Petitioner's challenge to the said OM in law. (Para 26 to 28)

Case Laws Relied on and Referred to :-

1. (1993) 1 SCC 364 : M/s.Gannon Dunkerley and Co. Vs. State of Rajasthan.
2. (2014) 1SCC 708 : Larsen and Toubro Limited Vs. State of Karnataka.

3. (2014) 7 SCC 1 : Kone Elevator India Private Limited Vs. State of Tamil Nadu.
4. (1999) 8 SCC 667 : Mathuram Agrawal Vs. State of M.P.

For the Petitioner : Mr.P.C.Nayak, Ms.Kananbala Roy Choudhury & Mr.Jashobanta Dash

For Opp. Parties : Mr.P.K.Muduli, A.G.A. Mr.Sunil Mishra, ASC, CT & GST

JUDGMENT Date of Judgment : 07.06.2021

B.P. ROUTRAY, J.

1. The Office Memorandum dated 10th December, 2018 of the Finance Department under Annexure-3 prescribing guidelines for the implementation of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1st July, 2017, the Revised Schedule of Rates-2014 (Revised SoR-2014) under Annexure-8 and the demand notice issued under Section 61 of the Odisha Goods and Services Act (OGST Act) has been questioned in the present writ petition and connected batch of cases. The prayers in the present petition read as under:

> "i. why the action and decision of the Opp.Parties shall not be declared illegal, unconstitutional and violative of legal right of the Petitioner on account of the Taxes being shared and borne by the Petitioner on post enactment Goods and Services Tax Act, 2017?
>
> ii. the Opp.Parties shall not be directed to restitute the benefit of GST to the Petitioner along with interest within a stipulated period in respect of work in which the estimated was prepared under VAT law.
>
> iii. the Office Memorandum dated 10.12.2018 issued by the Opp.Party No.4 under Annexure-3 shall not be declared illegal, arbitrary, unreasonable and same shall not be quashed.
>
> iv. further the process adopted by the Opp.Parties in preparation of revised SoR dated 15.09.2017 under Annexure-8 shall not be declared illegal, arbitrary and same shall not be quashed.
>
> v. why the notice issued by the Opp.Party No.9 under Annexure-9 shall not be declared illegal, arbitrary and same shall not be quashed?
>
> vi. why the Opp.Party shall not be directed to prepare a fresh schedule of rates considering rapidly change of rate and price and calculate the differential amount of GST on the contract in which estimate was prepared under VAT?"

2. The Petitioner is a registered work contractor and is stated to have executed many works contracts during the pre-GST period as well as post-GST period. The petitioner claims to have executed twenty-one contracts for different departments in the Government of Odisha where tenders were invited and estimates made prior to 1st July, 2017 but were completed after 1st July, 2017. But on verification of the tabular chart mentioned in the writ petition as well as in the affidavit dated 14th August 2020, it is seen that four numbers of works were completed prior to 1st July, 2017 and the rest of the works were commenced and completed after 1st July, 2017.

3. According to the Petitioner, the Tender Call Notice for all those works were issued in pre-GST period and the estimated value of contracts were arrived basing on pre-revised SoR-2014 when Odisha Value Added Tax Act (OVAT Act) was in operation. Such rates mentioned in SoR-2014 (pre-revised) were inclusive of value added tax. After implementation of GST, revised SoR-2014 was issued with effect from 1st July, 2017 wherein the rates prescribed are exclusive of tax components. As a result the estimated value of contract was reduced. The GST component with applicable rate was required to be added over the contract value.

4. Accordingly the Petitioner makes a grievance that a heavy financial burden in the form of differential tax amount falls on it as the rate quoted was according to pre-revised SoR-2014 prevailing at the time of inviting tender. Such reduction in the cost of materials and labour charges in the revised SoR-2014 along with imposition of GST amount on the contract value imposes an extra financial burden on the Petitioner.

5. The State-Opposite Parties, including the Finance Department, have filed their respective replies. According to them, under the GST law, 'works Contract' is subject to tax liability with effect from 1st July, 2017 at the rate of 5% or 12% or 18% of the contract value depending on the nature of contract. In the present case, it is 12%. For effective implementation of the tax liability, the contract value as determined in the pre-GST regime using SoR-2014, was required to be revised. Accordingly, the rates mentioned in SoR-2014 were also revised with effect from 1st July, 2017 under Annexure-8 since the earlier rates were inclusive of the tax components prevailing in the pre-GST era. Correspondingly, instructions/guidelines were issued under Annexure-3 prescribing the mode and manner of calculation of GST in respect of works contract executed after 1st July, 2017, either partly or fully.

6. The Central Goods and Services Tax Act (CGST Act) and the OGST Act came into force with effect from 1st July, 2017. The CGST & the OGST *inter alia* subsume the Value Added Tax and Service Tax in vogue during the pre-GST period. Sec. 2 (119) of the CGST Act defines, 'Works Contract' as follows:

> "(119)"works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alternation or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;"

7. Further, Clauses 5 and 6 of Schedule-II to the CGST Act define 'supply of services' as under:

> "5. Supply of services
>
> The following shall be treated as supply of services, namely:
>
> (a) renting of immovable property;
>
> (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.
>
> *Explanation* : For the purposes of this clause-
>
> (1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-
>
> (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or
>
> (ii) a chartered engineer registered with the Institution of Engineers (India); or
>
> (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;
>
> (2) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;

xx xx xx

6. Composite Supply

The following composite supplies shall be treated as a supply of services, namely:-

(a) works contract as defined in clause (119) of section 2; and

(b) xx xx xx"

8. Section 7(1)(d) and 7 (1-A) define the 'scope of supply' as under:

"7. Scope of supply

(1) For the purposes of this Act, the expression "supply" includes

xx xx xx

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II

xx xx xx

(1-A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II."

9. Further Section 17 (5) (c) specifies that:

"17. Apportionment of credit and blocked credits

(5) Notwithstanding anything contained in subsection (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely

xx xx xx

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service."

10. After implementation of the GST regime, works contract is treated as a composite supply of service taxable at applicable rates. It is the submission of the State-Opposite Parties that a works contractor is allowed to avail input tax credit (ITC) on the inputs used for the purchase of materials or input services, like for e.g., architect charges for the execution of works.

11. The basic price of materials as per SoR-2014 was inclusive of VAT, entry tax and other tax components. Since 1st July 2017 GST is payable on the value of the contract, the value of tax components in the price of the materials in SoR-2014 was revised and reduced by excluding such tax components prevalent during pre-GST period. As such, the revised SoR-2014 was issued on 16th September, 2017.

12. The Petitioner complains that the procedure adopted in the preparation of the revised SoR-2014 dated 16th September, 2017(Annexure-8) is illegal, arbitrary and contrary to the provisions of Odisha Public Works Department Code (OPWD Code) and that the rates have not been determined on the basis of actual rates prevailing in different areas of the State.

13. The said submission of the Petitioner is not found acceptable because the rates of materials are to be maintained uniformly all over the State. Further, if there is any difference in the actual rate and scheduled rate in any particular area, the Petitioner could submit the same to the employer and this has nothing to do with the GST.

14. A further ground urged on behalf of the Petitioner is that the tender was floated prior to 1st July, 2017. The price quoted for the items and labour was as per the then prevailing market rate. Therefore, the revised SoR-2014 brought into force on 1st July, 2017 at a reduced rate is illegal and discriminatory.

15. This contention of the Petitioner is not found convincing for the reason that, first, nothing has been brought on record to show any comparison of market rate in 2014 when SoR-2014 was issued and the market rate in 2017 when revised SoR was issued. Secondly, no dispute has been raised against the rates mentioned in pre-revised SoR-2014. The price difference in the revised SoR-2014 is to the extent of the changed tax amount only. Undoubtedly, the rates in revised SoR-2014 are applicable for the works all over the State.

16. Works contract is a composite supply of services and is taxable under the GST. The earlier SoR-2014 issued on 10th November, 2014 was inclusive of taxes like Central Excise Duty, Service Tax, VAT, Entry Tax etc. After the GST regime only some of the tax components needed to be included. This necessitated a revision of SoR-2014 to arrive at the GST exclusive work

value. The GST component is to be added to the work value. As the revised SoR is exclusive of the tax components, the estimated value of the work gets reduced to that extent. This was prepared under the recommendation of a Code Revision Committee and after verification of tax rate in the pre-GST period of each of the items including the hire charges of machineries.

17. Due to migration into a new tax regime with the implementation of the GST, in order to overcome the transitional difficulty, an Office Memorandum (OM) dated 10th December, 2018 was issued setting out the guidelines. Clause-3 of the said OM, which is the subject matter of challenge here, prescribes the procedure where tender was invited before 1st July, 2017 on the basis of the pre-revised SoR-2014, but where work has been executed fully or partly after the implementation of the GST or payments have been made after 1st July, 2017. Cluase-3 is reproduced below:

> "*3. In case of work, where the tender was invited before 01.07.2017 on the basis of SoR-2014, but payments made for balance work or full work after implementation of GST, the following procedure shall be followed to determine the amount payable to the works contractor;*
>
> *(i) Item-wise quantity of work done after 30.06.2017 (i.e. the Balance Work) and its work value as per the original agreement basing on the pre-revised SoR-2014 is to be ascertained first.*
>
> *(ii) The revised estimated work value for the Balance Work is to be determined as per the Revised SoR-2014, (In case of rates of any goods or service used in execution of the balance Work not covered in the Revised SoR-2014, the tax-exclusive basic value of that goods or service shall be determined by removing the embedded tax incidences of VAT, Entry Tax, Excise Duty, Service Tax, etc. From the estimated Price/Quoted Price.)*
>
> *(iii) The revised estimated work value for the Balance Work shall then be enhanced or reduced in the same proportion as that of the tender premium/discount.*
>
> *(iv) Finally, the applicable GST rate (5%, 12%, or 18% as the case may be) is to be added on the revised estimated work value for the Balance Work to arrive at the GST-inclusive work value for the Balance Work.*
>
> *(v) A model formant for calculation of the GST inclusive work value for the Balance Work is attached as Annexure. The competent authority responsible for making payment to the works contractor will determine GST inclusive work value for the Balance Work for which agreement executed on the basis of SoR-2014.*
>
> *(vi) A supplementary agreement shall be signed with the works contractor for the revised GSTinclusive work value for the Balance Work as determined above.*

(vii) In case the revised GST-inclusive work value for the Balance Work is more than the original agreement work value for the Balance work, the works contractor is to be reimbursed for the excess amount.

(viii) In case the revised GST-inclusive work value for the Balance Work is less than the original agreement work value for the balance Work, the payment to the works contractor is to be reduced accordingly. In case excess payment has already been made to the works contractor in pursuance of the original agreement, the excess amount paid must be recovered from the works contractor.

(ix) These procedures shall be applicable to all works contract including those executed in EPC/Turn-key/Lumpsum mode."

18. Prior to issuance of the OM dated 10th December, 2018 under Annexure-3 by the Finance Department, a notification dated 7th December, 2017 was issued. After issuance of notification dated 6th June, 2018 by National Rural Infrastructure Development Agency (NRIDA) by the Ministry of Rural Development (NORD), the earlier notification of Finance Department dated 7th December, 2017 was revised resulting in the issuance of the OM dated 10th December, 2018.

19. The submission of the Petitioner that OM dated 10th December, 2018 is not in tandem with the notification of NRIDA dated 6th June, 2018 is not found correct upon verification. A comparison of both the notifications reveals as follows:

Notification dtd.06.06.2018 issued by NRIDA, MoRD.GoI	**Finance Deptt. Office Memorandum dtd.10.12.2018**
Para.4: Implication of GST on PMGSY work has been divided into 4 categories. Category-A Works sanctioned prior to 01.07.2017 and are ongoing/subsisting. Category-B Works sanctioned after 01.07.2017 and Tenders have been completed. Category-C Works sanctioned after 01.07.2017 and tender process has not been initiated. Category-D All new works proposed and yet to be proposed.	**Para.3 :** Where the tender was invited before 01.07.2017 but payments made for balance work or full work after implementation of GST.

To cull out GST component of the existing contracts (i.e. The value of taxes subsumed under GST). The bench mark date for this purpose will be 01.07.2017, i.e. GST will be applicable on the portions of the contracts that are being paid from 01.07.2017. **(Clause (iii) & (iv) of Para-4(A))**	Item-wise quantity of work done after 30.06.2017 (i.e. the Balance Work) and its work value as per the original agreement basing on the pre-revised SoR-2014 is to be ascertained first. **(Para-3(i))**
The value of the portion of the work not completed or not paid for as on 01.07.2017 shall be divided into two components. (a) Value of work including taxes and duties such as Custom Duty, taxes on petroleum products and other non-VAT taxes that have not been subsumed into GST should be worked out. (b) The balance will be the value of taxes subsumed into GST such as Central Excise Duty and VAT i.e. GST Component. **(Para.4(A)(v))**	The revised estimated work value for the Balance work is to be determined as per the Revised SoR-2014. (In case of rates of any goods of service used in execution of the Balance work not covered in the Revised Sor-2014, the tax-exclusive basic value of that goods or services shall be determined by removing the embedded tax incidences of VAT, Entry Tax, Excise Duty, Service Tax, etc. From the estimated Price/quoted Price). **(Para.3(ii))**
The value of subsumed taxes The revised estimated under GST needs to be separated out from the contracted amount to arrive at the value of work. **(Para.4(A)(vi))**	The revised estimated work value for the Balance Work shall then be enhanced or reduced in the same proportion as that of the tender premium/discount. **(Para.3(iii))**
To estimate the value of the subsumed tax an indicative Excel format is attached. **(Para.4(A)(vii))**	A model formant for calculation of the GSTinclusive work value for the Balance Work is attached. **(Para.3(v))**
Once the value of work sanctioned and GST taxes are arrived, the employer may enter in to supplemental agreement with revised agreement value that will be original contracted value minus the value of subsumed tax arrived as above plus GST of 12%. (**Para.4(A)(viii))**	A supplementary agreement shall be signed with the works contractor for the revised GST-inclusive work value for the Balance Work. **(Para.3 (vi))**

The contractor pays GST on the value of work partly using the input tax credit that represents the taxes he has already paid through the inputs and partly using tax collected from the procuring entity concerned. Thus the supplier cannot claim to have incurred loss on account of embedded taxes that has been paid on the inputs. **(Para.4(A)(xii) & (xiii))**	In case the revised GST inclusive work value for the Balance Work is more than the original agreement work value for the Balance work, the works contractor is to be reimbursed for the excess amount. (**Para.3 (vii)**) In case the revised GST inclusive work value for the Balance Work is less than the original agreement work value for the Balance Work, the payment to the works contractor is to be reduced accordingly. In case excess payment has already been made to the works contractor in pursuance of the original agreement, the excess amount paid will be recovered from the works contractor. (**Para.3 (viii)**)

20. It is seen that the increased value of the contract after inclusion of GST is to be reimbursed by the employer whereas the decreased value of the contract, if any, after inclusion of GST is being recovered from the contractor after calculation. Whenever it is found that the contractor has received excess payment, the same is required to be recovered. The impugned demand notice issued to the Petitioner under Annexure-9 is a result of excess payment made thereof. Since the demand of recovery is pertaining to the excess payment received by the Petitioner, we do not see any flaw or illegality in the same as it is clear that the amount which is sought to be recovered from the Petitioner is the decreased value of contract and not the GST amount. The submission of the Petitioner to the contrary is misconceived.

21. It is made clear that the Petitioner has not challenged the tax liability on works contract nor any of the provisions of GST Act. Clause-30 of the General Conditions of Contract makes the contractor liable to bear all the taxes, cesses, tollage and charges etc. As discussed earlier, no major discrepancy is seen in the notification of NRIDA dated 6th June, 2018 and the corresponding OM dated 10th December, 2018 of the State Finance Department.

22. The Petitioner does not dispute the contention of Opposite Party No.7 (the Executive Engineer, RWSS Division, Baripada) that, he has received the payments of final bill along with GST @ 12% extra for work No.18 (of the

list mentioned in the writ petition) on 29th March, 2018 without any objection. This means the Petitioner has already accepted the benefits of GST as per Annexure-3.

23. The contention of the Petitioner that after issuance of the OM dated 10th December 2018, the agreement between the contractor and employer stands amended or modified accordingly, does not hold any merit for the reason that, it is a purely contractual obligation between the parties to either agree or disagree.

24. The further contention of the Petitioner that earlier circular dated 7th December, 2017 of the Finance Department which was inclusive of revised SoR dated 16th September, 2017 was challenged in a batch of writ petitioners earlier, wherein this Court has passed direction to effectively strike down the same, is factually incorrect. The operative portion of the order passed by this court in W.P.(C) No.6178 of 2018 and batch of similar cases reads as follows:

> "xxx……petitioner shall make a comprehensive representation before the appropriate authority within four weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10.12.2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 31.03.2019.
>
> If the petitioner(s) will be aggrieved by the decision of the authority, it will be open for the petitioner(s) to challenge the same……xxx"

25. Thus there was no determination of the issue raised on merits.

26. The Petitioner next cites the decision in ***M/s.Gannon Dunkerley and Co. v. State of Rajasthan (1993) 1 SCC 364***, to contend that the contractor is liable to pay the tax on material component only after deducting labour and service charges from the works component. But the position has changed after the amendment to the relevant provisions of the Finance Act, 1994 with effect from 1st June, 2007 and upon the coming into force of the CGST Act and the OGST Act with effect from 1st July, 2017. The Supreme Court has in ***Larsen and Toubro Limited v. State of Karnataka (2014) 1SCC 708*** held as follows:

"64. In *Gannon Dunkerley*, this Court, inter alia, established the five following propositions:

64.1. As a result of Forty-sixth Amendment the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and service and as a result of such contract which was single and indivisible has been brought on a par with a contract containing two separate agreements;

64.2. If the legal fiction introduced by Article 366 (29-A)*(b)* is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services;

64.3. In view of sub-clause *(b)* of clause 29-A of Article 366, the State Legislatures are competent to impose tax on the transfer of property in goods involved in the execution of works contract. Under Article 286(3)*(b)*, Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidents of such tax. This does not mean that the legislative power of the State cannot be exercised till the enactment of the law under Article 286(3)*(b)* by Parliament. It only means that in the event of law having been made by Parliament under Article 286(3)*(b)*, the exercise of the legislative power of the State under Entry 54 in List II to impose tax of the nature referred to in sub-clauses *(b)*, *(c)* and *(d)* of clause (29-A) of Article 366 would be subject to restrictions and conditions in regard to the system of levy, rates and other incidents of tax contained in the said law;

64.4 While enacting law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with Article 366 (29-A)*(b)*, it is permissible for the State Legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of the inter-State trade or commerce under Section 3 of the Central Sales Tax Act or outside under Section 4 of the Central Sales Tax Act or sale in the course of import or export under Section 5 of the Central Sales Tax Act; and

64.5. The measure for the levy of tax contemplated by Article 366 (29-A)*(b)* is the value of the goods involved in the execution of a works contract. Though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. Since

the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works and not the cost of acquisition of the goods by the contractor.

65. In *Gannon Dunkerley*, sub-section (3) of Section 5 of the Rajasthan Sales Tax Act and Rule 29(2)(1) of the Rajasthan Sales Tax Rules were declared as unconstitutional and void. It was so declared because the Court found that Section 5(3) transgressed the limits of the legislative power conferred on the State Legislature under Entry 54 of the State List. However, insofar as legal position after Forty-sixth Amendment is concerned, *Gannon Dunkerley* holds unambiguously that the States have now legislative power to impose tax on transfer of property in goods as goods or in some other form in the execution of works contract.

XX …… ……. XX …….. …….. …….. XX

72. In our opinion, the term 'works contract' in Article 366(29-A)*(b)* is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. The Parliament had such wide meaning of "works contract" in its view at the time of Forty-sixth Amendment. The object of insertion of clause 29-A in Article 366 was to enlarge the scope of the expression "tax of sale or purchase of goods" and overcome Gannon Dunkerley. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term 'works contract'. Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)*(b)* takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for

labour and services above. The Parliament had all genre of works contract in view when clause 29-A was inserted in Article 366.

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97. In light of the above discussion, we may summarise the legal position, as follows:

97.1. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract and (iii) the property in those goods must be transferred to a third party either as goods or in some other form.

97.2. For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. Are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

97.3. Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29- A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

97.4. Building contracts are species of the works contract.

97.5. A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

97.6. The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such

contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

97.7. A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

97.8. Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

97.9. The expression "tax on the sale or purchase of goods" in Schedule VII List II Entry 54 when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

97.10. Article 366 (29-A) (b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

97.11. Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods."

27. In ***Kone Elevator India Private Limited v. State of Tamil Nadu, (2014) 7 SCC 1***, the Supreme Court held as follows:

> ***"69***. Considered on the touchstone of the aforesaid two Constitution Bench decisions in *Builders' Assn. of India* and *Gannon Dunkerly*, we are of the convinced opinion that the principles stated in *Larsen and Toubro* as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, 'the dominant nature test' or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29-A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract."

28. Further, in ***Mathuram Agrawal v. State of M.P. (1999) 8 SCC 667***, it has been held that the statute should clearly and unambiguously convey three components of the tax law i.e., the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. In the instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute. The OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the transitional period of migration to GST Act with effect from 1st July, 2017. Consequently, the Court finds no merit in the Petitioner's challenge to the said OM in law.

29. At this juncture, it is necessary to take note of the fact that the Petitioner has filed the present writ petition after receipt of a notice (Annexure-9) of demand of recovery of excess payment. The notice has been issued under Section 61 of the OGST Act and the order passed pursuant thereto is appealable under the OGST Act. Therefore, the Court refrains from expressing any opinion at this stage on the merits of the said notice and leaves open all the contentions of the parties in relation thereto to be urged at the appropriate stage in those proceedings.

30. For all of the aforementioned reasons, the Court finds no merit in the writ petition, and it is accordingly dismissed. There shall be no order as to costs.

31. 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.

2021 (II) ILR - CUT- 318

KUMARI SANJU PANDA, J & S.K. SAHOO, J.

RVWPET NO. 255 OF 2013

STATE OF ODISHA & ORS. ……..Petitioners

.V.

PURNA CHANDRA CHAND ……....Opp. Party

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 47 Rule 1 – Review of judgment – When can be done? – Principles – Discussed.

"Order XLVII of Code of Civil Procedure, 1908 (hereafter 'CPC') deals with review of judgment. An order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 of CPC. The review proceedings are not by way of an appeal nor can an appellate power be exercised in the guise of power of review. Review is not re-hearing of an original matter. The power of review jurisdiction cannot be exercised as an inherent power and can be exercised for the correction of a mistake and not to substitute a view. Every error whether factual or legal cannot be made subject matter of review under Order 47 Rule 1 of CPC though it can be made subject matter of appeal arising out of such order. In other words, in order to attract the provisions of Order 47 Rule 1 of CPC, the error/mistake must be apparent on the face of the record of the case." *(Para 10)*

(B) WORDS AND PHRASES – "obiter dicta" – Meaning thereof – Held, The expression "obiter" means 'by the way', 'in passing', 'incidentally' – Obiter dictum is the expression of opinion stated in the judgment by a Judge which is unnecessary of a particular case – Obiter dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue – Explained in detail. (Para 11)

(C) EDUCATION SERVICE LAW – Petitioner functioned as in-charge Headmaster without having the B.Ed degree with seven years teaching experience as trained graduate teacher – The question arose as to whether the petitioner is entitled for the salary of the Headmaster – Held, no, he is only entitled for charge allowance.

In view of the foregoing discussions, we are of the humble view that the ratio laid down in the case of ***Ramakant Shripad Sinai Advalpalkar*** *(supra) is binding on us. Therefore, the opposite party is not entitled to get the salary of the post of Headmaster for the period from 01.06.1994 till 30.09.2001 in which period he was functioning as Headmaster in-charge of Sikshya Niketan, however, he is entitled to get only 'charge allowance' as admissible for the said period.* *(Para 12)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1999 S.C. 838 : Selva Raj Vs. Lt. Governor of Island, Port Blair & Ors.
2. 2008 (I) OLR 162 : Dillip Kumar Sahoo & Ors Vs. State of Odisha & Ors.
3. A.I.R. 2001 SC 560 : Pabitra Mohan Dash Vs. State of Orissa & Ors.
4. A.I.R. 1991 Supreme Court 1145 : Ramakant Shripad Sinai Advalpalkar Vs. Union of India.
5. (1983) 4 SCC 291 : Smt. P. Grover Vs. State of Haryana.
6. (2014) 13 SCC 707: Arun Kumar Aggarwal Vs. State of Madhya Pradesh
7. (2020) 5 SCC 421 : Union of India Vs. M.V. Mohanan Nair
8. (2020) 9 SCC 215 : Pandurang Ganapati Chaugule Vs. Vishwasrao Patil Murgud Sahakari Bank Ltd.
9. 1993 (I) OLR 303 (FB) : Golakh Chandra Mohanty Vs. State of Orissa.
10. Vol.87 (1999) CLT 272 : Priti Ranjan Pradhan -Vs. State of Orissa.
12. (1997) 8 SCC 715 : Parsion Devi and Ors. Vs. Sumitri Devi and Ors.
13. 2006) 4 SCC 78 : Haridas Das Vs. Usha Rani Banik (Smt.) & Ors.
14. State of West Bengal and Ors. Vs. Kamal Sengupta and Anr.
15. (2008) 8 SCC 612 : Kamlesh Verma Vs. Mayawati and Ors. (2013) 8 Supreme Court Cases 320
16. (1989)1 Supreme Court Cases 101 : Municipal Corporation of Delhi Vs. Gurnam Kaur.
17. A.I.R. 1995 S.C. 1729 : Sarwan Singh Lamba Vs. Union of India.
18. (2007) 5 SCC 428 : Oriental Insurance Co Ltd. Vs. Meena Variyal.
20. (2002) 4 SCC 638 : Director of Settlements Vs. M.R. Apparao.
21. A.I.R. 2007 S.C. 2053 : V.B. Prasad Vs. Manager, P.M.D.U.P. School & Ors.
22. (1989) 2 SCC 754 : Union of India Vs. Raghubir Singh (dead) by L.Rs. and Ors.
23. (2005) 2 SCC 673 : Central Board of Dawoodi Bohra Community Vs. State of Maharashtra.
24. (2011) 1 SCC 694 : Siddharam Satlingappa Mhetre Vs. State of Maharashtra
25. (2020) 3 SCC 492 : Unicorn Industries Vs. Union of India & Ors.

For Petitioners : Mr. Sandeep Parida, Sr. Standing Counsel (S&ME)

For Opp Party : Mr. Manoj Kumar Mohanty

JUDGMENT Date of Judgment: 31.05.2021

S.K. SAHOO, J.

The petitioners, who were the opposite parties nos. 1 to 3 in the writ petition i.e. W.P.(C) No. 456 of 2013 filed by the opposite party Purna Chandra Chand, have sought for review of the order dated 24.04.2013 passed by a learned Division Bench of this Court while disposing of the writ petition.

The operative portion of the order dated 24.04.2013 is extracted herein below for ready reference:-

".....In view of the aforesaid law laid down, this Court is of the opinion that the petitioner is entitled to the salary of Headmaster for the period, for which he has worked as in-charge Headmaster, the opposite parties are directed to calculate his entitlements at the scale of pay of Headmaster for the period, for which he has worked and as stated, he is continuing as such and to pay such salary to him deducting the amount already received by him. The entire exercise shall be completed within a period of three months from the date of communication of this order."

2. The factual matrix in the case at hand, is that the opposite party Purna Chandra Chand herein, as the writ petitioner filed W.P.(C) No.456 of 2013 seeking for a direction to the petitioners of this review petition to pay him the Headmaster scale of pay with effect from 01.06.1994 till the date he was holding the post of Headmaster of Madhabananda Sikshya Niketan, Mahulia (hereafter 'Sikshya Niketan') in the district of Balasore with all the consequential financial and service benefits accrued out of the same.

The case of the opposite party (writ petitioner) is that in a due process of selection, he was appointed as a Trained Graduate Teacher (CBZ) by the Managing Committee of the Sikshya Niketan vide resolution no.40 dated 20.08.1989 which was an unaided recognized educational institution and pursuant to the said resolution, the Secretary of Sikshya Niketan issued appointment letter on the very same day and accordingly, the petitioner joined the service on 21.08.1989. Due to the vacancy caused in the post of Headmaster, as per the resolution of the Managing Committee of the Sikshya Niketan, the petitioner was appointed as Headmaster of the Sikshya Niketan and joined his duty as such on 01.10.1993. While the petitioner was functioning as Headmaster, the Sikshya Niketan was notified as an aided educational institution as defined under section 3(b) of the Odisha Education Act, 1969 (hereafter '1969 Act') with effect from 01.06.1994. As per the requirement of the State authorities, the Managing Committee of the Sikshya Niketan submitted the proposal for approval of the services of the teaching and non-teaching staff of the Sikshya Niketan including the writ petitioner as Headmaster in order to enable them to receive their salary from the State Government as per Rule 9 of the Odisha Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter "1974 Rules"). The Inspector of Schools vide order dated 28.08.1997 approved the appointment of the teaching and non-teaching staff of the Sikhya Niketan and the services of the writ petitioner was approved as Headmaster in-charge of th e Sikshya

Niketan against the post of Headmaster with effect from 01.10.1994 instead of 01.06.1994. In view of the mistake in the date of approval, the Sikshya Niketan brought to the notice of the Inspector of Schools for modification in the order of approval. Accordingly, the Inspector of Schools vide office order dated 17.09.1998 modified the earlier order and approved the services of the writ petitioner as the Headmaster in-charge of the Sikshya Niketan with effect from 01.06.1994, but the writ petitioner was not given the Headmaster's scale of pay, rather he was given the Trained Graduate Scale of pay. The case of the writ petitioner was that he had worked for more than eighteen years in the post of Headmaster without the scale of pay attached to the said post and he made several representations to the State authorities for grant of Headmaster's scale of pay with effect from 01.06.1994, but the same yielded no result.

3. At the time of admission of the writ petition, notice was issued to the petitioners of this review petition on 21.02.2013 and the learned counsel for School and Mass Education Department (S&ME) entered appearance for them and accepted notice. Three extra copies of writ petitions were directed to be served on him and he was directed to obtain necessary instruction in the matter. The matter was next listed on 19.03.2013 on which date, the learned counsel for S&ME sought for time to file counter affidavit and accordingly, two weeks time was granted as last chance to file the counter affidavit. The matter came up next on 24.04.2013, but no counter affidavit was filed and accordingly, the case was disposed of on that day passing the order under review. From the order, it is not clear whether the learned counsel for S&ME was present on that day or not. Factual details have not been noted in the order, however, it is mentioned that the service of the petitioner as in-charge Headmaster was approved from 01.06.1994 but he was not paid salary of the Headmaster and was continuing in the salary of a trained graduate teacher. The learned Division Bench relying upon the ratio laid down by the Hon'ble Supreme Court in the case of **Selva Raj -Vrs.- Lt. Governor of Island, Port Blair and others reported in A.I.R. 1999 S.C. 838** and of this Court in the case of **Dillip Kumar Sahoo and others -Vrs.- State of Odisha and others reported in 2008 (I) Orissa Law Reviews 162** allowed the writ petition vide order dated 24.04.2013, operative portion of which has been extracted in Para 1 in directing the State authorities, the petitioners herein, to calculate the entitlements of the writ petitioner at the scale of pay of Headmaster for the period for which he had worked as Headmaster in-charge and was also continuing as such and to pay such salary to him deducting the amount

already received by him, with a further direction to complete the entire exercise within a period of three months from the date of communication of the said order.

4. Challenging the aforesaid order dated 24.04.2013 of this Court, the State of Odisha preferred Special Leave petition before the Hon'ble Supreme Court bearing Special Leave to Appeal (Civil) No.18803 of 2013 which was dismissed as withdrawn granting liberty to the review petitioners to approach this Court by filing a review petition within four weeks as per order dated 18.11.2013.

5. Mr. Sandeep Parida, learned Senior Standing Counsel (S&ME) appearing for the petitioners, at the outset pressing the interim application filed under section 5 of the Limitation Act vide I.A. No. 178 of 2018 argued to condone the delay of one day in filing the review petition in the interest of justice. He contended that since the opposite party was not having B.Ed. degree or any training qualification, his appointment was approved in the Trained Intermediate scale of pay i.e. Rs.1350-2200/- from 01.06.1994 to 30.09.1994 and from 01.10.1994 onwards in the Trained Graduate scale of pay on publication of B.Ed. result of the opposite party and therefore, the direction given by the Division Bench of this Court to pay him his entitlements in the scale of Headmaster for the period he had worked as in-charge Headmaster, is contrary to the Regulation 17(2) of Chapter IX of the Regulations of Board of Secondary Education, Odisha which stipulates that for appointment of Headmaster, a trained graduate in Arts or Science with minimum seven years experience after training is necessary. He placed heavy reliance upon the ratio laid down by the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash -Vrs.- State of Orissa and others reported in A.I.R. 2001 Supreme Court 560** wherein it has been held that a person who has been appointed as Headmaster in-charge cannot claim any right on the basis of that appointment even if the same might have been approved by any Competent Educational Authority as the in-charge Headmaster is not the same as the Headmaster of the School and it merely entitles a person to remain in charge and discharge the duties of a Headmaster. According to him, where the appointment itself has been made to the post of Headmaster as in-charge and such appointment has been approved, obviously the said appointee cannot claim to be continued as Headmaster or to be entitled to get the scale of pay attached to the post of Headmaster. He further submitted that the appointment/promotion of the writ petitioner in the post of Headmaster of

the Sikshya Niketan by the Managing Committee is contrary to the law laid down by the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash** (Supra). It is further contended that the writ petitioner acquired B.Ed. training qualification with effect from 01.10.1994 and as per Regulation 17(2) of the Boards' Regulations, the opposite party became eligible for promotion to the post of Headmaster only on completion of seven years of teaching experience as trained graduate teacher w.e.f. 01.10.2001. He further contended that as per Rule 8(3) of the 1974 Rules, the vacancies in the posts of Headmasters of Aided Boys' High Schools and Headmistresses of Girls' High Schools can be filled up by the eligible trained graduate teachers from the select list prepared by the Selection Board in the manner prescribed in the Regulation framed by the Selection Board for the purpose and such selection shall be made on the basis of seniority in the common feeding cadre and performance. According to Mr. Parida, the opposite party was never promoted to the post of Headmaster rather he was functioning as Headmaster in-charge of the Sikshya Niketan on a stop gap arrangement and therefore, he is not entitled to the Headmaster's scale of pay**.** It was urged that while passing the order under review, the Division Bench of this Court has not taken into consideration the judgment of the larger Bench of the Hon'ble Supreme Court in the case of **Ramakant Shripad Sinai Advalpalkar -Vrs.- Union of India reported in A.I.R. 1991 Supreme Court 1145**, wherein a contrary view was taken to the ratio laid down in the case of **Selva Raj** (supra) upon which the Division Bench placed reliance and therefore, the judgment relied on by the Division Bench is a judgment per incuriam. He further submitted that the eligibility condition for appointment of Headmaster and entitlement of the Headmaster in-charge to the scale of pay attached to the post of Headmaster has been decided by the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash** (supra) which is a 'ratio decidendi' and since there is mistake and error is apparent on the face of the record, therefore, the order passed by the learned Division Bench of this Court needs to be reviewed.

6. Mr. Manoj Kumar Mohanty, learned counsel for the opposite party on the other hand submitted that the scope of review of the order of the Division Bench is very limited in nature and when the impugned order passed by the learned Division Bench dated 24.04.2013 was not interfered with by the Hon'ble Supreme Court, this Court should not entertain the review petition particularly when it was filed beyond the stipulated period of four weeks as fixed by the Hon'ble Supreme Court while dismissing the Special Leave

Petition on 18.11.2013. He further submitted that the observation of the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash** (supra) that the in-charge Headmaster, even if such appointment has been approved, is not entitled to get the scale of pay attached to the post of Headmaster, is obiter dicta as the same was not the issue in that case. In support of his submission, he has relied upon the decisions of the Hon'ble Supreme Court in the cases of **Selva Raj** (supra), **Smt. P. Grover -Vrs.- State of Haryana reported in (1983) 4 Supreme Court Cases 291**, **Arun Kumar Aggarwal -Vrs.- State of Madhya Pradesh reported in (2014) 13 Supreme Court Cases 707, Union of India -Vrs.- M.V. Mohanan Nair reported in (2020) 5 Supreme Court Cases 421**, **Pandurang Ganapati Chaugule -Vrs.- Vishwasrao Patil Murgud Sahakari Bank Ltd. reported in (2020) 9 Supreme Court Cases 215** and of this Court in the case of **Dillip Kumar Sahoo** (supra)**.**

7. Adverting to the contentions raised by the learned counsel for the respective parties, it is not in dispute that Hon'ble Supreme Court dismissed the Special Leave Petition and granted liberty to the review petitioners to file a review petition before this Court within four weeks. The order was passed on 18.11.2013 and this review petition was filed on 17.12.2013. So far the delay of one day in filing the review petition is concerned, after perusing the grounds taken in the interim application and on going through the counter affidavit filed by the opposite party, we are of the humble view that in the matter of condonation of delay when there is no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice. Of course, condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. In the facts and circumstances, we are of the view that in the interest of justice, the delay of one day in filing the review petition as per the order dated 18.11.2013 of the Hon'ble Supreme Court passed in Special Leave to Appeal (Civil) No.18803 of 2013 needs to be condoned. Accordingly, the delay in filing present the review petition is condoned. The prayer made in I.A. No.178 of 2018 is allowed.

8. Prior to the enactment of the 1969 Act, the educational activities in the State of Odisha were being regulated through a collection of executive instructions issued by the Government from time to time and those instructions had been embodied in a Code, called 'Education Code'. The provisions of the Code had no statutory support and, as such, the Government

was not able to exercise effective control over the management of the Non-Government educational institutions. The managements of such institutions were playing hire and fire with the services of the teachers of the institution. The Odisha Legislature felt that such employees of the Non-Government Educational Institutions need to be protected from the exploitation by the management and Government also should have some control over those Non-Government institutions so that conditions of the institutions would not deteriorate. It is with the object to provide for better organization and development of educational institutions in the State, 1969 Act was enacted which came into force w.e.f. 15.10.1969 and since then, it has been amended from time to time to suit the needs of the hour. Much prior to the enactment of the 1969 Act, Orissa Secondary Education Act, 1953 (hereafter '1953 Act') was in force. 1969 Act has a Savings provision in section 28, which stipulates, inter alia, that the provisions contained in 1969 Act shall be in addition to and not in derogation of the provisions contained in 1953 Act and in the case of any inconsistency or repugnancy; the provisions of 1969 Act shall prevail. 1953 Act intended to establish a Board to regulate, control and develop Secondary Education in the State of Odisha. The expression 'prescribed' has been defined in section 2(i) of the 1953 Act to mean prescribed by regulations made by the Board under the Act. Section 3 of the 1953 Act casts a duty on the State Government to constitute a Board called the Board of Secondary Education to regulate, control and develop Secondary Education in the State of Odisha. Section 2(k) of the 1953 Act defines 'recognition' to mean recognition for the purpose of admission to the privileges of the Board including its examination. Section 2(l) of the 1953 Act defines 'Regulation' to mean regulation made or deemed to have been made by the Board under the Act. Section 21 of the 1953 Act confers powers on the Board to make regulations for the purpose of carrying into effect the provisions of the Act. Chapter IX of the Board's Regulations deals with certain pre-conditions in respect of the educational institutions. Regulation 17(2) of the Board's Regulations which comes under Chapter IX deals with the Headmaster who should be a trained graduate in Arts or Science with minimum seven years experience after training. It is this condition prescribed under the Regulation for being appointed as Headmaster of an aided educational institution. In exercise of power under section 27 of the 1969 Act, 1974 Rules have been framed. Rule 8(3) of 1974 Rules, inter alia, lays down the procedure for filling up the vacancies in the posts of Headmasters of aided Boys' High Schools and Headmistresses of Girls' High Schools.

9. In the case in hand, the opposite party joined as the Headmaster of Sikshya Niketan on 01.10.1993 on the basis of issuance of appointment letter as per the resolution of the Managing Committee. The Sikshya Niketan was notified as an aided educational institution as defined under section 3(b) of the 1969 Act with effect from 01.06.1994. The Inspector of Schools vide order dated 28.08.1997 approved the appointment of the teaching and non-teaching staff of the Sikshya Niketan, but the services of the writ petitioner was approved as Headmaster in-charge of the Sikshya Niketan against the post of Headmaster w.e.f. 01.10.1994 which was subsequently modified as per office order dated 17.09.1998 to be w.e.f. 01.06.1994. Since the opposite party was not having B.Ed. degree or any training qualification, his appointment was approved in the Trained Intermediate scale of pay i.e. Rs.1350-2200/- from 01.06.1994 to 30.09.1994. On publication of B.Ed. result of the opposite party, from 01.10.1994 onwards he was allowed to draw trained graduate scale of pay.

A two-Judge Bench of the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash (supra)** after considering the first Full Bench Judgment of this Court in the case of **Golakh Chandra Mohanty -Vrs.- State of Orissa reported in 1993 (I) Orissa Law Reviews 303 (FB)**, subsequent Full Bench Judgment of this Court in the case of **Priti Ranjan Pradhan -Vrs.- State of Orissa reported in 1996 (I) Orissa Law Reviews 145 (FB)** and also the five-Judge Bench of this Court in the case of **Priti Ranjan Pradhan -Vrs.- State of Orissa reported in Vol.87 (1999) Cuttack Law Times 272,** observed as follows:

> ".....It is not disputed that with effect from 29.5.1977, Regulation 17 in the Board of Secondary Education has been brought into force which makes it obligatory for every institution to have a Headmaster who must be a trained graduate and must have seven years of teaching experience as a trained graduate teacher. If subsequent to 29.5.1977, any appointment has been made to the post of Head Master contrary to the aforesaid provisions of the Regulation then the said appointment would be invalid appointment and would not confer any right on the appointee."

Since the opposite party became a trained graduate from 01.10.1994 and allowed to draw trained graduate scale of pay from that date, as per the ratio laid down in the case of **Pabitra Mohan Dash** (supra), he became eligible for promotion to the post of Headmaster on completion of seven years of teaching experience as trained graduate teacher w.e.f. 01.10.2001.

10. The preliminary objection raised by Mr. Mohanty to the maintainability of this review petition is on the ground that the impugned

order of learned Division Bench dated 24.04.2013 was not interfered with by the Hon'ble Supreme Court and it was dismissed. It can be lost sight of the fact that the Special Leave Petition was dismissed as withdrawn and liberty was granted to the review petitioners to approach this Court by filing a review petition. There is no adjudication on merit in favour of the opposite party by the Hon'ble Supreme Court. Therefore, the objection is overruled.

Order XLVII of Code of Civil Procedure, 1908 (hereafter 'CPC') deals with review of judgment. An order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 of CPC. The review proceedings are not by way of an appeal nor can an appellate power be exercised in the guise of power of review. Review is not re-hearing of an original matter. The power of review jurisdiction cannot be exercised as an inherent power and can be exercised for the correction of a mistake and not to substitute a view. Every error whether factual or legal cannot be made subject matter of review under Order 47 Rule 1 of CPC though it can be made subject matter of appeal arising out of such order. In other words, in order to attract the provisions of Order 47 Rule 1 of CPC, the error/mistake must be apparent on the face of the record of the case.

In the case of **Parsion Devi and Ors. -Vrs.- Sumitri Devi and Ors. reported in (1997) 8 Supreme Court Cases 715**, the Hon'ble Supreme Court held as under:

> "9. Under Order 47 Rule 1 Code of Civil Procedure, a judgment may be open to review, inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 Code of Civil Procedure. In exercise of the jurisdiction under Order 47 Rule 1 Code of Civil Procedure, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise."

In **Haridas Das -Vrs.- Usha Rani Banik (Smt.) and Ors. reported in (2006) 4 Supreme Court Cases 78**, the Hon'ble Supreme Court held as follows:

> "13....The parameters are prescribed in Order 47 Code of Civil Procedure and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient

reason". The former part of the Rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable, the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection...."

In the case of **State of West Bengal and Ors. -Vrs.- Kamal Sengupta and Anr. reported in (2008) 8 Supreme Court Cases 612**, the Hon'ble Supreme Court held as follows:

"21. At this stage, it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court earlier."

In the case of **Kamlesh Verma -Vrs.- Mayawati and Ors. reported in (2013) 8 Supreme Court Cases 320**, the Hon'ble Supreme Court after analysing number of decisions on scope of review, laid down its conclusions, which read as follows:-

"***Summary of the principles***

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

> The words "any other sufficient reason" have been interpreted in ***Chhajju Ram v. Neki* : *AIR 1922 PC 112*** and approved by this Court in ***Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius* : *AIR 1954 SC 526*** to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in ***Union of India v. Sandur Manganese & Iron Ores Ltd. : (2013) 8 SCC 337***.
>
> **20.2.** When the review will not be maintainable:
>
> (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
>
> (ii) Minor mistakes of inconsequential import.
>
> (iii) Review proceedings cannot be equated with the original hearing of the case.
>
> (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
>
> (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
>
> (vi) The mere possibility of two views on the subject cannot be a ground for review.
>
> (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.
>
> (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
>
> (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

Keeping in view the ratio laid down in the aforesaid decisions relating to maintainability of review petition and the power and scope of review jurisdiction, since it is urged before us by the learned Senior Standing Counsel (S&ME) that there is mistake and error is apparent on the face of the impugned judgment for which this review petition is maintainable in view of the ratio laid down in the case of **Kamlesh Verma** (supra), we are to analyse the same point wise.

11. The crux of the matter lies whether the observation of the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash** (supra) that the in-charge Headmaster, even if such appointment has been approved by the Competent Educational Authority, is not entitled to get the scale of pay attached to the

post of Headmaster, is obiter dicta as contended by the learned counsel for the opposite party as the same was not the issue in that case or a 'ratio decidendi' as argued by the Senior Standing Counsel (S&ME).

In the case of **Pabitra Mohan Dash** (supra), in two Civil Appeals, the judgment of five-Judge Bench of this Court in the case of **Priti Ranjan Pradhan** (supra) was under challenge, in which in para 19, inter alia, the following conclusions were arrived at:

> "**(a)** The decision of the Full Bench of the Court in **Golakh Chandra Mohanty's** case *(supra)* as contained in sub-paras (2), (3) and (4) of paragraph 26 is contrary to law. In paragraph 26(2) of the judgment, use of expression 'appointments' is admittedly improper as there is no question of direct appointment. In paragraph 20, the Full Bench itself observed that all posts were to be filled up as required by Rule 8(3) of the Rules. Regulation 17(2) of Chapter IX of Board's Regulations is applicable to both aided and unaided institutions and only when a person is a trained graduate with minimum of seven years of experience after training is eligible to become as Headmaster.
>
> **(b)** In **Priti Ranjan's case** *(supra),* the second Full Bench observed that the date 3-6-1988 has rational nexus with the object sought to be achieved by the provisions. The conclusion is indefensible in view of the analysis made above. The basis for such conclusion was enactment of Rule 8(3). In view of the analysis made that the Regulation 17(2)(i) operated at all times, the basis for such conclusion does not hold good. The conclusion in **Golakh Chandra Mohanty's** case *(supra)* as followed in **Priti Ranjan Pradhan's** case *(supra)* that in cases where prescribed qualifications had not been acquired by 3-6-1988, but were acquired subsequently were to be approved is clearly without any basis.
>
> **(c)** The orders of approval passed by the Inspectors of Schools are of no consequence and do not have any force on the question of promotion in terms of Rule 8(3)."

The Hon'ble Supreme Court in the case of **Pabitra Mohan Dash** (supra) did not find any infirmity with the conclusions arrived at by the five-Judge Bench of this Court and accordingly dismissed both the Civil Appeals. We find after analysing judgments rendered by five-Judge Bench of this Court in the case of **Priti Ranjan Pradhan** (supra) as well as by the Hon'ble Supreme Court in the case of **Pabitra Mohan Dash** (supra) that whether in-charge Headmaster, even if such appointment has been approved by the Competent Educational Authority, is entitled to get the scale of pay attached to the post of Headmaster was never an issue in those cases.

At this juncture, it would be appropriate to note as to what is "obiter dicta"? The expression "obiter" means 'by the way', 'in passing', 'incidentally'. Obiter dictum is the expression of opinion stated in the judgment by a Judge which is unnecessary of a particular case. Obiter dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue.

Explaining 'obiter dicta', the Hon'ble Supreme Court in **Municipal Corporation of Delhi -Vrs.- Gurnam Kaur reported in (1989)1 Supreme Court Cases 101**, made following observation in paragraphs 10 and 11:

> "10.....The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative.....
>
> 11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative....."

The Constitution Bench of the Hon'ble Supreme Court in the case of **Sarwan Singh Lamba -Vrs.- Union of India reported in A.I.R. 1995 S.C. 1729**, held that normally even an 'Obiter Dictum' is expected to be obeyed and followed. In **Oriental Insurance Co Ltd. -Vrs.- Meena Variyal reported in (2007) 5 Supreme Court Cases 428**, the Hon'ble Supreme Court, in Paragraph No. 26, has held as follows:-

> ".....An Obiter Dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But, as far as this Court is concerned, though not binding, it does have clear persuasive authority."

In the case of **Director of Settlements -Vrs.- M.R. Apparao reported in (2002) 4 Supreme Court Cases 638**, the Hon'ble Supreme Court extensively elaborated upon the principle of binding precedent. The relevant para 7 is reproduced hereunder:

> "7....Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of

> the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law", it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight..."

In the case of **Arun Kumar Aggarwal** (supra), it is held as follows:-

> "34....it is well settled that *obiter dictum* is a mere observation or remark made by the Court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand *does not form the part of the judgment of the Court and have no authoritative value*. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment."

In the case of **M.V. Mohanan Nair** (supra), it is held as follows:-

> "48. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all Courts within the territory of India, i.e. the pronouncement of the law on the point shall operate as a binding precedent on all Courts within India. Law declared by the Supreme Court has to be essentially understood as a principle laid down by the Court and it is this principle which has the effect of a precedent. A principle as understood from the word itself is a proposition which can only be delivered after examination of the matter on merits. It can never be in a summary manner, much less be rendered in a decision delivered on technical grounds, without entering into the merits at all. A decision, unaccompanied by reasons can never be said to be a law declared by the Supreme Court though it will bind the parties inter-se in drawing the curtain on the litigation."

In the case of **Pandurang Ganapati Chaugule** (supra), a five-Judge Constitution Bench while adjudicating the moot question regarding the applicability of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the co-operative banks, held as follows:-

> "13.7. The ratio of the judgment is material. The obiter relates to the finding of Court on an issue that arises in the matter but is not required to be decided for the final decision of the case. Thus, the finding of an issue is considered as an obiter. In contrast to ratio and obiter, the opinion of the Court on an issue that does not arise is a *casual or passing observation*."

We are of the humble view that Mr. Mohanty is right in his submission that whether the in-charge Headmaster, whose appointment has been approved by the Competent Educational Authority, is entitled to get the scale of pay attached to the post of Headmaster was never raised by any of the side either in the case of **Priti Ranjan Pradhan** (supra) or in the case of **Pabitra Mohan Dash** (supra) and therefore, when the same was never an issue in those cases, the observation made in the case of **Pabitra Mohan Dash** (supra) that the in-charge Headmaster, even if such appointment has been approved, is not entitled to get the scale of pay attached to the post of Headmaster, is a casual or passing observation which is not relevant, pertinent or essential to decide the issues involved in the said case and therefore, as held in the case of **Arun Kumar Aggarwal** (supra), such casual or passing observation does not form the part of the judgment of the Court and have no authoritative value.

12. Now, we are to adjudicate whether there is any mistake or error apparent on the face of the impugned judgment for which the same needs to be interfered with in exercise of the review jurisdiction.

Since in view of Regulation 17(2) of Chapter IX of Board's Regulations and Rule 8(3) of 1974 Rules and as per the ratio laid down in the case of **Pabitra Mohan Das** (supra), the opposite party became eligible for promotion to the post of Headmaster on completion of seven years of teaching experience as trained graduate teacher w.e.f. 01.10.2001, we are of the humble view that the direction of the learned Division Bench in the impugned order dated 24.04.2013 that the petitioner is entitled to the salary of Headmaster for the entire period, for which he had worked as in-charge Headmaster, is an error apparent on the face of such judgment. The learned

Division Bench has neither noted the factual details nor even considered as to from which date, the opposite party became eligible for promotion to the post of Headmaster. Reliance was placed in the impugned judgment upon the cases of **Selva Raj** (supra) and **Dillip Kumar Sahoo** (supra) but the factual scenario in those two cases are completely different. In those cases, the respective petitioners were having required eligibility criteria to hold the higher posts in which they were discharging their duties temporarily and in an officiating capacity. However, in the case in hand, the Inspector of Schools approved the services of the opposite party as Headmaster in-charge of the Sikshya Niketan with effect from 01.06.1994 but as on that date, the opposite party was having no eligibility criteria for promotion to the post of Headmaster. He was not having B.Ed. degree or any training qualification and only on publication of B.Ed. result, he became a trained graduate on 01.10.1994 and allowed to draw trained graduate scale of pay from that date and obviously, he became eligible for promotion to the post of Headmaster on completion of seven years of teaching experience as trained graduate teacher w.e.f. 01.10.2001. The question of his being considered for promotion to the post of Headmaster would not arise prior to 01.10.2001. Law is well settled as held in the case of **V.B. Prasad -Vrs.- Manager, P.M.D.U.P. School and Ors. reported in A.I.R. 2007 S.C. 2053** that eligibility condition must be satisfied before a person is considered for promotion/appointment in respect of a particular post.

The reliance placed by Mr. Mohanty in the case of **Smt. P. Grover** (supra) is no way helpful to the opposite party, as in that case the appellant Smt. P. Grover who was promoted as Acting District Education Officer claimed her entitlement to the pay of a District Education Officer which was allowed.

In the case in hand, the opposite party could not have been considered for promotion to the post of Headmaster from 01.06.1994 till 30.09.2001 as he was not satisfying the eligibility condition for such post and he was merely asked to discharge the duties in the higher post of Headmaster which was a stop gap arrangement. The very notion of appointment of the opposite party as Headmaster in-charge is that he is not the Headmaster in strict sense of the term but is merely to perform the duties of that office as an interim arrangement.

For deciding the entitlement of amount of salary, we are to segregate the entire period, for which the opposite party had worked as in-charge

Headmaster into two parts i.e. firstly, from 01.06.1994 till 30.09.2001 during which period he was not having eligibility criteria for promotion to the post of Headmaster and getting trained intermediate scale of pay first and then trained graduate scale of pay after publication of B.Ed. result and secondly, from 01.10.2001 onwards during which period he is having eligibility criteria for promotion to the post of Headmaster and he is getting trained graduate scale of pay.

In the case of **Ramakant Shripad Sinai Advalpalkar** (supra), a three-Judge Bench of the Hon'ble Supreme Court held that the distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantially holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case, he does not get the salary of the higher post; but gets only what in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement.

The Division Bench in the case of **Selva Raj** (supra), has not taken into account the ratio laid down in the case of **Ramakant Shripad Sinai Advalpalkar** (supra) which is a three-judge Bench decision. 'Per incuriam' means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. 'Incuria' literally means 'carelessness'. In practice, 'per incuriam' appears to mean per ignoratium.

In the case of **Union of India -Vrs.- Raghubir Singh (dead) by L.Rs. and Ors. reported in (1989) 2 Supreme Court Cases 754**, the Constitution Bench has held that a pronouncement of law by a Division Bench of the Supreme Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court.

A Constitution Bench of the Hon'ble Supreme Court in **Central Board of Dawoodi Bohra Community -Vrs.- State of Maharashtra reported in (2005) 2 Supreme Court Cases 673** has observed that the law laid down by the Supreme Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

In the case of **Siddharam Satlingappa Mhetre -Vrs.- State of Maharashtra reported in (2011) 1 Supreme Court Cases 694**, while addressing the issue of *per incuriam*, a two-Judge Bench held that the analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of co-equal strength.

In the case of **Unicorn Industries -Vrs.- Union of India and Ors. reported in (2020) 3 Supreme Court Cases 492**, it is held as follows:-

> **"51. Thus, it is clear that before the Division Bench deciding *SRD Nutrients (P) Ltd.* and *Bajaj Auto Ltd.*, the previous binding decisions of three-Judge Bench in *Modi Rubber Ltd.* and *Rita Textiles (P) Ltd.* were not placed for consideration. Thus, the decisions in *SRD Nutrients (P) Ltd.* and *Bajaj Auto Ltd.* are clearly *per incuriam*. The decisions in *Modi Rubber Ltd.* and *Rita Textiles (P) Ltd.* are binding on us being of Coordinate Bench, and we respectfully follow them."**

In view of the foregoing discussions, we are of the humble view that the ratio laid down in the case of **Ramakant Shripad Sinai Advalpalkar** (supra) is binding on us. Therefore, the opposite party is not entitled to get the salary of the post of Headmaster for the period from 01.06.1994 till 30.09.2001 in which period he was functioning as Headmaster in-charge of Sikshya Niketan, however, he is entitled to get only 'charge allowance' as admissible for the said period.

So far the period from 01.10.2001 onwards is concerned, it is not disputed at the Bar that during this period, the opposite party is having eligibility criteria for promotion to the post of Headmaster. He has been discharging his function as Headmaster in-charge for more than nineteen and half years after having acquired such eligibility criteria and at present also he is continuing to discharge his duty as such but receiving only trained graduate scale of pay. Mr. Parida, learned Senior Standing Counsel (S&ME) fairly submits that the Select List as mentioned in Rule 8(3) of 1974 Rules has not

yet been prepared by the Selection Board even though such rule came into force w.e.f. 03.06.1988. The State Government in its capacity as a model employer in a welfare State, is not expected to take advantage of its position rather it has the constitutional obligation to see that the opposite party is not deprived in getting Headmaster's scale of pay from 01.10.2001 onwards particularly when it is on account of laches on the part of the State Government that the Select List in terms of the Rule 8(3) of 1974 Rules could not be prepared till date, even though such rule came into force for about thirty three years back. Therefore, we are of the view that the opposite party is entitled to get the Headmaster scale of pay from 01.10.2001 onwards i.e. the period in which he has been functioning as in-charge Headmaster in Sikshya Niketan in spite of fulfilling the eligibility criteria for promotion to the Headmaster.

13. Accordingly, the review petition filed by the petitioners is allowed in part. We direct the petitioners to pay 'charge allowance' as admissible to the opposite party Purna Chandra Chand for the period from 01.06.1994 till 30.09.2001 in addition to the salary which he is stated to have received in the trained intermediate scale of pay from 01.06.1994 to 30.09.1994 and in the trained graduate scale of pay from 01.10.1994 till 30.09.2001.

The petitioners shall also pay the salary to the opposite party in the scale of pay of Headmaster from 01.10.2001 onwards during which period he has been functioning as in-charge Headmaster in Sikshya Niketan having the eligibility criteria for promotion to the post of Headmaster and as stated at the Bar he is getting trained graduate scale of pay.

The petitioners shall calculate the entitlements of the opposite party as per the above observation and disburse the same to the opposite party deducting the amount already paid to him.

The enhanced amount shall also carry interest at the rate of seven per cent per annum from the date of filing of the writ petition by the opposite party before this Court till the date of actual payment.

14. In the result, the review petition is allowed in part and the impugned order dated 24.04.2013 passed by the learned Division Bench is modified to the extent as indicated hereinabove, but without any order as to costs.

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2021 (II) ILR - CUT- 338

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

W.P.(C) NO. 6156 OF 2017

SUN PHARMACEUTICAL INDUSTRIES LTD. .....Petitioner

.V.

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

INDUSTRIAL DISPUTES ACT, 1947 – Section 10 – Reference – Termination – Award directing reinstatement of the employee with further direction to pay 50% back wages – Termination held to be illegal and there has been violation of the principles of natural justice – Effect of – Held, the employee is entitled for 100% back wages – It is a settled principle of law that in case a workman was terminated illegally, he is entitled to the full back wages irrespective of whether he was engaged elsewhere during that particular time or not.

(Para 11 to15)

Case Laws Relied on and Referred to :-

1. CA Nos.64 and 73 of 2015 and CA No.963-964 of 2014 in/and CP No.165 of 2014 (0 & M) pronounced on 9 March, 2015: M/s Ranbaxy Laboratories Ltd. Vs. M/s Sun Pharmaceuticals Industries Ltd.
2. 1994 AIR 182 : S.K. Maini vs Carona Sahu Co. Ltd
3. AIR 2001 SC 3290 : Hussan Mithu Mhasvadkar vs Bombay Iron & Steel Labour Board
4. AIR 1991 SC 1070 : Laxmi Shankar Pandey vs Union of India AndOrs
5. (2013) 11 SCC 626 : Bhuvnesh Kumar Dwivedi vs M/s. Hindalco Industries Ltd.
6. (2013) 11 SCC 626 : Shiv Nandan Mahto v. State of Bihar &Ors

For Petitioner : Shri Sourya Sundar Das, Sr. Adv.
M/s. S.K. Mohanty, J. Mohanty,
S.K. Mohanty & S. Modi.

For Opp. Parties : Shri Jagannath Patnaik, Sr. Adv.
M/s. P.K. Das-1 and S. Das

JUDGMENT Date of Hearing: 22.02.2021: Date of Judgment: 11.06.2021

S.K. PANIGRAHI, J.

1. The petitioner by way of this writ petition, assails the award dated 31.12.2016 in I.D. case No. 32 of 2015 passed by the learned Presiding Officer, Labour Court, Bhubaneswar holding that the present petitioner was bound by the reference by Government and directing reinstatement of the Opposite Party No.2 with further direction to pay 50% back wages.

2. The factual conspectus of the present petition hovers around the order of termination of the opposite party No.2 w.e.f. 18.02.2014 and the alleged dispute was set into motion based upon a reference vide letter No.4643-IR(ID)-16/2015-LESI dated 22.05.2015 by the Government of Odisha, in the Labour and E.S.I. Department which runs as follows:

> *"Whether the termination of the services of Shri Niranjan Sahoo, Ex-District Manager, Maxxim by the management of M/s. Ranbaxy Laboratories Ltd., Maxxim Division, Western EdgeI, Unit No.201-204, 2nd Floor, Western Express Highway, Borivali (East), Mumbai, having their Regional Office at OLISA House, 2nd Floor, 4, Govt. Place (North), Kolkata-1 with effect from the 18th February 2014 is legal and/or justified? If not, to what relief the workman is entitled?"*

3. The Opposite Party No.2 was employed with the erstwhile M/s. Ranbaxy Laboratories Ltd. as District Manager and was posted at Bhubaneshwar Headquarters w.e.f. 03.05.2010 in Maxxim Strategic Business Unit. During the short period of his joining in duty, his superiors identified issues of poor attitude, performance and team management by the Opposite Party No.2 and based on the same, the Regional Manager started conducting monthly reviews to guide and monitor him. On seeing, no significant improvement in the performance of the Opposite Party No.2 and the issues continued as such, it was recommended by the Strategic Business Unit to have his performance reviewed at Head Office, Mumbai. Accordingly, he was called to Head Office on 27.05.2012 and his performance was reviewed in the presence of HR and National Sales Manager. During the review process, it was observed that he was defiant on most of the points, even to the extent that he refused to sign the minutes of the meeting so held.

4. Subsequent to the same, there was no improvement seen in the working of the opposite party No.2 and when questioned, he projected indifferent attitude. Based on the same, the erstwhile Company decided to conduct a domestic enquiry against him through an independent Enquiry Officer and accordingly the services of Opposite Party No.2 were suspended vide letter dated 19.07.2013, pending enquiry. Thereafter, the concerned Regional Manager of the Maxxim Business Unit, while conducting a meeting of his District Managers at Cuttack, was illegally detained by the members of the Orissa Union with a demand of revoking the suspension of the Opposite Party No.2, for which the Company filed an FIR at the local Police Station. The Enquiry Officer submitted his report having afforded the opportunity of hearing to the Opposite Party No.2. Based on the findings thereof, the service

of Opposite Party No.2 was terminated w.e.f. 18.02.2014 by erstwhile Ranbaxy Laboratories Ltd.

5. Being aggrieved by the punitive culture of the management of the said Company, the Odisha Sales Executives' Association raised an industrial dispute before the DLO, Cuttack for conciliation against the termination order and the same having failed, was referred by Appropriate Government to Presiding Officer, Labour Court, Bhubaneswar. The Presiding Officer during pendency of the proceeding without any further reference impleaded the petitioner as a party and issued summons to the petitioner. Prior to the date of reference, the said M/s. Ranbaxy Laboratories Ltd. had been amalgamated with M/s. Sun Pharmaceuticals Industries Ltd. and there was no existence of the said management as M/s. Ranbaxy Laboratories Ltd. on the date of reference. Therefore, it was contended that without the rectification of the reference by the appropriate Authority of State Government, the present proceeding against M/s. Sun Pharmaceuticals Industries Ltd. was not maintainable. The learned Presiding Officer has also held that (i) the Petitioner management has not followed the principle of natural justice while conducting the domestic inquiry against the Opposite Party No.2. (ii) The Opposite Party No.2 is a workman under Section 2(s) of the ID Act, 1947 (iii) Since the petitioner Management has merged with the organisation of the second party management, so, the petitioner management is liable for the illegal termination of the Opposite Party No.2/workman (iv) The workman is not entitled to get full back wages, however, he is entitled to reinstatement of service by the petitioner management with back wages of 50%. Aggrieved by the order of the learned Labour Court, the petitioner has approached this Court.

6. Learned Counsel for the petitioner submits that the order is perverse to the materials available on record. The learned Presiding Officer, Labour Court, Bhubaneswar has failed to take note of the earlier judgments and orders passed by the Hon'ble Apex Court, and Hon'ble High Court which formed part of records and further failed to take note of the judgments and citations submitted during hearing. The learned Labour Court has erred in assuming jurisdiction which is not vested with it as the Opposite Party No.2 was not a workman as per the provision of Section 2 (s) of the I.D. Act, 1947 and the territorial jurisdiction of Court was limited to Court at Delhi in view of the submission of jurisdiction to Delhi in the appointment letter.

7. He has further submitted that the learned Presiding Officer, Labour Court has committed error in appreciating the requirement of burden of proof which rested on the Opposite Party No.2 as he claimed himself as workman and which could not have been shifted to petitioner. Neither the Opposite Party No.2 nor the Territory Executives reporting to the Opposite Party No.2 were discharging job of the nature of any manual, unskilled, skilled, technical, operational, clerical or supervisory work. As such, the opposite party No.2 cannot be termed as a 'workman'. Further, the domestic enquiry then was conducted by a neutral person in a fair and transparent manner by giving sufficient opportunity of hearing. Hence, the entire proceedings and the findings therein is valid in the eye of law but the learned Presiding Officer, Labour Court has erroneously returned a finding that the same is illegal and in violation of natural justice and accordingly passed an order of reinstatement.

8. He has further submitted that the Labour Court erred in the process, while fixing burden of proof on the petitioner though it was Opposite Party No.1 who was to discharge the same and prove the irregularity and prejudice caused to him if any, in the domestic enquiry. The learned Court further proceeded as if acting as an Appellate Authority over domestic enquiry and passed an order on erroneous appreciation of materials and evidence on record. Therefore, the Labour Court has acted mechanically sans application of its judicial mind while entertaining the claim and passing the impugned order. The said impugned order is prejudicially affect the petitioner hence warrants interference of this Court.

9. He contended that learned Labour Court, Bhubaneswar has failed to appreciate the fact that the Opposite Party No.2 nor the Territory Executive reporting to the Opposite Party No.2 were not discharging the job of any manual nature, unskilled, skilled, technical, operational, clerical or supervisory work as such Opposite Party No. 2 can't be termed as "workman" as held by the apex Court in plethora of judgments.

10. Learned Counsel for the Opposite Party No.2 contended that most of the charges levelled against the workman is non-specific and vague in nature. He further submitted that none of the allegations levelled against the petitioner was of serious nature, the suspension of service was wholly unwarranted. The inquiry was conducted at the company's office at Kolkata without conceding to any of the request of the workman and by violating the

principles of natural justice. It is submitted that so many extraneous factors have been brought in during the course of inquiry with so many vague allegations just to throw the workman out of the Company. The management arbitrarily terminated his service with immediate effect since 18th Feb, 2014 which is illegal hence, he is entitled to get the back wages.

11. Heard the parties at length. The issue pertains to the reference of Sun Pharmaceuticals as a party to the suit when it was not present in the reference by the appropriate authority of State Government. It has been brought into notice that pursuant to a scheme of arrangement effective on 24.05.2015, M/s Ranbaxy Laboratories Ltd. was merged with Sun Pharmaceuticals, which was also cleared during the investigation. Further, it was clarified that there is no existence of the M/s Ranbaxy Laboratories Ltd. The learned Counsel for the petitioner has strenuously contended that without the rectification of the reference by the appropriate authority of State Government, the said proceeding against Sun Pharmaceuticals was beyond the scope and purview of reference. However, it may be out of place to mention that the employees of M/s. Ranbaxy Laboratories Ltd. continued in their service under Sun Pharmaceuticals and the management of the erstwhile M/s. Ranbaxy Laboratories Ltd. even after the takeover. This, in turn, indicates the obligation of the Sun Pharmaceuticals towards the management of the M/s. Ranbaxy Laboratories Ltd. in so far as the issue of employee's welfare after the said takeover. Further, in the case of **M/s Ranbaxy Laboratories Ltd. vs M/s Sun Pharmaceuticals Industries Ltd.**[1], the Court has extracted the relevant clauses of the Scheme of Arrangement wherein it has been clearly provided that the Sun Pharmaceuticals is bound by the legal proceeding pending against M/s. Ranbaxy Laboratories Ltd. Therefore, the reference by the appropriate authority of State Government against M/s. Ranbaxy Laboratories Ltd. is binding on the Sun Pharmaceuticals.

12. Secondly, the issue pertaining to jurisdiction of this Court to decide the reference. The learned Counsel for the petitioner has contended that in the appointment letter Ext.C at Clause 18, it has been clearly mentioned that any dispute arising between the company and the petitioner with regard to interpretation of the letter or in the matter with regard to any claim or payment or damages etc. shall only be dealt with and adjudicated upon by the Courts functioning in Delhi. However, as rightly pointed out by the learned

1. CA Nos.64 and 73 of 2015 and CA No.963-964 of 2014 in/and CP No.165 of 2014 (0 & M) pronounced on 9 March, 2015

Presiding Officer of the Labour Court, it is a settled principle of law that the parties cannot exclude the jurisdiction of a Court by an agreement when a Court has got jurisdiction under an Act. The Government of Odisha in the Labour and E.S.I. Department, in exercise of powers conferred upon it by **Section 12(5) r/w Section 10(1)(c)** of the Industrial Disputes Act, 1947 referred the following dispute for adjudication by the Labour Court, Bhubaneshwar vide letter No.IR(ID)-16/2015/4643/LESI dated 22.05.2015.

> ***Section 10.*** *Reference of disputes to Boards, Courts or Tribunals.-*
>
> *(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing,--*
>
> *(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication.*
>
> ***Section12.*** *Duties of conciliation officers.*
>
> *(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.*
>
> *(5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.*

Therefore, this Court has ample jurisdiction to decide the dispute raised by the Opposite Party No.2 in the present reference.

13. The issue pertaining to the question as to whether the petitioner falls under the provision of workman u/s 2(s) of the Industrial Disputes Act, 1947. The learned Counsel for the petitioner has contended that the Opposite Party No.2 was entitled to the benefits and allowances and his responsibility was in lines with that of a 'Manager' and as such cannot be termed as a workman. He also argued that Opposite Party No.2 was supervising the works of the Territory Executives working under him and he was performing his duty in managerial and administrative cadre. It is well settled principle of law that designation or name of the post is not material while dealing with the question of person being workman. The main duties the employee is

performing is the criteria to determine whether he falls within the category of workman in the I.D.Act. In **S.K. Maini vs Carona Sahu Co. Ltd**[2], the Supreme Court has held as under:

> *"**9.** After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it."*

Additionally, the Labour Court has rightly relied on the case of **Hussan Mithu Mhasvadkar vs Bombay Iron & Steel Labour Board**[3] wherein the Supreme Court held that:

> *"**10.** No doubt, in deciding about the status of an employee, his designation alone cannot be said to be decisive and what really should go into consideration is the nature of his duties and the powers conferred upon as well as the functions assigned to him.*
>
> ***11.** Even if the whole Undertaking be an Industry, those who are not workmen by definition may not be benefited by the said status. **It is the predominant nature of the services that will be the true and proper test**."*

In the present case, during witness hearing and cross-examination, it was admitted that the Opposite Party No.2 was engaged in tasks which do not fall under personnel in managerial cadre and further was abstained from certain powers reserved for personnel in managerial or administrative position. Firstly, there are no documents before the Court to indicate that the territory executives were reporting to the petitioner and the latter was supervising their works. Moreover, the target for sale was fixed for the Opposite Party No.2 by the management from time to time. Further, the Opposite Party No.2 did not have any authority to sanction leave of the territory executives, nor take any

2. 1994 AIR 182 **3.** AIR 2001 SC 3290

disciplinary action against them. In addition to that, the Opposite Party No.2 had no role to play in formulating sales strategy, but he had the duty to execute through his team. Therefore, it can be established that the Opposite Party No.2 is a 'workman' as defined u/s. 2(s) of the Industrial Disputes Act, 1947.

12. The next issue pertains to the compliance to the principle of natural justice and the legality of the domestic enquiry. In the case of **Laxmi Shankar Pandey vs Union of India AndOrs[4],**
the Supreme Court held that:

> *"**6.**....It is laid down that such enquiries must be conducted in accordance with the principles of natural justice and that a reasonable opportunity to deny the guilt and to cross-examine the witnesses produced and examined, should be given and that the enquiry should be consistent with the rules of natural justice and in conformity with the statutory rules prescribing the mode of enquiry."*

From the witness examination, cross-examinations and the adduced evidence, it has been admitted that there were several flaws in the process of domestic enquiry followed by the M/s. Ranbaxy Laboratories Ltd. M/s. Ranbaxy Laboratories Ltd. has failed to produce the depositions of the witnesses recorded by the Enquiry Officer during the enquiry before the Court. It has been further admitted that the Enquiry Officer had not sent any notice to the Opposite Party No.2 for the domestic enquiry conducted against him. Therefore, there is a clear violation of the principle of natural justice. It is a settled law that in case the violation of principle of natural justice leads to hampering the domestic enquiry where the delinquent is not provided with a reasonable opportunity to defend himself, such a proceeding shall be held as null and void. In the present case, M/s. Ranbaxy Laboratories Ltd. has violated the principle of natural justice and the domestic enquiry is thereby held as null and void.

14. The next issue pertains to the legality of termination of Opposite Party No.2. From the issues discussed above, it is clear that the Opposite Party No.2 is a 'workman' u/s 2(s) of the Industrial Disputes Act, 1947 and therefore has the right to challenge his termination. Further, it has been proven that the 1st party managements have violated the principle of natural justice and the domestic enquiry has been thereby held as null and void.

4. AIR 1991 SC 1070

Hence, the termination of Opposite Party No.2 by M/s. Ranbaxy Laboratories Ltd. is illegal and not justified. Further, considering that the management of M/s. Ranbaxy Laboratories Ltd. is binding on the Sun Pharmaceuticals, the latter shall be liable for the illegal termination of Opposite Party No.2.

15. The *seventh* issue framed by the learned Labour Court pertains to the benefits the Opposite Party No.2 is entitled to, considering that the termination was illegal. The learned Labour Court has decided all the issues in favour of the workman. However, while replying to Issue No.7, the Labour Court held that there is no evidence that after termination of the opposite party No.2, he tried for his engagement under any other Company. Additionally, he has not contributed anything to the 1st party management after his termination and hence, he is only entitled to 50% back wages. However, it is a settled principle of law that in case a workman was terminated illegally, he is entitled to the full back wages irrespective of whether he was engaged elsewhere during that particular time or not. In the case of **Bhuvnesh Kumar Dwivedi vs M/s. Hindalco Industries Ltd.**[5], the Supreme Court held that:

> *"**30.** On the issue of back wages to be awarded in favour of the appellant, it has been held by this Court in the case of **Shiv Nandan Mahto v. State of Bihar &Ors**[6]. that if a workman is kept out of service due to the fault or mistake of the establishment/company he was working in, then the workman is entitled to full back wages for the period he was illegally kept out of service. The relevant paragraph of the judgment reads as under:*
>
> ***5.** …. In fact, a perusal of the aforesaid short order passed by the Division Bench would clearly show that the High Court had not even acquainted itself with the fact that the Appellant was kept out of service due to a mistake. He was not kept out of service on account of suspension, as wrongly recorded by the High Court. The conclusion is, therefore, obvious that the Appellant could not have been denied the benefit of back wages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the Appellant was entitled to be paid full back wages for the period he was kept out of service."*

Therefore, the Opposite Party No.2 should be granted 100% full back wages in the interest of justice.

16. In our considered opinion, the act of suspension and subsequent termination of Opposite Party No.2 without due compliance of the principle of natural justice vitiates the proceedings, dehors sufficient reasons, smacks

5. (2014) 11 SCC 85 **6.** (2013) 11 SCC 626

arbitrariness and malafide. Hence, the order dated 31.12.2016 passed in I.D. Case No.32 of 2015 by the learned Presiding Officer, Labour Court, Bhubaneswar is affirmed but the direction of 50% back wages granted to the opposite party No.2 is modified and made 100%. The Writ Petition is accordingly disposed of. No order as to cost.

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2021 (II) ILR - CUT- 347

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

CRLA NO. 29 OF 2002

1. RANJAN KUMAR BISOI …….Appellants
2. KALU @ RANJIT KUMAR GAUDA

.V.

STATE OF ORISSA …….Respondent

INDIAN PENAL CODE, 1860 – Section 302 and 201/34 – Offence under – Conviction based on circumstantial evidence – Chain of circumstances not complete – Effect thereof – Held, on analysis of the entire materials available on record, we are of the firm opinion that the circumstances like the previous attempt of rape on P.W.7, last seeing of the deceased in the company of the appellant no.1, confession of the appellants and discovery of weapon of offence on the discovery statement made by the appellants are not established conclusively in this case – So, there is no chain of circumstances complete in all respect, unerringly pointing towards guilt of the appellants – The learned Sessions Judge committed error on record by accepting prosecution case, convicting the appellants for the offence under Sections 302 and 201/34 of the Penal Code and awarding various sentences. (Para 17)

Case Laws Relied on and Referred to :-

1. (2015) 7 SCC 148 : Pawan Kumar Alias Monu Mittal and Another and other cases, Vs. State of Uttar Pradesh and Anr.
2. (2000) 6 SCC 269 : State of Maharastra Vs. Damu.

For Appellants : M/s. D. P. Dhal, Senior Advocate
R. Dash, S.K. Tripathy, P.K. Routray, K. Dash & B.K. Panda
For Respondent : Mr. A.K. Nanda (A.G.A.)

JUDGMENT Date of Hearing: 11.11.2020 & 11.06.2021 and Date of Judgment: 11.06.2021

S.K.MISHRA, J.

In this appeal, both the appellants, namely Ranjan Kumar Bisoi and Kalu @ Ranjit Kumar Gauda assail their conviction under Sections 302 and 201/34 of the Indian Penal Code, 1860 (hereinafter referred as the 'Penal Code', for brevity) and sentence to undergo imprisonment for life by the learned Sessions Judge, Kandhamal-Boudh, Phulbani in Sessions Trial No.34 of 1998, as per the judgment dated 01.07.2002.

2. The prosecution case in brief is narrated as follows: The deceased Dhoba Muli, son of P.W.8 Sasi Muli and P.W.7 Bilas Muli was called by the appellant no.1 Ranjan Kumar Bisoi from his house and thereafter Dhoba Muli was not found for several days. A missing report was lodged. Thereafter, P.W.1, medical officer at Daringibadi Community Health Centre (C.H.C.), informed the police on 03.01.1995 that he was informed by some children that something was floating inside the waters of the well. He along with staff found a gunny bag floating in the waters of the well. The police came to the spot and brought out the floating object and found that a dead body was inside. Then, he prepared inquest over the dead body. The dead body of Dhoba Muli was identified by the witnesses. Hence, the O.I.C., Daringibadi Police Station on his own information drew up the formal F.I.R., registered the case and took up the investigation.

In course of investigation, he visited the spot, examined the witnesses and recovered the dead body of the deceased Dhoba Muli from the well situated inside the campus of Daringibadi Community Health Centre (C.H.C.) in presence of the Executive Magistrate. He seized the wearing apparel of the deceased, discovery the weapon of offence on the recovery statement made by both the appellants separately. After completion of investigation, he submitted charge sheet against the accused persons.

3. The defence took the plea of simple denial and false accusation due to political rivalry.

The prosecution has examined 12 witnesses in this case. P.W.12, Niranjan Patra happens to be the informant as well as investigating officer in this case. P.W.7, Bilas Muli, happens to be mother of the deceased Dhoba Muli. Her evidence is pivotal in this case, as the prosecution relied on her

evidence to prove the previous incident as well as the last seen theory. P.W.8, Sasi Muli happens to be father of the deceased and husband of P.W.7, he has searched for some and he could not find his son and submitted missing report. P.W.1 Golak Bihari Samantaray is the doctor, who reported about the floating of the gunny bag in the well situated in the campus of Daringibadi Community Health Centre (C.H.C.). P.W.3, Yaksha Nayak, P.W.4, Prasanta Kumar Sahu, P.W.5, Santosh Kumar Sahu and P.W.6, Ajit Kumar Sahu are residents of the same village. They deposed about the bringing of dead body from the well, and seizure, on the discovery statement of the accused of the wooden merah. P.W.10, Upendranath Patnaik, the then forester, D.F.O., Office, Angul was examined to prove the alleged confession made by the appellants before the Investigating Officer and the leading to discovery of the weapon of offence. However, this witness has not supported the case of prosecution and he turned hostile to it. P.W.11, Sanyasi @ Sania Muli happens to be the uncle of the deceased. He and P.W.8, father of the deceased searched for the deceased but could not get any trace of him. In addition to examination of 12 witnesses, prosecution has relied upon 15 exhibits and 11 material objects, M.Os. VII to VII/5 being some photographs.

4. One witness was examined on behalf of defence, namely, Sankar Beheradalai to prove the political rivalry between the appellants and one Sanyasi @ Sania Muli, who happens to be the relative of Bilas Muli and Sasi Muli.

5. Admittedly, there is no direct evidence in this case. The prosecution case is based on circumstantial evidence and they are as follows:

(1) Homicidal nature of the dead of the deceased.

(2) The previous incident stated by P.W.7 that the appellant no.1 Ranjan Kumar Bisoi tried to rape her, 6 to 7 months prior to the occurrence and on the protest of the said witness and her deceased son, appellant no.1 ran away from her house.

(3) He remained absconding for 7 to 8 months. On the date of occurrence, he came to the house of the deceased and asked him to accompany and both of them went away.

(4) Finding of the dead body, after 7 to 8 days, in a well situated in premises of the C.H.C., Daringibadi.

(5) Absconding of the accused person.

(6) Confession of accused/appellants before the Investigating Officer.

(7) Leading to discovery of the weapon of offence, i.e., 'Wooden Medha'.

6. Mr. D.P. Dhal, learned senior counsel appearing for the appellants argued that the circumstances, relied upon by the trial Court, have not been conclusively established by the prosecution. While not challenging the findings of the learned Judge with respect to the homicidal nature of death of the deceased, the learned senior counsel for the appellants very emphatically challenges the findings of the learned Trial Judge regarding attempt to rape made by the appellant no.1 Ranjan Kumar Bisoi on P.W.7, the last seen of the deceased with the appellant no.1 and the confessional statement allegedly recorded by the Investigating Officer. He would also argue that the recovery weapon of offence has not been connected to the crime. Hence, the same cannot be taken into consideration as 'the fact discovery' under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act', for brevity).

7. Mr. A.K. Nanda, learned Additional Government Advocate appearing for the State, on the other hand, would argue that the various circumstances in this case has been conclusively established by the prosecution and the learned Sessions Judge has a perspicacious view of the materials and evidence. Hence, he urged the court not to disturb the conviction of the appellants by the learned Trial Judge.

8. As far as the homicide nature of the death of the deceased is concerned, there appears to be no dispute regarding the same at the stage. Moreover, from the materials available on record like evidence of P.W.9, Rakhal Chandra Behera, contents of Exhibit 6 and contents of Exhibit 7/1, i.e., the opinion of Medical Officer on the examination of the weapon of offence, this Court considers it inexpedient to further analyse the material available on record to come to a finding that the learned Session Judge was correct in holding that the death of the deceased was homicidal in nature.

9. The first circumstance in this case is that P.W.7 has stated that 7 to 8 months prior to the date of occurrence the appellant no.1, Ranjan Kumar Bisoi tried to commit rape on her. She has stated that in paragraph-4 of the Examination-In-Chief, on oath, at about 7 to 8 months prior to the departure of his son with the accused Ranjan Kumar Bisoi tried to rape her. She and her son protested. Hence, he ran away. The accused Ranjan Kumar Bisoi

absconded for 7 to 8 months. After 7 to 8 months thereafter on his return to the village accused Ranjan came to their house and called her son. At that time, (from paragraph-1) her son Dhoba Muli with other two minor sons was present in their house. Her husband had been to Surada in the morning of that day. Her deceased son Dhoba Muli accompanied accused Ranjan and went along with him. From that night of his going along with Ranjan Kumar Bisoi her deceased son did not return. Her husband came home on the next day of departure of her son Dhoba with accused Ranjan. He told her husband that deceased Dhoba Muli did not return home since the night before. He went along with accused Ranjan but did not return home.

10. This witness has been relied upon by the learned Sessions Judge. In fact, entire paragraph-10 of the impugned judgment has been devoted to discussion of the evidence of P.W.7, Bilas Muli. The learned Judge has held that she is a reliable witness. The learned trial Judge further observed that her evidence has not been challenged in any way in cross-examination. However, a reference to evidence of P.W.7 reveals that she has been cross-examined by the defence and she has denied the defence suggestion that he has not stated before the Investigating Officer that prior to 7 years back accused Ranjan Kumar Bisoi came to his house in the evening hours and called her son Dhoba Muli, who accompanied the accused Ranjan Kumar Bisoi and went away; and that thereafter her deceased son did not return home; and that she searched for her missing sons about 7 to 8 days; and that her brother told that the accused Ranjan has killed her deceased son Dhoba Muli and threw the dead body into a well at Daringibadi, C.H.C.; and that the accused Ranjan has disclosed this fact before her brother, who communicated to her. She has further denied the defence suggestion that she has not stated before the Investigating Officer in her statement recorded under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code', for brevity), that accused Ranjan came to her house about 7 to 8 months prior to the incident; and that he attempted to rape her; and that on protest on herself and her son, accused ran away; and that accused Ranjan remained absent for 7 to 8 months thereafter.

11. A reference to the evidence of P.W.12, I.O. in this case reveals that at paragraph-12 he has stated about contradictions of P.W.7 Bilas Muli. He has stated that the said witness did not state before him that 7 years back accused Ranjan Kumar Bisoi came her house and being accompanied by the deceased left her house and thereafter her deceased son did not return home; and that

she searched for her missing son; and that she heard from her brother that accused Ranjan killed her son and threw the dead body in the Community Health Centre, Daringibadi well at Daringibadi; and that accused disclosed this fact to her brother who communicated this fact to her. The witness has further proved that P.W.7 Bilas Muli has not stated before him that on 24.12.1994 accused Ranjan came to their house when she along with her three sons were present at home; and that called deceased Dhoba to accompany him; and that thereafter left her home. It is also borne out that she has not stated before the investigating officer that about 7 to 8 months prior to the incident, accused Ranjan came to her house and attempted to rape her; and that on the protest of her and her son, accused Ranjan fled away from the spot; and that accused Ranjan remained absent for 7 to 8 months thereafter.

12. Thus, as far as the circumstance of attempt to rape is concerned, no witness is speaking about any such evidence except P.W.7. P.W.7 has not stated this fact in her statement recorded under Section 161 of the Code by the I.O. Moreover, a contradiction in the shape of major omission in the previous statement made by her has been stipulated by the defence. Moreover, no F.I.R. was lodged for such an incident, investigation has not been made in this direction. So, we are of the considered opinion that the prosecution has failed to prove that the appellant no.1 Ranjan Kumar Bisoi made an attempt to rape P.W.7, about 7 to 8 months prior, to the incident of the murder of the deceased Dhoba Muli. So, prosecution endeavor to attribute motive on the part of Ranjan to kill the deceased because of such previous enmity has not been established in this case.

13. As far as the last seen theory is concerned, there is a major contradiction in the evidence of P.W.7 with respect to this aspect. From the evidence of I.O., it is well established that P.W.7 has not stated before the I.O. that the accused Ranjan came to their house, she along with her sons were present, he called the deceased to accompany and thereafter they left her home. There is no other material to establish last seen theory of the prosecution. The evidence of P.W.7 is not reliable enough as there is a major contradiction in her evidence with respect to the previous statement recorded under Section 161 of the Code. So, this circumstance is also not established by the prosecution.

14. Next circumstance is the recovery of the dead body of the deceased, which is not disputed by the defence and it is also made out from the record

that the dead body was first seen by some children, who informed P.W.1. P.W.1 then informed the police. The recovery of dead body of the deceased on 03.01.1995, is therefore well made out. Regarding the confession of the appellants before the investigating officer, the learned senior counsel for the appellants very emphatically argued that such a confession made before the I.O. is not at all admissible. Confessions leading to discovery of weapon of offence, has been marked as Exhibits 11 and 12. The learned Trial Judge committed the gross error in appreciation of evidence by taking into consideration the inculpatory portion of such statements. Reliance on the entire confessional statement is not proper. Section 26 of the Evidence Act provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. In this case, it is not the case of the prosecution that the confessional statement of Exhibits 11 and 12 has been made in the immediately presence of the Magistrate. So, the confession made by the appellants should have not been included in the evidence. Only the portion of such statement leading to discovery of 'fact', in this case the weapon of offence, in Exhibits 11 and 12 should have been taken into consideration.

15. Taken into consideration the material fact stated in Exhibits 11 and 12, it is seen that both of appellants have on the same day gave two statements before the Investigation Officer. On 08.01.1995, while in police custody, they stated that they have concealed the weapon of offence, i.e., 'Wooden Medha' (M.O.-I), in the field of Kalidas Nayak and gave recovery of the Wooden Medha. The Medha (M.O.-I) was seized in presence of witnesses.

In order to establish the information received from the accused while in police custody against the accused, section 27 of the Indian Evidence Act provides an exception to Sections 25 and 27 of the Indian Evidence Act. The said section provides that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

In the case of ***Pawan Kumar Alias Monu Mittal and Another and other cases, Vs. State of Uttar Pradesh and Another*** (2015) 7 Supreme

Court Cases 148, the Hon'ble Supreme Court has held that it is settled principle of law that the statement made by an accused before the police officer which amounts to confession is bar under Section 25 of the Indian Evidence Act. This prohibition has however relaxed to some extent by Section 27 of the Indian Evidence Act, which is quoted below:-

> **"27. How much of information received from accused may be proved**.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

The Hon'ble Supreme Court further held that in the light of Section 27 of the Indian Evidence Act, whatever information given by accused, in consequence of which a fact is discovered, only would be admissible in evidence, whether such information amounts to confession or not. The Hon'ble Supreme Court further held that basic idea embedded in Section 27 of the Evidence Act is the confirmation upon consequence information given by the accused. It is further held by the Hon'ble Supreme Court that the doctrine of confirmation is founded on the principle that if any fact is discovered in a search made on strength of any information obtained from accused, such a discovery is a guarantee that the information supplied by accused is true. The Hon'ble Supreme Court taking into earlier reported case of ***State of Maharastra v. Damu***, (2000) 6 SCC 269, held that the information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact, it becomes a reliable information.

The Hon'ble Supreme Court further held at paragraph 13 of the said judgment that the 'fact discovered' in Section 27 of the Evidence Act, embraces the place from which object was produced and knowledge of accused as to it, but information given must relate distinctly to that effect.

16. Judging from this angle, it is seen that two witnesses i.e. P.W.10 Upendranath Patnaik and P.W.4 Prasanta Kumar Sahu have not supported the case of the prosecution as far as the discovery statement being recorded by the investigating officer. They have been cross-examined by the prosecution having granted the permission by the court under Section 154 of the Evidence Act. It has been established by the prosecution that these witnesses, in fact, stated before the investigating officer, under Section 161 of the Code, regarding such statement being recorded and recovery of the

weapon. However, they have not supported the prosecution case. So, whatever has been stated to by the P.W.12 the I.O. has been taken by the learned trial judge, as to have been established by the prosecution. Whether such evidence is admissible in evidence as circumstances of discovery of the weapon of offence at the instance of the appellants has to be seen.

First of all, it is seen that the appellant no.1 Ranjan Kumar Bisoi gave a discovery statement recorded under Exhibit 11. The same fact has been stated to by the appellant no.2 Kalu @ Ranjit Gauda which has been Exhibited as Exhibit 12. As there is no submission with regard to this aspect, we do not consider it expedient in this case to discuss the question of giving discovery of 'a fact' by two persons and its probative value. Moreover, we find from the material on record that the weapon of offence (M.O.-I) was recovered from an open field which is accessible to all. P.W.12, Investigating Officer has stated that he did not send the weapon of offence (M.O.-I) for chemical test as the blood stains contain in a M.O.-I has been washed away from the rain water at the time of seizure. In order to establish the fact discovered which is relevant for proving a charge of commission of offence, the prosecution, must connect by cogent evidence, the crime and the fact discovered. In this case, the weapon of offence. Then the prosecution must establish that it is the weapon that was used for the commission of the crime or also 'fact discovered' is related to the offence alleged to have been committed. Then, there is a presumption that the offence is connected to the accused. However, it is seen that there is no establishment of the connection between the weapon of offence and the death of the deceased. Such a connection can be easily established by proving the DNA of the dead body of the deceased match with the DNA sample found on the weapon of offence. It may also been established by proving the blood that was found on the weapon of offence belonging to human blood and to the same group of dead body of the deceased. In such case, the court may safely conclude that the connection between weapon of offence, i.e., 'the fact discovered', and the crime has been established. However, in this case, the I.O. has admitted that he has not sent the weapon of offence, (M.O.-I), for chemical examination.

The prosecution has attempted to establish this connection between the crime and weapon of offence by relying upon the evidence of P.W.9 Dr. Rakhal Chandra Behera, who on police requisition, after examining the weapon of offence opined that the injuries noticed on the dead body of the deceased Dhoba Muli could have been possible by the wooden metha, M.O.-

I.There is no certainty in his opinion and in fact such a certain opinion cannot be given in any case. So, the efforts of the prosecution to establish connection between weapon of offence i.e., 'the fact discovered' and murder of Dhoba Muli has not been established in this case. So, Section 27 of the Evidence Act cannot be pressed into service in this case.

17. Thus, on analysis of the entire materials available on record, we are of the firm opinion that the circumstances like the previous attempt of rape on P.W.7, last seeing of the deceased in the company of the appellant no.1, confession of the appellants and discovery of weapon of offence (M.O.-I) on the discovery statement made by the appellants are not established conclusively in this case. So, there is no chain of circumstances complete in all respect, unerringly pointing towards guilt of the appellants. We are of the opinion that the learned Sessions Judge committed error on record by accepting prosecution case, convicting the appellants for the offence under Sections 302 and 201/34 of the Penal Code and awarding various sentences.

18. Hence, the appeal is allowed. The conviction of both the appellant no.1 Ranjan Kumar Bisoi and appellant no.2 Kalu @ Ranjit Kumar Gauda for offences under Sections 302 and 201/34 of the Penal Code by the learned Sessions Judge, Kandhamal-Boudh, Phulbani in Sessions Trial No.34 of 1998 and sentences of imprisonment for life and imprisonment for two years are hereby set aside. The appellants are acquitted of the offences. They are on bail. They be set at liberty forthwith. Their bail bonds be cancelled.

Accordingly, the CRLA is disposed of.

The Trial Court Records (T.C.Rs) be returned back to the trial court forthwith along with copy of this judgment.

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. D.P. Dhal, learned Senior Advocate for the appellants, 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- 357

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

CRLA NO. 49 0F 2002

MOHAN SABAR & ORS. .....Appellants

.V.

STATE OF ORISSA .....Respondent

(A) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Appreciation of evidence by the higher court in appeal – Principles to be followed – Held, as a long judicial practice adopted by the higher Courts that the appreciation of evidence by a Trial Judge, who has the opportunity of observing the demeanour of witnesses while recording their evidence in the Court in presence of the accused and counsel, should not be lightly interfered with by the appellate court who do not have that advantage of observing the demeanour of witnesses. (Para 11)

(B) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Appreciation of evidence – Wife of the deceased is the sole eye witness – She has no axe to grind against the accused persons – Her evidence is quite trustworthy having ring of truth and duly corroborated by the objective determination of the spot, which is verandah of their house where from the I.O. seized blood stained earth etc – Her evidence also gets corroboration from the evidence of P.W.6, the Doctor who found incised injury on the dead body of the deceased, in course of post mortem examination, which could have been caused by the axes seized in this case – The recovery of one of the weapon of offence at the instance of the appellant, Mohan Sabar, admissible under Section 27 of the Indian Evidence Act, lends further corroboration by principle of confirmation that the appellants did cause the death of the deceased – Conviction confirmed. (Para 23)

Case Laws Relied on and Referred to :-

1. AIR 1983 SC 753 : Bharwada Bhoginibhai Hirjibhai Vs. State of Gujarat
2. AIR 1985 SC 48 : U.P. Vs. M.K. Anthony.
3. (2000) 18 OCR (SC)34 : Leela Ram Vs. State of Haryana and Anr.
4. AIR 19988 SC 696 : Appabhai and another Vs. State of Gujurat.
5. AIR 1985 SC 1384 : State of U.P. Vs. Ballabh Das.
6. AIR 1999 SC 1776 : State of Rajasthan Vs. Teja Ram and other.

For Appellant : Mr. Trilochan Nanda (Amicus Curiae)

For Responden : Mrs. Saswata Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing:24.2.2021& 11.6.2021 & Date of Judgment: 11.6.2021

S.K.MISHRA,J.

The appellants have assailed their conviction and order of sentence for the offence under Section 302/34 of the Indian Penal Code (hereinafter referred to as the "Penal Code" for brevity) by the learned Addl. Sessions Judge, Bhanjanagar in S.C. Case No.41/14 of 2001. The learned Addl. Sessions Judge has convicted them on 15.7.2002 and sentenced them to undergo imprisonment for life.

2. The gravamen of the charges against the appellants is that on 3/ 4.10.2000 in the night the deceased Brajasundar Sabar after taking his dinner went to sleep on a cot in front of his house on the Varandah. He had no foreboding that it was his last night. His wife and children were sleeping inside the room by keeping the doors open. At the dead of the night his wife heard an unusual sound and noticed that the appellants were assaulting her husband by means of an axe (Tabal). At that time his wife could not come outside out of fear. Sometimes thereafter the appellants causing the death of her husband fled away. After this incident the informant called some of the villagers to the spot and lodged an F.I.R. on the next day at 7.15 A.M. at Khariar P.S. Police registered P.S. Case No.112 dated 4.10.2000 for the offence under Section 302/34 of the Penal Code and took up investigation.

3. In course of investigation the Investigating Officer, P.W.14, examined the informant in this case, examined other witnesses, visited the spot, held inquest on the dead body of the deceased, dispatched the dead body for post mortem and arrested the accused. After completion of investigation, the I.O. submitted charge sheet against the accused for the offence under Section 302/34 of the Penal Code.

4. The defence took the plea of complete denial.

5. In order to prove its case, the prosecution has examined fourteen witnesses. P.W.1 is the informant and P.W.2 is the daughter of the deceased. P.W.9 is the scribe of the F.I.R. P.Ws.3,4 and 5 are the post occurrence witnesses. P.W.6 is the autopsy doctor. P.Ws.7,8 and 13 are the seizure witnesses. P.W.10 is one Kundugutu Sabar who had seen the appellant-Mohan Sabar with an axe prior to the occurrence, P.Ws.11 and 12, the police constables assisted P.W.14 the Investigating Officer of the case.

The prosecution has also relied upon twenty three documents as exhibits and nine material objects. The defence, on the other hand, neither examined any witness nor relied on any documents to prove its case.

6. Mr. Trilochan Nanda, learned Amicus, submits that the learned Addl. District and Sessions Judge, Nuapada has recorded the order of conviction relying upon the sole testimony of P.W.1, the wife of the deceased. He would further submit that there is grave doubt as regards the identification of the accused persons by P.W.1. Admittedly, there was no electricity in the house of the deceased and it was a dark night. P.W.1 has clearly testified in her evidence that it was a dark night. Learned Amicus for the appellants submits that non-mention of the names of the accused persons in the inquest report casts a serious doubt on the prosecution case. Terming the testimony of P.W.1 being highly unreliable and untrustworthy and the evidence of P.W.2 being highly inconsistent and contrary to the evidence of P.W.1, the learned Amicus would submit that the evidences are discrepant with regard to the exact place of occurrence inasmuch as as per the evidence of P.Ws.1 and 2 that the deceased was sleeping in the Parchi it is not known how the dead body could be detected on the open verandah. It is submitted that the prosecution has not established the exact place of occurrence by cogent and reliable evidence. Learned Amicus would submit that P.W.1 never stated that axe was the weapon of offence. Learned Amicus would submit that the findings of the learned trial court are wholly unreasonable and not plausible both on facts and in law. He would further submit that the order of conviction is highly illegal and improper.

7. Learned Amicus has filed his written note of submission on 23.3.2021. He has stated in his note of argument that F.I.R. was scribed by the Police Officer in the Police Station and the informant, P.W.1, put her L.T.I. on it. The said F.I.R. which was reduced into writing by the Police Officer and P.W.1 had put her L.T.I. has not been brought to records by the prosecution. The F.I.R. which is on record is scribed by P.W.9, Parabu Sabar, which is marked as Ext.15. Learned Amicus has further mentioned in his notes of argument that P.W.9 says in his deposition that at the time of scribing the F.I.R. on 06.10.2000, P.W.1 was not present in the Police Station. P.W.9 stated that the contents of the F.I.R. was not read over to P.W.1.

8. Learned Amicus has further mentioned that on perusal of the F.I.R. it was seen that the F.I.R. had been lodged on 04.10.2000 and therefore, on close scrutiny of the evidence it is crystal clear that the F.I.R. lodged at the

earlier point of time has been suppressed and the discrepancies in the F.I.R. strike at the root of the prosecution case. Learned Amicus has mentioned in his notes of submission that as per the prosecution P.Ws.1 and 2 are the two eye witnesses to the occurrence. The learned trial court has discarded the evidence of P.W.2 stating that her evidence does not inspire confidence that she was the eye witness to the occurrence.

9. Learned Amicus has further stated in his notes of submission that there has been serious inconsistency between the oral evidence of P.W.1 and the Medical evidence. Learned Amicus would submit that the P.W.1 has developed a new story during the trial. P.W.1 had stated in her deposition that accused Mohan, Durja, Prahalad were assaulting her husband by axe(Tangi) which each of them were holding by their own hands. Accused Durje assaulted her husband on his neck by his axe and her husband fell down.

P.W.14, the Investigating Officer, has stated in his deposition that P.W.1 did not state in her statement that each of accused persons were armed and accused Durje cut the throat of her husband and other accused persons assaulted by their axe and her husband and fell down on the ground and accused Durje cut the throat. P.W. 2 has also not stated before the I.O. that her father was assaulted and the accused persons ran away from the spot. Learned Amicus has stated that the I.O. said in his deposition that at the time of inquest, no witnesses stated the name of the accused persons to be involved in the crime. Learned Amicus further mentioned that in the recitals of the FIR, the weapon of offence has been described as “Tabil”, but in the evidence the weapon of offence has been stated by P.W.1 as Tangi (axe). The prosecution had led no evidence in order to prove that “Tabil” and “Tangi” are the one and same weapon. Therefore, it creates great doubt regarding the weapon of offence. Learned Amicus would submit that the judgment of the trial court is based surmises and conjectures. He would submit that the prosecution has utterly failed to bring home the charges against the present appellants and, therefore, the judgment, order of conviction and sentence passed by the trial court should be aside.

10. The learned Addl. District and Sessions Judge, Nuapada came to the conclusion that the testimony of P.W.1 is so clear, cogent, consistent and reliable that it leaves no room for any doubt about the complicity of the appellants in the crime. The appellants have intentionally caused the grievous injuries on the body of the deceased as per Ext.3 with their common

intention to cause the death of the deceased and those injuries are sufficient in the ordinary course of nature to cause the death of a human being.

11. Learned Amicus in this case has basically assailed the appreciation of evidence by the learned Trial Judge. He also relies heavily on the fact described in the previous paragraphs regarding the suppression of an earlier F.I.R. It is, therefore, appropriate on our part to examine the law relating to appreciation of evidence. It is settled by the catena of decisions as a long judicial practice adopted by the higher Courts that the appreciation of evidence by a Trial Judge, who has the opportunity of observing the demeanor of witnesses while recording their evidence in the Court in presence of the accused and counsel, should not be lightly interfered with by the appellate court who do not have that advantage of observing the demeanor of witnesses.

12. In the case of **Bharwada Bhoginibhai Hirjibhai v. State of Gujarat**; reported in AIR 1983 SC 753, the Hon'ble Supreme Court held that over much importance cannot be attached to minor discrepancies. The reasons are obvious. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is over burdened by the events. The witness could not have anticipated the occurrence so often has an element of surprise. The mental facilities therefore cannot be expected to be attended to absorb the details. The power of observation differs from person to person. What one may notice, another may not. An object or movement might emboss its image on one persons mind, whereas it may go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross examination made by the counsel and out of nervousness mix up facts, get confused, regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operate an account of fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of defence mechanism activated on the spur of the moment.

13. While examining and appreciating of evidence of P.W.1, who happens to be the widow of the deceased, the fact cannot be ignored that she is not found to have any axe to grind against the appellant. She being the widow of the deceased shall also not implicate some innocent persons in commission of the crime and thereby letting real culprits go scot free.

14. In the case of State of **U.P. v. M.K. Anthony**; reported in AIR 1985 SC 48, the Hon'ble Supreme Court held that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not permit rejection of the evidence as a whole. If the Court before whom the witnesses, the appellate court which had not the benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observations retention and reproduction differ with individuals.

15. In the case of **Leela Ram v. State of Haryana and another**; reported in (2000) 18 OCR (SC)34, the Hon'ble Supreme Court held that it is indeed necessary to note that hardly one comes across a witness whose evidence does not contain some exaggeration or embellishment and sometimes in the over anxiety they may give slightly exaggerated account. The Court can shift the chaff from the corn and find out the truth from the testimony of witnesses. Total repulsion of evidence is unnecessary. The evidence is to be considered from the point view of trustworthiness. If this element is satisfied, they ought to inspire confidence in the mind of the court to accept the stated evidence though not, however, in the absence of the same.

16. In the case of **Appabhai and another v. State of Gujurat**; reported in AIR 19988 SC 696, the Hon'ble Supreme Court held that the Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may not be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witnesses. When a doubt arises in respect of certain facts alleged by such witnesses the proper course is to ignore that fact only, unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses if they are otherwise trustworthy.

17. In the case of **State of U.P. v. Ballabh Das;** reported in AIR 1985 SC 1384, the Hon'ble Supreme Court has examined the law relating to appreciation of evidence of a related witness or interested witness, it has observed that there is no law which says that in the absence of any independent witness, the evidence of interested witnesses should be thrown out at the behest of or should not be relied upon for convicting an accused. What the law requires is that where the witnesses are interested, the Court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witness is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence.

18. In the case of **State of Rajasthan v. Teja Ram and other**; reported in AIR 1999 SC 1776, the Hon'ble Supreme Court has held that over insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house the most natural witnesses would be inmates of the house. It is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have seen the occurrence.

19. In applying the aforesaid principles of law in appreciation of evidence, this Court keeps in mind that criminal trial cannot be equated to a mock scene of a stunt film. It is about the real people witnessing the gruesome being committed offences in their presence.

20 Learned Amicus, in this case, has emphasized upon the so called discrepancy between the evidence of P.W.1, P.W.9 and P.W.14-the Investigating Officer regarding the place where the F.I.R. which was prepared and affixed with L.T.I. So there appears to be some confusion regarding this aspect. But from the recorded materials available on record, that is, the F.I.R. itself and the case diary, which was referred by the I.O. at the time of his deposition in the Court, nothing substantially could be brought out to show that actually the F.I.R. was written in the Police Station at first was not registered and suppressed and a second F.I.R. was prepared in village Bijayapur. So only on the basis of some statements during the course of cross examination of P.W.9 that the F.I.R. was not read over to P.W.1 and in P.W.1's statement that she put her L.T.I. in village Bijayapur, the evidence regarding lodging of the F.I.R. cannot be doubted and cannot be held that the original F.I.R. has been suppressed in this case.

21. The second issue is relating to the spot. The Investigating Officer-P.W.9 in cross examination at paragraph-10 stated that the deceased was sleeping on the open verandah of the case house and the informant was sleeping in 'the parchi' which is adjacent to the verandah and covered up by a roof and the dead body of the deceased was found in the open verandah of a house and there appears to be no discrepancy regarding the same. Moreover, the I.O. has collected the blood stained earth, sample earth, blood stained bed sheet and napkin as per the seizure list Ext.10. It was sent for post mortem examination and it was found that the sample blood stained earth collected from the spot was stained with human blood of Group 'A'. Similarly the bed sheet and napkin seized from the spot were moderately stained with human blood of Group 'A" origin. The said blood group i.e. found on the lungi of the deceased as in the Axes i.e produced in this case on being seized by the I.O. as well as Dhoti and Napkin of two accused persons, which have been seized in this case. So there appears to be no plausible reason to come to a conclusion that there is a discrepancy regarding the spot as put forth by the prosecution in this case.

22. The learned Amicus would further argue that though the prosecution alleges that the appellants gave blows by means of Tabli or Tabal, the prosecution produced two Axes. He argued that Axe and Tabli are two different kind of weapons. We are unable to agree with the same because 'Tabil' is a variety of Axe and the distinction between the two is very minor. Both Tabli and axe have an iron portion with a sharp cutting edge and on the

back of it, a handle is appended. The only difference between Tabli and Axe which is known as 'Tangia' in western parts of Odisha is the length of the cutting edge. 'Tabli' generally has wider cutting edge and axe has a smaller cutting edge. But this aspect can be reconciled by the fact that the accused Mohan gave a discovery statement that lead to the discovery and seizure of one of the Axes. The other Axe was seized on production by the accused. Both the axes were found to be stained with deep spurs of human blood of group 'A' human blood was found on the wearing apparels of the deceased. Thus, we are of the opinion that the learned Amicus though advanced his argument in a very attractive manner, there is hardly any reason to accept the same.

23. On the final analysis, we find the evidence of P.W.1 is quite trustworthy having ring of truth. Her evidence is duly corroborated by the objective determination of the spot, which is verandah of their house where from the I.O. seized blood stained earth etc. Her evidence also gets corroboration from the evidence of P.W.6, the Doctor. The Doctor found incised injury on the dead body of the deceased, in course of post mortem examination, which could have been caused by the axes seized in this case. The recovery of one of the weapon of offence at the instance of the appellant, Mohan Sabar, admissible under Section 27 of the Indian Evidence Act, lends further corroboration by principle of confirmation that the appellants did the deceased to death. The final stand in the case of the prosecution is the result of the chemical examination which supports the case of the prosecution.

24. Thus, in the ultimate analysis we find that the learned Addl. District and Sessions Judge, Nuapada had a clear and perspicacious view of the evidences available on record, he noticing the demeanor of the witnesses while recording their evidence held that the prosecution has proved its case beyond reasonable doubt. There is no plausible or reasonable basis for disturbing such finding of fact which in our opinion are in the line of the various pronouncements of the Hon'ble Supreme Court on this aspect of appreciation of evidence of witnesses in a criminal trial.

25. In the result, the appeal is dismissed. The judgment of conviction and order of sentence passed by the learned Addl. District and Sessions Judge, Nuapada in S.C. No.41/14 of 2001 are hereby confirmed.

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2021 (II) ILR - CUT- 366

Dr. B.R.SARANGI, J.

W.P.(C) NO. 34606 OF 2020

MANAS RANJAN PATTNAIK AND ORS. .....Petitioners

.V.

STATE OF ODISHA AND ORS. .....Opp. Parties

(A) WORDS AND PHRASES – 'Promissory estoppel' – Meaning thereof – Held, the principle of 'Promissory estoppel' would estop a person from backing out of its obligation arising from a solemn promise made by it to the respondent. (Para 7 to 16)

(B) SERVICE LAW – Regularization – Petitioners appointed on contractual basis against sanctioned posts by following due recruitment process – Subsequently Govt. Resolution came providing rule that the contractual persons will be regularized on completion of six years – The petitioners were regularized from a later date against which they filed original applications before the SAT – SAT directed to regularized their services from the date when they completed six years – State filed writ petitions against such order which were dismissed – Order implemented – Then order was passed by Govt. directing cancellation of antedated regularization orders – The question thus arose as to whether such order can sustain in the eye of law? – Held, No.

> *"Taking into consideration the cumulative effect of the discussions, as made above, this Court is of the firm opinion that the order dated 27.11.2020 under Annexure-14 issued by the Deputy Secretary to Government in Health and Family Welfare Department to all the C.D.M. & P.H.Os., Odisha, with regard to cancellation of orders of antedation of regularization of MPHW (M) and MPHW (F), cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. Since the rights of the petitioners have been protected by this Court by passing the interim orders, they shall be deemed to be continuing in service on regularization as before from the date they have completed six years contractual service as per Annexure- 12 dated 01.10.2018."* (Para 30)

Case Laws Relied on and Referred to :-

1. (1956) 1 All ER 256 : Central London Property Trust Ltd. Vs. High Treas House Ltd.
2. (1970) 1 SCC 582 : Century Spg. And Mfg. Co. Ltd Vs. Ulhasnagar Municipal Council.

3. (1983) 3 SCC 379 : Gujurat State Financial Corporation Vs. Lotus Hotels.
4. 1988 SCC LSS 592 : Ashok Kumar Maheswari Vs. State of U.P.
5. AIR 2002 SC 322 : 2002) 2 SCC 188 : Sharma Transport Vs. Govt. of A.P.
6. (2004) 7 SCC 673 : State of Rajasthan Vs. J.K. Udaipur Udyog Ltd.
7. (2007) 2 SCC 725 : A.P. Steel Re-rolling Mill Ltd.Vs. State of Kerala.
8. (2003) 9 Scale 578 : State of Orissa Vs. Manglam Timber Products Ltd.
9. AIR 1952 SC 123 : Kathi Raning Rawat Vs. State of Saurastra.
10. AIR 1981 SC 818 : Swedeshi Cotton Mills Vs. Union of India.
11. (1989) 3 SCC 202 : I.J. Rao, Asstt. Collector of Customs Vs. Bibhuti Bhusan Bagh.
12. AIR 1978 SC 851 : Mohinder Singh Gill Vs. The Chief Election Commissioner.
13. (2015) 4 SCC 270: M/s Pepsico India Holding Pvt. Ltd Vs. Krishna Kant Pandey.

For Petitioner : M/s. K.C. Sahu, B.S. Panigrahi & D.K. Mahallik.
For Opp. Parties : Mr. A. Rath, Addl. Standing Counsel.

JUDGMENT Date of Hearing: 06.04.2021: Date of Judgment: 13.04.2021

Dr. B.R. SARANGI, J.

The petitioners, who are working as Multipurpose Health Worker (Male), have filed this writ petition seeking to quash the order dated 27.11.2020 under Annexure-14, whereby the orders antedating the regularization of the petitioners have been cancelled in pursuance of the orders passed by the Odisha Administrative Tribunal in different Original Applications.

2. The factual matrix of the case, in hand, is that an advertisement was issued in the year 2006 by the Chief District Medical Officer (C.D.M.O.), Nayagarh vide Annexure-1 for engagement of contractual daily wage staff under the Health and Family Welfare (H&FW) Department in Nayagarh district in different posts, which includes the post of Multipurpose Health Worker (Male) [for short "MPHW (M)"]. It was stipulated in the advertisement that the candidates must have passed HSC examination, besides other conditions, such as, the candidates of Nayagarh district would be given preference for appointment and such appointment would be purely temporary and may be terminated at anytime without assigning any reason thereof. The selected candidates were to submit an undertaking to the effect that they would not claim any government post/regular appointment in future and the candidates appointed on contractual basis would not claim for inter-district transfer. Name of the post applied for must be written on the top of the envelope and the applications with the requisite documents must reach the office of CDMO, Nayagarh on or before 08.08.2005 by registered/speed

post only. Incomplete applications and those received after due date or by means other than by registered/speed post would be summarily rejected. The application would be accompanied with attested copies of HSC certificate or its equivalent examination with mark sheet, diploma in nursing and midwifery certificate, any other educational qualification certificate and experience certificate, if any. In the advertisement it was also clearly mentioned that there were 65 vacancies in the post of MPHW (M) and the same would be filled up as per the ORV Act (80 point roster).

2.1 Pursuant to such advertisement, the petitioners along with others applied for the post of MPHW (M). By following due process of selection, the selection committee recommended vide order no.946 dated 18.02.2006 for their engagement on contractual basis and consequentially the petitioners were posted as per the stations mentioned in their engagement orders vide Annexure-2 series. At the time of initial engagement of the petitioners on contractual basis, regular process of selection was followed along with all other formalities, such as, advertisement, ORV Act etc. The petitioners were engaged as MPHW (M) on contractual basis against the regular sanctioned vacant posts, as per the decision of the government, like other paramedical posts, such as, Pharmacist, Staff Nurse, Lab Technician, Radiographer etc. As such, the posts against which the petitioners were engaged on contractual basis are sanctioned paramedical posts, in view of the letter of the government dated 09.06.2005 under Annexure-3. After their engagement on contractual basis, the petitioners have been discharging their duties continuously and in the meantime have completed more than 15 years. Therefore, otherwise also they should have been absorbed on regular basis on completion of six years of service, as their counterpart paramedical staff holding the posts of Pharmacist, Staff Nurse, Lab Technician, Radiographer etc., who were recruited along with the petitioners, have been regularly absorbed on completion of six years. Such discriminatory action of the opposite parties violates Articles 14 and 16 of the Constitution of India.

2.2 Opposite party no.3 regularized the services of the petitioners along with others w.e.f. 18.09.2013 as per order communicated vide memo no. 2785 dated 20.06.2014 on the basis of G.A. Department resolution dated 17.09.2013. Even though they had completed six years of contractual services since 2011 but their services were not regularized from that date of completion of six years of contractual service, although similar such employees like Pharmacists, those who were employed along with the

petitioners in response to very same advertisement, have been regularized from the date of exact completion of six years of contractual service.

2.3 The Health and Family Welfare Department, vide resolutions dated 29.10.2008 and 13.05.2013, with concurrence of the Finance Department took a policy decision that Pharmacist, Staff Nurse, Lab Technician, Radiographer etc. continuing on contractual basis for a period of six years are to be regularly absorbed converting the said contractual to regular one and basing upon the same the services of the said paramedical employees have been brought over to regular establishment, whereas the petitioners have been discriminated.

2.4 Due to non-regularization of the services of the petitioners by antedating their date of regularization from the date of completion of six years of contractual service like other paramedical posts, such as, Pharmacist, Staff Nurse, Lab Technician, Radiographer etc., the petitioners approached the State Administrative Tribunal by filing O.A. No. 13(B) of 2018, O.A. No. 10(B) of 2018, O.A. No.1735 of 2018 and O.A. No.2758 of 2018 with a prayer for antedating their regularization exactly from the date of completion of six years of contractual service like other paramedical contractual posts. The tribunal allowed those original applications directing the opposite parties to take appropriate decision for regularization of the services of the petitioners on completion of six years of contractual service, as has been done in the case of other paramedical posts by antedating their regularization on completion of six years of contractual service with consequential service benefits, within a period of three moths from the date of receipt of copy of the order. As such, the tribunal, while passing the order, relying upon the ratio as well as principle decided in O.A. No.2023 of 2015 and O.A. No.1821 of 2015, directed to consider the case of the petitioners. Needless to say, Government had already allowed the benefit of antedating of service with regard to the petitioners in O.A. No. 1821 of 2015 after getting concurrence from the Law Department as well as the Finance Department. Accordingly, on the basis of the order passed in O.A. No.1821 of 2015, Government directed to the CDMO, Jagatsinghpur for implementation of the same. Consequentially, the CDMO, Jagatsinghpur, vide order no.1074 dated 12.04.2018, directed for regularization of the petitioners in O.A. No.1821 of 2015 by antedating their services from the date of completion of six years of contractual service with all consequential service and financial benefits.

2.5 As a consequence thereof, the CDM & PHO, Nayagarh vide order dated 01.10.2018 under Annexure-12 passed order antedating regularization of services of the petitioners from the date of completion of six years of contractual service with all consequential service and financial benefits. After the order of the tribunal so also after implementation of the order passed by the CDM & PHO, Nayagarh, consequential benefits, including financial benefits so also seniority of the petitioners had been fixed and their names were indicated in the gradation list of MPHW (M) taking into account their revised antedated regularization under Annexure-12.

2.6 While the petitioners were so continuing, Govt. of Odisha in Health and Family and Welfare Department wrote a letter to all the CDM and PHOs referring to O.A. No.1554 of 2018 filed by Bipra Charan Mahal and others stating therein that State has filed writ petition against the order passed by the tribunal in all antedated cases on the basis of the views of the Law Department. Consequentially, vide letter dated 27.11.2020, the Government in Health and Family and Welfare Department wrote to all the CDM & PHOs with regard to cancellation of orders of antedated regularization of MPHW (M) and MPH (F) pursuant to orders passed by the tribunal in different O.As under Annexure-14. Hence this application.

3. Mr. K.C. Sahu, learned counsel for the petitioners vehemently contended that when similarly situated paramedical employees have got the benefit of regularization of service on completion of six years of service, non-extension of such benefit to the petitioners, who are similarly situated with that of para-medical staff, amounts to violation of Articles 14 and 16 of the Constitution of India and discriminatory. It is contended that pursuant to the order passed by the tribunal by getting concurrence from the Law Department as well as Finance Department, if the petitioners were regularized by antedating their services and also extended with the financial benefits as well as other service benefits, such as seniority, without giving due opportunity of hearing, any cancellation thereof under Annexure-14 cannot sustain in the eye of law and the same is hit by principles of natural justice. It is further contended that the petitioners were given antedated regularization against the sanctioned posts like that of other similarly situated paramedical staff and, therefore, without following due procedure of law, cancellation thereof cannot sustain in the eye of law and, as such, the order impugned dated 27.11.2020 has to be quashed. It is further contended that if the petitioners were allowed to continue by granting antedated regularization

along with seniority and other service and financial benefits, the decision taken for cancellation of such regularization is hit by provisions of estoppel. Thereby, the order dated 27.11.2020 cannot sustain in the eye of law and, as such, the same is liable to be quashed.

It is further contended that the petitioners were extended with the benefits pursuant to the order passed by the tribunal, which was challenged before this Court by way of filing writ petition and the same having been dismissed, the order passed by the tribunal reached its finality. Consequentially, if the benefits had already been extended to the petitioners, the same should not have been cancelled and, as such, the same amounts to violation of order passed by the tribunal as well as this Court. It is further contended that the tribunal has extended the benefit of regularization of service on completion of six years of contractual service like other paramedical staff such as Pharmacist, Staff Nurse, Lab Technician, Radiographer etc., thereby the petitioners could not have been discriminated. It is contended that when the direction given by the tribunal got concurrence from the Law Department as well as Finance Department and the same having been implemented and the benefit having been extended, by passing the order impugned, the same cannot be withdrawn on some pretext or other. It is further contended that challenging the order passed by the tribunal writ petitions bearing W.P.(C) No.4253 of 2021 (***State of Odisha v. Mahendra Nath Karan and others***) and W.P.(C) No.37783 of 2020 (***State of Odisha v. Trilochan Gochhayat and others***) though preferred by the State, but a Division Bench of this Court vide orders dated 09.03.2021 and 24.02.2021 respectively dismissed the said writ petitions. Similarly, W.P.(C) No.33917 of 2020 had been filed by one Sanjaya Kumar Biswal seeking direction to the CDM & PHO, Dhenkanal to implement the order passed by the tribunal in O.A. NO.12(B) of 2018 and in compliance of the same the Dy. Secretary, namely, Dr. Jasmine Patnaik (OAS) has passed the order on 21.06.2019 directing the CDM & PHO, Dhenkanal to implement the order passed by the tribunal. But the very same Dy. Secretary passed the order impugned dated 27.11.2020 cancelling the antedated regularization of the petitioners without any application of mind, thereby, the order impugned dated 27.11.2020 cannot sustain in the eye of law.

4. Mr. A. Rath, learned Addl. Standing Counsel for the State, referring to the counter affidavit filed by opposite parties no.1 and 2, contended that pursuant to the advertisement issued by CDM & PHO, Nayagarh selection

was done for the post of MPHW (M) on contractual basis on consolidated pay per month. As per the conditions for contractual appointment to the paramedical posts, as mentioned in the advertisement, the appointment is purely temporary and may be terminated at any time without assigning any reason thereof. The selected candidates were to submit an undertaking to the effect that they would not claim any government post/regular appointment in future. Therefore, on the basis of such condition stipulated in the advertisement, if the petitioners were selected and appointed, they will have no right to claim for regularization and they are bound by the terms and conditions of the contract itself. The reliance placed by the petitioners with regard to the G.A. Department resolution dated 17.09.2013 resolving therein to regularize the appointment of existing contractual Group-C and Group-D employees, who are not holding any post in contravention of any statutory recruitment rules made under the proviso to Article 309 of the Constitution of India or any executive instruction in absence of any rules. As per clause-2(1) of the above resolution "on the date of satisfactory completion of six years of contractual service or from the date of publication of the resolution, whichever is later, they shall be deemed to have been regularly appointed, a formal order of regular appointment shall be issued by the appointing authority". The said resolution has been passed in supersession of the resolution/orders/ instructions issued by different departments of government to that effect. Pursuant to such resolution, the services of the petitioners were regularized from 18.09.2013, i.e., the date of publication of resolution dated 17.09.2013 and the petitioners having accepted the same without any objection, now they cannot turn around and say that it should be given from the date they have completed six years of contractual service. It is further contended that the resolution dated 29.10.2008 and resolution nos.14575, 14567 and 14571 dated 13.05.2013 under Annexure-5 is with regard to contractually appointed Pharmacists, Radiographer, Laboratory Technicians, etc. and, as such, there was no such policy of the government for regularization of Health Workers appointed on contractual basis except the resolution dated 17.09.2013 of the G.A. Department and the petitioners have been regularized as per the resolution dated 17.09.2013. Thereby, no illegality or irregularity has been committed by the authority in cancelling the antedation regularization vide order dated 27.11.2020.

5. This Court heard Mr. K.C. Sahu, learned counsel for the petitioners and Mr. A. Rath, learned Addl. Government Advocate by virtual mode and perused the record. Since pleadings having been exchanged between the

parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. In the above backdrop, the only consideration to be made in this writ petition is whether the order impugned under Annexure-14 dated 27.11.2020 cancelling the orders antedating the regularization of the petitioners, pursuant to the order passed by the tribunal in different Original Applications, is legally tenable and well justified. It is not disputed that the petitioners, in pursuance of the orders dated 02.07.2018, 24.07.2018 and 02.07.2018 passed by the tribunal in O.A. No.13(B) of 2018, O.A. No.1735 of 2015 and O.A. No.10 (B) of 2018 respectively and consequential communication, vide D.H.S. (O) letter no.15304/MF (NVBDCP)-IV-OA-25/12018 dated 27.07.2018, were regularized with effect from the date of their completion of six years of service with usual pay and G.P. as admissible, vide Annexure-12 dated 01.10.2018. Consequent upon such regularization, the petitioners have been extended with the service and financial benefits as admissible to their posts on completion of six years of contractual employment. Thereby, the action so taken subsequent thereof in cancelling their antedating regularization, vide impugned order dated 27.11.2020 under Annexure-14, cannot sustain in the eye of law and, as such, the same is hit by the principle of promissory estoppel.

7. The ***Law Dictionary*** expresses promissory estoppel to the following effect:-

> *"A promise by which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promise, and which does induct such action or forebearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise."*

8. In ***Halsbury's Laws of England***, Fourth Edition, Vol.16 in Para-1514 at page 1017, the "promissory estoppel" has been defined to the following effect:-

> *"Promissory estoppel: When one party has, by his words or conduct made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."*

9. In ***Central London Property Trust Ltd. v. High Treas House Ltd.***, (1956) 1 All ER 256, it has been held that a promise is intended to be binding, intended to be acted upon, and in fact acted upon is binding.

10. In ***Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council***, (1970) 1 SCC 582, it has been held that there is no distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.

11. In ***Gujurat State Financial Corporation v. Lotus Hotels***, (1983) 3 SCC 379, it has been held that the principle of "promissory estoppel" would estop a person from backing out of its obligation arising from a solemn promise made by it to the respondent.

12. In ***Ashok Kumar Maheswari v. State of U.P.***, 1988 SCC LSS 592, it has been held that doctrine of "promissory estoppel" has been evolved by the Courts on the principle of equity to avoid injustice.

13. In ***Sharma Transport v. Govt. of A.P.***, AIR 2002 SC 322: 2002) 2 SCC 188, it has been held that the Government is equally bound by its promise like a private individual, save where the promise is prohibited by law, or devoid of authority or power of the officer making the promise. The equitable doctrine of promissory estoppel must yield where the equity so requires in the larger public interest.

14. In ***State of Rajasthan v. J.K. Udaipur Udyog Ltd.***, (2004) 7 SCC 673, it has been held that the "promissory estoppel" operates on equity and public interest.

15. In ***A.P. Steel Re-rolling Mill Ltd. v. State of Kerala***, (2007) 2 SCC 725, it has been held that where a beneficent scheme is made by the State, the doctrine of "promissory estoppel" would apply.

16. In ***State of Orissa v. Manglam Timber Products Ltd.***, (2003) 9 Scale 578, it has been held that to attract applicability of promissory estoppel a contract in writing is not a necessary requirement. This principle is based on premise that no one can take advantage of its own omission or fault.

17. Applying the principle of "promissory estoppel" to the present context, the Government, being a model employer, is bound by its promise

like regularization of service on completion of six years and, as such, the same is not prohibited by law, or devoid of authority or power of the officer making the promise. Rather, the benefit has been extended to the petitioners, in pursuance of the direction given by the tribunal. Therefore, the subsequent pleadings made in the counter affidavit that regularization can only be made applicable to the petitioners, in view of the G.A. Department notification dated 17.09.2013, is absolutely misconceived. Though it is admitted in the counter affidavit that contractual appointment of Pharmacists, Staff Nurse, Laboratory Technicians and Jr. Radiographers, etc. has been regularized in Nayagarh district on completion of uninterrupted six years of contractual services, as per the instructions issued by the government in Health and FW Department resolutions no.24160/H dated 29.10.2008, no.14575/H dated 13.05.2013 and no.14571/H dated 13.05.2013 under Annexure-5 series, but it is contended that no direction regarding regularization of contractual services of the MPHW (M) and their counterparts has been issued by the Government. If similarly situated paramedical staff have extended with the benefits of regularization of service on completion of six years, there is no valid and justifiable reason available with the State-authority not to extend such benefit to the MPHW (M), who stand on similar footing with those paramedical staff of the State. There is no plausible reason available with the State-authority to say that MPHW (M) employees are not the paramedical staff and they are distinct from them. If the petitioners are working as paramedical staff and, as such, if similarly situated persons have already been extended with the benefit of regularization on completion of six years of service, merely because no individual and separate order in that regard has been passed by the State Government, it cannot disentitle them from getting the benefit as claimed. Thereby, the action so taken by the authority is absolutely arbitrary, unreasonable, discriminatory and violative of Articles 14 and 16 of the Constitution of India.

18. Discrimination means difference in the treatment of two or more persons or subject. In ***Kathi Raning Rawat v. State of Saurastra***, AIR 1952 SC 123, it has been held that discrimination involves an element of unfavourable bias and it is in that sense the expression must be understood.

19. Therefore, if the paramedical staff, such as, Pharmacists, Staff Nurse, Laboratory Technicians, Jr. Radiographer, etc., those who were appointed on contractual basis, have already been regularized on completion of six years of service, such benefit to the similarly situated paramedical staff, namely,

MPHW (M) cannot be denied, as it suffers from vices of discrimination and, as such, it involves an element of unfavourable bias and there is difference in the treatment of two or more persons or subjects, which is violative of Articles 14 and 16 of Constitution of India.

20. In ***Swedeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the apex Court held that the maxim *audi alteram partem* has many facets. Two of them are: (a) notice of the case to be met; and (b) opportunity to explain.

21. In ***Forest v. Brighton***, (1981) 2 All ER 711, ***Lord Fraser of Tullybelton*** opined that one of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any administrative or judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representation, if any, as he sees fit.

22. In ***Selvarajan v. Race Relations Board***, (1976) 1 All ER 12, ***Lord Denning, MR*** opined that the fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be tale the case made against him and be afforded a fair opportunity of answering.

23. In ***I.J. Rao, Asstt. Collector of Customs v. Bibhuti Bhusan Bagh***, (1989) 3 SCC 202, it has been held that where rights of a person are adversely and prejudicially affected by an order made by an authority in a proceeding, such person is entitled to a pre-decisional notice irrespective of whether the proceeding is judicial, quasi-judicial or administrative in nature.

24. Therefore, notice is the first limb of *audi alteram partem*. It is essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play.

25. The four essentials of "due process" concept are: (a) notice of hearing, (b) opportunity of hearing, (c) impartiality of tribunal, and (d) an orderly course of procedure. A notice of hearing is, in fact, the prerequisite of the other three essentials, as it will be difficult for any person to avail himself of the opportunity of hearing or sticking to claim of impartiality of a

tribunal or of the orderly course of procedure unless he knows that a hearing is going to take place.

26. In ***Mohinder Singh Gill v. The Chief Election Commissioner***, AIR 1978 SC 851, the apex Court held that since in the absence of notice, hearing becomes hallow, the right becomes a ritual, the court may invalidate a decision for lack of pre-decisional notice.

27. Applying the above principles to the present context, admittedly while passing the order impugned under Annexure-14 dated 27.11.2020 cancelling the orders antedating regularization of the petitioners, no notice has been given to them. As such, by virtue of the order passed in Annexure-12 dated 01.10.2018 regularizing the services of the petitioners on completion of six years of service at par with their counterpart paramedical staff, a right has already been accrued in favour of the petitioners and more particularly they have been given financial as well as service benefits by fixing their seniority. Thereby, while cancelling such benefits, which had already been extended, principles of natural justice was to be complied with. As the same has not been complied with, the impugned order in Annexure-14 dated 27.11.2020 cannot sustain in the eye of law.

28. Apart from the above, on perusal of the impugned order dated 27.11.2020 in Anenxure-14, it appears that the same has been passed by the authority, pursuant to the orders passed by the tribunal in different O.As. But admittedly, such orders passed by the tribunal, where directions for regularization of MPHW (M) on completion of six years of service were issued, were challenged by the State before this Court by filing various writ petitions bearing W.P.(C) No.4253 of 2021 (***State of Odisha v. Mahendra Nath Karan and others***) and W.P.(C) No.37783 of 2020 (***State of Odisha v. Trilochan Gochhayat and others***), and a Division Bench of this Court, vide orders dated 09.03.2021 and 24.02.2021, dismissed the said writ petitions holding that there was no error apparent on the face of record and, as such, while dismissing the writ petitions reliance was placed by this Court on the case of ***M/s Pepsico India Holding Pvt. Ltd v. Krishna Kant Pandey***, (2015) 4 SCC 270, wherein the apex Court held that where there is error apparent on the face of record, the same can be interfered with by a writ Court in exercise of its jurisdiction under Article 227 of the Constitution of India. Therefore, if the writ petitions preferred by the State Government against the orders passed by the tribunal were dismissed, there was no valid and justifiable

reason available with the State to pass an order on 27.11.2020 under Annexure-14 cancelling the orders antedating regularization of service of MPHW (M) and MPHW (F). More so, in compliance of the order passed by this Court in W.P.(C) No.33917 (***Sanjay Kumar Biswal v. State of Odisha***), when direction had already been given by the Dy. Secretary to Government, namely, Dr. Jasmine Patnaik, OAS vide letter dated 21.06.2019 to the CDM & PHO, Dhenkanal to implement the orders passed by the tribunal in O.A. No.12 (B) of 2018, the very same authority ought not have passed the order impugned in Annexure-14 dated 27.11.2020, which itself shows that the same has been passed without any application of mind. Therefore, the order impugned on this count also cannot sustain in the eye of law.

29. The contention raised by Mr. A. Rath, learned Addl. Standing Counsel that since the G.A. Department has passed resolution on 17.09.2013, no retrospective regularization can be made by the authority, is not legally tenable in view of the fact that similarly situated paramedical staff have already been extended with the benefits as per the very same G.A. Department notification. Therefore, the petitioners, having stood in the same footing, cannot be denied such benefit.

30. Taking into consideration the cumulative effect of the discussions, as made above, this Court is of the firm opinion that the order dated 27.11.2020 under Annexure-14 issued by the Deputy Secretary to Government in Health and Family Welfare Department to all the C.D.M. & P.H.Os., Odisha, with regard to cancellation of orders of antedation of regularization of MPHW (M) and MPHW (F), cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. Since the rights of the petitioners have been protected by this Court by passing the interim orders, they shall be deemed to be continuing in service on regularization as before from the date they have completed six years contractual service as per Annexure-12 dated 01.10.2018.

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

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2021 (II) ILR - CUT- 379

Dr. B.R.SARANGI, J.

W.P.(C) NO. 7021 OF 2011

KABERI BEHERA ..... Petitioner

.V

STATE OF ORISSA AND ORS. .....Opp. Parties

WORDS AND PHRASES – "Mistake" – Meaning thereof – Held, "Mistake" is not mere forgetfulness; it is a slip "made, not by design but, by mischance" – Otherwise also the "mistake" includes an error in conduct consisting of an unintended failure to perform correctly and effectively a task intended to be duly performed – However, it is well settled in law that if a mistake is committed by the authority, the same can be corrected when it is brought to the notice. (Para 7 & 8)

Case Laws Relied on and Referred to :-

1. AIR 2001 SC 682 : (2001) 2 SCC 451 : West Bengal Electricity Board Vs. Patel Engg. Co. Ltd.
2. (2008) 2 SCC 439 : Deva Metal Powders (P) Ltd. Vs. Commr. Trade Tax, U.P.

For Petitioner : M/s. Srikanta Ku. Sahoo, A.K. Sahoo, B.B. Biswal, & M. Mahapatra.

For Opp. Parties : Mr. B.P. Tripathy, Addl. Government Advocate. M/s. P.K. Samantaray & R.N. Parija.

JUDGMENT Decided On : 09 .03.2021

Dr. B.R. SARANGI, J.

Kaberi Behera, who was a candidate for selection of Anganwadi Helper, has filed this writ petition to quash the order dated 21.09.2010 passed by the Additional District Magistrate, Puri in Anganwadi Misc. Case No. 2 of 2010, as well as the engagement order issued in favour of opposite party no.5-Mitanjali Swain, and further seeks for a direction to opposite parties no. 1 to 4 to give her engagement in the post of Anganwadi Helper of Torabanga Anganwadi Centre.

2. The factual matrix of the case, in hand, is that opposite party no.4, Child Development Project Officer (CDPO), Nimapara issued an advertisement on 18.01.2010 under Annexure-2 regarding selection of

Anganwadi Helper in different Anganwadi Centers of Nimapara Gram Panchayat. In the said advertisement, it was indicated to hold Mahila Sabha in all the centers, where intending women candidates were to remain present. It was also indicated therein that the candidate, who intends to apply for the post of Anganwadi Helper, should be a permanent resident of the Anganwadi Centre area, her age should not be less than 18 years as on 01.01.2020, she should have competency to manage the center, she should be liked by the villagers, should be able to read and write and should have shown her interest to work for the women and children of the locality. So far as Torabanga Anganwadi Centre is concerned, the date, time and place were fixed for Mahaila Sabha as 25.01.2010 at 10.00 a.m. in the premises of Torabanga Nilakantheswar Temple of Badasiribula G.P.

2.1 In compliance of notice dated 18.01.2010 under Annexure-2, the petitioner, along with three other candidates, participated in the process of selection for the post of Anganwadi Helper of Torabanga Anganwadi Centre. Out of four candidates, educational qualification of the petitioner being highest, majority of women selected the petitioner to be engaged as Anganwadi Helper. On the scheduled date, time and place though Mahila Sabha was held, result of such meeting was published later on selecting opposite party no.5-Mitanjali Swain and engaging her Anganwadi Worker. Her selection was objected to by local women, who submitted application on 08.03.2010 to the CDPO requesting to stick to the decision arrived at in the meeting. Since the petitioner was selected, she submitted an independent representation on 10.03.2010 before the Collector & District Magistrate, Puri requesting to look into the matter, which was marked to the CDPO for doing the needful, but no action was taken.

2.2 Due to non-consideration of the grievance made by the petitioner, she approached this Court by filing W.P.(C) No. 6970 of 2010, which was disposed of vide order dated 19.04.2010 with a direction that if the petitioner filed a fresh representation along with a copy of the order within two weeks from that day before the Addl. District Magistrate, Puri, the same would be disposed of by the ADM in accordance with law within a period of four weeks from the date of filing of the representation by giving opportunity of personal hearing to the petitioner and the affected parties. In compliance of the same, the petitioner filed a representation before the ADM, Puri, which was registered as Anganwadi Misc. Case No. 2 of 2010. Therein, the ADM issued notice to opposite party no.5 and, by affording opportunity of hearing,

passed order impugned dated 21.09.2010 by holding that the petitioner was not diligent enough to find out the real candidate in whose favour appointment order was issued. On the contrary, she moved the High Court impleading Gitanjali Swain as opposite party no.6 in W.P.(C) No. 6970 of 2010, who was not the real candidate. As such, the petitioner was not sincere to implead Mitanjali Swain as an opposite party, after the fact came to her notice to adduce evidence in support of her appointment as Anganwadi Helper in Torabanga Anganwadi Centre under ICDS Project, Nimapara. Thus the appeal filed by the petitioner, having no merit, was rejected. Hence this application.

3. Mr. B.B. Biswal, learned counsel for the petitioner argued with vehemence that the petitioner, who sought for engagement as Anganwadi Helper, has got higher qualification in comparison to other candidates whosoever were in the field and also belonged to SC community and, therefore, non-selection of the petitioner as Anganwadi Helper is arbitrary unreasonable and contrary to the provisions of law. It is further contended that a pre planned and well prepared resolution was passed on 25.01.2010 to show favour to Smt. Gitanjali Swain, who has been selected as Anganwadi Helper in respect to Torabanga Ananwadi Centre. Thereby, the entire selection process has to be quashed. Consequentially, rejection of the representation of the petitioner vide impugned order dated 21.09.2010 passed in Anganwadi Misc. Case No. 2 of 2010, which has been passed in pursuance of order dated 19.04.2010 passed by this Court in W.P.(C) No.6970 of 2010, cannot sustain in the eye of law and also engagement order issued in favour of opposite party no.5 should be quashed.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties contended that no candidate named Gitanjali Swain had ever participated in the Mahila Sabha held for selection of Anganwadi Helper in respect to Torabanga Ananwadi Centre. But, due to mishearing by the supervisor, the name of Mintanjali Swain was wrongly written as Gitanjali Swain and, accordingly, the appointment order was issued in the name of Gitanjali Swain. But, when the said mistake was realized, it was rectified subsequently. As such, said supervisor has also filed an affidavit stating that due to her heard of hearing, the name of Mitanjali Swain was written by her as Gitanjali Swain in the proceeding meeting, and that as soon as this fact came to her knowledge she rectified the same giving correct name as Mitanjali Swain in place of Gitanjali Swain. Thereby, no illegality or

irregularity has been committed by indicating correct name of the opposite party no.5. Consequentially, the grievance made by the petitioner cannot sustain in the eye of law and, as such, the ADM has rightly rejected the representation of the petitioner in due application of mind. Therefore, the writ petition should be dismissed.

5. Mr. R.N. Parija, learned counsel appearing for opposite party no.5 contended that no candidate named Gitanjali Swain had ever participated in the process of selection. Rather, opposite party no.5-Mitanjali Swain participated in the process of selection and she, having been supported by a large number of women in the Mahila Sabha, was declared to be engaged as Anganwadi Helper of Torabanga Ananwadi Centre. If a wrong was committed by the supervisor in recording the name of "Gitanjali Swain" in place of "Mitanjali Swain", that itself cannot disentitle her to continue as Anganwadi Helper and the petitioner cannot take advantage of such mistake and claim that she should be engaged as Anganwadi Helper in place of opposite party no.5. More so, the petitioner had not impleaded Mitanjali Swain as a party in her earlier writ petition, rather she had impleaded therein Gitanjali Swain as opposite party no.6, even though she knew that a mistake was committed on the part of the supervisor, who had heard of hearing, and when the same was brought to her notice, she rectified the same indicating Mitanjali Swain in place of Gitanjali Swain. Thereby, no illegality or irregularity was committed in the process of selection of Anganwadi Helper in respect of Torabanga Ananwadi Centre. More so, there is no such allegation made in the writ petition with regard to illegality or irregularity committed in the process of selection of Anganwadi Helper of the Torabanga Ananwadi Centre. Thereby, he seeks for dismissal of the writ petition.

6. This Court heard Mr. B.B. Biswal, learned counsel for the petitioner; Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for opposite parties no.1 to 4; and Mr. R.N. Parija, learned counsel for opposite party no.5. The opposite parties have not filed their counter affidavit in this case. It is contended that since it is a certiorari proceeding, on the basis of the pleadings available, it can be heard and disposed of at the stage of admission. Therefore, with the consent of the parties, the matter is being disposed of finally at the stage of admission.

7. The factual matrix, as delineated above, as well as the contentions raised by learned counsel appearing for the respective parties, as recorded

hereinbefore, if summed up, would emerge that challenging the selection of opposite party no.5, the petitioner raised an objection before the authority, but the same having not been acceded to, she approached this Court by filing W.P.(C) No. 6970 of 2010, which was disposed of vide order dated 19.04.2010 directing the petitioner to file a fresh representation to be considered by the ADM in accordance with law by affording opportunity of hearing to the affected parties. In compliance of the same, the ADM passed the impugned order dated 21.09.2010. As is evident from the said order, the ADM, on receipt of the application filed by the petitioner, registered the same as Anganwadi Misc. Case No.2 of 2010 and issued notice to all the parties to adduce evidence. But, notice as against Gitanjali Swain, who was opposite party no.6 in the said writ petition, could not be made sufficient and on the other hand a report was received from the police station that there was no such person in the village as Gitanjali Swain. Therefore, Mitanjali Swain, opposite party no.5 appeared and submitted that there was no such person as Gitanjali Swain in the village and she herself is Mitanjali Swain, who had been engaged as Anganwadi Helper of Torabanga Anganwadi Centre under Nimapara Block. The CDPO, Nimapara, on being called for, also submitted a report indicating therein that on verification of bio-data of the candidates and obtaining the majority views of the village Mahila Sabha, one Mitanjali Swain was selected as Anganwadi Helper of Torabanga Ananwadi Centre, but, while recording by the supervisor, the name of Mitanjali Swain had been wrongly written as Gitanjali Swain, as the said supervisor was suffering from heard of hearing. But consequentially, when this fact was brought to her notice, she rectified her mistake and corrected the name of Gitanjali Swain as Mitanjali Swain, opposite party no.5 herein. Though it is urged that the petitioner was selected in the proceeding held on 25.01.2010 for engagement as Anganwadi Helper of Torabanga Ananwadi Centre, but nothing has been placed on record to justify the same and prove that Mahila Sabha had selected her to be engaged as Anganwadi Helper. In the above premises, one thing is clear that wrong mentioning of the name of opposite party no.5 as Gitanjali Swain in place of Mitanjali Swain by the supervisor concerned, which was subsequently corrected on being noticed, has created such a confusing situation. Be that as it may, it is well settled in law that if a mistake is committed by the authority, the same can be corrected when it is brought to the notice.

8. **"MISTAKE"** is not mere forgetfulness; it is a slip "made, not by design but, by mischance". Otherwise also the "mistake" includes an error in

conduct consisting of an unintended failure to perform correctly and effectively a task intended to be duly performed.

9. In ***West Bengal Electricity Board v. Patel Engg. Co. Ltd.*** AIR 2001 SC 682 : (2001) 2 SCC 451, the apex Court held that a mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake.

10. In ***Deva Metal Powders (P) Ltd. v. Commr. Trade Tax, U.P.,*** (2008) 2 SCC 439, the word mistake means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error, a fault, a misunderstanding, a misconception.

11. Taking into consideration the meaning attached to the word "mistake", as mentioned above, that it is a misconception or error, which is unilateral or mutual, but it is always unintentional, and when it has been candidly stated that due to heard of hearing it is the supervisor who inadvertently mentioned the name of Gitanjali Swain in place of Mitanjali Swain and, as such, there is no such person Gitanjali Swain available in the village, consequentially, correct name has been indicated as Mitanjali Swain, thereby, no illegality or irregularity can be said to have been committed by the authority by issuing engagement order in favour of Mitanjali Swain, who had secured highest support in the Mahila Sabha to be engaged as Anganwadi Helper in respect of Torabanga Anganwadi Centre.

12. In view of such position, this Court does not find any illegality or irregularity in the impugned order dated 21.09.2010 passed by the ADM, Puri in Anganwadi Misc. Case No. 2 of 2010 vide Annexure-9 series, particularly when the selection and engagement of opposite party no.5 has been done in consonance with the guidelines issued by the government.

13. The writ petition thus merits no consideration and the same stands dismissed. There shall be no order as to costs.

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2021 (II) ILR - CUT- 384

Dr. B.R. SARANGI, J.

WPC(OAC) NO. 4118 OF 2012

BAMADEV SAHOO .....Petitioner

.V.

STATE OF ORISSA AND ORS. .....Opp. Parties

SERVICE LAW – 'The word 'lien' – Meaning thereof – Held, while considering Rule-9 (13) of the Fundamental Rules, it provides that "Lien means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively" – "Lien" connotes the right of a civil servant to hold the post substantively to which he is appointed. It is an incident of substantive appointment to a post – It is basically a singular concept since in public services substantive appointment is made against a particular post. (Para 11 &12**)**

Case Laws Relied on and Referred to :-

1. 1992 Supp (1) SCC 524: AIR 1992 SC 496 : Triveni Shankar Saxena Vs. State of U.P.
2. AIR 1958 SC 36 : Parshotam Lal Dhingra Vs. Union of India.
3. (1989) 4 SCC 99 : Ramal Khurana Vs. State of Punjab.
4. (1989) 2 SCC 84 : Haribans Misra Vs. Railway Board.
5. AIR 1936 PC 253 : Nazir Ahmed Vs. King Emperor.
6. AIR 1964 SC 358 : State of Uttar Pradesh Vs. Singhara Singh.
7. AIR 2001 SC 1512 Dhananjay Reddy Vs. State of Karnataka.
8. AIR 1999 SC 3558 : Chandra Kishore Jha Vs. Mahabir Prasad.
9. AIR 2008 SC 1921 : Gujrat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.
10. (2009) 6 SCC 735 : Ram Deen Maurya Vs. State of U.P.
11. 2016 (I) OLR 922 : Subash Chandra Nayak Vs. Union of India.
12. 2021 (I) OLR 844 : Rudra Prasad Sarangi Vs. State of Orissa and Ors.

For petitioner : M/s. Hara Prasad Rath & A.K. Behera.
For Opp. Parties : Mr. S. Jena, Standing Counsel for S & ME Department.

JUDGMENT Decided On : 29.06.2021

Dr. B.R. SARANGI, J.

The petitioner, who was working as Asst. Teacher, by means of this writ petition, seeks direction to the opposite parties for inclusion of his name in the draft gradation list dated 01.09.2012, which was prepared by opposite party no.3-District Inspector of Schools, Angul with a further prayer to quash the said draft gradation list.

2. The factual matrix of the case, in brief, is that the petitioner, by following due procedure of selection, was appointed as Asst. Teacher by the District Selection Committee and posted in Gopinathpur Lower Primary School, vide letter dated 22.09.1981 issued by the District Inspector of Schools, Angul-opposite party no.3, pursuant to which he joined on 26.09.1981. While so continuing, he acquired B.Ed. qualification on 1985

and became Trained Graduate from the date of acquisition of such qualification. By office order dated 21.01.1989 issued by the District Inspector of Schools, Dhenkanal, the petitioner was placed on deputation to Samal Barrage U.P. School under Angul Education District. Pursuant to such order, the petitioner was relived from the control of District Inspector of Schools, Dhenkanal and joined in Samal Barrage U.P. School on 01.02.1989 under the District Inspector of Schools, Angul, Orissa.

2.1 In order to regulate the method of recruitment and conditions of service of Teachers of Elementary Education, a set of Rule was framed in exercise of power conferred by the proviso to Article 309 of the Constitution of India, which came into force with effect from 18.12.1997 called as "The Orissa Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997 (hereinafter referred to as "Rules, 1997"). As per the said Rules, 1997, the post of Asst. Teachers of Govt. Primary and Upper Primary Schools belonged to Level-V. As the petitioner was working as Asst. Teacher in a Govt. Primary School, he was to be encadred in Level-V of Elementary Education Service. Rule-15 of the Rules, 1997 deals with seniority and preparation of gradation lists. All Asst. Teachers of Government Primary and Upper Primary Schools shall be treated as Level-V from the date of commencement of the said Rules, as per Explanation-I to Rule-15, and the seniority of such Asst. Teachers shall be determined with reference to the date of their appointment as such.

2.2 The opposite party no.2-Director, Elementary Education, Odisha, on 01.09.2012, published a draft gradation list of Level-V teachers having B.Ed. qualification as on that date. But, in the said draft gradation list, the petitioner's name was not enlisted, taking into consideration his date of joining as 26.09.1981. Therefore, he submitted an objection on 11.09.2012 specifically indicating therein that he having appointed as regular Asst. Teacher in Government Primary School on 22.09.1981 pursuant to which he joined on 26.09.1981, as per the stipulation made in Rule-15 of the Rules, 1997, his seniority ought to have been taken into account treating his date of appointment as 22.09.1981. On receipt of such objection dated 11.09.2012, the Director of Elementary Education, Odisha, vide his office order dated 24.09.2012 directed the District Inspector of Schools, Angul to furnish a detailed report along with the specific views and all supporting documents within a fortnight for further course of action. As no action was taken at his end, the Director, Elementary Education, Odisha-opposite party no.2, vide its

letter dated 30.11.2012, directed the District Inspector Schools, Angul-opposite party no.3 to send a clear report in detail informing that the petitioner's name was included in the gradation list or not. But, without responding to the same, the opposite party no.3-District Inspector of Schools, Angul proceeded to effect promotions from Level-V to Level-IV from out of the said draft gradation list causing prejudice to the petitioner. Aggrieved thereby, the petitioner filed O.A. No. 4118(C) of 2012 before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack, but on the abolition of the tribunal, the said original application has been transferred to this Court, pursuant to order dated 03.01.2020 passed by a Division Bench of this Court in W.P.(C) No. 26976 of 2019, and registered as writ petition.

3. Mr. H.P. Rath, learned counsel for the petitioner did not press the second limb of the prayer with regard to quashing of draft gradation list prepared by opposite party no.3-District Inspector of Schools, Angul, and contended that the authorities, by not considering the objection raised by the petitioner in proper perspective, have acted arbitrarily and unreasonably, and that on the basis of the draft gradation list, if promotions are effected from Level-V to Level-IV to the prejudice of the petitioner, the same cannot sustain in the eye of law. It is further contended that if the statutory rules prescribed a thing to be done in a particular manner, the same has to be adhered to in the same manner. When Explanation-I to Rule-15 of the Rules, 1997, unambiguously prescribes that the seniority of the petitioner shall be determined with reference to the date of his appointment, the petitioner, having been appointed as Asst. Teacher on 22.09.1981, his seniority should have been fixed accordingly. This position has been settled by this Court in W.P.(C) No. 14979 of 2010 and batch disposed of on 23.12.20211 and while interpreting the provisions of Exaplanation-1 to Rule-15 of Rules, 1997, this Court held that on the basis of initial date of appointment seniority is to be fixed. In view of the ratio decided in the said case, since the petitioner's date of appointment was 22.09.1981, his name should have found place in the gradation list prepared by the authority. Non-inclusion of his name in the draft gradation list prepared by the authority is arbitrary, unreasonable and contrary to the provisions of law.

4. Mr. S. Jena, learned Standing Counsel for School and Mass Education Department contended that the petitioner has not filed the draft gradation list dated 01.09.2012 along with the writ petition and, as such, in absence of the draft gradation list, the present case cannot be decided. Consequentially, the

writ petition is not maintainable and has to be dismissed in limine. It is further contended that the petitioner was appointed as Asst. Teacher and posted in Gopinathpur Lower Primary School, pursuant to the office order dated 22.09.1981 passed by the District Inspector of Schools, Angul and at that time the teachers of Primary Schools were not being treated as Govt. Servants and their services were only taken over by the Government in the year 1989. Therefore, the petitioner's claim for inclusion of his name in the draft gradation list from the date of his appointment in the service, w.e.f. 22.09.1981 cannot sustain in the eye of law and, as such, the writ petition is liable to be dismissed.

5. This Court heard Mr. A.K. Behra, learned counsel for the petitioner and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department through virtual mode, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, Rule-3 (1), (2)(i)(ii) and Rule-15(1)(a),(b) and (c) and Explanation-I of Rules, 1997, are quoted below:

> "***3. Constitution of Service-*** *(1) The Service shall comprise of the following levels, namely,*
>
> *(i) The Odisha Elementary Education Service,Level-V;*
>
> *(ii) The Odisha Elementary Education Service, Level-IV;*
>
> *(iii) The Odisha Elementary Education Service, Level-III;*
>
> *(iv) The Odisha Elementary Education Service, Level-II;*
>
> *(v) The Odisha Elementary Education Service, Level-I*
>
> *(vi) The Odisha Elementary Education Service, Level-l (Senior)*
>
> *(2) (i) The Odisha Elementary Education Service, Level-V shall consist of the Post of Assistant Teachers of Government Primary Schools and Assistant Teachers of Government Upper Primary Schools.*
>
> *(ii) The Odisha Elementary Education Service, Level-V shall consist of the posts of Headmasters/Headmistress of Government Primary Schools.*
>
> *xx xx xx*
>
> ***15. Seniority and gradation list –*** *(1)(a) The District Education Officer of the concerned Education Districts shall maintain gradating list separately for the posts*

belonging to Level-V, Level-IV and Level-III of the Service strictly on the basis of Seniority.

(b) The gradation list of incumbents of the above mentioned levels shall be updated by 15th July of every year.

(c) The District Education Officer shall invite objections by the 15th June before finalization of the gradation list and thereafter final gradation list shall be published by the 15th July of every year."

xx xx xx

***Explanation-I-** All persons now working as regular Assistant Teachers of Government Primary and Upper Primary Schools shall be treated as Members of Level-V of the Service from the date of commencement of these Rules. The seniority of such persons shall be determined with reference to the date of their appointment as such.*

xx xx xx

On perusal of the above mentioned rules, it is made clear that the Odisha Elementary Education Service Level-V consists of the posts of Assistant Teachers of Government Primary Schools and Assistant Teachers of Government Upper Primary Schools. For the purpose of implementation of Rule-15, the District Inspector of Schools of the concerned Education District shall maintain gradation list separately for the posts belonging to Level-V, Level-IV and Level-III of the Service strictly on the basis of seniority. As per Explanation-I, the persons those who are regular Assistant Teachers of Government Primary and Upper Primary Schools shall be treated as Members of Level-V of the service from the date of commencement of the rules and the seniority of such persons shall be determined with reference to the date of their appointment as such. Thereby, the rule is very clear that the seniority has to be determined with reference to the date of appointment.

7. On the basis of the factual matrix delineated above, there is no dispute that the petitioner has been issued with an appointment letter on 22.09.1981, by following due procedure of selection, by the District Selection Committee. In pursuance thereof, the petitioner joined on 26.09.1981. As such, he was appointed as an Assistant Teacher giving posting in Gopinathpur Lower Primary School. Therefore, applying the rules applicable to the petitioner, as an Asst. Teacher, his seniority should have been fixed in Level-V category on the basis of the Explanation-I to Rule-15 of the Rules, 1997 from the date of his initial appointment, i.e. from 22.09.1981. This fact is evident from the service book of the petitioner, which has been annexed as Annexure-2 to the writ petition, wherein it has been specifically mentioned that "*Appointed as*

primary school teacher vide order no. 3752 dt.22.09.81 of the D.I. of Schools, Angul." and the same has been duly endorsed by the competent authority. While so continuing, pursuant to letter dated 18.01.1989 of the Director of Elementary Education, Odisha, which was communicated vide letter dated 21.01.1989 of the Inspector of Schools, Dhenkanal Circle, he was deputed to Samal Barrage U.P. School to act as such in the old scale of pay without deputation allowance. Therefore, lien of the petitioner was continuing in his original post subject to deputation to new place of posting at Samal Barrage UP School. When the draft gradation list was prepared by the Director Elementary Education, Odisha and the name of the petitioner did not find place in the same, he filed objection vide Annexure-4 series enclosing the relevant documents. The same was attended to and the Deputy Director of Elementary Education, Odisha called upon the District Inspector of Schools, Angul to furnish a detailed report along with his specific views and all supporting documents to the Directorate within fortnight through a special messenger for taking further course of action at their end, but the same was not acted upon. Again, the Executive Engineer, Head Works Division, Samal Barrage provided the original service book of the petitioner to the District Inspector of Schools, Angul. Thereafter, on 30.11.2012, the Deputy Director, Elementary Education, Odisha again issued a letter to the District Inspector of Schools, Angul to furnish a report as to whether the name of the petitioner has been included in the gradation list or not, if not, the reasons along with his specific views in the matter be furnished to the Directorate by 03.12.2012. In response to same, the District Inspector of Schools, Angul furnished a report to the Director, Elementary Education, Odisha, Bhubaneswar stating inter alia that the petitioner, who was working as Asst. Teacher in Chhendipada Primary School under Angul Education District, was deputed to Samal Barrage U.P. School vide order dated 18.01.1989 of the Director, Elementary, Education, Odisha, Bhubaneswar, which was communicated vide memo no.1353 dated 21.01.1989 of the Inspector of Schools, Dhenkanal Circle, Dhenkanal. The Block Development Officer, Angul was informed, vide office memo no. 588 dated 28.01.1989, to relieve the petitioner. Being relieved by the B.D.O., Angul, the petitioner was working at Samal Barrage UP School on deputation. After his joining, he has not applied to any authority for cancellation of his deputation and also provided the original service book to the Director. This clearly indicates that the petitioner was continuing as Asst. Teacher in Chhendipada Primary School and his services were placed on deputation to Samal Barrage U.P. School. Therefore, the question of his application for cancellation of deputation, as stated by the

District Inspector of Schools, was not required. But that does not mean, his lien from Chhendipada Primary School to Samal Barrage School on deputation has been ceased.

8. In paragraphs-5 and 6 of the counter affidavit filed by opposite party no.3, it has been specifically stated as follows:

> *"5. That while the applicant was working as such, he was deputed the Samal Barrage U.P. School vide Order No. 1695 dtd.18.01.1989 of the Director of Elementary Education, Orissa, Bhubaneswar communicated vide Memo No. 1353 dtd.21.01.1989 of the Inspector of Schools, Dhenkanal Circle, Dhenkanal, the B.D.O., Angul was informed to leave the Teacher vide Memo No.588 dtd.28.01.1989 and being relieved by the B.D.O. has been working at Samal Barrage School and after his joining he should have applied the authority for cancellation of his deputation and when he was deputed to the Samal Barrage UP School the statute of the School was a Non-Govt. Primary School.*
>
> *6. That, after the services of the teachers of Primary Schools were taken over by the Govt. in the year 1989 such teachers are being treated as Govt. Servants w.e.f. the date of such taken over for all purposes. But the present applicant continued in the Samal Barrage UP School which is under the administrative Control of Executive Engineer, Head Works Division, Samal Barrage and he did not opt to come back to his parent school before services of such teachers working in non Govt. Primary Schools were taken over the Govt. and even after such taken over the Govt,. the present petitioner did not take any steps for coming back to his parent post and after a hiatus of more than 23 years he approached portals of this Hon'ble Tribunal for inclusion of his name in the gradation list prepared by the D.I. of Schools, Angul of Level-V teachers which is gross barred by limitation and the applicant without coming back to the Department again prayed for inclusion in the gradation list which is only consequential to his return to the department."*

So far as contention raised, that the petitioner, whose services were placed on deputation, should have applied for cancellation of the same, no where it has been provided for. When the authority required his services to be placed on deputation to Samal Barrage School and he was continuing there with the knowledge of the authority concerned, if the services of the petitioner were required, the authority could have brought him to the original cadre, and accordingly when the draft gradation list was prepared his lien with the original circle being continued, his name should have been placed in the draft gradation list, even though his services were placed on deputation to the borrowing authority.

9. In response to the counter affidavit filed by the opposite party no.3, the petitioner filed rejoinder affidavit, in paragraph-4 whereof it has been stated as follows:

> "*4. That, in reply to the Paragraph -5 and 6 of the counter affidavit filed by the opposite party no.3 are not correct. It is humbly submitted that by virtue of the*

order of the then Inspector of Schools, Dhenkanal the petitioner was deputed to Samal Barrage Upper Primary School and at no point of time he was permanently absorbed in Samal Barrage U.P. school not his lien in Angul District Education Cadre was suspended and as such while on deputation till retain lien in his parent cadre. As a matter of act after filing of Original Application the Block Education Officer cancel the deputation of the petitioner vide dated 09.09.2014 and consonance there of the petitioner has been relieved w.e.f. 15.10.2014 from Samal Barrage U.P. School by the Executive Engineer Samal by virtue of office order dated 12.09.2014 and accordingly the petitioner has joined in Chhendiapada Primary School under Block Education Officer Angul on 16.10.2014. This proves that the petitioner has lien in his cadre of Angul Education District throughout and there was no reason why his name shall not find place in gradation list of Level-V teachers of erstwhile Deputy Inspector of Schools, Angul. Thus, the name of the petitioner is liable to be included in the gradation list of Level-V teachers of Angul Education District prepared and published on 01.09.2012 at appropriate place treating the initial date of joining as 26.09.1981 for all purposes with consequential service benefit of promotion from the date of promotion of his juniors."

On perusal of the above, it is made clear that though the petitioner was deputed to Samal Barrage UP School, he had never been permanently absorbed in the said school and his lien had been continuing with Angul District Education Cadre. But fact remains, after filing the original application, the Block Education Officer cancelled the deputation of the petitioner on 09.09.2014, pursuant to which he was relieved w.e.f. 15.10.2015 from Samal Barrage UP School by the Executive Engineer, Samal Barrage, by virtue of the office order dated 12.09.2015. Accordingly, the petitioner joined in Chhendipada Primary School under Block Education Officer, Angul on 16.09.2014. Thereby, it is made clear that his lien with parent education district was continuing, pursuant to which he had been allowed to join in Chhendipada Primary School, wherefrom he was placed on deputation to Samal Barrage UP School. Therefore, the petitioner's name should have been included in the draft gradation list prepared by opposite party no. 3 with all consequential benefits.

10. In ***Triveni Shankar Saxena v State of U.P.,*** 1992 Supp (1) SCC 524: AIR 1992 SC 496, the apex Court held that the word "lien" originally means "binding" from the latin "ligament" and its lexical meaning was "right to retain".

11. While considering Rule-9(13) of the Fundamental Rules, it provides as follows:

> *"Lien means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively."*

12. The apex Court in ***Parshotam Lal Dhingra v. Union of India,*** AIR 1958 SC 36, the apex Court held as follows:

> *"A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post. This "lien" is defined in Fundamental Rules, section III, Ch II, Rule 9(13) as the title of a Government servant to hold substantively a permanent post, including a tenure post, to which he has been appointed substantively."*

Therefore, the apex Court in ***Ramal Khurana v. State of Punjab,*** (1989) 4 SCC 99, held that "Lien" connotes the right of a civil servant to hold the post substantively to which he is appointed. It is an incident of substantive appointment to a post. It is basically a singular concept since in public services substantive appointment is made against a particular post.

13. In ***Haribans Misra v. Railway Board,*** (1989) 2 SCC 84, the apex Court pointed out that only when a person was appointed on a permanent basis could he claim lien on the post to which he is so appointed.

14. Applying the principles of "lien", as discussed above, there is no dispute that the petitioner had been appointed against the permanent post and his services had been placed on deputation to Samal Barrage U.P. School. Thereby, his "lien" was continuing against substantive post at Chhendipada Upper Primary School and when he had been withdrawn from deputation, his services were placed at the very same School. In view of this, the petitioner's name should have been included in the gradation list as per Explanation-I to Rule-15 of Rules, 1997 taking into account his date of appointment as 22.09.1981.

15. It is apt to refer here the legal maxim "***Expressio Unius est exclusion alterius****"* i.e. if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred.

16. In ***Nazir Ahmed v. King Emperor***, AIR 1936 PC 253, law is well settled "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance

are necessarily forbidden." The said principles have been followed subsequently in ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358, ***Dhananjay Reddy v. State of Karnataka***, AIR 2001 SC 1512, ***Chandra Kishore Jha v. Mahabir Prasad***, AIR 1999 SC 3558, ***Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd***., AIR 2008 SC 1921, ***Ram Deen Maurya v. State of U.P.,*** (2009) 6 SCC 735.

17. In ***Subash Chandra Nayak v. Union of India,*** 2016 (I) OLR 922, similar question had come up for consideration before this Court and this Court in paragraph-8 observed as follows:

> *".....the statute prescribed a thing to be done in a particular manner, the same has to adhered to in the same manner or not at all. The origin of the Rule is traceable to the decision in* ***Taylor v. Tailor,*** *(1875) LR I Ch D 426, which was subsequently followed by Lord Roche in* ***Nazir Ahmad v. King Emperor,*** *AIR 1936 PC 253(2). But the said principle has been well recognized and holds the field till today in* ***Babu Verghese v. Bar Council of Kerala*** *(1999) 3 SCC 422, and* ***Zuari Cement Limited v. Regional Director, Employees' State insurance Corporation, Hyderabad and others,*** *(2015) 7 SCC 690 and the said principles has been referred to by this Court in* ***Manguli Behera v. State of Odisha and others*** *(W.P.(C) No. 21999 of 2014 disposed of on 10.03.2016)".*

This view has also been taken in ***Rudra Prasad Sarangi v. State of Orissa and others,*** 2021 (I) OLR 844.

18. Keeping in view the factual scenario and propositions of law, as discussed above, the opposite parties no. 2 and 3 are directed to fix seniority of the petitioner, as per Explanation-I to Rule-15 of Rules, 1997, in the draft gradation list dated 01.09.2012 published by opposite party no.3, taking into account his date of appointment as 22.09.1981, and extend all consequential benefits, as due and admissible to him in accordance with law as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment.

19. In the result, the writ petition is allowed. 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 judgment 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.

2021 (II) ILR - CUT- 395

BISWANATH RATH, J.

F.A.O. NO. 234 OF 2012

GEETANJALI JENA & ORS. ....Appellants

.V.

JUNIOR ENGINEER, ELECTRICAL, NESCO, JAJPUR AND ORS. ... ... Respondents

THE WORKMEN'S COMPENSATION ACT, 1923 – Section 03 – Relationship between employer and employee – Establishment of such factor – In the present case a retired employee as per the oral instruction of authority/Junior Engineer, while working on the electricity pole came into contact of live wire and died – Claim of compensation due to such death – The department raised the issue of non existence of such relationship and denied to give compensation – The issue of such relationship discussed and a wide meaning/connotation provided – Held, applying the doctrine of notional extension of the employment the claimant is entitled to get the compensation.

For Appellants : M/s. D.K.Mohapatra & L.Kavi.
For Respondent : M/s. Ramakanta Acharya & B.Barik.

JUDGMENT Date of Hearing : 25.02.2021 : Date of Judgment : 05.03.2021

BISWANATH RATH,J.

This is an appeal under Section 30 of the Workmen's Compensation Act, 1923.

2. Brief fact involving the appeal is that the wife, old parents and minor children of the deceased workman filed W.C. 97-D/2002 before the Commissioner for Workmen's Compensation-cum-DeputyLabour Commissioner, Cuttack alleging that the deceased working as labourer in the office of the respondent no.1 for over 12 years. On 12.2.2002, the deceased-workman while working over an electric pole near Mouza-Sitaleswar in Jajpur Town Section Office met with an accident by getting electric shock fell down on the ground sustaining serious bodily injuries resulting death claimed to be arising out of and in course of employment. It is on the premises of particular remuneration being received by the deceased at the relevant point of time, claim application was filed by the legal heirs of the deceased. It also came to light that involving said accident, U.D. Case No.8

of 2002 was also registered by the Police. Neither the Commissioner in judgment nor appeal memorandum have filed by the establishment brings any thing on the written statement if filed by the establishment. In the trial proceeding it however comes to light that in the trial the claimants examined 4 witnesses and also filed several documents by way of exhibits and on the contrary, the opposite party, i.e. the present appellant no.1 also filed some documents and adduced oral witness as OPW Nos.1 to 3 to controvert the claim of the claimants. In the first instance after considering the oral version and documentary evidence of the parties, the Commissioner for Workmen's Compensation-cum-Deputy Labour Commissioner, Cuttack by its judgment dated 7.12.2005 answering the issues in favour of the claimants directed for payment of compensation by the establishment-present respondents. Being aggrieved by the judgment dated 7.12.2005 in W.C. Case No.97-D/2002, the establishment preferred an appeal before this Court under Section 30 of the W.C. Act, 1923 bearing F.A.O.No.82 of 2006. This Court upon final hearing of that F.A.O. being satisfied with the grounds raised by the establishment, by order dated 8.8.2008 interfering in the judgment dated 7.12.2005 remitted back the matter to the Commissioner for re-consideration on the aspect of workmen the employer and the employee relationship but, however, entering into a fresh consideration and also giving reasonable opportunity to the parties involved. It is on remand of the matter, the claimants adduced P.W.5 and have also filed series of documents to establish employer-employee relationship between the deceased and the establishment whereas the opposite parties- respondents during re-trial could not able to file any other new documentary evidence but have adduced only oral evidence through OPWs 4 and 5. It is basing on the further plea and materials, W.C. Case No.97-D/2002 was freshly disposed of but, however observing that there is no relationship between the workman and the establishment thereby dismissing the W.C. Case giving rise to the filing of the present appeal. In filing the appeal, learned counsel appearing for the claimants-appellants contested the case on the following grounds:

On the further adjudication of the proceeding even though the claimants side produced further plea and evidence and in absence of any cogent evidence at the instance of the establishment, the view of the Commissioner in dismissing the claim case remains contrary to the material available and secondly, the impugned judgment remains contrary to the material available on record.

3. Learned counsel appearing for the appellants next submits that once the matter was remanded by the High Court for fresh adjudication, there ought to have been re-disposal of the claim case atleast on the issue of incident in course and arising out of employment under the establishment and then to decide on the question of amount of compensation.

4. It is alleged that the commissioner even though recorded the direction of the High Court in remand of the matter, the Commissioner unfortunately adhering to the evidence of P.W.5 decided the whole case. The sole observation of the Commissioner is that the Establishment produced the document relating to Wage Register and Attendance Register, which were marked as EXts.'A' & 'B' respectively and in the said Registers, the name of Late Paramananda Jena nowhere found and thus the claimants failed in establishing Master & Servant relationship between the parties. Learned counsel herein submits that for the open remand of the case, it was required on the part of the Commissioner to examine the whole evidence and come to conclusion involving such important issue and thus contended that there is failure of discharge of application of legal mind in deciding such matter. Further taking this Court to the evidence of some of the claimants witnesses, there is also attempt to establish that there was clear material available to establish that the deceased was a temporary employee and was engaged by the establishment on the fateful day and for the nature of work even performed by the deceased at the relevant point of time as an NMR employee, the name of the deceased could not have been found in the registers vide Exts. 'A' & 'B' since it involves permanent employees. For the claimants being the legal heirs, defending the case of the deceased involving a claim case, it is submitted that for the material available through oral evidence of several witnesses at the instance of the claimants, it is contended that if the Commissioner could have taken all the evidence into consideration the judgment of the Commissioner would have been otherwise.

5. Sri Acharya, learned counsel appearing for the respondent nos.1 to 3 on the other hand through the OPWs and the material support through Ext. 'A' and 'B' attempted to justify the judgment passed by the Commissioner. For the production of the copy of the Exts.'A' & 'B' by the counsel appearing for the appellants, giving reference to these documents, Sri Acharya, learned counsel contended that there was absolutely no material to establish that the deceased at any point of time was under employment of the establishment. It is in this view of the matter, Sri Acharya, learned counsel appearing for the respondent nos.1 to 3 while attempting to justify the impugned judgment prayed for dismissal of the appeal.

6. Considering the rival contentions of the parties, this Court finds the claim application involved an accident and death of the deceased was due to coming in contact of electricity. Reason of death also finds from the U.D. G.R. Case No.30 of 2002 due to shock and head injury. Final report in U.D.G.R. Case No.30 of 2002 prepared under Section 174 Cr.P.C. has a clear indication that in Police inquiry it has been ascertained that the deceased fell down from the electric pole at Sitaleswar while he was working there for which he received head injury and became measures. Treatment though given, it could not see recovery and finally the deceased died involving such accident. On scan of the evidence also this Court finds apart from claimant, there has been some witnesses on behalf of the establishment where one Rajkishore Parida appearing as OPW 2 working as Junior Engineer at the relevant point of time though disputed the engagement of the deceased-Paramananda Jena but had made it clear that he had no direct knowledge regarding accident involved herein on 12.2.2002. At the same time, on scrutiny of evidence of OPW 3 from the side of the Establishment, this Court finds this person has also categorically stated that he had no knowledge regarding the accident and employment of the deceased-Paramananda Jena and clarified that the Junior Engineer is to take attendance and distribution of work. Surprisingly the Junior Engineer even though has been examined, but did bring record involving NMR employees. The Executive Engineer has been subsequently examined vide remand order as OPW-5. He has also made it clear that neither he has any knowledge regarding the incident nor he has personal knowledge about the employment and he has deposed before the authority only on the basis of documents.

7. Now coming to scan the evidence from the side of claimants, this Court finds apart from claimants' witnesses by way of family members, the claimants have also examined some official witnesses of the establishment. P.W.2 an employee working in No.1 Section, No.1 Sub-Division at Jajpur as a lineman has a clear evidence that Paramananda Jena is dead and he died by electric shock while working on a pole belonging to Electricity Department. This person has clearly stated that the accident occurred on 12.2.2002 at 11.30 A.M. near Siteleswar while the

deceased was working on the electric pole, electric wire touched on his head. He then fell down from the electric pole to the ground. At that time, he and one Babuli Sethi, Staff, Gopal Parida, Staff, J.E.No.1 Section along with other villagers were there on the spot at the time of occurrence. This departmental person again submits as follows:

"The work which was performed by us as ordered/ instructed by S.D.O., Gouranga Das. J.E. Parida Babu told the deceased to work in the electric pole. The accident occurred during the course of his employment."

8. Similarly, it also appears from the statement of P.W.5, who claimed to be a retired employee in October, 2008 subsequent to the incident clearly stating that the deceased was on duty on the effective date. This Court here finds in spite of two of the departmental employees deposing on behalf of the claimants both are claiming that the J.E. Parida Babu had the instruction to the deceased to work at the relevant point of time. It is at this stage, this Court finds the J.E. Parida Babu produced as OPW No.2 by way of oral evidence attempted to resist such incident taking place. This Court finds the evidence from the side of the claimants particularly in absence of production of documents involving NMR/Casual Employees runs heavier than oral evidence at the instance of the establishment. It is in this situation, this Court herein takes into account a decision of the Kerala High Court in the case of Parameshwaran v. M.K.Parameshwaran Nair, 1991 (1) T.A.C. 416. In considering a case of casual engagement, the Kerala High Court in its Division Bench through this judgment in paragraphs-10 and 11 come to observe as follows:

> "10. We have to bear in mind that the Workmen's Compensation Act is a beneficial social legislation which was enacted to supply the need to provide compensation to workmen sustaining employment injuries. A strict and ritualistic adherence to the procedural formalities of a trial is neither necessary nor desirable in deciding the question of entitlement of the injured employees for compensation. Nor are the Commissioners who administer that legislation qualified or competent to conduct a formal trial. A more realistric and less formal approach is called for from authorities functioning under this beneficial enactment. They shall not pretend themselves to be Courts and try to discover ways todefeat the very purpose of the enactment by adopting a totally negative approach to the claims which the disabled workmen advance before them. Many of the provisions of the statute point out to this need for absence of rigidity on the part of the Commissioner in dealing with claims for

compensation. The need for such relaxation was emphasised in various decisions of this Court. We need cite only two of the decisions: In Mohammed Koya v. Balan [1987-I L.L.N. 352], a Division Bench of this Court held, that the requirement of a notice under S. !0 of the Act to the employer shall not be a reason for a rigid interpretation and that want of notice or any defect or irregularity in notice shall not bar entertainment of a claim if the employer had knowledge of the accident. In Pushpam v. Bonami Estate [1988-I L.L.N. 869], it was held, in Para. 10 at page 873, that:

"It is true, that S. 23 of the Workmen's Compensation Act confers all the powers of the Civil Court under the Code of Civil Procedure, for purposes of taking evidence on oath and the enforcing attendance of witnesses and compelling production of documents and material objects. That provision, however, does not constitute the Workmen's Compensation Commissioner as a "Court" for all purposes. Nor does that provision have the effect of disabling the Commissioner from exercising such powers as to further the beneficial objects of that enactment. No provision in the Workmen's Compensation Act disabled an authority like the Commissioner from rectifying an apparent error in the application submitted by an illiterate applicant, whose claim for compensation was denied by the employer."

11. We hold that the Commissioner who was administering a beneficial legislation meant to advance the cause of employees for compensation in respect of employment injuries was obliged to act in furtherance of the intention of the statute and not to stultify the same by rigid and mechanical approaches. If the claimant before him was a workman as defined in S. 2(n) of the Act, he should have seen to it that the workman receives the compensation. It is unfortunate that he embrodled himself in a highly technical debate which would enable him to exclude the applicant from the purview of the definition by adopting an artificiality which was contrary to the terms of the statute as understood by this Court in Kochu Velu [1980-II L.L.N. 564] (vide supra). The inconsistencies in the plea and the evidence of the employer, his refusal to produce relevant evidence and the total unreliable nature of the evidence consisting of exhibits M1 and M2 which he produced should have alerted the Commissioner to be wary in accepting the defence of the employer. In the light of the decided cases, which we have referred to, we have no hesitation in holding that the claimant was a workman since he was employed in connection with the trade or business of the employer, though such employment was casual in nature. We hold further that the material evidence relating to his employment was deliberately kept back by the employer. We hold that the Commissioner should have drawn inferences Adverse to the employer from the above conduct."

9. Similarly in the case of Leela Bai and Another v. Seema Chouhan and Another, 2019 (I) T.A.C. 735 (SC), the Hon'ble Apex Court in the nexus between accident and the employment applying doctrine of notional extension of the employment held the claimants have been wrongly denied compensation. In case at hand, this Court finds there is no dispute that the deceased died while working on the electric pole belonging to the electricity Department. Therefore, a clear inference can be drawn that unless the Department authorizes no person can dare to ride into an electric pole to attend work.

10. In the above background of the case, this Court while observing that judgment of the Commissioner in W.C. Case No.97-D/2002 remains perverse being contrary to the evidence on record and opposed the principle enunciated through the decision of the Kerala High Court as well as the decision of the Hon'ble Supreme Court indicated hereinabove, entering on the determination of the Commissioner on employer & employee relationship, holds there exists employer & employee relationship and therefore, the establishment is liable to pay compensation.

11. The Commissioner for his finding on employer and employee relationship has not attended to the issue of compensation, this Court in setting aside the impugned judgment is constrained to remit the matter back again to the Commissioner for Workmen's Compensation-cum-Deputy Labour Commissioner, Cuttack for re-adjudication only on the aspect of amount of compensation to be paid to the claimants on account of death of the deceased in course and arising out of employment. For there is definite entitlement of compensation to the claimants and keeping in view the sufficient loss of time, this Court while directing the Commissioner for Workmen's Compensation-cum-Deputy Labour Commissioner, Cuttack to conclude the issue on the aspect of compensation within a period of two months from the date of receipt of copy of this judgment through either side, this Court also directs the respondents to deposit a sum of Rs.2,00,000/- (Rupees Two lakhs) with the Commissioner for Workmen's Compensation-cum-Deputy Labour Commissioner, Cuttack within a period of two weeks hence and

the deposited amount shall be released in favour of the claimants within a period of one week thereafter. This release will however be subject to the adjustment in the ultimate determination of compensation by the Commissioner for Workmen's Compensation-cum-Deputy Labour Commissioner, Cuttack.

11. In the result, the appeal succeeds to the extent indicated hereinabove, but in the circumstance, there is no order as to cost.

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2021 (II) ILR - CUT- 402

BISWANATH RATH, J.

RPFAM NO. 235 OF 2019

KAMALAKANTA MISHRA .....Petitioner

.V.

SIMA SATPATHY ..... Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 125 – Maintenance – Grant of – On an application filed by wife the Family court granted Rs. 15,000/- as monthly maintenance – Husband challenges the quantum of maintenance – No material to show that the wife is earning – Held, the maintenance awarded is not in higher side keeping in view the minimum sustenance of a deserted lady in the present day society.

(Para 7)

For the Petitioner : Mr.J.Rath, P.K.Tripathy, K.C.Baral & N.Acharya.
For the Opp.Party : M/s.Dillip Ray, S.Das, K.B.Mishra & S.P.Mishra.

JUDGMENT Date of Hearing & Judgment: 24.06.2021

BISWANATH RATH,J.

This case involves a challenge to the order dated 06.06.2019 and the subsequent order 24.08.2019 dated passed by the Judge, Family Court, Balasore in original case as well as execution case respectively.

2. Cr.P.No. 32 of 2016 involves a claim at the instance of the wife for grant of monthly maintenance of Rs.60,000/- for the grounds involved therein that the marriage between the parties was solemnized on 11.02.2008 following the Hindu rites and rituals. It is alleged that the family members of the husband being not satisfied with the articles asked the wife involved herein to bring more money to met with dowry demand, In the process, they have started harassment to the petitioner mentally and physically. For some time wife accompanied with the husband to his place of working at Delhi but there also she was subjected to harassment even after giving birth to a son. During stay at Delhi, ill-treatment to the wife did not end. The wife even asked to sale the land available in her village to meet with the demand of the husband. It is further disclosed that when the wife was returning from Delhi with her husband, the husband attempted to kill her by pushing her down from the running train. Passengers traveling in the train rescued her but the opposite party-husband went away and escaped from the spot. Finding no reply from the side of the husband and no interest being shown from the husband to take up, the petitioner came back to her father's house. In the meantime family members of the husband on 17.12.2015 reached the house of the father of the petitioner and forcibly took the child to their custody compelling the wife to lead a life of destitute. On the premises that the husband was working in a Software company is earning Rs.80,000/- per month besides further earning a sum of Rs.5,00,000/- per annum from the cultivable land to the extent of 10 acres and that the mother of the husband was also getting Rs.10,000/- per month as pension, the wife got constrained to file both the cases claiming monthly maintenance @ Rs.60,000/- per month. The present opposite party-husband appeared and filed his objection resisting of the claim at the instance of the wife and disclosed that for the pendency of a PWDV Act case, present litigation is not maintainable. It was also further pleaded by way of objection of the husband that the wife since was working as a Teacher under Sarva Sikya Abhijan, which itself is sufficient to maintain the wife. Husband also disputed the wife's claim on husband's income and contended that the husband rather working as a Labourer in New Delhi and is earning paltry sum of Rs.15,000/-. It is in the above premises, the husband resisted the claim of the wife.

3. Basing on the pleadings, the trial court framed the following issues:

i) Whether the petition filed claiming maintenance is maintainable?

ii) Whether the petitioner has just cause of action to file the petition?

iii) Whether the petitioner-wife having no source of income has reasons to stay away from the O.P. and is liable to be maintained by him?

iv) Whether the O.P. having sufficient means neglected or refused to maintain the petitioner and as such liable to maintain her and if liable, what would be quantum of maintenance?

v) To what other relief(s) the petitioner is entitled to?"

Hearing the parties Family Court finally decided the matter on contest by passing the following order:

> "Petition claiming monthly maintenance as filed by the petitioner is allowed on contest against the O.P. He is directed to pay monthly maintenance of Rs.15,000/- (Rupees fifteen thousand) to the petitioner from the date of filing of the petition on dtd. 20.01.2016. The current maintenance amount is to be paid within the first week of the English Calendar month. The arrear maintenance occurring till date is to be paid in instalments within three months, failing which petitioner is to realize the same through the process of the Court."

4. After final disposal of the Cr.P. No.32 of 2016, the subsequent impugned order passed by way of disposal of the execution proceeding at the instance of the wife both impugned herein.

5. Filing the RPFAM, learned counsel for the husband taking this Court to the plea of the husband involving the same disclosures in TRP case between the parties attempted to contest the impugned orders on the premises that for the disclosures in the TRP Case, there has been no consideration of such disclosures in deciding the matter by learned Family Judge. A further stand is also taken by the learned counsel for the petitioner-husband that for the husband taking a specific plea that the wife was working as Teacher under Sarva Sikhya Abhijan and earning a sufficient sum has also not been taken into account by the court in disposal of the maintenance application. Besides, the impugned order is also contested on the premises that even though the wife has made the claim on the basis that the husband was working in IT Firm in Delhi but there was in fact no material available to come to find such fact even. It is in the above premises, learned counsel for the petitioner submitted that the impugned order is in non-consideration of material fact and also in absence of cogent material and thus contended that the impugned order be set aside. Further, the execution order being based on such defective assessment should also be interfered and set aside.

6. Sri Rath, learned counsel appearing for the wife-opposite party taking this Court to the disclosure of the case of the wife through the discussions in the impugned order submitted that there has been sufficient discussion on the claim and the rival claim of the parties by the trial court. Sri Rath, learned counsel for the petitioner relying on some recording in a proceeding in T.R.P. Case since does not form part of the proceeding involved herein, submitted that such contentions should be out-rightly rejected. It is further alleged by Sri Rath, learned counsel that husband has brought some material to establish that wife is an employee in some establishment is a blatant lie for wife producing clear material to establish that she is no more an employee. Further for the recording of the Family Court that there has been material available on record establishing the claim of the husband for bail on the apprehension of his losing the job involving a D.V. Act proceeding, it is contended that there is sufficient material to establish that the husband is an employee in an establishment in Delhi. It is further contended that the order of the Family Court is based on materials available on record and, therefore, there is no requirement of interference, as a consequence, there is no scope for interfering in the execution order.

7. Considering the rival contentions of the parties, this Court finds there is no dispute that there is marriage between the parties. From the disclosure, it is apparent that in the proceeding under Section 498-A/323/34 I.P.C. read with Section 4 of the D.P.Act, the husband has a clear disclosure that unless he be granted bail, there is likelihood of loosing job. Besides oral evidence on this aspect, there has been also relying on a final report disclosing all above through Ext.”A” submitted in Khandapada P.S. Case No.104 dated 04.03.2016. This Court further also finds there has been material available through evidence in the trial proceeding before the Family Court. For the certificate issued by the Principal, St.Xavier High School, Balasore vide Ext.”2” herein reveals that the wife though was working in a School as Hostel Warden on temporary basis only for two months in the year 2015-16 however, she resigned and left the school hostel. This itself falsifies the claim of the husband that the wife is earning Rs.10,000/- per month. Discussing the case of the parties and referring the decision of the Family Court in paragraph-10 therein, this Court finds there is a clear recording with regard to the material available establishing the husband’s working in Delhi. It is for the clear material available that the husband was working at Delhi brought by way of evidence at the instance of the wife, it appears, there is no attempt even by the husband at least to prove the same contrary. This Court here also

finds surprise that the husband even not volunteered to produce his payment status at the relevant point of time at least for appropriate consideration of the Family Court. In the circumstance, this Court finds the husband was working in an establishment in Delhi and for the attempt to suppress the income of the husband during trial process and further taking into consideration minimum sustenance of a deserted lady in the present day society, this Court finds the maintenance awarded by the Family Court, Balasore @ Rs.15,000/- per month cannot be held to be in higher side.

8. It is in the circumstances, this Court finds there is no infirmity in the order passed by the Family Court, Balasore in Cr.P.No.32 of 2016. As a consequence of above, this Court finds there is also no question of interfering in the order dated 24.08.2019 passed by the Executing Court in Execution Proceeding. Consequently, the RPFAM stands dismissed.

9. Since there is payment of a sum of Rs.1,00,000/- (Rupees One lakh) by virtue of the interim order dated 5.12.2019 passed by this Court in I.A.No.424 of 2019, the balance amount arrear involving the direction in the Execution Proceeding be deposited in lower court in three equal instalments by the petitioner within a period of three months hence for release of the same in favour of the wife-opposite party.

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2021 (II) ILR - CUT- 406

S. K. SAHOO, J.

BLAPL NO. 4652 OF 2020

NARESH DIGAL .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – Section 167 r/w Section 36-A of the NDPS Act – Statutory/mandatory bail – Offences under the NDPS Act – Incomplete of investigation within the statutory period – Application filed U/s.36-A of the Act seeking extension of another 90 days to file/submit final report – However the trial court granted the time without giving any opportunity to the accused although copy of the said application was served to the defence counsel – Plea of

natural justice and prejudice to the accused raised – Held, the accused is entitled to be released on bail on account of default of the prosecution to file charge sheet within the prescribed period and extending the same without giving any opportunity to the accused.

Case Laws Relied on and Referred to :-

1. (2018)71 OCR 31 : Lambodar Bag Vs. State of Odisha.
2. A.I.R. 1994 Supreme Court 2623 : Hitendra Vishnu Thakur Vs.State of Maharashtra.

For Petitioner : Mr. Saktidhar Das, Sr. Adv.
For Opp. Party : Mr. Deepak Ranjan Parida, A.S.C.

JUDGMENT Date of Hearing & Order: 27.01.2021

S. K. SAHOO, J.

This matter is taken up through Video Conferencing.

Heard Mr. Saktidhar Das, learned Senior Advocate appearing for the petitioner and Mr. Deepak Ranjan Parida, learned counsel for the State.

This is an application for bail under section 439 of Cr.P.C. in connection with K. Nuagaon P.S. Case No.30 of 2020 corresponding to C.T. Case No.25 of 2020 pending in the Court of learned Special Judge -cum- Addl. Sessions Judge, Balliguda for alleged commission of offences under sections 20(b)(ii)(C), 25, 27-A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act').

The prayer for bail of the petitioner has been rejected by the learned Special Judge -cum- Addl. Sessions Judge, Balliguda by order dated 17.06.2020.

The prosecution case, in short, is that on 09.06.2020 at about 8.00 p.m. as per direction of I.I.C., K. Nuagaon P.S., the informant Prakash Kumar Pradhan, S.I. of Police, K. Nuagaon police station along with his staff had been to perform their night patrolling duty and while performing their duty at Purun Nuagaon area, at about 8.10 p.m. the informant got information from D.S.P. I/C Balliguda police stattion Sri Manoj Kumar Pujhari that a Mahindra Bolero Maxx Pik-Up vehicle bearing Registration No. WB 57-B-9682 crossed Balliguda Naka post in a high speed in suspicious manner. The informant and his staff proceeded immediately towards Daringbadi and on

the way at Sirtiguda bazaar, due to rash and negligent driving of the driver of the said Bolero vehicle, it slipped near a under construction bridge and could not proceed ahead. S.I. Sri Pradhan could notice four persons who were sitting inside the Bolero started running to evade arrest by the police. However, they could manage to catch hold of two persons while other two persons fled away from the spot. On interrogation, the apprehended persons disclosed their identity so also identity of two absconding accused persons and confessed their guilt that they were transporting ganja towards Kolkata for selling purpose. They also disclosed that they procured ganja from one Sunil Digal of village Sindrigaon. The informant sent constable C/77 Sibaram Mallick to arrange two independent witnesses and a weighman from the locality and the informant also commanded the driver HG/498 Babula Pradhan to bring his laptop, printer, generator, brass seal, packing and sealing materials with requisition for deputation of a gazetted police officer to the spot as the spot was highly naxal affected area. On being asked in Hindi language, the accused persons agreed to be searched in presence of gazetted officer. Accordingly, the accused persons and other independent witnesses were searched personally. The S.D.P.O., Balliguda recovered cash of Rs.2560/- one Motorola mobile phone from accused Choton Sk. He also recovered one DL, one Xerox copy of RC book of Bolero vehicle bearing No. WB 57-B-9682 stands recorded in the name of owner Jahanara Bibi Sekh, one insurance certificate of that vehicle, one Vivo mobile phone from accused Jayanal Ansari and seized those articles and prepared seizure list at the spot in presence of witnesses. The informant searched the vehicle in presence of S.D.P.O. and independent witnesses and found twenty six polythene packets wrapped with cello tape kept in a concealed manner under ten potato bags in the Dala of the vehicle. The informant opened all the twenty six bags and kept it on a polythene on the ground and homogenously mixed and prepared eleven numbers of new packets (ten packets containing 12 kgs 200 grams each and another one packet containing 10 kgs 800 grams), in total 132 kgs. 800 grams and without bags, it was 131 kgs. 700 grams. The ganja was weighed and seized and brought to the police station along with accused persons Choton Sk and Jayanal Ansari. The informant presented a written report at the police station and the I.I.C., K. Nuagaon P.S. registered the case and directed S.I. P. Nayak to take up investigation of the case. In course of investigation, the I.O. arrested the accused persons Choton Sk and Jayanal Ansari on the same day and forwarded them to Court on 11.06.2020. The petitioner Naresh Digal was arrested on 16.06.2020 and forwarded to Court on the same day.

There is no dispute that the ganja seized in the case comes under 'commercial quantity' as defined under section 2(viia) of the N.D.P.S. Act. In view of sub-section (4) of section 36-A of the N.D.P.S. Act, for offences involving commercial quantity, the references in sub-section (2) of section 167 of Cr.P.C. to 'ninety days' shall be construed as reference to 'one hundred and eighty days', in other words, if the investigation of the case is not completed within one hundred and eighty days of the date of first remand of an accused to custody, he would ordinarily be entitled to default bail in view of the proviso to sub-section (2) of section 167 of Cr.P.C. but the proviso to sub-section (4) of section 36-A of the N.D.P.S. Act states that if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days. Therefore, if the Special Court extends the period of completion of investigation exercising the power as conferred under sub-section (4) of section 36-A of the N.D.P.S. Act then the accused would not be entitled to default bail under section 167(2) of Cr.P.C. on the ground of non-submission of final form within one hundred and eighty days of the date of his first remand to custody inasmuch as it cannot be said there is any default on the part of the investigating officer in not filing final form within the said period as time for completion of investigation has been extended.

In the case in hand, the petitioner was forwarded to the Court of learned Special Judge, Balliguda on 16.06.2020 and one hundred and eighty days period as per sub-section (4) of section 36-A comes to end on 13.12.2020. It appears that on 04.12.2020, a prayer was made by the investigating officer before the learned trial Court by filing a petition through the Special Public Prosecutor to extend the period of completion of investigation for ninety days more. Copy of the petition was served on the learned defence counsel on the very day i.e. on 04.12.2020 and on the same day, order was passed by the learned Special Judge in allowing the petition filed by the learned Special Public Prosecutor and the investigating officer was directed to complete the investigation and submit charge sheet in a further period of ninety days. The operative portion of the order dated 04.12.2020 passed by the learned Special Judge is extracted herein below:

> ".....The proviso to sub-section (4) of section 36-A of the N.D.P.S. Act makes it clear that, if it is not possible to complete the investigation within the period of 180 days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 180 days. The provision of sub-section (4) of section 36-A of the N.D.P.S. Act has been enacted for the purpose of declaring a law relating to the narcotic drugs and to make stringent provision for the regulation of operations relating to narcotic drugs and thus N.D.P.S. Act being a Special Act, it overrides the general provision of s.167(2) of Cr.P.C. [**Rasheek v. State of Karnataka 2007 Crl.L.J. 2316** (**Kant**.)]
>
> In view of the said provision, the petition filed by the learned Special P.P. is allowed. The I.O. is directed to complete the investigation and to submit the charge sheet further in a period of 90 days. Put up on the date fixed awaiting Final Form. Send an extract of this order to the I.O..."

Mr. Das, learned counsel for the petitioner contended that since copy of such extension petition was served on the learned defence counsel on 04.12.2020 and extension order was also passed on the very same day, the accused did not get a fair opportunity to have his say and to oppose the extension sought for by the prosecution and in all fairness of things, the learned Special Judge should have given some reasonable time to the learned defence counsel to obtain instruction from the petitioner who was in jail and file his objection, if any, to such extension petition and only thereafter on hearing the learned counsel for both the sides, the Court could have passed any order either allowing or rejecting the prayer for extension in accordance with law. It is further contended that the approach of the learned Special Judge in disposing of the petition for extension hurriedly on the very day of filing without giving opportunity to the accused to file his objection, has resulted in causing miscarriage of justice and therefore, the extension order is not sustainable in the eye of law and on that ground alone, the petitioner is entitled to be released on bail. He further contended that the application filed by the petitioner under section 167(2) of Cr.P.C. to enlarge him on default bail was rejected without application of mind and therefore, in view of period of detention in judicial custody, the bail application of the petitioner should be favourably considered.

Mr. Parida, learned counsel for the State, on the other hand, produced the case diary and submitted that since the copy of the extension application was served on the learned defence counsel, it was his duty to seek for time to file objection and since there is nothing in the order dated 04.12.2020 that the defence counsel sought for any time to file his objection, it presupposes that

the defence counsel or the accused, had no objection to such extension and therefore, it cannot be said that there is any infirmity in the order dated 04.12.2020 passed by the learned Special Judge in extending the completion of investigation for a further period of ninety days in view of the power conferred under section 36-A(4) of N.D.P.S. Act.

In the case of **Lambodar Bag -Vrs.- State of Odisha reported in (2018)71 Orissa Criminal Reports 31**, a question came up for consideration as to whether extension for completing the investigation beyond the prescribed period of one hundred and eighty days can be granted under section 36-A(4) of the N.D.P.S. Act on the report of the Public Prosecutor without any notice to the accused to have his say regarding the prayer for grant of extension. While answering the said question, this Court relying upon the decision of the Hon'ble Supreme Court in the case of **Hitendra Vishnu Thakur -Vrs.- State of Maharashtra reported in A.I.R. 1994 Supreme Court 2623** held that even though sub-section (4) of section 36-A of the N.D.P.S. Act does not specifically provide for issuance of notice to the accused on the report of the Public Prosecutor before granting extension, but it must be read into the provision both in the interest of the accused and the prosecution as well as for doing complete justice between the parties and since there is no prohibition to the issuance of such a notice to the accused, no extension shall be granted by the Special Court without such notice. Moreover, the report has to be filed by the Public Prosecutor in advance and not on the last day, so that on being noticed, the accused gets fair opportunity to have his say and oppose the extension sought for by the prosecution.

An order for release on bail under the proviso (a) of section 167(2) of the Cr.P.C. is an order on default on the part of the prosecution to file charge sheet within the prescribed period. It is a legislative command and not a judicial discretion of the Court. An indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in completing the investigation within the period prescribed. If an accused entitled to be released on bail under the proviso (a) makes an application before the Magistrate, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not and whether a challan has been filed or not. The merits of the case are not to be gone into while releasing the accused on bail under proviso (a) to section 167(2) Cr.P.C.

In the case in hand, the period of completion of investigation as per sub-section (4) of section 36-A of the N.D.P.S. Act from the first date of remand of the petitioner to custody was one hundred eighty days which was expiring on 13.12.2020 and the said period of investigation could have been extended as per proviso to the section in the manner it is provided which must be after complying principle of natural justice and after providing fair opportunity to the petitioner to have his say and oppose the extension sought for by the prosecution.

Therefore, when a petition was filed by the investigating officer in advance on 04.12.2020 (which was not the date fixed in the case earlier) through the Special Public Prosecutor to extend the period of completion of investigation for a further period of ninety days and copy of the petition was also served on the learned defence counsel on 04.12.2020, since nine days more period was still there for completion of one hundred eighty days, in all fairness of things, the case should have been posted to some other date by the learned Special Judge to consider the petition on merit by giving opportunity to the learned defence counsel to obtain instruction from the petitioner, who was in jail custody and to file his objection, if any, to such petition. If no objection would have been filed from the side of the petitioner, then the Court after hearing both the sides could have passed the order and similarly, if any objection would have been filed from the side of the petitioner, the Court could have passed the order considering the objection in accordance with law after giving opportunity of hearing to both the sides. In this case, when the order was passed on the very day the extension petition was served on the defence counsel and in the order, there is nothing to show that the defence counsel was aware that the petition would be considered on that day itself and there is also nothing that the defence counsel did not want to file any objection after taking instruction from the petitioner and there is also nothing that the defence counsel was present at the time of hearing of the petition and when it was the duty on the part of the Court to grant some reasonable time to the defence counsel to obtain instruction from the petitioner to file objection, if any, the same having not being done in this case, it cannot be said that fair opportunity was provided to the petitioner to have his say and oppose the extension sought for by the prosecution. Mere serving a copy of the extension petition by the prosecution on the defence counsel and that to on a date which was not earlier fixed, is not sufficient to assume that fair opportunity was provided to the petitioner.

In that view of the matter, I am constrained to hold that the order of extension to complete the investigation granted by the learned Special Judge as per order dated 04.12.2020, is not in accordance with law and therefore, the petitioner is entitled to be released on bail on that ground itself. Accordingly, the prayer for bail is allowed.

Let the petitioner Naresh Digal be released on bail in the aforesaid case on furnishing a bail bond of Rs.2,00,000/- (rupees two lakhs) with two local solvent sureties each for the like amount to the satisfaction of the learned Court in seisin over the matter with further conditions as the learned Court may deem just and proper including the condition that he shall appear before the learned trial Court on each date to which the case would be posted for trial. Violation of any of the conditions shall entail cancellation of bail. The BLAPL is accordingly allowed.

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2021 (II) ILR - CUT- 413

S.K. SAHOO, J.

BLAPL NO. 502 OF 2021

AKASH KUMAR PATHAK ……Petitioner

.V.

STATE OF ODISHA ……Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Grant of bail in Economic offences – Principles to be followed – Discussed.

"Law is well settled that at the stage of granting bail, detailed examination of evidence and elaborate discussions on merits of the case need not be undertaken but when the accused is charged with economic offences, the order must reflect the reasons for arriving at a prima facie conclusion as to why bail was being granted.

Thus, economic offences are considered grave offences as it affects the economy of the country as a whole and such offences having deep rooted conspiracy and involving huge loss of public fund are to be viewed seriously. Economic offence is committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. An economic offence is a well manipulated offence. It is a white collared crime which disturbs economic equilibrium in the society and the

weaker section is victimised. Liberty of an individual cannot outweigh the interest of the society. An economic offence has to be viewed from a serious perspective and no lenient view can be taken. A murderer takes away the life of a person but a person committing economic offence leaves a living person dead. Discretion of grant of bail should be used in a proper and judicious manner and the Court must take note of the nature of accusation, the nature of supporting evidence, the severity of punishment in case of conviction, reasonable apprehension of tampering with the evidence, criminal antecedents etc. Of course, bail should not be denied merely because the sentiments of the community are against the accused. It is not to be denied merely because there is a prima facie case which requires trial of the issue of guilt or innocence. Its purpose is to secure attendance of the accused at the trial and non-interference with a fair and speedy trial. The purpose of bail law is not punitive but preventive. Even if there is a prima facie case for a possible conviction, bail cannot be refused, unless there is reasonable evidence before the Court that the accused would abscond or destroy evidence or tamper with witnesses to frustrate the trial and grant of bail would be against the larger interests of the public and State and similar other considerations. More heinous is the crime, the greater is the chance of rejection of the bail, though it would always be depended on the factual matrix of the matter. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail application." (Para 7)

Case Laws Relied on and Referred to :-

1. (1977) 4 SCC 308 : State of Rajasthan Vs. Balchand @ Baliay.
2. (1972) 3 SCC 393 : Thulia Kali Vs. State of Tamilnadu
3. (2010) 8 SCC 775 : Kishan Singh Vs. Gurpal Singh.
4. (1994) 4 SCC260 : Joginder Kumar Vs. State of Uttar Pradesh & Ors
5. (2018) 7 SCC 581 : Sheila Sebastian Vs. R. Jawaharaj.
6. (2019) 74 OCR 332 : Muna Patra @ Patro Vs. State of Odisha .
7. (2012) 9 SCC 446 : Ash Mohammad Vs. Shiv Raj Singh.
8. (2013) 55 OCR (SC) 825 : Y.S. Jagan Mohan Reddy Vs. C.B.I.
9. 1987 S.C. 1321 : State of Gujarat Vs. Mohan Lal Jitamal Torwal A.I.R.
10. (2013) 55 OCR (SC) 833 : Nimmagadda Prasad Vs. C.B.I.
11. (2015) 62 OCR 219 : Ram Chandra Hansdah Vs. Republic of India.
12. (2014) 2 SCC 1 : Lalita Kumari Vs. Govt. of U.P. and Ors.
13. (2012) 6 SCC 204 : Jitender Kumar Vs. State of Haryana.

For Petitioner : Mr. Pitambar Acharya (Sr. Adv.)
For Opp. Party: Mr. Soubhagya Ketan Nayak (Addl. Govt. Adv)

JUDGMENT Date of Argument: 04.06.202: Date of Order: 17.06.2021

S.K. SAHOO, J.

The petitioner Akash Kumar Pathak has knocked at the portals of this Court by filing an application under section 439 of Cr.P.C.

seeking for bail in connection with CID, CB, Cyber Crime P.S. Case No.26 of 2020 corresponding to C.T. Case No.4053 of 2020 pending on the file of S.D.J.M., Bhubaneswar in which first charge sheet has been submitted for offences punishable under sections 419, 420, 467, 468, 471 read with section 120-B of the Indian Penal Code and 66-C, 66-D of the Information Technology Act, 2000 (hereafter 'I.T. Act') keeping the investigation open under section 173(8) of Cr.P.C.

2. On 18.05.2020 an email was received from one Trilochan Mohanty, Deputy General Manger-Ethics at Tata Motors Limited (hereafter 'the Company'), Jamshedpur Works, Jamshedpur as authorised representative addressed to the IG, CID, CB, Cuttack, Odisha alleging therein that it was brought to the notice of the Company on several occasions that certain unscrupulous elements were committing fraud and thereby causing harm to the reputation of the Company by contacting common public with criminal intent to defraud them and collect illicit money from them on the pretext of offering them jobs in the Company. The modus operandi of such people was to use the logo of the Company and/or TATA Group and other easily identifiable insignia. They were mentioning a name and number of a person to whom they misrepresent as an official of the Company.

It is further mentioned in the email that an alarming case was brought to the notice of the Company through one email dated 7th May 2020 16:32 highlighting the illegal and unauthorized use of brand name and well known trademark of the Company and/or TATA and impersonation as an official of the Company relating to fraudulent job offer by Mr. Vijoy Jha from his email id vkjhamd@gmail.com enquiring about the confirmation of the post of the petitioner who is the son of an Indian Forest Officer of Odisha Cadre Mr. A.K. Pathak and that the petitioner was taking huge amount of money fraudulently from unemployed youth to secure them a job in the Company. The email also stated that the petitioner was illegally impersonating and projecting himself as MD, Tata Motors, Pune Passenger Division and CEO designate. A copy of the aforesaid email dated 7th May 2020 was attached to the email dated 18.05.2020. It is stated that the petitioner was using **(i)** A fake ID card mentioning Employee ID 88176 **(ii)** A fake visiting card with the official details as Akash Kumar Pathak, TAS, VP- Administration, 1st Floor, JRD Administrative Block, Tata Motors Limited, Telco Road, Pimpri, Pune-411018, Email ID- akash.pathak@tatamotors.com and Contact nos. 9556968888/7077608883. Copies of the said fake ID card and visiting card

used by the petitioner were attached to the email for taking drastic legal actions against the culprits.

The fake ID card and visiting card indicated having 'TATA' stylized word mark as it appears on various passenger and commercial vehicles manufactured by TML. Those cards were having the 'T in circle' blue design mark which is a mark appearing on various passenger and commercial vehicles manufactured by TML by which the public identifies the conglomerate and the various products offered. The email id of such person mentioned in the email has the word 'Tata' in it.

The person sending email found certain other evidence in support of the complaints pertaining to the petitioner that he had donated rupees five lakhs by fraudulently portraying himself as a M.D. (I/C) of the Passenger Division at Pune to the CM of Odisha at his official residence in Bhubaneswar, Odisha which can be found in the newspaper articles at http://tathya.in/news/39145/0/ Pathak- Contributes- To-CMR Fand http://odishabarta.com/2020/04/19/3263/. The Company also found the LinkedIn and Facebook Profile of the petitioner posing as TAS officer of Tata Motors Limited joined in 2017. A screenshot of the same was also attached to the email.

It is further mentioned in the email that the general public believed that the petitioner was representing the Company. Neither the petitioner mentioned in the email, newspaper articles, LinkedIn or Facebook that he was employed by the Company nor the Company sought for money from any prospective candidates for recruitment. It is mentioned that there was no person in the name of the petitioner working for the Company as M.D. for Tata Motors, Pune Passenger Division or CEO designate.

It is further mentioned in the email that there are clear evidence that the petitioner intentionally duped the common public fraudulently of their money and maligning the reputation of the Company and its officials. It was apprehended that this nature of fraud would lead to larger cunning acts with public at large i.e. business establishments, officials of the government, media houses, investors, TML local and regional establishments etc. and some of the instances were apparent in the complaint itself. It is stated that the offences committed by the petitioner amounts to criminal conspiracy, cheating, fraud, forgery, impersonation, infringement of trademarks and

copyrights and to engage a person with an intent to inflict monetary losses and theft of identity.

In the said email, request was made to investigate and take necessary steps to trace out the persons using the phone numbers 9556968888 and 7077608883 as mentioned by the petitioner, to trace out the culprits involved in the matter and to ensure that such activities are discontinued forthwith and appropriate steps are taken to prosecute the people behind the act of fraud, forgery and impersonation.

In the email, it is alleged that the petitioner along with other culprits cheated the company dishonestly and fraudulently by committing fraud, forgery by manufacturing Id mail and other documents to misappropriate money from public by impersonating fraudulently for which accused persons are liable to be punished for such criminal act of cheating, impersonation, committing fraud and forgery, misappropriation of money from public and other penal provision available for commission of cyber crime and penalty stipulated under cyber crime.

3. On 23.09.2020 the complainant Trilochan Mohanty appeared at Cyber Crime Police Station, Cuttack and reported to have lodged a report on 18.05.2020 before the I.G. of Police, CID, CB, Odisha, Cuttack through email. The records were verified and it was ascertained that the copy of the report was sent to DCP, Bhubaneswar for appropriate action but no action was taken thereon as on 23.09.2020. Accordingly, on 23.09.2020 CID, CB, Cyber Crime P.S. Case No.26 of 2020 was registered under sections 419, 420, 467, 468, 469, 471 of the Indian Penal Code and 66-C, 66-D of the I.T. Act against the petitioner only.

During course of investigation of the case, the complainant Sri Trilochan Mohanty was examined and his statement was recorded who corroborated the F.I.R. story and produced some relevant documents like **(i)** two pages of email communication received by complainant Trilochan Mohanty in his mail id-trilochan.mohanty@tatamotors.com on 08.05.2020 from his Chief Ethic Councillor Sunil Pundlik from mail id-sunil.pundlik@tatamotors.com regarding the mail of vkjhamd@gmail.com about the fraudulent activities of the accused, **(ii)** two pages of mail communication sent from complainant Trilochan Mohanty on dtd.08.05.2020 from his mail id-trilochan .mohanty@ tatamotors.com to the mail id-

vkjhamd@gmail.com regarding furnishing of information about the fraud, **(iii)** nine pages of mail communication sent from the mail id-vkjhamd@gmail.com to complainant Trilochan Mohanty on dtd.08.05.2020/09.05.2020 to his mail id-trilochan.mohanty @tatamotors.com regarding submission of more information about the petitioner, **(iv)** one LinkedIn account page of the petitioner having URL:- https:// www .linkedin .com/in/ akash- kumar-pathak-a45b09157having information written about Tata Administrative Service, **(v)** one Facebook account page of the petitioner having URL:- https://www.facebook.com/ akashkumar.pathak.5 having information written about Tata Administrative Service, **(vi)** one HP Laptap in which the complainant communicated with the source through gmail having specification Make:-HP, Sl. No.:-SCD9112R48, TATA MOTORS No.-96535 were seized under seizure list.

Basing on the seized documents correspondence made with Mobile Service Providers, it was ascertained that both the mobile numbers 9556968888 and 9556968888 belonged to one Sakir Khan of Unit-9, Bhubaneswar but the user could not be traced out. During course of investigation, correspondences were made with Face book Law Enforcement Agency for providing User registration details of the Facebook Id:-Akash Kumar Pathak along with IP addresses details which were awaited.

During course of investigation, the Investigating Officer visited the Business Plaza situated at Pune where the petitioner was running his office at 10th Floor and hired half of the floor and opened his Tata Motors Office. The Investigating Officer also visited Gods Blessing Apartment at Pune, Waters Apartment at Pune and examined different witnesses and recorded their statements. The witnesses proved the fraudulent, dishonest, illegal and clandestine activities of the petitioner by projecting himself as the MD of Tata Motors Ltd., Pimpri Division and convincing the people that his office in Hotel West Inn was his additional office to discharge his escalating work pressure. One witness David Peter proved the meeting of the petitioner with other co-accused persons namely Pradeep Kumar Panigrahi and Sarveswar Rao and regarding their conspiracy to cheat public by using fake identity card, visiting card, mail id, Tata Motors logo etc. as genuine. The witness further stated that the petitioner and the co-accused Pradeep Kumar Panigrahi were visiting different places in Charter Flight and staying together in hotels at different places.

During course of investigation, the Investigating Officer seized some vital documents at Pune which proved that the petitioner was running a fake office in the name of Tata Motors by using Tata Motors Logo etc. at Business Plaza. Requisition was given to Sarfaraj Maner, General Manager HR (CVBU), Pimpri, Pune to furnish detail information relating to the petitioner who was projecting himself as MD (I/c), Passenger Division, Tata Motors Ltd., Pimpri, Pune who in his reply affirmed that the petitioner was not working in the said Office at Pimpri, Pune.

On examination of some witnesses of Berhampur and peripheral area, it was proved that number of job aspirants have been cheated by co-accused Pradeep Panigrahi, who was an associate of the petitioner and he was also personally collecting money from the job aspirants and their parents/guardians by projecting himself as he would be father-in-law of the petitioner by projecting the petitioner as the MD (I/c), Passenger Division, Tata Motors Ltd., Pimpri, Pune. It was found during investigation that the innocent local people believed the version of co-accused Pradeep Panigrahi in good faith and many of them paid huge amount of money in cash as well as by account payment to the co-accused for securing a job in TATA Motors. Co-accused V. Sarveswar Rao collected resume of different job aspirants and sent the same to the petitioner and assured people for job in the Tata Motors. The job aspirants received application forms on their mails from careers@tata-motors.org and appeared online interview. They also provided list of selected candidates and attended online training course. Further the email communications between the mail id of job aspirants with mail id careers@tata-motors.org for getting job in TATA Motors Ltd. along with 65-B Certificates from some witnesses were seized which proved the correspondence between the job aspirants and the petitioner.

Statement of accounts of victims indicates that huge amount of money transactions was made from their account to account of co-accused Pradeep Panigrahi and similarly transactions of huge amount of money were made from Pradeep Panigrahi's account to the account of the petitioner. The statement of account also corroborate the statements of victims/ witnesses regarding withdrawal of huge amount of money to attend the illegal demand of accused for providing job in Tata Motors.

The Investigating Officer made correspondence with eNom, Inc, Registrar IANA, Google LLC with a request to furnish the point wise

information related to domain tata-motors.org i.e. User Registration details, IP addresses, payment details etc., but the report was still awaited. Some Laptops, Mobile handset, SIM cards etc. which were related to the petitioner were re-seized by Inspector R.P. Satpathy and David Peter Metre which were originally seized from them by vigilance.

The petitioner was brought in police remand who while in police custody confessed to have created email id akash.pathak@tata-motors.org and received resumes of job aspirants from the email id of the co-accused Pradeep Panigrahi and the petitioner in presence of Government witnesses opened the email id akash.pathak@tata-motors.org created in the name of TATA Motors for impersonating himself and screenshots of each step was taken and memorandum was prepared in presence of witnesses. The screenshots and other related documents, email communication between the petitioner and co-accused Pradeep Panigrahi were also seized.

The Investigating Officer made correspondence with Google INC through mail for providing User registration details, IP address details along with MAC address of the alleged computer used at the time of registration, login details concerned IP address with login date and time in respect of the e-mail ID:- mlagopalpur2019@gmail.com for the period from creation/registration of e-mail account and the reply was received.

The Investigating Officer made correspondence with Ms. Nupur Mallick, Group CHRO, TATA Sons seeking for clarifications about the petitioner, who confirmed that the petitioner was never empanelled in TATA Administrative Service.

The seized exhibits were forwarded to the Director, State Forensic Science Laboratory, Rasulgarh, Bhubaneswar for forensic examination and opinion through learned S.D.J.M., Bhubaneswar and the report is still awaited.

The Investigating Officer found that the petitioner had committed the offence of forgery by creating forged documents like I-Card, Visiting Card in the name of Tata Motors. He has committed the offence of identity theft in the name of Tata Motors and gave an impression of being a senior functionary of Tata Motors so as to get pecuniary advantages using forged document as genuine. The petitioner along with co-accused Pradeep

Panigrahi and Sarveswar Rao committed the offence of cheating by impersonation by creating forged electronic records in the form of Gmail in the name of TATA Motors. The offence was committed by the petitioner and co-accused Pradeep Panigrahi and Sarveswar Rao in a pre-planned and calculated manner for their wrongful gain by inflicting wrongful loss to the common people in the name of providing jobs to the job seekers in Tata Motors Ltd. which is a white-collar crime affecting socio-economic fabric of the State. The petitioner along with co-accused Pradeep Panigrahi and Sarveswar Rao hatched out criminal conspiracy in a pre-planned and calculated manner to dupe and induce the gullible job aspirants and their guardians in the guise of providing jobs in Tata Motors and collected huge amount of money. The petitioner along with co-accused Pradeep Panigrahi and Sarveswar Rao fraudulently fabricated documents including electronic documents to project the petitioner as the MD (I/c) of Tata Motors, Passenger Division and received resumes of the job aspirants, sent them letters purportedly issued by Tata Motors Ltd., conducted fake online interviews and collected money from them after issuing forged selection letters. The petitioner also organized fake online training for the selected candidates. From the evidence collected, it was found that the petitioner along with co-accused Pradeep Kumar Panigrahi and V. Sarveswar Rao have committed the offences under sections 419/420/467/468/471/120-B of the Indian Penal Code read with sections 66-C/66-D of I.T. Act and accordingly, first charge sheet was submitted against them keeping the investigation open under section 173(8) of Cr.P.C.

4. The bail application of the petitioner came to be rejected by the learned 3rd Addl. Sessions Judge, Bhubaneswar in BLAPL No.1623 of 2020 as per order dated 07.01.2021 mainly on the ground that there are prima facie materials against the petitioner and the accusation against the petitioner are grave and serious and the investigation is under progress and many other factors are likely to be unearthed and that there is every likelihood of pressurising and threatening the witnesses, if the petitioner is enlarged on bail.

5. Mr. Pitambar Acharya, learned Senior Advocate appearing for the petitioner in his own inimitable elegant style contended that while the petitioner was in judicial custody in connection with Cuttack Vigilance Cell P.S. Case No.06 dated 27.11.2020, he was taken on remand in this case since 07.12.2020 as per the orders of learned S.D.J.M., Bhubaneswar. The

petitioner has been released on default bail on 27.01.2021 in the vigilance case since the vigilance police failed to submit the charge sheet within the statutory period of sixty days. In the said vigilance case, while calculating the assets of the father of the petitioner, all the bank accounts of the petitioner were taken into account. Therefore, on the one hand, one investigating wing has taken the money in the petitioner's bank accounts as his father's disproportionate assets whereas the other investigating wing has alleged that the said money in the petitioner's bank accounts was collected from job aspirants through co-accused Pradeep Kumar Panigrahi. It is argued that the prosecution is trying to mislead the Court by projecting that the petitioner was not an employee of TATA Group even though the Investigating Officer has received the appointment letter of the petitioner from the official email id of Nirav Khambati, the CEO of TATA Sons. The domain names of TATA Sons and TATA Motors cannot be created. There has been inordinate delay of four months in registering of F.I.R. after receipt of email from Trilochan Mohanty against the petitioner and the prosecution has no answer to the same. The offences are triable by Magistrate First Class and charge sheet has already been submitted on 31.03.2021 and the petitioner has suffered pre-trial detention for more than six months. It is contended that the allegations against the petitioner are mainly to be proved on the basis of documentary evidence including electronic materials which have been seized. None of the witnesses stated to have paid any money directly to the petitioner for allegedly securing jobs in TATA Motors and there is no nexus between the job seekers/aspirants and the petitioner and thus, the element of cheating within the scope and ambit of section 415 of Indian Penal Code is not attracted. He emphasised that email contents of Trilochan Mohanty are false and frivolous and without a reasonable satisfaction reached after some investigation as to the genuineness of accusations leveled in email, the curtailment of liberty of the petitioner is a drastic abridgment of constitutional protection which is a determining factor to be taken into account in this bail application. According to Mr. Acharya, the investigating agency has used all the three investigating wings of the State i.e. Vigilance, Police Commissionerate and Crime Branch to implicate the petitioner, his father and his would be father-in-law with false accusation. The Crime Branch has taken the petitioner on five days police remand and after five days, no further remand was prayed for by the investigating agencies. The petitioner cannot have any access to the official witnesses or to any official documents/records pertaining to the case which have been seized and as such, there is no question of tampering with the evidence.

It is further contended that while granting bail to the co-accused Pradeep Kumar Panigrahi in BLAPL No.9008 of 2020 vide order dated 24.02.2021, this Court secured the money allegedly paid by the job seekers and directed deposit of Rs.47.45 lakhs by the said co-accused before the learned Court below. The allegations made in the F.I.R., even if they are taken at their face value and accepted in its entirety do not prima facie constitute any offence against the petitioner.

It is further contended that the petitioner is a young boy of twenty six years old and he is a graduate in Mechanical Engineering and there is no criminal antecedent against him save and except the present F.I.R. and subsequent F.I.Rs which were lodged on similar accusations on account of political differences between his would-be father-in-law, a sitting M.L.A. and present ruling party of the State and the petitioner has become a victim of a well-designed conspiracy. He placed reliance in the cases of **State of Rajasthan -Vrs.- Balchand @ Baliay reported in (1977) 4 Supreme Court Cases 308, Thulia Kali -Vrs.- State of Tamilnadu reported in (1972) 3 Supreme Court Cases 393**, **Kishan Singh -Vrs.- Gurpal Singh reported in (2010) 8 Supreme Court Cases 775**, **Joginder Kumar -Vrs.- State of Uttar Pradesh and others reported in (1994) 4 Supreme Court Cases 260** and **Sheila Sebastian -Vrs.- R. Jawaharaj reported in (2018) 7 Supreme Court Cases 581**.

6. Mr. Soubhagya Ketan Nayak, learned Addl. Govt. Advocate on the other hand vehemently opposed the prayer for bail and argued that the investigation so far reveals that co-accused Pradeep Panigrahi had collected a hefty sum of Rs.88,00,000/- (rupees eighty eight lakh) from the job aspirants for providing them jobs which is the subject matter of different cases and such money was transferred to the bank account of the petitioner on different dates. It is further argued that in spite of opportunities being provided to the petitioner to produce documents to show that he was serving as M.D. (I/c) of TATA Motors and received salary as an employee of the company for his job, he failed to do so. Reliance was placed on the notification of the Finance Department, Govt. of India dated 13.05.2005 which indicates that salaries of Government servants and employees in Private/Public & Corporate Sectors are to be paid through bank accounts. It is contended that the claim of the petitioner as an employee of TATA Group is totally false and baseless. He highlighted the reply received from the Head HR Manager, TATA Motors, Pimpiri, Pune to the query made by the Investigating Officer that the

petitioner was never posted as M.D. (I/c) of TATA Motors. He also placed a reply received from Ms. Nupur S Mallik, Group Chief Human Resources Officer to show that the petitioner was never in TATA Group and he was never allotted ID No.88176 and the said witness is yet to be examined during course of further investigation. It is further argued that the offences alleged against the petitioner have serious social ramifications and there is segment of larger conspiracy to cheat the innocent unemployed youth in the name of providing jobs. Answering to the point raised by Mr. Acharya relating to the seizure of bank accounts of the petitioner in the vigilance case instituted against the petitioner and his father Abhaykant Pathak, it is stated in the written note submitted on behalf of State that the bank accounts of the petitioner in which he received money from co-accused Pradeep Panigrahi have been duly investigated by the vigilance and such money was treated as personal income of the petitioner and not as the disproportionate assets of his father. While concluding the argument, it is emphasised that in case the petitioner is released on bail at this stage when further investigation on certain important aspects is under progress, there is every likelihood of tampering with the evidence and dissuading the witnesses to speak the truth and thereby there would be derailing of the ongoing investigation. He placed reliance in the case of **Muna Patra @ Patro -Vrs.- State of Odisha reported in (2019) 74 Orissa Criminal Reports 332**.

7. Law is well settled that at the stage of granting bail, detailed examination of evidence and elaborate discussions on merits of the case need not be undertaken but when the accused is charged with economic offences, the order must reflect the reasons for arriving at a prima facie conclusion as to why bail was being granted.

In the case of **Ash Mohammad -Vrs.- Shiv Raj Singh reported in (2012) 9 Supreme Court Cases 446**, it is held that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.

In the oft-quoted decision of the Hon'ble Supreme Court in case of **Balchand @ Baliay** (supra), Hon'ble Justice V.R. Krishna Iyer speaking for the Bench observed that when an accused seeks enlargement on bail from the Court, the basic rule is to grant bail, not jail, except where there are

circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like. The gravity of the offence involved which is likely to induce the accused to avoid the course of justice so also the heinousness of the crime must weigh with the Court when considering the question of bail.

At this stage, it would be appropriate to discuss the ratio laid down by the Hon'ble Supreme Court and this Court relating to the principles of grant of bail in economic offences.

In the case of **Y.S. Jagan Mohan Reddy -Vrs.- C.B.I. reported in (2013) 55 Orissa Criminal Report (SC) 825**, it is held as follows:-

> "15. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.
>
> 16. While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of public/State and other similar considerations."

In case of **State of Gujarat -Vrs.- Mohan Lal Jitamal Torwal reported in A.I.R. 1987 S.C. 1321**, it is held as follows:-

> "5.....The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white colour crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest".

In the case of **Nimmagadda Prasad -Vrs.- C.B.I. reported in (2013) 55 Orissa Criminal Reports (SC) 833**, it was held that economic offences

have serious repercussions on the development of the country as a whole. Such offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as a grave offence affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

In the case of **Ram Chandra Hansdah -Vrs.- Republic of India reported in (2015) 62 Orissa Criminal Reports 219**, I have held that economic offences are considered grave offences as it affects the economy of the country as a whole and such offences having deep rooted conspiracy and involving huge loss of public fund are to be viewed seriously. Economic offence is committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. In such type of offences, while granting bail, the Court has to keep in mind, inter alia, the larger interest of public and State. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail applications. Similar view was taken by me in the case of **Muna Patra @ Patro** (supra), while dealing with a bail application in case of an economic offence.

Thus, economic offences are considered grave offences as it affects the economy of the country as a whole and such offences having deep rooted conspiracy and involving huge loss of public fund are to be viewed seriously. Economic offence is committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. An economic offence is a well manipulated offence. It is a white collared crime which disturbs economic equilibrium in the society and the weaker section is victimised. Liberty of an individual cannot outweigh the interest of the society. An economic offence has to be viewed from a serious perspective and no lenient view can be taken. A murderer takes away the life of a person but a person committing economic offence leaves a living person dead. Discretion of grant of bail should be used in a proper and judicious manner and the Court must take note of the nature of accusation, the nature of supporting evidence, the severity of punishment in case of conviction, reasonable apprehension of tampering with the evidence, criminal antecedents etc. Of course, bail should not be denied merely because the

sentiments of the community are against the accused. It is not to be denied merely because there is a prima facie case which requires trial of the issue of guilt or innocence. It's purpose is to secure attendance of the accused at the trial and non-interference with a fair and speedy trial. The purpose of bail law is not punitive but preventive. Even if there is a prima facie case for a possible conviction, bail cannot be refused, unless there is reasonable evidence before the Court that the accused would abscond or destroy evidence or tamper with witnesses to frustrate the trial and grant of bail would be against the larger interests of the public and State and similar other considerations. More heinous is the crime, the greater is the chance of rejection of the bail, though it would always be depended on the factual matrix of the matter. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail application.

8. The crux of matter is whether the petitioner was an employee of Tata Motors Ltd. and he was working as MD (I/c) of Pimpri Division, Pune at the relevant point of time.

According to the prosecution, from the statements of witnesses and documents collected so far particularly from the reply furnished by Sarfaraj Maner, General Manager HR (CVBU), Pimpri, Pune and Ms. Nupur Mallick, Group CHRO, TATA Sons, it appears that the petitioner was not working in Tata Motors Division Office at Pimri, Pune and was never empanelled in TATA Administrative Service. The office which he was running in the name of Tata Motors by using Tata Motors logo etc. at 10th Floor, Business Plaza, Westin, Koregaon Park, Pune was a fake one. The petitioner also created forged documents like I-Card, Visiting Card in the name of Tata Motors. In spite of opportunities provided to the petitioner, according to the prosecution, he failed to produce documents to show that he was serving as M.D. (I/c) of TATA Motors and received salary as an employee for his job. Since the investigation is under progress, the prosecution is expecting some more incriminating materials to be unearthed in that connection.

Though Mr. Pitambar Acharya, learned Senior Advocate filed xerox copies of certain documents regarding the appointment of the petitioner in TATA Group, at this stage it would not be proper to give any opinion on such documents. Neither the original copies were filed nor were the documents

filed with an affidavit that those are the true copies of the original documents. The Investigating Officer is expected to verify the authenticity of those documents filed in Court. If the Investigating Officer has received the appointment letter of the petitioner from the official email id of Nirav Khambati, the CEO of TATA Sons as submitted by the learned counsel for the petitioner, the same will certainly be brought on record at the time of submission of final chargesheet. The petitioner will also get ample opportunity at the stage of trial to prove the original documents in that connection in accordance with law.

In view of the materials collected by the prosecution so far during course of investigation and the documents produced by the learned counsel for the petitioner, I refrain from giving any opinion on the disputed question as to whether the petitioner was working in Tata Motors Division Office at Pimri, Pune and he was ever empanelled in TATA Administrative Service. However, after evidence is adduced from both the sides, the learned trial Court would be in a better position to evaluate the materials produced before it and to give a finding thereon.

9. Adverting to the contentions raised by the learned counsel for the petitioner regarding delay in lodging first information report, it appears that on 18.05.2020 an email was received from one Trilochan Mohanty addressed to the IG, CID, CB, Cuttack, Odisha and the report was sent to DCP, Bhubaneswar for appropriate action but no action was taken thereon. On 23.09.2020 the said Trilochan Mohanty appeared at Cyber Crime Police Station, Cuttack and reported to have lodged a report on 18.05.2020. The records were verified and when it was found that no action was taken on the email, the very same email dated 18.05.2020 was registered as F.I.R. on 23.09.2020 as CID, CB, Cyber Crime P.S. Case No.26 of 2020 against the petitioner. Therefore, here is a case of delay of four months in the registration of the F.I.R. even after getting the email against the petitioner on 18.05.2020. At this juncture, two decisions relied upon by the learned counsel for the petitioner need to be discussed.

In the case of **Thulia Kali** (supra), the Hon'ble Supreme Court held that first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting

upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.

In the case of **Kishan Singh** (supra), the Hon'ble Supreme Court held that prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. In case, there is some delay in filing the F.I.R., the informant must give plausible explanation for the same. Undoubtedly, delay in lodging the F.I.R. does not make the informant's case improbable when such delay is properly explained. However, deliberate delay in lodging the F.I.R. is always fatal. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal Court. The Court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an F.I.R. is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the Court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case.

The Constitution Bench of the Hon'ble Supreme Court in the case of **Lalita Kumari -Vrs.- Govt. of U.P. and Ors. reported in (2014) 2 Supreme Court Cases 1** held that the registration of first information report is mandatory under section 154 of the Code of Criminal Procedure, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. If the inquiry discloses the commission of a cognizable offence, the first information report must be registered. The police officer cannot avoid his duty of registering offence if cognizable offence is

disclosed. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. The Hon'ble Court further held that in what type and in which cases preliminary inquiry is to be conducted would depend on the facts and circumstances of each case. The categories of cases in which preliminary inquiry may be made were enumerated therein.

In the case of **Jitender Kumar -Vrs.- State of Haryana reported in (2012) 6 Supreme Court Cases 204,** it is held that the settled principle of criminal jurisprudence is that mere delay in lodging the first information report may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the first information report can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the first information report cannot be a ground by itself for throwing away the entire prosecution case. The Court has to seek an explanation for delay and check the truthfulness of the version put forward. If the Court is satisfied, then the case of the prosecution cannot fail on this ground alone.

At the stage of considering bail application, it is not required to seek an explanation for delay in lodging or registering the first information report from the prosecution and check the truthfulness of the version put forth.

Mr. Nayak, learned Additional Govt. Advocate, however, on his own tried to explain the delay in registration of F.I.R. by submitting that some kind of preliminary enquiry was going on relating to the allegations made in the email sent on 18.05.2020 by Trilochan Mohanty and when the allegations were prima facie found to be correct, then the F.I.R. was registered. It is very difficult to accept such explanation at this stage particularly when no such aspects find place in the case records submitted by him. There is nothing as to who was conducting the enquiry and what the outcome of such enquiry was. The chargesheet rather indicates that on 23.09.2020 when Trilochan Mohanty appeared at Cyber Crime Police Station to know about the status of his email dated 18.05.2020, records were verified and it was found that no action was taken on the email.

However, the prosecution can produce the materials at the stage of trial giving plausible explanation for the delay in registration of F.I.R., which is obviously to be taken into account by the learned trial Court in accordance with law. It would not be proper on the part of this Court to give any finding

on such submission particularly at the stage of adjudication of the bail application. It is needless to say that even if there is some delay in lodging the F.I.R. or registration of the F.I.R., it has to be brought on record by the defence that there was deliberate delay which was the result of malafide or actuated by extraneous considerations and it has to be further established as to whether any serious prejudice was caused to the accused thereby or it cast any doubt on the prosecution case.

10. The learned counsel for the petitioner raised a contention that one investigating wing has taken the money in the petitioner's bank accounts as his father's disproportionate assets whereas the other investigating wing has alleged that the said money in the petitioner's bank accounts was collected from job aspirants through co-accused Pradeep Kumar Panigrahi. However, in the written note submitted on behalf of State, it has been clarified that the bank accounts of the petitioner in which he received money from co-accused Pradeep Panigrahi have been duly investigated by the vigilance and such money was treated as personal income of the petitioner and not as the disproportionate assets of his father.

11. The contention raised by the learned counsel for the petitioner that there has been curtailment of liberty of the petitioner without proper investigation as to the genuineness of accusations levelled in the email, is very difficult to be accepted. Reliance was placed in the case of **Joginder Kumar** (supra) where the Hon'ble Supreme Court held that no arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. Reliance was also placed by the learned counsel for the petitioner in the case of **Sheila Sebastian** (supra), wherein it is held that the Investigating Officer is expected to be diligent while discharging his duties. He has to be fair, transparent and his only endeavour should be to find out truth.

The case records indicate that after registration of the first information report on 23.09.2020, the petitioner was taken on remand in the case on 07.12.2020. Prior to that, he was in judicial custody in connection with

Cuttack Vigilance Cell P.S. Case No.06 dated 27.11.2020. During investigation, witnesses were examined and some relevant documents were seized and the I.O. also visited the office of the petitioner at 10th Floor, Business Plaza and it was revealed that the petitioner was running a fake office in the name of Tata Motors by using Tata Motors logo etc. at Business Plaza and his fraudulent, dishonest, illegal and clandestine activities by projecting himself as the MD of the Company came to fore. Thereafter, the I.O. made a prayer before learned S.D.J.M., Bhubaneswar to take remand of the petitioner in the case, which was allowed. In view of the materials on record, it can be said that there was reasonable satisfaction of the I.O. reached after some investigation as to the genuineness and bona fides of the accusations levelled in the first information report whereafter the petitioner was taken on remand. There is nothing to show that the investigation was unfair. Consequently, the contention of the learned counsel for the petitioner on this score fails.

12. The case records indicate that in a pre-planned and calculated manner, the petitioner and the co-accused persons have incurred wrongful gain by inflicting wrongful loss to the common people in the name of providing them jobs in TATA Motors which is a white collar crime that affects socio-economic fabric of the State. According to the prosecution, the petitioner became successful in his evil mission in collecting huge amount from the job aspirants in view of the influence of local M.L.A. who is a co-accused in the case who projected the petitioner as his prospective son-in-law. The gullible job aspirants were also mesmerised as the petitioner alleged to have created forged documents and electronic records of Tata Motors, received resumes of job aspirants, conducted fake online interviews, issued forged selection letters and organised fake online training programme for the selected candidates.

The very term 'unemployment' sounds like a death knell for the future of the youth of this nation. When an educated youth carrying certificates of Boards and Universities is drenched in rain of sorrows for non-availability of any suitable job for him and unable to show his tears to anyone even though he is crying inwardly, feeling pain in his hurting heart and tries to hide sign of sadness, instead of providing him an umbrella for weathering storms of life and playing a supportive role to let him overcome depression, if someone on the pretext of providing job, exploits the youth and dupes him of his money arranged with much difficulty and makes him falling prey to temptations of lucrative jobs, it is a cheating of highest order. It brings

wrongful gain to the duper and wrongful loss to the person duped. Making false promise by an accused to the job aspirant by assuring that he would get job on payment of huge amount itself establishes one of the essential ingredients of cheating as envisaged under section 415 of the Indian Penal Code that at the time of making the promise, the accused had fraudulent and dishonest intention to deceive the job aspirant and to get gained wrongfully. According to the data collected by Centre for Monitoring Indian Economy (CMIE), the unemployment rate among educated youth is on massive rise. Needless to say, the cases of fraudsters cheating job aspirants are also on sharp rise. These white-collar crimes, which have drastic effects, are required to be dealt with iron hands and severe punishment needs to be awarded to the culprits on proof of charges by the prosecution beyond all reasonable doubt.

13. In view of the foregoing discussions, without detailed examination of evidence and elaborate discussion on merit of the case but taking into account prima facie case of commission of act of cheating, fraud and forgery and impersonation alleged against the petitioner which is also the subject matter of further investigation and the fact that such offences are essentially matters of evidence which could be proved as a fact by direct evidence or by inferences drawn from proved facts, further taking into account the manner in which gullible job aspirants have been allegedly duped with deliberate design keeping an eye on personal profit regardless of the consequence to the community and that there may be many more such persons who might have been duped in the name of providing jobs in a reputed company like TATA Motors which is likely to be unearthed during course of further investigation, the nature and gravity of the accusation, severity of the punishment in the event of conviction, the position and standing of the petitioner and the co-accused sitting M.L.A. who has been recently released from judicial custody, the reasonable apprehension of tampering with the evidence and when on some important aspects the investigation is still under progress, in the larger interest of public and State, I am not inclined to release the petitioner on bail.

It is made clear that the observation made while disposing of this bail application relates to the materials collected during course of investigation so far and the findings recorded herein are for the purpose of adjudication of this bail application only. This may not be taken as an expression of opinion on the merits of the case. The learned trial Court would be at liberty to decide the matter in the light of evidence which shall come on record after it is led de hors any finding recorded in this order. Accordingly, the bail application sans merit and hence stands rejected.

2021 (II) ILR - CUT- 434

K.R. MOHAPATRA, J.

MACA NO. 421 OF 2003

NEW INDIA ASSURANCE CO. LTD. ……Appellant

.V.

MATHA BEWA & ORS. ……Respondents

MOTOR ACCIDENT CLAIM – Whether gratuitous passenger is entitled to get compensation? – Held, for a smooth and hassle free remittance of the compensation to the victim of a vehicular accident, which is the aim and object of the act, the insurance company should satisfy the impugned award and would be at liberty to recover the same from the owner of the offending vehicle.

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 2252 : National Insurance Company Ltd. Vs. Kaushalaya Devi & Ors.
2. (2003) 2 SCC 223 : New India Assurance Company Ltd. Vs. Asha Rani & Ors.
3. 1999 (II) OLR 209 : Divisional Manager, Oriental Insurance Co. Ltd. Vs. Hadiya Gouda & Ors.
4. 1996 (I) OLR 629 : Divisional Manager, National Insurance Company Ltd., Bhubaneswar Vs. Ranjan Kumar Pati & anr .
5. 2007 (Suppl-1) OLR 987 : National Insurance Company Ltd. Vs. Gatikrushna Sahu & Ors.
6. 2001 (II) OLR 583 : New India Assurance Co. Ltd. Vs. Smt. Rama Dei & Ors.
7. 2017 (I) ILR Cuttack 149 : Charulata Mallik and Ors. Vs. Prakash Kumar Mohanty.
8. (2004) 2 SCC 1 : Asha Rani (supra), Satpal Singh (supra) and National Insurance Company Ltd. Vs. Baljit Kaur.
9. (2004) 8 SCC 517 : National Insurance Co. Vs. Challa Upendra Rao & Ors.

For Appellant : M/s. S.S. Rao, & B.K. Mohanty,
For Respondents : M/s. J.R. Dash, K.L. Dash, S.C. Samal, N. Sahoo (R.4)

JUDGMENT Date of Judgment: 27.02.2019

K.R. MOHAPATRA, J.

This appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act') has been filed assailing the judgment and award dated 02.04.2003 passed by learned Motor Accident Claims Tribunal, Kalahandi-Nuapada, Bhawanipatna (for short 'the Tribunal') in MJC No.1 of 1998, whereby learned Tribunal awarded a compensation of Rs.1,35,000/- (rupees one lakh thirty five thousand) in favour of the claimants-respondent No.1 to 3 with interest @ 9% per annum from the date of filing of the claim petition till realization and directed the appellant-Insurance Company to pay the same.

2. Facts in nutshell relevant for proper adjudication of this appeal are that on 25.10.1997 at about 3.00 P.M., when the deceased, namely, Minaketan Naik, who was a Coolie, by profession, was travelling on a Tractor and trolley bearing registration No.OR-08 6912 and OR-08 6913 respectively, he fell down from the Tractor near Saradapur Chhak due to a heavy jerk and the wheel of the trolley ran over him. As a result, he died instantaneously. The offending Tractor as well as Trolley was insured with the appellant-Insurance Company covering the date of the accident. As he was the only breadwinner of the family, the widow and children of the deceased filed claim petition under Section 166 of the Act for compensation.

3. Mr. S.S Rao, learned counsel for the appellant assailed the impugned judgment and award only on the ground that the liability for payment of the compensation could not have been saddled on the appellant-Insurance Company for the reason that the driver of the offending Tractor had no valid driving license on the date of the accident. Moreover, the tractor being not a passenger vehicle, the Insurance Company cannot be held liable to indemnify the owner of the offending tractor. It is contended that the driver of the offending Tractor had driving license No.3642/91 issued by the licensing authority, Jamshedpur, which was renewed vide DL.No.3397/94/R by the licensing authority, Sambalpur. On verification of records, it was found that the Original Driving License of the driver bearing DL No.3642/91, which was issued by the Licensing Authority, Jamsedpur stood in the name of one Ashar Khursid and not in the name of the driver of the offending vehicle, namely, Motiram Naik. The Insurance Company had taken a specific plea to that effect in their written statements and filed documents, namely, Ext.A-1, the Challan deposit of Rs.20/- towards verification of DL No.3642 of 91 dated 07.01.2002, Ext.A-2, verification report dated 15.01.2002 in respect of DL No.3642/91 issued in favour of Ashar Khursid. Ext.A-3, certified copy of the DL No.3397/R/94 issued in favour of Motiram Naik dated 25.11.2001 in support of their claim. Learned Tribunal although took note of the contention of the appellant, but without giving any finding on the same, straightway proceeded to saddle the liability on the Insurance Company, which is not sustainable in the eyes of law.

In support of his case, Mr. Rao, relied upon the case laws reported in the case of ***National Insurance Company Ltd. –vs- Kaushalaya Devi & Ors,*** reported in AIR 2008 SC 2252 and ***New India Assurance Company Ltd. -v- Asha Rani and others***, reported in (2003) 2 SCC 223 and contended that the

Insurance Company cannot be held liable to indemnify the liability of payment of compensation for an occupant of a Tractor, which is not a passenger carrying vehicle. The risk of the deceased was neither contemplated at the time when the contract with the Insurance Company was entered into nor was any premium paid to cover the risk of the deceased. Hence, he prayed for setting aside the impugned award to the extent of making the Insurance Company liable for payment of compensation.

4. Mr. Dash, learned counsel for the respondent No.4-owner of the vehicle, on the other hand, refuted the submissions of Mr. Rao and contended that law is no more *res integra* to the effect that even if the risk of the deceased was not covered under the policy of the offending vehicle, the Insurance Company has to pay the compensation, inasmuch as even though it is held that the original driving license was not issued in favour of the driver of the offending Tractor by the Licensing Authority, Jamshedpur, but the same was renewed by the RTO, Sambalpur, who issued driving license No.3397/R/94 in favour of the driver of the Tractor, namely, Motiram Naik and the same was valid on the date of the accident. The owner had no occasion to know that DL No.3642 /91, which was issued by the Licensing Authority, Jamshedpur was not in the name of said Motiram Naik. Thus, it cannot be held that he had allowed an unauthorized person to ply the vehicle. In support of his case, he relied upon the decision reported in the case of ***Divisional Manager, Oriental Insurance Co. Ltd. –v- Hadiya Gouda and others***, reported in 1999 (II) OLR 209; ***Divisional Manager***, ***National Insurance Company Ltd., Bhubaneswar Vs. Ranjan Kumar Pati and another***, reported in 1996 (I) OLR 629; ***National Insurance Company Ltd. Vs. Gatikrushna Sahu and others***, reported in 2007 (Suppl-1) OLR 987 and ***New India Assurance Co. Ltd. Vs. Smt. Rama Dei and others***, reported 2001 (II) OLR 583 and contended that the Insurance Company is liable to pay the compensation for the vehicular accident in question and no fault can be found with the award passed by learned Tribunal. Hence, he prayed for dismissal of the appeal.

5. None appears for the claimants-respondent Nos. 1 to 3 in spite of valid service of notice.

6. Taking into consideration the rival contentions made by learned counsel for the parties, the issues that arise for consideration, firstly whether the Insurance Company can be held liable to pay the compensation in respect of a victim of an accident, traveling as a gratuitous passenger in a goods

carriage? Secondly, whether the driver of the offending tractor, namely, Sri Motiram Naik had a valid driving licence to drive the offending vehicle on the date of accident?

7. The appellant-Insurance Company to substantiate its case exhibited, Exts.A-1 to A-3 to show that the DL No. 3642/91 issued by the Licensing Authority, Jamshedpur stood in the name of one Ashar Khursid and not in the name of Motiram Naik, who was the driver of the offending vehicle on the date of the accident. However, subsequently the same was renewed by the Licensing Authority, Sambalpur vide DL No.3397/R/94 in the name of said Motiram Naik. The aforesaid factual position is not disputed at the Bar.

8. Section 147 of the Act deals with requirement of an insurance policy and limits of liability of an Insurer. Section 149 of the Act deals with duty of the Insurer to satisfy judgments and awards against person(s) insured in respect of third party risks. Learned counsel for the appellant contended that the instant case falls under the condition prescribed in Section 149 (2)(a)(ii) which reads as under:-

> *"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.—*
>
> *1)* xx xx xx
>
> *2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—*
>
> *(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—*
>
> *(i) a condition excluding the use of the vehicle—*
>
> *(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or*
>
> *(b) for organised racing and speed testing, or*
>
> *(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or*

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification;

xxx xxx xxx"

The aforesaid provisions of the Act contemplates that the Insurance Company can be absolved of its liability, when it proves that there has been a breach of specified condition of the policy detailed in clause (a) excluding driving of the vehicle by a person who has not duly licensed. Section 3 of the Act provides that no person shall drive a Motor Vehicle unless he holds a valid and effective driving license. Section 181 of the Act prescribes that any person who drives a motor vehicle in contravention of Section 3 shall be punishable. In other words, a driver who uses a fake driving license is punishable under Section 181 of the Act. Further, Section 180 of the Act prescribes that any person being the owner or person in charge of a motor vehicle is liable to be punished, if he causes or permit any person to drive a vehicle in contravention of Section 3 of the Act.

9. On a conspectus of the aforesaid provisions, it is clear that both the owner as well as the driver of the offending vehicle, are liable for punishment, if the driver of the offending vehicle does not have a valid driving license. In the case of ***Hadiya Gouda (supra)***, this Court after discussing different provisions of the Act and relying upon different case laws holding the field at the relevant time came to the following finding;

"10. Section 3 of the Act provides that no person shall drive a motor vehicle unless he holds a valid and effective driving licence. Section 181 of the Act prescribes that any person who drives a motor vehicle in contravention of Section 3 shall be punishable. In other words, a driver who used a fake driving licence is punishable Under Section 181 of the Act as he knows that his licence is not valid. Section 180 of the Act lays down that any person being the owner or person in charge of a motor vehicle is liable to be punished if he causes or permits any other person to drive a vehicle in contravention of Section 3 of the Act. It is obvious that in order to hold him liable under Section 180 of the Act, it has to be established that the person had the necessary mens rea. If a forged driving licence is produced before an owner of a vehicle, it may not be possible for the owner to satisfy himself regarding the genuineness of the driving licence. The forgery committed by the driver may not be within the knowledge of the owner of the vehicle. In such a case, it cannot be said that the owner would also be liable though obviously the driver in possession of a forged driving licence would be liable.

11. In the present case, it appears that there was no original licence in favour of the driver in question though subsequently there has been a renewal. Law is well settled

that no person can take advantage of his own fraud. If the original driving licence is a fake one or a forged one, the driver cannot claim that he has got a valid driving licence merely because subsequently he obtains a renewal of the driving licence. The driving licence purportedly obtained from one place can be renewed by the licensing authority at any other place. Sometimes, such renewal may be granted by the licensing authority without knowing that the original licence in a fake one and at times such renewal may be obtained even by collusion. Whatever may be the position, it is obvious that the driver possessing such fake 'original licence' is guilty of an offence punishable Under Section 181 of the Act. His original action in obtaining a fake driving licence being a punishable crime, the subsequent action in obtaining a renewal on the basis of a fake licence cannot place him in a better position and so far as the driver is concerned, such renewed licence shall be equally invalid. Section 15 of the Act contemplates renewal of a "licence". A fake or forged licence cannot be considered to be "licence" within the meaning of the expression as used in the Act. However, merely because the original licence is fake or the subsequent renewal is invalid, it cannot be assumed that the owner of a vehicle employing such driver is also guilty for the original fraud. In most of the cases, the owner would be oblivious of the proceeding forgery committed by the driver. Therefore, unless it is established that the owner had permitted the driver to drive the vehicle knowing that his original driving licence was a fake one, or the renewed licence was illegal, the owner cannot be found guilty Under Section 180 of the Act. Applying the same logic, the Insurance Company cannot be exonerated from the liability of satisfying the award unless it is established that the owner of the vehicle had knowingly permitted the driver with a fake licence to drive the vehicle. For the aforesaid reasons, 1 am unable to accept the contention raised by the learned counsel for the appellant and the appeal is accordingly liable to be dismissed."

10. There is no quarrel over the fact that the original driving license held by Motiram Naik was a fake one. Thus, in view of the ratio in ***Hadiya Gouda (supra)***, the contentions of Mr. Dash to the effect that it was validly renewed by the RTO, Sambalpur has no relevance, inasmuch as when the original driving license was a fake one, the renewal by the licensing authority cannot give it a new lease of life. In other words, it will remain an invalid one on the date of the accident. However, there is no material on record to show that the owner of the Tractor-respondent No.4 was aware of the same and had allowed said Motiram Naik to drive the offending Tractor.

Further, this Court in the case of ***Gatikrushna Sahu (supra)*** at paragraphs-8 and 9 held as follows:

8. In this respect the decision of a division bench of this Court in the case of Divisional Manager, Boudh Commercial Division, Orissa Forest Development Corporation Ltd. v. Janakalata Barik and Ors. reported in 2001 (1) OLR 535 was relied on for various clauses of the Certificate of Insurance which reads as follows:

...A perusal of the aforesaid Certificate of Insurance indicates under the heading "Persons or classes of persons entitled to drive:

(a) The Insured.

(b) Any other person who is driving on the licensee's order or with his permission, pravided that the person driving holds or had held and has not been disqualified from holding an effective driving licence with all the required endorsements thereon as per the Motor Vehicles Act, 1988....

The defence of the Insurance Company is obviously based upon the provisions contained in Section 149(2)(a)(ii). The relevant provisions are extracted hereunder:

149(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any Judgment or award unless, before the commencement of the proceedings which the Judgment or award is given the insurer had notice through the Court of as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such Judgment or award, so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions namely:

(i) a condition excluding the use of the vehicle-

(a) to (d)

(ii) a condition excluding driving by a "named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or....

The ground of defence is available if there is breach of a specified condition of the policy. The Insurance Company is authorized to issue any policy incorporating conditions excluding driving by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining the driving licence during the period of disqualification. If such conditions are not included in the policy, there cannot be any breach of the policy. In other words, the question of exclusion of the liability of the Insurance Company would depend upon the terms and conditions of the policy. It is always open to the Insurer to incorporate conditions envisaged in the Act. The exoneration from liability would be on the ground that there is violation of a specified condition of the policy. It is, of course, true that such incorporated conditions must be a condition enumerated in Section 149 and not beyond such enumerated conditions. The provisions contained in Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988, only enable the Insurance Company to take up such defenses, provided that such conditions have been incorporated. From the conditions of the policy, already extracted, it is clear that any person who had held a driving licence, but is not disqualified from holding a driving licence is also permitted to drive the vehicle. In the present case, apparently, the driver had a valid driving licence, but the tenure of the licence had expired. There is no material to indicate that the time of the accident, the driver had incurred any of the

disqualifications, as contemplated under the Act or the Rules. It cannot be said that he was disqualified to hold or obtain a licence. By specifically incorporating such a clause in the policy, it is apparent that the Insurer has permitted for driving of the vehicle by a person who had held a driving licence prior to the date of accident, but was not disqualified to hold a licence at the relevant time, that is to say, at the time of accident. Therefore, even though on the date of accident there was no valid driving licence, since the driver had held a driving licence and was not disqualified to hold a driving licence, it cannot be said that there has been any violation of any specified conditions of the policy. Section 149 of the Motor Vehicles Act only contemplates restrictions, which can be imposed by the Insurance Company by incorporating the conditions in the policy. The exclusion of liability is not on the basis of Section 149 itself, but on the basis of any violation of the terms and conditions which are permissible to be imposed in the policy. Since the policy itself had permitted a person who had held a driving licence, obviously in the past, but was not disqualified to hold licence at the time of accident, there is no violation of the condition. The aforesaid view taken by me gains support from the decision reported in AIR 1975 Mad. 250 Madras Motor and General Insurance Co. Ltd. v. Madathi Ammal and Anr.

9. The Judgment under reference answers the question raised by the Learned Counsel for the Appellant inasmuch as it cannot be said that there has been violation of any specific condition of the policy since the deceased driver had held a driving licence (though not renewed) and was not disqualified to hold the same though he was not holding a valid driving licence on the date of accident. Section 149 of the Motor Vehicles Act only contemplates restrictions, which can be imposed by the Insurance Company by incorporating the conditions in the policy. The exclusion of liability is not on the basis of Section 149 itself, but on the basis of any violation of the terms and conditions which are permissible to be imposed in the policy. Since the policy itself had permitted a person who had held a driving licence, obviously in the past, and was not disqualified to hold licence at the time of accident, there is no violation of the condition in the insurance certificate.

Learned counsel also relied upon the case of ***Smt. Rama Dei (supra)*** in which at paragraph 5, this Court held as follows:

"5. Learned counsel for the appellant reiterates the grievance by stating that since the offending vehicle was being driven by a person having no valid driving licence, therefore, the Insurance Company is not liable to pay the compensation. It is no longer res integra that liability of the Insurance Company cannot be disowned on account of the vehicle being driven by a person having no valid driving licence. Such ground does not hold any water. The aforesaid point has already been settled at rest in view of the decision of this Court reported in AIR 2001 Orissa 108 (Chenna Jyothirmayi and others. V. Third Motor Accident Claims Tribunal, Bhubaneswar)."

However, the contentions raised by Mr. S.S. Rao to the effect that in view of the case laws decided in ***Asha Rani (supra),*** the Insurance Company cannot be made liable to pay the compensation, has to be considered

seriously. This Court in the case of ***Charulata Mallik and others -v- Prakash Kumar Mohanty,*** reported in 2017 (I) ILR Cuttack 149 had the occasion to deal with a situation as to whether the Insurance Company can be held liable to pay the compensation when there is a breach of policy condition. The deceased in the said case was a gratuitous passenger in a goods carriage. For ready reference, paragraphs-8, 9 and 10 of the case of ***Charulata (supra)*** quoted hereunder:

> *"8. In the decision in the case of Baljit Kaur (supra), the Hon'ble Supreme Court held as follows.*
>
> *"21. The upshot of the aforementioned discussion is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable (?). We do not think so. We therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani's (supra). We, therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle".*
>
> *9. This Court in the case of Manguli Juanga (supra) and in an unreported decision in Sahabi Dharei (supra), placing reliance on the case of Manager National Insurance Co.Ltd –v- Saju P. Paul, reported in (2013) 2 SCC 41 held that in order to ensure prompt payment of compensation to the family members of the deceased, the Insurance Company should be directed to pay compensation amount to the claimants with a right of recover from the owner of the offending vehicle in due process of law.*
>
> *There cannot be any quarrel over the ratio decided in Kaushalya Devi as well as Tilak Singh's case (supra) so also in the case of National Insurance Company Co. Ltd. –v- Bommithi Subbhayamma and others, reported in (2005) 12 SCC 243, wherein it has been held that carrying a gratuitous passenger in a goods carriage vehicle is a fundamental breach of condition. Thus, the owner of the vehicle is liable to pay compensation amount as awarded and therefore, the insurer cannot be asked to pay the awarded compensation amount to the claimants and thereafter, the same shall be recovered from the owner of the vehicle. The Hon'ble Apex Court while arriving at this conclusion has also taken into consideration the observation made at para-20 of a larger Bench in Baljit Kaour's case (supra), which reads as follows:*
>
> *"20. It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to person other than the owner of the goods or his authorized representative remains the same. Although the owner*

of the goods or his authorized representation would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."

However, the conclusion arrived at para-21 of the said case (quoted above) was neither discussed nor disturbed.

10. It is not only the duty of the Tribunal to see that just and adequate compensation is awarded to the claimants for the loss suffered by the deceased due to the accident, but also to see that there is hassle free payment of compensation with promptitude in order to save the claimants from distress. In that view of the matter, I am persuaded to rely upon the decision of Hon'ble Apex Court in the case of Baljit Kaur (supra) and Saju P. Paul (supra) and followed in the decision reported in 2016 (II) OLR 448 as well as unreported decision in M.A.C.A. No. 485 of 2007 (supra)."

Hon'ble Apex Court had the occasion to deal with the issue in the case of ***United India Insurance Company -v- Nagammal and others***, reported in 2009 (1) CTC 1 (Full Bench) (equivalent 2008 SCC Online Madras 973). Madras High Court after an elaborate discussion of the case law in ***Asha Rani (supra)***, ***Satpal Singh (supra)*** and ***National Insurance Company Ltd. –vs- Baljit Kaur***, reported in (2004) 2 SCC 1 concluded as under:-

"30. From a conspectus of the decisions, thus analysed, it is now apparent that before Asha Rani's case was decided, the decision in Satpal Singh's case was holding the field and such latter decision was overruled only in ***Asha Rani's case****. Under such peculiar circumstances in Baljit Kaur's case it was observed, that even though the Insurance Company was not liable to pay the compensation in respect of a passenger in a goods vehicle, yet since the law was not clear before Asha Rani's case was decided, the doctrine of prospective overruling was applied and a direction was issued in the interest of justice directing the Insurance Company to satisfy the award and recover the same from the owner of the vehicle. In other words, even though the statutory provision under Section 149(4) and Section 149(5) was not applicable, the Supreme Court applied the Doctrine of "pay and recover". The ratio of the said decision has been applied selectively in some of the later decisions and in some of the subsequent decisions, the doctrine of "pay and recover" in respect of matters which are not strictly covered under Sections 149(4) and 149(5) has not been applied by the Supreme Court depending upon the facts and circumstances of a particular case.*

Therefore, it cannot be said as an inexorable principle of law that in each case where the liability is in respect of a passenger in a goods vehicle, which is not required to be covered under Section 147 of the Act, the Insurance Company would be directed to first pay the amount and thereafter recover the same from the owner and such discretion is obviously with the Court either to apply such principle or not.

31. Thus from an analysis of the statutory provisions as explained by the Supreme Court in various decisions rendered from time to time, the following picture emerges:

(i) The Insurance Policy is required to cover the liability envisaged under Section 147, but wider risk can always be undertaken.

(ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Where it is successful in its defence, it may yet be required to pay the amount to the claimant and thereafter recover the same from the owner under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5).

(iii) Under Section 147 the Insurance Company is not statutorily required to cover the liability in respect of a passenger in a goods vehicle unless such passenger is the owner or agent of the owner of the goods accompanying such goods in the concerned goods vehicle.

(iv) Since there is no statutory requirement to cover the liability in respect of a passenger in a goods vehicle, the principle of "pay and recover", as statutorily recognised in Section 149(4) and Section 149(5), is not applicable ipso facto to such cases and, therefore, ordinarily the Court is not expected to issue such a direction to the Insurance Company to pay to the claimant and thereafter recover from the owner.

(v) Where, by relying upon the decision of the Supreme Court in Satpal Singh's case, either expressly or even by implication, there has been a direction by the Trial Court to the Insurance Company to pay, the Appellate Court is obviously required to consider as to whether such direction should be set aside in its entirety and the liability should be fastened only on the driver and the owner or whether the Insurance Company should be directed to comply with the direction regarding payment to the claimant and recover thereafter from the owner.

(vi) No such direction can be issued by any Trial Court to the Insurance Company to pay and recover relating to liability in respect of a passenger travelling in a goods vehicle after the decision in Baljit Kaur's case merely because the date of accident was before such decision. The date of the accident is immaterial. Since the law has been specifically clarified, no Trial Court is expected to decide contrary to such decision.

(vii) Where, however, the matter has already been decided by the Trial Court before the decision in Baljit Kaur's case, it would be in the discretion of the Appellate Court, depending upon the facts and circumstances of the case, whether the doctrine of "pay and recover" should be applied or as to whether the claimant would be left to recover the amount from the person liable i.e., the driver or the owner, as the case may be."

11. On a conspectus of aforesaid case laws and more particularly paragraph-21 of the ***Baljit Kaur's (supra)*** case, which still holds the field and I am of the considered opinion that there cannot be any blanket direction either or not 'to pay and recover'. It will depend upon the facts and circumstances of each case. Moreover, the ratio decided in the case of ***Saju P.Paul (supra)***, the Hon'ble Supreme Court taking into consideration the ratio of ***Asha Rani (supra)***, ***Baljit Kaur (supra)*** and ***National***

Insurance Co. Vs. Challa Upendra Rao and others, reported in (2004) 8 SCC 517 held as follows:-

> "26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur and Challa Upendra Rao should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in the case of Challa Upendra Rao."

As such, I am persuaded to hold that in the facts and circumstances of this case, the widow and children of the deceased, who was earning his livelihood as a Coolie, cannot be compelled to struggle further to recover the compensation. For a smooth and hassle-free remittance of the compensation to the victims of a vehicular accident, which is the aim and object of the Act, the Insurance Company should satisfy the impugned award and would be at liberty to recover the same from the owner of the offending vehicle (respondent No.4) in accordance with law. It is submitted by Mr. Dash, learned counsel for respondent No.4-owner of the offending vehicle that the Insurance Company, in compliance of the impugned award, has already paid the compensation to the claimant-respondent Nos.1 to 3. But, no material is available on record in support of such contention. The issues are answered accordingly.

Resultantly, the Insurance Company, if not complied with the impugned award, is directed to deposit the amount of compensation along with interest before learned Tribunal within a period of six weeks hence. On the deposit being made, the same shall be released in favour of the claimant-respondent Nos.1 to 3 forthwith on proper identification. It is, however, made clear that the Insurance Company is at liberty to recover the amount so deposited before learned Tribunal from respondent No.4 following due procedure of law.

The deposit made by the appellant-Insurance Company before this Court shall be released in its favour along with interest accrued thereon on making a proper application along with proof of deposit of the compensation amount along with interest before learned Tribunal.

12. The appeal is allowed to the extent stated above.

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2021 (II) ILR - CUT- 446

K.R. MOHAPATRA, J.

W.P.(C) NO. 22426 OF 2019

PALLISHREE MOHANTY .....Petitioner

.V.

STATE OF ODISHA AND ORS. .....Opp. Parties

THE INDIAN STAMP ACT, 1899 – Sections 31, 32(3) (b) r/w sections 29(2) & 5 of the Limitation Act – Certificate by the Collector – General Power of attorney executed before the Assistant Consular Officer, Consulate General of India at New York i.e. outside India – However it produce before the Collector after 3 months, from the date of its first receipt in India – The Collector denied to certify in view of the expiry of the period of the production – Order of the collector challenged – Question was raised that, whether the limitation Act apply to the Indian Stamp Act while condoning the delay – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2009 SCC Online Ker 2436 : M.P. Rajeswaran Nair Vs. The District Collector & Ors.
2. (2001) 8 SCC 470 : Union of India Vs. Popular Construction Co.
3. AIR 2019 SC 505 : M/s. Simplex Infrastructure Ltd. Vs. Union of India.
4. AIR 2010 SC 2061 : Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Ors.
5. AIR 1964 SC 1099 : (Vidya Charan Sukla Vs. Khubchand Baghel).
6. (1995) 5 SCC 5 : Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker.
7. AIR 1946 Madras 437: Y.A.A.V.R. Sethuraman Chettiar vs K.K.R.M.R.M. Ramanathan

For Petitioner : M/s. Ranjan Kumar Nayak, F.R.Mohapatra, M.K.Panda,& S.K.Panda

For Opp. Parties : Miss Samapika Mishra, A.S.C.

M/s. Dayananda Mohapatra, M.Mohapatra,
G.R.Mohapatra, A.Dash, M.R.Pradhan and J.M.Barik.

ORDER Order delivered on 18.06.2021

K.R.MOHAPATRA, J.

This writ petition has been filed for issuance of a writ in the nature of Mandamus to direct the Collector, Cuttack (OP No.3) to register the General Power of Attorney (for short, 'GPA') (Annexure-4) and issue certificate in terms of Section 32 of the Indian Stamp Act, 1899 (for short, 'Stamp Act').

2. Briefly stated, the relevant facts for proper adjudication of this case are that Plot No.1B/16 in Sector-10 of Abhinaba Bidanasi, Cuttack (for short, 'the case land') was allotted in favour of the Petitioner vide Allotment letter No.6321 dated 27.03.2002 (Annexure-1) and delivery of possession of the same was made by the Cuttack Development Authority (for short, 'CDA') in her favour vide order No.1319 dated 14.01.2003 (Annexure-2). After approval of the plan, a two storied building has already been constructed over the case land. The Petitioner at present is staying in United States of America (USA). Due to certain compulsions, the Petitioner is not in a position to come to India frequently for which she executed a GPA in the name of her husband, namely, Sri Himansu Sekhar Mohanty in respect of the case land on 16.08.2013 (Annexure-4) before the Assistant Consular Officer, Consulate General of India at New York. In spite of repeated requests of the Petitioner, lease deed in respect of the case land was not executed in her favour for which the Petitioner through her GPA filed W.P.(C) No.7018 of 2019, which was disposed of on 08.04.2019 with a direction to the Secretary, CDA (OP No.2) to dispose of the application of the Petitioner for execution of the lease deed in respect of the case land within a period of one month from the date of receipt of certified copy of the said order. However, the Secretary CDA (OP No.2), vide his letter No.6697/CDA dated 11.05.2019 (Annexure-4 series) intimated the attorney of the Petitioner, namely, Sri Himansu Sekhar Mohanty that since the GPA was executed outside India, i.e., at New York by the Petitioner, it was required to be registered before the competent authority, namely, District Sub-Registrar, Cuttack. Hence, he was requested to register the document/instrument and submit the same before the CDA for taking further action on the application. It is further contended in the writ petition that the Petitioner and her family members are suffering from acute financial stringency and the Petitioner is also required to repay some personal loans for which she has taken financial assistance from a prospective purchaser of the

case land, namely, Abinash Samal. As the deed of transfer could not be executed within a reasonable time and in the meantime two years have already elapsed, the prospective purchaser is pressing hard to return the advance money, but the Petitioner is not in a position to repay the same.

2.1 After taking return of the document from CDA, the Petitioner ascertained that the GPA under Annexure-4 is required to be submitted before the Collector, Cuttack (OP No.3) for issuance of necessary certificate in terms of Section 32 of the Stamp Act. Accordingly, the Petitioner has already submitted the original document before the Collector, Cuttack (OP No.3) to do the needful. Till date, the Collector, Cuttack has not taken any action on the same for which the aforesaid relief is sought for.

3. The Opposite Party No.3, Collector and District Magistrate, Cuttack filed his counter affidavit stating inter alia that under Section 31 of the Stamp Act, the Collector is required to determine the duty, if any, to be paid on the instrument only when a person applies for the same. When an application is brought to the notice of the Collector under Section 31 of the Stamp Act, the Collector shall certify by endorsement on such document that the stamp duty (stating the amount) with which the instrument is chargeable has been paid under Section 32 of the Stamp Act. The Petitioner, in the instant case, has not filed any application as required under Section 31 of the Stamp Act. Had it been submitted in terms of Section 31 of the Stamp Act it could have been adjudicated and considered for issuance of certificate under Section 32 of the said Act. It is further contented that proviso (b) to Sub-section (3) of Section 32 of the Stamp Act envisages that it is not obligatory on the part of the Collector to endorse any instrument executed out of India and brought before the Collector after expiration of three months from the date of its first receipt in India. The certificate issued under Section 32 of the Stamp Act shall be recognized under Section 33 of the Indian Registration Act, 1908. But, due to non-compliance of the aforesaid provision of the Stamp Act, the case of the Petitioner needs no consideration and a prayer is made for dismissal of the writ petition.

4. Mr. Nayak, learned counsel for the Petitioner reiterating the averments made in the writ petition made his legal submissions to the effect that an instrument executed out of India should be presented before the concerned District Collector within three months from the date when it is first received in India. Although applicability of the provisions of the Limitation

Act, 1963 (for short, 'Limitation Act') to Sections 31 and 32 of the Stamp Act is not specifically provided under the Stamp Act itself, but in view of the language and tenor of Section 29 (2) of the Limitation Act Sections 4 to 24 of the Limitation Act are applicable to the Stamp Act. Thus, the Collector, Cuttack (OP No.3) has the power to consider and issue certificate under Section 32 of the Stamp Act, if an application under Section 31 along with the petition under Section 5 of the Limitation Act is presented before him beyond the three months as stipulated under proviso (b) to Sub-section (3) of Section 32 of the Stamp Act. He accordingly prayed for such a direction.

4.1 He further submitted that unlike Section 125 of the Electricity Act, 2003 and Section 37 of the Arbitration and Conciliation Act, 1996, there is any restriction in the provisions under Sections 31 and 32 of the Stamp Act, which would exclude the applicability of the provisions under Section 4 to 24 of the Limitation Act. He made an alternate argument that Section 31 of the Stamp Act itself does not specify any period of limitation to make an application to the Collector for adjudication with regard to adequacy of stamp duty paid on instrument. Section 32 of the Stamp Act comes into operation after adjudication with regard to the duty chargeable on the instrument. If the instrument is brought before the Collector within three months (State amendment) from the date when it is first received in India, the applicant would be entitled to a certificate to the effect that the instrument so produced has been properly stamped. In support of his case, Mr. Nayak, learned counsel for the Petitioner, placed reliance on a decision of the Kerala High Court in the case of ***M.P. Rajeswaran Nair -v- The District Collector and others,*** reported in **2009 SCC Online Ker 2436,** which reads thus:-

> *"7. This is all the more so, since under Section 31 an unexecuted document can also be brought for adjudication. The limitation prescribed under proviso to Section 32 applies only in respect of documents brought after the expiry of one month from the date of its execution. Therefore, for attracting the limitation under the proviso to Section 32, the document has to be one which has been executed. That itself shows that two sections are not interdependent. Further, Section 32 becomes applicable only after the Collector determines either the instrument is fully stamped or stamp duty is payable or the instrument is not chargeable with duty at all. Therefore, the question of application of Section 32 arises only after adjudication under Section 31. Further, if the limitation under the proviso to Section 32 is held to be applicable to Section 31 also, then even if an instrument is properly stamped and it is disputed after one month from its execution, it would become impossible for a person to get an adjudication as to the proper stamp duty by the Collector, which cannot be the intention of the law maker while incorporating the limitation in the proviso to Section 32. This is further evident from the language of the proviso. The words "nothing in this Section shall authorise the*

Collector to endorse" puts an embargo only on the endorsement and not on the adjudication under Section 31. Therefore, clearly the limitation prescribed under the proviso to Section 32 is not application to adjudication of the proper stamp duty under Section 31."

4.2 Pursuant to the direction of this Court in W.P.(C) No.7018 of 2019, which was disposed of on 08.04.2019, the authority under CDA vide its letter No.6697 dated 11.05.2019, directed the Petitioner to register the document and then submit the same to take further action. In that process, more than two years had elapsed. Thereafter, the Petitioner had to run from pillar to post and ultimately came to learn that she has to file an application under Section 31 of the Stamp Act to get a certificate from the Collector under Section 32 of the Stamp Act with regard to adequacy of the stamp on the instrument. Further, the Petitioner due to restriction of pandemic of COVID-19 is unable to come to India to execute a fresh GPA to get the lease deed executed in her favour and transfer of the case land in favour of Sri Abinash Samal following due procedure of law. As such, the Petitioner is in a precarious condition and unless prayer made in the writ petition is granted, she will suffer irreparable loss.

5. Miss Samapika Mishra, learned Additional Standing Counsel made her submissions referring to the counter affidavit and contended that the provision of Section 29(2) of the limitation Act is not applicable to the case at hand. It is her submission that on a conjoint reading of Sections 31 and 32 of the Stamp Act makes it clear that the instrument is to be brought before the Collector of the district under Section 31 of the said Act and if the Collector after adjudication finds that the document has been properly stamped, he shall make an endorsement to that effect and issue certificate accordingly under Section 32 of the Stamp Act. Proviso (b) to Sub-section (3) of Section 32 of the Stamp Act envisages that it is not obligatory on the part of a Collector to endorse the instrument, which is executed or first executed out of India and brought before him after expiration of three months from the date it is first received in India. Admittedly, the Petitioner has not yet produced the instrument along with an application under Section 31 of the Stamp Act for issuance of a certificate under Section 32 of the Stamp Act. Thus, Collector, Cuttack is not authorised to entertain any application under Section 31 of the Stamp Act intended to be filed by the petitioner in view of proviso (b) to Sub-section (3) of Section 32 of the Stamp Act. Limitation provided in the proviso (b) to Sub-section (3) of Section 32 is different from the period prescribed under the Schedule in the Limitation Act. Thus, in view of Section 29 of the

Limitation Act, Sections 4 to 24 of the Limitation Act will not apply to the Stamp Act. She also relied upon the case law in the case of ***Union of India Vs. Popular Construction Co.,*** reported in (2001) 8 SCC 470 and case law in the case of ***M/s. Simplex Infrastructure Ltd. Vs. Union of India***, reported in *AIR 2019 SC 505* and submitted that the provision of Sections 4 to 24 of the Limitation Act will not be applicable to the special statute where a period of limitation other than the Schedule of the Limitation Act has been provided. Giving an illustration of Section 125 of the Indian Electricity Act, 2003, Miss Mishra, learned Additional Standing Counsel placed reliance on the case law in the case of ***Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Ors.***, reported in *AIR 2010 SC 2061* and submitted that where limitation other than the Schedule of the Limitation Act has been provided in any special statute, Sections 4 to 24 of the Limitation Act will not be made applicable to such provisions of the special law. Hence, she contended that the claim of the Petitioner being hopelessly time barred the Collector, Cuttack (OP No.3) has no jurisdiction to adjudicate and endorse the instrument presented by the Petitioner.

6. Mr. Mohapatra, learned counsel appearing for CDA, although did not file counter affidavit, but assisted the Court in making his legal submissions. It is his submission that since no direction has been sought for against the CDA-opposite party No.2, it did not feel necessary to file counter affidavit. It is his submission that the Stamp Act and the Rules framed there under do not provide either application or exclusion of the provisions of the Limitation Act to it. Section 3 of the Limitation Act provides that subject to provisions contained under Sections 4 to 24 of the Limitation Act (both inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Section 5 of the Limitation Act enables a party to file an appeal or application with a petition seeking condonation of delay and the Court is competent to condone the delay in case sufficient cause is assigned to the satisfaction of the said Court. A plain reading of Section 29(2) of the Limitation Act makes it clear that period of limitation provided in a special or local law shall be the period of limitation as if it is prescribed under the Schedule of the Limitation Act. But the applicability of Sections 4 to 24 (both inclusive) shall be subject to the extent to which and insofar as they are not expressly excluded by said special or local law. The said provision came under interpretation before the Constitutional Bench of the Hon'ble Supreme Court in the celebrated case reported in AIR 1964 SC 1099 (***Vidya Charan***

Sukla Vs. Khubchand Baghel). Interpreting the provision of Section 29(2) of the Limitation Act with reference to an Election Appeal preferred under 116(A) of the Representation of People Act, 1951, the majority view of the Hon'ble Supreme Court was that if the requirements of Section 29(2) of the Limitation Act are satisfied, provisions of Sections 4 to 24 of the said Act will be made applicable to the local or special Act. It came up for consideration again in the reported case of ***Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker***, reported in (1995) 5 SCC 5, wherein at paragraphs-8 and 9, it has been observed as follows:-

> *"8. xxx xxx xxx A mere look at the aforesaid provision shows for its applicability to the facts of a given case and for importing the machinery of the provisions containing Sections 4 to 24 of the Limitation Act the following two requirements have to be satisfied by the authority invoking the said provision.*
>
> *(i) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application;*
>
> *(ii) The said prescription of period of limitation under such special or local law should be different from the period prescribed by the Schedule to the Limitation Act.*
>
> *9. If the aforesaid two requirements are satisfied the consequences contemplated by Section 29(2) would automatically follow. These consequences are as under:-*
>
> *(i) In such a case Section-3 of the Limitation Act would apply as if the period prescribed by the special or local law was the period prescribed by the Schedule;*
>
> *(ii) For determining any period of limitation prescribed by such special or local law for a suit, appeal or application all the provisions containing Sections 4 to 24 (inclusive) would apply insofar as an to the extent to which they are not expressly excluded by such special or local law."*

After a thorough analysis, at paragraph-10 it is held as follows:

> *"10. .....It is now well settled that a situation where in a period of limitation is prescribed by a special or local law for an appeal or application and for which there is no provision made in the schedule to the Act, the second condition for attracting Section 29(2) would get satisfied. As laid down by a majority decision of the Constitution bench of this Court in the case of Vidyacharan Shukla Vs. Khubchand Baghel and Ors. (AIR 1964 SC 1099), when the first schedule of the Limitation Act prescribes no time limit for a particular appeal, but the special law prescribes a time limit for it, it can be said that under the first schedule of the Limitation Act all appeals can be filed at any time, but the special law by limiting it provides for a different period. While the former permits*

> *the filing of an appeal at any time, the latter limits it to be filed within the prescribed period. It is therefore, different from that prescribed in the former and thus Section 29(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act."*

In the case of ***Popular Construction Co. (supra)***, Hon'ble Supreme Court had the occasion to consider applicability of the Limitation Act to the Arbitration and Conciliation Act, 1996 in view of language employed in Section 34(3) of the said Act, wherein at paragraphs-6 and 8, it has been held as follows:-

> *"6. On an analysis of the section, it is clear that the provisions of Section 4 to 24 will apply when :*
>
> *(i) There is a special or local law which prescribes a different period of limitation for any suit, appeal or application; and*
>
> *(ii) The special or local law does not expressly exclude those sections.*
>
> *xxx xxx xxx xxx xxx xxx*
>
> *8. Had the proviso to Section 34 merely provided for a period within which the court could exercise its discretion, that would not have been sufficient to exclude Section 4 to 24 of the Limitation Act because "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section-5."*

Further, the Hon'ble Supreme Court in the case of ***Chhattisgarh State Electricity Board (supra)*** had the occasion to consider the applicability of Limitation Act with reference to Section 125 of the Indian Electricity Act, 2003, wherein at paragraph-32 it has been held as follows:-

> *"In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."*

It was his submission that in view of the language and tenor of Section 34(3) of the Arbitration and Conciliation Act, 1996 and Section 125 of the Indian Electricity Act, 2003, limiting the scope specifically, the statutory period to invoke the said provisions, the provisions of Limitation Act would not be applicable in such cases. But in the instant case, there is no such prohibition

or restriction under Sections 31 and 32 of the Stamp Act. As such, Section 4 to 24 of the Limitation Act will apply to the case at hand in full force. He also reiterated an alternate argument raised by Mr.Nayak, learned counsel for the Petitioner and submitted that the Petitioner may make an application for adjudication with regard to adequacy of stamp on the instrument before the Collector along with an application under Section 5 of the Limitation Act, which can be considered in accordance with law.

7. Taking into consideration the rival contentions raised by learned counsel for the parties, the question that crops up for consideration is whether the provisions of Limitation Act can be made applicable to Sections 31 and 32 of the Stamp Act.

8. Section 31 of the Stamp Act makes provision for adjudication with regard to adequacy of stamp duty paid on the instrument. It provides that when a person brings an instrument to the Collector and applies to have his opinion as to the duty (if any) with which it is chargeable and pay fees as directed, the Collector shall determine the duty (if any) with which such instrument is chargeable. Section 32 of the said Act makes provision for issuance of certificate by the Collector. It provides that when an instrument is brought to the Collector under Section 31, which in his opinion, one of a description chargeable with duty the Collector shall certify by endorsement on such instrument that the full duty (stating the amount), with which it is chargeable has been paid. When he is of the opinion that the instrument is not chargeable with duty, the Collector shall certify in the manner as provided that such instrument is not so chargeable. Sub-section (3) of Section 32 is relevant for our consideration, which reads as follows:-

> *"**32. Certificate by Collector-***
>
> *(1) xx xx xx*
>
> *(2) xx xx xx*
>
> *(3) Any instrument upon which an endorsement has been made under this section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duty stamped :*
>
> *Provided that nothing in this section shall authorize the Collector to endorse –*
>
> *(a) Any instrument executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;*

(b) Any instrument executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or

(c) Any instrument chargeable with a duty not exceeding then naye paise, or any bill of exchange or promissory note, when brought to him, after the drawing or execution thereof, on paper not duly stamped.

9. On a close scrutiny of Sections 31 and 32 of the Stamp Act, it is apparent that proviso (b) to Sub-section (3) of Section 32 makes it clear that the Collector is not authorized to endorse any instrument executed or first executed out of India and brought to him after expiration of three months after it was first received in India. In the instant case, there is no dispute to the fact that the GPA in question was executed by the Petitioner on 16.08.2013 before the Assistant Consular Officer, office of Consulate General of India at the Embassy of India in New York, USA. Although the date on which it was for the first time received in India is not available in the writ Petition, but it is not in dispute that the document was presented before the Collector, Cuttack (OP No.3) for issuance of a certificate after expiration of three months from the date when it is first received in India.

10. Thus, the question for consideration is as to whether the delay in presentation of an instrument can be condoned by the Collector for issuance of a certificate under Section 32 of the Stamp Act.

11. Section 3 of the Limitation Act provides that subject to provisions contained under Sections 4 to 24 of the Limitation Act every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. However, Section 5 of the Limitation Act provides that, an appeal or any application, (other than an application under Order XXI Code of Civil Procedure, 1908) may be admitted after prescribed period, if the appellant or applicant, as the case may be, satisfies the Court that he has sufficient cause for not preferring the appeal or making application within such period as provided under the Schedule to the Limitation Act. But, no period of limitation to make an application under Section 31 is provided in the Schedule of the Limitation Act. Section 31 of the Stamp Act also does not provide any period of limitation to make such an application. It is only the proviso (b) to Sub-section (3) of Section 32 of the Stamp Act provides that Collector is not authorised to make an endorsement if the instrument executed out of India is brought before him after expiration of three months of its first receipt in India. It impliedly stipulates that in the aforesaid contingency an application

under Section 31 of the Stamp Act should be made within the period provided in proviso to Section 32(3). Kerala High Court in the case of ***M.P.Rajeswaran Nair (supra)*** relying upon a decision of the Madras High Court in the case of ***Y.A.A.V.R. Sethuraman Chettiar vs K.K.R.M.R.M. Ramanathan*** reported in AIR 1946 Madras 437, at paragraph-10 took a view as under:-

> *"10. As held in that judgment if an executed instrument is produced for adjudication as to proper stamp under Section 31, after one month of its execution, the other consequences applicable to production of an insufficiently stamped instrument before a person in charge of a public office under other provisions of the Kerala Stamp Act would necessarily follow and after adjudication of the proper stamp, if the Collector finds that the same is insufficiently stamped he has to proceed further against that instrument under those provisions. In other words, if an executed instrument is produced before the Collector under Section 31, within one month, even if the Collector finds that the instrument is insufficiently stamped, the instrument would not attract penalty, and the Collector shall make the endorsement under Section 32, if the party pays the deficit stamp whereas if it is produced after one month, it would, and the Collector cannot make the endorsement which is the effect of the limitation prescribed under the proviso to Section 32, instead the Collector has to, after adjudication of the proper stamp, proceed either under Sections 33 and 39 read with Section 41 or under Section 40 read with Section 41."*

Interpreting relevant provisions of the Stamp Act, Kerala High Court held that if a person seeks adjudication beyond the time limit prescribed under Section 32 of the Stamp Act, the Collector has to first decide whether the instrument is duly stamped for which no period of limitation is provided and if the same is not duly stamped, the Collector shall impound the instrument and require payment of the additional duty chargeable on the instrument together with the prescribed penalty¸ if any. However, the issue involved in the instant case is completely different. Unless a certificate is issued under Section 32 of the Stamp Act, the adjudication of application under Section 31 will be meaningless. As such, the restriction provided in proviso (b) to Sub-section (3) of Section 32 of the Stamp Act clearly applies to this case.

12. Section 29(2) of the Limitation Act read as follows:-

> *"**29. Savings.—***
>
> *(1) xx xx xx*
>
> *(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed fo r any suit,*

appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

It makes a provision that when a special or local law prescribes period of limitation different from the period prescribed in the Schedule of the Limitation Act, the provision of Section 3 of the Limitation Act shall apply as if such period were the period prescribed by the Schedule. However, Sections 4 to 24 of the Limitation Act will only apply insofar as and to the extent to which they are not expressly excluded by such special or local law. The Hon'ble Supreme Court in the case of ***Popular Construction Co. (supra)*** had the occasion to deal with applicability of the Limitation Act in view of the provision under Section 34(3) of the Arbitration and Conciliation Act, 1996. Proviso (b) to Sub-section (3) of Section 34 of the Arbitration and Conciliation Act makes it clear that if the Court is satisfied that the applicant is prevented by sufficient cause from making an application within a period of three months as provided under Sub-section (3), it may entertain an application within a further period of thirty days, but not thereafter. Thus, this special Act specifically puts a restriction to applicability of Section 5 of the Limitation Act in view of language employed under the proviso (b) to Sub-section (3) as aforesaid. Accordingly, discussing the said provision Hon'ble Supreme Court held that Sections 4 to 24 of the Limitation Act has no application to the said provisions. In view of the above, no application under Section 5 of the Limitation Act can be entertained after the extended period of 30 days provided therein.

13. Likewise, in the case of ***Chhattisgarh State Electricity Board (supra),*** the Hon'ble Supreme Court interpreting the applicability of the Limitation Act to the Indian Electricity Act, 2003 held that in view of proviso to Section 125 of the Electricity Act, 2003 any interpretation to attract the provision of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing appeal or against the decision of the Tribunal and the proviso to Section 125 will become nugatory.

13.1 Such is not the case at hand. As discussed earlier, although no period of limitation is prescribed to make an application under Section 31 of the Stamp Act, but in view of the proviso (b) to Sub-section (3) of Section 32 of the said Act, it becomes imperative on the part of the applicant to make an application under Section 31 of the Stamp Act within a period of three

months from the date, when an instrument executed out of India, is first received in India. There is no restriction under the aforesaid provision to receive any application beyond the period of three months, as stipulated in Arbitration and Conciliation Act, 1996 or in Electricity Act, 2003. Thus, in view of the discussions made above and in view of the ratio decided in the case of ***Vidya Charan Sukla (supra)*** and ***Mukri Gopalan (supra),*** I am of the considered opinion that Section 29(2) of the Limitation Act is squarely applicable to the case at hand. The Application under Section 31 of the Stamp Act along with a petition under Section 5 of the Limitation Act explaining the cause for such delay can be received and adjudicated by the Collector for issuance of a certificate of endorsement under Section 32 of the Stamp Act, when an instrument is brought before the Collector after three months of its first receipt in India.

14. Accordingly, the writ petition is allowed to the extent stated above and it is directed that in the event the Petitioner makes an application within a period of two months under Section 31 of the Stamp Act along with a petition under Section 5 of the Limitation Act enclosing the instrument in original for which the certificate of endorsement is sought for under Section 32 of the Stamp Act, the Collector, Cuttack (OP No.3) shall receive and adjudicate the same in accordance with law giving opportunity of hearing to the parties concerned.

15. 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- 458

MISS. SAVITRI RATHO, J.

CRLREV NO. 11 OF 2021

DEBASIS @ TAPAS KHUNTIA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 – Section 12 – Grant of Bail – Conditions therein – Discussed – Held, Non consideration of the provisions of section 12 as well as mere repetition of the provisions without actually applying the same to the facts of the case with reference to the social investigation report renders these orders liable for interference – Bail granted.

Case Laws Relied on and Referred to :-

1. (2008) 41 OCR 553 : Naresh Naik Vs. State
2. (2012) 52 OCR 356 : Ashik Kumar Sahu Vs. State.
3. 2017 (1) OLR 1137 : Sumanta Bindhani Vs. State.
4. 2018 (II) OLR 13 : Ranjit Paika Vs. State
5. 2018 (II) OLR 377 : Chittaranjan @ Biswajit Sahoo Vs. State.
6. (2009) 42 OCR 315 : Re-A Juvenile Vs. State.
7. 1989 (1) OLR 89 : Abrahim Kristian Vs. State.
8. (2010) 47 OCR (SC) 855 : Ajay Kumar Vs. State of MP.
9. (2010) 46 OCR (SC) 665 : Mohan Mali Vs. State of M.P.

For the Petitioner : Mr. Pitambar Jena
For Opp. Parties : Mr. G.N. Rout, A.S.C

ORDER Date of Order : 17.05.2021

MISS. SAVITRI RATHO, J.

I have heard Mr. Pitambar Jena, learned counsel for the petitioner and Mr. G.N. Rout, learned Addl. Standing Counsel for the State in video conferencing mode.

This is an application under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short "the JJ Act ") for grant of bail to the CICL (name withheld) in connection with J.J. Case No.42 of 2020 arising out of Nayakote P.S. Case No.59 of 2020 in the Court of the Juvenile Justice Board, Keonjhar, registered for commission of offence punishable under Section 302/34 of I.P.C and challenging the orders passed by the learned Additional Sessions Judge –cum- Special Judge, Keonjhar and the J.J. Board, Keonjhar rejecting his prayer for bail.

The prayer for bail of the CICL was rejected by the learned J.J. Board on 15.10.2020 and thereafter by the learned Addl. Sessions Judge -cum- Special Judge, Keonjhar in Criminal Appeal No.22 of 2020 on 22.12.2020. The said orders have been challenged in this criminal revision.

The prosecution allegations in brief are that the deceased had illicit relations with the mother of the CICL and on 13.10.2020 at about 6.00 p.m., the deceased had come to the house of the CICL and the latter assaulted the deceased with an axe which resulted in his death .Multiple incised injuries were found on the body of the deceased .

Learned counsel for the petitioner submits that the petitioner-CICL is aged about 17 years old. He is detained in the observation home since 15.10.2020 and charge sheet has been filed in the meanwhile. He further submits he has no criminal antecedent and the social investigation report is favourable and his release is necessary in view of his age and in view of the mandate of Sec. 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015. He states that omnibus allegations have been made against the petitioner. He further submits that the CICL is a student of +2 Arts of Pateswar Higher Secondary School (Jr. College), Suakati, Keonjhar and has filled up the form to appear in the Final Examinations which were scheduled to be held in May 2021 for which he has filed I.A No 218 of 2021 for interim bail. He has relied on the decisions rendered by this Court in the case **of Naresh Naik -Vrs.- State : (2008) 41 OCR 553, Ashik Kumar Sahu -Vrs.- State : (2012) 52 OCR 356, Sumanta Bindhani -Vrs.- State: 2017 (1) OLR 1137, Ranjit Paika -Vrs.- State : 2018 (II) OLR 13, Chittaranjan @ Biswajit Sahoo -Vrs.- State : 2018 (II) OLR 377** and **Re-A Juvenile -Vrs.- State : (2009) 42 OCR 315** in support of his prayer for bail .

This Court in the case of **Naresh Naik** (supra) referred to the ratio in the case **of Abrahim Kristian -Vrs.- State : 1989 (1) OLR 89** that release of a juvenile on bail is the rule unless there appear reasonable grounds for believing that his release is likely to bring him in association with known criminals or expose him to moral danger and relying on the favourable report of the Superintendent Probation Hostel, directed for release of the juvenile on bail. In the case of **Ashik Kumar Sahu** (supra), who was an accused in case registered under section – 376 (2) (g) I.P.C., this Court referring to Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 directed the JCL to be released on bail. In the case of **Sumanta Bindhani** (supra) who was accused in a case under Section – 20(b) (ii) (c) of the NDPS Act, this Court held that Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 over rides the provisions of Section – 37 of the NDPS Act and directed for release of the petitioner therein. In the case of **Chittaranjan @ Biswajit Sahoo** (supra), the CCL had been chargsheeted for an offence under Section – 306 I.P.C. Referring to the provisions of section 12 of the Act, it was held that gravity of the offence is not to be considered but the circumstances in which the offence was committed and whether his environment is conducive is to be considered. In the case of **Re-A Juvenile** (supra) where the accused was involved in a case under section – 302 I.P.C. and other sections, this Court held that the mandate of section 12 of the Act is that a juvenile is to be released on bail however heinous the crime may be and the only restriction is availability of reasonable grounds

that his release is likely to bring him in association with known criminals or expose him to any moral, physical or psychological danger or his release would defeat the ends of justice. Referring to the allegations against the petitioner, it was held that there was scope of psychological danger if he was not released on bail and the prayer for bail was allowed. In the case of **Ranjit Paika and another** (supra) the appellants had been convicted for commission of offences under Section – 20(b) (ii) (c) of the NDPS and an application had been filed for treating the Appellant No.2 Bijay Paika as a juvenile and to release him on bail as he had stayed in custody for more than three years. Relying on the ratio laid down by the Hon'ble Supreme Court in the case of **Ajay Kumar -Vrs.- State of MP : (2010) 47 OCR (SC) 855** and **Mohan Mali -Vrs.- State of M.P. : (2010) 46 OCR (SC) 665** that a juvenile can be kept in special home for a maximum period of three years and referring to the rights of juveniles and the intention of the Legislature while enacting the 2000 Act, the appellant No 2 who had been declared as a juvenile by an earlier order, was directed to be released on bail as he had stayed in custody for more than four years.

Learned counsel for the State has produced the case diary along with social investigation report of the CICL. Referring to the statements of his mother Laxmipriya Khuntia; immediate post occurrence witnesses Pranabandhu Khuntia and Jugal Khuntia, he has stated that the CICL has inflicted a number of injuries on the deceased which resulted in his death. He does not dispute the submission that the CICL has no criminal antecedents but objects to the grant of bail stating that the CICL has committed a heinous offence and his institutional care is necessary for his reformation which will not be possible if he is released on bail.

The CICL had been released on interim bail from 01.0.2021 till 08.03.2021 to enable him to fill up his form for appearing in the Annual Higher Secondary Examinations, 2021. The CICL has surrendered in time and alongwith a Memo on 15.03.2021 has filed the order dated 09.03.2021 of the JJ Board accepting his surrender. It appears from the said order that summons has been issued to the chargesheet witnesses on that day. The order dated 18.02.2021 passed by the JJ Board treating him as a juvenile to be tried by the Board has also been filed. On 24.02.2021 the copy of the order dated 15.10.2020 passed by the JJ Board rejecting his prayer for bail had been filed.

I have perused the case diary, social background report, order of the JJ Board treating him as a juvenile and the order of the JJ Board rejecting the prayer for bail and the order of the learned Additional Sessions Judge, rejecting the prayer for bail.

From the statement of Laxmipriya Khuntia, it is apparent that she was earlier involved with the deceased and he would come to her house during absence of her husband and compel her to have physical relations inspite of her protest. On the relevant day when her husband had gone to the hospital, the deceased came in an inebriated condition to her house and was compelling her to have physical relations with him. When she refused, he threatened her with a tangia. This infuriated the CICL who grabbed the tangia and assaulted the deceased. The two post occurrence witnesses Pranabandhu Khuntia and Jugal Khuntia have stated that on hearing shouts they went to the spot and saw the deceased lying with bleeding injuries and the CICL standing nearby holding a tangia. The statements Dhiren Khuntia and Rangadhar Khuntia have stated that the deceased used to come to the house of the CICL in the absence of his father and harass them. On the date of occurrence the deceased had come and was harassing them for which the CICL assaulted him with a tangia.

The social background report by the Child Welfare Police Officer in respect of the CICL indicates he has studied upto Class XI, his father is employed and mother is a housewife and his younger brother studies in class VI. His habits are watching TV and movies, playing indoor and outdoor games, reading books, drawing, painting, acting and singing. The reason for leaving school has been indicated to be sudden demise of his parents which appears to be a mistake as the CICL is represented by his father guardian in this bail application and there is no material to show that his mother has expired. The report also indicates that the majority of his friends are educated and he has not been subjected to any form of abuse and is not a victim of any offence and is not used by any gangs or adults for drug peddling and he has recommended that the child be given a chance to remain with his family for future reformation.

From a perusal of Section 12 of the Juvenile Justice (Care and Protection of Children) Act 2015 (in short "*JJ ACT* "), it is clear that a delinquent juvenile has to be released on bail irrespective of nature of offence alleged to have been committed by him unless it is shown that if he is released on bail there are reasonable grounds to believe that the release of the CICL is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. The nature of offence and the merits of the case do not have any relevance but can be considered to some extent if they are of such a nature as would defeat the ends of justice. But such materials have to be produced by the prosecution to make out any of the grounds provided in the Section 12(1) of the JJ Act of 2015, which may persuade the Court not to release the juvenile on bail. But in this case, there is nothing on record to show that the release of the petitioner is likely to bring

him into association with any known criminal or expose to moral, physical or psychological danger or that his release would defeat the ends of justice.

It appears that the JJ Board has by order dated 18.02.2021 decided that the CICL should be treated as a juvenile and tried by the Board . But before that, by order dated 15.10.2020, the JJ Board has rejected the prayer for bail observing that the CICL has committed murder of Ganeswar Khuntia by means of an axe for which the Board feels that institutional care is necessary for his reformation considering the gravity of the offence. There is no discussion or finding that if the CICL if released on bail, he would come into association with any known criminal or his release would expose him to moral, physical or psychological danger or defeat the ends of justice. The Appellate Court has referred to the provisions of Section 12 of the Act, but dismissed the appeal observing that there is a strong prima facie case showing his involvement for which there exists every likelihood of absconding and influencing prosecution witnesses. It has further observed that the allegations are grave, brutal and serious, he needs reformation which can be done only in the observation home and that in view of the gravity of the offence there is chance of physical or moral danger to the appellant at that stage and his release will spread a bad message in the society and will encourage others to commit similar offence.

There is no reference to the social background report in the impugned orders. Non consideration of the provisions of section 12 as well as mere repetition of the provisions without actually applying the same to the facts of the case with reference to the social investigation report renders these orders liable for interference.

The nature of allegations against the CICL prima facie do not indicate that the CICL is a hardened criminal or has committed a pre planned murder. On the other hand, the circumstances indicate that infuriated by the conduct of the deceased who was harassing his mother, the CICL has assaulted the deceased with a tangia. That apart, the fact that he had availed interim bail to fill up his form for appearing in the +2 examinations indicates that the CICL is interested in pursuing his studies and he has not misused the liberty granted to him as he has surrendered in Court after expiry of the period of interim bail, within the time specified. He has filed another I.A for interim to appear in the +2 final examinations which were scheduled to commence this month but were postponed, due to resurgence of the covid pandemic.

Therefore considering the nature of allegations against the CICL, the mandate of Section 12 of the JJ Act, the social investigation report, the decisions

of this Court referred to above, the desire of the CICL to continue his studies and the conduct of the CICL which precludes any reasonable apprehension of his absconding from the process of justice and absence of material to indicate that if he is released on bail, the CICL would come into association with any known criminal or would be exposed to moral, physical or psychological danger or his release would defeat the ends of justice, I am inclined to allow this application. The impugned orders refusing to grant bail to the CICL are therefore set aside.

Let the petitioner-CICL represented through his natural guardian-father be released on bail to the satisfaction of the Court in seisin of the case in the aforesaid case on such terms and conditions as he deems just and proper including the following conditions:-

(i) His father-natural guardian shall furnish an undertaking that after release, the CICL will not be allowed to come in contact with any criminals.

(ii) The CICL will not indulge in any criminal activity.

(iii) He will pursue his studies.

(iv) The concerned Child Probation Officer shall maintain general oversight and supervision over the CICL by visiting his house time-to-time as may be deemed necessary, to ensure that he is not exposed to any moral, physical or psychological danger and is pursuing his studies.

No observation in this order shall be construed as an expression on the merits of the case.

The CRLREV is accordingly disposed of.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the petitioner 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.

I.A. No 11 of 2021 and I.A. No 218 of 2021

In view of the order passed in CRLREV No.11 of 2021, these I.As for interim bail are disposed of as infructuous.

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