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It is further observed that inter-locutory application has been filed at a much belated stage that is in the midst of the final hearing of the writ petition (where the veracity of the order passed under the OLR Act has to be tested). As all the forums available under the OLR Act have been exhausted, literally there is no proceeding under the OLR Act pending at present, the question of abatement of ceiling proceeding does not arise at all.

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PARDANASHIN WOMAN – Execution of sale deed by 'pardanashin' woman – Burden of proof – Held, it must be proved by the person relying on it that executant being a paradarnashin woman, the deed was read out to her; it must further be shown that it was explained to her, or that she

understood its conditions and effect; and that explanation included all material points as well as the general nature of transaction – The principle upon which the law accords protection as above is founded on equity and good conscience – Applicability of the same principles to a poor lady who is equally ignorant and illiterate, but is not paradahanashin – Held, Yes.

Amal Bhakta -V- Manada Bala.

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PREVENTION OF MONEY LAUNDERING ACT, 2002 – Complaint under section 45 – Application under section 439 Cr.P.C with a prayer to release on bail – Bar U/s. 45 (1) of the Act pleaded – Co-accused already have been released on bail – Prayer of the petitioner considered – Held, as the Hon'ble apex Court in Nikesh Tarachand Shah Vs. Union of India and another has declared the twin conditions of section 45(1) as unconstitutional, hence direction issued to release the petitioner on bail.

Srikrushna Padhi - V- Enforcement Directorate, GOVT. of India.

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SERVICE LAW – Regularization of service – Outsourcing Data entry operator/Supervisor – Similarly situated candidates have already been regularized in the various departments through the Govt. resolution – Right to equal opportunity in the Public employment as well as existence of relationship between

employer and employee pleaded – Regularisation of service claimed – Held, as the petitioners are discharging the duties and responsibilities for the Govt., of the Govt. and by the Govt., even though they have been paid through outsourcing agencies, they are entitled to get the benefit of contractual appointment.

Sucharita Mhanty @ Mohapatra & Ors. -V - State Of Odisha & Ors.
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WORDS AND PHRASES – 'Abadi' – Meaning thereof – Held, the word "Abadi" is to be read, *noscitur a sociis*, along with other words "Khasmahal", Nazul, Gramakantha Parambok, as they appear in S. 3(4)(a) of the Act, 1962 and none of the words would indicate "Pathara Bani" to be "Abadi", i.e., cultivated – As stated by the Privy Council : "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them".

Tophan Kumar Behera -V- State of Odisha & Ors.
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WORDS AND PHRASES – The words 'compensation' and 'escalation' – Distinction – Compensation means anything given to make things equivalent, a thing given to or to make amends for loss, recompense, remuneration or pay – It need not therefore necessarily be in terms of money whereas the

expression 'escalation' used in an agreement ordinarily means an agreement allowing for adjustment up and down according to change in circumstances as in cost of material in work contract or in cost of living in wage agreement – It would not bring within its sweep higher rate of wage which a contractor is otherwise liable to pay.

Raghunath Sahu -V- State of Odisha & Ors.
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Dr. S. MURALIDHAR, C.J & A.K. MOHAPATRA, J.

CRLA NO. 736 OF 2017

BAI @ NILU @ NIRANJAN BEHERA …….Appellant
(In Jail Custody)

.V.

STATE OF ODISHA ……..Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Murder – FIR by police after noticing a dead body lying in a place with injury marks on his body – Charge sheet – Conviction – Appeal – Motive behind such murder absent – Conviction only on the basis of circumstantial evidence – The question thus arose as to whether conviction can be based on circumstantial evidence when motive behind the act not proved? – Held, it is not safe to maintain conviction.

> *"No doubt the Hon'ble Supreme Court of India has held in many judgments that failure to establish motive in a criminal trial by the prosecution is not fatal and the conviction can still be sustained on the basis of other corroborative evidence on record, however, cases based on circumstantial evidence are different. To complete the chain of circumstance and to come to conclusion that the accused, in fact, had committed the crime, the motive receives significance and the same is required to be proved by the prosecution to complete the chain of circumstances. In other words, failure on the part of the prosecution to establish motive in a case based on circumstantial evidence, it would not be safe to convict the accused in such cases. Considering the evidence led by the prosecution in the present case, this Court is of the opinion that the prosecution has failed to establish the motive behind the crime." (Para 30)*

Case Laws Relied on and Referred to :-

1. AIR 1952 SC 343 : Hanumant Govind Nargundkar Vs. State of M.P.
2. AIR 1984 SC 1622 : Sharad Birdhichand Sarda Vs. State of Maharashtra.
3. AIR 1990 SC 79 : Padala Veera Reddy Vs. State of A.P.
4. (2005) 3 SCC 114 : State of U.P. Vs. Satish.
5. (2008) 39 OCR (SC) 662 : Sattatiya@Satish Rajanna Kartalla Vs. State of Maharastra.
6. (2006) 10 SCC 172 : Ramreddy Rajesh Khanna Reddy & Anr. Vs. State of A.P.
7. AIR 2011 SC 72 : Varun Chaudhury Vs. State of Rajasthan.
8. (2008) 11 SCC 645 : Inspector Police, Tamilnadu Vs. Balaprasanna.
9. 2021 (4) Crimes 334 (SC) : Nagendra Sah Vs. State of Bihar.

For Appellant : Mr. Smruti Ranjan Mohapatra,Mr. B.R. Mohanty,
Mr. S. Harichandan, Mr. M.K. Mohanty,Mr. M. Swain,

Mr. L. Pattanaik and Mr. S. Mohanty.

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

JUDGMENT Date of Hearing : 02.12.2021 : Date of Delivery :24.01.2022

A.K. MOHAPATRA, J.

1. The present criminal appeal under Section 374(2) of the Code of Criminal Procedure, 1973 is directed against a judgment of conviction and sentence dated 25th day of September, 2017 passed in Crl. Trial No.29 of 2011 by the learned Additional Sessions Judge, Bhubaneswar, whereby the Accused-Appellant has been found guilty of offence under Sections 302/394 of Indian Penal Code (in short the 'I..P.C.') and accordingly he has been sentenced to undergo imprisonment for life with payment of fine of Rs.5,000/-(Rupees five thousand) only in default to undergo R.I. for six months for the offence U/s.302 of I.P.C.. Further sentence to undergo R.I. for 10 years with payment of fine of Rs.3,000/- (Rupees three thousand) only in default to undergo R.I. for six months for the offence u/s.394 of I.P.C. Both the sentences shall run concurrently.

2. The prosecution case, in brief, is that on 31st August, 2010, a written FIR was lodged before the ASI of Khandagiri P.S. against an unknown accused person. In the FIR, it is stated by the informant that on 31st August, 2010 at about 9.30 A.M. while he was working as ASI of Khandagiri P.S., he along with Havildar Bharat Ch. Mallick were performing patrolling duty and during such patrolling, he got information from the police station that a dead body was lying near Bhaiji Restaurant, Patrapada. The informant immediately took the help of the local police and searched the nearby places and could find that the dead body of a male person was lying in the Patasbania bushy jungle, Patrapada. Upon a close inspection, he found several injuries on the body of the deceased. Two stone pieces stained with blood were lying at a nearby place. One gamucha (towel) was tied around his neck. The informant suspected murder of the deceased. As such, directed Havildar Bharat Ch. Mallick to guard the place and came back to police station and lodged a written FIR before the Inspector-in-Charge, Khandagiri P.S.

3. Basing on the aforesaid preliminary information, Khandagiri P.S. case No.313 of 2010 was registered. One A.K. Sethi, S.I. of Police took up investigation of the case. During investigation, the I.O. visited the place of

occurrence, seized incriminating materials lying near the spot conducted inquest over the dead body of the deceased, took photograph of the same, sent the dead body for post mortem examination under dead body challan and completed all other formalities. One Purna Ch. Naik, the cousin brother of deceased identified the dead body from the photograph taken by the I.O. During investigation, it is alleged that while the appellant was in police custody, he confessed to have committed murder of the deceased for the auto rickshaw and laid the I.O. and the witnesses to the place of concealment of auto rickshaw, mobile phone, identity card of the deceased and his wearing apparels. On recovery of such articles, the I.O. seized the same and the seized articles were sent for chemical examination.

4. That after completion of investigation, the I.O. submitted Charge-Sheet No.426 against the appellant under Sections 302/394 of I.P.C. and as such, the accused was made to face trial.

5. To bring home the charges, the prosecution has altogether examined 16 witnesses in support of its case. It is made clear here that there is no eye witnesses to the occurrence. Out of the 16 witnesses, P.W.1 is the informant, P.W.2 is the Medical Officer, who examined the appellant on police requisition, P.W.3 is cousin brother of the deceased and the owner of the auto rickshaw , which was being driven by the deceased, P.W.4 is the witness to the seizure of the auto rickshaw, P.Ws.5 and 9 are police constables of Khandagiri police station and witnesses to the seizure of wearing apparels of the deceased, P.W.6 is a pharmacist of Bolgarh Area Hospital and is a witness to the seizure of OPD Register, P.W.7 is a police constable, who carried the dead body for post-mortem examination, P.W.8 is a Havildar of Khandagiri Police Station and a member of patrolling party on the date of occurrence, P.W.10 is a Medical Officer, who conducted postmortem examination, P.W.11 is an independent witness, P.W.12 is a witness to inquest, P.W.13 is the owner of the brick factory, P.W.14 is the I.O. in this case, P.W.15 is a witness to the inquest and seizure, P.W.16 is a witness to the seizure. Apart from the above noted witnesses, the prosecution also relied on Exhibits 1 to 24. However, no material object is marked. On the contrary, the defence did not adduce any evidence either oral or documentary in this case.

6. The plea of the accused appellant in the trial is one of complete denial and further he took the stand that he has been roped in this case on false accusation.

7. Learned trial court formulated two points for determination in the trial:

> i) Whether the accused on 31.08.2010 in the morning inside Pattasbania near Patrapada committed murder intentionally or knowingly causing death of Ramesh Nayak?
>
> ii) Whether on the above date, time and place the accused committed robbery of the property of the deceased Ramesh Nayak i.e. an auto rickshaw bearing Regd. No.OR-02-AH-0934, mobile phone, identity card and cash of Rs.300/- and that as such voluntarily caused murder of deceased Ramesh Nayak?

8. That the learned trial court has answered the aforesaid two points in the affirmative relying upon the circumstantial evidence produced before the learned trial court from the side of the prosecution. Since there are no eye witnesses to the occurrence, the judgment of conviction by the trial court is entirely based on circumstantial evidence. Now we have to examine whether on the basis of evidence placed before the trial court, the trial court was right in its approach to hold the appellant guilty for commission of offences punishable under Sections 302 read with section 394 of I.P.C.

9. That before scanning and analyzing the evidence adduced from the side of the prosecution in this case, let us remind ourselves of the golden principle that is being followed consistently by all the Courts since the year 1952. The evidence in the present case needs to be scanned in the light of the principle laid down by the Hon'ble Supreme Court of India in a land mark judgment in the case ***Hanumant Govind Nargundkar Vrs. State of M.P.***, reported in ***AIR 1952 SC 343***. It is extremely important to keep in mind the principle laid down in the aforesaid case. While considering an appeal against conviction based on circumstantial evidence, observed thus:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

10. Further it is also equally important to keep in mind the principle laid down by Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda Vrs. State of Maharashtra***, reported in ***AIR 1984 SC 1622*****,** while dealing with a case based on circumstantial evidence, it has been held by the Hon'ble Apex Court that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. Further, the conditions precedent in the words of the Hon'ble Supreme Court of India, before conviction could be based on circumstantial evidence, the following conditions must be satisfied;

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

11. In ***Padala Veera Reddy Vrs. State of A.P,.*** reported in ***AIR 1990 SC 79***, the Hon'ble Supreme Court of India has held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

12. Similarly, in the case of ***State of U.P. Vrs. Satish*, r**eported in ***(2005) 3 SCC 114***, the Hon'ble Supreme Court has observed as follows;

> "14. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.
>
> 17. When the evidence on record is analyzed in the background of principles highlighted above, the inevitable conclusion is that the prosecution has established its accusations."

With the touchstone of the above noted principles laid down by the Hon'ble Supreme Court of India, the evidence adduced by the prosecution in the present case needs to be examined carefully.

13. Dr. Arati Jena (P.W.10) had conducted the post mortem examination over the body of the deceased. She had also proved the post mortem examination report (Ext.12). On examination (P.W.10) found the ligature mark around the neck of the deceased. The doctor found multiple lacerated injuries and abrasions. In toto, the doctor has reported three external injuries on the body of the deceased. Further on dissection of skull and brain, she found that the temporal bone is fracture and compressed with the brain mater bulging out. Further it was observed by the doctor internal maxillary facial and orbital bones are also fractured and the internal organs were congested.

P.W.10 in his post mortem examination report has finally opined that all injuries are ante mortem in nature. Ligature mark around the neck suggests that the person strangulated by means of violent attack. The cause of death is due to asphyxia. According to P.W.10 the time of death is within 48 hours of post mortem examination. On the basis of evidence of P.Ws.1, 8 and 14 coupled with inquest report and the aforesaid medical evidence, the trial court has come to a conclusion that the death is homicidal.

14. The next question that falls for consideration is whether the Appellant is the perpetrator of the crime. It is apt to mention here that there are no eye witnesses to the occurrence. The prosecution case is entirely based upon circumstantial evidence. Therefore, the oral evidence of some of the material witnesses needs to be examined carefully and cautiously.

15. To establish the charges, the prosecution has broadly relied upon the following chain of circumstances:-

(i) Motive;

(ii) Disclosure statement of the accused;

(iii) Last seen of the deceased with the accused;

(iv) Recovery of auto rickshaw of P.W.3, Identity Card of the deceased and bloodstained wearing apparels of the accused; and

(v) Conduct of the accused after the occurrence.

16. So far the allegation that the deceased and the Appellant were last seen together is concerned, the trial court has relied upon the evidence of P.Ws.3, 4 and 11 to come to the conclusion that the deceased was last seen by P.W.3 in the company of the accused on 30th August, 2010 at 8.00 P.M. It is, therefore, necessary to re-examine the evidence of P.W.3 in this case.

17. P.W.3 is the cousin brother of the deceased and the owner of the auto rickshaw. In his evidence, he has stated that on 30th August, 2010 at about 8.00 P.M., he found both the deceased and the Appellant were standing near the gate of the house with auto rickshaw. When he asked both of them as to whether they would go anywhere, they told that they will go to Khurda.

18. Learned counsel appearing for the Appellant vehemently submitted that the aforesaid piece of evidence of P.W.3 is an improvement over the statement which he had initially made before the Investigating Officer (P.W.14). P.W.3 in his Examination-in-Chief has stated as follows:-

> "At about 8.00 P.M. I returned to my house. By that time the deceased Ramesh Naik along with accused Niranjan Behera were standing near the gate of my house with auto rickshaw. I asked both of them as to whether they would go anywhere and they told that they will go to Khurda. Thereafter, the accused andthe deceased went to Khurda."

Whereas the Investigating Officer (P.W.14) in his cross-examination at Paragraphs-42 and 43 has controverted the evidence of P.W.3. The said two paragraphs are quoted here in below;

> "42. P.W.3 has not stated before me that Ramesh Naik and the accused Niranjan Behera were standing near the gate of his (P.W.3) house with his (P.W.3) auto rickshaw. He has not stated before me that he asked both of them (Ramesh Naik and Niranjan Behera) as to whether they would go anywhere. It is a fact that P.W.3 has stated that Ramesh has telephoned him. Ramesh has telephoned P.W.3 on 30th August, 2010 at about 10 p.m."

> "43. P.W.3 has not stated before me that Ramesh told him that he along with the accused are leaving for Khurda."

19. In view of the aforesaid inconsistencies in the evidence of P.W.3, it would not at all be safe to rely upon the evidence of P.W.3 to come to a conclusion that the appellant and the deceased were last seen together by P.W.3. The P.W.3, who happens to be the cousin bother of the deceased and as such is a interested witness has made material improvement in his evidence before the court. His evidence doesn't inspire the confidence of this Court to hold that the P.W.3 had seen them together in the absence of any other piece of evidence to corroborate the evidence of the P.W.3.

20. P.W.4 is another witness upon whose evidence the trial court has laid much emphasis to establish that the deceased and the Appellant were last seen together at 6.00 P.M. on 30th August, 2010. P.W.4 is also a cousin brother of the deceased as such he is an interested witness. Merely because P.W. 4 is an interested witness, his evidence cannot be thrown out lightly. In view of the settled position of law his evidence needs to be examined carefully and cautiously. P.W.4 was also an auto rickshaw driver and used to park his auto at Gapabandhu Chhak Auto Stand, Bhubaneswar. In his Examination-in-Chief although he has stated that on 30th August, 2010 in the evening at about 6.00 P.M., he had seen the deceased and the Appellant together. In his cross-examination at Para-6, he has stated as follows:-

> "06. It is a fact that, I had given my evidence (examination-in-chief) before the court in this case on dated 23.11.2011 as per the direction of the police. On that day i.e. on 23.11.2011, the police had accompanied me to the court and that, the police had tutored me by giving that to depose against the accused."

In view of the aforesaid evidence of the P.W.4 in his cross-examination it would not at all be safe to rely upon his evidence solely to come to a conclusion that the deceased and the appellant were last seen together.

21. The trial court has relied upon the evidence of P.W.11. P.W.11 was working at Bishnupriya Cement Factory at Patrapada where the Appellant was previously working with him as a helper. In his Examination-in-Chief, he has stated that more than one and half years ago, on one night at about 10.00 P.M., the Appellant came in an auto rickshaw to the factory and by that time both the gates of the factory were closed. The Appellant kept the a uto

rickshaw outside the factory gate and entered into the factory premises by climbing over back gate and came to P.W.11. By that time, P.W.11 saw that there was another person on the same auto rickshaw. The Appellant although called the other person to come inside the factory premises but he did not come. The Appellant slept near P.W.11. P.W.11 said that he went to sleep at about 10.30 P.M. and on the next day morning when he woke up, he found the Appellant as well as the other person in the auto rickshaw were absent. P.W.3 in his cross-examination has stated that although he woke up in the night for urination, at that time he had seen that the Appellant was on the bed and finally when he woke up in the next day morning he found that the Appellant was absent on the bed. The prosecution could have shown the photograph of the Appellant to the P.W.3 for identification of the person who had accompanied the deceased to the factory, but for the reasons best known to the prosecution, no photograph was shown to P.W.11 for identification of the person, who was alleged to be with the Appellant outside Bishnupriya Cement Factory.

In such view of the matter, it can never be safely concluded that P.W.11 had actually seen the deceased and the Appellant together in the night of 30th August, 2010.

22. In view of the aforesaid inconsistencies in the evidence of P.Ws.3, 4 and 11, the trial court has apparently committed an error by relying upon their evidences and by coming to the conclusion that the Appellant and the deceased were last seen together in the night of 30th August, 2010. Thus, the prosecution has miserably failed to prove the last seen together of the Appellant and the deceased by adducing reliable and trustworthy evidence. Thus a very important link in the chain of circumstances has not been established by the prosecution to complete the chain.

23. The 2nd circumstance that the trial court has relied upon to hold that the Appellant is guilty of the offence is an alleged disclosure statement of the Appellant before the police and recovery of the stolen auto rickshaw, Identity Card of the deceased and bloodstained wearing apparels of the Appellant. The Investigating Officer (P.W.14) in his evidence has stated that disclosure statement of the Appellant (Ext.7) was recorded in presence of P.Ws.4 and 16 and that the same was prepared at the Khandagiri Police Station at about 6.30 A.M. after the Appellant was arrested. Thereafter, the Appellant led the Investigating Officer to village Maradabadi and gave recovery of auto

rickshaw, its key and R.C. Book, Insurance and fitness certificate inside the box and other incriminating materials as per (Exts.4, 5 and 6). The Appellant also gave recovery of wearing apparels i.e. bloodstained red colour T-shirt and Pant and also gave recovery of mobile phone, identity card of the deceased.

24. After careful scrutiny of the evidence adduced by the prosecution in this case, this Court finds that the prosecution has miserably failed to prove that the place of recovery of the alleged incriminating articles was a confined place and the public had no access to such place and moreover, the Appellant had special knowledge of the place. The prosecution has not led any evidence to rule out that the incriminating articles could not have been planted at the place from where the alleged recovery took place. Moreover, law is fairly well settled that the confessional statement and disclosures made to police are not admissible in evidence.

25. After carefully considering the entire evidence on record in this case, this Court is of the considered opinion that it may not be safe to rely upon the Ext.7, i.e. disclosure statement of the Appellant for the following reasons:

I. Ext.7 was prepared at the police station as admitted by the Investigating officer in his evidence.

II. None of the seized articles pursuant to the disclosure statement of the Appellant were produced before the trial court and the same were not marked as M.O.

III. There is nothing on record that during search and seizure the Investigating Officer (P.W.14) has neither taken the assistance of the local police station (Bolagarh Police Station) nor any independent witnesses of the locality have been cited as witnesses to the search and seizure in compliance of section 100(4) of the Cr.P.C.

IV. A close scrutiny of Ext.7 reflects some discrepancies and material omissions in such statement thereby making it untrustworthy for the purpose of the present case.

V. The seizure list does not disclose specific place of auto rickshaw except from the village Maradabadi.

VII. The witnesses to the disclosure statement i.e. P.W.4 and P.W.6 have turned hostile during trial as they did not support the prosecution case. Further these two witnesses in their depositions have stated that the Appellant had not told anything in their presence to the police.

In view of the aforesaid discrepancies and inconsistencies in the evidence of seizure witnesses and non-production of seized articles before the trial court, this Court is compelled by law to come to a conclusion that the prosecution has failed to discharge its duty and has failed to establish the seizure of incriminating articles by leading reliable and trustworthy evidence during trial and as such this Court has no other option but to differ with the conclusion arrived at by the trial court in this regard.

26. In the aforesaid context, the learned counsel for the Appellant relied upon a judgment of the Hon'ble Supreme Court of India in the matter of ***Sattatiya@Satish Rajanna Kartalla Vrs. State of Maharastra, reported in (2008) 39 OCR (SC) 662***. The said reported case was a case u/ss.302/34 I.P.C. and based on circumstantial evidence. The prosecution in that case relied on the circumstantial evidence of last seen, recovery of blood stained pant and shirt from a building, blood stained half blade and handkerchief near body of the deceased. The question that was raised before the Apex Court was whether the prosecution had succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the Appellant had committed the crime. Discussing the evidence, the Apex Court has answered the question in the negative.

27. In ***Ramreddy Rajesh Khanna Reddy & another Vrs. State of A.P..*** *reported in* ***(2006) 10 SCC 172*** it has been observed by the Hon'ble Supreme Court of India as follows;

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

28. The next question that falls for consideration in this case is motive. In the present case, the prosecution has failed to establish motive of the Appellant to commit the crime by leading credible and trustworthy evidence. The Appellant is no doubt the owner of an auto rickshaw as per the materials available on record, however, the failure of the prosecution to produce the seized articles before the trial court has complicated the matter and in a case

based on circumstantial evidence, the motive forms a very important link in the chain of links or the chain of evidences so that the evidence collected by the prosecution when read in its entirety would lead to a conclusion that the accused is the only person who could have committed the crime and none else. As such in a case of this nature, it would not be safe to come to a conclusion that the prosecution has conclusively proved the guilt of the accused without proving the motive behind the crime.

29. The learned Counsel appearing for the Appellant relies upon a judgment of the Hon'ble Supreme Court of India in the matter of ***Varun Chaudhury Vrs. State of Rajasthan,*** *reported in* ***AIR 2011 SC 72***. Paragraph-23 of the said reported judgment is quoted here in below;

> "23. It is also pertinent to note that the prosecution could not establish the purpose for which the deceased was murdered by the accused. Of course, it is not necessary that in every case motive of the accused should be proved. However, in the instant case, where there is no eye witness or where there is no scientific evidence to connect the accused with the offence, in our opinion, the prosecution ought to have established that there was some motive behind commission of the offence of murder of the deceased. It was the case of the prosecution that the deceased, an Income Tax Officer had raided the premises belonging to some scrap dealers and, therefore, he had received some threats from such scrap dealers. It is an admitted fact that the accused are not scrap dealers or there is nothing to show that the accused had been engaged by scrap dealers to commit the offence. Thus, there was no motive behind the commission of the offence so far as the accused are concerned."

30. No doubt the Hon'ble Supreme Court of India has held in many judgments that failure to establish motive in a criminal trial by the prosecution is not fatal and the conviction can still be sustained on the basis of other corroborative evidence on record, however, cases based on circumstantial evidence are different. To complete the chain of circumstance and to come to conclusion that the accused, in fact, had committed the crime, the motive receives significance and the same is required to be proved by the prosecution to complete the chain of circumstances. In other words, failure on the part of the prosecution to establish motive in a case based on circumstantial evidence, it would not be safe to convict the accused in such cases. Considering the evidence led by the prosecution in the present case, this Court is of the opinion that the prosecution has failed to establish the motive behind the crime.

31. The other material circumstances which the trial court has relied upon while convicting the Appellant under Sections 302/394 of I.P.C. are the

injuries on the body of the appellant and seizure of bloodstained wearing apparels of the Appellant as well as the deceased. The Appellant in his statement recorded under Section 313 of the Cr.P.C. in reply to two question i.e. nos.14 and 15 has denied the allegation that he was treated at the Bologarh hospital for the bite injury. Further upon careful scrutiny of the evidence of P.W.2 -Dr. Pravat Kumar Sahu, who had examined the Appellant on 3rd September, 2010, it is found that P.W.2 is not the doctor, who initially treated the Appellant for the injuries sustained by the Appellant. Although he had stated that the injuries seen by him could be caused by teeth bite. He has further stated that during his examination he found injuries partially filled up. In crossexamination, the P.W.2 has stated "since I examined the injured after three days it is difficult to assume that the injuries caused were definitely by teeth bite. Lacerated injury can be caused by lathi. All the injuries may be caused by lathi." Ext.10/2 which has been cited by the prosecution to prove that the Appellant had undergone treatment at Bolagarh hospital. The doctor who is the scribe of the said document, namely, Dr. Ram Prasad Panda has not been examined in this case. Moreover, a mere photo copy of the relevant column of the OPD Register produced by pharmacist (P.W.6) is not admissible in evidence as the same has not been proved as secondary evidence in views of the provisions contained under Section 65 of the Evidence Act.

32. So far the bloodstained wearing apparels of the Appellant and the deceased are concerned, the seizure list containing the seized bloodstained wearing apparels has not been brought on record during trial. As such, it is difficult to come to a conclusion as to whether blood stains found on the wearing apparels are that of the either Appellant or the deceased. Although the blood stains found on the wearing apparels were found to be of group 'B', however, the prosecution is silent with regard to the blood group of the deceased as well as the Appellant. As such the seizure of the blood stained wearing apparels could not be connected with the present crime. The confusion over the seizure and identification of bloodstained wearing apparels has complicated the issue further and the same does not conclusively prove anything. Therefore, the prosecution has failed to prove by cogent, trustworthy and unimpeachable evidence this important link in the chain of evidences and as such the same is of no help to the prosecution.

33. In the context of the seizure of blood stained wearing apparels of both the deceased as well as the Appellant, the learned counsel for the

Appellant places his reliance on a judgment of the Hon'ble Supreme Court of India in the matter of ***Inspector Police, Tamilnadu Vrs. Balaprasanna, reported in (2008) 11 SCC 645***, where in it has been observed as follows;

> "27. The alleged statement made by the accused led to discovery of knife, bloodstained clothes, rope, etc. Unfortunately, for the prosecution there is no evidence to show that in fact the wearing apparels containing bloodstains belonged to the accused, save and except the alleged confessional statement. No witness has spoken that those clothes were worn by the accused at any time far less at or about the time of occurrence. It is also to be kept in view that those articles were recovered from the house of P.W.3 and at the initial stage of investigation, P.W.3 himself was one of the suspected person and he was arrested. Therefore, the statement of P.W.3 and his mother that those articles were brought by the accused and left in the upstairs room is to be considered with a pinch of salt. Moreover, there is nothing to indicate that in fact the bloodstained clothes and rope had tallied with the blood grouping of the deceased. The knife did not contain any bloodstain. Therefore, the aspect relating to recovery of articles from the house of P.W.3 and his mother cannot be considered as a link to complete the chain of circumstantial evidence."

34. With regard to the failure of the Appellant to give any explanation or a satisfactory explanation about the existence of other materials facts which are within his special knowledge in the context of the case on hand, it is apt to refer to a latest judgment of the Hon'ble Supreme Court of India in the matter of ***Nagendra Sah Vrs. State of Bihar, reported in 2021 (4) Crimes 334 (SC),*** it has been observed in paragraph 21 of the said judgment as follows;

> "21. When a case is resting on circumstantial evidence, if the Accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the Accused to discharge the burden Under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the Accused.

35. In view of the aforesaid analysis and meticulous scrutiny of the evidence led by the prosecution to establish the involvement of the Appellant in the present crime, this Court is not at all satisfied with the manner in which the prosecution has discharged its obligation in this case. There are several lacunas, inconsistencies and infirmities in the evidence led from the side of

the prosecution. Since there are no eye witnesses to the occurrence and entire prosecution case is based on circumstantial evidence, it would not be safe to accept the findings arrived at by the trial court.

36. Therefore, we are of the considered view that the guilt of the Accused has not been established beyond all reasonable doubt. Hence, the appeal must succeed and we hereby set aside the impugned judgment passed on 25th day of September, 2017 in Crl. Trial No.29 of 2011 by the learned Additional Sessions Judge, Bhubaneswar and the Appellant stands acquitted from the charges framed against him for the offences punishable Under Sections 302/394 of the Indian Penal Code. The Appellant shall be forthwith set at liberty and Bail bonds stand discharged, unless he is required in connection with any other case.

37. The Appeal is accordingly allowed. There shall be no order as to costs.

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2022 (I) ILR - CUT- 255

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

O.J.C. NO. 3092 OF 1996

GADADHAR NAYAK ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Illegal and fraudulent settlement of deity's land – Upon filing of review the order of settlement recalled – Plea of the petitioner that the review petition was not maintainable – The records show the order was obtained upon misrepresentation of fact and on playing fraud on court – The question arose as to whether the order obtained by playing fraud on court can be recalled? – Held, Yes – The proposition of law that a Tribunal or Court may recall an order earlier made by it where there exists fraud or collusion in obtaining the judgment, where there has been a mistake of the Court causing prejudice to a party and even assuming that such an application is not maintainable also, the Courts/Tribunals are not devoid of power to recall their order passed earlier once it comes to their notice that the order passed has been obtained fraudulently and by committing a jurisdictional error.

(Para 45)

Case Laws Relied on and Referred to :-

1. (2010) 2 SCC 114 : Dalip Singh .Vs. State of Uttar Pradesh & Ors.
2. 1999(II) OLR (SC) 151 : Budhia Swain & Ors. .Vs. Gopinath Deb & Ors.
3. (1994) 1 SCC 1 : S.P.Chengalvaraya Naidu Vs. Jagannath.
4. (2010) 8 SCC 383 : Meghmala .Vs. G. Narasimha Reddy.
5. (2005) 7 SCC 605 : Bhaurao Dagdu Paralkar .Vs. State of Maharashtra.
6. AIR 2021 SC 5423 : Smriti Madan Kansagra .Vs. Perry Kansagra.
7. (2007) 4 SCC 221 : A.V. Papayya Sastry & Ors. .Vs. Government of A.P. & Ors.

For Petitioner : Mr. B. Routray, Sr. Adv.

For Opp.Parties: Mr. D.K.Mohanty, A.G.A.
Mr. S.P. Mishra, Sr. Adv.

JUDGMENT Date of Judgment:25.01.2022

BY THE BENCH

1. At the outset, we are reminded of the erudite words written by Justice A.K.Ganguly, a former Chief Justice of this Court and former Judge of the Supreme Court of India in ***Dalip Singh -vrs.- State of Uttar Pradesh & others:*** **(2010) 2 Supreme Court Cases 114,** which has been extracted and reproduced here in below:

> "*For many centuries Indian society cherished two basic values of life i.e. "Satya" (truth) and "ahimsa" (non-violence), Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre- Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, the post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.*"

2. The present writ application has been filed assailing the order dated 27th June 1992 passed by the Additional Tahasildarcum- O.E.A. Collector-Banpur, in O.E.A. Case No.95 of 1987 (Annexure-3), order dated 22nd August, 1995 passed by the O.E.A. Collector-cum-Additional Tahasildar,

Banpur in O.E.A. Misc.BCase No.1 of 1995 (Annexure-4) and order dated 30th March, 1996 passed by the learned Member, Board of Revenue, Odisha, Cuttack in O.E.A. Revision Case No.20 of 1995 (Annexure-5).

3. Initially the above noted writ petition was filed by one Gadadhar Nayak in the year 1996. During the pendency of the present writ petition, Gadadhar Nayak has died on 5th August, 2011 leaving behind his only daughter namely, Sujata Mohapatra as his only legal heir. On an application bearing Misc. Case No.251 of 2013 filed at the instance of said Sujata Mohapatra, this Court vide order dated 30th November, 2016 has allowed the application for substitution bearing Misc. Case No.251 of 2013 and accordingly she has been substituted in place of the deceased original Petitioner.

4. The factual backdrop of the Petitioner's case as culled out from the writ Petition is that the disputed property relates to village Banpur, Sabik Khata No.1, Plot Nos.431,433,434 and 435 measuring a total area of Ac.0.285 dec. which corresponds to Hal Khata No.59/28, Plot No.431 Ac.0.12 dec, Plot No.433 Ac.0.35 dec., Plot No.434 Ac.0.224 dc. Plot No.435 Ac.0.14 dec. The kisam of the land has been recorded as *gharbari.* The disputed land was originally recorded in the name of the deity Dakheswar Bhagabati, marfat, Trust Board, Banpur (Opposite Party No.4) and the status of the land was intermediary interest (Nij Dakhal) status and the deity was the intermediary.

5. The original Petitioner was a Mali by caste and his ancestors were *Sebayats* of the Opposite Party No.4 deity. The then Trust Board of the deity had allowed the grandfather of the original Petitioner to construct their dwelling house on the case land and with such permission, the grandfather of the original Petitioner had constructed the dwelling house and started staying there with his family members. It is also stated that the grandfather of the original Petitioner and after him his successors were/are in exclusive possession of the case land for last 33 years.

6. By virtue of a Notification dated 18th March, 1974 issued under section 3 of the Estate Abolition Act, the trust estate vested in the State. Where after no application under Sections 6 & 7 of the O.E.A Act was filed by the Ex-intermediary. Therefore, the right, title and interest of the deity, if any, prior to the vesting have been extinguished.

7. The original Petitioner, who had claimed to be in exclusive possession of the case land made an application in the year 1987 for settlement of the case land on lease in his favour. The said application of the Petitioner was registered as Vesting Case No. 95 of 1987 before the Tahasildar, Banpur. Thereafter a general notice was issued inviting public objection. Further, notices were also issued to the Endowment Inspector of *Dakheswar Bhagabati*, who was in charge of the deity. The Revenue Inspector (R.I.), Banpur was also asked to submit a report after visiting the spot.

8. After service of notice, the Revenue Inspector, Banpur was reminded by order dated 20th November, 1987 to submit the report as had been directed. The Revenue Inspector, Banpur had enquired into the matter in presence of the local gentlemen and submitted his report stating therein that the disputed plots are in physical possession of the original Petitioner prior to 1962. The Revenue Inspector had also indicated that the plots in question have been given to the original Petitioner by the Trust Board for rendering *Sebapuja* of the deity and as such the original Petitioner had constructed the dwelling house from his forefathers' time and was living there with his family.

9. Pursuant to the notice, the Endowment Inspector appeared and submitted that the Trust Board has allotted these plots to Sri Nayak for performing *sebapuja* of the deity long since.

10. After due enquiry and after hearing the parties, the Tahasildar, Banpur by order dated 28th November, 1987 held that the original Petitioner is physically in possession over the suit plot since more than 25 years and using the same as *gharbari* and has further held that the original Petitioner is in possession over the case land prior to the date of vesting i.e., 18th March, 1974 and that the Ex-intermediary is not in possession over the case land. With such said findings, the Tahasildar, Banpur settled the case land in favour of the original Petitioner with a further direction to the original Petitioner to pay *Salami* and the arrear rent from the year 1974.

11. As against the aforesaid order dated 27th June, 1992 passed in OEA Case No.95 of 1987, no appeal or revision has been preferred by anybody. After expiry of the appeal period on 26th November, 1991, the Tahasildar directed the Revenue Inspector for realization of Government dues from the original Petitioner and further directed to send the case record for correction

of the Record of Rights after realization of Government dues. It is further stated that after the aforesaid order, the original Petitioner had paid the arrear rent and other dues. Thereafter, pursuant to the direction of the Tahasildar, Record of Right was corrected in respect of the case land. After such correction of Record of Right, the Revenue Inspector had accepted the rent from the original Petitioner and granted receipts thereof. Copies of the corrected Record of Right as well as the rent receipts have been filed along with the writ application.

12. While this was so, after a gap of five years, the Opposite Party No.4 filed an application purported to be an application under Section 6 & 7 before the O.E.A. Collector, Banpur for settlement of the case land. Again on 27th June, 1992 the Opposite Party No.4 filed a Petition for review of the order passed in O.E.A.Case no.95 of 1987 and to settle the case land in favour of the deity instead of the original Petitioner. The Additional Tahasildar-cum-O.E.A. Collector on 27th June 1992 passed an order to the effect that;

> "Since the original CR is not readily available and could not be traced out, no correction to the ROR should be made. The rent roll issued by this office for realization of back rent and salami is recalled, Sri *Gadadhar* Mahapatra, Opp. Party to this case did not attend the Court nor could produce any documentary evidence. Hence, he is not being treated as tenant in respect of the above plots."

13. The Petitioner has further stated that the aforesaid order was passed behind his back and the original Petitioner had absolutely no knowledge about such order.

14. Thereafter another application was filed bearing OEA Misc. Case No.1 of 1995 before the Additional Tahasildar, Banpur by the present Opposite Party No.4 with a prayer to set aside the correction made by virtue of the order passed in O.E.A. Case No.95 of 1987. It has been further stated that though notices were issued in the said OEA Misc. Case No.1 of 1995, but the Additional Tahasildar passed an order behind the back of the original Petitioner on 22nd August, 1995 declaring that the order passed after 27.06.1992 in OEA Case No.95 of 1987 to be erroneous.

15. Thereafter, an eviction proceeding was initiated against the original Petitioner bearing Endowment Misc. Case No.18 of 1995 by the Collector, Khurda at the instance of Opposite Party No.4. In the said Endowment Misc. Case No.18 of 1995 notice was issued to the original Petitioner for eviction

on the basis of the order passed by the Additional Tahasildar in favour of the deity and by treating the Opposite party No.4 deity as the owner of the case land.

16. Being aggrieved by the initiation of the aforesaid eviction proceeding, the original Petitioner had moved the Member, Board of Revenue (Opposite Party No.2) by filing a revision application under Section 38-B of the O.E.A. Act against the order passed by the Additional Tahasildar, Banpur on 22nd August, 1995 in OEA Misc. Case No.1 of 1995. The Member, Board of Revenue by order dated 18th November, 1992 called for the records of Vesting Case No.95 of 1987 and order dated 20th October, 1987, 28th November, 1987 and 27th June, 1992. However, very shockingly the record of OEA Case No.95 of 1987 could not be produced on the plea that the same is missing in the Tahasil Office. The Member, Board of Revenue issued notice to one Brajabandhu Subudhi, the then Senior Clerk of Banpur Tahasil, who was in charge of that file. Despite such notice neither the Tahsildar nor Sri Subudhi had any explanation to offer about the missing records. However, both of them admitted that order dated 28th November, 1987 had been passed by the Additional Tahasildar.

17. The Member, Board of Revenue, Odisha proceeded on the basis of the certified copy of the order produced by the original Petitioner. Finally, the Member, Board of Revenue dismissed the revision filed by the original Petitioner with the finding that the Additional Tahasildar has inherent jurisdiction to recall the earlier order and that the order dated 28th November, 1987 is fraudulent in nature. It is alleged by the Petitioner that the Member, Board of Revenue while finally disposing of the revision application has not decided the right, title and interest of the Opposite Party No.4 over the case land and moreover, he has not taken into consideration the report of the Endowment Inspector, which shows that the original Petitioner was in possession over the case land on the date of vesting.

18. That the Opposite Party No.4 has controverted the allegations made by the original Petitioner in the writ Petition by filing a counter affidavit. In the counter affidavit, it has been specifically stated that Plot Nos.431, 433, 434, 435 under C.S. Khata No.1, amongst other plots, was the property recorded in the name of Sri Dakheswar Bhagabati Marfat Trust Board in the Sabik Settlement R.O.R. The case land along with other properties are the trust estate and by virtue of the blanket Notification dated 18th March, 1974

under the O.E.A. Act, the said properties vested in the State free from all encumbrances. Further the case land recorded under Khata No.1 of C.S. R.O.R.is the Debottar Lakhraj Bahel Nijdakhal land of the deity and the same was in khas possession of the deity prior to as well as on the date of vesting. In the Counter Affidavit, it has also been sated that in a Suo motu proceeding under the O.E.A. Act bearing Suo Moto Vesting Case No.143 of 1981 which was initiated at the instance of the Additional Tahasildar-cum-O.E.A. Collector, Banpur and after due enquiry and after following due procedure of issuing proclamation inviting objections from the public and with proper notice to the parties, by its order dated 11th November, 1982 settled the case land in favour of Sri Dakheswar Bhagabati Marfat Trust Board. A certified copy of the order dated 11th November, 1982 passed in Suo Motu Vesting Case No.143 of 1981 has been filed by Opposite Party No.4 along with his counter affidavit.

19. It is further stated by the Opposite Party No.4 in its counter affidavit that the original Petitioner claimed to be a tenant in possession of the case land in lieu of his service to the deity and although he claims benefit under Section 8(1) of the O.E.A. Act, but he had raised a claim in 1987 for settlement of the land in his favour and accordingly by order dated 28th November, 1987 the then Tahasildar settled the case land in his favour under Section 6 & 7 of the O.E.A. Act. The Opposite Party No.4 has also contended that order dated 20th October, 1987 and the subsequent orders are *per se* not in consonance with the statutory provisions under the O.E.A. Act and as such the same cannot confer any right in favour of the Petitioner. It is further contended in the said counter affidavit that no order of settlement under Seton 6 & 7 of the O.E.A. Act could be passed in favour of a tenant save and except under Section 8(3) of the O.E.A. Act. Since the case land is admittedly a Trust estate, as per the proviso to Section 8(3) of the O.E.A. Act, the provision envisaged in Section 8(3) of the Act is not applicable to the facts of the Petitioner's case.

20. When the fact of the aforesaid illegal and fraudulent settlement in favour of the original petitioner came to the knowledge of the Opposite Party No.4 in the year 1992, the Opposite Party No.4 moved an application seeking review of the order in O.E.A. Case No.95 of 1987, which was filed to recall the order passed in O.E.A. Case No.95 of 1987. Thereafter the OEA Collector-cum-Additional Tahasildar, Banpur vide order dated 27.06.1992

under Annexure-3 directed that the R.O.R. should not be corrected and the order passed for issuance of rent roll and realization of back rent was recalled. It is further stated by the Opposite Party No.4 that despite order dated 27th June, 1992, the Office of the Tahasildar, for reasons best known to it corrected the record of right.

21. The Executive Officer of the Opposite Party no.4 after coming to know about such illegal and fraudulent correction of the Record of Rights, moved an application before the OEA Collector -cum-Additional Tahasildar, Banpur with a prayer to record the name of the deity in the Record of Rights by setting aside the previous order passed in O.E.A. Case no.95 of 1987. Such prayer made at the instance of the Opposite Party No.4 was allowed vide order dated 22nd August, 1995. It is further stated in the Counter Affidavit that the order of settlement under the O.E.A. Act dated 11th November, 1982 in favour of the deity could not be brought to the notice of the Additional Tahasildar-cum-O.E.A. Collector inadvertently. However, both the O.E.A. Collector as well as the Member, Board of Revenue upon scrutiny of the records realized that the original Petitioner by practicing fraud had obtained order of settlement which is *per se* void. Therefore, the order of O.E.A. Collector recalling the order of settlement in favour of the original petitioner obtained by fraud has been supported and defended by the Opposite Party No.4 in its Counter Affidavit. It is further submitted that there is no bar in law for the authority to recall its own order when the same is legally void and has been obtained by suppression of facts and by practicing fraud upon the Court. Furthermore, it has been stated in the counter affidavit that the case record of O.E.A. Case No.95 of 1987 was deliberately suppressed and despite an order the same could not be produced before the Member, Board of Revenue although the Petitioner has filed the certified copy of the order sheet of the year 1995, but the Petitioner could obtain the same in the year 1993. It has also been stated in the counter affidavit that the original Petitioner has not produced any material to show that he was at any point of time a tenant under the deity (Opposite Party No.4). Further, when the property has been settled in favour of the deity in the year 1981, the question of entertaining any further application by the O.E.A. Collector under any provisions of the O.E.A. Act is absolutely unjust, unfair and improper.

22. Heard Mr.J.Biswal, learned counsel for the Petitioner,Mr.S.P.Mishra, Senior Advocate for Opposite Party No.4 and Mr.D.K.Mohanty, learned Additional Government Advocate on behalf of the Sate-Opposite Parties. Perused the records as well as the impugned orders.

23. The main plank of argument of Mr.J.Bswal, learned counsel appearing on behalf of the Petitioner is that the power of review any judgment/order being a creature of Statute has to be exercised strictly in accordance with the provisions governing the exercise of such power. It is further submitted that by exercising inherent power, judgment/order could not have been reviewed by the authorities. He further submits that the O.E.A. Collector cannot exercise inherent power under Section 151 of the Code of Civil Procedure to review his own order. As such the impugned order passed in exercise of review power by the O.E.A. Collector is bad in law.

24. Learned counsel for the Petitioner further submits that Section 38-A of the O.E.A. Act only confers power on the O.E.A. Collector for correction of clerical and arithmetical mistake and further in view of the statutory provisions, such power is available to be exercised by the O.E.A. Collector only within a period of one year from the date of the order, which is sought to be reviewed. Therefore, the O.E.A. Collector-cum-Additional Tahasildar, has exceeded his jurisdiction conferred upon him by a statutory provision and as such by reviewing its own order, the O.E.A. Collector has exercised the power under Section 38-A read with Section 151 of the Code of Civil Procedure, even though there is no clerical and arithmetical error apparent in the order sought to be reviewed. He further submits that the order dated 27th June, 1992 passed by the O.E.A. Collector does not reveal anything about the misrepresentation of fact or any fraud that was practiced upon the Court while passing order dated 28th November, 1987. In such view of the matter, he further submits that the impugned order passed by the Member, Board of Revenue holding that the Additional Tahasildar-cum-O.E.A. Collector has the power to recall earlier order dated 28th November, 1987 is absolutely illegal and without jurisdiction.

25. On behalf of the Petitioner, it was also contended that there is absolutely no material available on record to come to a conclusion that the order dated 28th November, 1987 passed by the O.E.A. Collector settling the case land in favour of the original Petitioner was based on either misrepresentation of fact or the same is an outcome of fraud. Therefore, the finding of the Member, Board of Revenue that the order was passed by misrepresentation of facts and by practicing fraud upon the court is not only perverse but the same has caused miscarriage of justice. Learned counsel for the Petitioner further submits that the order dated 28th November, 1987 is in accordance with law and the same has been passed in presence of Opposite

Party No.4 and that the said order having not been challenged in any higher forum by Opposite Party No.4, the Opposite party No.4 is legally estopped to challenge the said order by filing an application for review of order dated 28th November, 1987. It was also contended on behalf of the Petitioner that the Petitioner had filed an application seeking exercise of suo motu revision power under section 38-B of the O.E.A. Act by the Member, Board of Revenue. The Member, Board of Revenue (Opposite Party No.2) while exercising such revision power under section 38-B has exceeded his jurisdiction and has made out a third case which is not permissible in law.

26. It is also contended by the learned counsel for the Petitioner that the power of review under section 38-A of the O.E.A. Act has been exercised by the O.E.A. Collector beyond the period of limitation as provided under the O.E.A. Act. Further, the O.E.A. Collector before passing order dated 29th April, 1992 has not given any opportunity of hearing to the original Petitioner and that the finding of the Member, Board of Revenue (Opposite Party No.2) that notice was served by registered post on the original Petitioner is illegal and baseless.

27. Learned counsel for the Petitioner also contended that Opposite Party No.4 had not filed any application under Section 6 & 7 of the O.E.A Act for settlement of the case land in their favour. As such the properties vested in the State Government free from all encumbrances and the State has become the owner of the case land. Therefore, no fault can be found with the Additional Tahasildar-cum-O.E.A. Collector in settling/leasing out the case land in favour of the original Petitioner.

28. Mr.S.P.Mishra, learned senior counsel appearing on behalf of the Opposite Party No.4 submitted that the case land had been recorded in Khata No.1 under C.S. Record of Right as Debottar Lakhraj Bahel Nijdakhal land of the deity and the same was under the khas possession of the deity prior to as well as on the date of vesting. Thus, the case land stood recorded in the name of Sri Dakheswar Bhagabati Marfat Trust Board in the Sabik Settlement Record of Rights.

29. Mr. Mishra further emphatically submits that the original Petitioner by suppressing material facts and by practicing fraud has managed to get the case land settled in his favour behind the back of Opposite Party No.4. He further submits that after the case land which is admittedly a Trust estate,

vested in State by virtue of a blanket Notification dated 18th March 1974 under the O.E.A. Act free from all encumbrances. Thereafter, a Suo Motu Proceeding under the O.E.A. Act bearing Suo Motu Vesting case No.143 of 1981 was initiated by the then Additional Tahasildar-cum-O.E.A. Collector, Banpur in the year 1981 and after due enquiry and after issuing proclamation inviting objections from the Public and after due notice to the Commissioner of Endowment, the case land was settled in favour of Sri Dakheswar Bhagabati Marfat Trust Board by order dated 11th November, 1982. A copy of the said order has been filed along with the Counter Affidavit.

30. Further, referring to the said order dated 11th November, 1982, Mr. Mishra, submits that the said order was suppressed by the original Petitioner and that the Additional Tahasildar had also not taken note of the order dated 11th November, 1982 while passing order dated 20th November, 1987. He further submits that when the records of the O.E.A. Case No.95 of 1987 was called for by the Member, Board of Revenue in exercise of Suo Motu power of revision, the records could not be produced and a strange plea was taken before Opposite PartyNo.2 that the case record relating to OEA Vesting Case No.95 of 1987 is missing. Relying upon all these facts, learned Senior Counsel appearing for Opposite Party No.4 submitted that order dated 28th November, 1987 settling the case land in favour of the original Petitioner is an outcome of suppression/misrepresentation of facts and the order has been obtained by practicing fraud upon the Court.

31. It was also submitted by him that once the case land was settled in favour of the Opposite Party No.4 deity in Suo Motu Vesting Case No.143 of 1981 by order dated 11th November, 1982, it is no more open to the Additional Tahasildar-cum-O.E.A. Collector, Banpur to again settle the very same case land in favour of the original Petitioner. Therefore, the order dated 28th November, 1987 is absolutely illegal and void one. In course of his argument, learned Senior counsel appearing for Opposite Party No.4 read out the entire order sheet of Suo Motu Vesting Case No.143 of 1981 to convince this Court that the order dated 11th November, 1982 under Annexure-D/1 was passed after complying with all the statutory requirements and strictly in accordance with the provisions of the O.E.A. Act.

32. Mr.Mishra, learned Senior Counsel, further submitted that there can be no order of settlement under sections 6 & 7 of the O.E.A. Act in favour of the original Petitioner even accepting for a moment but not conceding that he

was a tenant under Opposite Party No.4, save and except under section 8(3) of the O.E.A. Act. Since the case land is admittedly a Trust estate, in view of the proviso to Section 8(3) of the O.E.A. Act, the case land could not have been settled in favour of the original Petitioner. In reply to the Petitioner's contention of power of review under section 38-A of the O.E.A. Act, the learned Senior Counsel submitted that the application which was filed before the Additional Tahasildar-cum- O.E.A. Collector is actually an application to recall the order dated 28th November, 1987 as the same was obtained by suppressing facts and practicing fraud upon the Court. He further submits that it is well settled proposition of law that every Court has inherent power to recall its own order in the event it is detected by the concerned Court/authority that the order has been obtained by suppression/misrepresentation of facts and by practicing fraud. He further submits that the Member, Board of Revenue (Opposite Party No.2) being the highest revenue authority of the State has been conferred with power to call for any record and examine the same on its own motion for the purpose of satisfying itself as to the regularity of such proceeding or correctness, legality or propriety of such decision or order and if in any case it appears to the Member, Board of revenue that any such decision or order ought to be modified, annulled, reversed or remitted, it may pass order accordingly. Therefore, the order passed by the Member, Board of Revenue which is sought to be challenged in the present writ Petition is perfectly legal, proper and valid.

33. Having heard learned counsel for the Petitioner and learned Senior Counsel appearing for Opposite Party No.4, we will now examine the contentions raised by the learned counsel for the Petitioner. The main plank of argument on behalf of the Petitioner is that the order dated 27th June, 1992 passed in O.E.A. Case No. 95 of 1987 by the O.E.A. Collector, Banpur is beyond his jurisdiction and not in conformity with the provisions contained under section 38-A of the O.E.A. Act. Learned counsel for the Petitioner calls in question the very conduct of the O.E.A. Collector in entertaining the review application under Section 38- A of the O.E.A. Act that too beyond the period of limitation prescribed in the Statute. In this regard Section 38-A of the O.E.A. Act may be referred to, which is quoted herein below:

> "***38-A.*** *Review- Any decision made or order passed under this Act, whether before or after the commencement of the Orissa Estate abolition (amendment) Act, 1973 (other than a decision or order against which an appeal or revision has been*

> *preferred under this Act may, within one year from the date of the decision or order, as the case may be, and after giving all persons interested an opportunity of being heard, be reviewed by the officer who made the decision, or passed the order, or his successor in office on the ground that there has been a clerical or arithmetical mistake in the course of any proceeding under this Act."*

34. Upon a perusal of the aforesaid provisions conferring the power of review on the authorities under the O.E.A. Act, it can be seen that any decision made or order passed under the O.E.A. Act (other than the decision and order against which an appeal or revision has been preferred) could be reviewed within a period of one year from the date of such decision or order after giving all persons interested an opportunity of being heard. Further, such power of review as provided under section 38-A could be used on the ground that there has been a clerical or arithmetical mistake in the course of any proceeding under the O.E.A. Act.

35. In the aforesaid context, it would be fruitful to refer to a judgment of the Hon'ble Supreme Court of India in the matter of ***Budhia Swain and others -vrs.- Gopinath Deb and others:*** reported in **1999(II) OLR (SC) 151**. In the reported decision, the appellants, who are resident of village Panibhandar in the district of Puri filed an application seeking review of order of settlement dated 2nd April, 1966 in favour of the deity on the ground that the public notice was not served in the locality as prescribed. The O.E.A. Collector exercising the power of review set aside the order of settlement. In Appeal, the A.D.M. sustained the order of setting aside dated 2nd April, 1966. Thereafter the deity preferred a writ application under Articles 226 and 227 of the Constitution of India to this Court. This Court while setting aside the order passed by both the O.E.A. Collector and A.D.M. held that the power of review as assumed by the O.E.A. Collector did not exist and the circumstances of the case did not warrant the exercise of power to recall earlier order passed by the O.E.A. Collector which was one passed under the jurisdiction of the O.E.A. Collector. Further, this Court held that when the averments made in the application seeking review/recall did not go beyond alleging an irregularity merely or at the worst an illegality, thereafter the villagers preferred a SLP before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India dismissed the matter holding that the order dated 2nd April, 1966 did not suffer from lack of jurisdiction or error from jurisdiction much less an inherent one. While upholding the order passed by this Court, Civil Appeal was dismissed with the finding that the order passed

by the O.E.A. Collector was without jurisdiction and the O.E.A. Collector has exercised jurisdiction which by law did not vest in him. Therefore, in view of the aforesaid judgment of the Hon'ble Supreme Court, it is well settled by now that power under section 38-A of the O.E.A. Act is limited to correct the clerical or arithmetical mistake.

36. In the above referred judgment of the Hon'ble Supreme Court while dealing with the scope of review under Section 38-A of the O.E.A. Act, in Paragraph-8 of the judgment (*supra*) it has been observed as follows:

> *"8. In our opinion a Tribunal or a Court may recall an order earlier made by it if*
>
> *(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction if patent,*
>
> *(ii) there exists fraud or collusion in obtaining the judgment.*
>
> *(iii) There has been a mistake of the Court prejudicing a party, or*
>
> *(iv) A judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented. The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppelsor acquiescence."*

Therefore, in the aforesaid judgment, the Supreme Court of India has approved the proposition of law that a Tribunal or Court may recall an order earlier made by it where there exists fraud or collusion in obtaining the judgment, where there has been a mistake of the Court causing prejudice to a party. The proceeding culminating into an order suffers from inherent lack of jurisdiction and such lack of jurisdiction if patent.

37. In the light of the proposition of law laid down by the Hon'ble Supreme Court, the facts of this case are required to be relooked to find out whether the conduct of the Additional Tahasildar-cum- O.E.A. Collector, Banpur in recalling its earlier order dated 28th November, 1987 is legal, correct and valid and sustainable. A bare perusal of the order sheet in Suo Motu Vesting Case No.143 of 1981 filed by Opposite Party No.4 as Annexure-D/1 to the Counter Affidavit clearly reveals that the case land was settled in favour of Opposite Party No.4 deity much prior to the proceeding which was initiated by the original Petitioner in the year 1987 and in which

an order of settlement dated 28th November, 1987 was passed in his favour. This Court upon careful examination of the entire order sheet is of the opinion that the same is absolutely valid, legal and passed in accordance with O.E.A. Act and Rules framed there under. Further, the order of settlement under Annexure-D/1 vide order dated 11th November, 1982 settling the land in favour of Opposite Party No.4 is legal, valid and the said order dated 11th November, 1982 having not been challenged before any higher forum either by filing an appeal or revision, the same has attained finality and as such binding on the parties.

38. Further, once the case land was legally and validly settled in favour of Opposite Party No.4 by order dated 11th November,1982 in Suo Motu Vesting Case No.143 of 1981 by the Additional Tahasildar-cum-O.E.A. Collector, Banpur, the case land was no more open to be settled in favour of any other person than the Opposite Party No.4 deity. As such, the very conduct of the Additional Tahasildar-cum-O.E.A. Collector in entertaining an application for settlement of the case land in the year 1987, vide O.E.A. Case No.95 of 1987 is null and void. By entertaining such an application filed by the original Petitioner in the year 1987 and settling the case land, which was no more available to be settled in favour of the original Petitioner, the Additional Tahasildar-cum- O.E.A. Collector, Banpur has committed grave jurisdictional error. Moreover, such an order which was passed without notice to a valid settllee under the O.E.A. Act like the Opposite Party No.4 has caused miscarriage of justice and serious prejudice to the Opposite Party No.4. Therefore, in view of the principle of law laid down in Paragraph-8 of the judgment of the Hon'ble Supreme Court (supra) the O.E.A. Collector has not committed any illegality in recalling the earlier order dated 28th November, 1987 in exercise of power conferred on him by virtue of Section 38-A of the O.E.A. Act. Thus, the main plank of argument of the learned counsel for the Petitioner that the O.E.A. Collector by exercising power under section 38-A to either review or recall his earlier order is illegal and without jurisdiction is bound to fail.

39. The order passed by the O.E.A. Collector in O.E.A. Case No.95 of 1987 dated 27th Jun, 1992 was carried in revision to the Member, Board of Revenue, Odisha, Cuttack bearing O.E.A. Revision Case No.20 of 1995. The Member, Board of Revenue decided the case while exercising his power under section 38-B of the O.E.A. Act. Section 38-B of the O.E.A. Act reads as follows:

*"**38-B. Revision –**(1) The (Board of Revenue) may, on its own motion or on a report from the Collector, call for and examine the record of any proceeding in which any uthority subordinate to the (Board of revenue) has made any decision or passed an order under this Act (not being a decision against which an appeal has been preferred to the High Court or the District Judge under section 22) for the purpose of satisfying itself as to the regularity of such proceeding or the correctness legality or propriety of such decision or order and if in any case it appears to the (Board of Revenue) that any such decision or order ought to be modified, annulled, reversed or remitted, it may pass order accordingly.*

(2) The Board of Revenue shall not

*[(i) ***]*

(ii) revise any decision or order under this section without giving the parties concerned an opportunity of being heard in the matter.]"

40. The provisions contained in Section 38-B of the OEA Act confers a sweeping power on the highest revenue authority of the State i.e. Member, Board of Revenue to correct jurisdictional error committed by subordinate revenue authorities, the Member, Board of Revenue, Odisha has examined the entire matter very carefully and meticulously and finally dismissed the revision petition at the instance of the Revision Petitioner by holding that the order dated 28th November, 1987 has been obtained by misrepresentation of facts and by practicing fraud on the Court. After careful examination of the order passed by the Member, Board of Revenue vide order dated 30th March, 1996 in Revision Case No.20 of 1995, this Court is convinced that the Member, Board of Revenue while passing order dated 30th March, 1996 has not committed any illegality at all, rather the order passed by him helps to secure the ends of justice.

41. After analyzing the facts and circumstances involved in the present case, the question that arises now is when can it be said that a person is guilty of playing fraud upon the Court? In this context it would be fruitful to refer to the landmark judgment of the Hon'ble Supreme Court of India in the matter of ***S.P.Chengalvaraya Naidu Vs. Jagannath reported in (1994) 1 SCC 1***. In paragraph 6 of the said judgment it has been observed as follows;

"6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He

> purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the Appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the Appellants-Defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the Plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."
>
> Further, in ***Indian Bank vs. Satyam Fibres (India) (P) Ltd.: reported in (1996) 5 SCC 550***, the Hon'ble Supreme Court of India in paragraph 21 of the judgment has observed as follows;
>
> "21. In ***Smith v. East Elloe Rural Distt. Council [1956 AC 736 : (1956) 1 All ER 855 : (1956) 2 WLR 888]*** the House of Lords held that the effect of fraud would normally be to vitiate any act or order. In another case, ***Lazarus Estates Ltd. vs. Beasley [(1956) 1 QB 702 : (1956) 1 All ER 341 : (1956) 2 WLR 502] (QB at p. 712), Denning, L.J.*** said:
>
> No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

In the matter of ***Ram Chandra Singh vs. Savitri Devi: reported in (2003) 8 SCC 319,*** it has been held by the Supreme Court of India that a fraudulent misrepresentation can also be construed as fraud in law. In paragraph 18 of the said judgment it has been observed as follows:

> "18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

Further in ***Meghmala vs. G. Narasimha Reddy reported in (2010) 8 SCC 383*** the Supreme Court of India has observed:

> "28. It is settled proposition of law that where an Applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. "Fraud avoids all judicial acts,

> ecclesiastical or temporal." (***Vide S.P.Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1 : AIR 1994 SC 853]. In Lazarus Estates Ltd. V.Beasley [(1956) 1 QB 702 : (1956) 2 WLR 502 :(1956) 1 All ER 341 (CA)] the Court observed without equivocation that: (QB p. 712)*** "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

It has also been held by the Supreme Court of India in ***Bhaurao Dagdu Paralkar vs. State of Maharashtra:*** *reported in* ***(2005) 7 SCC 605,*** that suppression of a material document would also amount to fraud on the Court. Although, negligence is not fraud but it can be evidence on fraud.

42. In the light of the law laid down by the Supreme Court of India as discussed here in above, the next question i.e. required to be considered here is whether the conduct of the original Petitioner and the manner in which order dated 28th November, 1987 has been passed by the Additional Tahasildar-cum-O.E.A. Collector, Banpur constitutes misrepresentation/suppression of facts and fraud on Court? As discussed herein above, the case land was settled in favour of Opposite Party No.4 deity by a valid and legal proceeding and by order dated 11th November, 1982. The R.O.R. stood in the name of Opposite Party No.4 deity. Therefore, it is difficult to believe that such fact was not within the knowledge of the original Petitioner. Further, the application which was filed by the original Petitioner in the year 1987 and order of settlement passed therein by order dated 28th November, 1987 in favour of the Petitioner is shrouded by a dense cloud of doubt. The very same O.E.A. Collector, who had passed earlier order on 11th November, 1982 settling the land in favour of Opposite Party No.4 deity could not have again settled the very same land in favour of the original Petitioner. This Court is unable to persuade itself to accept the contention of the Petitioner that the order dated 11th November, 1982 and the settlement of the case land pursuant thereto was not within the knowledge of either the original Petitioner or the O.E.A. Collector. Moreover the said order dated 11th November, 1982 or any fact relating thereto were never brought to the notice of any of the authorities concerned by the original Petitioner. Anyways, the O.E.A. Collector, Banpur while passing order dated 11th November, 1982 settling the land in favour of the original Petitioner has been misled by suppression of material facts to believe that the case land has not been settled in anybody's favour.

43. Further while hearing the revision petition, the Member, Board of Revenue called for the case record in O.E.A. Case No.95 of 1987. Hearing of the revision petition by Member, Board of Revenue, Odisha was

unnecessarily delayed and held up due to non-production case records of O.E.A. Case No.95 of 1987. The Tahasildar, Banpur in his letter dated 21st December, 1995 reported the Member, Board of Revenue that the case record had not been handed over by one Brajabandhu Subudhi, the then Senior Clerk of Banpur Tahasil. The said Brajabandhu Subudhi was noticed by Member, Board of Revenue to appear in his Court. Further, the Member, Board of Revenue in his order has specifically observed,which is quoted herein below:

> *"On verification of the records of movement of papers, I came to a prima facie finding that Shri Subudhi had the custody of the case record and thereafter it was missing. Taking into account the entries in the relevant registers dealing with movement of case record in the Tahasil Office I had directed Collector, Nayagarh in my order dated 23.2.1996 to place Shri Subudhi under suspension and proceed against him departmentally. That was done with the hope that faced with the ultimate prospect of a major penalty in a Departmental Proceedings the record may come to light eventually. But that has not happened yet and one has to take the story further on the basis of the certified copy of the order sheet in O.E.A.Case No.95/87 which has been filed in this case."*

44. The Member, Board of Revenue, Odisha while examining the order sheet in O.E.A. Case No.95 of 1987 has pointed out many glaring illegalities in its order dated 30th March, 1996. The Member, Board of Revenue has further observed that when the Executive Officer of the Trust Board filed an application for reviewing the order passed in O.E.A. Case No.95 of 1987 and to settle the land in deity's favour, the Additional Tahasildar, Banpur verified the R.O.R. and found that even though the order had been passed earlier on 28th November, 1987 to settle the land in favour of the original Petitioner, but the Record of Rights had not been corrected. The Member, Board of Revenue has also referred to the order of the Tahasildar where it has been stated that in the last Settlement which took place in the year in 1961, the property in question was recorded in the name of the deity as Trust property and the name of the recorded tenant cannot be changed, therefore,he had ordered that the Record of Rights should stand as it was at that time. Despite the aforesaid order dated 27th June, 1992, the Record of Rights was surreptitiously corrected in the name of the original Petitioner i.e. the Record of Right was corrected unauthorisedly even after order dated 27th June 1992. It is further observed by Member, Board of Revenue referring to Tahasildar's order that even after the order dated 27th June 1992 was passed recalling the order dated 28th November, 1987 settling the land in favour of the original Petitioner on 19th September, 1992, the Record of Rights was unauthorisedly

corrected in the name of the original Petitioner. Further, it has been observed by the Member, Board of Revenue that after passing order dated 28th November, 1987 surprisingly the Additional Tahasildar, Banpur had ordered to put up the file on 26th November, 1991 i.e. after a gap of four years.

45. Now, reverting back to the issue of the conduct as well as the power, scope and authority of the Addl. Tahasildar cum OEA, Collector, Banpur to review/recall his earlier order dtd.28.11.1987, this court is of the considered view that the said order is an outcome of fraud and misrepresentation/suppression of material fact by the original petitioner. As has been held by the Supreme Court of India in the case ***Budhia (supra)*** in paragraph 8 of the judgment that the review/recall application filed by the OP No.4 in the present case is maintainable in law under section 38~A of the O.E.A. Act. Even assuming that such an application is not maintainable also, then the Courts/Tribunals are not devoid of power to recall their order passed earlier once it comes to their notice that the order passed has been obtained fraudulently and by committing a jurisdictional error. By now it is a well accepted position of law that every court has inherent power to set aside an order obtained by practicing fraud upon that Court. In this context it would be gainful to refer to a latest judgment of the Hon'ble Supreme Court of India in the matter of ***Smriti Madan Kansagra vs. Perry Kansagra: reported in AIR 2021 SC 5423***. In paragraphs 22 and 23 of the judgment it has been observed as follows;

> "22. The judiciary in India also possesses inherent power, specially Under Section 151 Code of Civil Procedure, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.
>
> 23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See: Benoy Krishna Mukerjee v. Mohanlal Goenka: AIR 1950 Cal 287]; Gajanand Sha v. Dayanand Thakur: AIR 1943 Pat 127: ILR 21 Pat 838];

> Krishnakumar v. Jawand Singh : AIR 1947 Nag 236 : ILR 1947 Nag 190]; Devendra Nath Sarkar v. Ram Rachpal Singh : [ILR (1926) 1 Luck 341 : AIR 1926 Oudh 315]; Saiyed Mohd. Raza v Ram Saroop : ILR (1929) 4 Luck 562 : AIR 1929 Oudh 385 (FB)]; Bankey Behari Lal v. Abdul Rahman [ILR (1932) 7 Luck 350 : AIR 1932 Oudh 63]; Lekshmi Amma Chacki Amma v. Mammen Mammen : 1955 Ker LT 459], The court has also the inherent power to set aside a sale brought about by fraud practised upon the court (Ishwar Mahton v. Sitaram Kumar : AIR 1954 Pat 450] or to set aside the order recording compromise obtained by fraud. (Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh : AIR 1958 Pat 618 : 1958 BLJR 651]; Tara Bai v. V.S. Krishnaswamy Rao : AIR 1985 Kant 270 : ILR 1985 Kant 2930]

Further in paragraph 36 of the judgment in ***Smriti Madan Kansagra's case (supra)*** the Supreme Court of India has observed as follows;

> "36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is nonest."

46. The observation of the Member Board of Revenue, Odisha to the effect that every Court/Tribunal/Authority has inherent power to review/recall its own order in the event it is found that the order has been obtained by misrepresentation/ suppression of facts or by practicing fraud upon the Court, gets support from a judgment of the Supreme Court of India in ***A.V. Papayya Sastry and Ors. vs. Government of A.P. and Ors.:*** *reported in* ***(2007) 4 SCC 221***, at Para 22 of the judgment it has been observed by the Apex Court in the following words;

> "22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and nonest in the eye of law. Such a judgment, decree or order --by the first Court or by the final Court-- has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings."

47. In reply to the Petitioner's contention that he was not noticed and as such was deprived of an opportunity of hearing before recalling the order of settlement in his favour, the Member, Board of Revenue, Odisha in its order dated 30th March, 1996 has categorically observed as follows:

"11 xx xx xx
In this case I find from the order dated 22.8.95 that notices to Sarat Chandra Mahapatra, Gaddhar Nayak @ Gadadhar Mahapatra, the present revision petitioner and Susil Mahapatra were sent through registered post. These registered letters were also received by these persons through Banpur Sub-Post Office vide their receipt Nos.4367,4368 and 4369. In reply Susil Kumar Mahapatra submitted a petition stating that he had nothing to say as he was not a party to the original O.E.A. case. The other O.P. Gadadhar Nayak alias Gadadhar Mahapatra did not appear in spite of receipt of notice. As such, it is not open for him to say that the order was passed behind his back."

In view of the aforesaid findings, the ground taken by the original Petitioner that he was not given any notice or opportunity of hearing is not sustainable in law.

48. The facts and circumstances as discussed herein above and as borne out from the record, it is manifest that the original Petitioner colluded with the staff of Tahasil Office particularly, Brajabandhu Subudi to gain undue advantage against the deity, who in law considered to be a perpetual minor, and as such suppressed material facts and indulged in fraudulent practice. The aforesaid analysis of facts and circumstances compel this Court to believe that as a result of misrepresentation/ suppression of facts and fraud committed upon the Court, the direct benefit goes to the original Petitioner. Therefore, this Court is of the considered view that the original Petitioner is guilty of suppression/misrepresentation of facts as well as practicing fraud upon the Court. In such view of the matter, the Petitioner is not entitled to any relief whatsoever in law.

49. In view of the aforestated facts and circumstances and in view of the conclusion of this Court that orders were obtained by practicing fraud and by suppressing material facts, this Court is not inclined to interfere with the orders impugned in this Writ Petition and accordingly the Writ Petition is, hereby, dismissed.

50. In the facts and circumstances of the case, the Petitioner is directed to pay a cost of Rs.10,000/- (Rupees ten thousand) to Opposite Party No.4 Trust within a period of four weeks from the date of this judgment.

51. As the restrictions due to resurgence of COVID -19 situation are continuing, learned counsel for the parties may utilize a print out 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 and Office Order dated 7th January, 2022.

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2022 (I) ILR - CUT- 277

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

CRLA NOS.288, 289, 242, 234, 241 AND 246 OF 2011

TUKU @ ABDUL NAIM KHAN ……..Appellant
.V.
STATE OF ODISHA …...…Respondent

CRLA No.289 of 2011
SK.ROMAN ……..Appellant
.V.
STATE OF ODISHA …......Respondent

CRLA NO.242 OF 2011
MIR ASKAR @ RAJU ………Appellant
.V.
STATE OF ODISHA …........Respondent

CRLA NO.234 OF 2011
BABAJI @ SIBA PRASAD MOHANTY ………Appellant
.V.
STATE OF ODISHA …..........Respondent

CRLA NO.241 OF 2011
SUDAM SUNDAR SATAPATHY ……….Appellant
.V.
STATE OF ODISHA …..........Respondent

CRLA NO.246 OF 2011
BABLU @ NASIRUDDIN AHMED ………Appellant
.V.
STATE OF ODISHA …..........Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 164 read with section 154 of the Evidence Act – Provisions under – Offence under sections 302 of IPC and section 27 of the Arms Act – All eye witnesses

turned hostile – Conviction recorded only on the basis of some of the statements of witnesses recorded under section 164 – The question thus arose as to whether conviction can be based on the basis of statements recorded under section 164 of Cr.P.C ? – Held, no – Principles – Discussed.

> *"The principles discussed in above decisions make it clear that 164 statement of the witness is not substantive evidence of facts and the same cannot be used so. The earlier statement recorded under Section 164 Cr.P.C. can only be used for corroboration or contradiction. If the witness while giving evidence in Court sticks to his earlier statement recorded under Section 164 Cr.P.C, such statement can be acted upon subject to rule of caution. But when the witness resiles from his earlier statement, procedure is that he should be cross-examined and his statement made earlier as recorded under Section 164 Cr.P.C. should be confronted to him in extenso. The prosecution can place reliance on such statement only for the purpose of corroboration and that too, subject to rule of caution and if there are other sufficient evidence before the Court. It is true that though the statement under Section 164 Cr.P.C. is recorded before a Judicial Magistrate on oath, but the witness is not cross-examined there. When the statement of a witness is not tested through cross examination, truthfulness of his statement is not ascertained. It is the test of knowledge of the witness what he testifies. This is a major difference between the statement of a witness made under Section 164 Cr.P.C. and his deposition recorded by the Court under Section 137 of the Indian Evidence Act and the provisions contained in Chapter XXIII of the Cr.P.C. 18. Sections 59 and 60 of the Indian Evidence Act stipulate that the facts may be proved by oral evidence and such oral evidence must be direct. In the instant case, as stated earlier, none of the projected eyewitnesses and other independent witnesses have supported the prosecution version. Most of those witnesses were cross-examined by the prosecution under Section 154 of the Indian Evidence Act. It is true that the evidence of a hostile witness is as good as a normal witness. Here the conviction is mainly founded on the earlier statement of P.Ws.2, 13, 14, and 17 recorded under Section 164 Cr.P.C. Thus in absence of substantial evidence and keeping in view the nature of evidences in entirety, the conviction founded on the earlier statement of hostile witnesses recorded under Section 164 Cr.P.C. is bound to fall and liable to set aside." (Para 16,17 & 23)*

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

1. (1972) 3 SCC 280 : Ram Kishan Singh Vs. Harmit Kaur and another.
2. AIR 1974 SC 2165 : Balak Ram Vs. State of U.P.
3. AIR 1968 SC 1270 : Ram Charan Vs. State of U.P.
4. AIR (1980) 2 SCC 84 : Dhanabal and another Vs. State of Tamil Nadu.
5. AIR 1970 SC 1305 : State of Rajasthan Vs. Kartar Singh.
6. (2013) 14 SCC 266 : R. Shaji Vs. State of Kerala.

CRLA NOS.288
For Appellant : Mr.J.N.Kamila
For Respondent : Mr.J.Katikia, AGA

CRLA No.289 of 2011
For Appellant : Mr.J.N.Kamila.
For Respondent : Mr.J.Katikia, AGA

CRLA NO.242 OF 2011
For Appellant : Mr.R.Roy.
For Respondent : Mr.J.Katikia, AGA

CRLA NO.234 OF 2011
For Appellant : Mr.J.N.Kamila, (Amicus Curiae)
For Respondent : Mr.J.Katikia, AGA

CRLA NO.241 OF 2011
For Appellant : Mr.J.N.Kamila, (Amicus Curiae)
For Respondent : Mr.J.Katikia, AGA

CRLA NO.246 OF 2011
For Appellant : Mr.R.C.Maharana.
For Respondent : Mr.J.Katikia, AGA

JUDGMENT Date of Judgment: 04.02.2022

B.P. ROUTRAY, J.

1. All the six Appellants in the above appeals have been convicted under Section 302/34 of the I.P.C. in the same trial i.e., S.T.Case No.4/82 of 2007. Further, the Appellants in CRLA Nos.241, 234, 289 and 288 have been convicted under Section 27 of the Arms Act additionally. They have been sentenced to undergo R.I. for life for the offence under Section 302 of the I.P.C. and R.I. for a period of seven years under Section 27 of the Arms Act.

2. All the Appellants along with two others were prosecuted in S.T.Case No.4/82 of 2007 in the court of learned Additional Sessions Judge, Bhubaneswar.

3. Prosecution case is that, the deceased namely Chuna @Mallik Hanan was killed by Sk Hyder (since dead) and his associates on 31st May, 2005 between 7.30 to 7.45 P.M. by gunshot firing near Stewart School, Bhubaneswar due to group rivalry relating to tender fixing. The Inspector-in-Charge (P.W.47) of Nayapalli Police Station upon receipt of telephonic information of the incident immediately proceeded to the spot and found the

deceased lying dead in front of the tyre-shop of one Tahir Alli. P.W.47 drew the plain paper F.I.R., which was registered as Nayapalli P.S.Case No.157 dated 31st May,2005. He held inquest over the dead body and seized one motorcycle, one Nokia mobile set, ten empty cases of cartridges and other articles from the spot. There was arch enmity between Sk Hyder and the deceased, both gangsters.

Subsequently, Sk.Hyder and others were arrested from Nagpur (Maharashtra) on 6th June, 2005 and were brought to Bhubaneswar. P.W. 47 continued with investigation which was later taken over by P.W.48, the Inspector of C.I.D.C.B., Cuttack. P.W.48 submitted the charge-sheet on 2nd October, 2005 for the offences stated above along with offence under Section 120-B of the I.P.C.

4. Prosecution examined 48 witnesses in course of the trial and exhibited 34 documents as well as 8 material objects. Among those witnesses, P.Ws.1 to 5, P.Ws.8 to 18 and P.Ws.20 to 23 were projected as eyewitnesses. But all such witnesses were turned hostile and did not support rosecution version. Similarly P.Ws.27, 28, 32, 33, 34, 36, 37 & 38, the seizure witnesses, were also turned hostile and denied their knowledge about the case as well as the seizures. P.W.9, 24 & 25 – the wife and sisters of the deceased, P.W.14 & 15 –the brother and brotherin- law of the deceased have all turned hostile and did not support the prosecution case. P.W.26 is the Sub-Inspector of Police of Maharashtra, who arrested the Appellants at Nagpur. P.Ws.43, 44 and 45 are the Officers, who accompanied P.W.47 to the spot on 31st May, 2005 after the occurrence. P.W.46 is the Officer, who registered the F.I.R.

5. It is submitted on behalf of the Appellants that in absence of any substantial evidence with regard to direct eye witnessing of the occurrence or any circumstance connected thereto, the learned trial judge has convicted the Appellants based on the statements of some witnesses recorded under Section 164 Cr.P.C. It is further submitted that the learned trial judge has committed gross illegality by relying on 164 statements of those witnesses viz. P.Ws. 2, 13, 14 & 17 despite their retraction in course of trial.

6. Having perused the trial court record, it reveals that the deceased sustained 11 gunshot injuries including entry and exist wounds. As per the opinion of forensic expert as well as ballistic expert marked under Exts.12,

15 & 24, six bullet injuries covering an area of 8" x 8" on the left bdomen were fired from a greater distance of 25ft. and rest of the injuries were fired from a shorter distance of 20ft. Some of the entry wounds do not have corresponding exit wounds due to lodging of the bullets inside the body either in any bonny cavity or bonny canal. The postmortem examination report under Ext.12 and the expert's opinion under Exts.15 & 24 were not disputed in course of trial and the contents thereof have been admitted by the Appellants. These are also not disputed in the appeals and as such going through the contents of those documents and based on the opinion of the experts, the death of the deceased can safely be said as homicidal in nature. Such homicidal nature of death of the deceased is never disputed by the Appellants.

7. As stated earlier, all the independent witnesses including the projected eyewitnesses did not support prosecution version and have turned hostile. The learned trial judge has stated at paragraph-19 of the impugned judgment that the statements of four eyewitnesses, namely, Mallik Lokman (P.W.14), Akhila Rout (P.W.2), Bapina Panda (P.W.13) and Pabitra Naik (P.W.17) were recorded under Section 164 Cr.P.C. before the learned Judicial Magistrate (P.W.39) which are marked under Exts.31 to 34 respectively. It is further mentioned in paragraph-23 that such witnesses though have made statements before the Magistrate, but denied to say so during their examination in the court being under threat, which is quite obvious and natural on the part of an ordinary human being when the case relates to a gangster. After discussions, it is observed by the trial court at paragraph-25 of the impugned judgment as follows:

> "25. xxx xxx xxx
>
> Here in the instant case, the statement recorded under this provision of law by the Magistrate found to be true and voluntary. As it reveal from those Ext.31 to Ext.34 the Magistrate administered the oath after recording the statement read over and explained to them where no police personnel were present and the concerned deponents finding the statement correct put their respective signatures on the body of the statement. Accordingly, in view of the discussion held (Supra), the statement of these eye witnesses u/s 164 of the Code though not substantive piece of evidence can inspires confidence to the case of prosecution."

Resultantly, the Appellants were convicted.

8. In view of the nature of evidence brought in course of trial, the question falls for determination is that, whether the statements of those

witnesses recorded under Section 164 Cr.P.C. can be relied on to sustain the conviction.

9. Admittedly, the statement of witnesses recorded under Section 164 Cr.P.C. is not a substantive piece of evidence. Section 164 Cr.P.C. stipulates as follows:

> "**164. Recording of confessions and statements-**(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:
>
> Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
>
> (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.
>
> (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.
>
> (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-
>
> " I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (Signed) A.B.
> Magistrate".
>
> (5) Any statement (other than a confession) made under subsection (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.
>
> (6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."
>
> *(before 2009 amendment w.e.f.31.12.2009)*

10. In the case of ***Ram Kishan Singh v. Harmit Kaur and another,*** (1972) 3 SCC 280, the Supreme Court has held that a statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness.

11. In ***Balak Ram V. State of U.P.,*** AIR 1974 SC 2165, it was held that the evidence of a witness cannot be discarded for the mere reason that his statement was recorded under Section 164. It is of course open to the Court to accept the evidence of a witness whose statement was recorded under section 164, but the salient rule of caution must always be borne in mind.

12. In ***Ram Charan v. State of U.P.,*** AIR 1968 SC 1270, the Supreme Court relied upon the observation of the Andhra Pradesh High Court in ***Re: Gopisetti Chinna Venkata Subbiah*, **AIR 1955 Andhra 161 which runs as follows:

> "We are of opinion that if a statement of a witness is previously recorded under section 164, Criminal Procedure Code, it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded under section 164 will not be sufficient to discard it. The Court, however, ought to receive it with caution and if there are circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon."

13. In ***Dhanabal and another v. State of Tamil Nadu*, *AIR (1980) 2 SCC 84***, a three judges Bench of the Supreme Court held as follows:

> "13. The second legal contention raised by the learned counsel was that the High Court was in error in taking into account the statements recorded from the witnesses under Section 164 of the Code of Criminal Procedure in coming to the conclusion that the evidence given by them in the committal Court could be relied upon. The High Court stated "we are satisfied having regard to 164 statements of PWs 1 to 3 and 5 that the statements given by those witnesses before the committing Court are true and could be relied on" and proceeded to observe "that as there are more statements admitted in evidence under Section 288 of the Code of Criminal Procedure than one, the evidence of one witness before the committing Court is corroborated by that given by others". Mr. Mulla, learned Counsel, submitted that a statement recorded under Section 164 of the Code of Criminal Procedure indicates that the Police thought that the witnesses could not be relied on as he was likely to change and, therefore, resorted to securing a statement under Section 164 of the Code of Criminal Procedure. The statement thus recorded, cannot be used to corroborate a statement made by witness in the committal Court. In support of this

contention the learned counsel relied on certain observations of this Court in *Ram Charan v. State of U.P.* In that case, in a statement recorded from the witness under Section 164 of the Code of Criminal Procedure, the Magistrate appended a certificate in the following terms:-

"Certified that the statement has been made voluntarily. The deponent was warned that he is making the statement before the 1st Class Magistrate and can be used against him. Recorded in my presence. There is no Police here. The witness did not go out until all the witnesses had given the statement."

The Court observed that the endorsement made is not proper but declined to infer from the endorsement that any threat was given to those witnesses or that it necessarily makes the evidence given by the witnesses in Court suspect or less believable. The view of the Patna High Court in *Emperor v. Manu Chik,* where the observations made by the Calcutta High Court in *Queen Empress v. Jadub Das,* that statements of the witnesses obtained under this section always raises a suspicion that it has not been voluntarily made was referred to, was relied on by the learned counsel. This Court did not agree with the view expressed in the Patna case but agreed with the view of Subba Rao, J. (as he then was) in *Re Gopisetti Chinna Venkata Subbiah,* where he preferred the view expressed by Nagpur High Court in *Parmanand v. Emperor,* it was observed that the mere fact that the witnesses' statement was previously recorded under section 164 will not be sufficient to discard it. It was observed that the Court ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses, it can be acted upon. During the investigation the police officer, sometimes feels it expedient to have the statement of a witness recorded under Section 164 of the Code of Criminal Procedure. This happens when the witnesses to a crime are closely connected with the accused or where the accused are very influential which may result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the Police had reasons to suspect that the witness might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded, tainted. If the witness sticks to the statement given by him to the Magistrate under Section 164 of the Code of Criminal Procedure, no problem arises. If the witness resiles from the statement given by him under under Section 164 in the committal Court, the witness can be crossexamined on his earlier statement. But if he sticks to the statement given by him under section 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under Section 288 of the Code of Criminal Procedure, will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled in coming to the conclusion as to whether the witness should be believed or not. The fact that the police had Section 164 statement recorded by the Magistrate, would not by itself make his evidence tainted.

14. S. 157 of the Evidence Act makes it clear that the statement recorded under Section 164 of the Code of Criminal Procedure can be relied on for corroborating

the statements made by the witnesses in the committal Court vide State of Rajasthan v. Kartar Sing."

14. In the ***State of Rajasthan v. Kartar Singh,*** AIR 1970 SC 1305, is held as follows:

"It is thus clear from the authorities referred to above that the requirements of section 288 would be fully complied with if the statements of the witnesses are read *in extenso* to them and they admit that they have made these statements in the committal Court."

15. In the case of ***R. Shaji v. State of Kerala,*** (2013) 14 SCC 266, the Supreme Court held as follows :

"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide *Jogendra Nahak v. State of Orissa and CCE v. Duncan Agro Industries Ltd*.).

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.

29. During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. (vide *Mamand v. Emperor, Bhuboni Sahu v. R.Ram Charan v. State of U.Ps and Dhanabal v. State of T.N.*)

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> 61. Be that as it may, when a statement is recorded in court, and the witness speaks under oath, after he understands the sanctity of the oath taken by him either in the name of God or religion, it is then left to the court to appreciate his evidence under Section 3 of the Evidence Act. The Judge must consider whether a prudent man would appreciate such evidence, and not appreciate the same in accordance with his own perception. The basis for appreciating evidence in a civil or criminal case remains the same. However, in view of the fact that in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, courts have created the requirement of a high degree of proof."

16. The principles discussed in above decisions make it clear that 164 statement of the witness is not substantive evidence of facts and the same cannot be used so. The earlier statement recorded under Section 164 Cr.P.C. can only be used for corroboration or contradiction. If the witness while giving evidence in Court sticks to his earlier statement recorded under Section 164 Cr.P.C, such statement can be acted upon subject to rule of caution. But when the witness resiles from his earlier statement, procedure is that he should be cross-examined and his statement made earlier as recorded under Section 164 Cr.P.C. should be confronted to him *in extenso*. The prosecution can place reliance on such statement only for the purpose of corroboration and that too, subject to rule of caution and if there are other sufficient evidence before the Court.

17. It is true that though the statement under Section 164 Cr.P.C. is recorded before a Judicial Magistrate on oath, but the witness is not cross-examined there. When the statement of a witness is not tested through cross examination, truthfulness of his statement is not ascertained. It is the test of knowledge of the witness what he testifies. This is a major difference between the statement of a witness made under Section 164 Cr.P.C. and his deposition recorded by the Court under Section 137 of the Indian Evidence Act and the provisions contained in Chapter XXIII of the Cr.P.C.

18. Sections 59 and 60 of the Indian Evidence Act stipulate that the facts may be proved by oral evidence and such oral evidence must be direct. In the instant case, as stated earlier, none of the projected eyewitnesses and other independent witnesses have supported the prosecution version. Most of those witnesses were cross-examined by the prosecution under Section 154 of the Indian Evidence Act. It is true that the evidence of a hostile witness is as good as a normal witness. Here the conviction is mainly founded on the earlier statement of P.Ws.2, 13, 14, and 17 recorded under Section 164

Cr.P.C. Such statements of those witnesses have been marked under Exts.31 to 34.

19. First, looking to the evidence of those witnesses, it reveals that P.W.14 is the brother of the deceased. He denied to identify any of the accused persons except Sk.Hyder. The other three witnesses have stated that they neither know the accused persons nor the deceased. The prosecution has cross-examined all those four witnesses under Section 154 of the Indian Evidence Act. Except P.W.17, other three witnesses were not asked any question with regard to their earlier examination and recording of statements under Section 164 Cr.P.C. But P.W.17 being asked so by the prosecutor has denied to have given any such statement before any Magistrate. He has categorically denied to have stated before the Magistrate about seeing the accused persons at the time of occurrence and gun-firing by them.

20. Admittedly, none of those four witnesses have been confronted with their previous statements marked under Exts.31 to 34 nor any suggestion was given to them by the prosecutor if they were subject to any threat by any of the accused persons. Exts.31 to 34 are marked through the investigating officer or any other witnesses. Those were marked into evidence on 10th February, 2011 in course of argument. So it is clear that none of those statements under Exts.31 to 34 were either confronted to the respective witnesses or their contents were read in extenso through confrontation to those witnesses. The depositions of P.Ws.2, 13, 14 & 17 do not whisper anything about any threat or influence exerted on them by any of the accused persons. No other material is also produced in evidence to suggest any threat or pressure used by the accused persons on the witnesses. Therefore the observation of the learned Judge to presume for any threat to life and property on any of the witness compelling to resile them from their earlier statement is seen unfounded. Such a presumption canvassed by the trial court is without merit and without material.

21. Coming to the see if any other material is there on record to suggest such circumstances completing the chain against the Appellants appearing from the evidence, it is seen that the test identification of one of the Appellants namely Siba Prasad Mohanty by P.W.13, the Judicial Magistrate who conducted the T.I.Parade and recovery of three live bullets from the possession of another accused namely Kasur Niaz Khan and identification of the Bolero vehicle as well as those accused persons at Nagpur based on the

evidence of P.W.26 and the Manager of the Hotel (P.W.24), have been highlighted by the trial court to sustain the conviction. It needs to be mentioned here that no fire-arm was produced before the trial court and none of the independent witnesses have stated about seizure of the same. The circumstances of the seizure of the fire arm have not been explained by the investigating officer. The bullets recovered from the dead body are not substantially connected to the Appellants nor recovery of the fire-arms and their use to commit the offence are substantially established by the prosecution. None of the witnesses have stated about anything to connect the possession of any firearm by any of the Appellants. The presence of the Appellants in the Bolero vehicle at the spot or even presence of the vehicle during the occurrence cannot, at any stretch, be inferred from the evidence of P.W.26. In other words, the circumstances discussed by the learned trial court as residual materials to connect the Appellants to the alleged crime are found unsatisfactory.

22. The law on circumstantial evidence has been reiterated by the Supreme Court in catena of decisions. It demands that the circumstances on the basis of which conclusion of guilt is to be drawn must be fully established pointing guilt of the accused excluding all hypothesis of innocence. The chain of circumstances must be complete and conclusive in nature without leaving any reasonable doubt in favour of the accused. [See: *Tahasildar Singh v. State of U.P.*, **AIR 1959 SC 1012**, *Sharad Birdhichand sarda* **(1984) 4 SCC 116**, *Paramjeet Singh* **(2010) 10 SCC 439**].

23. Therefore, as discussed above, no substantial evidence is found against of the Appellants and as such in absence of the same, the question of corroboration through 164 statements does not arise. Thus in absence of substantial evidence and keeeping in view the nature of evidences in entirety, the conviction founded on the earlier statement of hostile witnesses recorded under Section 164 Cr.P.C. is bound to fall and liable to set aside.

24. Resultantly, the conviction and sentences as directed by the learned trial court in respect of the appellants are set aside. All the Appellants are acquitted from the charges and they be set at liberty forthwith, if their detention is not required in any other case.

25. The appeals are allowed.

26. 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, modified by the Notice No.4798, dated 15th April, 2021, and Court's Office Order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

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2022 (I) ILR - CUT- 289

JASWANT SINGH, J & M.S. SAHOO, J.

W.A. NO. 975 OF 2021

TOPHAN KUMAR BEHERA …….Appellant

.V.

STATE OF ODISHA & ORS. …….Respondents

(A) WORDS AND PHRASES – 'Abadi' – Meaning thereof – Held, the word "Abadi" is to be read, *noscitur a sociis*, along with other words "Khasmahal", Nazul, Gramakantha Parambok, as they appear in S. 3(4)(a) of the Act, 1962 and none of the words would indicate "Pathara Bani" to be "Abadi", i.e., cultivated – As stated by the Privy Council : "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them".

(B) ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 read with ORISSA GOVERNMENT LAND SETTLEMENT RULES, 1983 – Sections 3, 8 and 11 and Rules 5B and 5BB – Provisions under – Petitioner, trespasser over the Govt. land owned by G.A Department – BMC evicted the petitioner for beautification of Kalinga Stadium in Bhubaneswar in the larger public interest – Provisions of the OGLS ACT AND RULES not made applicable to the lands situated within the city limits of the Capital – Claim of settlement of the land in question on the basis of adverse possession in absence of the satisfactory compliance of the principles of such Adverse possession – Scope of interference by court in writ jurisdiction – Indicated.

Testing the claim of the appellant/petitioner for the sake of argument, we find that the position would not change in any manner for the following reasons :

i. It is not the case of the appellant that he had ever applied in any manner under the provisions of the Act, 1962 prior to or post amendment, 2020 in tune with the prescribed statutory scheme. Even otherwise, the application for such settlement prior to the amended provision w.e.f. 8.9.2020 would not have succeeded in light of the Govt. land belonging to G.A. not legally permitted to be dealt with within the area of BMC, moreover no such plea has been taken in the writ petition.

ii. Concededly, eviction proceedings were concluded in the year 2017 prior to the amended provisions were introduced in 2020 which have prospective application, thereby providing no succour to the set up claim of the appellant/petitioner;

iii. appellant admittedly was operating a "Dhaba", on Govt. land, and it is evident that such activity/category is not permissible for settlement as per Rule-2 (Schedule IV) of amendment Rules 2020, notifying Rules for settlement of Govt. land situated within the limits of BMC Area; (Para 26)

Case Laws Relied on and Referred to :-

1. (2004) 10 SCC 779 : Karnataka Board of Wakf Vs. Government of India and Ors.
2. (2007) 3 SCC 569 : Krishna Murthy S Setlur Vs. O.V. Narasimha Setty.
3. (2019) 8 SCC 729 : Ravinder Kaur Grewal Vs. Manjit Kaur.
4. (1879) 5 AC 63 : Angus Robertson Vs. George Day.
5. AIR 1955 SC 604 : M.K.Ranganatham Vs. Govt. of Madras.

For Appellant : Mr. Gautam Mukherji, Sr. Adv.
Ms. Ankita Mukherji.

For Respondents : Mr. L. Samantaray, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 25.01.2022

BY THE BENCH

1. The appellant by filing the writ appeal, has challenged the order dated 24.11.2021 passed by the learned Single Judge in W.P.(C) No.26041 of 2017, disposing of the writ petition.

2. In the writ petition, the petitioner-appellant, inter alia, had prayed for a direction not to evict the appellant from the occupation of a Govt. land, adjacent to the National Highway No.16, over plot no.1577, presently plot no.639/3368 of Khata no.3293, measuring Ac.0.215 dec., out of Ac.1.530.

3. The appellant/petitioner has averred in the writ petition that the appellant's father had plot nos.663 & 664 in the mouza-Nayapally and plot no.639/3368, owned by the Govt., was adjacent to the said plots. By occupying plot no.639/3368, the appellant had opened a Dhaba, selling food, in the name and style, "Maa Mahima Dhaba", claiming it to be in existence since very long.

It is not disputed by the appellant/petitioner that the Dhaba was running on a Government plot, near Kalinga Stadium. When the Kalinga Stadium was refurbished and expanded for holding International Hockey Match, the petitioner was evicted and the Government plot was utilized, by the authorities.

4. Mr. Mukherji, learned Senior Counsel appearing for appellant submits that the nature of the land having been described as "Pathara Bani", it can be said to be "Abadi Land", as per Section 3(4)(a) of the Odisha Government Land Settlement Act,1962 (hereinafter 'the Act, 1962' for short). Therefore, it is further submitted by the learned senior counsel that the appellant is entitled for settlement of Government land as provided under Section 3(4)(a) of the Act,1962.

5. Mr. L. Samantaray, learned Additional Government Advocate appearing for respondent no.1- General Administration (hereinafter "G.A." for short) Department, which owns the Government land in the capital City of Bhubaneswar, submits that the appellant does not have any enforceable legal right to encroach and occupy a valuable Government land for whatever purpose and the utilization of the land by the Govt. is for the larger public interest, for expansion of an International Hockey Stadium and beautification of the road, besides the National Highway, NH-16. He further submits that the order passed by the learned Single Judge is just and proper and the appellant has not brought any material before this Court for exercising its appellate jurisdiction under Letters Patent, as the appellant has failed to point out any error apparent on the face of record.

6. Regarding the inapplicability of the Act, 1962, it is further contended by the learned Additional Government Advocate that the land within the area of Bhubaneswar Municipal Corporation belong to Govt. in the General Administration Department, allotment of the land were only granted as per The Government Grants Act,1895 which has been repealed by the Govt. of India, by 'Repealing Amending (Second) Act, 2017', Act 4 of 2018, dated 05.01.2018.

7. In the counter affidavit filed in the writ petition on behalf of the General Administration Department, who owns the land, it has been stated that the Government land is recorded as "Pathara Bani" and not "Ghara Bari". It is further stated that there is no note of any kind of possession, in the up-to-date Revenue Record of Rights (ROR), which indicates that the appellant is a trespasser. It has been further stated that the appellant obtaining license to run the Dhaba, availing the power supply, getting telephone connection and paying trade license fees to Municipal Corporation, does not fructify to a right of the appellant to encroach and occupy the Government land.

8. The respondents have also harped on the aspect that the land being owned by Government, was required and utilized for expansion of "Kalinga Stadium", which is a project of National importance and that the appellant had violated Section 403 of the Odisha Municipal Corporation Act,2003 and has been evicted following the power and procedure provided under Section 407 of the said Act, 2003.

9. The said Sections 403 & 407 of the Odisha Municipal Corporation Act, 2003 have been specifically referred to in the counter filed by the Bhubaneswar Municipal Corporation-respondent no.5.

Section 403 of the Act provides: Prohibition of structures or fixture which cause obstruction in street; Section 407 provides : "Commissioner may, without notice, cause to be removed any wall, fence, rail, post, step, booth or other structure, whether fixed or movable and whether of a permanent or a temporary nature, or any fixture which shall be erected or set up in or upon or over any street,… in contravention of the Act." Both the G.A. Department : Respondent No.1, as well as Respondent no.5-BMC have also referred to the requirement of the land as it is adjacent to the busy National Highway, N.H.16.

10. Regarding the plea of the adverse possession, it has been specifically averred on behalf of respondent no.1-G.A. Department, Government of Odisha, who owns all the Government land within the area of Bhubaneswar Municipal Corporation that the appellant's plea of adverse possession is untenable, in view of the law laid down by the Hon'ble Supreme Court in the cases of ***Karnataka Board of Wakf v. Government of India and others : (2004) 10 SCC 779 and Krishna Murthy S Setlur v. O.V. Narasimha Setty : (2007) 3 SCC 569***

11. The decision in ***Karnataka Board of Wakf*** (*supra*) at para-11, page-784 of SCC, lays down that

> *"………It is a well-settled principle that a party claiming adverse possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over statutory period".*

As noted above, none of the conditions as laid in the ***Karnataka Board of Wakf*** (*supra*) is satisfied by the appellant inasmuch as, he had never tried to prove the factum of adverse possession in a properly constituted proceeding, before a civil court of jurisdiction, rather, opted to invoke the extraordinary writ jurisdiction, based on disputed questions of fact.

12. In ***Krishna Murthy S Setlur*** (supra), it has been laid down (para-13, p.579 of SCC),

> *"………In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be an owner by adverse possession has to plead actual possession. He has to plead period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner."*

Applying the above principles, the appellant in the present case, did lose possession by eviction, has not proved that his possession was exclusive and undisturbed. Lastly instead of petitioner having a hostile title, the owner of the land, i.e., G.A. Department has been hostile to the petitioner. In any event, for proving this factual aspects, the petitioner never sought recourse to proper judicial proceeding under the provisions of the CPC.

13. In **Ravinder** ***Kaur Grewal v. Manjit Kaur :(2019) 8 SCC 729;*** at paragraphs 60 and 63 of SCC (Pages 777 & 778) the following has been held, as quoted herein :

> 60. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, nec vi i.e. adequate in continuity, nec clam i.e. adequate in publicity and nec precario i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to

know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus possidendi under hostile colour of title is required. Trespasser's long possession is not synonymous with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and large the concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

xx xx xx xx

63. When we consider the law of adverse possession as has developed vis-àvis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In such cases, on the land reserved for public utility, it is desirable that rights hould not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statue of limitation that no rights can accrue by adverse possession."

(Emphasis Supplied)

14. On perusal of the pleadings of the parties and applying the principles laid down in the aforesaid decision of the Hon'ble Supreme Court, the appellant's plea of adverse possession as against G.A. Department does not sustain, more so, when the ownership of the land being that of the Government Department was undisputed and the purpose of utilization being of larger public interest, i.e., expansion of an International Stadium and beautification of the land adjacent to the National High Way No.16, close to the stadium. It is otherwise well accepted that the plea of adverse possession is a plea of defence and not a plea of seeking declaration.

15. On perusal of the records of the writ petition, no such plea claiming benefits, purportedly under Section 3(4)(a) of the OGLS Act, 1962 was found to have been taken in the writ petition, before the learned Single Judge or before any authority prior to filing of the writ petition. In the writ petition, the appellant did not lay any claim as a beneficiary under Section 3(4)(a) of the Act. However, the claim assuming for the sake of argument to be question of law only, based on the interpretation of accepted revenue entries and provisions of the enactment, is delved into, in the present appeal.

16. Learned Senior counsel for the appellant, though referred to a lexicon/Glossary, to contend that "Pathara Bani" is "Abadi Land", such

contention is misconceived, inasmuch as, the "Government land" has been defined in the statute i.e. Act, 1962, vide Section-2 (b), b(i), b(ii), b(iii), b(iv).

Further, the "Final Report on the Revision Settlement of Orissa (1922-1932 A.D.)" at APPENDIX XVIII, GLOSSARY (Showing the sense in which words have been used in the record-of-rights), indicates "Abadi" to be "Cultivated".

17. Further, the word "Abadi" is to be read, *noscitur a sociis*, along with other words "Khasmahal", Nazul, Gramakantha Parambok, as they appear in S. 3(4)(a) of the Act, 1962 and none of the words would indicate "Pathara Bani" to be "Abadi", i.e., cultivated. As stated by the Privy Council : "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them" : ***Angus Robertson v. George Day*, *(1879) 5 AC 63***; Referred to in ***M.K.Ranganatham v. Govt. of Madras : AIR 1955 SC 604*** (Para-21 of AIR)

18. The case of the appellant/petitioner is that he occupied Government land adjacent to the vacant land of his father which was acquired for construction of the Kalinga Stadium and such land, at any stretch of imagination, can not be held to be "abadi", i.e., "cultivated". Further the appellant has not produced any revenue record to shows that the area is an "abadi" area. The appellant himself contends that he had opened a "Dhaba" before being evicted, thus not put to cultivation and cannot be "Abadi".

19. To further consider the submission of learned Senior Counsel for the appellant/petitioner, the relevant provisions of the 1962 Act, as well as Odisha Government Land Settlement Rules, 1983 (1983 Rules) need to be adverted to and are quoted herein :

> "Section 3. Reservation and settlement of Government land :– (4) Notwithstanding anything to the contrary contained in the preceding sub-sections or in any law or any custom, practice or usage having the force of law-
>
> (a) any land of the category of Khasamahal, Nazul, Gramkantha Parambok or Abadi, wherever situated and used for any purpose, <u>may, on application, be permanently settled with heritable and transferable right with the person who is in occupation of such land either on the basis of lease or otherwise for a period of at least three years prior to the appointed date, in such manner and subject to payment of such amount to the Government as may be prescribed;</u> (Emphasis Supplied)

> Explanation :– The word 'lease' includes sub-lease or subsequent lease by the lessee or the sub-lessee, as the case may be."

Rule-5-B of the 1983 Rules (substituted vide Orissa Gazette Extraordinary dated 17th February, 2010) provides as follows :

> 5-B. Settlement of Khasmahal, Nazul, Gramakantha Paramboke and Abadi lands - Notwithstanding anything contained in Rules 3, 5, 5-A, 8, 11, 12 and 13, settlement of Khasmahal and Nazul land leased out, and Gramakantha Paramboke and Abadi land occupied, prior to 26th day of February, 2006 and used for homestead purpose shall be made in the manner prescribed in Schedule-V. (Emphasis Supplied)

Rule-5-BB of 1983 Rules (inserted vide Odisha Gazette Extraordinary dated 11.11.2014) provides as follows :

> 5BB. Settlement of Khasmahal, Nazul, Gramakantha Paramboke and Abadi land for the purposes other than homestead and agriculture - Notwithstanding anything contained in rules 3, 5, 5-A, 8, 11, 12 and 13, settlement of Khasmahal and Nazul land leased out, and Gramakantha Paramboke and Abadi land occupied, for a continuous period of three years prior to the 26th day of February, 2009 and used for the purposes other than homestead and agriculture shall be made in the manner prescribed in Schedule-V-A. (Emphasis Supplied)

20. Concededly, the appellant/petitioner has never resorted to any procedure as contained in the Section 3(4)(a) read with Rule 5-B and Section 3(4)(a) read with Rule 5-BB, for settlement of the land in question in his favour, during the time he was in possession as claimed.

21. To consider the contention raised by learned Senior Counsel for the appellant regarding applicability of OGLS Act, 1962, it requires determination as to whether the OGLS Act, 1962 is/was applicable to the area within the limits of Bhubaneswar Municipal Corporation, which are owned by General Administration Department, the relevant provisions are quoted herein :

Section 8 of the 1962 Act (inserted vide Odisha Act No.2 of 1990) provides as follows :

> 8. Delegation of power:– The Government may by notification in the Official Gazette direct that any power exercisable by it under this Act shall, subject to such conditions, if any , as may be specified in the direction, be exercisable also by any authority not below the rank of a Revenue Officer. (Emphasis Supplied)

Rule 11 of the 1983 Rules provides as follows :

> 11. Authorities competent to dispose settlement - Disposal of application for settlement of land for various purposes shall be made by the authorities specified in Schedule II up to the extent mentioned therein. All other cases for settlement of land shall be referred to the Government for orders.
>
> (Emphasis Supplied)

The Schedule II of the 1983 Rules provides as follows :

SCHEDULE II [See Rule 11] POWER TO SANCTION SETTLEME'NT OF GOVERNMENT LAND				
Sl.No.	In whose favour	Officer exercising powers	In rural area	In urban area excluding Bhubaneswar, Rourkela, Sunabeda

(Emphasis Supplied)

22. A conjoint reading of Section-8 of the Act, 1962, Rule-11 & Schedule II of the Rules, 1983, leads to an irresistible conclusion that the Government had not delegated the power to settle Government land in the urban area of Bhubaneswar, under the provisions of the OGLS Act, 1962 and the 1983 Rules. Therefore, the appellant's contention to take benefit of the OGLS Act, 1962 under Section 3(4)(a) would be untenable as per the statutory scheme, the Government land in the urban area of Bhubaneswar having been specifically excluded from the purview of the exercises of power by any delegatee under the OGLS Act, 1962 and Rules, 1983, as amended.

23. It has to be further noted that for settlement of Govt. land under Section 3(4)(a) of the Act, the Government has notified the procedure by notification dated 10.09.2019 issued by the Revenue and Disaster Management Department, i.e., for "Settlement of Khasmahal, Nazul, Gramkantha, Paramboke and Abadi category of land in the State- "Submission of Application". The appellant has not made out any case that he was/is an applicant for settlement under Section 3 (4)(a) of the Act,1962, read with the notification dated 10.09.2019.

24. Although it is not the pleaded case, a further development, which could have a bearing on the case of the appellant, is that after the repeal of Government Grants Act, by the Govt. of India w.e.f. 5.1.2018, the State of

Odisha has amended the Rules, 1983 by OGLS (Second amendment) Rules, 2020. The said Amendment Rule was published in the Gazette on 08.09.2020.

25. By the amendment Rules, 2020, Rule 5AA has been introduced along with Schedule IV-A.

Rule 5-AA provides as follows :

> "5-AA. Notwithstanding anything contained in rules 3, 5, 8, 10,11, 13 and 14, settlement of Government land situated within the limits of the Bhubaneswar Municipal Corporation area shall be made in the manner prescribed in Schedule IV-A". (Emphasis Supplied)

The newly introduced Schedule-IV-A provides as follows

> "Schedule-IV-A
> (See rule-5-AA)
>
> Rules for settlement of Government land situated within the limits of Bhubaneswar Municipal Corporation Area"

26. A reading of the now amended Rules, 1983, amended w.e.f. 8th September, 2020, would go to show that a *non-obstante* clause has been introduced by inserting Rule-5AA, therefore, the Rule 5-AA and Schedule-IV-A are to operate notwithstanding the exception carved out earlier, in Schedule-II read with Rule 11 of the Rules, 1983.

After the amendment, 2020, in view of the *nonobstante* clause, the land owned by Govt., G.A. Department, conterminous to the area of the Bhubaneswar Municipal Corporation, can be allotted as per the procedure prescribed in the newly introduced Rules : "Schedule-IV-A", read with Rule 5-AA of Rules, 1983, but such settlement of Govt. land, situated within the limits of BMC area is to be made by the authority specified, i.e., "Land Allotment Committee" constituted as per Rule 3 of the Rules (Schedule-IV-A) and for the purposes as specified in Rule 2 (Schedule IV-A), which defines "purpose for settlement".

Testing the claim of the appellant/petitioner for the sake of argument, we find that the position would not change in any manner for the following reasons :

i. It is not the case of the appellant that he had ever applied in any manner under the provisions of the Act, 1962 prior to or post amendment, 2020 in tune with the prescribed statutory scheme. Even otherwise, the application for such settlement prior to the amended provision w.e.f. 8.9.2020 would not have succeeded in light of the Govt. land belonging to G.A. not legally permitted to be dealt with within the area of BMC, moreover no such plea hasbeen taken in the writ petition.

ii. Concededly, eviction proceedings were concluded in the year 2017 prior to the amended provisions were introduced in 2020 which have prospective application, thereby providing no succour to the set up claim of the appellant/petitioner;

iii. appellant admittedly was operating a "Dhaba", on Govt. land, and it is evident that such activity/category is not permissible for settlement as per Rule-2 (Schedule IV) of amendment Rules 2020, notifying Rules for settlement of Govt. land situated within the limits of BMC Area;

27. Lastly it has been contended by Mr. Mukherjee, learned Senior Counsel for the appellant that "*the appellant could not have been relegated to the status of a street vendor*." We may agree such contention raised by the learned Senior Counsel that the appellant cannot be described as a street vendor under the provisions of Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014. With a benevolent objective that the appellant/petitioner may get relief in the form of rehabilitation at any of the permitted vending zones within the area of BMC, the learned Single Judge, taking a sympathetic view, has made those observations. We refrain from expressing any opinion on the said contention raised by the learned Sr. Counsel for appellant. Further, it would be open for the appellant/petitioner to avail any benefit under the said Act, 2014 or not.

28. In view of the aforesaid discussions, the writ appeal fails being devoid of any merit and is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

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2022 (I) ILR - CUT- 300

C.R.DASH, J & BISWANATH RATH, J.

WP(C) NO.1087 OF 2012 & 10861 OF 2011

HRUSIKESH SWAIN ....Petitioner

.V.

THE PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, BHUBANESWAR & ANR. ....Opp.Parties

In WP(C) NO.10861 OF 2011

M/S.HAWKINS COOKER LTD. ....Petitioner

.V.

THE PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, BHUBANESWAR & ANR. ....Opp.Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 2 (s) – 'Workman' – Definition – The person working as commission agent, whether can be said as a workman? – Held, Yes.

> *"Coming to challenge of the Management on the score that Employee involved here was only paid commission cannot be brought under definition of 'Workman', this Court finds, in order to bring a person within the ambit of definition, the work for which he is employed should be for hire or reward. The work must be for wages or other remuneration. Legislatures purportedly used words 'hire or reward' rather than the word 'wages' definitely with a view to enlarging the scope of definition. Word 'Hire' necessarily imports an obligation to pay. In the case at hand, there is admission by Employer that it used to pay commission on utilization of service of the Workman involved. It is only a form of pay and cannot escape the satisfaction of definition Section 2(s). There is also no doubt that the work done by the Workman is incidental to the activities of the Establishment involved."* *(Para 11 & 12)*

Case Laws Relied on and Referred to :-

1. AIR 2010 SC 502 : Ashok Kumar Sharma Vs. Oberoi Flight Services.
2. 1995 LLR 906 : B.S.Kurup Vs. Bicycle Corporation of India Ltd.
3. AIR 1971 (SC) 922 : Burmah-Shell Oil Storage and Distributing Co. of India Ltd. Vs. Burmah-Shell Management Staff Association.
4. (1983) I L.L.J. 30 : Hutchiah Vs. Karnataka State Road Transport Corporation.
5. (1973) II L.L.J. 446 : The Chief Engineer (Irrigation), Chepauk, Madras Vs. N.Natesan.
6. (1970) II L.L.J. 454 : Elumalai vrs. Management of Simplex Concrete Piles (India) Ltd.
7. (1973) II L.L.J. 130 : Saraspur Mills. Co. Ltd. Vs. Ramanlal Chimanlal.
8. (1963) II L.L.J. 436 : J.K.Cotton Spinning and Weaving Mills Co. Ltd. Vs. Labour

Appellate Tribunal of India & Ors.
9. (1957) I L.L.J. 477 (SC) : Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra & Ors.
10. (1957) II L.L.J. 29 also (1962) II L.L.J. 356 (SC) : Charity Aids Bus Services Vs. Narayanswami Raji.
11. (1958) II LLJ 252 : Chintaman Rao & Anr. Vs. State of Madhya Pradesh.

In WP(C) NO.1087 OF 2012

For Petitioner : M/s.A.Mishra, D.K.Pani & A.K.Roy
For OPP. Parties : M/s.S.S.Das, Sr.Adv., S.Modi, P.A.Ghosh & S.S.Pradhan.

In WP(C) NO.10861 OF 2011

For Petitioner : M/s. S.S.Das, Sr.Adv., S.Modi,P.A.Ghosh & S.S.Pradhan.
For OPP. Parties : M/s. A.Mishra, D.K.Pani & A.K.Roy.

JUDGMENT Date of Hearing : 16.11.2021 & Date of Judgment : 04.12.2021

BY THE BENCH

1. Writ Petition bearing W.P.(C) No.1087/2012 is at the instance of the Workman, whereas W.P.(C) No.10861/2011 is at the instance of the Management involving a challenge to the award passed in I.D. Case No.292 of 2008 (previously registered as I.D. Case No.50 of 2002) by the Presiding Officer, Industrial Tribunal, Bhubaneswar being aggrieved by both the Workman as well as Management respectively.

2. For involvement of common fact and common judgment involving I.D. Case No.292 of 2008, keeping in view the nature of challenge by both the Workman and the Management, as both the matters can be decided in one hearing and with consent of learned counsel for the Parties, this Court takes up both the Writ Petitions together in one hearing and disposes of both with this common judgment.

3. Undisputed facts leading to W.P.(C) No.1087/2012 are that the Petitioner, Hrusikesh Swain (Workman) involved herein claimed to have been appointed as an Demonstration Representative by virtue of an engagement order dated 6.2.1997 of M/s. Hawkins Cooker Ltd. with a set of conditions appearing therein. Further case of the Workman is that while working under the Management till 30.9.1998, all of a sudden the Workman was not permitted to discharge his duty with effect from 1.10.1998. It is alleged that the Workman was discharged from service by verbal order of the

Management neither giving him opportunity to know the reasons of his disengagement nor following the provision of the Industrial Disputes Act, 1947 (in short, "the I.D.Act") in the matter of retrenchment or termination. The Workman further alleged that when he raised a dispute before the Local Labour Agency, the Management disputed the claim of the Workman on the premises that the Petitioner was not a Workman under the provision of the I.D. Act. It is claimed, the conciliation proceeding ended in failure, the Labour Authority accordingly made an order of reference on 4th April, 2002 referring the following for adjudication of the dispute by the Competent Authority.

> "(I) Whether the termination of services of Sri Hrusikesh Swain, by way of refusal of employment by the Management of M/s. Hawkins Coopers Ltd., with effect from 1st October, 1998 is legal and/or justified ?
>
> (II) If not, what relief Sri Swain is entitled to ?"

It further reveals, for the nature of establishment of the Management even though a reference was made to the Labour Court, Bhubaneswar, initially, subsequently the reference was transferred to the Industrial Tribunal, Bhubaneswar for its adjudication in exercise of power under the provisions of the I.D.Act.

4. On being noticed, the Management appearing in the Proceeding as First Party filed written statement submitting that even though the Workman was engaged as a Demonstration Representative for the State of Odisha but it denied that there was discharge of the Workman from service. While admitting that for the nature of engagement involving the Workman requiring to satisfy the Consumers on the products of the Company in a purpose of boosting their sale, in exchange of which he was to get commission based on sale of products, the Management claimed, in the circumstance and for the nature of engagement, there was no Master-Servant relationship and the other Party was not a Workman under the definition of Section 2(s) of the Act.

5. Based on the Claimant's statement and the written statements of the Workman and the Management, the Tribunal chose to frame the Issues quoted herein above. To substantiate their case, the Workman examined himself as W.W.No.1, on the other hand the Management in its attempt to satisfy its case examined two witnesses as M.W.Nos.1 & 2 appearing to be one of the Staff and a Senior General Manager of the First Party.

6. Considering the rival contentions of the Parties and the materials available on record; oral and documentary, the Tribunal answering Issue No.I came to hold that there has been illegal refusal of employment by the

Management after coming to hold that Hrusikesh Swain was a Workman in terms of the provision at Section 2(s) of the I.D. Act. It appears, the Tribunal deciding both the aforesaid Issues has relied on several decisions including the decision of the Hon'ble apex Court and came to hold that there has been illegal termination of the Workman but however keeping in view the nature of engagement and further taking into account that the Workman was not a regular employee of the First Party, relying on the decision of the Hon'ble apex Court in ***Ashok Kumar Sharma vrs. Oberoi Flight Services*** **:** AIR 2010 SC 502, the Tribunal considered it to be just and proper to compensate the Workman in lieu of reinstatement and back wages. The Tribunal appears to have taken the time spent in the litigation process by the Workman into consideration and directed the Management to pay compensation of Rs.1.00 lakh to the Second Party in lieu of reinstatement.

7. The Writ Petition bearing W.P.(C) No.10861/2011 came to be filed by the Management involving the aforesaid award. In filing the Writ Petition the Management in its challenge to the award contested the same on the ground that the reference was made without any material for its satisfaction, as to whether there existed any industrial dispute ? The Management thus claimed that the reference was illegal and uncalled for. It is in this view of the matter, the Management claimed that rendering an award involving such defective reference also becomes illegal on the premises of contractual job involving the Second Party. The Management also raised a question as to whether Hrusikesh Swain can be considered as a Workman under the ambit of Section 2(s) of the I.D. Act ? The Management also took an alternative plea that the Second Party having miserably failed to plead that he had rendered 240 days continuous service during the period of twelve calendar months preceding such assumed termination as mandatorily required under Section 2(b) of the I.D.Act. It is in the premises that the Workman had not completed 240 days continuous service in a calendar year, the Management claimed, the finding of the Tribunal that the Workman has completed continuous service of 240 days in a year becomes erroneous. The Management also challenged the award on the premises that the Tribunal had committed error of law in coming to hold that the Management has not taken any specific plea regarding continuous service by the Workman and the finding of the Tribunal on this score becomes presumptive. The Management also challenged the finding of the Tribunal involving the award in shifting the proof of continuous or no continuous service by the Workman on the Management. Further taking this Court to the evidence, the Management also

took an alternate stand that in no case, it can be construed that the matter involved a termination by the Management. Management, on the other hand, claimed that the Workman abandoned the job. The Management also alleged that the finding of the Tribunal remains contrary to the evidence on record. The Management also challenged the finding of the Tribunal on application of Section 25(F) of the I.D.Act aspect. Finally the Management challenged the award of grant of lakh of rupees as compensation remains contrary to the materials available on record. It is in view of the above grounds, the Management by filing the Writ Petition prayed this Court for interfering with the award dated 30.10.2010 passed in I.D. Case No.292 of 2008.

8. The Workman in filing W.P.(C) No.1087/2012 contended that once the Tribunal has come to hold that the Claimant was a Workman under the provision of the I.D. Act and that there has been illegal termination /disengagement of the Workman, the Tribunal had the only alternative to restore the position of the Workman and it had no scope to answer the reference by awarding a sum of Rs.1.00 lakh, as compensation in lieu of reinstatement. The Workman in his Writ Petition also contended that in the worse, following the decision of the Hon'ble apex Court in Ashok Kumar Sharma (supra) at least a minimum compensation of Rs.2.00 lakh should have been awarded. It is in the above premises, in his Writ Petition the Workman prayed this Court for interfering with the award so far it relates to the direction portion and the award be modified to the extent awarding higher lump-sum compensation along with the benefit of back wages.

9. Heard the submissions of the respective Counsel. Learned counsel for the Management taking this Court to the stand of the Management in the written statement as well as evidence on their part recorded by the Tribunal attempted to harp on the ground taken note herein above in its challenge to the award involved herein. Similarly, learned counsel for the Workman also justified their final pleading through the grounds taken in the Writ Petition and taken note herein above.

10. Hearing the rival contentions of the Parties and on perusal of the grounds taken by the Management, particularly, this Court from the pleadings in the written statement and the grounds in the Writ Petition reading together with the evidence, finds, the Management runs parallel pleadings to establish its case. In the process, it is observed, the Management while claiming that there was no Master-Servant relationship, keeping in view the nature of job

also took the stand that the Workman since did not complete 240 days in a Calendar year, he is not a Workman in terms of the provision of Section 2(s) of the I.D.Act. From the statement of the Claimant, this Court finds, the Workman has a clear claim to have been engaged by the Management since 2.6.1997 and there is unilateral stoppage of work by way of prohibition on 1.10.1998. To this claim of the Workman since the stage of conciliation contended for the nature of job entrusted to Hrusikesh Swain, the Workman, it was contractual and in its written statement in the Industrial adjudication process before the Labour Court also considered by the Tribunal on transfer of the same to the Industrial Tribunal. The Management while attempting to demonstrate the nature of work of the Workman attempted to non-suit Mr.Swain on the premises that Hrusikesh Swain is not a Workman in terms of the provision of the I.D. Act. There is, however, absolutely no pleading with regard to whether the Workman had completed 240 days or not. In the above background of the pleadings, taking into account the evidence of both the Parties and keeping in view the Issues framed by the Tribunal, it is observed, the Tribunal has categorically come to hold that the Management failed to refute the claim of the Workman to have completed 240 days in a year. Further for the pleading and the materials available, the Tribunal has also come to hold that looking to the nature of job and remuneration received by the Workman in discharge of his duty can be considered as a Workman under the provision of the I.D.Act. This finding of the Tribunal is supported by the materials available on record, the pleadings and the evidence taken support by the respective Parties. The Tribunal appears to be justified in such finding. Besides, it also appears, the Tribunal taking such decision has also taken note of several decisions, particularly on the question of one becoming workman, such as ***B.S.Kurup vrs. Bicycle Corporation of India Ltd.*** : 1995 LLR 906 and ***Burmah-Shell Oil Storage and Distributing Co. of India Ltd. Vrs. Burmah-Shell Management Staff Association*** : AIR 1971 (SC) 922.

11. In the above background of the case, now taking into account the challenge of the Management on the aspect, if Sri Swain was a Workman, this Court finds, the claim of the Workman rather gets support from the definition of Section 2(s) of the I.D.Act, which is placed herewith as follows :-

> "Section 2(s)- "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or

> retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
>
> (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
>
> (ii) who is employed in the police service or as an officer or other employee of a prison, or
>
> (iii) who is employed mainly in a managerial or administrative capacity, or
>
> (iv) who, being employed in a supervisory capacity, draws wages exceeding (ten thousand rupees) per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature)."

Now looking to the controversy raised by the Management on the above aspect, this Court here also takes into account the law of the land through different counts as follows :-

I. Any person including an apprentice employed in an Industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward is a Workman, as held in the case of ***Hutchiah vrs. Karnataka State Road Transport Corporation*** reported in (1983) I L.L.J. 30.

II. Even a temporary or casual employee fall within definition of 'Workman', as held in ***The Chief Engineer (Irrigation), Chepauk, Madras vrs. N.Natesan*** : (1973) II L.L.J. 446**.** This is also the view in the case of ***Elumalai vrs. Management of Simplex Concrete Piles (India) Ltd.*** reported in (1970) II L.L.J. 454

III. In ***Saraspur Mills. Co. Ltd. vrs. Ramanlal Chimanlal*** reported in (1973) II L.L.J. 130, Hon'ble Supreme Court held **-** workers in Canteen run by Cooperative Society was under an obligation to maintain and run the Canteen for its employees.

This Court here looking to the job assigned to the Workman finds, his work was even incidental to the main job of the Industry. This Court here takes support of the observation of the Hon'ble Supreme Court in the case of ***J.K.Cotton Spinning and Weaving Mills Co. Ltd. vrs. Labour Appellate Tribunal of India & ors.*** reported in (1963) II L.L.J. 436. In this case,

Hon'ble Supreme Court in case of a Mali, observed, his engagement with Officers residing in Bungalow was incidental to main work of the Industry.

For the factual position narrated herein above with support of law discussed herein above, there is no doubt that Mr.Swain is a Workman under the provisions of the I.D.Act.

12. Coming to challenge of the Management on the score that Employee involved here was only paid commission cannot be brought under definition of 'Workman', this Court finds, in order to bring a person within the ambit of definition, the work for which he is employed should be for hire or reward. The work must be for wages or other remuneration. Legislatures purportedly used words 'hire or reward' rather than the word 'wages' definitely with a view to enlarging the scope of definition. Word 'Hire' necessarily imports an obligation to pay. In the case at hand, there is admission by Employer that it used to pay commission on utilization of service of the Workman involved. It is only a form of pay and cannot escape the satisfaction of definition Section 2(s). There is also no doubt that the work done by the Workman is incidental to the activities of the Establishment involved. This Court here takes support of two decisions : firstly in the case of ***Dharangadhra Chemical Works Ltd. vrs. State of Saurashtra & ors.*** **:** (1957) I L.L.J. 477 (SC) (a Constitutional Bench decision). Secondly, in the case of ***Charity Aids Bus Services vrs. Narayanswami Raji*** : (1957) II L.L.J. 29 also (1962) II L.L.J. 356 (SC).

Similarly, in the case of ***Chintaman Rao & anr. vrs. State of Madhya Pradesh*** : (1958) II LLJ 252, Hon'ble Supreme Court held – the identifying mark of a Servant is that he should be under the control and supervision of the Employer in respect of the details of work. Here in the case at hand, the workman satisfies this condition also.

13. For the discussions, pleadings, the materials available on record and the citations of the Parties, this Court finds, the finding of the Tribunal is justified requiring no interference and the finding of the Tribunal on the aspect of the Workman involved herein remains unassailable.

14. So far as Issue No.II, granting of relief, considering the rival contentions of the Parties, particularly keeping in view the claim of the Workman, this Court observes, once the Tribunal came to observe that the Claimant was a Workman and that there has been illegal disengagement of

the Workman involved, even after relying on the decision of the Hon'ble Supreme Court in Ashok Kumar Sharma (supra), this Court looking to the period lost in the process of adjudication involving the disengagement in the year 1998 and the award being passed in the year 2010, the Tribunal should have thought for granting higher compensation in the event the reinstatement with back wages was declined. Looking to the further loss of time in the meantime, this Court here also finds, both the Writ Petitions were filed in 2012 & 2011 respectively and the matter is taken up for final hearing in 2021 and in the meantime, there is loss of another decade.

15. Keeping in view the above and the observation of this Court that the Workman would have been entitled to more compensation in the event of denial of his reinstatement, this Court interfering with the impugned order so far it relates to the grant of compensation of Rs.1,00,000/- (rupees one lakh) to the Second Party-Workman awarded by the Tribunal enhances the same at least to Rs.2,00,000/- (rupees two lakh) and directs that the modified awarded compensation shall be released by the Management in favour of the Workman involved herein within a period of two months from the date of this judgment.

16. This Court while deciding to entertain W.P.(C) No.10861/2011 and dismissing the same and entertaining W.P.(C) No.1087/2012 in partial modification of the Award involved herein raises the compensation involving the Workman to Rs.2,00,000/- (rupees two lakh). However, there is no order as to cost.

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2022 (I) ILR - CUT- 308

BISWAJIT MOHANTY, J.

W.P.(C) NO. 17041 OF 2021

JEEVAN MOHARANA ....Petitioner

.V.

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

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 25 (2) (d) – Disqualification for membership of Grama Panchayat – Provisions under – Sarapanch or any other members of a Grama panchayat shall

be disqualified if he failed to pay any arrears of any kind accrued due by him to such society – The 'disqualification' – When attracted – Held, it is attracted only when there was an adjudicated and quantified arrear and in spite of demand it remains unsatisfied – No evidence to show that the arrears have been adjudicated and quantified nor any demand notice was issued – Disqualification set aside.

> "*In the present case, it may be noted here that no evidence has been produced by any of the opposite parties before this Court indicating that the arrears have been adjudicated and quantified in tune with above noted two decisions of this Court by any appropriate authority under the Odisha Co-operative Societies Act, 1962 and that on the basis of the same, a notice was served on the petitioner demanding clearance of the dues. The impugned order dated 08.04.2021 under Annexure-11 also does not reflect that upon adjudication and determination of the accrued dues any demand notice was issued to the petitioner directing him to clear the arrears. Rather it shows a peculiar procedure unknown to law was adopted by the Collector who called for a report from ARCS, Jagatsinghpur with regard to loan of the petitioner which he disputed as never been taken by him and as the learned counsel for the petitioner after going through the report could not submit any explanation refuting the same, he jumped to a conclusion that accrued dues of the loan against the petitioner has been substantiated. It may be noted here in that though in the written statement under Anenxure-7 filed by the petitioner, a reference was made to the decision of this Court as reported in AIR 1976 Orissa 1 and 1985 (II) OLR 403 however, the Collector has not applied his mind to both the above noted decisions of this Court which make it clear that in order to become an accrued due, arrears have to be adjudicated and quantified by the appropriate authority as provided under the Co-operative Societies Act, 1962. In fact there exists no evidence of any dispute being raised by the financing society for determination of such accrued dues. In such background, this Court is of the opinion that since there is nothing to show that a demand notice was served on the petitioner after adjudication and quantification of the arrears by appropriate authority, the impugned order under Annexure-11 declaring him disqualified under Section 25(2)(d) of 'the Act' is clearly legally unsustainable."*
>
> *(Para 9 & 10)*

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

1. AIR 1976 Orissa 1 : Mahendar Prasad Rout Vs. The Election Officer and Ors.
2. 1985(II) OLR 403 : Narahari Mallick & Madhab Pradhan Vs. Colelctor, Dhenkanal.
3. 2014 (I) OLR (FB) 867 : Debaki Jani Vs. The Collector and Anr.

For Petitioner: Mr. Sidhartha Mishra.

For Opp. Party Nos.1, 2, - Addl. Govt. Adv. 4 & 5

For Opp. Party No.3: M/s. B.R. Behera, A. Baral & N.A. Kulraj.

JUDGMENT Date of Hearing: 16.12.2021 : Date of Judgment: 20.12.2021

B. MOHANTY, J.

This writ petition has been filed with a prayer to quash the order dated 08.04.2021 under Anenxure-11 passed by the Collector, Jagatsinghpur (opposite party No.2) in Election Misc. Case No.22 of 2017 whereby, the election of the present petitioner to the Office of Sarapanch of Rahana Grama Panchayat has been declared illegal as he has been declared to be a disqualified person as per Section 25(2)(d) of the Odisha Grama Panchayat Act, 1964 for short 'the Act'. Pursuant to such order, Collector and District Magistrate, Jagatsinghpur (opposite party No.2) vide notification No.254/G.P dated 10.05.2021 has notified that the election of the petitioner to the post of Sarapanch, Rahana Grama Panchayat is illegal. This order dated 10.05.2021 has been challenged in W.P.(C) No.16949 of 2021.

2. Mr. Mishra, learned counsel for the petitioner submits that the present opposite party No.3, namely Sanatan Behera filed Election Misc. Case No.22 of 2017 before the Collector, Jagatsinghpur under Section 25(2)(d) of 'the Act' alleging that the present petitioner who was elected as Sarapanch of Rahana Gram Panchayat in the year 2017 is a loan defaulter vis-à-vis Rahana Co-operative Society affiliated to Cuttack Central Co-operative Bank, Balikuda. On the date of his nomination i.e. on 17.01.2017, his loan default stood at Rs.41,720/- and accordingly, he prayed that the election of the present petitioner be declared illegal and invalid as he was disqualified to continue as per Section 25(2)(d) of 'the Act'. After receiving notice in that case, the petitioner filed his written statement under Annexure-2 denying the allegations made against him clearly stating therein that he had never incurred any loan as alleged and no notice was ever served on him indicating the alleged loan dues and he came to know about such loan for the first time from the Election Misc. Case and on coming to know about the said fact, he filed a representation before the Registrar, Co-operative Society, Odisha on 07.09.2018 under Anenxure-3 requesting him to cause an enquiry and lodge F.I.R. against those who by practising fraud has taken loan in his name. Since no action was taken on such representation, he filed W.P.(C) No.14308 of 2019 which was pending at the time when written statement was filed. Later on 06.09.2019 under Annexure-4, this Court disposed of the above mentioned writ petition directing the Registrar, Co-operative Society, Odisha to take a decision on the said representation dated 07.09.2018 within

a period of six weeks from the date of production of the certified copy of this order in accordance with law after giving reasonable opportunity of hearing to Rahana Co-operative Society, Jagatsinghpur which was arrayed as opposite party No.3 in that case. According to Mr. Mishra, till date no final decision has been communicated to the petitioner on the same. He further submitted that the averment made by the petitioner in the written statement that no notice was ever served on the petitioner indicating the loan was never disputed. He also submitted that to the best of the knowledge of the petitioner, the above noted Co-operative Society has never raised any dispute before the appropriate authority under the Odisha Co-operative Societies Act, 1962 vis-à-vis the alleged defaulted loan.

While such was the position, the Collector disqualified the petitioner by his order dated 22.08.2019 under Annexure-5 which the petitioner challenged in W.P.(C) No.16397 of 2019. The said writ petition was allowed on 24.09.2019 at Annexure-6 setting aside the disqualification order and remanding the matter for fresh disposal. On 20.02.2020 the petitioner submitted his written argument under Anenxure-7 where he took a specific plea that till date the "accrued due" as indicated under Section 25(2)(d) of 'the Act' and as interpreted by this Court in the case of **Mahendar Prasad Rout Vs. The Election Officer and others,** reported in AIR 1976 Orissa 1 and in the case of **Narahari Mallick & Madhab Pradhan Vs. Colelctor, Dhenkanal,** reported in 1985(II) OLR 403 has not been determined in any dispute filed by the Rahana Cooperative Society after its adjudication and quantification by the appropriate authority under the Co-operative Societies Act, 1962 nor has the society raised demand on the petitioner on the basis of such adjudication which has remained unpaid within six months of such demand. Thus he cannot be described as a loan defaulter.

3. Relying on the certified copy of the order sheet filed by him, Mr. Mishra also submitted that the matter was heard by opposite party No.2 on 13.02.2020 and posted the matter to 27.02.2020 for further hearing. But on 27.02.2020 no hearing took place and ultimately without giving intimation to the petitioner about the next date of hearing to be 08.04.2021, the matter was disposed of by the Collector behind his back disqualifying him and declaring his election to the Office of Sarapanch of Rahana Grama Panchayat as illegal under Annexure-11. In such background, he submitted that the impugned order under Annexure-11 has been passed in violation of principles of natural justice and accordingly should be set aside. Secondly, he contended that

opposite party No.3 being a defeated candidate, the application filed by him which was registered as Election Misc. Case No.22 of 2017 was not maintainable as Section 26 of 'the Act' does not permit filing of such application by said opposite party. Lastly, he reiterated that the petitioner has never taken any loan nor any notice was served upon him by the concerned society demanding payment of such dues. He also submitted that in order to disqualify a Sarapanch under Section 25(2)(d) of 'the Act', it has to be proved that Sarapanch being a member of Co-operative Society, has failed to pay any arrears of any kind accrued due by him to such society within six months after a notice in this behalf has been served upon him by the society. Apart from the fact that the petitioner had never received any notice of demand from the society, there has also been no quantification of accrued dues in tune with the decision of this Court in the case of **Mahendar Prasad Rout** (supra) and in the case of **Narahari Mallick & Madhab Pradhan** (supra). Accordingly, he prayed for quashing of the impugned order under Annexure-11.

4. Mr. R.P. Mohapatra, learned Additional Government Advocate submitted that a perusal of the impugned order clearly shows that the opposite party No.2 has clearly indicated that he has heard the parties at length from both sides and also the Government pleader. According to him, the petitioner was opposite party No.1 in the Election Misc. Case No.22 of 2017. In the impugned order, the Collector has also clearly noted that the learned counsel for opposite party No.1 perused the report of the ARCS, Jagatsinghpur. Therefore, in such background, it cannot be said that the impugned order has been passed behind the back of the petitioner. He submitted that though from the available records, there is nothing to show that specific notice was issued to the parties with regard to taking up of hearing on 08.04.2021 however all the parties were present when the matter was heard on 08.04.2021. Accordingly, he contended that the impugned order cannot be set aside on the ground of violation of principles of natural justice. With regard to the second submission of Mr. Mishra that a defeated candidate like opposite party No.3 cannot file Election Misc. Case, he submitted that under Section 26 of the 'the Act' which lays down procedure of giving effect to disqualification, the Collector has got suo motu power for making enquiry. Relying on Full Bench decision of this Court in the case of **Debaki Jani Vs. The Collector and another,** reported in 2014 (I) OLR (FB) – 867, he submitted that it has been laid down by this Court therein that the matter relating to disqualification can be brought to the notice of the Collector by

any person and the Collector in exercising the suo motu power is not debarred from obtaining information and materials from various sources. Therefore, he submitted that the opposite party No.3 was eminently qualified to bring this matter to the notice of the Collector. Therefore, it cannot be held that Election Misc. Case at his behest was not maintainable. With regard to the last contention of Mr. Mishra he submitted that he cannot dispute the proposition of law as laid down by this Court in **Mahendar Prasad Rout** case (supra) **and Narahari Mallick and Madhab Pradhan** case (supra). He also could not throw any light whether any demand notice was served upon the petitioner to clear the loan after the default amount has been adjudicated and quantified in a dispute relating to arrears raised at the behest of the financing society.

5. Mr. B.R. Behera, learned counsel for opposite party No.3 submitted that once the report of the ARCS, Jagatsinghpur relied upon by opposite party No.2 shows that the loan amount has not been cleared and when such report was not refuted by the learned counsel for the petitioner, it was clear that the petitioner has not cleared the accrued dues. With regard to raising of a dispute by the financing society leading to adjudication and quantification of default amount, like Mr. Mohapatra, he also could not throw any light.

6. In reply, Mr. Mishra submitted that before the Collector, the petitioner has not indicated about any dispute being raised by the financing society under the appropriate provisions of the Odisha Co-operative Societies Act, 1962 leading to adjudication and quantification of the default loan amount. Besides, he reiterated that the petitioner has not received any demand notice from the society or bank and also submitted that conceding for a moment but not admitting that the petitioner has received a demand notice, however, since there is nothing to show that such demand notice was issued pursuant to an adjudication and quantification of the default loan amount in a dispute case raised by the financing society, the petitioner cannot be disqualified as has been done in the impugned order under Section 25(2)(d) of 'the Act'.

7. Heard Mr. S. Mishra, learned counsel for the petitioner, Mr. R.P. Mohapatra, learned Additional Government Advocate and Mr. B.R. Behera, learned counsel for opposite party No.3.

8. As indicated above, the first contention of the Mr. Mishra is that since the impugned order has been passed behind the back of the petitioner, the

same should be set aside. A perusal of the impugned order under Anenxure-11 does not support such contention of the petitioner as it has been clearly indicated therein that parties from both the sides have been heard and the counsel for the petitioner was present during the course of hearing, who perused the report of ARCS, Jagatsinghpur. Accordingly, the first contention of Mr. Mishra fails.

9. With regard to second contention of Mr. Mishra that opposite party No.3 being a defeated candidate could not have filed the Election Misc. Case No.22 of 2017 inviting the Collector to exercise his power under Section 26 of the Act also cannot be accepted inasmuch as the Full Bench decision of this Court in the case of **Debaki Jani** (supra) makes it clear that any person can bring to the notice of the Collector about the disqualification incurred by Sarapanch and Collector in exercising his suo motu power is not debarred from acting on such information. In fact it has been made clear there that Collector can gather information and materials from various sources for exercising such power. Therefore, it cannot be said that the Election Misc. Case at the behest of opposite party No.3 was not maintainable. In such background, the contention of Mr. Mishra on this account also fails.

Last contention of Mr. Mishra is that the Collector, Jagatsinghpur (opposite party No.2) could not have declared the petitioner disqualified on account of violation of Section 25(2)(d) of 'the Act' as no notice was ever served on him demanding paying of loan by the financing society and as till date the accrued due has not been adjudicated and quantified by appropriate authority under the Odisha Co-operative Societies Act, 1962. In this context, he has relied on the case of **Mahendar Prasad Rout** (supra) and followed by **Narahari Mallick and Madhab Pradhan** (supra). Before discussing the case law, this Court thinks it appropriate to refer to the relevant portion of Section 25 of 'the Act'.

> **"25. Disqualification for membership of Grama Panchayat –** (1) A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he-
>
> (a) XXX
> (b) XXX
> (c) XXX
> (d) XXX
> (e) XXX

(f) XXX
(g) XXX
(h) XXX
(i) XXX
(j) XXX
(k) XXX

(l) being a member of a Co-operative Society, has failed to pay any arrear or any kind accrued due by him to such society before filling of the nomination paper in accordance with the provisions of this Act and the rules made thereudner. Provided that in respect of such arrears a bill or a notice has been duly served upon him and the time, if any, specified therein has expired; or

(m) XXX
(n) XXX
(o) XXX
(p) XXX
(q) XXX
(r) XXX
(s) XXX
(t) XXX
(u) XXX
(v) XXX
XXX XXX XXX

(2) A Sarapanch or any other members of a Grama panchayat shall be disqualified to continue and shall cease to be a member if he-
(a) XXX
(b) XXX
(c) XXX

(d) Being a member of a Co-operative Society has failed to pay any arrears of any kind accrued due by him to such society within six months after a notice in this behalf has been served upon him by the society.

XXX
XXX
XXX"

Both clause (l) of Sub-Section (1) of Section 25 and Clause (d) of Sub-Section (2) of Section 25 quoted above are akin to each other. Both clauses use the phrase "accrued due". While interpreting that phrase with reference to Section 25(1)(l), this Court has made it clear in **Mahendar Prasad Rout** case that the disqualification under the said cause is attracted only when there was an adjudicated and quantified arrear and in spite of demand it remains unsatisfied and that the Odisha Co-operative Societies Act, 1962 provides the

necessary machinery for adjudication of such dispute relating to arrear and its determination/quantification. In **Narahari Mallick and Madhab Pradhan case,** this Court while referring to Section 25(2)(d) of 'the Act' has made it clear that without adjudication and quantification of "accrued due" by the appropriate authority as provided under the Odisha Co-operative Societies Act, 1962 a person cannot said to have incurred the disqualification in the said section.

10. In the present case, it may be noted here that no evidence has been produced by any of the opposite parties before this Court indicating that the arrears have been adjudicated and quantified in tune with above noted two decisions of this Court by any appropriate authority under the Odisha Co-operative Societies Act, 1962 and that on the basis of the same, a notice was served on the petitioner demanding clearance of the dues. The impugned order dated 08.04.2021 under Annexure-11 also does not reflect that upon adjudication and determination of the accrued dues any demand notice was issued to the petitioner directing him to clear the arrears. Rather it shows a peculiar procedure unknown to law was adopted by the Collector who called for a report from ARCS, Jagatsinghpur with regard to loan of the petitioner which he disputed as never been taken by him and as the learned counsel for the petitioner after going through the report could not submit any explanation refuting the same, he jumped to a conclusion that accrued dues of the loan against the petitioner has been substantiated. It may be noted here in that though in the written statement under Anenxure-7 filed by the petitioner, a reference was made to the decision of this Court as reported in AIR 1976 Orissa 1 and 1985 (II) OLR 403 however, the Collector has not applied his mind to both the above noted decisions of this Court which make it clear that in order to become an accrued due, arrears have to be adjudicated and quantified by the appropriate authority as provided under the Co-operative Societies Act, 1962. In fact there exists no evidence of any dispute being raised by the financing society for determination of such accrued dues. In such background, this Court is of the opinion that since there is nothing to show that a demand notice was served on the petitioner after adjudication and quantification of the arrears by appropriate authority, the impugned order under Annexure-11 declaring him disqualified under Section 25(2)(d) of 'the Act' is clearly legally unsustainable. Accordingly, the same is set aside and the writ petition is allowed. No cost.

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2022 (I) ILR - CUT- 317

Dr. B.R. SARANGI, J.

W.P(C) NO. 27367 OF 2020

SUCHARITA MOHANTY @ MOHAPATRA & ORS. ..……..Petitioners

.V.

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

SERVICE LAW – Regularization of service – Outsourcing Data entry operator/Supervisor – Similarly situated candidates have already been regularized in the various departments through the Govt. resolution – Right to equal opportunity in the Public employment as well as existence of relationship between employer and employee pleaded – Regularisation of service claimed – Held, as the petitioners are discharging the duties and responsibilities for the Govt., of the Govt. and by the Govt., even though they have been paid through outsourcing agencies, they are entitled to get the benefit of contractual appointment.

Case Laws Relied on and Referred to :-

1. AIR 1957 SC 264 : Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra.
2. AIR 1958 SC 388 : Chintaman Rao Vs. State of M.P.
3. (1990) 3 SCC 682 : Punjab Land Development Recreation Corporation Vs. Labour Court.
4. (2014) 9 SCC 407 : Balwant Rai Saluja Vs. Air India Ltd.

For Petitioners : M/s. B.S. Tripathy-1, A. Tripathy and A. Sahoo.
For Opp. Parties : Mr. Pravakar Behera, S.C, Transport Department.

JUDGMENT Date of Hearing: 07.12.2021 : Date of Judgment: 21.12.2021

Dr. B.R. SARANGI, J.

The petitioners, who are working as Data Entry Operators/Computer Supervisors in the establishment of opposite party no.2-State Transport Authority, have filed this writ petition seeking direction to the opposite parties to issue formal orders in their favour regularizing their services in the Pay Band-1-5200-20,200+GP Rs.1900/-, as per G.A. Department Resolution dated 17.09.2013, on completion of satisfactory service as has been allowed to the similarly outsourced Data Entry Operators in various State Government Departments and other various Government Establishments with all consequential service and monetary benefits.

2. The factual matrix of the case, in brief, is that in order to introduce e-Governance system in the Road Transport Sector, Govt. of India in the Ministry of Road Transport & Highways, in exercise of their powers conferred under Sections 27, 64, 110 & 137 of the Motor Vehicle Act, 1988, amended the Central Motor Vehicle Rules, 1989 w.e.f. 31.05.2002, vide Ministry of Road Transport & Highways Notification No.GSR-400(E) dated 31.05.2002 . The said Rules were called as the Central Motor Vehicle (Third Amendment) Rules, 2002. The said notification authorized both the State Government and Union Territories to specify their respective notification. Basing on the said notification of the Government of India, opposite party no.1 issued guidelines dated 10.08.2004 to implement the mandatory statutory provisions of Central Motor Vehicle (Third Amendment) Rules, 2002 by inviting private participation to carry out entire e-Governance system in the Road Transport Sector including various functions relating to issuance of Smart Card based driving license, registration certificates and other functions of the Transport Department in the State of Odisha. Thereafter, Govt. of Odisha-opposite party no.1 invited proposals from successful bidders vide NIT dated 15.09.2005 and finally accepted the bid of M/s. Smart Chip Limited, New Delhi-M/s Smart Chip (P) Ltd. by issuing letter of acceptance dated 01.05.2006 for implementation of the aforesaid project.

2.1. Opposite party no.1 made Registered Concession Agreement on 29.07.2006 with M/s. Smart Chip Ltd., New Delhi as the “Concessionaire” for implementation of the specified services as defined in Schedule-II for a period of 15 years commencing from the date of agreement, i.e 29.07.2006. The tenure of the said agreement with M/s. Smart Chip Ltd. would come to an end during 2021. The agreement dated 29.07.2006 defines the term “Govt. of Odisha Offices” to mean Regional Transport Office (RTO) and office of the Transport Commissioner, Odisha and further the “Govt. of Odisha Receipts” has been defined to mean the moneys for issuance/renewal/amendment/ providing other services, including penalties and other incidental levies, in accordance with the Act in respect of fees for driving licence, fees for Learner Licence, fees for Registration Certificate, fees for Trade Certificate, fees for Fitness Certificate, Motor Vehicle Tax and Permit Fees.

2.2. Under Article-5 of the said agreement, the Govt. of Odisha-opposite party no.1 was to provide all reasonable assistance to the Concessionaire for procuring electrical and water connections. Under Article-6 of the agreement,

the authority has been given to the Concessionaire for levying and collecting appropriate service charges from users for rendering special services in accordance with Schedule-IV of the agreement. Perusal of the agreement would reveal that the entire governmental work of the State of Odisha in respect of e-Governance of the Transport Department including Smart Card Based Driving License, Registration Certificates and other functions of the Department including collection of Govt. Fees and Receipts under the Act, as defined in the agreement, have been assigned to the said Concessionaire, namely, M/s. Smart Chip Ltd., New Delhi. On behalf of State of Odisha-opposite party no.1, the Principal Secretary to Govt., Commerce & Transport Department had signed the agreement. Instead of implementing the e-Governance System in Transport Department by appointing persons in its various offices of STA, RTO and other Govt. Offices under the Transport Department, opposite party no.1 had introduced the aforesaid new device of implementing the e-Governance project through M/s. Smart Chip (P) Ltd. permitting the said private opposite party to make contractual appointment of IT Personnel on daily wage basis by the process of "Walk-in-interview" as against the posts sanctioned for each Govt. Offices of the STA and RTOs. For such engagement of IT personnel, State Government had prescribed modality for selection of those IT Personnel through M/s. IDCOL Software Ltd., a State Govt. Agency for conducting a transparent selection. Thereafter, opposite party no.2 in its letter dated 13.02.2007 communicated to the MD, M/s. IDCOL Software Ltd. the details regarding the role, responsibility, educational qualification and experience required for those IT Personnel, including the Assistant Programmers.

2.3. M/s. Smart Chip (P) Ltd. notified for "Walk-in-interview" for appointment of Computer Operators with qualification of PGDCA. As a consequence thereof, M/s. Smart Chip Ltd. in consultation with M/s. IDCOL Software and with the permission of the State Govt. in Finance Department, engaged IT Personnel, including petitioners, as Data Entry Operators/Supervisors, having requisite qualification of PGDCA, on being selected through "Walk-in-interview", in the office of the Regional Transport Officer, Rourkela on fixed term employment basis in the aforesaid project as per "Offer of Employment" with a consolidated amount per month on and from the date of their joining. Petitioners joined in their respective services in between 2008 and 2015. After six months of their continuance, all of them were confirmed in their services.

2.4. As the petitioners have completed 6 years of service, they claim for regularization of their services. The issue of regularization of similarly situated outsourced and contractual employees engaged in various Tahasils of the State was the subject matter of consideration by the State Govt. In the Minutes of meeting held on 28.04.2012, it was decided that Data Entry Operators engaged on contractual basis in Tahasils should continue and should not be disengaged till a decision regarding regularization is finalized, and that the Govt. was contemplating to frame policy on regularization of contractual Data Entry Operators in various Departments.

2.5. During continuance of the petitioners as contractual outsourced Data Entry Operators, the Govt. of Odisha promulgated a policy for regularization of services of existing outsourcing and direct contractual Group-C and Group-D employees working under the State Govt., vide G.A Department Resolution No.26108 dated 17.09.2013. As per the said policy, for regular appointment a gradation list of such contractual employees shall be prepared by the appointing authority on the basis of their date of appointment and regular appointment of those categories of contractual employees shall be made on the date of completion of six years of service or from the date of publication of the resolution, whichever is later.

2.6. The period of six years shall be counted from the date of contractual appointment prior to publication of the resolution. As per paragraph-2 of the Resolution dated 17.09.2013, 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 and a formal order of regular appointment shall be issued by the appointing authority. Consequent upon regular appointment under the contractual post, if any, shall get re-converted to regular sanctioned post. In case the person concerned has crossed the upper age limit for entry into Government service on the date of contractual appointment for the corresponding regular post, the appointing authority shall allow relaxation of upper age limit. Subsequently, Government of Odisha in G.A Department issued another resolution on 16.01.2014 expressly clarifying the G.A Department Resolution dated 17.09.2013 that proposal for regularization of contractual appointments/ engagements as per resolution dated 17.09.2013 shall be considered and approved by the High Power Committee to be constituted under the Chairmanship of the concerned Department. Departments of Higher Education, Tourism & Culture and the Dean & Principal, SCB Medical

College & Hospital, Cuttack, have implemented the G.A Department resolution for the Data Entry Operators in their respective posts w.e.f. 17.09.2013 in P.B.-1 Rs.5,200-20,200 with GP Rs.1900 and/or Rs.2400/-. Similarly situated outsourced employees like the petitioners, having been regularized, as per resolution dated 17.09.2013, the petitioners' claim for similar benefit should be extended to them. Similarly, the Data Entry Operators working under CT & GST Organization, who were initially engaged on outsourcing basis in 2005-07 were brought as direct contractual in February, 2008 had approached the Odisha Administrative Tribunal, Cuttack by filing O.A. No.2172(C) of 2015 (***Jatin Kumar Das v. State***) and batch for regularization of their services, as per G.A Department Resolution dated 17.09.2013, and the Tribunal allowed their claim vidfe judgment dated 17.05.2017. Aggrieved thereby, the State approached this Court by filing W.P.(C) No.6661 of 2018 and this Court, vide judgment dated 10.05.2018, dismissed the said writ petition. The State then carried the matter to the apex Court in SLP(C) No.18642 of 2018, which was also dismissed vide order dated 06.08.2018. Thereafter, all the Data Entry Operators working in CT & GST Organization were regularized, pursuant to the judgment dated 17.05.2017 passed in the case of ***Jatin Kumar Das*** (supra). The petitioners' case being identical to the Data Entry Operators in CT & GST, similar benefit should be extended to them.

2.7. Basing upon G.A Department Resolution dated 17.09.2013, all the Data Entry Operators, including the petitioners, submitted their representations on 06.06.2015 to opposite parties no.1 & 2 and also to the Chief Secretary, Home Secretary, Finance Secretary and Secretary, G.A. Department, Govt. of Odisha seeking necessary action for regularization of their services under opposite parties no.1 & 2 with issuance of formal appointment order in their favour, as they have completed more than 10 years of service. Thereafter, the petitioners' Union made a detailed representation on 28.07.2017. Accepting the request of the association, the Addl. Commissioner of Transport, STA furnished all necessary details of the Data Entry Operators continuing on outsourcing basis, opposite party no.1 vide letter dated 25.02.2019 referred the matter to the Special Secretary G.A. Department for needful action. Since no action was taken, the petitioners approached this Court by filing W.P.(C) No.29349 of 2019 and this Court vide order dated 09.01.2020 in I.A. No.18563 of 2019 passed interim order directing that status quo as on date in respect of the petitioners be maintained till the next date. In the meantime, Transport Commissioner-cum-Chairman,

STA issued letter dated 05.12.2019 approving the proposal of various Regional Transport Officers for deployment of additional DEOs and other staff in the financial year 2019-20 through service provider on daily wage basis. Prior to the said letter, steps were taken at the instance of opposite party no.1 and instructions were issued by the Transport Department with the intention to dispense with the services of the petitioners working on outsourcing basis. Consequentially, the petitioners when met opposite party no.3 on 16.12.2019 to ascertain about their claim in the context for deployment of additional DEOs, in turn the said opposite party stated that after such additional deployment, the services of the outsourcing employees would be dispensed with and to reaffirm the same, opposite party no.2 issued letter dated 20.02.2020 by directing the outsourcing agency not to deploy persons so engaged by it for more than 3 years at one place and to take appropriate action in terms of Finance Department OM No.37323/F dated 30.11.2018 and Transport Department letter dated 13.11.2019 and opposite party no.1 also accorded post facto approval for engagement of 350 manpower on daily wage basis by the service provider up to 30.09.2020. As a consequence thereof, there is every reasonable apprehension that the petitioners' services may be dispensed with at any point of time by opposite party no.2 even during pendency of their claim for regularization.

2.8. The Finance Department has also taken decision on austerity measure due to COVID 19 and issued office memorandum dated 07.07.2020 stating that the persons, who are engaged on outsourcing basis, are to be paid their entitlement as per the terms and conditions of the engagement till contract period ends. If the contract period ends within the lock down period, then the entitlements to be paid till the end of the contract period. Being aggrieved by such action, the petitioners filed W.P.(C) No.9878 of 2020 seeking direction to the opposite parties to take a final decision on the issue of regularization of the petitioners in service as Data Entry Operators/Computer Operators in the establishment of STA in the scale of pay of Rs.5,200-20,200 + GP Rs.2400/- with effect from the date of their completion of six years of services with consequential benefits as per resolution dated 17.09.2013. The said writ petition was permitted to be withdrawn on 07.10.2020 granting liberty to the petitioners to file a better application. It is contended that the petitioners' cases are identical to the case of the petitioners in W.P.(C) Nos.10190, 9968, 10240 and 10243 of 2019 and W.P.(C) No.27248 of 2019, who have been extended regularization of their services. Therefore, the petitioners seek similar benefit and lay emphasis that the petitioners having completed six

years of service on outsourced contractual basis, as per G.A. Department resolution dated 17.09.2013, they are deemed to have been regularized. Hence this application.

3. Mr. B.S Tripathy-1, learned counsel for the petitioners admitting the fact that the petitioners were engaged by outsourcing agency, emphatically urged that they have been rendering service for opposite party no.1-Transport Organization for more than 10 years continuously and that though essentially they are discharging the nature of duties assigned to government service, but they are being paid by outsourcing agency. Such an action is nothing but a camouflaged approach made by the State authorities to the service rendered by the petitioners just to deprive them of the benefits of contractual employment, as per resolution dated 17.09.2013 passed by the Government in G.A. Department and subsequent Rules framed in 2013 called "Odisha Group-"C" and Group-"D" Posts (Contractual Appointment) Rules, 2013". It is also contended that even though the petitioners are engaged on outsourcing basis, they are discharging their duties and responsibility of the State and, therefore, they are entitled to get regularization in terms of the Government resolution dated 17.09.2013 and rules framed in 2013, as have been referred to above. It is further contended that the petitioners' appointment may be considered to be irregular one, but cannot be said to be illegal, as they have come through the process of selection. Consequentially, they are entitled to get the benefit of contractual appointment in terms of G.A. Department resolution dated 17.09.2013 and subsequent Rules framed in 2013. It is further contended that even though the petitioners are employed through outsourcing agency, there exists master-servant relationship between the petitioners and the opposite parties, thereby, they are entitled to get regularization. More so, if the services of similarly situated persons have already been regularized, the petitioners cannot be discriminated. Therefore, their claim for regularization on contractual basis has to be considered by the Government in proper perspective. It is further contended that similar question had come up for consideration before this Court in ***Rashmi Rekha Dash v. State of Odisha*** (W.P.(C) No.16906 of 2020, disposed of on 23.11.2021), wherein this Court, after dealing with a catena of decisions, passed an elaborate order extending the benefit. Therefore, the petitioners being stood on the same footing, in terms of the said judgment, the benefit should be extended to them.

4. Per contra, Mr. P. Behera, learned Standing Counsel for Transport Department fairly stated that the petitioners have been appointed through the outsourcing agency and they are being paid by outsourcing agency and as such, there is no existence of master-servant relationship between the petitioners vis-à-vis the State. By referring to various provisions of the agreement executed between the State and the outsourcing agency, he contended that though the petitioners are being engaged by outsourcing agency and are performing their duties and responsibility under the State authority, they cannot claim regularization of their services or absorption on contractual basis. It is further contended that there is strong distinction between the contract of service and contract for service. In support thereof, he has referred to the provisions contained in offer of employment, such as Clause-1, 2, 3, 4, 5 & sub-clause (iv), (v) & (vi) of Clause-7. Thereby, he contended that since the petitioners have been engaged by outsourcing agency through an offer of employment, there is no existence of master servant relationship so as to claim for regularization of their services under the State authority. He has also placed reliance on Clause-A, Clause-2.1.1, sub-clause (iii) of Clause-2.1.2 of Article-2, Clauses-5.1, 5.3, 5.3.2, 5.3.3, 5.3.4 of Article-5, Clauses-11.1, 11.1.8 of Article-11, Clauses-14.2.2, 14.2.4, 14.02.5 of Article-14, Clauses-2, 3, 13, 15 of Schedule-II and Schedule-IV of Concession Agreement under Annexure-A/1.

To substantiate his contention, he has relied upon the judgment of the apex Court in ***Dharangadhara Chemical Works Ltd. v. State of Saurashtra***, AIR 1957 SC 264; ***Chintaman Rao v. State of M.P.***, AIR 1958 SC 388; ***Punjab Land Development Recreation Corporation v. Labour Court***, (1990) 3 SCC 682; ***Balwant Rai Saluja v. Air India Ltd***., (2014) 9 SCC 407 and the judgments of this Court in ***Rashmi Rekha Dash v. State of Odisha*** (W.P.(C) No.16906 of 2020, disposed of on 23.11.2021) & ***Santosh Kumar Muduli v. State of Odisha*** (W.P.(C) No.18877 of 2021, disposed of on 23.11.2021)

5. This Court heard Mr. B.S. Tripathy-1, learned counsel for the petitioners and Mr. P. Behera, learned Standing Counsel for Transport Department by hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petitions are being disposed of finally at the stage of admission.

6. From the factual matrix and the rival contentions as narrated above, it is unraveled that the petitioners, having been undisputedly engaged by

outsourcing agency, are discharging their duties and responsibility in different offices of the State Transport Department as Data Entry Operators/Supervisors. Essentially, the nature of work, as has been discharged by the petitioners, is for the Government and of the Government, and payments have been made to them through outsourcing agencies by the Government. Even if they are discharging their duty as Data Entry Operators/Supervisors for the Government, of the Government and by the Government, the benefit of regularization on contractual basis also accrued to them in terms of nature of duty discharged by them, even though they have been engaged in a camouflaged manner through service providers. More so, recruitment rules have already been framed by the Government bringing them into the fold of regular contractual posts. But, in the name of financial crunch or by adopting some plea or the other, the Government even though is a model employer, is not making their appointment as regular contractual by following due procedure or rules governing the field for recruitment to the regular posts. Many a times, it is observed that the Government is engaging the people through outsourcing agencies and by paying a paltry sum of money is extracting the work similarly to regular employees of the Government. Thereby as a model employer, the Government is exploiting the employees, those who have been engaged by outsourcing agencies, by depriving them of getting their legitimate dues in terms of regular employment or in terms of contractual employment as per rules applicable to them.

7. The Government in the name of technological development depriving the manpower utilization for its betterment. No doubt, technology has got its own place for growth of the State, but that does not mean it will not create any employment causing a massive inconvenience to the youths of the country. Consequentially, there is brain drain of multi-laundering the persons to the country and outside the country. Therefore, the Government should be careful that the eligible persons are not denied employment in the name of technological development. It is easy to utilize the outsourcing agencies for supply of manpower, but that itself amounts to exploiting the young generations upon whom the future of the State as well as the country rests. Once youth is exploited, frustration grows up and ultimately it will have tremendous adverse effect on the growth of the State, resulting in creating disastrous conditions, which should be taken care of by the Government as a model employer. But instead of doing so, as it appears, steps are being taken from time to time to cause harassment to the youths by generating

unemployment, which will have grave repercussions on the State and at that time the State cannot control the situation.

8. In a similar situation, in ***Rashmi Rekha Dash*** (supra), this Court had occasion to consider the similarly placed persons by relying upon various judgments of the apex Court, including the judgments cited by the opposite parties herei, and applying the *piercing the veil,* has come to a definite finding that the petitioners are discharging the duties and responsibilities of the government, for the government and by the government. Though they have been paid their remuneration through the outsourcing agency, that *ipso facto* cannot be said that no master-servant relationship exists between the petitioners and the State opposite parties for whom they are rendering the services.

9. So far as the contention raised by Mr. P. Behera, learned Standing Counsel for Transport Department, that the present case is distinguishable from the judgment in ***Rashmi Rekha Dash*** (supra) is not substantiated how the same is distinguishable and more so, the contentions so raised by him referring to various clauses of agreement, were also raised in ***Rashmi Rekha Dash*** (supra). Thereby, the petitioners being stood in the same footing like the petitioner in ***Rashmi Rekha Dash*** (supra), the benefit should be extended to them in the light of the said judgment. As such, the said judgment is fully applicable to the present case.

10. Considering from other angle, if all the above aspects borne in mind, it would apparently be made clear that the petitioners are discharging the duty and responsibility akin to the State Government employees, though they are being paid through the outsourcing agencies. Needless to say, similarly situated employees like ***Jatin Kumar Das and Others,*** who were working as DEOs, had approached the Tribunal in O.A. No. 2172 (C) of 2015 and batch, which were allowed vide judgment dated 17.05.2017. The judgment so passed by the Tribunal was challenged before this Court in W.P.(C) No.6661 of 2018, which was dismissed by judgment dated 10.05.2018. Although the said judgment was assailed by the State in SLP No.18642 of 2018, but the same was dismissed on 06.06.2018. Pursuant thereto, all the DEOs working under the CT & GST Department having been regularized, the petitioners cannot be discriminated from ***Jatin Kumar Das & others,*** so as to deprive them of the benefit of contractual appointment in terms of resolution dated 17.09.2013 or Rules, 2013, otherwise it will amount to violative of Article 14 of the Constitution of India.

11. In view of the facts and circumstances, as discussed above, this Court is of the considered view that as the petitioners are discharging the duties and responsibilities for the Government, of the Government and by the Government, even though they have been paid through outsourcing agencies, they are entitled to get the benefit of contractual appointment, as per resolution dated 17.09.2013 or they may be brought over to the contractual establishment in view of the 2013 Rules governing the field, since they stand at par with the employees those who have been absorbed in CT&GST Department, pursuant to the judgment of the Tribunal in ***Jatin Kumar Das*** (supra). Thereby, the ratio decided in ***Rashmi Rekha Dash*** (supra) is fully applicable to the present case. As a consequence thereof, such benefits should be extended to the petitioners as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment.

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

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2022 (I) ILR - CUT- 327

Dr. B.R. SARANGI, J & S.K. PANIGRAHI, J

W.P(C) NO. 24589 OF 2014

RAGHUNATH SAHU ……….Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in contractual matters – Maintainability – Principles – Plenary right of writ court – Discussed.

> *"The plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitution mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."*

(B) WORDS AND PHRASES – The words 'compensation' and 'escalation' – Distinction – Compensation means anything given to make things equivalent, a thing given to or to make amends for loss, recompense, remuneration or pay – It need not therefore necessarily be in terms of money whereas the expression 'escalation' used in an agreement ordinarily means an agreement allowing for adjustment up and down according to change in circumstances as in cost of material in work contract or in cost of living in wage agreement – It would not bring within its sweep higher rate of wage which a contractor is otherwise liable to pay.

Case Laws Relied on and Referred to :-

1. (2004) 3 SCC 553 : ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.
2. AIR 1969 SC 634 : State of Gujarat Vs. Shantilal Mangal Das.
3. (2003) 7 SCC 197 : KSRTC Vs. Mahadeva Shetty.
4. (2006) 2 SCC 508 : Sandvik Asia Ltd. Vs. CIT.
5. (2008) 13 SCC 30 : Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd.
6. AIR 1965 SC 1069: Jeejeebhoy Vs. Asst. Collector, Thana.
7. AIR 1998 Ori. 159 : Kiranbala Dandapat Vs. Secy. Grid Corporation of Orissa Ltd.
8. (2006) 13 SCC 779 : Food Corporation of India Vs. A.M. Ahmed & Co.
9. AIR 2005 Ori. 26 : Suryamani Nayak Vs. Orissa State Housing Board.

For Petitioner : M/s. (Mrs.) Pami Rath, J. Mohanty & J.P. Behera,

For Opp. Parties : Mr. T. Pattnaik, Addl. Standing Counsel

JUDGMENT Date of Hearing: 10.01.2022: Date of Judgment:19.01.2022

Dr. B.R. SARANGI, J.

The petitioner, who is a registered contractor in 'A' class category of the State P.W.D. Department, has filed this writ petition seeking to quash the letter dated 03.12.2013 under Annexure-17 issued by the Joint Secretary to Government of Odisha, Fisheries & ARD Department in compliance of the order dated 19.02.2008 passed by this Court in W.P.(C) No.15922 of 2007, stating that no further escalation is considerable at Government level for payment against the work "Construction of Landing Quay and allied structures at Talasari Fish Landing Centre in Balasore District", because of existing situation and the conditions in the work supported with the undertaking dated 15.10.2002 after payment of legitimate claims for Rs.11,85,207/- through Bank Draft No.792415 dated 26.11.2010 by the Executive Engineer, Fishery Engineering Division, Bhubaneswar as per

Fisheries and ARD Department Sanction Order No.11834/FARD dated 04.11.2010, and further to direct the opposite parties to disburse the differential escalation amount of Rs.4,20,940/- with interest @ Rs.18% per annum from the date the escalation bill was submitted, i.e., 27.08.2002.

2. The factual matrix of the case, in brief, is that the petitioner, being the lowest tenderer in respect of the work "Construction of Landing Quay and allied structures at Talasari Fish Landing Centre in Balasore District", was selected in the tender process floated by opposite party no.4. The work was entrusted to him by execution of an agreement i.e. Divisional Agreement No.22F2 of 1999-2000. As per stipulation made in the agreement, the date of commencement and the date of completion of the work were 01.12.1999 and 30.05.2001 respectively. Although bids were opened on 06.04.1998, but there was delay on the part of the opposite parties in finalization of the tender and according approval due to pendency of some litigation. Due to delay in acceptance of the tender, the rate quoted by the petitioner became unworkable. The agreement is nothing but verbatim copy of the tender conditions and thus the original date of commencement and completion reflected in the tender papers have also been copied even though the agreement actually was executed on 25.03.2000 and the work actually commenced on 01.12.1999 and the work was completed on 31.03.2003 during extended period delay being not attributable to the petitioner.

2.1. As per contractual provision, i.e. Clause-32(a)(b)(c) is strictly for payment of price escalation during execution of the work in case of increase/decrease in average wholesale price index (all commodities) for material inputs and Consumer Price Index for industrial workers towards labour inputs of the work and price of POL (diesel oil being the representative item for price adjustment) pursuant to the prescribed formulae provided that the work is carried out within the stipulated time or extension thereof for the reasons that are not attributable to the petitioner.

2.2. In view of the above provisions of contract and in pursuance of the other conditions of the contract, the petitioner is entitled to escalation cost. In spite of difficult site condition and unavoidable situations, the petitioner executed the work and completed the same during the period extended validly by the opposite party-Department. The cause of delay in completion of the work is solely attributable to the opposite parties and after considering the hindrances caused to the work, the opposite parties have not only granted

extension of time, but also paid running account bills during extended period. Opposite party no.3 effected payment through running account bill, but neglected miserably in his contractual obligation to pay the differential cost of escalation charges as per Clause-32 of the agreement in spite of escalation bill of Rs.16,06,147/- submitted on 27.08.2002.

2.3. The petitioner approached the authority time and again by submitting representations/letters addressed to the opposite parties for releasing price escalation bill amount, as mentioned above, but the same were not attended to. On account of unusual delay caused in making payment of the escalation bill amount, the petitioner was forced to approach this Court by filing W.P.(C) No.15922 of 2007 seeking direction for release of undisputed escalation amount of Rs.16,06,147/- together with interest @ 18% per annum from 27.08.2002 i.e. the date of submission of the escalation bill and cost. This Court, vide order dated 19.02.2008, disposed of the said writ petition with a direction that in case, the petitioner submits a representation to the opposite parties with regard to payment of escalation amount, the same shall be considered and disposed of by giving a reasoned order within two months from the date of production of such representation. In compliance thereof, the petitioner submitted his representation to opposite party no.3 with copies of the order to opposite parties no.1 and 2 on 18.03.2008. Subsequently, he sent reminders to the said opposite parties on 10.09.2008. Though opposite parties no.2 & 3 in their letters dated 13.08.2008 and 05.08.2008 respectively admitted the claim of the petitioner for payment of escalation amount after due check up to the bills presented by him, there was inordinate delay caused by opposite party no.1 in according approval. However, after a good deal of correspondence and clarification, opposite party no.1 communicated to the petitioner that an amount of Rs.11,85,207/- (which is less than the bill presented) towards escalation charges for payment was sanctioned in his favour vide letter dated 12.11.2010, without disclosing the reasons for not sanctioning the entire escalation bill amount of Rs.16,06,147/-. As the petitioner was undergoing much financial hardship due to substantial amount remaining blocked in the hands of the department and as situation then warranted to make payment to his creditors and to be saved from payment of unnecessary interest, the petitioner accepted the sanctioned amount of Rs.11,85,207/- on protest on 24.11.2010 vide acknowledgement on the reverse of running account bill-C prepared by opposite party no.3 for Rs.16,06,147/-, but limited it to Rs.11,85,207 in view of Government sanctioned order. As a consequence thereof, the petitioner is deprived of

getting payment of balance amount of Rs.4,20,940/- towards his price escalation cost under the agreement, which is due to one sided and illegal course of action by the opposite parties dishonouring the agreemental provision made in Clause-32 (a)(b)(c). Hence this application.

3. Mrs. Pami Rath, learned counsel for the petitioner emphatically urged before this Court that the opposite parties are liable to pay the admitted escalation dues as per Clause-32 (a)(b)(c) of the agreement and the letter dated 05.08.2008 issued by opposite party no.3, it has been clearly held that price escalation to the petitioner is payable as per the formula fixed by the Works Department. Non-payment of a part thereof amounting to Rs.4,20,940/-, the opposite parties have violated the agreemental provision of Clause-32 (a)(b)(c). It is further contended that in order to receive the balance price escalation amount, the petitioner again made representation and finally he served a notice under Section 80 CPC for taking steps towards clearance of his blockage balance payment of Rs.4,20,940 under original agreement period. It is further contended that though opposite parties no.2 and 3 found that the dues of the petitioner are genuine, pursuant to letter dated 22.08.2012 issued by opposite party no.4-Director of Fisheries, Cuttack under Annexure-18, and the letter 23.05.2012, issued by opposite party no.3-Executive Engineer, Fishery Engineering Division, Bhubaneswar and as evident from the fact, opposite party no.3 paid a part of the escalation amount, but opposite party no.1 in a most whimsical and unjustified manner illegally refused to pay the entire escalation charges by virtue of the undertaking of the petitioner dated 15.10.2002. It is further contended that vide letter dated 03.12.2013, opposite party no.1 rejected the claim of the petitioner for disbursement of the rest of the amount claimed in the bill dated 27.08.2002 assigning the reason for non-release of the left over amount that the petitioner had submitted a no claim certificate when extension of time was granted, while the departmental instruction dated 28.06.1996 states that such certificate cannot be made a ground to reject the claim for escalation cost. Thereby, the action taken by the authority is arbitrary, unreasonable and contrary to the provisions of law and as a consequence thereof, the petitioner is entitled to get Rs.4,20,940/-, which was deducted from the escalation cost along with interest @ 18% per annum. To substantiate her contentions, she has relied upon the judgment of the apex Court in ***ABL International Ltd. V. Export Credit Guarantee Corporation of India Ltd***., (2004) 3 SCC 553.

4. Per contra, Mr. T. Pattnaik, learned Additional Standing Counsel for the State contended that the date of commencement and stipulated date of completion were 01.12.1999 and 30.05.2001 respectively, i.e. 18 months from the date of commencement. The work was not completed by the petitioner within the stipulated period of 18 months, therefore, the petitioner applied extension of time up to 31.03.2003 and submitted an undertaking that he will not claim any compensation on any account from the Department for delay in completion of the work and considering the same, opposite party no.1 granted extension of time till 31.03.2003 vide letter no.3888 dated 10.03.2005. Thereby, escalation bill raised by the petitioner amounting to Rs.16,06,147/- was submitted to opposite party no.1, i.e. Government in Fisheries and A.R.D. Department for approval and concurrence of Finance Department for due approval and payment. Opposite party no.1 after examining the claim of the petitioner by way of short audit after due concurrence of Financial Advisor (FA)-cum-Joint Secretary of the Department and in consultation with Finance Department, accorded approval/sanction to an amount of Rs.11,85,207/- for payment to the petitioner vide letter dated 22.11.2010. Accordingly, the payment of Rs.11,85,207/- was made on 26.11.2010 vide bank draft. Thereby, the petitioner is not entitled to get the balance amount of Rs.4,20,940/-, as claimed in the writ petition. Therefore, he contended that the writ petition is liable to be dismissed as it does not warrant interference of this Court.

5. This Court heard Mrs. Pami Rath, learned counsel for the petitioner and Mr. T. Pattnaik, learned Additional Standing Counsel for the State opposite parties by video conferencing mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. At the outset, this Court made a query with regard to maintainability of the writ petition in a contractual matter, more particularly for payment of the dues as claimed in the writ petition. In this regard, learned counsel for the petitioner relied upon paragraph-27 of ***ABL International Ltd.*** (supra), wherein it is stated as follows:

> *"27.From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:*
>
> *(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.*

> *(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.*
>
> *(c) A writ petition involving a consequential relief of monetary claim is also maintainable."*

7. In view of paragraph-27(c), as quoted above, it has been clarified that the writ petition involving a consequential relief of monetary claim is also maintainable. But, while entertaining an objection with regard to the maintainability of a writ petition under Article 226 of the Constitution of India, it should be borne in mind the fact that power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power.

8. The plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitution mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

9. Taking into account the above principle, now in the fact of the present case it is to find out whether the petitioner is entitled to get the relief or not as sought in the writ petition filed by him. Furthermore, there is no dispute that the opposite parties are the "State" under Article 12 of the Constitution of India. Therefore, on the factual matrix delineated above, whether the opposite parties are liable to pay the petitioner's blockage balance amount of escalation cost of Rs.4,20,940/- as per the original agreement.

10. Escalation cost is payable, in view of Clause-32 (a)(b)(c) of the agreement, which reads as follows:

> *Clause 32-(a) "if during the progress of the work the price of any material incorporated in the work (not being materials supplied from the Engineer-in-charge's store in accordance with Clause ………. there of) increases or decreases as a result of increase or decrease in the average wholesale Price Index (all commodities), and the Contractor there upon necessarily and properly pays in*

respect of that material (incorporated in the work) such/increased or decreased price, then he shall be entitled to reimbursement or liable to refund, quarterly, as the case may be, such an amount, as shall be equivalent to the plus or minus difference of 70% in between the Average Wholesale price Index (all commodities) which is operative for the quarter under consideration and that operated for the quarter in which the tender was opened, as per the formula indicated below, provided that the work has been carried out within the stipulated time or extension thereof as are not attributable to him.

Formula to calculate the increase or decrease in the price materials:-

$$Vm- 0.75x \quad \frac{Pm}{100} \; X \; \frac{R(i-i0)}{10}$$

Vm- Increase or decrease in the cost of work during the quarter under consideration due to changes in the rates for material.

R- The value of work done in rupees during the quarter under consideration.

i0- The average wholesale Price Index (all commodities) for the quarter in which the tender was opened (as published in R.B.I. Bulletin).

i- The average wholesale Price Index (all commodities) for the quarter under consideration.

Pm- Percentage of material Component (Specified in Schedule of analysis) of the item.

(b) Similarly, if during the progress of work, the wage of labour increase or decrease as a result of increase or decrease in the Average Consumer's Price Index for industrial workers (wholesale Price), and the Contractor thereupon necessarily and properly pays in respect of labour engaged on execution of the work such increased or decreased wages, then he shall be entitled to reimbursement or liable to refund, quarterly as the case may be, such an amount as shall be equivalent to the plus or minus difference in between the Average Consumer's Price Industrial workers (wholesale price) which is operating for the quarter under consideration and that operated for the quarter in which the tender was opened as per the formula indicated below provided that the work has been carried out within the stipulated time or extensions thereof as are not attributable to him.

Formula to calculate the increase or decrease in the cost of labour :-

$$VI- 0.75 \; x \; \frac{PI}{100} \; x \; R \; \frac{(i- i0)}{10}$$

VI- Increase or decrease in the cost of work during the quarter under consideration due to changes in the rates of labour .

R- The value of work done in rupees during the quarter under consideration.

i0- The average Consumer's Price Index for industrial workers (wholesale price) for the quarter in which the tender was opened (as published in R.B.I Bulletin).

i- The average Consumer's Price Index for industrial workers (wholesale price) for the quarter under consideration.

P1- Percentage of labour Component (Specified in schedule and analysis) of the item.

(c) Similarly if during the progress of work, the price of Petrol, Oil and lubricants (Diesel oil being the representative item for price adjustment) increases or decreases as a result of the price fixed therefor by the Government of India and the Contractor thereupon necessarily and properly pays such increased or decreased price towards Petrol, Oil and Lubricants used on execution of the work, then he shall be entitled to re-imbursement or liable to refund quarterly, as the case may be such an amount, as shall be equivalent to the plus or minus difference in between the price of P.O.L. which is operating for the quarter under consideration and that operated for the quarter in which the tender was opened as per the formula indicated below."

11. As has been already stated, the work was entrusted to the petitioner by execution of an agreement i.e. Divisional Agreement No.22F2 of 1999-2000 by opening bids on 06.04.1998 and as per the terms of the agreement, the date of commencement and the date of completion of work were 01.12.1999 and 30.05.2001 respectively. But, the agreement was executed on 25.03.2000 and the work was actually commenced on 01.12.1999 and it was completed on 31.03.2003 during the extended period, delay being not attributable to the petitioner. Therefore, the petitioner submitted escalation bill of Rs.16,06,147/- on 27.08.2002 as per Clause-32 of the agreement. Opposite parties no.2 and 3, vide letters dated 13.08.2008 and 05.08.2008 respectively, admitted the claim of the petitioner for payment of escalation cost. As against claim of Rs.16,06,147/-, opposite party no.1 vide letter dated 22.11.2010, in compliance of the order dated 19.02.2008 passed by this Court in W.P.(C) No.15922 of 2007, approved an amount of Rs.11,85,207/- in order to make payment of the said amount in favour of the petitioner towards escalation charges as admissible for the work "Construction of Landing Quay and allied structures at Talasari Fish Landing Centre in Balasore District" and the petitioner received such payment on protest as has been indicated in the running account bill 'C' which reads as follows:

> *"Received the payment Rs.11,25,947/- with protest to my claim Amount Rs.16,06,147/- against my escalation bill."*

12. The petitioner made grievance on 13.01.2011 for payment of balance amount of Rs.4,20,940/-, but the said amount was not paid on the plea of "no claim certificate" dated 15.10.2002 submitted by the petitioner. The no claim certificate, which was given by the petitioner, reads as follows:

> *"Certified that I will not claim any compensation on any account from the department for the delay incompletion of the work construction of Construction of Landing Quay and allied structure of Talsari Fish Landing Centre in Balasore Dist under Agreement No: 22F2/1999-2000."*

On perusal of the same, it appears that no claim certificate was in respect of only 'compensation', but not with regard to 'escalation cost' as embodied in the agreement itself.

13. In ***State of Gujarat v. Shantilal Mangal Das***, AIR 1969 SC 634, the apex Court held that "compensation" means anything given to make things equivalent, a thing given to or to make amends for loss, recompense, remuneration or pay. It need not therefore necessarily be in terms of money.

Similar view has also been taken by the apex Court in ***KSRTC v. Mahadeva Shetty***, (2003) 7 SCC 197 and ***Sandvik Asia Ltd. v. CIT***, (2006) 2 SCC 508.

14. In ***Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd***., (2008) 13 SCC 30, the apex Court held that a 'compensation' maybe held to be payable on a periodical basis, as part from the compensation, other terms and conditions can also be imposed.

15. In ***Jeejeebhoy v. Asst. Collector, Thana***, AIR 1965 SC 1069, the apex Court held that the expression 'compensation' means 'just equivalent of what the owner has been deprived of'.

16. In ***Kiranbala Dandapat v. Secy. Grid Corporation of Orissa Ltd***., AIR 1998 Ori. 159, this Court has also considered 'compensation' as follows:

> *"Compensation means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and*

> *manner in which compensation is to be determined as given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damified may receive equal value for his loss or be made whole in respect of his injury; something given or obtained as equivalent given for property taken or for an injury done to another, a recompense in value; a recompense given for a thing received recompense for whole injury suffered, remuneration or satisfaction for injury or damage or every description. The expression 'compensation' is not ordinarily used as an equivalent to 'damage' although compensation may often have to be measured by the same rule as damages in an action for a breach."*

17. Therefore, the no claim certificate so given by the petitioner can be construed that he will not claim any 'compensation'. But, fact remains the petitioner claims escalation cost as per provisions of Clause-32 (a) (b) (c) of the agreement.

18. In ***Food Corporation of India v. A.M. Ahmed & Co***., (2006) 13 SCC 779, the apex Court held that 'escalation' is normal and routine incident arising out of gap of time in this inflammatory age in performing any contract of any type.

19. In ***Suryamani Nayak v. Orissa State Housing Board***, AIR 2005 Ori. 26, this Court held that the expression 'escalation' used in an agreement ordinarily means an agreement allowing for adjustment up and down according to change in circumstances as in cost of material in work contract or in cost of living in wage agreement. It would not bring within its sweep higher rate of wage which a contractor is otherwise liable to pay.

20. Therefore, taking into consideration the meaning attached to the word 'escalation', as per terms and conditions of the agreement, the petitioner is entitled to get escalation cost but not the compensation, for which the blockage of the escalation benefit has been made. Needless to say, an 'undertaking' is nothing but a standard form, which every contractor has to sign and submit to the effect that he shall not claim for compensation for delay in work and extend the period of work. This is submitted whenever extension of time is granted for completion of work or else extension will not be granted. This document is signed, without adjudicating the merits of the claim of the petitioner, and is done under duress or else the contract would be liable to be terminated with penalty, even though the petitioner may not be responsible for delay in execution of work.

21. The Government of Odisha in Works Department, vide letter dated 28.06.1996 under Annexure-12, introduced the provision of escalation clause in P.W.D. Contract form for payment of escalation charges to the contractor during the extended period, relying upon the extract of the proceedings of the Codes Revision Committee Meeting held on 25.11.1995 at 11.30 A.M. in the Office Chamber of Engineer-in-Chief-cum-Secretary to Government, Works Department in Item -1, which is extracted hereunder:-

> *"Item -1: Payment of escalation charges to Contractors.*
>
> *Xxx xxx xxx*
>
> *(ii) While granting extension of time to the Contractors "no claim certificate" is obtained from them in the prescribed form of the Department. The significance of such certificate is that the Contractor surrenders his claim for "compensation on any account". But it is seen in many cases that contractors are putting up their claims for escalation in spite of no claim certificate given by them earlier. It is to be decided if such claim of the contractors are consistent with the non claim certificate. At this point, Secretary, Works Department observed that compensation and escalation are not one and the same. The object of payment of compensation is to make good the loss suffered by the contractor on account of negligence, default or fraud committed by the other party and does not cover escalation. Hence "no claim certificate" will not be a bar to te claim of escalation. The members endorsed the above views of the Engineer-in-Chief-cum-Secretary.*
>
> *Xxx xxx xxx"*

In view of the above mentioned provision, even though the petitioner executed "no claim certificate", but that will not be a bar for him to claim escalation cost.

22. In the present case, the bill dated 27.08.2002 was raised towards escalation cost to the tune of Rs.16,06,147/-, but the authority considered the same, after the order was passed by this Court on 19.02.2008 in W.P.(C) No.15922 of 2007, and sanctioned a sum of Rs.11,85,207/- towards escalation cost, by deducting Rs.4,20,940/- without any rhyme or reason, for which the said amount of Rs.11,85,207/- was received by the petitioner with protest. Thereby, the opposite parties have agreed that the petitioner is entitled to escalation cost during extended period of work and as such, extension of work was not due to fault of the petitioner. As a matter of fact, the escalation cost was granted in part to the petitioner, relying upon no claim undertaking submitted by the petitioner, which is absolutely a myth. The opposite parties, having accepted the entitlement of escalation cost by the

petitioner as per Clause-32 of the agreement, have taken into consideration the "value of work done in rupees during the quarter under consideration". The said value of the work in rupees of the relevant quarter has already been decided and sanctioned by opposite party no.1 vide sanction order dated 18.08.2003. As per certificate dated 18.08.2003, the Junior Engineer F4 Engineering, Sub-Division, Bhadrak and Sub-Divisional Officer, Balasore, F4 Engineering Sub-Division, Bhadrak have certified the value in rupees of quarter-wise work, which states as follows:

Serial No.	Running Bill	Dateof measurement by opposite party	Related quarter	Value of work in rupees
1	1st	18.2.2000	1st quarter of 2000	Rs.35,74,433
2	2nd	12.5.2000	2nd quarter of 2000	Rs.46,89,274
3	3rd and 4th	23.6.2000& 11.8.2000	3rd quarter of 2000	Rs.18,15,326
4	5th and 6th	1.3.2001	1st quarter of 2001	Rs.15,00,596

The bill dated 27.08.2002 also reflects the same value even though it has been submitted earlier. As it appears, instead of taking note of own certified document dated 18.08.2003, the opposite parties, while dealing with the escalation bill of the petitioner dated 22.11.2010, have reduced the value of the work arbitrarily, so far it relates to the value of 1st quarter of 2000. Instead of reflecting the value as Rs.35,74,433/-, it has been reflected as Rs.1,21,600/-, which has resulted in arriving at a different amount as escalation cost and that is how instead of Rs.16,06,147/- the escalation cost has been calculated as Rs.11,85,207/-.

23. The reflection of work value for the first quarter of 2000 as Rs.1,21,600/-, instead of Rs.35,74,433/-, is erroneous and contrary to its own recording in certificate dated 18.08.2003. This is also fortified from the entries made by the opposite parties in the measurement book, which has been placed on record as Annexure-15, wherein for 1st quarter of 2000 the amount of Rs.35,74,433/- has been specifically mentioned at page 137.

Though in respect of other quarters the amount has been mentioned correctly, and the same has been reasonably placed, but erroneously calculated for payment of escalation cost as Rs.11,85,207/- in place of Rs.16,06,147/-. As per the measurement book and certificate dated 18.03.2002, the total value of work upon which escalation is to be calculated has come to Rs.1,15,79,625/-, i.e. the said amount is also the amount payable to the petitioner. The said amount has also been paid in the form of final bill, which has been paid much prior to the payment of escalation amount. Thereby, there is no dispute with regard to the value of work reflected in the measurement book or in the certificate dated 18.03.2002. But, due to erroneous intimation of amount for the 1st quarter of 2000 running account bill in the letter dated 22.11.2010 in Annexure-14 amounting to Rs.1,21,600/- in place of Rs.35,74,433/-, the escalation cost reduced from Rs.16,06,147/- to Rs.11,85,207/-. Therefore, due to wrong recording of value of work, the blockage amount of Rs.4,20,940/- towards escalation cost is payable to the petitioner.

24. Even in paragraph-23 of the writ petition, the petitioner has pleaded as follows:-

> *"23. That the said amount reflected for the 1st quarter of 2000 as Rs.1,21,600/- instead of Rs.35,74,433/- is not only contrary to its own recording in certificate dated 18.08.2003 but also to the entries made by the opposite party in measurement book. The amount reflected in certificate dt. 18.08.2003 is also supported by the entries in the measurement book which again is a document authored by the opposite party. It is clearly reflected in measurement book that the amount for 1st quarter of 2000 is not Rs.1,21,600/- but Rs.35,74, 433/-."*

But, there is no specific denial to such pleading. Rather in paragraph-11 of the counter affidavit, it is stated as follows:-

> *"11. That in reply to the averments made in Paragraphs-21 to 28 of the writ application, it is humbly submitted that the after examining the claim of the petitioner, the O.P. No.1, by conducting short audit and in consultation with the Finance Department has sanctioned the legitimate amount in favour of the petitioner and accordingly the same has been paid to the petitioner. No further claim of the petitioner is pending with the Opp. Parties. Considering the aforesaid facts, the Hon'ble Court may graciously be pleased to dismiss the writ being devoid of any merit."*

Since the pleadings made in paragraph-23 of the writ petition have not been disputed by the opposite parties and the claim has been denied only on the basis of no claim certificate, the petitioner is entitled to get the benefit of blockage amount of Rs.4,20,940/- towards escalation cost as per the bill submitted on 27.08.2002.

25. Considering the facts and law, as discussed above, this Court is of the considered view that the opposite parties are liable to pay the blockage amount of Rs.4,20,940/- towards escalation cost as per the bill submitted on 27.08.2002 along with interest @ 12% per annum w.e.f. 22.08.2012 till the actual payment is made. As such, the payment shall be made within a period of three months from the date of communication/production of the judgment, failing which it will carry further interest @ 18% per annum w.e.f. from 22.08.2012 till the actual payment is made.

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

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a print out 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, and Court's Office Order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

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2022 (I) ILR - CUT- 341

Dr. B.R. SARANGI, J.

W.P.(C) NOS. 30107, 31137 & 41959 OF 2021

SURENDRA KUMAR SAHOO ..………Petitioner

.V.

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

W.P.(C) NO. 31137 OF 2021

RANJAN KUMAR PRUSTY AND ORS. ………..Petitioners

.V.

CHIEF EXECUTIVE OFFICER, (C.E.O.),
TATA POWER CENTRAL ODISHA DISTRIBUTION
LTD. (TPCODL), BBSR AND ORS . ……….Opp. Parties

W.P.(C) NO. 41959 OF 2021

GEETA CHOUDHURY ………..Petitioner

.V.

THE CHIEF EXECUTIVE OFFICER,
TATA POWER CENTRAL ODISHA DISTRIBUTION
LTD (TPCODL), BBSR & ANR. ………..Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 12 – State – Definition thereof – The question arose as to whether a private body exercising its public functions even if it is not a part of the State, the aggrieved person has a remedy under the Constitution, by way of a writ petition under Article 226? – Held, yes.

> *"Applying the principles laid down by seven Judge Bench in* ***Pradeep Kumar Biswas*** *(supra), it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more. With the majority view of the apex Court, it was held that when a private body exercises its public functions even if it is not a part of the State, the aggrieved person has a remedy not only under the ordinary law but also under the Const itution, by way of a writ petition under Article 226. Therefore, merely because a non- governmental body exercises some public duty that by itself would not suffice to make such body a part of the State for the purpose of Article 12. Thereby, the BCCI does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to the public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a part of the State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32. (Para 43 & 44)*

(B) CONSTITUTION OF INDIA, 1950 – Article 12 – State – Definition thereof – Whether Tata Power which is distributing electricity in the name and style of as TPNODL, TPWDL, TPSODL and TPCODL, and, thereby, discharging the public duty, the State having some control over its management through GRIDCO, whether can be called an 'Authority' ? – Held, yes.

> *" In view of the foregoing discussions, it is made clear that though TPCL is a company, but it has indulged in distribution of electricity in four distribution*

areas of the State in different names, such as, TPNODL, TPWDL, TPSODL and TPCODL, and, thereby, discharging the public duty and, as such, its management is also controlled by the State through GRIDCO. Therefore, TPCL can be said to be an "authority" within the meaning of Article 226 of the constitution of India. On conspectus of the facts available on record and the propositions of law, as discussed above, it can be safely held that the distribution companies like TPNODL, TPWDL, TPSODL and TPCODL, in which the Government through GRIDCO has got 49% of equity share, whereas as TPCL has got 51% of equity share, are discharging their functions under the Statute and the activities undertaken by them are in the nature of a public duty. Therefore, they are coming within the meaning of 'authority' under Article 226 of the Constitution of India, if not as 'State' as prescribed under Article 12 of the Constitution of India, and otherwise satisfy the requirement of the law and thereby it can be held that writ petitions are maintainable against those distribution companies." (Para 48 & 49)

Case Laws Relied on and Referred to :-

1. 2005) 4 SCC 649 : AIR 2005 SCC 2677 : M/s. Zee Tele Films Ltd. & Anr. Vs. Union of India & Ors.
2. 2010 (supp.-1) OLR-919 : North Eastern Electricity Supply Company of Orissa Ltd Vs. State of Orissa & Ors.
3. 126 (2018) CLT 633 : National Bank for Agriculture and Rural Development (NABARD) & Anr. Vs. Chita Ranjan Patnaik & Ors.
4. (2001) 7 SCC 1 : Steel Authority of India Ltd Vs. National Union Waterfront Workers.
5. (1967) 3 SCR 377 : AIR 1967 SC 1857 : Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal & Ors.
6. (1975) 1 SCC 421 : 1975 SCC : Sukhdev Singh & Ors. Vs. Bhagatram Sardar Singh Raghuvanshi & Ors.
7. (1979) 3 SCC 489 : AIR 1979 SC 1628 : Ramana Dayaram Shetty Vs. International Airport Authority of India.
8. (1981) 1 SCC 722 : Ajay Hasia Vs. Khalid Mujib Sehravardi.
9. AIR 1980 SC 840 : U.P.Warehousing Corporation Vs. Vijay Narain.
10. (1981) 1 SCC 449 : AIR 1981 SC 212 : Som Prakash Rekhi Vs. Union of India.
11. (1975) 1 SCC 485 : AIR 1975 SC 1329 : Sabhajit Tewary Vs. Union of India.
12. AIR 1988 SC 469 : Tekraj Vasandi alias Basandi Vs. Union of India.
13. (1989) 2 SCC 69 : Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust Vs. V.R. Rudani.
14. AIR 1992 SC 76 : Chandra Mohan Vs. NCERT.
15. (2002) 5 SCC 111 : Pradip Kumar Biswas Vs. Indian Institute of Chemical Biology.
16. AIR 2005 SC 411 : Virendra Kumar Srivastava Vs. U.P. Rajya Karmachari Kalyan Nigam & Anr.
17. (2005) 4 SCC 649 : Zee Telefilms Ltd. and another Vs. Union of India & Ors.
18. (2015) 4 SCC 670 : K.K. Saksena Vs. International Commission on Irrigation & Drainage & Ors.

W.P.(C) NO. 30107 OF 2021

For Petitioner : Mr. P.K. Mohanty, Senior Advocate along with M/s. S.B. Das and P.K. Nayak

For Opp. Parties: Mr. S.N. Nayak, Addl. Standing Counsel

W.P.(C) NO. 31137 OF 2021

For Petitioners : M/s. B.K. Mohanty and J. Sahu, Advocates

For Opp. Parties : None

W.P.(C) NO. 41959 OF 2021

For Petitioner : M/s. Satyabrata Mohanty, S.S. Mohapatra, A.K. Jena, A.P. Rath and P. Sinha.

For Opp. Parties : None

JUDGMENT Date of Hearing: 18.01.2022: Date of Judgment: 24.01.2022

Dr. B.R. SARANGI, J.

A good number of writ petitions, having been filed against different electricity distribution companies, this Court called upon learned counsel appearing for the petitioners in those writ petitions to address this Court with regard to their maintainability. In response, learned counsel appearing for the petitioners in the above noted three writ petitions participated in the process of hearing and addressed the Court on the question of maintainability of the writ petitions. Therefore, these three writ petitions are taken up for consideration with regard to their maintainability before this Court against the distribution companies, irrespective of the factual matrix mentioned in each of the writ petitions.

2. Mr. P.K. Mohanty, learned Senior Advocate appearing along with Mr. S.B. Das, learned counsel for the petitioner in W.P.(C) No. 30107 of 2021 contended that as the opposite party-Tata Power Northern Odisha Distribution Limited (TPNODL) performs activity of supply of electricity, which is a duty of public nature, therefore, it is a 'State' and, as such, the writ is maintainable as against TPNODL. To substantiate his contention, he has relied upon the judgments of the apex Court in ***M/s. Zee Tele Films Ltd. and another v. Union of India and others***, (2005) 4 SCC 649 : AIR 2005 SCC 2677; ***North Eastern Electricity Supply Company of Orissa Ltd v. State of Orissa and others***, 2010 (supp.-1) OLR-919; and ***NESCO Power Engineers Association v. Managing Director, NESCO, WESCO & Director, SOUTHCO and others*** (W.P.(C) No. 9745 of 2010 disposed of on 18.04.2011).

3. Mr. Binaya Kumar Mohanty, learned counsel for the petitioner in W.P.(C) No. 31137 of 2021 supported the argument advanced by Mr. P.K. Mohanty, learned Senior Advocate appearing for the petitioner in W.P.(C) No. 30107 of 2021. He also relied on the judgment of this Court in ***National Bank for Agriculture and Rural Development (NABARD) and another v. Chita Ranjan Patnaik and others***, 126 (2018) CLT 633.

4. Mr. Satyabrata Mohanty, learned counsel appearing for the petitioner in W.P.(C) No. 41959 of 2021 also supported the contention raised by Mr. P.K. Mohanty, learned Senior Advocate appearing for the petitioner in W.P.(C) No. 30107 of 2021 and Mr. Binaya Kumar Mohanty, learned counsel for the petitioner in W.P.(C) No. 31137 of 2021. He unequivocally contended that since TPCODL is discharging the duties and responsibilities of supplying electricity to the people, is performing "public duty". Therefore, the writ petition is maintainable against TPCODL.

5. At the outset, it is of relevance to mention here that initially the supply of electricity, including transmission, maintenance and distribution, was undertaken by Orissa State Electricity Board, a corporation created under the statute and completely regulated by the State. Subsequently, with a view to restructuring of the electricity industry for rationalization of the generation, transmission, distribution and supply of electricity; and for avenues for participation of private sector entrepreneurs in the electricity industry in the State in an efficient, economic and competitive manner, including the constitution of Electricity Regulatory Commission for the State and for the matters connected therewith and incidental thereto, the State Government, in exercise of the powers conferred under Sub-section (5) of Section 23 read with Section 55 of the Orissa Electricity Reforms Act, 1955 (Orissa Act 2 of 1996) as amended by the Orissa Electricity Reforms (Amendment) Ordinance, 1998 (Orissa Ordinance No. 3 of 1998) and after consultation with the Grid Corporation of Orissa Limited, made the transfer scheme rules, for the purpose of providing and giving effect to preparation and implementation of a scheme for the transfer of distribution undertakings of the Grid Corporation of Orissa Limited to the distribution companies, called "Orissa Electricity Reform (Transfer of undertakings, Assets, Liabilities, Proceedings and Personnel of Gridco to Distribution Companies) Rules, 1998 (hereinafter to be referred as "Rules, 1998").

Accordingly, the entire State of Odisha was divided into four distribution zones/areas for supply of electricity and incorporated four distribution companies, namely, WESCO, NESCO, CESCO and SOUTHCO. As such they were performing the essential public duty and also executing schemes sponsored by the Central and the State Government. These companies came into existence as per the Rules, 1998 and were entrusted with the task of spending the Central and State Government assistance, while executing such schemes. Those four distribution companies were in charge of collection of electricity duty, which is government revenue, along with the energy charges, collected from the customers. They were subsidiary of GRIDCO, a wholly owned company of the State Government, which holds 49% share and, therefore, those companies were funded by the State Government through the share held by the GRIDCO. More so, various schemes like Accelerated Power Development & Reform Programme (APDRP) and Minimum Need Programme (MNP) etc. were carried out by those distribution companies, for which funds were provided by the State Government for electrification work in the State.

6. For a just and proper adjudication of the maintainability issue, the factual matrix of W.P.(C) No. 30107 of 2021, which is essential only for the purpose of deciding the issue of maintainability, is referred to herein below.

7. North Eastern Electricity Supply Company of Odisha Limited (NESCO), which is one of the four above named distribution companies and whose against WP(C) No. 30107 of 2021 has been preferred, was incorporated on 19th November, 1997 under the Companies Act, 1956. Pursuant to the Odisha Electricity Reforms Act 1995 and Odisha Electricity Reforms Rules, 1998, all the assets of GRIDCO pertaining to the distribution business in the Northern Zone of GRIDCO comprising districts of Balasore, Mayurbhanj, Keonjhar, Jajpur, and Bhadrak were transferred to NESCO. On 1st April, 1999, 51% (fifty one percent) shares of GRIDCO in NESCO were transferred to BSES Limited selected through competitive bidding process. NESCO continued to be managed by BSES Limited and later by its successor R-Infra Limited. Under Section 19 of the Electricity Act, 2003 (the "Act, 2003"), the Commission revoked license of NESCO with effect from March, 2015 and appointed CMD, GRIDCO as the Administrator under Section 20(d) of Act, 2003 and vested the management and control of NESCO Utility along with their assets, interests and rights with the CMD, GRIDCO Limited. The order on revocation of licenses by the Commission was upheld by the

APTEL in Appeal No. 64 of 2015 and also confirmed by the apex Court vide order dated 24.11.2017 in Civil Appeal No.18500 of 2017. In terms of Section 20 of Act, 2003, the Commission initiated a transparent and competitive bidding process for selection of an investor for sale of utility of NESCO and had issued the updated Request for Proposal ("RFP") on 31.07.2020. In response to the said RFP, single bid was received by due date. After detailed evaluation by independent bid evaluation committee set up by the Commission, Tata Power Company Limited ("TPCL") was recommended as the successful bidder and Commission accepted the same under Section 20(1)(a) of the Act, 2003. Thereafter, the Commission issued a Letter of Intent (the "LoI") to TPCL vide letter dated 29.01.2021. TPCL communicated the acceptance of the LoI vide letter dated 05.02.021.

8. As per the terms of the RFP, upon completion of sale, NESCO Utility shall vest in a Special Purpose Vehicle ("Project SPV" or "Operating Company") in which TPCL shall hold 51% (fifty one percent) equity shares and Government of Odisha shall hold 49% (forty nine percent) equity shares through GRIDCO. The Commission, vide letter dated 29.01.2021, directed GRIDCO to incorporate the SPV, to which the utility of NESCO shall be vested and license of NESCO Utility shall be transferred. TP Northern Odisha Distribution Limited ("TPNODL") will be incorporated as a wholly owned subsidiary of GRIDCO with an authorized share capital of Rs. 1000 crores (Indian Rupee One thousand crores) only and paid-up capital of Rs. 5 lakhs (Indian Rupee Five lakhs) only. TPNODL shall be the SPV, in which TPCL and GRIDCO shall hold 51% (fifty one percent) and 49% (forty nine percent) equity shares respectively after the completion of sale. The Commission, vide letter dated 29.01.2021, provided GRIDCO/ OPTCL the RFP Documents namely – Share Acquisition Agreement, Shareholders Agreement, Bulk Supply Agreement and Bulk Power Transmission and SLDC Agreement for execution by concerned parties. TPCL quoted a purchase price of Rs. 375 crores (Indian Rupee Three hundred seventy five crores) in its financial bid in response to the RFP for 100% (one hundred percent) equity in the SPV. TPCL is required to pay 51% (fifty one percent) of the purchase price of Rs. 375 crores (Indian Rupee Three hundred seventy five crores) quoted in its bid. As per terms of RFP, this amount is required to be deposited by TPCL with the Commission. The Commission, vide letter dated 29.01.2021 (LoI), had directed TPCL to submit the Performance Guarantee and deposit the amount equivalent to 51% (fifty one percent) of the purchase price with the Commission. In compliance thereto, TPCL vide

letter dated 10.03.2021 communicated that they have deposited Rs.191.25 (Indian Rupee One ninety one crore and twenty five lakhs only) with the Commission which is 51% of the bid amount of Rs. 375 crore and submitted the Performance Guarantee of Rs. 150 crores (Indian Rupee One hundred fifty crores) as per the directions of the Commission.

9. As a consequence thereof, TPNODL has come to existence and carrying on business of distribution of electricity in the northern part of the State of Orissa. Similarly, in the other parts of the State, TPCL has also entered into the agreement and engaged in the business of distribution of electricity. As per the terms of the RFP, upon completion of sale, the earlier distribution company shall vest in a SPV, in which TPCL shall hold 51% (fifty one percent) equity shares and Government of Odisha shall hold 49% (forty nine percent) equity shares through GRIDCO. In view of the provisions of Section 21(a) of the Act, 2003, the utility of NESCO shall be vested in TPNODL with effect from 01.04.2021. As a consequence thereof, the license, the rights and responsibilities of NESCO utility transferred to TPNODL with effect from 01.04.2021, pursuant to the vesting order dated 25.03.2021 passed by the Orissa Electricity Regulatory Commission in Case No. 9/2021. The vesting order dated 25.03.2021 also clarifies with regard to the management, funds and control over the distribution company by the State Government through GRIDCO. The petitioner in W.P.(C) No. 30107 of 2021 files an affidavit on 09.11.2021 placing the vesting order dated 25.03.2021 on record and thereafter by way of a memo filed on 13.12.2021 placed on record the Shareholders Agreement between GRIDCO Limited and The Tata Power Company Limited and TPNODL dated 1st day of April 2021, the Share Acquisition Agreement between GRIDCO Limited and The Tata Power Company Limited and TPNODL dated 1st day of April, 2021 and Bulk Supply Agreement between GRIDCO Limited and TPNODL dated 1st day of April, 2021.

10. Shareholders agreement dated 1st April, 2021 clearly signifies its utility and responsibility and also deals with its objective under Article 2. Article-4 thereof deals with the Management of TPNODL-Directors, Chairman, Managing Director/ Manager. Clasue-4.1, 4.2 and 4.3 of Article-4, being relevant, are extracted herein below:-

> *"4.1 The Board of Directors of TPNODL shall consist of the nominees of the respective parties, i.e. GRIDCO and TPCL in proportion to the shares held by them. For as long as each of GRIDCO and TPCL is th e registered shareholders of ten*

> *percent (10%) or more of the shares it shall be entitled to appoint one Director of TPNODL for each tranche of ten percent (10%) of the Shares of which it is the registered holder at the relevant time and to remove and replace such Director.*
>
> *4.2 Given the shareholding of fifty one percent (51%) by TPCL and forty nine percent (49%) by GRIDCO, the Board of TPNODL shall consist of nine (9) Directors nominated by Shareholders. TPCL shall be entitled to nominate five (5) Directors whereas GRIDCO shall be entitled to nominate four (4) Directors. The Directors nominated by GRIDCO may include all or any one from among the Chairman of GRIDCO, the Principal Secretary, Department of Energy, Government of Odisha and the Chief Secretary, Government of Odisha as decided by the Government of Odisha.*
>
> *4.3 Any one from among Chairman of GRIDCO or the Principal Secretary, Department of Energy, Government of Odisha or the Chief Secretary, Government of Odisha, who are nominated as Directors by GRIDCO, shall be the Chairman of the Board of Directors as decided by the Government of Odisha. The Parties may also mutually agree to appoint an eminent person, who is appointed as an independent Director on the Board, as the Chairman of the Board. In the absence of the Chairman of the Board at any of the Board meetings, the members personally present at such meeting shall elect one of the Directors nominated by the GRIDCO to be the Chairman, on a show of hands, to preside over such meeting."*

Article 5 deals with Business of TPNODL; Article 6 deals with funding; Article 7 deals with matters requiring consent of both parties; Article 8 deals with the financial policy, accounts and audit; Article 13 deals with termination; and Article 18 deals with Mutual Cooperation.

11. Similarly, in Share Acquisition Agreement dated 1st April, 2021 it has been clearly specified at Clause 1.2 (a) that all references in this agreement to statutory provisions shall be construed as meaning and including references to any statutory modification, amendment, consolidation or re-engagement made after the date of this agreement and for the time being in force. Thereby, the law which is applicable has given effect to by virtue of this agreement.

12. Even in the Bulk Supply Agreement dated 1st April, 2021, it is provided that they are also to be regulated under the provisions of the law and in definitions, it has also been specified that "Act" means Electricity Act, 2003. Thereby, TPNODL is regulated and guided by the existing Acts, Rules and Regulations framed for distribution of electricity.

13. The petitioner in W.P.(C) No. 30107 of 2021 has also filed a memo on 18.01.2022 bringing on record, the notifications nominating the Directors

on behalf of GRIDCO in the Board of Directors of TPNODL, TPWODL, TPSODL and TPCODL and also incorporated the Memorandum of Association of TPNODL and Article of Association of TPNODL. On perusal of the Notification dated 31st March, 2021, it is made clear that the Principal Secretary to Government, Energy Department, Chairman, GRIDCO and Managing Director, GRIDCO are nominated as the Directors to the Board of Directors of TPNODL, but subsequently in place of Chairman, GRIDCO, the Managing Director has been included to the Board of Directors by notification dated 24.05.2021. Thereby there is a pervasive control of the State over the Management of TPNODL.

14. In the Memorandum of Association, Clause III (b) deals with matters which are necessary for furtherance of the objects specified in Clause 3 (a), sub-clause (1) of which reads thus-

> *"1. To enter into any arrangement with the government of India or the Government of Odisha, the Orissa Electricity Regulatory Commission ("OERC") or any Local or State Government or with authorities, national, local, municipal or otherwise or with any person for the purpose of directly or indirectly carrying out the objects or furthering the interest of the Company or its members and to obtain from any such Government, State Authority, the OERC or other persosn any licenses, charters, subsidies, loans, indemnities, grants, contracts, decrees, rights, sanctions, privileges, permissions, consents, approvals or concessions whatsoever, (whether statutory or otherwise) which the Company may think it desirable to obtain and to carry out exercise and comply with the same and to do anything which the Company is authorized or required to do under or by virtue of any licence granted to the Company by the OERC for attainment of its objects."*

15. In the Article of Association, it has been clarified a public company means a company which is not a private company and that a company, which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles. Clasue-89 thereof deals with Shareholders' Agreement Provisions, which reads as follows:-

> *"The provisions of the Shareholders' Agreements dated April 01, 2021 among the Company, The Tata Power Company Limited and GRIDCO Limited (as amended from time to time) ("Shareholders' Agreement"), a copy of which is attached as Annexure A, shall form an integral part of the Articles of Association of the Company, which thereby means that in the event of any conflict or inconsistency, between Articles 1-88 of these Articles of Association and the Shareholders' Agreement, the provisions of the Shareholders' Agreement will be followed."*

16. Before adverting to the core issue, it is required to take a look at Articles 12 and 226 (1) of the of the Constitution of India, which read as under :

> *"12. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."*
>
> *xxx xxx xxx*
>
> *"226. (1) Power of High Courts to issue certain writs:- (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."*

17. In Article 12, the 'State' has not been defined. It is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word 'or' is disjunctive and not conjunctive. Similarly, Article 226 (1) envisages that the power of the High Court to issue certain writs to 'any person' or 'authority' including in appropriate cases to any Government within the territories for enforcement of rights conferred by Part III and for any other purpose.

18. The expression 'authority' has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation to arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12 or the meaning of the word 'authority' as mentioned in Article 226 (1).

19. The term "other authorities" contained in Article 12 is not to be treated as ejusdam generis. Similarly, the word 'authorities', as mentioned in Article 226 of the Constitution, has to be taken into consideration for adjudication of the matter itself.

20. In "**Concise Oxford English Dictionary**", 10th Edition, the word 'authority' has been defined as under :

> *"1. the power or right to give orders and enforce obedience. 2. a person or organization exerting control in a particular political or administrative sphere. 3. the power to influence others based on recognized knowledge or expertise."*

21. According to **Corpus Juris Secundum** (at p.1290), the following are the meanings of the term 'authority':

> *"In its broad general sense, the word has been defined as meaning control over; power; jurisdiction; power to act, whether original or delegated. The word is frequently used to express derivative power; and in this sense, the word may be used as meaning instructions, permission, power delegated by one person to another, the result of the manifestations by the former to the latter of the formers consent that the latter shall act for him, authority in this sense in the laws of at least one state, it has been similarly used as designating or meaning an agency for the purpose of carrying out a state duty or function; some one to whom by law a power has been given."*

> *"Authority, as the word is used throughout the Restatement, is the power of one person to affect the legal relations of another by acts done in accordance with the others manifestations of consent to him; an agency of one or more participating governmental units created by statute for specific purpose of having delegated to it certain functions governmental in character; the lawful delegation of power by one person to another; power of agent to affect legal relations of principal by acts done in accordance with principals manifestations of consent to him."*

The above meaning of 'authority' has been referred to in ***Steel Authority of India Ltd V. National Union Waterfront Workers***, (2001) 7 SCC 1.

22. From the above meaning, there are three different concepts which exist for determining the question which fall within the expression 'authorities'.

> *(i) The Corporations and the Societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution where for the capital, infrastructure, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control there over.*
>
> *(ii) Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.*
>
> *(iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government.*

23. There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether it fulfills the requirements of law therefor or not.

24. What is necessary is to notice the functions of the Body concerned. A ‘State’ has different meanings in different context. In a traditional sense, it can be a body politic but in modern international practice, a State is an organization which receives the general recognition accorded to it by the existing group of other States. Union of India recognizes the Board as its representative. The expression “other authorities” in Article 12 of the Constitution of India is ‘State’ within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by Part-III of the Constitution and Directive Principles of the State Policy contained in Part-IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

25. Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a charter of liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred ┬ the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government established under the Constitution and the establishments of organizations funded or controlled by the Government.

26. It is not that every body or association which is regulated in its private functions becomes a ‘State’. What matters is the quality and character of functions discharged by the body and the State control flowing therefrom.

The development of law in this field is well-known. At one point of time, the companies, societies etc. registered under the Indian Companies Act and Societies Registration Act were treated as separate corporate entities being governed by its own rules and regulations and, thus, held not to be 'States' although they were virtually run as department of the Government, but the situation has completely changed. Statutory authorities and local

bodies were held to be States in ***Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal & Ors***. (1967) 3 SCR 377 : AIR 1967 SC 1857.

27. The concept that all public sector undertakings incorporated under the Indian Companies Act or Societies Registration Act or any other Act for answering the description of 'State' must be financed by the Central/State Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. The primary question which is required to be posed is whether the body in question exercises "public function".

28. The expansion in the definition of 'State' is not to be kept confined only to business activities of Union of India or other State Governments in terms of Article 298 of the Constitution of India but must also take within its fold any other activity which has a direct influence on the citizens.

29. In ***Rajasthan Electricity Board*** (supra), the Constitution Bench of the Apex Court considered the question whether the Electricity Board - which was a Corporation constituted under a statute primarily for the purpose of carrying on commercial activities could come within the definition of 'State' in Article 12. After considering earlier decisions, it was said:

> *"These decisions of the Court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities".*

30. It followed that since a Company incorporated under the Companies Act is not formed statutorily and is not subject to any statutory duty vis-a-vis an individual, it was excluded from the purview of '***State***'. In ***Praga Tools Corporation V. Shri C.A. Imanual & Ors.***, (1969) 1 SCC 585 : (1969) 3 SCR 773, where the question was whether an application under Article 226 for issuance of a writ of mandamus would lie impugning an agreement arrived at between a Company and its workmen, the Court held that:

> *"[T]here was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company".*

31. In ***Rajasthan SEB*** (supra), the Constitution Bench of the apex Court has held as follows:-

> *"The expression 'other authorities' in Art. 12 is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India. The expression 'other authorities' will include all constitutional or statutory authorities on whom powers are conferred by law.*

32. In ***Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Ors***, (1975) 1 SCC 421 : 1975 SCC, by following the said ratio, the apex Court noted that the concept of 'State' in Article 12 had undergone "drastic changes in recent years". The question in that case was whether the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation each of which were public corporations set up by statutes were authorities and therefore within the definition of State in Article 12. The Court affirmed the decision in ***Rajasthan State Electricity Board*** (supra) and held that the Court could compel compliance of statutory rules. But the majority view expressed by A.N. Ray, CJ also indicated that the concept would include a public authority which:

> *"is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit".*

33. The tests propounded by Mathew, J in ***Sukhdev Singh*** (supra) were elaborated in ***Ramana Dayaram Shetty v. International Airport Authority of India***, (1979) 3 SCC 489 : AIR 1979 SC 1628 and were re-formulated two years later by a Constitution Bench in ***Ajay Hasia v. Khalid Mujib Sehravardi***, (1981) 1 SCC 722. What may have been technically characterised as 'obiter dicta' in ***Sukhdev Singh*** and ***Ramana*** (since in both cases the 'authority' in fact involved was a statutory corporation), formed the ratio decidendi of ***Ajay Hasia***.

34. In ***Ajay Hasia*** (supra), the Constitution Bench summarized the relevant tests gathered from the decision in ***R.D.Shetty*** for determining whether an entity is a 'State' or "instrumentality of the State" as follows:

> *(1) "One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicting that the corporation is an instrumentality or agency or Government.*

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

(3) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(4) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classified the corporation as a instrumentality or agency of Government.

(5) *Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government*."

It was held in ***Ajay Hasia*** that if on consideration of the relevant factors, it is found that the Corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12. The same view has also been taken into consideration by the apex Court in ***U.P.Warehousing Corporation v. Vijay Narain***, AIR 1980 SC 840.

35. On the same day that the decision in ***Ajay Hasia*** was pronounced came the decision of ***Som Prakash Rekhi v. Union of India***, (1981) 1 SCC 449: AIR 1981 SC 212. Here too, the reasoning in ***Ramana*** was followed and Bharat Petroleum Corporation was held to be a "State" within the "enlarged meaning of Art.12". ***Sabhajit Tewary v Union of India*** (1975) 1 SCC 485 : AIR 1975 SC 1329 was criticised and distinguished as being limited to the facts of the case. It was said:

> *"The rulings relied on are, unfortunately, in the province of Art.311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C.J., rejected the argument that merely because the Prime Minister was the President or that the other members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in Airport Authority case the composition of the Government Body alone may not be decisive. The laconic discussion and the limited ratio in Tewary hardly help either side here."*

36. In ***Tekraj Vasandi alias Basandi v. Union of India*** , AIR 1988 SC 469 (paragraphs 17-A and 20), it is held that the expression 'authority' in its

etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed. But in paragraph 20 the Court observed as follows:

> *"In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence in the absence of a fair application of the tests to be made, there is possibility of turning every non- governmental society into agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality."*

37. In ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani***, (1989) 2 SCC 69, the apex Court held as follows:-

> *"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. * So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.*
>
> * * *
>
> *17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means every body which is created by statute - and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Court to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose'.*

* * *

19. The term 'authority' used in Article 226, in the context, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art.32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

38. In para 15 of **Andi Mukta Sudguru** case, the Court spelled out two exceptions to the writ of mandamus, viz. (i) if the rights are purely of a private character, no mandamus can issue; and (ii) if the management of the college is purely a private body "with no public duty", mandamus will not lie. The Court clarified that since the Trust in the said case was an aiding institution, because of this reason, it discharges public function, like Government institution, by way of imparting education to students, more particularly when rules and regulations of the affiliating University are applicable to such an institution, being an aided institution. In such a situation, held the Court, the service conditions of academic staff were not purely of a private character as the staff had super-aided protection by University's decision creating a legal right and duty relationship between the staff and the management.

39. Further, the Court explained in para 20 of **Andi Mukta Sudguru** case that the term "authority" used in Article 226, in the context, would receive a liberal meaning unlike the term in Article 12, inasmuch as Article 12 was relevant only for the purpose of enforcement of fundamental rights under Article 31, whereas Article 226 confers power on the High Courts to issue writs not only for enforcement of fundamental rights but also non-fundamental rights. What is relevant is the dicta of the Court that the term "authority" appearing in Article 226 of the Constitution would cover any other person or body performing public duty. The guiding factor, therefore, is the nature of duty imposed on such a body, namely, public duty to make it exigible to Article 226.

40. In ***Chandra Mohan v. NCERT***, AIR 1992 SC 76, in paragraph-3, the apex Court held as follows:

> *"It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Art.12. The State control, however, vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State"."*

41. The tests, which have been determined in ***Ajay Hasia*** (supra), are also held not rigid set of principles so that a body falling within any one of them must be considered to be 'State'. The question in case would be: whether on facts, the body is financially, functionally and administratively dominated by or under the control of Government and such control must be particular to that body and must be pervasive. Therefore, the decision in ***Sabhaijit Tewary*** (supra) has been overruled by the 7 Bench judgment of the apex Court in ***Pradip Kumar Biswas v. Indian Institute of Chemical Biology***, (2002) 5 SCC 111 and the apex Court by over- ruling ***Sabhaijit Tewary*** (supra) held as follows:

> *"(1) simply, by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of " other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute creating the entity should have been vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs or other people- their rights, duties, liabilities or other legal relations. It created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavor and clear indicia of power- constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in* ***Ajay Hasia*** *enable determination of governmental ownership or control. Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Therefore, the question whether an entity is an "authority" cannot be answered by applying* ***Ajay Hasia*** *tests.*

*(2) The tests laid down in **Ajaya Hasia** case relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned."*

42. In ***Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and another***, AIR 2005 SC 411, taking into consideration ***Pradip Kumar Biswas*** (supra), the apex Court has held that the question in each case would be-whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a 'State' within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a 'State'.

43. In ***Zee Telefilms Ltd. and another v Union of India and others***, (2005) 4 SCC 649, the majority view of the apex Court, referring to the guidelines laid down in ***Pradeep Kumar Biswas*** (supra), held that for a body to be a part of 'State' under Article 12 are:-

(1) Principles laid down in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.

(2) The Question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.

(3) Such control must be particular to the body in question and must be pervasive.

(4) Mere regulatory control whether under statute or otherwise would not serve to make a body a State.

The facts established in the said case shows the following :-

1. Board is not created by a statute.

2. No part of the share capital of the Board is held by the Government.

3. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.

> *4. The Board does enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected.*
>
> *5. There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.*
>
> *6. The Board is not created by transfer of a Government owned corporation. It is an autonomous body.*

To these facts, applying the principles laid down by seven Judge Bench in ***Pradeep Kumar Biswas*** (supra), it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more.

With the majority view of the apex Court, it was held that when a private body exercises its public functions even if it is not a part of the State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non- governmental body exercises some public duty that by itself would not suffice to make such body a part of the State for the purpose of Article 12.

Thereby, the BCCI does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to the public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a part of the State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

44. In ***K.K. Saksena v. International Commission on Irrigation & Drainage and others***, (2015) 4 SCC 670, the apex Court held as follows:-

> *"The term "authority" used in Article 226 to be more liberally interpreted that same term used in Article 12 since Article 12 is relevant only for enforcement of fundamental rights, while Article 226 confers power on High Courts to issue writs for enforcement of non-fundamental rights also. Thereby, it is held even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function."*

45. In ***North Eastern Electricity Supply Company of Orissa Ltd.*** (supra), this Court has come to a conclusion that the said 4 distribution companies are governed by the different rules and regulations framed by the State Government, for supply and distribution of electricity in the State of Orissa under the Electricity Act, 2003 and Orissa Electricity Reform Act, 1995, the performance of the distribution companies and the rate of tariff to be collected by them and regulated by OERC. Moreover, the 4 distribution companies, including the petitioner company, are discharging governmental functions of distribution and supply of electricity to the people of the State, which is an essential public duty. Thereby, held that company is a "public authority" and, therefore, fall within the definition of "public authority" as defined in the RTI Act.

46. In ***NABARD*** (supra), this Court had come to a conclusion that taking into account the nature of constitution of NABARD and discharge of its duties and keeping in view the parameters provided in the cases of Dr. S.L. Agarwal, Ajay Hasia and Pradeep Kumar Biswas, NABARD can be construed as a 'State' within the meaning of Article 12 of the Constitution of India, being an instrumentality of the State and an 'authority'. Thus, writ application against NABARD is maintainable.

47. In ***NESCO Power Engineers Association*** (supra), which is an unreported judgment, this Court held that the opposite parties are the creatures of the Statute of 1995 and the distribution companies are public utility companies formed under the Orissa Electricity Reforms Act, 1995 to discharge the statutory functions and their functions are also for the general public, meaning thereby, their public duty is to supply power to the

consumers in the State of Orissa. Hence, they come under the definition of Articles 12 and 226 of the Constitution of India. Therefore, the writ petitions are maintainable.

48. In view of the foregoing discussions, it is made clear that though TPCL is a company, but it has indulged in distribution of electricity in four distribution areas of the State in different names, such as, TPNODL, TPWDL, TPSODL and TPCODL, and, thereby, discharging the public duty and, as such, its management is also controlled by the State through GRIDCO. Therefore, TPCL can be said to be an "authority" within the meaning of Article 226 of the constitution of India.

49. On conspectus of the facts available on record and the propositions of law, as discussed above, it can be safely held that the distribution companies like TPNODL, TPWDL, TPSODL and TPCODL, in which the Government through GRIDCO has got 49% of equity share, whereas as TPCL has got 51% of equity share, are discharging their functions under the Statute and the activities undertaken by them are in the nature of a public duty. Therefore, they are coming within the meaning of 'authority' under Article 226 of the Constitution of India, if not as 'State' as prescribed under Article 12 of the Constitution of India, and otherwise satisfy the requirement of the law and thereby it can be held that writ petitions are maintainable against those distribution companies.

50. Accordingly, all the writ petitions be segregated and listed before the assigned bench under appropriate heading for disposal on their own merits.

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2022 (I) ILR - CUT- 363

ARINDAM SINHA, J.

W.P.(C) NO. 7216 OF 2020

M/S. BAJAJ ELECTRICALS LTD. ……….Petitioner

.V.

MICRO SMALL AND ENTERPRISERS FACILITATION & ANR. ……….Opp. Parties

MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Section 18 read with the provisions of Limitation Act, – Arbitration proceeding and Award under – Petitioner took the plea that the claims being barred by limitation, the proceeding was not maintainable – OP pleaded that, the Act, 2006 prohibits the applicability of provision of any other Act including the Limitation Act, 1963 – Further plea that in the event of dispute between a general Act versus special Act, the later will always prevail over the provision of the former – Law on the subject examined with reference to various decision of the apex court – Held, it appears from the contentions and the consequential award, the point of limitation has not been adjudicated at all – Even under the Act of 2006 a person is entitled to plead the question of limitation in defence at the first instance, against a claim lodged before the Council – Award set aside – Matter remanded for disposal in accordance with law.

Case Laws Relied on and Referred to :-

1. SCC Online SC 439 : Silpi Industries Vs. Kerala State Road Transport Corporation available at 2021
2. (2005) 8 SCC 618 : SBP & Co. Vs. Patel Engineering Ltd.
3. (2008) 7 SCC 169 : Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department
4. (2011) 167 Company Cases 596 (Orissa): Eimco Elecon (India) Ltd. Vs. Mahanadi Coalfields Ltd.

For Petitioner : Mr. Ram Chandra Panigrahi.
For Opp. Parties : Mr. A.K. Sharma, AGA.
Mr. S.P. Mishra, Sr. Adv.

ORDER Date of Order : 05.01.2022

ARINDAM SINHA, J.

1. Mr. Panigrahi, learned advocate appears on behalf of petitioner. He submits, impugned is award dated 10th December, 2019 made by Director of Industries, Odisha. This award was purportedly made under section 18 of Micro, Small and Medium Enterprises Development Act, 2006. He submits, there should be interference in writ jurisdiction because there are no reasons given in the award, in dealing with his client's contention that the claims are barred by limitation. He relies on **judgment dated 29th June, 2021** of the Supreme Court in **Silpi Industries vs. Kerala State Road Transport Corporation** available at **2021 SCC Online SC 439** (**Civil Appeal nos. 1570-1578 of 2021**), paragraphs 13 and 18. Two issues were framed in the adjudication. First issue was whether provisions of Indian Limitation Act,

1963 are applicable to arbitration proceedings initiated under section 18(3) of the 2006 Act. The Supreme Court in paragraph-18 declared that provisions of Limitation Act, 1963 are applicable to arbitration proceedings under section 18(3) of the 2006 Act. He laid emphasis on following sentence in paragraph 18, reproduced below.

> *"Thus, we are of the view that no further elaboration is necessary on this issue and we hold that the provisions of Limitation Act, 1963 will apply to the arbitrations covered by Section 18(3) of the 2006 Act."*

2. Mr. Mishra, learned senior advocate appears on behalf of opposite party and submits, the writ petition is not maintainable. He relies on the following.

(i) **Order dated 2nd November, 2020** in **Petition for Special Leave to Appeal (C) no.11883 of 2020**. Text of the order is reproduced below.

> *"Having heard Shri Kalra, learned counsel appearing for the petitioner, for some time, we may only reiterate what we have stated in Deep Industries Limited v. Oil and Natural Gas Corporation Limited and Another (2019) SCC Online SC 1602 and several other cases that we have frowned upon persons knocking at the doors of the Writ Court in arbitration matters. This is one more such case.*
>
> *As a result, we dismiss the matter with costs of Rs.50,000/- to be paid to the Supreme Court Legal Services Committee within two weeks."*

(ii) **Order dated 10th December, 2021** made by a Division Bench of this Court in **W.A. no.836 of 2021** (**M/s. Anupam Industries Ltd. v. State of Orissa and others**). The entire order is reproduced below.

> *"1. Mr. S.C. Tripathy, learned counsel for the Appellant urges that since in the present case there is a clear violation of principles of natural justice, the learned Single Judge ought not to have relegated the Petitioner to the appellate remedy provided under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act). He refers to the decision of the Supreme Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1.*
>
> *2. Having considered the submissions of Mr. Tripathy, the Court is unable to find any error having been committed by the learned Single Judge in observing that all the grounds urged in the writ petition would be urged before the Appellate Authority, under the MSME Act, in accordance with law.*
>
> *3. Accordingly, the Court is not persuaded to interfere with the writ appeal. Accordingly, it is dismissed.*

(iii) **Order dated 20th December, 2021** made by this Bench in **W.P.(C) no.28464 of 2020** (**Rolta India Ltd. v. Micro and Small Enterprises Facilitation Council and another).** He relies particularly on paragraphs 4 and 5, reproduced below:

> *"4. He also submits, order dated 10th December, 2021 made by the 1 st Division Bench of this Court in dismissing appeal against order dated 22nd September, 2021 made by coordinate Bench in Anupam Industries Ltd. (supra) cannot bind this Bench, in the circumstances of law declared by the Supreme Court.*
>
> *5. Committee of Court demands that view taken by order dated 22nd September, 2021 in Anupam Industries Ltd. (supra) by coordinate Bench, confirmed in appeal by order dated 10th December, 2021, be followed. As such, there is no room for interference."*

3. Without prejudice to above contention he submits, there is alternative efficacious statutory remedy available to petitioner. The remedy lies under section 19 of the 2006 Act read with section 34 in Arbitration and Conciliation Act, 1996. Petitioner's grounds of challenge herein against the award are to be urged under section 34 of the 1996 Act. The Court should not be moved to interfere in exercise of its extraordinary writ jurisdiction. He reiterates, the Supreme Court has frowned upon persons knocking at the doors of the writ Court, in arbitration matters. He then relies on another judgment of the Supreme Court in **SBP & Co. v. Patel Engineering Ltd.,** reported in **(2005) 8 SCC 618** paragraph-45. The paragraph is reproduced below.

> *"It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."*

One more judgment of the Supreme Court in **Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department** reported in **(2008) 7 SCC 169**, paragraph-43 he relies. Separate view was taken by **Raveendran, J.** in said paragraph. Same is reproduced below.

> *"Where the Schedule to the Limitation Act prescribes a period of limitation for appeals or applications to any court, and the special or local law provides for filing of appeals and applications to the court, but does not prescribe any period of limitation in regard to such appeals or applications, the period of limitation prescribed in the Schedule to the Limitation Act will apply to such appeals or applications and consequently the provisions of sections 4 to 24 will also apply. Where the special or local law prescribes for any appeal or application, a period of limitation different from the period prescribed by the Schedule to the Limitation Act, then the provisions of section 29(2) will be attracted. In that event, the provisions of section 3 of Limitation Act will apply, as if the period of limitation prescribed under the special law was the period prescribed by the Schedule to Limitation Act, and for the purpose of determining any period of limitation prescribed for the appeal or application by the special law, the provisions contained in sections 4 to 24 will apply to the extent to which they are not expressly excluded by such special law. The object of section 29(2) is to ensure that the principles contained in sections 4 to 24 of Limitation Act apply to suits, appeals and applications filed in a court under special or local laws also, even if it prescribes a period of limitation different from what is prescribed in the Limitation Act, except to the extent of express exclusion of the application of any or all of those provisions."*

4. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of opposite party no.1 and submits, his client duly acted, in good faith.

5. Mr. Panigrahi, in reply submits, **M/s. Anupam Industries Ltd.** (supra) and **M/s. Ved Prakash Mithal and Sons** (supra) are not orders made on adjudication. There is no ratio decidendi. They are not precedents. He submits, every case is unique and there must be adjudication for ascertaining whether or not there can be exercise of writ jurisdiction.

6. For purpose of adjudication on the question of maintainability, it is required that impugned order be looked at, to see whether interference is warranted. Impugned award begins with brief history of the case. It proceeds under heading 'counter' to record contentions of petitioner. That is followed by further record of contentions of opposite party, as appearing from the rejoinder filed before the Council.

7. On perusal of impugned award, it is clear that petitioner took the point of the claims being barred by limitation. Paragraphs 4 and 5, under heading 'counter' in impugned award, are reproduced below.

> **"***4. That the petition is heavily barred by law of limitation and is bound to be dismissed.*
>
> *5. That, the petitioner claims to have raised bills on 06.08.2010, 28.06.2010 and 15.12.2010. A look at the invoices reveals that none of the invoices have any acknowledgement from the Opposite Party."*

Opposite party had a contention pleaded in the rejoinder as recorded in impugned order and reproduced below.

> *"3. That, this Act statutorily prohibits the applicability of provision of any other Act including the Limitation Act, 1963. It is well settled principle of law that in the event of dispute between a general Act versus special Act, the later will always prevail over the provision of the former. Therefore, the claim of the claimant being with regard to the provisions of the MSMED Act, 2006 which is a special Act, the provision of Limitation Act, 1963 will have no applicability to present case which is protected under a special Act. Thus, the objection of the respondent in this regard is baseless."*

8. Basis for the award is reproduced below:

> **"***Heard the matter.*
>
> *The petitioner submitted before the Council that he has supplied the Electrical Conductors to the different destination of Bajaj Electricals Ltd., Mumbai as against P.O. during the year 2010. Accordingly, he has raised the bills and O.P. made part payment leaving a balance of Rs.14,32,517.62. Thus, it is implied that he has supplied the materials & it has been utilized. It is obligatory that O.P. is to pay the balance amount of Rs.14,32,517.62 towards principal and Rs.70,06,820.36 towards interest and no coercive action should be taken by the O.P. against the petitioner thereof. It was decided to make an amicable settlement by both the parties with each other within 15 days from today and report its outcome for final hearing on 30.10.2019.*
>
> *The case was adjourned to 30.10.2019 for final hearing. Due to administrative exigencies, the case was deferred to 16.11.2019.*
>
> *Both the parties were present in the 75th Sitting of MSEFC held on 16.11.2019. The petitioner submitted before the Council that they have supplied the materials and raised the bills during the year 2010-11.* ***The points raised by the O.P. were perused by the Council and it was decided that O.P. is to establish the facts of delay for such nonpayment instead of asking for non-maintainability of the case.***

> *The petitioner has supplied the materials as per the P.O. and these materials have been received and utilized without any objection. Hence, O.P. is to pay the dues of the petitioner."* *(emphasis supplied)*

9. It appears from above extracts of the contentions and basis of award, reproduced in last two preceding paragraphs, the point of limitation was not adjudicated at all. The situation emerged is petitioner was not heard.

10. Even under the Act of 2006 a person is entitled to plead in defence at the first instance, against a claim lodged before the Council. Remedy on a person being aggrieved by an award passed under section 18 is there but it is coupled with condition precedent of deposit, in event challenge to the award is to be looked into for adjudication. This condition the law requires for the party aggrieved, to fulfill before there is adjudication. Question is whether petitioner is aggrieved by a reasoning or he has not been heard at all.

11. The Supreme Court in **Silpi Industries** (supra) declared the law to be that provisions of Limitation Act, 1963 apply to arbitrations covered by section 18(3) of the 2006 Act. Mr. Mishra pointed out that impugned award is dated 10th December, 2019, made at a time when the judgment was not there. In that context, he had relied on paragraph-43 in **Consolidated Engineering Enterprises** (supra). View taken in said paragraph is that by section 29 in Limitation Act, 1963, savings have been provided. Sub-section (2) in section 29 saves application of limitation prescribed by special or local laws. The Act of 2006 is a special law. It, however, does not provide for limitation separately, with non-obstante clause ousting operation of the Act of 1963. So far as the declaration of law by **Silpi Industries** (supra) coming at a date later than impugned award is concerned, it is to be gainsaid that a declaration of law cannot be said to be prospective.

12. The question for consideration, adjudication and answer is whether petitioner was heard. Court is convinced that in facts and circumstances aforesaid, petitioner was not heard or given the right of hearing it was entitled to under the Act of 2006. Petitioner cannot be compelled to seek setting aside of the award, on being aggrieved. As such, it is a clear case where there must be interference in writ jurisdiction. The writ petition is found to be maintainable. **Patel Engineering** (supra) is not applicable in this case. Paragraph-45 must be read in context of adjudication by the Supreme Court regarding whether or not appointment made by the Chief Justice under sub-section (6) of section 11 (in the Act of 1996 before amendment), is an

administrative or judicial order. On declaring that the order is a judicial order, it was said that there was no warrant for the approach to proceed on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under articles 226 or 227 of the Constitution. The scheme of the Act of 1996 was referred to, for holding as would appear from the passage in paragraph 45, extracted and reproduced below.

> *"The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.*"

It must be remembered that an arbitration concluded by award on a reference under section 18(3) of the Act of 2006 cannot be equated with an arbitration under an arbitration agreement between the parties, even if compelled as constituted by the Chief Justice. In **Patel Engineering** (supra) there was disapproval of the stand taken by some High Courts that any order passed by the arbitral tribunal is capable of correction in writ jurisdiction. Case in hand is not a matter of correction but to address grievance of petitioner that he was not heard at all. In compelling petitioner to statutory remedy of seeking setting aside of award, necessarily petitioner will be required to deposit 75% of the award. All this in consequence of omission to hear and adjudicate at the first instance.

13. **M/s. Ved Prakash Mithal and Sons** (supra) obviously is deprecation of sharp practice adopted by the litigant(s). In **Rolta India Ltd.** (supra) this Bench refused to interfere in writ jurisdiction in spite of petitioner therein having relied on judgments of the Supreme Court to urge statutory compliance of provisions in section 18 of the Act 2006, mandating, inter alia, conciliation before reference to arbitration. No view was expressed by this Bench since, on similar point, there was no interference by **Anupam Industries Ltd.** (supra). This case is distinguishable on facts. Petitioner's contention was rejected out of hand, on observation that petitioner instead ought to have established the facts of delay for non-payment. Therefore, petitioner was not heard at all, for there to be said there was adjudication for passing of award.

14. A further point was taken by Mr. Mishra regarding the writ petition not being in form. He submitted, the writ petition was filed by a person claiming to be authorized representative. That is not permissible as per view taken by a Division Bench of this Court in **judgment dated 16th July, 2010** in **Eimco Elecon (India) Ltd. v. Mahanadi Coalfields Ltd.** reported in **(2011) 167 Company Cases 596 (Orissa)**, paragraph-6. In that case there was scrutiny of the writ petition filed, on question raised regarding its form. It was found that the writ petition was filed by the Sales Manager as constituted attorney of the Director, duly authorized in that behalf. The Board of Directors of the company passed resolution authorizing the Director to institute the proceeding on behalf of the company. As such view taken was, the Director had no further authority to execute power of attorney in favour of the Sales Manager, to act on his behalf. In this case the writ petition has been filed by the authorized representative of the company. Said person has affirmed affidavit on 21st February, 2020, in which he said, inter alia, as follows:

> *"1) That I am the Power of Attorney holder of M/s. Bajaj Electricals Limited having its registered office at 45-47, 1st Floor, Veer Nariman Road, Mumbai-400001, Maharashtra and in pursuance of the resolution of the Board of Directors duly authorized to carry out all activities of company and duly authorized to swear this affidavit on behalf of the company."*

Eimco Elecon (supra) is of no assistance to opposite party.

15. Impugned award is set aside and quashed. Claim of opposite party no.2 is restored, along with the subsequent pleadings. Opposite party no.1 will hear and dispose of the claim in accordance with law, as expeditiously as possible.

16. The writ petition is disposed of.

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2022 (I) ILR - CUT- 371

D. DASH,J.

RSA NO.154 OF 2010

AMAL BHAKTA ....Appellant.

.V.

MANADA BALA ....Respondent.

PARDANASHIN WOMAN – Execution of sale deed by 'pardanashin' woman – Burden of proof – Held it must be proved by the person relying on it that executant being a paradarnashin woman, the deed was read out to her; it must further be shown that it was explained to her, or that she understood its conditions and effect; and that explanation included all material points as well as the general nature of transaction – The principle upon which the law accords protection as above is founded on equity and good conscience – Applicability of the same principles to a poor lady who is equally ignorant and illiterate, but is not paradahanashin – Held, Yes.

> *"On the aforesaid, this Court then has taken a view that there is no justification as to why rule applicable to paradahnashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not also apply to the case of a poor lady who is equally ignorant and illiterate, but is not paradahanashin, simply because she does not belong to that class, the object of the rule of law being to protect the weak and the helpless, the distressed and the down-trodden and it should not be restricted to a particular class or community. Even in the case of a lady who is outside the paradahnashin class, it is for those who deal with her to establish that she had the capacity of understanding that she has been entering into the transaction voluntarily and with full knowledge and import of what the transactions actually meant. In case of Prasanna Kumar Giri vrs. Radhashyama Paul and others; 70 (1990) CLT 720, it has also been so held. Same is the view taken in case of Kumadei vrs. Md. Abdul Latif : 1993 (II) OLR 568. Reliance has been placed upon the decision in Smt. Kharbuja Kuer vrs. Jangbahadul and others: AIR 1963 SC 1203, that as regards documents taken from a paradahnashin women, the Court has to ascertain that the party executing them has a free agent and has been duly informed of what she was about that reason for the rule is; that ordinary presumption that a person understands the document to which he has affair his name does not apply in case of a paradahnashin women: that burden shall always rests upon the person who seeks to sustain a transaction entered into with a paradahnashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction: that it should be established that it was not only her physical act but also her mental act and that the burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence direct and circumstantial." (Para 13)*

Case Laws Relied on and Referred to :-

1. AIR 1925 P.C. 204 : Farid-un-Nisa Vs. Munishi Mukhtar Ahmad.
2. (1960) CLT, 304 : Chandal Bewa Vs. Madhav Panda & Ors.
3. 70 (1990) CLT 720 : Prasanna Kumar Giri Vs. Radhashyama Paul & Ors.
4. 1993 (II) OLR 568 : Kumadei Vs. Md. Abdul Latif.
5. AIR 1963 SC 1203 : Smt. Kharbuja Kuer Vs. Jangbahadul & Ors.

6. 1988 (2) OLR 582 : Krushna Chandra Patra and Anr Vs. Kami Bewa and Anr.
7. AIR 1990 Orissa 64 : Rankanidhi Sahu Vs. Nanda Kishore Sahu.
8. (60) 1985 CLT 487 : Narayan Mishra and two Ors Vs. Champa Dibya.
9. AIR 1948 Cal. 84 : Karunamayee Vs. Maya.
10. I.L.R. 14 All. 420 (PC) : Amarnath Vs. Achan.

For Appellant : M/s. K.M. Mishra, Mr. R.K Mohanty, K. Parida, B. Das, K.M. Mishra, L.Mohapatra & R. Mohanty.
For Respondent : M/s. Soumendra Pattanaik & K.C. Swain.

JUDGMENT Date of Hearing: 13.12.2021 : Date of Judgment: 03.01.2022

D. DASH, J.

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by learned Additional District Judge, Malkangiri in RFA No. 7 of 2009.

By the above judgment and decree, the First Appeal filed by the Appellant (Defendant) under section 96 of the Code has been dismissed and thereby the judgment and decree passed by the learned Civil Judge (Senior Division), Malkangiri in C.S. No. 49 of 2008 have been confirmed. The suit filed by the Respondent as the Plaintiff has been decreed.

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

3. **Plaintiff's case:-**

The suit land better described in the schedule of the plaint belonged to Santosh Kumar Bala, the father of the Plaintiff. He being refugee and having the family as such finally settled at village-MV 47 by the Central Govt. through its LNK project meant for the purpose. At that point of time, they had been allotted with a house as well as some land for doing agricultural operation in earning their livelihood. In the year 1991, the Record of Right in the settlement operation was prepared in the name of Santosh Kumar Bala, the father of the Plaintiff. Santosh died in the year 2000 and his wife and son had predecesit in. So after the death of Santosh, Plaintiff being the sole surviving heir, inherited all his properties and became the owner as such and remained in possession of the same.

The Plaintiff's husband had however deserted her after few days of their marriage when the Plaintiff was carrying a child in his womb. That was prior to the death of her father. So she being the deserted daughter was staying with her father till his death. In the year 1984, the Plaintiff gave birth to girl child who was given in marriage with one Binod and to the said wedlock the son and a daughter were born. That son-in-law of the Plaintiff also left for Kolkata in the year 2002 and thereafter did not return to take care of his wife and children. The Plaintiff, her daughter and grand children thus had to remain in a helpless condition with nobody to assist them in any matter whatsoever. During that crucial period, the Defendant came forward in saying that he would assist them in order to tide over the difficult situation. The Plaintiff being an illiterate lady having no outside exposure then readily agreed to the proposal in good faith in believing his words. The Defendant thus coming in contact with the Plaintiff enjoyed her full confidence and the family was depending on his aid, advice and assistance so provided. Sometime thereafter, the Defendant pursuaded the Plaintiff to execute a Will in his favour bequeathing half of his total land in his name so that he would be looking after the entire family and manage everything including their landed property. Being under such a relationship and finding the Defendant to have been rendering the service with all sincerity and showing all the promptitude whenever she needed for the benefit of the family, the Plaintiff had yielded to the request.

It is stated that on 2.4.2003, the Defendant took the Plaintiff to Malkangiri Tahasil Office and there she was asked to put her thumb impressions over some stamp papers and the Defendant thereafter cultivated the land of the Plaintiff and continued to provide the maintenance to all the family members. Subsequently, as his mind was mischievous from the very beginning which was not known to the Plaintiff, the neglect was shown to the Plaintiff and family by the Defendant. He then sold away one house of her for Rs.8,000/- and took away the entire money. The Plaintiff finding no other alternative being an illiterate simple ton lady having no male member by her side to advice in carrying the liability of her deserted daughter and grandchildren approached 'Palli Mangal Samiti' of her village. The members of the Samiti then instructed the Defendant to handover the record of right and other connected papers of the landed properties of the Plaintiff to her. The Defendant however then gave only a copy of the record of right to the Plaintiff in stating that the original was missing. Subsequent to the same, it came to the knowledge of the Plaintiff that the Defendant in the guise of a

Will as suggested had obtained a sale deed in his favour in respect of the suit land and mutated the same in his name behind her back and knowledge. The Defendant then avoided to respond to the Plaintiff any more. He in turn initiated a proceeding under section 144 of the Code of Criminal Procedure (Cr.P.C.) in the Court of Sub-Divisional Magistrate, Malkangiri vide Misc. Case No. 12 of 2008. In that proceeding prohibitory order being initially passed was later on vacated and the proceeding was dropped directing the parties to take shelter before the Civil Court. So the Plaintiff filed the suit praying the relief of declaration of her right, title, interest and possession over the suit land and declare the register sale deed dated 2.4.2003 as null and void. She has also advanced the prayer for recovery of possession of the said from the Defendant in case of dispossession.

4. **The Defendant's Case:-**

The Plaintiff was never in possession of the entire suit land after the death of her father Santosh Kumar Bala. It is said that the Defendant had never persuaded the Plaintiff to execute any Will in his favour by bequeathing half of her property. The allegations that the Plaintiff was taken to Malkangiri Tahasil Office where her thumb impressions over some stamp papers and different registers were taken with an assurance to provide maintenance have been denied. It is stated that on 2.4.2003, the Plaintiff appeared before the Registering Authority with the witnesses and executed the sale deed in respect of the suit land measuring Hc.1.265 of Mouza-Chidutalli in his favour on receipt of consideration of Rs.85,000/-. The Defendant having got the sale deed and thus purchased the suit land mutated the said land in his favour. The record of right was issued in his name on 14.7.2003 and since then he is in possession of the same paying land revenue to the State. It is the counter allegation that in the month of June, 2008, the Plaintiff had come to his house and then had sought for advancement of hand loan of Rs.5000/-. The Defendant when expressed his inability, she got annoyed. On the next day, under the direction of the Plaintiff one Ranjit Mandal was found to be cultivating the suit land. For that the Defendant had to initiate a proceeding under section 144 of the Cr.P.C.

5. On the above rival case, the Trial Court framed as many as six issues. Issue Nos. 3 and 5 are interlinked. Those concern with the Plaintiff's right, title, interest and possession over the suit land as well as the claim of the Plaintiff that the said registered sale deed dated 2.4.2003 standing in the

name of the Defendant is null and void. The answer to the above issues has placed the final say over the litigation.

The Trial Court coming to decide issue No. 5 as to the fate of the registered sale deed dated 2.4.2003 as it appears has made elaborate discussion of evidence let in by the parties. The conclusion has been that the sale deed is not legal and binding upon the Plaintiff and as such is null and void. This answer has paved the way for recording the answers on other issues in favour of the Plaintiff in finally, decreeing the suit of the Plaintiff for the reliefs as prayed for.

6. The Defendant being aggrieved by the above judgment and decree passed by the Trial Court having carried the first has failed in that move. Hence, he is with the present Second Appeal before this Court.

7. The Appeal has been admitted on the following substantial questions of Law:-

> "1. Whether, the plaintiff's suit is barred by Article 56 & 59 of the Indian Limitation Act on the basis of her admission that the cause of action for the suit filed on 10.9.2008 arose on 18.4.2003, when the plaintiff came to know that the defendant fraudulently managed to obtain the impugned Sale Deed dated 02.04.2003 (Ext.2 and A).
>
> 2. Whether, the plaintiff having duly appeared before the Registering Authority and the Registering Authority having given the statutory certificate as prescribed under Section 58,59 and 60 of the Indian Registration Act, it was incumbent on the plaintiff to bring her suit within three years of such Execution/Registration.
>
> 3. Whether, due Execution/Registration statutory Mutation and continuous payment of Rent are sufficient to hold that the plaintiff had clear knowledge about the impugned Sale Deed for which she was obliged to see it aside as a voidable document within the prescribed period of limitation, she being E.O. nominee party to the impugned transaction".

8. Mr. R.K. Mohanty, learned Senior Counsel for the Appellant submitted that as the Plaintiff having come to know on 18.4.2003 that the Defendant has fraudulently managed to obtain the sale deed dated 2.4.2003 (Ext.A = Ext.3), has filed the suit on 10.9.2008. He thus submitted that in view of the provisions of Article 56 and 59 of the Indian Limitation Act, the Courts below ought to have held the suit to be barred by limitation. According to him, the provisions of sections 56 and 59 of the Limitation Act

clearly stand on the way of the entertainment of the suit filed by the Plaintiff for the reliefs claimed. clearly stand on the way amendment of the suit the Plaintiff any relief to the suitor, the Plaintiff. He further submitted that the deed under challenge being a registered one followed by the recording of the said transacted land in favour of the Defendant in a mutation proceeding and continuous payment of rent by the Defendant-purchaser, the challenge to the same ought to have been found to be untenable. It was submitted that the knowledge of the Plaintiff as to the said sale deed ought to have been taken to be from that very year, 2003 and therefore as within the time period prescribed the Plaintiff has not filed the suit in seeking appropriate relief of setting aside of the said registered sale deed on those grounds as projected in the plaint, the Courts below have committed grave error in decreeing the suit when the right over the suit land in favour of the Defendant had already been crystallized being no more amenable to challenge. He further submitted that the deed in question i.e. Ext.A = Ext. 3 is registered one, and presumption is attached to the same as per the provisions contained in the Registration Act, not only as to the genuineness and due execution but also as to the factum of knowledge about the existence of the same by the parties to the document. He therefore submitted that the Courts below having ignored all these important aspects since have decreed the suit, the same is liable to be set at naught.

9. None appeared for the Respondent (Plaintiff) despite the opportunity and accommodation.

10. Keeping in view the submission made, I have carefully read the judgments passed by the Courts below.

11. In so far as the controversial facts are concerned; the Trial Court as well as the Lower Appellate Court upon detail discussion of evidence and their critical examination from all angles at their respective level and independent of one another as at para-6 of the judgment of the trial court as also at para-8 of the judgment of the Lower Appellate Court have recorded the finding that the Plaintiff has not been paid with the consideration of Rs.85,000/- for the purported transaction of sale and (ii) that the Defendant has failed to discharge the heavy burden of proof lying upon him in proving the factum of due execution of the said sale deed by the Plaintiff, an illiterate lady having no other male member other than the Defendant by her side on whom she had reposed full faith and confidence. The findings as above have been returned by the Courts below are seen to be the outcome net result of the

strenuous exercise so undertaken. Let us now proceed to judge the sustainability of the same.

12. The Plaintiff is an illiterate lady who does not know to read and write Odia and she has put her thumb impressions everywhere. She was then living with her deserted daughter and grandchildren having no other male member in the family. It is stated that she was being helped by the Defendant and on him, she was reposing confidence and in good faith was thus following his advice. The evidence on record do not show that the Plaintiff had any such experience in those outside affairs. She admittedly was a refusee and staying in a rural area in the scheduled District of the State having no such extra source of income other than the return from the landed property.

So, here in view of the aforesaid, the matter has to be approached by putting the burden of proof upon the Defendant as regards due execution by applying the principles of execution of document by paradarashin ladies.

13. At this juncture, before proceeding for further examination the settled position of law is required to be discussed and stated for reference and proper appreciation in arriving at a correct decision.

The law as to the burden of proof has been summarized in a decision of Privy Council in case of Farid-un-Nisa Vrs. Munishi Mukhtar Ahmad; AIR 1925 P.C. 204:-

> "The law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the granter. In such cases, it must also, of course, be established, that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated too well settled to be doubted or upset."
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> "The law of India contains well known principles for own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only been given the special development, which Indian social usages make necessary, to the general rules of English Law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of law relating to personal capacity to make binding transfers or settlements of property of any kind."

The position thus emerges that executant being a paradarnashin woman, the deed was read out to her; it must further be shown that it was explained to her, or that she understood its conditions and effect; and that explanation included all material points as well as the general nature of transaction. The principle upon which the law accords protection as above is founded on equity and good conscience.

In that case, it has been held that:-

> "In the instant case the learned Munsif, and on appeal, the learned Subordinate Judge found concurrently that the two widows put their thumb marks without understanding the true import of the document. Imam, J., in second appeal reversed the said finding on the ground that they were vitiated by an erroneous view of the law in the matter of burden of proof. The judgment, if we may say so with respect, consists of propositions which appear to be contradictory. The learned Judge after reviewing the case law on the subject, concludes his discussion by holding that it was the duty of the plaintiff to prove that there was fraud committed and that, as that had not been established, the question whether the document was read over and explained to the plaintiff in his opinion, in the circumstances, did not arise. This proposition, in our view is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India, Pradahnashin ladies have been given a special protection in view of the social conditions of the time: they are presumed to have an imperfect knowledge of the world, as by the paradah system they are practically excluded from social intercourse and communion with the outside world....
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> xxx xxx xxx xxx
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> ".... The legal position has been very well-settled. Shortly it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pradahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

As held by this Court in Chandal Bewa v. Madhav Panda and others; XXVI (1960) CLT, 304, that when a question arises as to whether the document has duly been executed by an old and illiterate lady belonging to a village, in order that the documents may be enforced against her, or , as a matter of that, in order that it may be found by the Court that the documents were properly executed, the vendee must prove that the documents were read over and explained to the illiterate executant, who is a lady, and she knew the nature and character of the transactions while she became a willing party to

the documents and particularly that she was aware of the acreage involved in the transactions.

On the aforesaid, this Court then has taken a view that there is no justification as to why rule applicable to paradahnashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not also apply to the case of a poor lady who is equally ignorant and illiterate, but is not paradahanashin, simply because she does not belong to that class, the object of the rule of law being to protect the weak and the helpless, the distressed and the down-trodden and it should not be restricted to a particular class or community. Even in the case of a lady who is outside the paradahnashin class, it is for those who deal with her to establish that she had the capacity of understanding that she has been entering into the transaction voluntarily and with full knowledge and import of what the transactions actually meant. In case of Prasanna Kumar Giri vrs. Radhashyama Paul and others; 70 (1990) CLT 720, it has also been so held. Same is the view taken in case of Kumadei vrs. Md. Abdul Latif : 1993 (II) OLR 568. Reliance has been placed upon the decision in Smt. Kharbuja Kuer vrs. Jangbahadul and others: AIR 1963 SC 1203, that as regards documents taken from a paradahnashin women, the Court has to ascertain that the party executing them has a free agent and has been duly informed of what she was about that reason for the rule is; that ordinary presumption that a person understands the document to which he has affair his name does not apply in case of a paradahnashin women: that burden shall always rests upon the person who seeks to sustain a transaction entered into with a paradahnashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction: that it should be established that it was not only her physical act but also her mental act and that the burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence direct and circumstantial.

13.1 In case of "Krushna Chandra Patra and another Vrs. Kami Bewa and another" 1988 (2) OLR 582, it has been enunciated that the situation relating to the document executed by paradanshin women and illiterate person, the onus lies on the person who derives the benefit under the document to prove and establish that the executant had executed the document after having full knowledge of the contents as well as it s effect and consequences. Further in case of "Rankanidhi Sahu Vrs. Nanda Kishore Sahu":AIR 1990 Orissa 64,

this Court while holding the principles governing proof of execution of document taken from paradanashin woman to be actually applicable to the document taken from an illiterate woman, reiterated further that the burden is heavy on the person getting advantage under the document to establish that the contents of the document were read over and explained to her, she understood the same, she had independent advise at the relevant time, and that the execution of the document was not only a physical act, but also a mental act. In the said case, while alternatively holding that the document under challenge therein was not merely executed, it was held to be void and inoperative document conferring no title in respect of immovable property covered under the said transaction.

13.2 This Court in case of "Narayan Mishra and two others Vrs. Champa Dibya"; (60) 1985 CLT 487 have held that the disposition of such nature made must be found to have been substantially understood and must really be the mental act, as its execution is the physical execution of the person who makes it. The words of caution for the court are that the court must be satisfied that the deed has been explained to and understood by the party under disability either before execution or after it, under situations showing that the deed has been executed with the full knowledge and comprehension. Mere execution by such a person although not accompanied by duress, protest or obvious signs of understanding or one of comprehension itself not the real proof of true understanding mind of the executant. It must be proved affirmatively and concluded that the deed was not only executed by but also explained to and really understood by the grantor. The courts have been asked to insist the proof that the lady had independent legal advise although in variable terms depending upon the facts and circumstances of each case to case. Generally, the Courts have to demand affirmative to prove on the subject of the lady's intelligent understanding and execution of deed and the court would not repeatedly hold that this onus to have been discharged where it has not been shown that the lady had any independent advise. The true nature of transaction must be proved to have been understood by the executant.

The protection application to a pradahnashin woman can be extended to illiterate and rustic village woman or to documents made by old, invalid infirm and illiterate persons (Krisha Mohan Kul vrs. Pratima Maity; Air 2003 SC 4351).

13.3. In case of “Karunamayee Vrs. Maya”: AIR 1948 Cal. 84, it has been emphatically held that those who seek to affect paradanashin woman with liability under the instrument are bound to prove that they had knowledge of the nature and character of the transaction, that they had some independent and disinterested adviser in the matter; and that they executed the instrument fully understanding what they were about in doing so. In several other cases, it has also been held that when a Court in dealing with disposition of property by pradahnashin woman ought to be satisfied that the transaction was explained to her specially in case where, without legal assistance, she executed document written in a language she did not understand, which deprived of all her property {Ashgar v. Delroos ILR -3 Cal. 324 (P.C.) and Amarnath Vr. Achan I.L.R. 14 All. 420 (PC)} Where an instrument has not been properly explained so that she did not understand its contents and effect or did not know what liabilities she was incurring, the transaction cannot stand.”

In case of Satish v. Kali Dasi 34 C.L.J.-529:-

> “The position settled is that when the court is called upon to deal with a deed executed by a pardanshin lady, it must satisfy itself or evidence, first fact that the deed was actually executed by her with full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction in which she is said to have entered; and thirdly, that she had independent and disinterested advise in the matter. The cases fall broadly into two groups, namely, first the cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character; and secondly, the cases where the persons who seeks enforce the deed was an absolute stranger. The court in former class of cases will act with great caution and will presume confidence put and influence exerted, in the later class of cases the court will require the confidence and influence to be proved intrinsically. If the confidence is reposed and it is abused, the court will grant relief.”

In Shree Thakurjee Vrs. Ramdei, 59 M.L.J. 14 (P.C.) it has been held that where the facts disclose a confidential relation between the parties and also establish that the deed was harsh and unconscionable, the burden of proving absence undue influence rests on the party seeking to support the deed.

It is also the position settled in a plethora of decisions standing in a confidential relation towards others cannot entitle themselves to hold the benefits which those others have conferred upon them unless they can show to the satisfaction of the court, the person by whom the benefits have been conferred had competent and independent advice in conferring them.

14. In the touchstone of the above principle, the Courts below are thus have found to have rightly gone for elaborate discussion of evidence on record with record to ascertain whether the Defendant has discharged the aforesaid burden of proof resting upon the Defendant. It is the specific stand of the Plaintiff that she has never sold the suit land to the Defendant at any point of time. She has deposed that during the year 2003, the Defendant brought her to Malkangiri Tahasil Office and took her thumb impressions over stamp papers and in different registers by assuring to provide all sorts of maintenance in looking after her and her family as if her son. According to her, those promises and assurances were all false, came to her notice about a year prior to the filing of the suit when the Defendant neglected her and her daughter and sold away of her houses for Rs.8,000/-and grabbed away the entire money. So she had to bring it to the notice of the Gram Samiti and subsequent thereto, it was known that the Defendant had obtained the sale deed fraudulently and mutated the land in his name without her knowledge and consent of the Plaintiff by taking advantage of her illiteracy and simplicity abusing the confidence that she had reposed on her at that time. P.Ws. 2 to 5 are the co-villagers. They state that the Defendant was cultivating the land of the Plaintiff on her behalf and only when the Plaintiff complained before the village Committee about the neglect shown by the Defendant, it was known that the Defendant had created the sale deed.

The written statement is not specific on the point that the Plaintiff was correctly told and apprised of and made to understand the details of the document and its implication before her thumb impressions appeared thereon. The witnesses examined on behalf of the Defendant have not stated in clear terms in that light. The evidence on record do not disclose that the Plaintiff was having any independent advice at the time of execution of the document. On 2.4.2003 as stated by D.W.4, the Defendant himself, all had gone to Tahasil Office. The Plaintiff is said to have contacted the deed writer and the Defendant then had given a sum of Rs.10,000/- to the Plaintiff to purchase the stamp papers for registration. The stamp papers in total is worth Rs.9,100/-. This D.W.4 has stated to have then paid the rest amount of Rs.75,000/-. He states that in presence of Bimal Mistry and Rebati Ranjan Haldar, the deed was read over and its contents were explained to the Plaintiff and when asked about the receipt of consideration, the Plaintiff so agreed before them. The Plaintiff then agreed before the Sub-Registrar. This payment of consideration in two installments is not pleaded in the written statement. D.W.7, the deed writer has admitted that she has not seen the

factum of payment of consideration by the Defendant to the Plaintiff. D.W. 2 Bimal Mistry has stated to have not seen Defendant giving money to the Plaintiff. The sale deed Ext. A shows that ten numbers of stamp papers have been used therein. The sale deed has been registered on 2.4.2003. Out of the ten stamp papers, two have been purchased on 29.3.2003; two on 30.3.2003; two on 31.3.2003 and the rest on 1.4.2003 and 2.4.2003. There is no explanation in removing this suspicious feature from the side of the Defendant rather he stated that on the very day i.e. 2.4.2003 the money being paid to the Plaintiff she, with the help of the same, purchased the stamp papers. Ext. A the sale deed does not contain the endorsement of the scribe as to who has taken thumb impression of the Plaintiff over the sale deed and it has not been so indicated in the very deed. The scribe has simply put her signature stating to have written the sale deed.

With all these evidence on record further having read, the lengthy paragraph-6 of the Trial Court's judgment as also the paragraph-8 of the judgment of the Lower Appellate Court, this Court finds absolutely no justification to hold that the Defendant has discharged the burden of proof as to execution of the said document by the Plaintiff. This Court thus finds no infirmity in the said finding recorded by the courts below in saying the findings of the Courts below cannot be sustained. Upon thorough examination of the evidence, this Court also finds itself in full agreement with the finding of the Courts below on that score.

15. Next the Courts below on the admitted factual settings and circumstances further viewing the factors concerning the Plaintiff are found to have held the Defendant has failed to prove by leading clear, cogent and acceptable evidence that for said transaction the consideration of Rs.85,000/- had been paid to the Plaintiff which she had received. This being the factual findings concurrently recorded by the Courts below are hereby affirmed. The next important aspect arises to address is whether the passing of title under Ext.A=Ext.3 was dependent upon passing of consideration or it was so independent. The recitals of the sale deed on that score are not found to be free from ambiguity in showing clear intention of the executant (vendor) in that regard. So now the said intention has to be gathered from the surrounding circumstances as those emerge from the evidence let in by the parties. Except the factum of mutation of the suit land in the name of the Defendant after few months of the existence of that impugned registered sale deed, no such other favourable and attending circumstance emanate to cull

out the intention of the executants (vendor) that notwithstanding the passing of the consideration, she had intended that the title of the suit land involved under the transaction would pass on the hands of the Defendant (vendor).

In that view of the matter, this Court finds that the said concurrent findings of the Courts below are unimpeachable.

16. Coming to address the substantial question of law, it has been noted that the specific case of the Plaintiff that the Defendant was possessing the suit land and maintaining her and her family. While disclosing the cause of action at para-11, of the plaint it has been stated as under:-

> "That the cause of action for the suit arose in the year 1963 when the suit land along with other lands were allotted to the father of the plaintiff, and then in the year 1991 when final R.O.R. was issued in the name of deceased Santosh Kumar Bala the father of the plaintiff and after his death in the year 2000 when the Plaintiff became the absolute owner being only living heir of the recorded owner Santosh Kumar Bala. And then on 18.4.2003 when the Plaintiff came to know that the Defendant fraudulently managed to obtain the impugned sale deed and when the S.D.M., Malkangir4i on 12.8.08 instructed plaintiff to take shelter in the Civil Court."

But as the vendor (Plaintiff) remained in possession which has also been found from the evidence, that it was with the Defendant as her agent, the limitation starts running from the date when over the property, the Defendant claimed the right as its owner as to have purchased the same and thereby the dispossession was sought to be made, there thus was no need for the Plaintiff to file a suit resorting to Article 59 of the Indian Limitation Act. The right of the Plaintiff being disputed by said dispossession by the Defendant claiming as the owner by so-called purchase, the suit too is not found to be hit under Article 56 of the Limitation Act. Thus, this Court is of the considered opinion that in the facts and circumstances, the provision of Article 56 and 59 of the Indian Limitation Act do not stand as a bar for entertainment of the suit for the reliefs claimed.

Accordingly, the substantial questions of law receive their answers against the Plaintiff and claim of the Defendant and in favour of confirming the judgments and decrees passed by the Courts below.

17. In the wake of aforesaid, the Appeal stands dismissed. There shall, however, be no order as to cost.

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2022 (I) ILR - CUT- 386

D. DASH, J.

SAO NO. 4 OF 2021

RAMANI RANJAN MOHANTY ……...Appellant.

.V.

W.V. RAJA ………Respondent.

CODE OF CIVIL PROCEDURE, 1908 – Sections 96 and 100 – Provisions prescribed for appeal from every original decree or from every decree passed in Appeal respectively, but none of the provisions enumerates the person who can file an Appeal – Held, it is settled by the long catena of decisions that to be entitled to file an Appeal, the person must be one aggrieved by the decree – Unless a person is prejudicially or adversely affected by the decree, he is not entitled to file an Appeal – No Appeal lies against a mere finding – Section 96 and 100 of the Code provide for an Appeal against decree and not against judgment – No Appeal lies against a finding / observation when the decree has not gone in any way against that person coming to file the Appeal.

(Para 16)

Case Laws Relied on and Referred to :-

1. (2003) 9 SCC 606 : Banarasi & Ors. Vs. Ram Phal.
2. 2018 (II) CLR 766 : Golok Bihari Mohanty Vs. Umesh Chandra Mohanty & Anr.

For Appellant : M/s. P.K. Rath, A. Behera, S.Das & S. Rath.

For Respondent : Mr. Y. Das, Sr. Adv.
M/s. Rajeet Roy, S.K. Singh, S. Sourav & T.P. Tripathy.

JUDGMENT Date of Hearing: 07.01.2022 : Date of Judgment: 25.01.2022

D. DASH,J.

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment/order passed by the learned 2nd Additional District Judge, Berhampur in RFA No.27 of 2018.

By the said judgment/order, the Appeal filed by the Respondent (Defendant No.2) under section 96 of the Code has been allowed in remanding the matter to the Trial Court for carrying out certain directions given thereunder.

The Association i.e. Ganjam District Cricket Association (for short, 'the GDCA'), registered under the Societies Registration Act, 1860 represented by the President (as stated) had filed the suit i.e. C.S. No. 297 of 2013. The present Appellant had been arraigned therein as the Defendant No. 1 being described as the former Secretary of Plaintiff- Association whereas this Respondent had been arraigned as the Defendant No.2.

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

3. The Plaintiff-Association said to have been represented by one Ramesh Chandra Patra filing the suit has prayed for the declarations that (i) the revised by-law of the Society is valid and binding on the office bearers of the Plaintiff-Association; (ii) that the Defendant No. 1 is not the Secretary and is a removed member of the Plaintiff-Association; and (iii) that the election of the office bearers of the Plaintiff-Association held on 10.11.2013 is void.

It has been further prayed that the Defendant Nos. 1 and 2 and other office bearers and their henchman be restrained from interfering in the affairs of the Plaintiff-Association and bring any liaison or contract with the Apex Association of the State i.e. Odisha Cricket Association (in short, 'the OCA').

It is stated that on 18.9.1988 the Plaintiff-Association was formed to promote cricket playing activities in the District of Ganjam. It has been affiliated to the OCA. The Plaintiff-Association was registered under the Societies Registration Act, 1860 on 14.10.1988, with its own by-laws for the organization, control of its activities and other things. One Sri Ramesh Chandra Patra and the Defendant No. 1 had been elected to the posts of President and Secretary respectively of the Plaintiff-Association in the election held on 6.3.2005. This election was challenged in Civil Suit No. 124 of 2008 in the court of learned Civil Judge (Senior Division). The court upheld the said election. In the said election, the following persons were the office bearers:-

(i) Ramesh Chandra Patra (President)
(ii) Suresh Chandra Mohapatra (Vide President)
(iii) Ashok Kumar Sahu (General Secretary)
(iv) Ramani Ranjan Mohanty (Joint Secretary)

(v) Trilochan Panigrahi (Joint Secretary)
(vi) Laxmi Kanta Patra (Treasurer).

It is stated that on account of resignation of Ashok Kumar Sahu (iii), the elected General Secretary, the Defendant No. 1 being the Joint Secretary took charge of the said office. There being several discrepancies and loopholes in the by-laws of the Association, the President decided to draft the revised by-law and that was finally approved in the General Body Meeting held on 23.10.2011. It had been sent to the District Magistrate-cum-Collector, the Registering Authority, OCA and the Additional Registrar of Societies-cum-Additional District Magistrate, Ganjam for approval. The Sub-Collector submitted his enquiry report on 31.12.2011 to the said revised by-laws, whereafter it was approved by the Additional Registrar of Societies and President Ramesh Chandra Patra circulated a notice with agenda of different items on 15.1.2012 convening the Special General Body Meeting on 5.2.2012. Revised by-laws being apprised to the members present to the General Body Meeting; it was decided to conduct the election by the end of April, 2013. In the said meeting, the voter list has been prepared and finalized. Accordingly, letters were issued to the Authorities. Finally,after observing all the formalities, the election was conducted on 8.4.2012. In the said election the following persons were elected as the office bearers of the Plaintiff-Association:-

(i) Ramesh Chandra Patra (President).
(ii) Y. Rabindranath (Vice President-1).
(iii) Prakash Ch. Panda (Vice President-2).
(iv) Ramani Ranjan Mohanty (Secretary).
(v) Trilochan Panigrahi (Joint Secretary-1).
(vi) Debendra Biswal (Joint Secretary-2).
(vii) P.Prasad Rao (Treasurer).

It is next stated that the dissention arose between the parties thereafter regarding non-submission of the audited bank account of the Plaintiff-Association by the Treasurer and Secretary. Thus, the differences between the President and Secretary arose. In the next Special General Body Meeting on 30.12.2012, membership of one Manikeswar Prasad Dev and Debabrata Dev had been ceased. In the Special General Body Meeting on 7.4.2013, the Secretary and the Treasurer were removed and in their place Manoj Kumar Singh was made the Secretary-in-charge and one Pradip Kumar Das was kept

as Treasurer in-charge by an election in the said meeting and they were to remain in-charge till the next election. The Secretary and Treasurer then were directed to handover all the books of accounts and other documents in their custody which they did not. So in the next meeting, the primary membership of the Secretary, Treasurer and two others were ceased. The Defendant No. 1 as the Secretary then sent letters questioning the said Annual General Body Meeting held on 28.7.2013 and called for a General Body Meeting to be held on 18.9.2013 which was resisted by the President. However, despite such objection by the President, the meeting was held on 15.9.2013 and in that meeting, revised by-laws were rejected by restoring the old by-laws; the Secretary and the Treasurer stood restored to their position and an Ad hoc Committee was constituted of five members to run the day to day affairs of the Plaintiff-Association and take further call to conduct the election within two months. Pursuant to the said agenda, the election was conducted on 10.11.2013 by nominating an Election Officer as per the provision of old by-laws. The Plaintiff-Association represented by said President asserted that the said election was illegal and thus not binding. It has been further stated that the Office bearers so declared to have been elected in that meeting have no right or authority over the functioning of Plaintiff-Association in carrying out any such activity.

With all these pleadings, the suit was filed for the reliefs as already indicated in the previous paragraph.

4. The Defendants in their written statement while traversing the plaint averments have mainly stated that said Ramesh Chandra Patra who has filed the suit representing the Society as its President has no authority to institute the suit. They have asserted the election held on 10.11.2013 to be valid and approved by General Body of the Plaintiff-Association. It is next stated that the President Ramesh Chandra Patra has misappropriated a sum of Rs.2,46,000/- by withdrawing the same from the account of the Plaintiff-Association without any authority and that the office bearers of the Plaintiff-Association so elected by the election held on 10.11.2013 have been recognized by the OCA. With such pleadings in countering to the plaint averments, they prayed for dismissal of the suit.

5. The Trial Court on the above rival pleadings framed in total seven issues. Proceeding to answer issue no. 3 as to the validity of the election held on 8.4.2012 as per the revised by-laws, the answer has been recorded that the

election held as per the provisions of the said revised by-law on 8.4.2012 is valid.

Next coming to answer issue no. 4 on the status of Defendant No. 1 as the Secretary and Defendant No. 2 as a member of the Plaintiff- Association and the question as to the removal of the Defendant No.1 (Secretary) by resolution dated 7.4.2013; it has been said that the removal of the Defendant No. 1 from his post and duties vide resolution dated 7.4.2013 is illegal. Both the Defendants are held to be the members of the Plaintiff-Association and it has been held that the Defendant No. 1 is the Secretary of the Executive Council of the Plaintiff-Association. On the other issue, the election conducted by the Ad hoc Committee on 10.11.2013 has been held to be illegal. Further taking into account the developments from time to time, the Trial Court has taken a view that there are several lacunas and deficiencies in the original by-laws and those are to be amended in order to meet the present situation. Having held as above, the Trial Court observed that the office bearers of the Executive Council elected as per the election held on 6.3.2005 which has been earlier upheld in the previous suit, has asked for conducting election.

6. The Trial Court at the end in answering issue nos. 1 and 2 as to the maintainability of the suit and cause of action for filing the same has concluded that the Plaintiff has miserably failed to establish his case and he has no cause of action for filing the suit. Accordingly, the ultimate decision has gone for dismissal of the suit holding the Plaintiff not entitled to any of the reliefs claimed.

7. The suit thus being dismissed by the Trial Court; that Ramesh Chandra Patra who had instituted the suit in his capacity as President of Plaintiff-Association, as claimed did not file any Appeal.

However, the dismissal of the suit was called in question by the Defendant No. 2 in carrying an Appeal under section 96 of the Code.

It may be stated here that the said Defendant No. 2 had been arraigned in the suit as the Secretary of the Ad hoc Committee of the Plaintiff-Association and he was contesting the suit by filing the written statement jointly with the Defendant No.1. He had examined himself as D.W.1 when the Defendant No.2 has been examined as D.W.2. One set of documents had been proved from the side of the Defendants and they were thus contesting the suit althrough.

8. The Lower Appellate Court referring to its earlier order dated 08.04.2021 has said that Ramesh Chandra Patra who had instituted the suit on behalf of the Plaintiff-Association asserting himself to be the President having died during pendency of the Appeal; the suit against him stood abated. It is better that the said portion of the sub-para of aragraph-6 of the judgment/order of the Lower Appellate Court be noted:-

> "In the meantime, the President who was the Plaintiff in the above case Sri Ramesh Chandra Patra died and as per the order dated 8.4.2021, the suit against him stood abated. However, the Association was represented by the Secretary".

9. It may be stated at the stage that the Appeal had been filed arraigning Sri Ramesh Chandra Patra as the former President of the Plaintiff-Association and the Defendant No. 2 as the former Secretary of he Plaintiff-Association. In that situation, it is not understood as to how t would be observed that the suit against that Plaintiff would abate. Moreover, the lower Appellate Court is not further indicating about any impact of the same over the progress of the Appeal and nothing is stated in that light.

In view of all these above, this Court no more feels to discuss hat aspect any further.

10. Be that as it may, before the lower Appellate Court, the maintainability of the Appeal was contested upon. It has been contended that the suit having been dismissed as against the Defendants declining the Plaintiff to grant any relief as prayed for; the Defendant No. 2 has no right to prefer the Appeal as he cannot be said to have been in any way aggrieved by the ultimate result recorded in the suit when as against mere finding or findings or observation/ observations; no Appeal under section 96 of the Code lies. This contention has been negated and the Appeal has been allowed with certain observations as would be seen from the ordering portion. The Appellate Court has then again directed the Trial Court to make an interim arrangement by hearing the parties in the best interest of the Plaintiff-Association regarding running of the Plaintiff-Association till a new body is elected including the member of the elected body of the year 2012-13. A course which appears to be totally foreign to the scope and beyond the purview of the Appeal.

11. This Appeal has been admitted on the following substantial questions of law:-

> "1. Whether the Lower Appellate Court has fallen in error of law in entertaining the First Appeal under section 96 of the Code of Civil Procedure filed by the Respondent (Defendant No.2.) in questioning the finding/observation of the Trial Court in its judgment when he has not been affected by the result in the suit standing dismissed?; and
>
> 2. Whether the Lower Appellate Court has failed to appreciate the judgments cited on the question of maintainability of the Appeal in their proper perspective and as such the impugned judgment is vitiated?"

12. Mr. P.K. Rath, learned counsel for the Appellant (Defendant No.1) submitted that the learned lower Appellate Court simply should have dismissed the Appeal as not maintainable as the Defendant No. 2 who had contested the suit with the Defendant No. 1 by filing one written statement and leading evidence together had no right of Appeal. According to him, when the very suit filed by Ramesh Chandra Patra claiming himself to be the President of the Plaintiff-Association has been dismissed and the Trial Court has declined to grant any relief as prayed for, the Defendant No. 2 had no right of Appeal as per law.. He further submitted that the learned lower Appellate Court has not carefully gone through the provision of law in this regard and thus has fallen in grave error by holding that the observation made by the Trial Court being adverse to the interest of Defendant No. 2, he has the right of Appeal against such observation. In support of the same, he has relied upon the decision of the Apex Court in case of *Banarasi & Others Vrs. Ram Phal*; (2003) 9 SCC 606. He further submitted that even on merit the judgement/order passed by the learned lower Appellate Court is not sustainable.

13. Mr. Y. Das, learned Senior Counsel submitted all in favour of the judgment/order passed by the learned lower Appellate Court. He submitted that the learned lower Appellate Court having found it proper to make an interim arrangement till the new election of the office bearers of the Plaintiff-Association is held did commit no error in remanding the matter to the Trial Court for passing an order in that regard.

14. Keeping in view the submission made, I have carefully read the judgments passed by the Trial Court as well as the Lower Appellate Court. I have also gone through the rival pleadings.

15. At the outset, it may be stated that the Lower Appellate Court has not found any fault with the findings/ conclusions of the Trial Court and has also

not so recorded in the entire judgment/order impugned herein. Nor the ultimate decision of the Trial Court in dismissing the suit has been held to be unsustainable. This Court being not in a position to cull out the gist, and unable to follow as to what the lower Appellate Court has meant, thereby, feels it apposite to straightway reproduce those relevant paragraphs 13 and 14 of the judgment of the Lower Appellate Court which read as under:-

> "13. The suit was dismissed on contest against W.V.Raja who was the defendant no.2 in the suit and now the appellant. In a way defendant no.2 in the C.S. 297/2013 was successful. However in the R.F.A he challenges only para-10 which is the observation asking the body of 2005 to manage and control the affairs of the association till a new body of office bearers are elected as per original bye-laws.
>
> 14. From an affidavit filed by the respondent no.2 R.R.Mohanty, it reveals that after the judgment in C.S. 297/2013 was passed by the learned lower Court in February, 2008, election notice was issued to all valid members of 2005, to begin the election process and its procedure was completed with due legal formalities. He added that the result would be announced six days lanter i.e., 22.7.2018 and persons likely to be elected were not the office bearers of the election of 2012 & 2013.

From his affidavit it became clear that the observation made by the lower court in para-10 was implemented. Again reverting back to the decision of the Apex Court in Ramesh Chandra vrs. Shiv Charan Das and applying its test, this court feels that though the defendant No.2/appellant was successful in the suit in C.S. No. 297/2013 since no relief was granted to the plaintiff (Ramesh Patra, dead now), but the observation made in para-10 of the judgment was carried out in letter and spirit. So, defendant no.2 W.V. Raja being appointed the Secretary by the Adhoc Committee in 2013 to run the association with other office bearers was naturally affected by the observation being given effect to though not reflected in the decree. So this appeal though not against any order, but against such observation made would be maintainable."

16. At this stage before proceeding further, the decision of the Hon'Apex Court in *Banarasi & Others* (supra), being carefully gone through; it is seen that the legal position on the point has been set at rest that section- 96 ad 100 of the Code make provision for an Appeal being preferred from every original decree or from every decree passed in Appeal respectively. None of the provisions enumerates the person who can file an Appeal.

Keeping in view the authoritative pronouncements of Hon'ble Apex Court, this Court also in case of *Golok Bihari Mohanty Vrs. Umesh Chandra*

Mohanty and another; 2018 (II) CLR 766 has held that no Appeal against a finding lies.

It is settled by the long catena of decisions that to be entitled to file an Appeal, the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree, he is not entitled to file an Appeal. No Appeal lies against a mere finding.Section-96 and 100 of the Code provide for an Appeal against decree and not against judgment. No Appeal lies against a finding / observation when the decree has not gone in any way against that person coming to file the Appeal.

17. In view of the aforesaid, this Court is of the view that the lower Appellate Court has not examined and appreciated the contention as to the maintainability of the Appeal filed by the Respondent (Defendant No.2) and its entertainment at its end when the suit has been dismissed disentitling the Plaintiff from the reliefs claimed through correct legal lens.

Therefore, the answers to the substantial questions of law are hereby returned in favour of acceptance of the contention raised by the learned counsel for the Appellant (Defendant No.1) in holding that the Appeal filed by the Defendant No.2 before the lower Appellate Court against the dismissal of the suit was not maintainable. Accordingly, the judgment/order passed by the lower Appellate Court in RFA No. 27 of 2018 which has been impugned in the present Appeal is found to be vulnerable.

18. Resultantly, the Appeal stands allowed. The judgment and decree passed by the lower Appellate Court are hereby set aside.

The parties are however directed to bear the respective cost of litigation all throughout.

19. 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 and Court's Office order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

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2022 (I) ILR - CUT- 395

BISWANATH RATH,J.

C.M.P. NO. 764 OF 2021

SANJEEB MOHANTY ………. Petitioner

.V.

THE REGIONAL DIRECTOR & ANR. ……….Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 6 Rule 17 – Amendment – Plaintiff files an application seeking amendment of plaint – Pleadings/averments in amendment petition appears to be the replies to the averments made in the written statement – Whether such amendment petition can be allowed? – Held, No.

For Petitioner : Mr. D. Mohanty
Opp. Parties : Govt. Counsel.

ORDER Date of Order : 06.01.2022

BISWANATH RATH,J.

1. The Civil Miscellaneous Petition involves a challenge to the impugned order of rejection of an amendment application at the instance of Plaintiff.

2. Mr. Mohanty, learned counsel for the Petitioner challenges the impugned order on the premises that the amendment since was answering the written statement plea, there was no reason to reject such amendment application and as such Mr. Mohanty, learned counsel urged before this Court that the rejection order should be interfered and the amendment application ought to be allowed. Question here required to be considered is; for the nature of response, if there is any scope to bring an amendment to the plaint by way of answer to the written statement plea through amendment?

3. On entire reading of the amended paragraphs involving the amendment application at page 20 of the brief, this Court finds, in all these paragraphs the plaintiffs have attempted to answer the pleadings made the written statement. For the clear provision in the C.P.C. the plaintiff is required to have its pleading on service of copy of the plaint on the defendant and the defendants are requiredto answer the pleadings by way of written statement. This Court is ofthe opinion that there is no scope for the

plaintiff to make its answer by way of amendment of the pleadings in the written statements, except dealing with same in trial by way of evidence. This Court on entire reading of the amended paragraphs nowhere finds any fresh material required to be brought by way of amendment of the plaint, on the premises that the plaintiff was unaware of such fact. It is, at this stage of the matter, this Court again on reading of the whole application finds, there is attempt to bring a response to the denial ofthe defendant to the pleadings in the plaint in the written statement by way of amendment of the plaint, which is not permissible in the eye of law. There is no such scope in the Code of Civil Procedure. Any such attempt is simply to be rejected.

4. Perused the reasoning in the impugned order. For the reasoning therein and the observation of this Court, there is no scopeto entertain such Civil Miscellaneous Petition, which is thus dismissed at admission stage.

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2022 (I) ILR - CUT- 396

BISWANATH RATH, J.

W.P.(C) NO. 40630 OF 2021

ASHOK KUMAR TRIPATHY ………Petitioner

.V.

TOYOTA FINANCIAL SERVICE INDIA, LTD. ……..Opp. Parties

CONSUMER PROTECTION ACT, 1986 – Sections 13 and 17 read with Article 226 of the Constitution of India, 1950 – Power and functions of District Forum and Jurisdiction of the State Commission – Complaint filed wherein an interim order was passed by the District Forum – A revision was carried to State Commission against such interim order – State Commission disposed of the revision at the stage of admission ex-parte by setting aside the interim order – Writ petition challenging such ex-parte order of disposal by the State Commission – Writ court held, the ex-parte order passed in the revision by the State commission was not proper.

For Petitioner : Ms. P.P. Mohanty

For Opp. Parties : Mr. R.C. Panigrahy

ORDER Date of Order : 27.01.2022

BISWANATH RATH, J.

1. This writ petition involves a challenge to the order passed by the State Consumer Disputes Redressal Commission, Orissa in Revision Petition No.79 of 2021.

2. Taking this Court to some documents relating to this case Ms. Mohanty, learned counsel for the Petitioner while not disputing that the Petitioner is a loanee and the Opposite Party is a Banker / private financer, but however, contended that for the pandemic situation due to COVID-19, there has been a lot of suffering to the owner of the vehicle in question resulting the Petitioner was not in a position to clear the agreed installments. As a consequence, the Opposite Party-Financer attempted to take the possession of the vehicle of the Petitioner. Finding the Financer undertaking forcible measures the Petitioner was constrained to approach the District Consumer Disputes Redressal Commission, Khurda, Bhubaneswar for appropriate relief. In entertaining the C.C. Case No.147 of 2021 along with I.A. No.58 of 2021, the District Consumer Dispute Redressal Commission, Khurda while issuing notice by order dated 2.09.2021 granted interim protection thereby directing the Private Financer not to take any coercive action against the complainant more particularly in respect of the vehicle bearing registration No.OD-02-BG-9507 until further orders. Upon finding such *ex parte*order, the Financer approached the revisional forum i.e. the State Consumer Disputes Redressal Commission, Orissa by filing Revision Petition No.79 of 2021. It is alleged that while taking up the matter for admission for considering the *ex parte* nature of order being passed by the District Forum, the revisional authority finally disposed of the revision by setting aside the interim protection granted by the District Forum and also remitting the matter to the District Forum for passing an order with reason. It is here allegedthat the revisional authority while considering validity involving an interim order passed *ex parte* decided the Revision finally and without affording opportunity to the Petitioner and the Revisional order remains *ex parte*. Ms. Mohanty, learned counsel for the Petitioner submitted that for the suffering of the loanee-Petitioner due to the pandemic situation, the loanee was not in a position to clear the installments and the District forum being prima facie satisfied with the difficulties faced by the Petitioner-the loanee, was pleased to pass the interim direction. It is, in the circumstance,contended that there was no illegality committed by the District Forum in granting the interim order and since the order involved is

an interim order, there was no necessity of assigning any reason as there was no finality of the proceeding. Ms. Mohanty, learned counsel for the Petitioner also contended that in the event the Opposite Party-Financer was aggrieved by such order, nothing prevented the Private Financer to move the very same Court for variation of the order instead of approaching the revisional authority. It is on the face of *ex-parte* disposal of the revision Ms. Mohanty, learned counsel for the Petitioner claimed that the revisional order becomes bad and needs to be interfered with.

3. Mr. Panigrahy, learned counsel for the Opposite Party- Financer, however, taking this Court to the nature of disposal of the I.A. No.58 of 2021 contended that for the Opposite Party-Financer likely to be affected by such interim order, an opportunity of hearingought to have been provided to the Financer before passing such *ex-parte* order. Mr. Panigrahy, learned counsel, however, did not dispute to the allegation of the Petitioner that since the revision was filed involving an *ex-parte* order, the revisional authority ought notto have disposed of the matter *ex-parte*. It is at this stage of the matter Mr. Panigrahy, learned counsel for the Opposite Party-Financer contended that once the loanee is a defaulter in making payment, he has to discharge his liability. Further no consumer proceeding ought to have been entertained in the already initiation of an Arbitration Proceeding involving both parties. Opposite Party thus while defending the impugned order prayed this Court for passing appropriate order.

4. Undisputedly both the parties are bound by the terms and conditions in the finance involved in the sale of the vehicle involved. Maintainability of the consumer proceeding as raised by the learned counsel for the Opposite Party is yet to be raised and adjudicated. Considering the rival contentions of the parties and on the questionof *ex-parte* nature of interim order passed by the District Forum resulting filing of revision, this Court finds, the District Consumer Dispute Redressal Commission, Khurda has passed the following order in I.A. No.58 of 2021 :-

"<u>Extract of the order No.01 : dated : 02/09/2021</u>

> The Interim Application supported by affidavit, filed by the complainant praying for interim order U/s. 38 (8) of C.P. Act, 2019, is put up for consideration. In the facts & circumstances of the case, however, as an interim measure, the OPs are directed not to take any coercive action against the complainant in respect of the vehicle bearing registration number OD-02-BG-9507 until further orders.

> Communicate the Ops accordingly and put up on the date fixed i.e. 30/09/2021 for hearing on the above petition filed U/s.38(8) of the C.P. Act, 2019 on merits in presence of both sides if objection is filed by the OPs or else the above order shall be made absolute and the petition shall stand disposed of accordingly."

5. Looking to the language used in the interim order this Court finds, the interim order was granted for a particular time and also keeping the I.A. No.58 of 2021 for final adjudication to 30.09.2021. For the opinion of this Court the I.A. No.58 of 2021 was still pending for final adjudication after appearance of the all the parties therein. Looking to the nature of order, this Court observes, nothing prevented the Opposite Party-Financer to appear before the trial court and file appropriate application and/or objection objecting continuance of the interim order, if any. No revision should have been entertained at this stage for the clear opportunity available to the Private Financer in the lower court proceeding itself. Now coming to the challenge of the Petitioner to the order of the revisional authority being decided *ex-parte*, this Court from the above background is of the opinion that once the revision is filed involving *ex-parte* disposal of the I.A. No.58 of 2021, the revisional authority should have been careful enough at least in not disposing the revision *ex-parte*. It is, only on this ground, this Court finds, the revisional order is not sustainable in the eye of law, which is, hereby, set aside.

Since the trial court proceeding still survives, it will be open to the Opposite Party to appear at there and raise all its' objection. At this stage considering the submission of Mr. Panigrahy, learned counsel for the Opposite Party-Private Financer that since the loanee is in heavy outstanding on account of lapse in not clearing the installments in time and is bound to pay the dues, this Court records the submission of Ms. Mohanty, learned counsel for the Petitioner that the Petitioner is in outstanding of nearly Rs.3,88,000/-. In the process, this Court while leaving it open for the parties to get their dispute adjudicated before the District Consumer Dispute Redressal Commission, Khurda, however, recording the statement of learned counsel for the Petitioner that the Petitioner is ready to pay some amount and request for re-scheduling of the loan outstanding, this Court observes, pendency of consumer dispute shall not stand as a bar in the Petitioner's above attempt and directs, in the event the Petitioner deposits at least a sum of Rs.75,000/- (rupees seventy-five thousand) only along with an application for replacement of the loan outstanding, the Opposite Party-Private Financer shall not take any coercive action against the Petitioner at least till a decision

is taken on the application for replacement of the loan outstanding offered by the Petitioner. It is also directed that the Petitioner will, however, go on continuing with the payment of installments falling presently.

6. With the aforesaid direction the writ petition stands disposedof.

7. As 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 mannerprescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021 and Court's Office order circulated vide memo Nos.514 & 515 dated 7th January, 2022.

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2022 (I) ILR - CUT- 400

S.K. SAHOO, J.

BLAPL NO. 1887 OF 2021

PITAMBAR SAHOO ……….Petitioner

.V.

STATE OF ODISHA ………..Opp. Party

BLAPL NO. 1811 OF 2021
SAROJ KUMAR PRUSTY ....Petitioner

.V.

STATE OF ODISHA ....Opp. Party

BLAPL NO. 3287 OF 2021
DEBASIS HAZRA ....Petitioner

STATE OF ODISHA ....Opp. Party

BLAPL No. 3189 of 2021
LALIT KUMAR SONI ....Petitioner

.V.

STATE OF ODISHA. ....Oppo. Party

LAW OF BAIL – Economic offences – Grant of bail – Principles – Held, economic offences are always considered as grave offences as it

involves deep rooted conspiracy and huge loss of public fund – Such offences are 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. (Para 8)

Case Laws Relied on and Referred to :-

1. (1987) 2 SCC 364 : State of Gujarat Vs. Mohanlal Jitamalji Porwal & Ors.
2. (2013) 7 SCC 439 : Y.S. Jagan Mohan Reddy Vs. CBI.
3. (2021) 84 OCR 1: Aswini Kumar Patra Vs. Republic of India.

BLAPL NO. 1887 OF 2021
For Petitioner : Mr.Dharanidhar Nayak, Sr, Adv.

BLAPL NO. 1811 OF 2021
For Petitioner: Mr.Soura Chandra Mohapatra

BLAPL NO. 3287 OF 2021
For Petitioner : Mr. Devashis Panda

BLAPL No. 3189 of 2021
For Petitioner : Mr. Avijit Pattnaik

For State of Odisha (in all BLAPLs) : Mr. Soubhagya Ketan Nayak Addl. Govt. Adv.
Mr.Tapas Kumar PraharajStanding Counsel

For the informant (in all BLAPLs) : Mr. Asit Kumar Choudhury

ORDER Date of Order: 06.12.2021

S.K. SAHOO, J.

The petitioners Pitambar Sahoo, Saroj Kumar Prusty, Debasis Hazra and Lalit Kumar Soni in the above bail applications have approached this Court for bail under section 439 of Code of Criminal Procedure in connection with Mangalabag P.S. Case No.297 of 2020 corresponding to G.R. Case No.1504 of 2020 pending in the Court of learned J.M.F.C. (City), Cuttack in which charge sheet has been submitted against the petitioners on14.05.2021 for the offences under sections 419, 420, 411, 406, 409,

467, 468, 471, 379 read with section 120-B of the Indian Penal Code keeping the investigation open under section 173(8) of Cr.P.C.

The applications of the petitioners for bail before the learned Sessions Judge, Cuttack were rejected as per orders dated 01.03.2021, 18.02.2021, 16.04.2021 and 12.04.2021 respectively.

Since all bail applications arise out of one case, with the consent of the learned counsel for the parties, those were heard analogously and disposed of by this common order.

2 The factual matrix of the case at hand, is that one Samir Debnath, the Area Head of Link Road area of M/s. Manappuram Finance Ltd., Cuttack Division (hereafter in short 'Manappuram') lodged the first information report before the Inspector in-charge, Mangalabag police station against twentyfour accused persons including the four petitioners stating therein that Manappuram used to lend money against pledged gold ornaments through its branches. Accused nos.1 to 20 were the customers of Manappuram and accused nos.21 to 24 were the previous employees of Manappuram. The Branch Head/Assistant Branch Head was the custodian and authorized to sanction the loans against the pledging of gold basing on the purity of the gold after verification of KYC of the customers.

It is further stated in the F.I.R. that the Inspector in- charge of Lalbag Police Station came to Manappuram on 25.11.2020 and seized 6714.3 grams of gold ornaments from the Bajrakabati Branch of Manappuram on the accusation that those ornaments were involved in Lalbag P.S. Case No. 294 of 2020. During course of investigation of the said case, which was under section 395 of the Indian Penal Code and sections 25 and 27 ofthe Arms Act, basing on the statements of the customers/accused, the ornaments were seized. In the said case, the police had already seized gold from the pledged accounts belonging to accused nos. 1 to 20 as they had taken gold loan by pledging theft gold ornaments and that they had stolen away goldornaments from 2018 gradually on various dates and fraudulently they availed gold loans from Manappuram. During enquiry by police officials, the accused nos. 1 to 20 confessed that they had pledged those stolen gold ornaments in Manappuram to avail loans.

It is further stated in the F.I.R. that at the time of pledging of the gold ornaments, Manappuram used to collect a declaration from each and every

customer that the gold ornaments pledged were the absolute property of the customer and that no other person was having any right, title, claim or interest over the gold ornaments and that he had got absolute right to pledge the gold. Further the customer is to accept all the terms and conditions of the gold loan and also issue demand promissory note as part of the loan documentation. It is stated that Manappuram received the pledged gold as security for the loan advanced on the implied and lucid promise from the accused persons that those ornaments pledged were their absolute property. It is also stated in the F.I.R. that Manappuram lost the gold ornaments which were the only security to the loan and thereby Manappuram sustained a total loss of Rs.2,13,24,884/- (rupees two crores thirteen lakh twenty four thousand eight hundred eighty four only) and interest thereon.

It is further stated in the F.I.R. that Manappuram usedto collect KYC (Know Your Customer) documents i.e. Aadhar Card/PAN Card/Votor ID Card/Ration Card/Driving License as per RBI guidelines whenever a new customer was coming for availing gold loan and each customer used to have an customer ID basing on the KYC document submitted by the customer. It is also stated that Manappuram did not allow to create ID without live photograph of the customers. Accused nos.1 to 20 being colluded with accused nos.21 to 24 created customer IDs without following the guidelines of Manappuram for wrongful gain.

It is also stated in the F.I.R. that the accused/customers being aware of fact that they were not entitled to the gold ornaments pledged by them, induced Manappuram to part with the loan amounts, thereby the act of the accused persons created wrongful gain to them and huge loss was caused to Manappuram.

On the basis of such first information report, Mangalabag P.S. Case No.297 dated 12.12.2020 was registered against the petitioners and others under sections 419, 420, 411, 406, 409 of the Indian Penal Code.

3. During course of investigation, it was found that Manappuram used to lend money against gold through its branches. At the time of pledging of the gold ornaments, Manappuram collected a declaration from each and every customer that the gold ornaments pledged are his/her absolute property and no other person is having any right, title, claim or interest over the gold ornaments and he has absolute right to pledge them. The customers accepted all the terms and conditionsof the gold loan of Manappuram and a demand

promissory note (undertaking) issued to the customers taking their signatures on the same as a part of the loan documentation. Manappuram received the pledges for the loan advanced. Accordingly, theaccused persons, namely, (1) Lalit Kumar Soni (petitioner in BLAPL No. 3189 of 2021),(2) Golap Sahoo, (3) Pravat Kumar Nayak, (4) Rajkishore Sahoo, (5) Lipun Behera, (6) Suman Mandal, (7) Bapuni Nayak, (8) Prakash Chandra Sahu, (9) Basanta Behera, (10) Hemalata Mohanty, (11) Prakash Kumar Sahoo, (12) Kabita Mantry, (13) Kartika Chandra Patra, (14) Dasarathi Sahoo, (15) Anil Kumar Nayak, (16) Padmini Behera, (17) Nilamani Saha, (18) Debasis Hazra (petitioner in BLAPL No. 3287 of 2021), (19) Saroj Kumar Prusty (petitioner in BLAPL No. 1811 of 2021) and (20) Nityananda Sahoo availed gold loan by depositing pledged gold ornaments for security of their loan with all the terms and conditions of Manappuram. On 25.11.2020, the Inspector in-charge of Lalbag Police Station came to the branch office of Manapuram and seized 6714.3 gram of gold ornaments from the branch stating that the said gold is involved in Lalbag P.S. Case No.294 of 2020 under section 395 of the Indian Penal Code read with sections 25/27 of the Arms Act. During investigation of the above case of Lalbag police station, it was established that the police had already seized gold from the pledged accounts of above accused persons and they had taken gold loan by pledging theft gold ornaments and gradually from 2018 on various dates, they availed gold loans from Manappuram in fraudulent manner by pledging those stolen gold ornaments as security. During availing of gold loan, they submitted KYC (Know Your customer), documents i.e. Adhar Card/PAN Card/Votor ID Card/Ration Card/Driving License as per RBI guidelines. It was further revealed that though Manappuram was not allowing to create an ID without the photograph of the customer, but the above accused persons nos.1 to 20 being colluded with staff/Ex- staff of the Manappuram, namely, (1) Silu Mantry, (2) Gitanjali Behera, (3) Lala Ranjan Ray, (4) Pitambar Sahoo (petitioner in BLAPL No. 1887 of 2021) all are of B.K. Road branch, Cuttack created Customer ID without following the guidelines of company for their wrongful gain and thereby causing wrongful loss of Rs.2,13,24,884/- to Manappuram.

During course of investigation, the Investigating Officer examined the informant, visited the spot, examined the witnesses, seized the copy of Reserve Bank Guidelines on Fair Practices code for non-banking financial corporation, copy of by- law of Manappuram, copy regarding Duty Distribution of Employees of Manappuram, copy regarding procedure for

sanction of loan, loan particulars of customers, namely, Lalit Kumar Soni, Golap Sahoo, Pravat Kumar Nayak, Rajkishore Sahoo, Nilamani Saha, Debasis Hazra, Lipuna Behera, Suman Mandal Mohanty, Nityananda Sahoo, Prakash Kumar Sahoo, Kabita Mantry, Kartik Chandra Patra, Dasarathi Sahoo, Padmini Behera, Anil Kumar Nayak, appointment letter of Manappuram in favour of petitioner Pitambar Sahoo (BLAPL No.1887 of 2021), Chandan Kumar Jena, salary statement of Pitambar Sahoo, Gettanjali Behera, Chandan Kumar Jena, Lala Ranjan Ray, report regarding stolen gold of Manappuram addressed to the Manager, Vigilance Department of Manappuram and experience details of staffs on production by the complainant.

During the course of investigation, the investigating officer found prima facie case under sections 419, 420, 411, 406, 409, 379 and 120-B of the Indian Penal Code against the accused persons, namely, Lalit Kumar Soni (petitioner in BLAPL No. 3189 of 2021), Rajkishore Sahoo, Prakash Kumar Sahoo, Nilamani Saha, Debasish Hazra(petitioner in BLAPL No. 3287 of 2021), Saroj Kumar Prusty (petitioner in BLAPL No. 1811 of 2021), Pitambar Sahoo (petitioner in BLAPL No. 1887 of 2021) and Lala Amrut Sagar Roy and others, who colluded with the present staffs, namely, Pitambar Sahoo(petitioner in BLAPL No. 1887 of 2021) and Gettanjali Behera and ex-staffs Lala Ranjan Ray and Silu Mantry of Manappuram and Lala Amrut Sagar Roy of Indian Infoline Finance Ltd., Nayasarak Branch, Cuttack (hereafter in short, 'IIFL') to have made conspiracy and pledged the theft gold ornaments by creating ID violating the guidelines of Reserve Bank of India as well as bye-law of Manappuram causing huge loss of about Rs.2,13,24,884/-. Since the petitioners had already been arrested in connection with Lalbag P.S. Case No. 294 of 2020, the Investigating Officer submitted remand report in respect of the said accused persons. It is further revealed during the course of investigation that the petitioners and other accused persons hatched criminal conspiracy with dishonest intention to derive wrongful gain by inflicting wrongful loss to the Manappuram and IIFL in a fraudulent manner. The investigation further revealed that the accused persons having a pre-meditation consent to cheat the IIFL and Manappuram forged and fabricated a number of documents in clandestine manner to plant identity of the so- called account holders and after creation of such accounts, the accused persons operated the accounts and could succeed to receive cash against the pledged gold, which actually did not belong to them. The offensive act of the accused persons inforging the

documents pertaining to the identity of so-called non- existing customer amounts to forgery of valuable security, which is punishable under section 467 of the Indian Penal Code. Since forgery was committed for the purpose of cheating, sections 468/471 of the Indian Penal Code are attracted against the accused persons as after manufacturing the documents, they used the same as genuine having absolute knowledge that the documents are forged. During investigation, it was revealed that the petitioners Lalit Kumar Soni and Saroj Kumar Prusty made several transactions in their accounts with Manappuram and they pledged the theft gold ornaments of IIFL in Manappuram with the knowledge of the staffs of Manappuram, namely, petitioner Pitambar Sahoo and Geeetanjali Behera. The investigation further revealed that soon after transaction, the cash was transferred to the account of accused Lala Amrut Sagar Roy through UPI (Phone payment), which clearly proved that he was fully aware about the pledging of theft gold ornaments or sent the pledged gold ornaments of IIFL for depositing at Manappuram through the petitioners Lalit Kumar Soni, Saroj Kumar Prusty, Pitambar Sahoo and others. As investigation of the case could not be completed, but the statutory period was going to be completed, first charge sheet was submitted keeping the investigation open for verification of involvement of other customers, receipt of transaction details of the bank account of the alleged customers, physical verification, examination of all the customers/ staff and sample signature of petitioner Pitambar Sahoo and other staff of Manappuram.

4. At this stage, before proceeding further, I would like to jot down the accusation against each of the petitioners.

(i) **Accusation against the petitioner Pitambar Sahoo (BLAPL No. 1887 of 2021)**:

During investigation, it is revealed that the petitioner Pitambar Sahoo, the Ex-Branch Head of Manappuram made criminal conspiracy with accused Lala Amrut Sagar Roy of IIFL and other accused persons and misappropriated public money as a banker by pledging the stolen gold of IIFL by opening fake customer ID without following guidelines of Manappuram for wrongful gain. The petitioner created accounts in the name of his mother Golap Sahoo and brother Nityananda Sahoo deviating all the guidelines of Manappuram and knowingly re-pledged the stolen gold of IIFL in Manappuram in their names and availed cashloan. It is also revealed

that he placed the photographs of different persons, putting signature in their name and also placed his own photograph in the account of his brother Nityananda Sahoo and gave wrong mobile number. He misused his power and misappropriated the public money by pledging stolen gold of IIFL in their accounts at Manappuram. He also opened two fake accounts in the name of Suman Mandal and Lipun Behera without their knowledge by forging the documents and using it as genuine and has changed the father's name of Suman Mandal as Jasobanta Mandal instead of Hadu Mandal and pledged the stolen gold of IIFL in their names. The statements of Lipun Behera and Suman Mandal proved the criminal conspiracy in between the petitioner Pitambar Sahoo and accused Lala Amrut Sagar Roy. The investigation further revealed that transactions were made between Lala Amrut Sagar Roy and Manappuram though Lala Amrut Sagar Roy had no pledged account in Manappuram and he had not pledged any gold in his name.

During the course of investigation, the Investigating Officer recorded the statements of the witnesses and seized number of documents which showed the involvement of the petitioner in the alleged crime in connivance with other accused persons.

(ii) **Accusation against the petitioner Saroj Kumar Prusty (BLAPL No. 1811 of 2021)**:

During the course of investigation, it is revealed that the petitioner Saroj Kumar Prusty made criminal conspiracy with accused Lala Amrut Sagar Roy, petitioner Pitambar Sahoo and other accused persons and knowingly re-pledged the stolen gold weighing 192.50 grams of IIFL in Manappuram and availed cash of Rs.6,32,159/- (six lakhs thirty two thousand one hundred fifty nine) giving false undertaking that the stolen gold ornaments belonged to him. As all the gold ornaments pledged by the petitioner were stolen from IIFL, those were seized in connection with Lalbag P.S. Case No. 294 of 2020. During the test identification parade in respect of the jewelleries, it was revealed that the jewellery of Vinod Singh, Nikhil Kumar Dey which were pledged at IIFL were stolen and re-pledged at Manappuram by the petitioner in connivance with his associates. The documents regarding account details, quantity of pledged gold, details of outstanding loan amount of accused persons were seized, which proved his involvement in the case. The investigation further revealed that five nos. of bank transactions were made by the petitioner with the principal accused

Lala Amrut Sagar Roy from his Bandhan Bank, Chandi Chhak Branch account for the period from 04.08.2020 to 06.08.2020 and a total sum of Rs. 1,10,000/- (one lakh ten thousand) was debited from the account of the petitioner to the account of the principal accused Lala Amrut Sagar Roy, which proves criminal conspiracy between the two. The investigation further revealed that the mobile number, photograph and signature, which were given at the time of opening of account in Manappuram by the petitioner Saroj Kumar Prusty are genuine.

During the course of investigation, the confessional statement of accused Lala Amrut Sagar Roy regarding deposit of gold at Manappuram by the petitioner got corroborated by the statements of Area Manager Sameer Debnath, Ranjan Kumar Sahoo, Priyambada Mohanty, Truptimayee Parida, PrabhuduttaDash and Sanjay Kumar Kap.

(iii) **Accusation against the petitioner Debasish Hazra (BLAPL No. 3287 of 2021)**:

During the course of investigation, the Investigating Officer found that the petitioner Debasish Hazra made criminal conspiracy with accused Lala Amrut Sagar Roy, petitioner Pitambar Sahoo and other accused persons and knowingly re- pledged the stolen gold weighing 1215.70 grams of IIFL in Manappuram and availed Rs.37,10,026/- of cash as loan. He also gave false undertaking that the stolen gold ornaments belongedto his own. It is also revealed during investigation that all the goldjewelleries pledged by petitioner Debasish Hazra were seized in connection with Lalbag P.S.Case No. 294 of 2020. During the identification process, the gold ornaments pledged at IIFL, which belonged Ashok Kumar Sahoo, Asit Kumar Sahu, Dhananjaya Kumar Dagra, Harekrushna Sahoo, Santoshi Sahoo, Shyam Sundar Ghosh, Sk.Ebrahim, Sonali Lenka, Tapas Kumar Sahoo were found to have been stolen and re-pledged at Manappuram by the petitioner in connivance with other accused persons to avail loan. The investigation further revealed that during opening of the pledge account at Manappuram, the phone number given by the petitioner was found to be genuine. The investigation further revealed that bank transaction was made from accused Lala's ICICI bank account to the account of the petitioner.

Confessional statement of accused Lala Amrut Sagar Roy implicating the petitioner regarding deposit of pledged gold ofIIFL at Manappuram stood

corroborated from the statements of Area Manager Sameer Debnath, Ranjan Kumar Sahoo, Priyambada Mohanty, Truptimayee Parida, Prabhudutta Dash, Sanjay Kumar Kap so also the involvement of petitioner in the alleged occurrence.

(iv) **Accusation against the petitioner Lalit Kumar Soni (BLAPL No. 3189 of 2021)**:

During the course of investigation, it was revealed that the petitioner Lalit Kumar Soni made criminal conspiracy with accused Lala Amrut Sagar Roy, petitioner Pitambar Sahoo and other accused persons and knowingly re-pledged the stolen gold weighing 795.60 grams of IIFL in Manappuram and availed cash loan of Rs.24,98,165/- and he had not repaid the loan amount. The investigation further revealed that the petitioner had given false undertaking that the stolen gold ornaments belonged to him. It was also revealed during investigation that all the gold jewelleries pledged by petitioner were seized in connection with Lalbag P.S. Case No. 294 of 2020. During the identification process, the gold ornaments pledged at IIFL, which belonged to Dhananjay Dagara, Manas Kumar Rout, Pradip Kumar Ray, petitioner Saroj Kumar Prusty, Soumya Ranjan Muduli, Sukanta Mohanty and Venkatesh Sethy were found to be stolen and re- pledged at Manappuram by the petitioner in connivance with otheraccused persons. The investigation further revealed that during opening of the pledge account at Manappuram, the phone number given by the petitioner was found to be genuine. The investigation further revealed that a sum of Rs.70,000/- has been debited from the HDFC Bank account of the petitioner to the account of the principal accused Lala Amrut Sagar Roy on 10.10.2020. The petitioner used his own mobile phone to get new loans by pledging the gold of IIFL in his own name in connivance with the other employees and agents and received loans of huge amount in that respect.

The confessional statement of accused Lala Amrut Sagar Roy regarding deposit of gold at Manappuram by the petitioner got corroborated by the statements of Area Manager Sameer Debnath, Ranjan Kumar Sahoo, Priyambada Mohanty,Truptimayee Parida, Prabhudutta Dash, Sanjay Kumar Kap and others regarding involvement of petitioner in the allegedoccurrence.

5. Mr. Dharanidhar Nayak, learned Senior Advocate appearing for the petitioner Pitambar Sahoo in BLAPL No. 1887 of 2021 submitted that the petitioner was the Branch Manager of Manappuram and he was taken on

remand in this case on 19.01.2021. It is further contended that during his entire service career, the petitioner has performed his duty sincerely in his official capacity and he has neither issued fake accounts to the customers nor misappropriated any money. It is argued that in his official capacity, the petitioner has provided loans to different customers against the gold pledged in the branch after due verification and there was no malafide intention of the petitioner while sanctioning the loans nor any act of misappropriation was done by him in course of sanction of loans. Learned counsel further contended that the gold items were in the custody of the branch and those were never kept with the petitioner and he has not misappropriated any gold ornaments at any point of time. It is further contended that some customers might have committed mistake in order to fulfill their ulterior motive, which was behind the back of the petitioner. It is further submitted that the basic ingredients for constituting the offences under which charge sheet has been submitted against the petitioner are lacking and therefore, the bail application may be considered favourably.

Mr. Soura Chandra Mohapatra, learned counsel appearing for the petitioner Saroj Kumar Prusty in BLAPL No. 1811 of 2021 contended that the petitioner is in judicial custody since 27.11.2020 and he is a victim of the circumstances. The so- called criminal conspiracy between the accused persons is based on the confessional statement of the petitioner and the co-accused persons before police, which is not admissible. The test identification parades of the jewelleries were not conducted in accordance with law. There are no materials that the petitioner had knowledge that the gold ornaments, which he pledged availing loan were stolen from IIFL and therefore, the bail application may be favourably considered.

Mr. Devashis Panda, learned counsel appearing for the petitioner Debasish Hazra in BLAPL No. 3287 of 2021 submitted that the petitioner was taken on remand in this case on 19.01.2021. He further submitted that there are no materials to prove that the petitioner had taken loan by pledging theft gold ornaments of IIFL, rather a false case has been foisted against the petitioner. He further submitted that some theft gold ornaments of IIFL might have been pledged in Manappuram but the gold ornaments pledged by the petitioner are not theft materials. According to him, neither the petitioner pledged the theft gold ornaments nor he has got any involvement in the crime. Learned counsel further submitted that basing on the statements of the co-accused persons in connection with Lalbag P.S. Case No.294 of 2020,

the petitioner has been implicated and remanded in this case and therefore, the bail application may be favourably considered.

Mr. Avijit Patnaik, learned counsel appearing for the petitioner Lalit Kumar Soni in BLAPL No. 3189 of 2021 submitted that the petitioner is a jewellery shop owner and he was taken on remand in this case since 19.01.2021 and there is no clinching materials on record to show that the petitioner had connived with the co-accused persons in the misappropriation of ornaments of the customers pledged in IIFL to avail the gold loan by repledging in Manappuram. Learned counsel further submitted that the allegation of the informant that the petitioner along with others re-pledged the theft gold ornaments of IIFL in Manappuram is not based on any evidence. It is further submitted that the petitioner being a jewellery shop owner, he deals with a lot of people and legally procures gold from them for various other practical uses for his business and the gold seized from Manappuram belonged to him and the same were pledged by him. Learned counsel further submitted that the petitioner while purchasing gold from accused Lala Amrut Sagar Roy, had absolutely no knowledge that those were the stolen gold of IIFL and he purchased the gold on good faith as Lala Amrut Sagar Roy was a business customer since long. Learned counsel further submitted that the allegation against the petitioner that the petitioner being colluded with accused nos. 21 to 24 created fake customer I.Ds without following the guidelines of Manappuram cannot be accepted and therefore, the bail application may be favourably considered.

6. Mr.Soubhagya KetanNayak, learned Addl. Government Advocate for the State being ably assisted by Mr. Tapas Kumar Praharaj, learned Standing Counsel submitted that the statements of Sameer Debnath, the informant and other co- employees of Manappuram indicated that after the audit was conducted in IIFL, number of illegalities committed by the main accused Lala Amrut Sagar Roy in connivance with others including the Branch Manager of IIFL and Manappuram came to fore. It is submitted that huge unlawful cash transaction between the accounts of the petitioners and the account of the accused Lala Amrut Sagar Roy, conduct of the petitioner Pitambar Sahoo (BLAPL No. 1887 of 2021) in pledging huge quantity of gold ofIIFL in the name of his own mother and brother in Manappuram fraudulently in connivance with accused Lala Amrut Sagar Roy, prima facie makes out the offences against him. Similarly, the petitioners Saroj Kumar Prusty, Debasis Hazra and Lalit Kumar Soni re-pledged the stolen gold

ornaments of IIFL and availed gold loan and the jewelleries were identified by the persons to be theirs in the T.I. parade as they had pledged it in IIFL. He further submitted that during investigation of Lalbag P.S. Case No. 294 of 2020, the Investigating Officer came to know that the present petitioners along with the staff of IIFL and others being colluded with each other have re-pledged the theft gold of IIFL in Manappuram and availed huge loan and thereby innocent customers have suffered huge loss and Manappuram has also suffered financial instability. He further submitted that when the investigation is still under progress on some important angles and final charge sheet is yet to be submitted, at this stage the petitioners should not be released on bail as there is likelihood of derailing the ongoing investigation.

7. Mr. Asit Kumar Choudhury, learned counsel appearing for Manappuram submitted that in connivance of all the petitioners, economic fraud has been committed in both IIFL and Manappuram and huge amount of loans has been availed and thereby innocent customers have suffered huge loss and Manappuram has also suffered financial instability. It is argued that the petitioners being hand in glove with each other committed the crime in a pre-planned way keeping an eye on personal profit regardless of the consequence to the society and therefore, they should not be released on bail particularly when there is chance of tampering with the evidence. Reliance was placed on the decisions of the Hon'ble Supreme Court in the cases of **State of Gujarat -Vrs.- Mohanlal Jitamalji Porwal and others reported in (1987) 2 Supreme Court Cases 364**, Y.S. Jagan Mohan Reddy -Vrs.- CBI reported in (2013) **7 Supreme Court Cases 439** and **Aswini Kumar Patra** -Vrs.- **Republic of India reported in (2021) 84 Odisha Criminal Reports 1.**

8. Economic offences are always considered as grave offences as it involves deep rooted conspiracy and huge loss of public fund. Such offences are 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. (Ref: **Mohanlal Jitamalji Porwal** (supra), **Y.S. Jagan Mohan Reddy** (supra) **and Aswini Kumar Patra** (supra)).

It is the settled law that detailed examination of evidence and elaborate discussion on merits of the case should not be undertaken while adjudicating a bail application. The nature of accusation, the severity of punishment in case of conviction, the nature of supporting evidence, the criminal antecedents of the accused, if any, reasonable apprehension of tampering with the evidence of the witnesses, apprehension of threat to the witnesses, reasonable possibility of securing the presence of the accused at the time of trial and above all the larger interests of the public and State are required to be taken note of by the Court while granting bail.

9. Adverting to the contentions raised by the learned counsel for the respective parties and analyzing the oral and documentary evidence on record carefully, it appears that there are prima facie materials to show criminal conspiracy between the petitioners and the co-accused persons. The stolen gold of IIFL were pledged in Manappuram by opening fake accounts without following the guidelines and huge loan was availed against pledged gold and misappropriated. The manner in which the petitioner Pitambar Sahoo being the Ex-Branch Head of Manappuram has conducted himself in the opening of fake loan accounts and grant of loan against pledging of stolen gold of IIFL, is very suspicious. He has even availed loan in the names of his mother and brother by pledging the stolen gold ornaments of IIFL. Since the guidelines of Manappuram were not followed at the timeof grant of loan, fake photographs and fake signatures were used at the time of opening of the loan accounts as well as sanction of loan, it prima facie shows that without the connivance of the petitioner Pitambar Sahoo, it could not have been possible to avail the loan of such huge amount in so many accounts. The fact that the pledged gold of the petitioners were identified in the T.I. parade as the pledged gold of IIFL by the genuine customers and particularly in view of the bank transactions between the petitioners with the main accused Lala Amrut Sagar Roy, it primafacie makes out the offences under which charge sheet has been submitted. The contention raised by the learned counsel for the petitioners regarding the innocence of the petitioners is not at all acceptable at this stage in view of the oral and documentary evidence collected against them during investigation. Moreover, the investigation is still under progress and it appears from the charge sheet that many more important areas of the case are still under investigation and many vital links in the crime are yet to be unearthed and at this stage, if the petitioners are enlarged on bail, there is every likelihood of derailing the ongoing investigation and there is also every chance of influencing the witnesses.

In view of the foregoing discussions, without detailed examination of the evidence on record and elaborate discussion on the merits of the case, but considering the nature and gravity of accusation, the nature of supporting evidence to substantiate such accusation, the pre-planned manner in which the crime has been committed, the financial loss suffered by Manappuram on account of such crime, the incriminating articles seized from the petitioners and moreover, the severity of punishment in case of conviction and since huge amount of public money has been misappropriated, the impact of the crime on the society and in the larger interest of public and State, I am not inclined to release the petitioners on bail.

Accordingly, all the bail applications being devoid of merits, stand rejected.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioners. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial.

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2022 (I) ILR - CUT- 414

K.R.MOHAPATRA, J

I.A. NO. 26 OF 2021
(Arising out of OJC No.1921 of 1999)

RADHAKANTA MATH ………Petitioner

.V.

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

ODISHA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 3 – Notification under section 3(1) – Prayer to abate the suo-moto ceiling proceeding initiated under the Odisha Land Reform Act, 1960 – Prayer rejected – Held, there can be no ambiguity in the position of law to the effect that upon publication of notification under section 3(1) of the Consolidation Act,

the proceeding which are capable of being adjucated under the provisions of the said act, will certainly abate if the same are pending either in any Civil Court or in a revenue Court – A ceiling proceeding being unique in its nature which is initiated under the OLR Act, will continue being unaffected by the notification under section 3(1) of the Consolidation Act. (Para-13)

It is further observed that inter-locutory application has been filed at a much belated stage that is in the midst of the final hearing of the writ petition (where the veracity of the order passed under the OLR Act has to be tested). As all the forums available under the OLR Act have been exhausted, literally there is no proceeding under the OLR Act pending at present, the question of abatement of ceiling proceeding does not arise at all. (Para-14)

Case Laws Relied on and Referred to :-

1. (1974) 2 SCC 27: (Agricultural & Industrial Syndicate Ltd. Vs. State of U.P. & Ors.
2. (1980) 3 SCC 719 : (Ambika Prasad Mishra Vs. State of U.P. & Ors.).
3. 2015 (I) ILR-CUT 545 : Pradeep Kumar Behera & Ors. Vs. Commissioner, Land Records and Settlement & Ors.

For Petitioner : Mr. Dayananda Mohapatra
For Opp Parties : Mr. Ajodhya Ranjan Dash, AGA.

ORDER Date of Order : 04.02.2022

K.R.MOHAPATRA, J.

1. This IA has been filed by the State of Odisha-Opposite Party with a prayer to abate the proceeding under the Odisha Land Reforms Act, 1960 (herein after referred to as 'OLR Act' for convenience) as the said area under which the land in question situates is under consolidation operation initiated under the provisions of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as 'Consolidation Act' for convenience).

2. Materials on record reveal that Sri Radhakanta Math situated in the district of Puri (hereinafter referred to as 'Math' for convenience) is a Public Religious Institution under Odisha Hindu Religious Endowments Act, 1951 (hereinafter referred to as 'Endowments Act' for convenience) and Rules framed thereunder. In the year 1976, a *suo motu* ceiling proceeding under the OLR Act was initiated on the basis of the report of the Amin in respect of an area Ac.515.03 decimal pertaining to Khata No.21 in mouza Sipasirubali

(hereinafter referred to as 'the case land' for convenience) against Mahanta Goura Gobinda Das Goswami of Radha Gobinda Das Goswami, Radhakanta Math, Balisahi, Puri and draft statement prepared under Section 43(1) of the OLR Act was confirmed under Section 44(1) of the OLR Act vide order dated 16th December,1995 (Annexure-5) holding the case land to be the personal property of Mahanta Goura Gobinda Das Goswami. Assailing the same, the Petitioner-Math preferred Appeal under Section 58 of the OLR Act in OLR Appeal No.12 of 1996. The Sub-Collector, Puri, vide his order dated 11th August, 1997 (Annexure-6) confirmed the order under Annexure-5.Assailing the same, the Petitioner-Math preferred OLR Revision Case No.1 of 1997, which was also dismissed vide order dated 9th September, 1998 (Annexure-7). Hence, the present writ petition has been filed.

3. Counter affidavit has also been filed by the State Government. In course of final hearing of the writ petition, the State of Odisha came up with this IA stating that during pendency of the ceiling proceeding under the OLR Act, a notification under Section 3(1) of the Consolidation Act was published notifying initiation of the consolidation operation in the area, i.e., Sipasirubali in which the case land situates. It is also stated in the IA that on the prayer of the Petitioner, further proceedings in Objection Case Nos.2667/1996 and 2668/1996 as well as Objection Case Nos. 597 to 612 of 2007 initiated under the provisions of the Consolidation Act pending before the Sub-Collector, Puri, was stayed. Although an application in Misc. Case No.22 of 2013 has been filed by the State of Odisha-Opposite Party to vacate the interim order, but no order to that effect has yet been passed.

4. It is contended in the petition that in view of Section 4 (3) and (4) of the Consolidation Act, the ceiling proceeding initiated under the OLR Act ought to have been abated, but it was allowed to continue and at present is pending before this Court. An objection to the said IA has also been filed by the Petitioner denying the allegations made in the IA.

5. Learned counsel for both parties addressed the Court at length on the issue involved.

5.1 Mr. Dash, learned AGA submitted that the question of abatement of any proceeding arises when in the pending proceeding (in the instant case, the Ceiling proceeding) before any authority/Court, an issue of existence of right, title and interest over the subject matter arises which is under consideration

either in the Civil Court or in any proceeding under the Special Act, i.e., in Consolidation Act in the instant case. The OLR authorities have so far proceeded under the premises that the person against whom Ceiling proceeding has been initiated has right, title and interest over the case land. But in the meantime, consolidation operation started and objection cases relating to the existence of right, title and interest in respect of the case land are pending before the Consolidation Authority. Objection cases have also been filed before the Consolidation Authority, which are awaiting disposal. The ceiling surplus land, if any, of the Petitioner can only be determined after a decision on the right, title and interest of the Petitioner over the case land. Thus, the issue with regard to maintainability of the ceiling proceeding, is dependent upon completion of the Consolidation operation. In such premises, OLR authorities should not proceed with the matter and should keep the ceiling proceeding on hold till completion/closure of the Consolidation proceeding. The consolidation authorities have jurisdiction of a Civil Court to decide the issue of right, title and interest of the parties litigating, whereas the OLR authorities do not have such jurisdiction. Thus, the irresistible conclusion that flows from the above is that on an application filed by any of the parties to the ceiling proceeding, a direction should be made to abate the ceiling proceeding and await final decision on the issue of right, title and interest over the case land. In other words, upon a notification under Section 3(1) of the Consolidation Act, the ceiling proceeding will abate and after closure of the Consolidation operation, the ceiling proceeding may revive depending on the facts and circumstances of each case. In support of his case, he relied on ***(1974) 2 SCC 27 (Agricultural & Industrial Syndicate Ltd. Vs. State of U.P. and others)***and ***(1980) 3 SCC 719 (Ambika Prasad Mishra Vs. State of U.P. and others)***. In view of the above, he prayed for allowing the IA.

6. Mr. Mohapatra, learned counsel for the writ Petitioner-Math objecting to the prayer in the IA submitted that the present proceeding, i.e., the writ petition, cannot be said to be a proceeding under the OLR Act. Further, the OLR authorities treating Goura Gobinda Das Goswami as a ceiling surplus land holder prepared draft statement under Section 43(1) of the OLR Act and initiated *suo motu* OLR Case No. 1/243 of 1986 against his Chela namely, Mahanta Dhyan Chandra Das. The issue involved in the OLR proceeding is as to whether the land in question is the personal property of said Goura Gobinda Das Goswami or it belongs to the Math, which is a public religious institution. The OLR authorities on the premises that the land in question is

personal property of Sri Goura Gobinda Das Goswami confirmed the draft statement, which has been affirmed by the appellate authority as well as revisional authority and is pending for consideration in this writ petition. There is no issue of right, title and interest over the case land. If on the materials available on record, this Court comes to a conclusion that the Math is a privileged Raiyat and the property belongs to it, then the draft statement which has been made final, will not sustain. The notification under Section 3(1) of the Consolidation Act was made on 22nd September, 1988, i.e., only two years after the initiation of the *suo motu* Ceiling proceeding. But at no stage of the proceeding under the OLR Act, such a question was raised by the State of Odisha, although it contested the proceeding in all forums. In the counter affidavit filed by the State of Odisha, no such issue has also been raised. In course of final hearing of the writ petition, this IA has been filed. Such a plea has been taken only to drag the litigation and to harass the writ Petitioner.

7. It is his submission that Section 4(3) or (4) of the Consolidation Act does not clothe a ceiling proceeding under the OLR Act. Section 4 (3) of the Consolidation Act refers to abatement of the proceeding relating to survey, preparation and maintenance of record as well as settlement of land. Although preparation and maintenance of record of right has not been defined in the Consolidation Act, it has the same meaning as mentioned in Odisha Survey and Settlement Act, 1958 (hereinafter referred to as 'Settlement Act') in view of the proviso to Section 2(w) of the Consolidation Act. Section 2(7) of the Settlement Act defines ROR. Section 16 of the said Act refers to maintenance of records. Rules 33 of the Odisha Survey and Settlement Rules, 1962 (hereinafter referred to as 'Rules') prescribes the manner and procedure of maintenance of records. A harmonious reading of the provisions of the OLR Act vis-à-vis Consolidation Act as well as Settlement Act makes it clear that a ceiling proceeding initiated under the OLR Act does not come within the scope and ambit of Sub-sections (3) and (4) of Section 4 of the Consolidation Act. He also refers to a decision of this Court in the case of ***Pradeep Kumar Behera & Ors. Vs. Commissioner, Land Records and Settlement & Ors*** reported in ***2015 (I) ILR-CUT 545***, wherein this Court dealing with scope and ambit of Section 4(3) observed as follows:-

> *"It is also seen that as per provision of Sub-Section-3 of Section 4 every proceeding relating to Survey and preparation of ROR and Settlement of rent which might be pending before the authorities under Orissa Survey and Settlement Act shall stand abated after publication of Notification under Sub-Section 1 of Section 6 by the Director, Consolidation initiating preparation of Map and land register in respect of the consolidation area."*

It is categorically observed therein that in order to avoid duplication work by the Settlement as well as Consolidation Authority, provision under Section 4(3) has been incorporated in the Consolidation Act. Thus, a ceiling proceeding initiated under the OLR Act shall not abate on initiation of consolidation operation by notification under Section 3(1) of the Consolidation Act. Section 7 of the Consolidation Act only refers to abatement of a proceeding for partition of the holding situated in the consolidation area under Section 19 of the OLR Act, as it is capable of being adjudicated by the Consolidation authority.

8. Section 51(1) of the Consolidation Act refers to abatement of the disputes/proceedings relating to right, title and interest in the land situated in the consolidation area except those coming within the jurisdiction of revenue courts or authorities under any local law for the time being in force. Thus, the OLR Act being local law, ceiling proceeding under the OLR Act will not come within the ambit of Sub-sections (3) or (4) of Section 4 of the Consolidation Act. The Consolidation operation does not give a fresh cause of action to adjudicate the grievance concerning right, title and interest which is already settled. It only deals with subsisting dispute with regard to right, title and interest and if the same is pending before any civil court, it will certainly abate. But in the instant case, the State of Odisha accepting the Petitioner as the land owner, initiated ceiling proceeding under the OLR Act. Thus, it will not abate as a proceeding for determination of ceiling surplus holding is not amenable to the jurisdiction of the Civil Court in view of Section 67 of the OLR Act.

9. Mr. Mohapatra, learned counsel further contended that the ratio in ***Agricultural & Industrial Syndicate Ltd. (supra)*** has no application to the instant case**,** as the Hon'ble Supreme Court while interpreting Section 5(2) of the U.P. Consolidation of Holdings Act, 1954 (hereinafter referred to 'UP Consolidation Act') laid down the ratio. Realizing the difficulty, Section 5(2) of the U.P Consolidation Act was subsequently amended and the amended provision was interpreted in the case of A***mbika Prasad Mishra (supra).*** While distinguishing the ratio decided in ***Agricultural & Industrial Syndicate Ltd. (supra),*** Hon'ble Supreme Court in paragraph 34 held as follows:-

> *"34. ……Thus there is no basic injustice nor gross arbitrariness in the continuance of the land reforms proceedings even when consolidation proceedings are under way. ….."*

Mr. Mohapatra, thus, prayed for dismissal of the IA.

10. The prayer made in the IA has to be considered in the context of Sub-sections (3) and (4) of Section 4, Section 7 as well as Section 51 of the Consolidation Act. For ready reference, relevant portion of the said provisions are reproduced hereunder:-

> *4. **Effect of notification**. - Upon the publication of the notification issued under sub-section (1) of section 3 in the Official Gazette, the consequences as hereinafter set forth, shall, subject to the provisions of this Act, ensue in the consolidation area till the publication of notification under section 41 or sub-section (1) of section 5, as the case may be-*
>
> *xxx xxx xxx*
>
> *(3) Every proceeding relating to survey, preparation and maintenance of record-of-rights and settlement of rent shall stand abated after publication of the notification under sub-section (1) of section 6; and*
>
> *(4) Every suit and proceeding for declaration of any right or interest in any land situate within the consolidation area in regard to which proceedings could be or ought to be started under this Act, which is pending before any Civil Court, whether of the first instance or appeal, reference or revision shall, on an order being passed in that behalf by the Court before which such suit or proceeding is pending, stand abated;*
>
> *Provided that no such order shall be passed without giving the parties concerned an opportunity of being heard;*
>
> *[Provided further that on the issue of a notification under sub-section (1) of section 5 in respect of the said area or part thereof –*
>
> *(a) every order passed by the Court under clause (4) in relation to the lands situate in such area or part thereof, as the case may be, shall stand vacated; and*
>
> *(b) all such suits and proceedings as are referred to in clause (3) or clause (4) which related to lands situate in such area or part thereof, as the case may be, shall be proceeded with and disposed of in accordance with the law as if they had never abated;]*
>
> *Provided also that such abatement shall be without prejudice to the right of the person affected to agitate the right or interest which formed the subject matter of the said suit or proceeding, before the proper consolidation authority in accordance with the provisions of this Act or the rules made there under.*
>
> *Xxx xxx xxx*
>
> *"7. **Powers relating to partition of joint holding, amalgamation of holdings and to determine rent and cess and effect change in the village boundaries. -** (1) Upon the publication of the notification issued under Subsection (1) of Section 3, no*

partition of a holding lying in the consolidation area under Section 19 of the Orissa Land Reforms Act, 1960 (Orissa Act 16 of 1960) shall be effected by the Revenue Officer till the publication of the notification under Section 41 or Sub-section (1) of Section 5, as the case may be, and the Assistant Consolidation Officer and the Consolidation Officer shall, in addition to the powers vested in them under this Act, have powers to effect partition of joint holdings on application of any party interested notwithstanding anything to the contrary contained in any other law for the time being in force:

xxx xxx xxx

51. ***Bar of jurisdiction of Civil Courts****. - Notwithstanding anything contained in any other law for the being in force, but subject to the provisions contained in [clause] (3) of section 4 and sub-section (1) of section 7*

(1) all questions relating to right, title, interest and liability in land lying in the consolidation area, except those coming within the jurisdiction of Revenue Courts or authorities under any local law for the time being in force, shall be decided under the provisions of this Act by the appropriate authority during the consolidation operations; And

(2) no Civil Court shall entertain any suit or proceeding in respect of any matter which an officer or authority empowered under this Act is competent to decide."

11. On a harmonious reading of the aforesaid provisions of the Consolidation Act, it can be safely inferred that on an application or otherwise, as the case may be, cause of action in respect of any subject matter of dispute, which is capable of being adjudicated by the Consolidation authorities, will stand abated as soon as a notification under Section 3(1) of the Consolidation Act is published in the official gazette and will continue to be in effect till a notification either under Section 41 or Section 5(1) of the Consolidation Act is made.

12. Section 7 of the Consolidation Act provides for partition of joint holding, amalgamation of holdings, to determine rent and cess and to effect change in the village boundaries. It provides that upon the publication of the notification issued under sub-section (1) of section 3 of the Consolidation Act, no partition of a holding lying in the consolidation area shall be effected by the Revenue Officer under Section 19 of the OLR Act, till the publication of the notification under Section 41 or subsection (1) of Section 5 of the Consolidation Act, as the case may be, is made and the Assistant Consolidation Officer and the Consolidation Officer shall, in addition to the powers vested in them under the said Act, will have power to effect partition of joint holdings on application of any party interested notwithstanding

anything to the contrary in any other law for the time being in force. Thus, Section 7 (1) of the Consolidation Act makes it clear that a proceeding under Section 19 of the OLR Act will abate on initiation of a consolidation operation in the village or locality in which the land in question situates. A ceiling proceeding is not covered under Section 19 of the OLR Act.

13. Mr. Dash, learned AGA strenuously argued that unless right, title and interest in respect of the land in question is determined, no ceiling proceeding can either be initiated or continued to determine the retainable area of the land owner. It also transpires from the record that a notification under Section 3 (1) of the Consolidation Act published in the Official Gazette on 22nd September, 1988 (Annexure-A to the IA), which includes the village in which the case land situates. Further, no notification either under Section 5(1) or Section 41 of the Consolidation Act has yet been made in respect of the village. Thus, consolidation operation is in vogue in the village. Some Objection Cases have also been filed in respect of case land. Further, proceeding of the Objection cases have been stayed pursuant to interim order passed by this Court.

13.1 In the case of ***Agricultural & Industrial Syndicate Ltd. (supra)***, the Appellant-Agricultural & Industrial Syndicate Ltd. was a tenure holder of the land in two villages in the district of Saharanpur, Uttar Pradesh. Some of the areas of such holding were declared as ceiling surplus under the provisions of UP Imposition of Ceiling on Land Holdings Act (hereinafter referred to 'UP Land Ceiling Act' for convenience). The main contention raised before the Hon'ble Supreme Court was that the prescribed authority should have stayed the ceiling proceeding during continuance of the consolidation operation in the said village. Relevant portion of pre-amended Section 5(2) of the UP Consolidation Act, reads as follows:-

> *"Upon such publication of the notification under subsection (2) of section 4 the following further consequences shall ensue in the area to which the notification relates:*
>
> *(a) every proceeding for the correction of records and every suit and proceedings in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference, or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated. Provided further that on the issuance of a notification*

under sub-section (1) of section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part...... shall stand vacated.

(b) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules thereunder."

Taking into consideration the different provisions of the UP Land Ceiling Act as well as UP Consolidation Act, Hon'ble Supreme Court at paragraphs-9 and 10 held as follows:-

"*9. It is true that the purposes of the two Acts are different. Under the Ceiling Act, the ceiling area and surplus land of a tenureholder are determined; under the Consolidation Act, the holdings of a tenure holder are consolidated. But neither purpose may in a large number of cases be accomplished without first determining the right or interest of various claimants in the plots. So the crucial question for decision is as to whether the Prescribed Authority under the Ceiling Act or the Consolidation authority under the Consolidation Act has got a preemptive jurisdiction to determine rival rights and interests in the land of the appellant. We have already shown that the proceeding under s. 12 of the Ceiling Act is a proceeding within the purview of s. 5(2) of the Consolidation Act. Section 49 of the Consolidation Act materially provides:*

"Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of rights of tenure-holders in respect of land lying in an area, for which a notification has been issued under subsection (2) of s. 4 .... shall be done in accordancewith the provisions of this Act. . . . "

10. Obviously the purpose of the non-obstante clause in s. 49 is to exclude the operation of any other overlapping Act. So the nonobstante clause would exclude the operation of the Ceiling Act while the Consolidation Act is in operation in a particular area. Section 5(2) and s. 49 indicate clearly that the proceedings in the instant case are to be abated under s. 5(2). Section 48A of the Consolidation Act expressly saves the jurisdiction of the Custodian of the Evacuee properties to decide claims to the, plots of the evacuees during consolidation operations. The absence of a like provision in relation to the jurisdiction of the Prescribed Authority under the Ceiling Act lends support to our inference."

13.2 In course of discussions, Hon'ble Supreme Court observed that the purposes of the Act, i.e., UP Land Ceiling Act and UP Consolidation Act are different. Under the provisions of the UP Land Ceiling Act, a ceiling area and surplus land of the tenure holder is determined, whereas, under the provisions of the UP Consolidation Act, holding of the tenure holder is consolidated, but neither of the purposes may in large number of cases be accomplished

without first determining the right and interest of various claims in the plots. So a crucial question for determination is as to whether the prescribed authority under the Ceiling Act or the Consolidation Act has a preemptive jurisdiction to determine rival rights and interests in the land of the tenure holder. Mr. Dash, learned AGA advanced his argument in the light of the aforesaid observation of the Hon'ble Supreme Court. It is his submission that when the consolidation operation is in vogue, the prescribed authority under the OLR Act should await the decision of the consolidation authorities with regard to right and title of the Petitioner in respect of the land in question. It is only after determination of the rights of the Petitioner vis-à-vis the land in question, a decision with regard to ceiling surplus area of the Petitioner can only be determined. The argument of Mr. Dash, learned AGA is quite persuasive, but keeping in view the provisions of both the statutes, namely, OLR Act as well as Consolidation Act, the same has to be considered. On a close scrutiny of the materials available, it is apparent that at the time of initiation of the ceiling proceeding, the Petitioner has been accepted to be the land owner (tenure holder). Neither any civil suit nor proceeding under any special Act with regard to the right or title of the Petitioner in respect of the case land, was pending at the time of notification under section 3(1) of the Consolidation Act. In course of the OLR proceeding, no issue with regard to the title of the Petitioner was ever raised by any party. In the ceiling proceeding, the Petitioner claimed the case land to be that of the Math (religious institution), whereas the prescribed authority under the OLR Act taking into consideration the ROR published, held the same to be the personal property of the Mahanta (Manager of the Math). Hon'ble Supreme Court, in the case of ***Agricultural and Industrial Syndicate Ltd. (supra)*** made the aforesaid observation taking into consideration the tenor and language of Section 5(2) and Section 49 of the UP Consolidation Act. Section 5(2) of the said Act provided that upon issuance of notification under Section 4(2) of the UP Consolidation Act, the consequences as provided under Section 5(2) of the said Act, would follow. It specifically provides that upon publication of such notification every proceeding for correction of record and every suit and proceedings in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the said Act, pending before any Court or authority whether at the first instance or in appeal, reference or revision shall, on an order being passed in that behalf by the Court or the authority before whom such proceeding is pending shall stand abated. But the provisions of Section 4(3) and (4) of the Consolidation Act is

quite different. It does not include a proceeding pending before an '*authority*'. As provided under Section 51 (1) of the Consolidation Act that all questions relating to right, title, interest and liability in the land lying in the consolidation area except those coming within the jurisdiction of revenue courts or authorities under any local law for the time being in force, shall be decided under the provisions of the Consolidation Act. There can be no second thought that the authorities under the Consolidation Act cannot take up and adjudicate upon a ceiling proceeding initiated on publication of draft statement under Section 43(1) of the OLR Act. However, aproceeding under Section 19 of the OLR Act shall stand abated upon publication of the notification under Section 3(1) of the Consolidation Act, as the consolidation authority under Section 7 of the Consolidation Act is capable of taking up the issue of partition. The language of Section 7 read with Section 51 of the Consolidation Act makes the same abundantly clear.

13.3 In view of language of Section 4(3), 7(1) and Section 51 of the Consolidation Act, there is no iota of confusion to come to a conclusion that upon publication of notification under section 3(1) of the Consolidation Act, the issue which is capable of being adjudicated by the consolidation authority, shall stand abated, if the same is pending either before any civil court or any revenue authority as discussed earlier. Authorities under the onsolidation Act are not empowered to adjudicate upon a ceiling proceeding. Further, a ceiling proceeding is initiated only after the authorities under the OLR Act come to a conclusion that the property in question belongs to the tenure holder. Keeping in view the difficulty/ambiguity in Section 5(2) of the UP Consolidation Act, the State of Uttar Pradesh thought it proper to amend the said provision after the judgment in ***Agricultural and Industrial Syndicate Ltd. (supra)***. Subsequently, Hon'ble Supreme Court had the occasion to deal with the amended provision of Section 5 of the UP Consolidation Act in the case of ***Ambika Prasad Mishra (supra)***. In the said case law, a larger Bench in paragraphs-33 and 34, observed as follows:-

> *"**33.** The whole scheme of consolidation of holdings is to restructure agrarian landscape of U.P. so as to promote better farming and economic holdings by eliminating fragmentation and organising consolidation. No one is deprived of his land. What happens is, his scattered bits are taken away and in lieu thereof a continuous conglomeration equal in value is allotted subject to minimal deduction for community use and better enjoyment. Once this central idea is grasped, the grievance voiced by the petitioner becomes chimerical. Counsel complains that the tenure-holder will not be able to choose his land when consolidation proceedings*

are in an on-going stage. True, whatever land belongs to him at that time, may or may not belong to him after the consolidation proceedings are completed. Alternative allotments may be made and so the choice that he may make before the prescribed authority for the purpose of surrendering surplus lands and preserving "permissible holding" may have only tentative value. But this factor does not seriously prejudice the holder. While he chooses the best at the given time the Consolidation Officer will give him its equivalent when a new plot is given to him in the place of the old. There is no diminution in the quantum of land and quality of land since the object of consolidation is not deprivation but mere substitution of scattered pieces with a consolidated plot. The tenure-holder may well exercise his option before the prescribed officer and if, later, the Consolidation Officer takes away these lands, he will allot a real equivalent thereof to the tenure-holder elsewhere. There is no reduction or damage or other prejudice by this process of statutory exchange.

34. Chapter III of the Consolidation Act provides, in great detail, for equity and equality, compensation and other benefits when finalizing the consolidation scheme. Section 19(1) (b) ensure that

"the valuation of plots allotted to a tenure- holder subject to deductions, if any, made on account of contributions to public purposes under this Act is equal to the valuation of plots originally held by him:

Provided that, except with the permission of the Director of Consolidation, the area of the holding or holdings allotted to a tenure-holder shall not differ from the area of his original holding or holdings by more than twenty five percent of the latter."

When land is contributed for public purposes compensation is paid in that behalf in the event of illegal or unjust orders passed, appellate and revisory remedies are also provided. On such exchange or transfer taking place, pursuant to the finalisation of the consolidation scheme, the holding, upto the ceiling available to the tenure holder, will be converted into the new allotment under the consolidation scheme. Thus, we see no basis in justice nor gross arbitrariness in the continuance of the land reforms proceedings even when consolidation proceedings are under way. We are not all impressed with counsel's citation of the ruling in Agricultural & Industrial Syndicate Ltd. v. State of UP and others,(l), particularly because there has been a significant amendment to s. S subsequent thereto. The law as it stood then was laid down by this Court in the above case; but precisely because of that decision an explanation has been added to s. 5 of the Consolidation Act which reads thus:

Explanation:- For the purposes of subsection(2) a proceeding under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 or an uncontested proceeding under Sections 134 to 137 of the U.P. Jamindari Abolition and Land Reforms Act, 1950, shall not be deemed to be a proceeding in respect of declaration of rights or interest, in any land.

The view of the Allahabad High Court in Kshetrapal Singh v. State of U.P.(2) (H.C.) is correct, and in effect negatives the submission of Shri Arvind Kumar that there should be a stay of ceiling proceedings

pending completion of consolidation proceedings. The head note in Kshetrapal Singh's case (Supra) brings out the ratio and for brevity's sake, we quote it;

By adding the Explanation after sub-section(2) of Section 5 of the Act a legal fiction has been created. What is otherwise a proceeding in respect of declaration of rights or interest in any land is deemed not to be such a proceeding. That is the clear legislative intent behind the Explanation. ordinarily an Explanation is intended to explain the scope of the main section and is not expected to enlarge or narrow down its scope but where the legislative intent clearly and unambiguously indicates an intention to do so, effect must be given to the legislative intent notwithstanding the fact that the legislature named that provision as an Explanation."

(emphasis supplied)

It flows from the aforesaid observation that the larger Bench did not approve the analogy made in the case of ***Agricultural and Industrial Syndicate Ltd. (supra)***. Thus, there can be no ambiguity in the position of law to the effect that upon publication of notification under Section 3(1) of the Consolidation Act, the proceedings which are capable of being adjudicated under the provisions of the said Act, will certainly abate if the same are pending either in any civil Court or in a revenue Court. A ceiling proceeding being unique in its nature which is initiated under the OLR Act, will continue being unaffected by the notification under Section 3(1) of the Consolidation Act.

14. Although the notification under Section 3(1) was made on 22nd September, 1988 by publication in the Official Gazette, but no step was ever taken by the State Government to make a prayer before the OLR authorities either to suspend the proceeding or to abate the same till completion/closure of the consolidation operation either under Section 41 or under Section 5(1) of the Consolidation Act and rightly so. Further, no proceeding under the OLR Act at present is pending, since the revision under Section 59 of the OLR Act has already been decided and the matter is pending before the constitutional Court to test the veracity of the order passed under the OLR Act. True it is that, further proceeding in certain Objection cases relating to the land in question has been stayed by this Court in the present writ petition. Even if, said proceedings under the Consolidation Act are allowed to continue it will not affect the proceedings under the OLR Act, as the Consolidation authorities have to respect the record of right published in respect of the land in question by following due procedure of law unless and until it is proved to be null and void by any competent Court of law. Admittedly, the ROR in respect of the land in question has not been challenged and proved to be null and void by any competent Court of law. It

is further observed that this Interlocutory Application has been filed at a much belated stage, i.e., in the midst of the final hearing the writ petition. As all the forums available under the OLR Act have been exhausted, literally there is no proceeding under the OLR Act pending at present.

15. In view of the discussions made above, question of abatement of ceiling proceeding does not arise at all.

16. Thus, the prayer made in the Interlocutory Application merits no consideration and the IA is accordingly dismissed.

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2022 (I) ILR - CUT- 428

B. P. ROUTRAY, J.

BLAPL NO. 65 OF 2022

SRIKRUSHNA PADHI ....Petitioner

.V.

ENFORCEMENT DIRECTORATE, GOVT. OF INDIA ....Opp. Party

PREVENTION OF MONEY LAUNDERING ACT, 2002 – Complaint under section 45 – Application under section 439 Cr.P.C with a prayer to release on bail – Bar U/s. 45 (1) of the Act pleaded – Co-accused already have been released on bail – Prayer of the petitioner considered – Held, as the Hon'ble apex Court in Nikesh Tarachand Shah Vs. Union of India and another has declared the twin conditions of section 45(1) as unconstitutional, hence direction issued to release the petitioner on bail.

The present petitioner is in custody since 30.05.2013. It is admitted by the parties that despite such long detention of the petitioner inside custody, the trial has not commence yet. Thus keeping in view the period of detention of the petitioner inside custody, the delay in trial, release of the other co-accused persons, as well as the observation rendered by this court and other High Courts with regard to applicability of the provision of section 45 of the PMLA Act, 2002, it is directed to release the petitioner on bail with conditions.

(Para-11)

Case Laws Relied on and Referred to :-

(2018) 11 SCC 1 : Nikesh Tarachand Shah Vs. Union of India and another,

2. 2021 SCC OnLine Ori 2307 : Pradeep Kumar Sethy Vs. Enforcement Directorate, Government of India, Bhubaneswar Zone.
3. 2021 SCC OnLine Delhi 1081 : Chandrasekhar Vs. Directorate of Enforcement.

For Petitioner : Mr. A. Mishra

For Opp.Party : Mr. G. Agarwal, (for E.D.)

JUDGMENT Date of Judgment :14.02. 2022

B. P. ROUTRAY, J.

1. Present application has been filed under Section 439, Cr.P.C. praying to release the Petitioner on bail in connection with Crl. Misc. (PMLA) Case No34 of 2016 pending in the court of learned Sessions Judge-cum-Special Judge, Bhubaneswar.

2. The facts of the case reveal that, initially Kharavela Nagar P.S. Case No.44 of 2013 and 45 of 2013 were registered against Arthatatwa Group of Companies and others. Subsequently, Central Bureau of Investigation (CBI) took up investigation of the said cases along with other cases in pursuance to the directions issued by the Supreme Court of India. As such, SPE Case No.42 of 2014 (arising out of Kolkata CBI/SCB/RC/No.47/S/2014-Kol. dated 5th June, 2014) has been registered alleging commission of offences under Section 120-B/294/341/406/409/420/467/468/471/506/34 of the Indian Penal Code and Sections 3/4/5 of the Prize Cheat and Money Circulation Scheme (Banning) Act, 1976. Keeping in view the nature of allegations and as materials surfaced revealing commission of schedule offences under the Prevention of Money Laundering Act, 2002 (hereinafter „PML Act‟) the complaint under Section 45 was lodged before the learned Special Judge, Bhubaneswar which was registered as Crl. Misc. (PMLA) Case No.34 of 2016 and the learned Special Judge, Bhubaneswar by order dated 1st November, 2016 took cognizance of the offences under Section 3 of the PML Act, punishable under Section 4 of the said Act. The present Petitioner is one amongst seven accused persons in the afore-stated case.

3. The allegations leveled against the Petitioner are that, he was the Director of Arthatatwa Infra India Pvt. Ltd. and also the Finance Manager of Arthatatwa Consultancy Pvt. Ltd. The Petitioner was

looking after accounts related deposits collected from the public and thereafter depositing the cheques and supervising the works related to accounts, deposits, payments, etc. He being aware of all the financial transactions and collection of money from public with false promise of high returns was actively involved in commission of offences of Money Laundering with the principal accused Pradeep Kumar Sethy and enjoyed the proceeds of crime to his personal benefits

4. It needs to be mentioned here that the prayer for bail of the Petitioner was earlier rejected by this Court in BLAPL No.4165 of 2020 vide order dated 24.09.2021.

5. It is submitted by the counsel for the Petitioner that in the meantime the principal accused of the case, namely, Pradeep Kumar Sethy has been released on bail in BLAPL No.5606 of 2020 vide order dated 17.12.2021 and one more accused, namely, Jyoti Prakash Jay Prakash has also been released on anticipatory bail in ABLAPL No.15091 of 2019 vide order dated 27.10.2021 by different coordinate Benches of this Court.

6. Mr. G. Agarwal, learned counsel for the Enforcement Directorate (ED) (complainant) submits that there are ample materials against the Petitioner evidencing commission of offences of Money Laundering where the Petitioner has taken active role to siphon public money in close association of other accused persons.

7. After hearing both the parties, it reveals that two other co-accused persons, namely, Pradeep Kumar Sethy and Jyoti Prakash Jay Prakash, whose release on bail has been referred by the Petitioner were granted on bail upon reliance of the decision of the Supreme Court in the case of ***Nikesh Tarachand Shah vs. Union of India and another, (2018) 11 SCC 1***, wherein the Supreme Court held the twin conditions prescribed for release on bail as per Section 45(1) of the PML Act, 2002 to be unconstitutional as violative of Articles 14 and 21 of the Constitution of India.

8. The Supreme Court in the case of Nikesh Tarachand Shah (supra) at paragraphs 46 and 54 have observed that:

"46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature.

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54. Regard being had to the above, we declare Section 45(1) of the Prevention of Money-Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective courts which denied bail. All such orders are set aside, and the cases remanded to the respective courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that the persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective courts for fresh decision. The writ petitions and the appeals are disposed of accordingly."

2. In the case of ***Jyoti Prakash Jay Prakash vs. Union of India (E.D.)*** (disposed of on 27.10.2021 in ABLAPL No.15091 of 2019) this Court has further held at paragraph 22 that, the amendment introduced to sub-Section (1) of Section 45 of the PML Act after the decision in the case of ***Nikesh Tarachand Shah*** (supra) does not have the effect of reviving those twin conditions in the PML Act. It is observed as follows:

"13. That clause (ii) of sub-Section (1) of Section 45 of the PMLA places two conditions for release of a person accused of an offence under the PMLA, on bail, if that the Public Prosecutor opposes the bail application, the Court has to arrive at the satisfactions (i) that there are reasonable grounds for believing that the accused is not guilty of such offence and (ii) that he is not likely to commit any offence while on bail. Whether substitution of the words „under this Act‟ in place of the words „punishable for a term of imprisonment of more than three years under Part A of the Schedule‟ in Section 45(1) of the Act, has the impact of meeting with the reasoning and logic incorporated and discussed by the Hon‟ble Supreme Court in case of Nikesh Tarachand Shah (supra) for declaring the Clause (ii) of sub-Section (1) of Section 45 of the Act ultra vires and, therefore, Clause (ii) of sub-Section (1) of Section 45 of the PMLA in present form how far the impact,

despite Hon"ble Supreme Court"s decision in case of Nikesh Tarachand Shah (supra) is the matter to be seen, so that on said touchstone, the factual settings of the case would stand for consideration.

xx xx xx

21. The Hon"ble Apex Court thus noticed anomalies in prescribing conditions for entertaining petition for grant of bail under Section 45(1) of the PMLA with reference to the Scheduled offences. In paragraph 46 of the judgment in case of NikeshTarachand Shah (supra),it has been held that Section 45 of the PMLA is a drastic provision which makes drastic inroads into the fundamental right of personal liberty guaranteed under Article 21 of the Constitution of India. It was observed that before application of such provision, one must be doubly sure that it furthers a compelling State interest in tackling serious crimes. Absence of any such compelling State"s interest, indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. The Hon"ble Supreme Court noted that the provisions akin to Section 45 have been upheld on the ground that there was compelling State interest in tackling crimes of an extremely heinousn ature. For better appreciation, paragraph 46 in the case of Nikesh Tarachand Shah (supra) is quoted below:-

"46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."

The Hon'ble Apex Court clearly held that indiscriminate application of the provision of Section 45 of the PMLA will certainly violate Article 21 of the Constitution of India.

22. In the aforesaid background, it is to be seen as to if by the amendment introduced in Section 45 of the PMLA, as noted above, by Act No.13 of 2018; the entire Section 45 has been reframed in reviving and resurrecting the requirement of twin-conditions under sub-Section (1) of Section 45 of the PMLA for grant of bail. In view of clear language used in paragraph 46 of the Hon"ble Supreme Court"s decision in case of Nikesh Tarachand Shah (supra), this Court is of the considered view that the amendment in sub-Section (1) of Section 45 of the PMLA introduced after the Hon"ble Supreme Court"s decision in case of Nikesh Tarachand Shah (supra) does not have the effect of reviving the twin-conditions for grant of bail, which have been declared vires Articles 14 and 21 of the Constitution of India."

10. In the case of ***Pradeep Kumar Sethy vs. Enforcement Directorate, Government of India, Bhubaneswar Zone, 2021 SCC OnLine Ori 2307***, this Court by order dated 17.12.2021 directed him to be released on bail after taking note of the decisions rendered in the case of ***Nikesh Tarachand Shah*** (supra) and other decisions rendered by Bombay High Court in the case of ***Deepak Virendra Kochhar vs. Directorate of Enforcement*** (Order dated 25.3.2021 in Bail Application No.1322 of 2020), ***Sameer M. Bhujbal vs. Assistant Director, Directorate of Enforcement***, (Order dated 06.06.2018 in Bail Application No.286 of 2018), by Delhi High Court in the case of ***Sai Chandrasekhar vs. Directorate of Enforcement, 2021 SCC OnLine Delhi 1081***, and the decisions of various other High Courts.

11. The present Petitioner is inside custody since 30.5.2013 relating to Kharavela Nagar P.S. Case No.44 of 2013 and in respect of the present case since 16.10.2017. It is admitted by the parties that despite such long detention of the Petitioner inside custody, the trial has not commenced yet. Thus keeping in view the period of detention of the Petitioner inside custody, the delay in trial, release of other two co- accused persons, namely, Pradeep Kumar Sethy and Jyoti Prakash Jay Prakash as well as the observations rendered by this Court and other High Courts with regard to applicability of the provisions of Section 45 of the PML Act, 2002, it is directed to release the Petitioner on bail. The Petitioner be released on bail for Rs.1,00,000/- (rupees one lakh) with two sureties each to the satisfaction of learned Sessions Judge, Khurda at Bhubanesswar in connection with Crl. Misc. (PMLA) Case No.34 of 2016 with further condition that out of two such sureties furnished by the Petitioner, one shall be his relative and that, he shall not be involved in any other offence while on bail and shall not dissuade any witness directly or indirectly by way of inducement, threat or promise acquainted with the facts of the case from disclosing such facts before the court or tamper with the evidence.

12. The BLAPL is disposed of.

13. An urgent certified copy of this order be granted on proper application.

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2022 (I) ILR - CUT- 434

S.K. PANIGRAHI, J.

BLAPL NOS. 776 & 6687 OF 2021

SMRUTI RANJAN MOHANTY …. …..Petitioner

.V.

STATE OF ODISHA ……….Opp. Parties

AND

BLAPL No.6687 of 2021

RAJEEV MISHRA ………Petitioner

.v.

STATE OF ODISHA ……….Opp. Parties

BLAPL NO.776 OF 2021

For Petitioner : Mr. Ajaya Kumar Moharana.

For Opp. Parties : Mr. Sunil Mishra, ASC (for C.T. & GST)

BLAPL NO.6687 OF 2021

For Petitioner : Mr. Gouri Mohan Rath.

For Opp. Parties : Mr. Sunil Mishra, ASC (for C.T. & GST)

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Application for bail – Offences under sections 132(1)(c),132(1)(b) and 132(1)(i) of the OGST Act, 2017 – Classification of the offence made as serious economic offence – It was pleaded that, in case serious economic offenece bail should be denied – Justification of such classification/categorization questioned – Held, it has to be borne in mind that there is as such no justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category – It cannot, therefore, be said that bail should invariably be refused in cases involving serious economic offences – It is not in the interest of justice that the petitioners should be in jail for an indefinite period.

(Para-8)

Case Laws Relied on and Referred to :-

1. (2009) 2 SCC 28 : Vaman Narain Ghiya Vs. State of Rajasthan.
2. (1978) 4 SCC 47 : Moti Ram Vs. State of M.P.
3. (2012) 1 SCC 40 : Sanjay Chandra Vs. CBI.
4. 84 (2000) DLT 854 : Anil Mahajan Vs. Commissioner of Customs.
5. CRL.M (BAIL) 459/2010 : H.B. Chaturvedi Vs. CBI.
6. (1978) 1 SCC 118 : Gurcharan Singh Vs. State (Delhi Administration).

7. (1978) 1 SCC 240 : Gudikanti Narasimhulu Vs. Public Prosecutor.
8. BLAPL No 4125 of 2020: Pramod Kumar Sahoo Vs. State of Odisha.

JUDGMENT Date of Hearing: 24.12.2021 : Date of Judgment: 18.02.2022

S.K. PANIGRAHI, J.

1. The present Petitioners, who are in custody since 21.12.2020, have filed the instant bail application under Section 439 of Cr.P.C. corresponding to 2(C)CC Case No.03 of 2020 pending in the court of the Learned J.M.F.C(R), Cuttack for commission of offences under Sections 132(1) (c), 132(1)(b) and 132(1)(i) of the OGST Act, 2017. Prior to the instant application, the Petitioners had approached the learned District and Sessions Judge, Cuttack, vide Bail Application No. 11023 of 2020 which was rejected on 25.01.2021.

2. Shorn of unnecessary details, the prosecution's case is that both the Petitioners alongwith other accused, were involved in the creation and operation of 12 fictious/ bogus firms in the name of unconnected persons by misutilizing their identity proof. The same was done behind their back, in order to avail and utilize bogus input tax credit of an amount of Rs. 20.45 crores on the strength of fraudulent purchase invoices without any physical receipt or actual purchase of goods. As such both of them are alleged to be part of a collusion to evade taxes to the tune of approximately Rs. 42.00 crores and therefore are liable for the payment of the same under Section 132 of the OGST Act, 2017.

3. Per contra, the Ld. Counsel for the Petitioners earnestly submitted that the allegations made against the Petitioners in the prosecution report are bald allegations which are completely false and baseless. It was contended that the Petitioner No. 1 was a mere employee who has dutifully followed the directions and orders of his superiors. Similarly, Petitioner No. 2 was in no way connected to the case as he is a mere paan shop owner and has no nexus to the alleged fraud in any way whatsoever and has been embroiled in the matter merely because he is the brother of Petitioner No. 1. It has bene submitted that the alleged fraud has been perpetrated by someone else and the present Petitioners who are mere pawns, have unduly been made scapegoats despite having no involvement in the alleged fraudulent activities. It is further submitted that the Petitioners have been duly cooperating with the authorities and have on multiple occasions appeared in the OGST offices to assist the

authorities with the investigation, but despite their bonafide actions, they were forwarded into custody on 21.12.2020 and have remained in custody ever since. The Petitioners have wives, young children and a widowed mother who are completely dependent on the Petitioners and are on the brink of starvation due to the absence of the only two earning members in the family especially given the pandemic situation. The Ld. Counsel for the Petitioners finally urged that given that there is no risk of the Petitioners fleeing given that they reside locally and that they shall not tamper with evidence, they should be released on bail as even trial has not commenced and they have been in custody for over a year.

4. Heard learned counsel for both parties and perused the records. The core concept and philosophy of bail was discussed by the Hon'ble Supreme Court in ***Vaman Narain Ghiya v. State of Rajasthan***[1], wherein it was observed that:

> *"6. 'Bail' remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb 'bailer' which means to 'give' or 'to deliver', although another view is that its derivation is from the Latin term 'baiulare', meaning 'to bear a burden'. Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:*
>
> *'… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance.'*
>
> *Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.*
>
> *7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the*

1. (2009) 2 SCC 281

police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras [AIR 1950 SC 27).

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

5. In ***Moti Ram v. State of M.P.***[2] the Hon'ble Supreme Court, while discussing pretrial detention, held:

"14. The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

Furthermore, the Hon'ble Supreme Court in ***Sanjay Chandra v. CBI***[3], dealing with a case involving an economic offence of formidable magnitude, touching upon the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is jurisprudentially neither punitive nor preventive. Although the Hon'ble Supreme Court sounded a caveat that any imprisonment before conviction does have a substantial punitive content. It was elucidated therein that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege is regulated to a large extent by the facts and circumstances of each particular case. It was also held that detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted.

2. (1978) 4 SCC 47 , 3. (2012) 1 SCC 40

6. It would also be apposite at this juncture to reproduce the Hon'ble Delhi High Court's succinct elucidation of the legal position in matters pertaining to bail as laid down in ***Anil Mahajan v. Commissioner of Customs***[4] ***and H.B. Chaturvedi v.CBI***[5], whereinthe Hon'ble High Court after considering the judgments, *inter alia*, in ***Gurcharan Singh v. State (Delhi Administration)***[6] and ***Gudikanti Narasimhulu* v. *Public Prosecutor***[7], observed as follows:

> *"14. The legal position emerging from the above discussion can be summarised as follows:*
>
> *(a) Personal liberty is too precious a value of our Constitutional System recognised under Article 21 that the crucial power to negate it is a great trust exercisable not casually but judicially, with lively concern for the cost to the individual and the community. Deprivation of personal freedom must be founded on the most serious considerations relevant to the welfare objectives of society specified in the Constitution.*
>
> *(b) As a presumably innocent person the accused person is entitled to freedom and every opportunity to look after his own case and to establish his innocence. A man on bail has a better chance to prepare and present his case than one remanded in custody. An accused person who enjoys freedom is in a much better position to look after his case and properly defend himself than if he were in custody. Hence grant of bail is the rule and refusal is the exception.*
>
> *(c) The object of bail is to secure the attendance of the accused at the trial. The principal rule to guide release on bail should be to secure the presence of the applicant to take judgment and serve sentence in the event of the Court punishing him with imprisonment.*
>
> *(d) Bail is not to be withheld as a punishment. Even assuming that the accused is prima facie guilty of a grave offence, bail cannot be refused in an indirect process of punishing the accused person before he is convicted.*
>
> *(e) Judges have to consider applications for bail keeping passions and prejudices out of their decisions.*
>
> *(f) In which case bail should be granted and in which case it should be refused is a matter of discretion subject only to the restrictions contained in Section 437(1) of the Criminal Procedure Code. But the said discretion should be exercised judiciously.*
>
> *(g) The powers of the Court of Session or the High Court to grant bail under Section 439(1) of Criminal Procedure Code are very wide and unrestricted. The restrictions mentioned in Section 437(1) do not apply to the special powers of the High Court or the Court of Session to grant bail under Section 439(1). Unlike under*

4. 84 (2000) DLT 854, 5. CRL.M (BAIL) 459/2010 , 6. (1978) 1 SCC 118 , 7. (1978) 1 SCC 240

Section 437(1), there is no ban imposed under Section 439(1) against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. However while considering an application for bail under Section 439(1), the High Court or the Court of Sessions will have to exercise its judicial BLAPL Nos.776 & 6687 of 2021 Page 9 of 14 discretion also bearing in mind, among other things, the rationale behind the ban imposed under Section 437(1) against granting bail to persons accused of offences punishable with death or imprisonment for life.

(h) There is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the Courts. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail. The answer to the question whether to grant bail or not depends upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

(i) While exercising the discretion to grant or refuse bail the Court will have to take into account various considerations like the nature and seriousness of the offence; the circumstances in which the offence was committed; the character of the evidence; the circumstances which are peculiar to the accused; a reasonable apprehension of witnesses being influenced and evidence being tampered with; the larger interest of the public or the State; the position and status of the accused with reference to the victim and the witness; the likelihood of the accused fleeing from justice; the likelihood of the accused repeating the offence; the history of the case as well as the stage of investigation, etc. In view of so many variable factors the considerations which should weigh with the Court cannot be exhaustively set out. However, the two paramount considerations are: (i) the likelihood of the accused fleeing from justice and (ii) the likelihood of the accused tampering with prosecution evidence. These two considerations in fact relate to ensuring a fair trial of the case in a Court of justice and hence it is essential that due and proper weight should be bestowed on these two factors.

(j) While exercising the power under Section 437 of the Criminal Procedure Code in cases involving nonbailable offences except cases relating to offences punishable with death or imprisonment for life, judicial discretion would always be exercised by the Court in favor of granting bail subject to Sub-section (3) of Section 437 with regard to imposition of conditions, if necessary. Unless exceptional circumstances are brought to the notice of the Court which might defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life.

(k) If investigation has not been completed and if the release of the accused on bail is likely to hamper the investigation, bail can be refused in order to ensure a proper and fair investigation.

(l) If there are sufficient reasons to have a reasonable apprehension that the accused will flee from justice or will tamper with prosecution evidence he can be refused bail in order to ensure a fair trial of the case.

(m) The Court may refuse bail if there are sufficient reasons to apprehend that the accused will repeat a serious offence if he is released on bail.

(n) For the purpose of granting or refusing bail there is no classification of the offences except the ban under Section 437(1) of the Criminal Procedure Code against grant of bail in the case of offences punishable with death or life imprisonment. Hence there is no statutory support or justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. When the Court has been granted discretion in the matter of granting bail and when there is no statute prescribing a special treatment in the case of a particular offence the Court cannot classify the cases and say that in particular classes bail may be granted but not in others. Not only in the case of economic offences but also in the case of other offences the Court will have to consider the larger interest of the public or the State. Hence only the considerations which should normally weigh with the Court in the case of other non-bailable offences should apply in the case of economic offences also. It cannot be said that bail should invariably be refused in cases involving serious economic offences.

(o) Law does not authorise or permit any discrimination between a foreign National and an Indian National in the matter of granting bail. What is permissible is that, considering the facts and circumstances of each case, the Court can impose different conditions which are necessary to ensure that the accused will be available for facing trial. It cannot be said that an accused will not be granted bail because he is a foreign national."

7. This court has also had the prior occasion of dealing with a similar application for grant of bail in a case relating to prosecution under the provisions of the OGST Act, 2017 the case of ***Pramod Kumar Sahoo v State of Odisha***[8] wherein this court had the occasion to elaborately deal with the view taken by various other High Courts in such matters.

8. Bail, as it has been held in a catena of decisions, is not to be withheld as a punishment. Bail cannot be refused as an indirect method of punishing the accused person before he is convicted. Furthermore, it has to be borne in mind that there is as such no justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. It cannot, therefore, be said that bail should invariably be refused in cases involving serious economic offences. It is not in the interest of justice that the Petitioners should be in jail for an indefinite period. No doubt, the offence

8. BLAPL No 4125 of 2020

alleged against the Petitioners is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, however, should not deter this Court from enlarging the Petitioners on bail when there is no serious contention of the Respondent that the Petitioners, if released on bail, would interfere with the trial or tamper with evidence.

9. Having regard to the entire facts and circumstances of the case, especially the fact that both the bread earning sons of a family have been in custody for over a year now I do not find any justification for detaining the Petitioners in custody for any longer. As a side note it observed that more and more such cases are brought to the fore where the mere pawns who have been used as a part of larger conspiracy of tax fraud have been brought under the dragnet by the prosecution. It is perhaps time that the prosecution will do well to follow the trail upstream and bring the "upstream" parties who are the ultimate beneficiaries who are the gainers in these evil machinations.

10. In view of the above discussion, it is directed that the Petitioners in both the BLAPLs be released on bail by the court in *seisin* over the matter in the aforesaid case on such terms and conditions as deemed fit and proper by him/ her with the following conditions:

> (i) The Petitioners shall co-operate with the trial and shall not seek unnecessary adjournments on frivolous grounds to protract the trial;
>
> (ii) The Petitioners shall not directly or indirectly allure or make any inducement, threat or promise to the prosecution witnesses so as to dissuade them from disclosing truth before the Court;
>
> (iii) In case of their involvement in any other criminal activities or breach of any other aforesaid conditions, the bail granted in this case may also be cancelled.
>
> (iv) The Petitioners shall submit their passports, if any, before the learned trial court and shall not leave India without prior permission of this Court.
>
> (v) Any involvement in similar offences of under the GST Act will entail cancellation of the bail.

11. With the above directions the instant bail applications are allowed. However, expression of any opinion hereinbefore may not be treated as a view on the merits of the case and that the assessment of the tax liability of the Petitioners shall be carried out strictly in accordance with the applicable provisions of applicable law.

12. The bail applications are, accordingly, disposed of along with any pending applications (if any).

2022 (I) ILR - CUT- 442

MISS SAVITRI RATHO,J.

BLAPL NO. 1897 OF 2020

BABU @ SAMIR KUMAR NAYAK ……..Petitioner

.V.

STATE OF ORISSA ………Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Regular bail applications – It is seen that bail applications are filed in both the forums simultaneously without furnishing the certificate of pendency of any one application in other forum – Effect of such situation – Held, there should be strict observance of the circular directing furnishing of the certificate.

Case Laws Relied on and Referred to :-

1. (BLAPL No. 11734 of 2014 : Bansidhara Pradhan Vs. State.

For Petitioner : Mr. Srinibas Sahoo
For Opp. Party: Mr. P.C. Das, ASC

ORDER Date of Order : 18.11.2021

MISS SAVITRI RATHO,J.

The matter is taken up by hybrid mode.

Vide order dated 08.10.2021, Registry had been directed to call for a report from the learned C.J.M., Jajpur in C.T. No. 20 of 2020 arising out of C.T. Case No. 193 of 2019 corresponding to Binjharpur P.S case No 43 of 2019 as to how the prayer for bail was considered and granted by him on 06.08.2020, when this application i.e. BL APL No. 1897 of 2020 filed on 26.02.2020 was pending before this Court.

In pursuance of the said order, a report had been received from learned C.J.M., Jajpur on 06.11.2021 wherein it is stated that he had no knowledge regarding the pendency of this bail application before this Court as nothing would be ascertained from the bail petition filed by the advocate for the accused nor the submissions of the Advocate about pending bail petition of the accused Babu @ Samir Kumar Nayak before this Court at the time of hearing of the bail petition by him. It is also stated that four accused persons namely Bhimasen Das @ Bhima, Biswajit Das @ Bitu, Subhakanta

Behera @ Kajal and Samir Kumar Nayak are facing trial. On 17.07.2020 two accused persons namelyBiswajit Das @ Bitu and Subhakanta Behera @ Kajal were released on bail in obedience to order of this Court passed in BLAPL No. 9072 of 2019. On 06.08.2020, a fresh Vakalatnama was filed by Advocate, Rajesh Ch. Das having Enrollment No. O-1187/95 for the accused Babu @ Samir Kumar Nayak along with a petition to release him on bail (Annexure-1) and as the bail petition does not whisper anything regarding the pending bail application before the Hon'ble Court. The bail petition was heard on dated 06.08.2020 on merit and disposed of on the same day in which the accused Babu @ Samir Kumar Nayak was directed to release on bail with certain conditions.

A perusal of the bail application annexed to the report shows that no certificate has been given that no bail application at the instance of the accused is pending in any court.

This Court in the case of ***Bansidhara Pradhan vrs. State (BLAPL No. 11734 of 2014 disposed of on 07.07.2014)*** had held as follows:-

> "*…… It appears that in many cases under Section 439 Cr.P.C., the accused persons are approaching both the forums simultaneously. In spite of the Circulars issued by this Court, in many cases, Sessions Judges are also not looking to the fact that whether a certificate has been furnished by the counsel indicating therein that during non-pendency of such bail petition before any other forum. So also, though a circularwas issued by this Court that on the date the bail petition is taken up for hearing, counsel must file a memorandum stating therein that no other application for bail is pending in anyother Court. In spite of the direction of this Court vide Circular No. 3447 dated 30.03.1984 of this Court and the subsequent Circular No. 6973 dated 01.10.1996, it is seen that the same is observed more in breach and as such, resulting in conflicting orders. The Sessions Judges, Additional Sessions Judges and Assistant Session Judges of the State while exercising the power under Section 439 of Cr.P.C. therefore, must adhere to the Circulars issued by the Court while dealing with the petition under Section 439 Cr.P.C. hereinafter strictly.*
>
> *Therefore, theRegistrar(InspectionandEnquiry)is directed to circulate this order along with the aforesaidCirculars issued by this Court in this regard among all theSession Judges throughout the State once again, who in turnshall circulate the same among the Officers with a direction to strictly observe the aforesaid while entertaining the prayer for bail…..*"

As a consequence, vide L.No.XLIX-D-1/2014/6456(30) dtd. 24.07.2014, the order dated 07.07.2014 passed in BLAPL No. 11734 of 2014 has been communicated to the learned District & Sessions Judge along with Courts Circular Letter No. 3447 dated 30.03.1984 and No. 6973 dated

01.10.1996 for information and circulation amongst all criminal courts subordinate to them with a direction for strict observance while entertaining an application for bail.

But as many bail applications are being disposed of in the Court of Sessions without insisting for such certificate, it is apparent that some of our judicial officers are not aware of the order dated 07.07.2014 passed in BLAPL No. 11734 of 2014. In the present case, the bail application has been entertained by the learned CJM Jajpur in the absence of such certificate and the prayer for bail has been allowed by order dated 06.08.2020 passed in BLAPL No. 11734 of 2014 by the learned CJM , Jajpur, when this bail application was pending before this Court .

The Registry is, therefore, directed to communicate the order dated 07.07.2014 passed in BLAPL No. 11734 of 2014 to all the learned District & Sessions Judges along with Courts Circular Letter No. 3447 dated 30.03.1984 and No. 6973 dated 01.10.1996 again, for information and circulation amongst all criminal courts subordinate to them with a direction for strict observance while entertaining an application for bail.

In the aforesaid circumstances if the trial is still pending, the order dated 06.08.2020 granting bail is liable to be recalled. After surrender / apprehension of the petitioner, his prayer for bail can be considered on its own merit. The learned CJM shall do the needful and submit a report by 28.02.2022. List this matter on 11.03.2022. Copy of this order be sent to the learned CJM, Jajpur for necessary compliance.

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2022 (I) ILR - CUT- 444

MISS SAVITRI RATHO, J.

CRLREV NO. 759 OF 2017

SAMBHUNATH PANDA & ORS. ……....Petitioners

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

CRIMINAL TRIAL – Complaint filed under the provisions of the Protection of Women From Domestic Violence Act, 2005 – Application

filed under section 12 of the Act – In the midst of the trial, application for amendment in the prayer/ seeking additional prayers filed – Such application allowed – Order of the trial court allowing the amendments in prayer challenged – It was pleaded that, in criminal proceeding there is no provision for amendment – Order of the trial Court considered – Held, allowing such prayers will prevent multiplicity of litigation and have therefore been rightly ordered – Moreover the concerned Act is a beneficial legislation and rejection of the amendment on hyper technical ground would not be in the interest of justice.

Case Laws Relied on and Referred to :-

1. (2016)11 SCC 774 : Kunapareddy alias Nookala Shanka Balaji Vs. Kunapareddy Swarna Kumari and Anr.
2. (2015)9 SCC 609 : S.R. Sukumar Vs. S. Sunaad Raghuram.

For Petitioners : Mr. H.S. Deo
For Opp. Parties : Mr. S.S. Pradhan, AGA & Mr. Debasis Samal.

ORDER Date of Order : 02.12.2021

MISS SAVITRI RATHO,J.

1. Heard Mr. H.S. Deo, learned counsel for the petitioners, Mr. S.S. Pradhan, learned Additional Government Advocate and Mr. Debasis Samal, learned counsel for the Opposite Party No.2-wife and Opposite Party No.3-child through hybrid mode.

2. Vide order dated 19.06.2017 passed by the learned J.M.F.C., Dhamnagar in D.V. Misc. Case No. 01 of 2015, the learned Magistrate has allowed the application for amendment of the prayer portion of the application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 holding that the amendment sought for by the petitioners is formal in nature and will not change the nature and character of the case. Keeping in view the interest of justice, the petition has been allowed.

This order has been confirmed by the learned Additional Sessions Judge in CRL APPEAL No. 45 of 2017 vide judgment dated 12.09.2017.

3. Mr.H.S Deo, learned counsel for the petitioners has challenged the aforesaid order and judgment passed by the two Court. He submits that the said amendment for correction of the prayer portion will change the nature and character of the DV petition and is otherwise not maintainable as the

proceeding under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short "DV Act") is a criminal proceeding and there is no provision for amendment in the Crl.P.C .

4. Mr. Debasis Samal, learned counsel for the Opposite PartyNos.2 & 3 supports the impugned order submitting that they do not call for any interference . He brings to my notice the decision of the Hon'bleApex Court rendered in the case of ***Kunapareddy alias Nookala Shanka Balaji vs. Kunapareddy Swarna Kumari and Anr*. reported in *(2016)11 SCC 774,*** wherein the Hon'ble Apex Court has held that:-

> " 17. What we are emphasizing is that even in criminal cases governed by the Code, the Court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings.The argument of the learned Counsel for the Appellant, therefore, that there is no power of amendment has to be negated.
>
> *18. In this context, provisions of Sub-section (2) ofSection 28 of the DV Act gain significance. Whereasproceedings under certain Sections of the DV Act as specified in Sub-section (1) of Section 28 are to be governed by the Code, the Legislature at the sametime incorporated the provisions like Sub-section (2) as well which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23 (2) of the DV Act. This provision has been incorporated by the Legislature keeping a definite purpose in mind. Under Section 12, an application can be made to a Magistrate by an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person to claim one or more reliefs under the said Act. Section 23 deals with the power of the Magistrate to grant interim and ex-parte orders and Sub-section (2) of Section 23 is a special provision carved out in this behalf which is as follows:*
>
> "23 (2*) If the Magistrate is satisfied that an application prima facie discloses that the Respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the Respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person Under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the Respondent."*
>
> *19. The reliefs that can be granted by the final order or an by interim order, have already been pointed out above wherein it is noticed that most of these reliefs are of civil nature. If the power to amend the complaint/application etc. is not read into the aforesaid provision, the very purpose which the Act attempts to sub-serve itself may be defeated in many cases……* "

He also relies on the decision of the Hon'ble Apex Court rendered in the case of S***.R. Sukumar vrs. S. Sunaad Raghuram: (2015)9 SCC 609*** **where the t**he Hon'ble Apex Court has held as follows : -

> "…18. In so far as merits of the contention allowing the application for amendment, it is true that there is no specific provision in the code to either amend a complaint or a petition under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints ………"
>
> "19. What is discernible from the **U.P. Pollution Control Board** case is that an easily curable legal infirmity could be cured by means of a formal application for amendment. If theamendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be madein the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint.
>
> *20. In the instant case, the amendment application was filedon 24.05.2007 to carry out the amendment by adding paras 11(a) and 11 (b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application. Firstly, Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused,no prejudice would be caused to the accused. Thirdly, the amendment did not change the original nature of the complaint being one for defamation. Fourthly, the publication of poem 'Khalnayakaru' being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by therespondent by filing a separate complaint and therefore to avoid multiplicity of proceedings, the trial court allowed the amendment application. Considering these factors which weighed in the mind of the courts below, in our view, theHigh Court rightly declined to interfere with the order passedby the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmitywarranting interference in exercise of jurisdiction under Article 136 of the Constitution of India."*

5. In the present case, amendment of the prayer portion of theapplication filed under Section – 12 of the DV Act, has been sought forby adding prayers for additional reliefs. These reliefs are available to the applicants and they could have filed a separate application with these prayers. But allowing the additional prayers to be included in the complaint would prevent multiplicity

of litigation and have therefore been rightly allowed. Moreover the DV Act is a beneficial legislation and rejection of the amendment on hyper technical ground would notbe in the interest of justice. Even if it as assumed that the amendment will change the nature and character of the application to some extent, no prejudice will be caused to the petitioners as they will have a chance to file an objection to the amended/ consolidated application.

6. In view of the aforesaid discussion and after considering the submissions of the counsels, I do not find this is a fit case to interferewith the impugned orders. The Criminal Revision is accordingly dismissed.

Interim order passed earlier stands vacated.

7. Since the case is pending since 2017, the learned Magistrate shall do well to dispose of the application expeditiously keeping in view the provisions of Section 12(5) of the Protection of Women from Domestic Violence Act, 2005.

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2022 (I) ILR - CUT- 448

SASHIKANTA MISHRA, J.

CRLMC NOS. 2040, 1401 & 2163 OF 2021

NABARATNA @ NABARATAN AGRAWAL ……..Petitioner
.V.
STATE OF ODISHA ……..Opp. Party

CRLMC No. 1401 of 2021
SAROJ SINGH ……..Petitioner
.V.
STATE OF ODISHA ……..Opp. Party

CRLMC No. 2163 of 2021
CHANDAN KUMAR JENA ……..Petitioner
.V.
STATE OF ODISHA ……..Opp. Party

ODISHA MOTOR VEHICLES (ACCIDENTS CLAIMS TRIBUNAL) RULES, 2018 – Rule 06 – Prohibition of release of the Vehicle due to non insured of the vehicle – In the present case, seized vehicle was not

released due to non cover of third party insurance – Order of the tribunal as well as Appellate tribunal challenged – It is argued that neither the investigating officer demanded the security nor the petitioner called upon to furnish the security as mandated in the section – Order of both the tribunals assailed – Held, the impugned orders rejecting the application for release of vehicle without calling upon the vehicle owner to furnish security as per rules, and/or by giving opportunity to do so is contrary to the statutory mandate – Such rejection enures to the benefit of no one as in the process, neither the right of the victim is taken care of nor the right of the owner to use his vehicle is protected – On the contrary, the vehicle would continue to remain idle and thereby subject to deterioration on passing of each day.

Case Laws Relied on and Referred to :-

1. (2021) 81 OCR 635 : Ramakrushna Mahasuar Vs. State of Odisha.
2. JT 2009 (15) SC 443 : Jai Prakash Vs. M/s. National Insurance Company & Ors.
3. (2002)10 SCC 283 : Sunderbhai Ambalal Desai Vs. State of Gujarat.

For Petitioners : M/s. S.K. Nanda, A. Nanda & B. Sahoo (in CRLMC No. 2040 of 2021)

M/s. A.K. Sahoo & B.K. Nayak, (In CRLMC No.1401 of 2021)

M/s. Bigyan Kumar Sharma, S. Palei, S.K. Singh, J. Pradhan (In CRLMC No. 2163 of 2021)

For Opp. Parties : Mr. S.K. Mishra,Addl. Standing Counsel (In all the cases)

ORDER Date of Order : 13.12.2021

SASHIKANTA MISHRA, J.

In all these applications, the petitioners challenge the orders passed by the courts below in rejecting their applications filed under Section 457 Cr.P.C. for release of their vehicles.

FACTS

CRLMC No. 2040 of 2021

2. In this case, the petitioner claims to be the registered owner of a Tractor bearing Registration No.OD-31-F-9493 with Trailer bearing Registration No. OD-31-F-9494. The said vehicle was seized in connection with Dunguripali P.S. Case No. 138/2021 corresponding to G.R. Case No.

83/2021 of the Court of learned G.N. –cum- J.M.F.C., Dunguripalli for the alleged commission of offence under Sections 279/304(A) of IPC against one Jitendra Behera, driver of the said Tractor. During investigation, the said accused expired and the case abated against him and accordingly final report was submitted as such on 05.08.2021. The petitioner being the owner of the vehicle filed an application under Section 457 Cr.P.C. for release of the seized Tractor and Trailer. Learned Magistrate, upon receipt of report from I.O. held that there is no requirement of the vehicle for further investigation and that no confiscation proceeding has been initiated against him. But it was found that the vehicle was not insured as on the date of occurrence. On such finding, learned Magistrate by referring to the decision of this Court rendered in the case of ***Ramakrushna Mahasuar vs. State of Odisha*** reported in (2021) 81 OCR 635 held that insurance of the seized vehicle was not valid on the date of accident and it is difficult to ascertain the compensation amount and accordingly rejected the petition. The petitioner thereafter filed revision vide Criminal Revision No. 11 of 2021 in the Court of Sessions Judge, Sonepur. By order dated 20.09.2021, the learned Sessions Judge by referring to Rule 6 of Orissa Motor Vehicles (Accidents Claims Tribunal) Rules, 2018 (herein after referred as "2018 Rules") (wrongly mentioned as OMV Rules, 2018) and the decision of this Court in ***Ramakrushna Mahasuar*** (supra), held that the petitioner did not furnish any sufficient security to satisfy the compensation to be paid to the claimant, if any, before the trial Court or before passing of the impugned order and therefore, did not deem it proper to interfere with the order passed by the learned G.N. –cum- J.M.F.C., Dunguripalli. The said order is impugned in the present application.

CRLMC No. 1401 of 2021.

3. In this case, the petitioner claims to be the owner of a Truck bearing registration No.OD-23A-7371, which was involved in an accident that occurred on 02.03.2021 leading to registration of Barkote P.S. Case No.65 of 2021 corresponding to C.T. Case No. 113 of 2021 of the Court of learned S.D.J.M., Deogarh for the alleged commission of offence under Sections 279/304-A of IPC. The vehicle was seized by Barkote Police. The Driver of the said Truck was shown as the accused. The petitioner filed an application under Section 457 Cr.P.C. before the learned S.D.J.M., Deogarh for release of the vehicle pending trial of the case. Learned S.D.J.M. vide order dated 11.06.2021 by referring to Rule-6 of the 2018 Rules held that as the vehicle was not insured on the date of the accident, the prayer of the petitioner for

release of the vehicle cannot be allowed and accordingly rejected such petition. Being aggrieved, the petitioner carried the matter in revision to the Court of Sessions in Criminal Revision No. 6 of 2021-04/2021 of the court of learned Addl. Sessions Judge, Deogarh. Learned Addl. Sessions Judge also relied upon the aforesaid rules and the decision of this Court in the case of ***Ramakrushna Mahasuar*** (supra) and held that no case for exercise of revisional jurisdiction is made out in respect of the impugned order and accordingly dismissed the revision petition. The said order is impugned in the present application.

CRLMC No. 2163 of 2021

4. In this case, the petitioner claims to be the owner of a Tipper bearing registration No. OD-29-H-8181, which was involved in an accident occurring on 28.07.2021. In connection with such accident, Keonjhar Town P.S. Case No. 266/2021 was registered corresponding to G.R. Case No. 1170/2021 for the alleged commission of offence under Section 279 of IPC against the driver of the said Tipper. The petitioner filed an application under Section 457 of Cr.P.C. for release of the vehicle during pendency of the proceeding before learned S.D.J.M., Keonjhar. Learned S.D.J.M. rejected such prayer for release of the vehicle on the ground of non-existence of the insurance policy covering the date of accident following the ratio laid down by this Court in ***Ramakrushna Mahasuar*** (supra). Challenging such order, the petitioner filed revision in Criminal Revision No. 07/07 of 2021 in the court of learned Addl. Sessions Judge-cum- Special Judge (Vigilance), Keonjhar. Vide judgment dated 25.09.2021, learned Addl. Sessions Judge-cum- Special Judge (Vigilance) held that the vehicle was not covered under a valid policy of insurance covering the date of the accident and therefore, the vehicle cannot be released in favour of the petitioner. In holding so, the learned Addl. Sessions Judge-cum- Special Judge (Vigilance) relied upon the judgment of this court in ***Ramakrushna Mahasuar*** (supra). The said order is impugned in the present application.

5. Heard Mr. S.K. Nanda, learned counsel for the petitioner in CRLMC No, 2040 of 2021; Mr. A.K. Sahoo, learned counsel for the petitioner in CRLMC No. 1401 of 2021; Mr. B.K. Sharma, learned counsel for the petitioner in CRLMC No. 2163 of 2021 and Mr. S.K. Mishra, learned Addl. Standing Counsel for the State in all the cases.

SUBMISSIONS

6. Mr. S.K. Nanda has contended that in his case the provision contained in Rule-6 of the 2018 Rules cannot be enforced because the driver of the Tractor has expired and there is no claim for compensation from any quarter whatsoever.

Mr. A.K. Sahoo contends that two vehicles were admittedly involved in the accident but police submitted charge sheet against one vehicle only and therefore, acceptance of such charge sheet by the learned Magistrate is improper.

Mr. B .K. Sharma has contended that unless the owner of the vehicle is called upon to furnish security for a particular amount, he cannot be expected to do so on his own. It is only if the owner fails to furnish the security as ordered by the court can his application for release of the vehicle be rejected. It is additionally argued by Mr. Sharma that in his case learned Magistrate committed an illegality in holding that the vehicle in question was not covered under policy of insurance even though there were ample materials on record to show that the vehicle was actually under insurance coverage at the relevant time. In this regard Mr. Sharma has referred to the insurance policy enclosed as Annexure-4 to his CRLMC petition. It reveals that the policy was issued on 28.07.2021 at 2.53 p.m. whereas the accident took place at 9 p.m.. The insurance Company however, committed an illegality in mentioning the period of insurance as commencing from 00.00 hours on 29.07.2021 to midnight of 28.07.2022. Referring to Section 64(VB) of the Insurance Act, 1938 Mr. Sharma would argue that premium amount having been duly paid on 28.07.2021, the Insurance Company is duty bound to assume risk from such date and not from any later date. Mr. Sharma has also referred to Rule-4 of the Insurance Regulatory and Development Authority (Manner of Receipt of Premium) Regulations, 2002 (in short "2002 Regulations"), which prescribes that in all cases of risks covered by the policies issued by an insurer, the attachment of risk to an insurer will be in consonance with the terms of section 64-VB of the Act (The Insurance Act).

7. Apart from contending as above, learned counsel for the parties have specifically raised the ground that the courts below have never directed them to furnish any security not quantified such amount and that they are ready and willing to furnish security for such amount as may be fixed by the respective courts and therefore, necessary directions may be issued by this Court.

8. Per contra, Mr. S.K. Mishra, learned Addl. Standing Counsel has supported the impugned orders by contending that Rule-6 of 2018 Rules puts an embargo on release of vehicle involved in an accident-causing death or bodily injury to any person or damage to property if on the date of accident, the vehicle is not covered under a policy of insurance covering 3rd party risks. This Court has already dealt with the matter in ***Ramakrushna Mahasuar's*** case, which all the three courts below have followed. Therefore, according to Mr. Mishra, there is no necessity of interference by this court with the impugned orders.

FINDINGS

9. A reference to Rule-6 of 2018 Rules, at the outset would be in order:

> "***6. Prohibition against release of motor vehicle involved in accident****:— (1) No court shall release a motor vehicle involved in an accident resulting in death or bodily injury or damage to property, when such vehicle is not covered by the policy of insurance against third party risks taken in the name of registered owner or when the registered owner fails to furnish copy of such insurance policy despite demand by investigating officer, unless and until the registered owner furnishes sufficient security to the satisfaction of the court to pay compensation that may be awarded in a claim case arising out of such accident.*
>
> *(2) Where the motor vehicle is not covered by a policy of insurance against third party risks, or when registered owner of the motor vehicle fails to furnish copy of such policy in circumstance mentioned in sub-rule(1), the motor vehicle shall be sold off in public auction by the magistrate having jurisdiction over the area where accident occurred, on expiry of three months of the vehicle being taken in possession by the investigating officer, and proceeds thereof shall be deposited with the Claims Tribunal having jurisdiction over the area in question, within fifteen days for purpose of satisfying the compensation that may have been awarded, or may be awarded in a claim case arising out of such accident."*

10 A reading of the Rule would reveal that undoubtedly certain restrictions have been placed by the Legislature in the matter of release of a vehicle involved in an accident if the said vehicle is not covered by an Insurance Policy but, it is also evident that an exception has been carved out in the latter part of sub-Rule(1) to the effect that such vehicle can also be released if the registered owner furnishes ***"sufficient security to the satisfaction of the Court***" to pay for compensation that may be awarded in a claim case arising out of such accident.

11. The aforementioned rules came into force on 28.12.2018, i.e., the date on which they were published in the Odisha Gazette. Further, the said rules

were framed in exercise of powers conferred by Section 176 of the Motor Vehicles Act, 1988, and in supersession of the Odisha Motor Vehicles (Accident Claims Tribunal) Rules, 1960. The Odisha Motor Vehicles (Accident Claims Tribunal) Rules, 1960 (hereinafter referred to as "Rules, 1960") had 32 provisions, but there was no provision dealing with release of vehicle. For the first time such a provision came into existence in the form of Rule-6 of 2018 Rules. It would be apt to refer to the background of framing such a rule. In the case of ***Jai Prakash vs. M/s. National Insurance Company and others*** reported in JT 2009 (15) SC 443, the Apex Court while issuing several directions to different authorities with regard to motor accidents claim cases held as follows:

> *"28. Where there is no insurance cover for a vehicle, the owner should be directed to offer security or deposit an amount, adequate to satisfy the award that may be ultimately passed, as a condition precedent for release of the seized vehicle involved in the accident. If such security or cash deposit is not made, within a period of three months, appropriate steps may be taken for disposal of the vehicle and hold the sale proceeds in deposit until the claim case is disposed of. The appropriate Governments may consider incorporation of a rule on the lines of Rule 6 of the Delhi Motor Accident Claims Tribunal Rules, 2008 in this behalf."*

Subsequently, in the case of ***Ushadevi & Anr. vs. Pawan Kumar & Others***, (Civil Appeal No(s). 9936-9937/2016), decided on 13.09.2018, the Hon'ble Supreme Court while reaffirming the principles laid down in ***Jai Prakash*** (supra) have held as follows:

> *"41. Where there is no insurance cover for a vehicle, the owner should be directed to offer security or deposit an amount, adequate to satisfy the award that may be ultimately passed, as a condition precedent for release of the seized vehicle involved in the accident. If such security or cash deposit is not made, within a period of three months, appropriate steps may be taken for disposal of the vehicle and hold the sale proceeds in deposit until the claim case is disposed of. The appropriate Governments may consider incorporation of a rule on the lines of Rule 6 of the Delhi Motor Accident Claims Tribunal Rules, 2008 in this behalf."*
>
> *"xxxxxxxxxx. What has been stated in paragraph-41 (quoted in this judgment hereinbefore as paragraph-28 of its judgment in* ***Jai Prakash*** *mentioned supra) is a some kind of solace to the victims. But for the said purpose, proper rules are required to be framed. Xxxxxxxxxxxx"*

Referring thereafter to Rule-6 of the Delhi Motor Accidents Claims Tribunal Rules, 2008, the Apex Court directed all States to see that such a rule is introduced if already done, so that the victims upon accident get some compensation.

12. Delhi Motor Accident Claims Tribunal Rules, 2008 was notified in the Delhi Gazette on 13th July 2009. Rule-6 thereof reads as follows:

> *"**6. Prohibition against release of motor vehicle involved in accident**.-(1) No court shall release a motor vehicle involved in an accident resulting in death or bodily injury or damage to property, when such vehicle is not covered by the policy of insurance against third party risks taken in the name of registered owner or when the registered owner fails to furnish copy of such insurance policy despite demand by investigating police officer, unless and until the registered owner furnishes sufficient security to the satisfaction of the court to pay compensation that may be awarded in a claim case arising out of such accident.*
>
> *(2) Where the motor vehicle is not covered by a policy of insurance against third party risks, or when registered owner of the motor vehicle fails to furnish copy of such policy in circumstance mentioned in subrule (1), the motor vehicle shall be sold off in public auction by the magistrate having jurisdiction over the area where accident occurred, on expiry of three months of the vehicle being taken in possession by the investigating police officer, and proceeds thereof shall be deposited with the Claims Tribunal having jurisdiction over the area in question, within fifteen days for purpose of satisfying the compensation that may have been awarded, or may be awarded in a claim case arising out of such accident."*

Obviously, Rule-6 of 2018 Rules is in pari materia to Rule-6 of the Delhi Motor Accident Claims Tribunal Rules, 2008 quoted above.

13. As already referred to, the Hon'ble Supreme Court ***Jai Prakash*** (supra) have held that where there is no insurance cover for vehicle, the owner should be directed to offer security or deposit an amount that may be adequate to satisfy the award that may be ultimately passed xxxxxxxxxxx.

14. A reading of the 2018 Rules would suggest that sufficiency of the security to be furnished by the owner must be to the satisfaction of the Court. In this context, it is contended by Mr. B.K. Sharma that second limb of Sub-Rule (1) of Rule-6 may not be workable because there may not be any claim case or, there may be a claim case resulting in nil award or, there may be a case where negligence of the driver may not be proved and in such a case compensation may not be awarded. Further, under Section 168 of the Motor Vehilces Act, the Claims Tribunal shall specify the amount in the form of compensation which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them as the case may be. Therefore, which compensation amount shall be taken into consideration by the learned court below while asking for security from the registered owner for release of the vehicle will be difficult to determine.

Undoubtedly, this is a vexed question having no direct answers. It may be difficult for a criminal Court to have definite knowledge of the amount that would be awarded as compensation in a claim case that may be filed. In this scenario, it needs to be determined as to what would be a correct approach to address this problem viz-a-viz the mandate of Rule-6 of 2018 Rules. As quoted hereinbefore, while sub-rule 1 authorizes the Court to ask for security to pay for the compensation that may be awarded in the claim case, sub-rule 2 authorizes the Court also to sell off the vehicle in public auction on expiry of three months after the vehicle is taken in possession (seized) by the investigating officer and deposit the sale proceeds thereof in the Claims Tribunal having jurisdiction over the area in question. Obviously, sub-rule 2 is a sort of exception to sub-rule 1 to be resorted to in the event of failure of the owner to furnish security as required under sub-rule 1 within three months of the seizure of the vehicle. In such event, it would be lawful for the Court to sell of the vehicle in public auction and deposit the sale proceeds for payment of compensation. So, on a conjoint reading of sub-rules 1 and 2, it would be apparent that the pious intent of the legislature being to safeguard the interest of the victim of a road accident caused by an uninsured vehicle, Rule 6 has ensured that the same remains protected either by asking the owner to furnish sufficient security keeping in view the compensation that may be awarded or by selling off the vehicle and applying the sale proceeds thereof for such purpose.

So, taking a cue from the legislative scheme as ingrained in Rule-6, it would not be unreasonable to hold that if and when the Court is unable to quantify the compensation, it would be proper to ask for security at least equal to the present market value of the vehicle, which can be invoked, if need be at the relevant time to pay compensation that may be awarded in future.

In a case before the High Court of Delhi, i.e. ***Rajesh Tyagi & Ors. Vs. Jaibir Singh & Ors.*** (F.A.O. No. 842 of 2003) decided on 8th June, 2009, a similar view was taken wherein it was observed as under:

> *"xxxxxxx if the vehicle is not insured, the vehicle shall be released on superdari only after the owner furnishes sufficient security to the satisfaction of the Court to pay the compensation or at least equal to the value of the vehicle"*

Adopting such a course of action alone can strike a balance between the right of a victim of the accident or his dependants as the case may be, to

receive compensation for their loss vis-à-vis the right of the vehicle owner to have his vehicle released.

15. Thus, from the discussion made hereinbefore, it is manifestly clear that the impugned orders rejecting the application for release of vehicle without calling upon the vehicle owners to furnish security as per rules, and/or by giving them opportunity to do so is contrary to the statutory mandate. Such rejection enures to the benefit of no one as in the process, neither the right of the victim is taken care of nor the right of the owner to use his vehicle is protected. On the contrary, the vehicle would continue to remain idle and thereby be subject to deterioration with each passing day. Having regard to the spirit of the ratio laid down by the Apex Court in the case of ***Sunderbhai Ambalal Desai vs. State of Gujarat,*** reported in (2002)10 SCC 283 it would be in the fitness of things for the Court to direct release of the vehicle albeit after complying with the requirements of Rule-6 of the 2018 Rules.

16. From a conspectus of the analysis made above and on reference to the specific language employed in Rule-6, it would be evident that giving effect to the latter part of Sub-Rule-1 of Rule-6 entails the following steps:

> (i) The court concerned is to quantify an amount to be furnished as security which, in its opinion would be adequate to cover the compensation that may be awarded in a claim case arising out of such accident. In the event the Court is unable to quantify such security it may call upon the owners to at least furnish security to the extent of the present market value of the vehicle.
>
> (ii) Upon furnishing of such security, the vehicle can be directed to be released by imposing such other conditions as it may deem fit and proper in the facts and circumstances of the case.

17. In all the three cases before this Court, no such direction was issued to the owners of the vehicles (petitioners) to furnish security and yet their applications were rejected on the ground that they had failed to furnish such security.

18. In view of the discussion on the legislative intent made hereinbefore, this Court is constrained to observe that the methodology adopted by the concerned courts amounts to putting the cart before the horse, inasmuch as, without calling upon the petitioners to furnish security it has been held in all the three cases that the petitioners have failed to furnish security for such amount.

19. As regards the directions issued by this Court in ***Ramakrushna Mahasuar's*** case, it is to be kept in mind that the above aspects were not raised before the Court. In that case, the correctness of the order passed by the court below in rejecting the prayer for release of vehicle on the ground of absence of insurance policy was raised which was answered by referring to Rule-6 of the 2018 Rules. The cases at hand stand on different footing inasmuch as, all the petitioners herein have specifically contended that they are ready and willing to abide by the provisions of Rule-6 of 2018 Rules by furnishing such security as may be directed by the courts below.

20. Having regard to the discussion made hereinbefore, it is evident that the impugned orders cannot be sustained in the eye of law, thereby warranting interference by this Court.

21. As regards the contentions raised by Mr. Sharma with regard to date and time of commencement of the insurance policy, it is observed that the same involves interpretation of the provisions of the Insurance Act and 2002 Regulations vis-à-vis the Motor Vehicles Act. Obviously, the criminal court cannot be expected to decide the controversy arising therefrom. It is open to the petitioner to approach the appropriate forum for redressal of his grievance on such score.

22. For the forgoing reasons therefore, this Court holds that the courts below have committed manifest error in not correctly interpreting the provisions of Rule-6 of 2018 Rules and have therefore, committed illegality in rejecting the petitions filed by the owners of the concerned vehicles for release of the said vehicles without first calling upon them to furnish security as per Rule-6 of 2018 Rules. As such, the impugned orders are liable to be quashed.

23. In the result, all the impugned orders are hereby quashed. The concerned courts below are directed to act as per the steps indicated under paragraph-16 of the judgment and pass appropriate order thereupon. It goes without saying that in the event the owners do not furnish sufficient security to the satisfaction of the courts concerned, no order for release of the vehicles shall be passed.

24. With the above observations and directions, the CRLMC applications are disposed of.

2022 (I) ILR - CUT- 459

A.K. MOHAPATRA, J.

CRLREV NO. 465 OF 2021

SHYAM SUNDAR DAS …. ….Petitioner

.V.

STATE OF ODISHA AND ANR. ……..Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 401 r/w section 397– Conviction under section 138 of N.I Act – During pendency of the case the matter has been amicably settled with complainant – Whether offences under section 138 of the N.I Act could be compounded at a later stage of litigation – Held, Yes – As per the decision of Hon'ble Supreme Court (in K.M.IBRAHIM Vs K.P.MOHAMMED) the section 147 of the N.I. Act being a provision in a special statute, the same will have over riding effect over the provision relating to compounding of offences under the section 138 of the N.I Act. (Para-16)

Keeping in view the fact that the matter has been amicably settled between the parties and the parties are desirous to compound the offence under section 147 of the N.I. Act, this Court permits the parties to compound the offence, however, said compounding is subject to payment of cost. although the petitioner is required to pay cost of Rs. 8,250/- (rupees eight thousand two hundred fifty which is 15% of Rs. 55,000/- i.e. the cheque amount) as per the guidelines of the Hon'ble Supreme Court, however considering the fact that the petitioner has served the sentence for some days, he is directed to pay a cost of Rs.5,000/-. (Para-17)

Case Laws Relied on and Referred to :-

1. (2010) 5 SCC 663 : Damodar S. Prabhu Vs. Sayed Babalal H.
2. 2021(4) Crimes 196 (SC): Gimpex Private Limited Vs. Manoj Goel (decided on 08.10.2021)
3. 2022(I) OLR 42 : Khirod Kumar Sahu Vs. State of Odisha and Ors.
4. (2010) 1 SCC 798 : K.M. Ibrahim Vs. K.P. Mahammed.
5. (2010) 5 SCC 663 : Damodar S. Prabhu Vs. Sayed Babalal H.

For Petitioner : Mr. S.R. Mulia

For Opp. Parties: Mr. M.K. Mohanty, A.S.C.
Mr. R.R. Nayak.

ORDER Date of Order : 14.02.2022

A.K. MOHAPATRA, J.

1. Pursuant to the notice issued by this Court vide order dated 21.02.2021, the complainant-Opposite Party No.2 has appeared through Mr. R.R. Nayak, Advocate and filed an affidavit dated 19.11.2022. The said affidavit is taken on record.

2. On the consent of both sides, the matter is taken up for final disposal, although the matter is listed under the heading for fresh admission.

3. Heard Mr. S.R. Mulia, learned counsel for the Petitioner, Mr. M.K. Mohanty, learned Additional Standing Counsel for Opposite Party No.1-State and Mr. R.R. Nayak, learned counsel for the complainant-Opposite Party No.2.

4. The present criminal revision has been filed under Section 401 read with Section 397, Cr.P.C. by the accused-Petitioner challenging the order of conviction dated 27.08.2019 passed by the learned Sessions Judge, Balasore in Criminal Appeal No.57 of 2018 thereby confirming the judgment and order of conviction dated 30.07.2018 passed by the learned S.D.J.M., Nilgiri in I.C.C. No.465 of 2013 (New F. No.128 of 2015) thereby convicting the accused-Petitioner under Section 138 of the N.I. Act.

5. The complaint case, in short, is that the complainant-Opposite Party No.2 instituted a complaint case against the present Petitioner for commission of offence under Section 138 of the N.I. Act. In the complaint petition, it was alleged by the complainant that he had a Steel and Aluminum utensil shop at Hat Chhak, Nilgiri and the accused- Petitioner used to take utensils from his shop partly on credit and partly on payment. As on 17.03.1013, a sum of Rs.55,000/- was outstanding against the accused-Petitioner. On being requested by the Opposite Party No.2, the Petitioner on 05.08.2013 issued a cheque bearing No.471505 dated 05.08.2013 for Rs.55,000/- to clear off the entire outstanding dues. The said cheque was presented for encashment to the Banker by the Opposite Party No.2. However, the same was dishonoured by the Banker with the endorsement that "funds insufficient" and accordingly, intimation was sent by the Bankers to the Opposite Party No.2.

6. After the above noted cheque was dishonoured by the Banker, the Opposite Party No.2 issued a demand notice through his Advocate to the Petitioner on 21.08.2013 by Registered Post with A.D. demanding payment

of the cheque amount from the Petitioner. However, said notice was returned without service with an endorsement that the "addressee absent". Accordingly, on 22.10.2013, the Opposite Party No.2 filed the above noted complaint case under Section 138 of the N.I. Act.

7. Learned trial court after going through the evidence and materials available on record, by a judgment dated 30.07.2018 in the above noted ICC Case found the Petitioner of the offence under Section 138 of the N.I. Act and convicted him thereunder and sentenced him to undergo S.I. for one year and further directed the Petitioner to pay a sum of Rs.80,000/- to the complainant-Opposite Party No.2 as compensation.

8. The judgment dated 30.07.2018 passed in above noted ICC Case was assailed before the learned Sessions Judge, Balasore in Criminal Appeal No.57 of 2018. The appellate court after hearing the learned counsels for both the sides, confirmed the judgment passed by the trial court and modified the sentence to the extent that the Petitioner shall pay a compensation amount of Rs.80,000/- and in default, to undergo further S.I. for two months while setting aside the sentence of one passed by the trial court.

9. Challenging the judgment and order of conviction dated 27.08.2019 passed by the learned Sessions Judge, Balasore in Criminal Appeal No.57 of 2018, the present revision petition has been filed by the Petitioner.

10. Mr. S.R. Mulia, learned counsel appearing for the Petitioner submits that the matter has been amicably settled with the complainant- Opposite Party No.2 and the Petitioner has paid a sum of Rs.80,000/- (rupees eighty thousand) to the complainant-Opposite Party No.2. In such view of the matter, learned counsel for the Petitioner submits that since matter has been amicably settled outside the court, the entire outstanding amount has been paid to the complainant-Opposite Party No.2 and the revision petition filed by the Petitioner may be allowed and the judgment and order of conviction by both the courts below be set aside.

11. Mr. R.R. Nayak, learned counsel appearing for the complainant-Opposite Party No.2 agrees with the submissions made by the learned counsel for the Petitioner. He further submits that the complainant- Opposite Party No.2 has received a sum of Rs.80,000/-(rupees eighty thousand) and that the dispute has been amicably settled between the parties and as such, he

does not want to proceed further in the matter. The submissions made by learned counsel for the complainant is supported by an affidavit filed by the complainant-Opposite Party No.2.

12. Mr. M.K. Mohanty, learned Additional Standing Counsel appearing on behalf of the Opposite Party No.1-State submits that the State has nothing to say in the matter as the dispute is purely private and the same is between the Petitioner and the complainant-Opposite Party No.2. However, Mr. Mohanty, leaned Additional Standing Counsel further relying upon the judgment of the Hon'ble Supreme Court of India in the matter ***Damodar S. Prabhu vs. Sayed Babalal H*** **: reported in** ***(2010) 5 SCC 663*** submits that as per the guidelines/direction issued by the Hon'ble Supreme Court of India, the parties should have compounded offence during the early stage of the litigation and that further continuance of the litigation has caused choking of the criminal justice system. Further in the aforesaid judgment, the Hon'ble Supreme Court of India has laid down a guideline for imposing cost on the parties, who have delayed in compounding the offences in cheque bounce cases. On a close scrutiny of the aforesaid judgment, it is found that the Hon'ble Supreme Court of India has observed that if the accused does not make an application for compounding at an early stage of trial and makes such an application at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding before the Legal Service Authority, or such authority as the court deems fit. It has been further observed that if the application for compounding is made before the Sessions court or High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of cost.

13. Further the law laid down by the Hon'ble Supreme Court of India in ***Damodar S. Prabhu's case (Supra)*** has been quoted with approval in a latter decision of the Hon'ble Apex Court in the case of ***Gimpex Private Limited vs. Manoj Goel (decided on 08.10.2021) reported in 2021(4) Crimes 196 (SC***). In paragraph 31 of the said judgment it has been observed as follows;

> "31. Thus, under the shadow of Section 138 of the NI Act, parties are encouraged to settle the dispute resulting in ultimate closure of the case rather than continuing with a protracted litigation before the court. This is beneficial for the complainant as it results in early recovery of money; alteration of the terms of the contract for higher compensation and avoidance of litigation. Equally, the Accused is benefitted as it

> leads to avoidance of a conviction and sentence or payment of a fine. It also leads to unburdening of the judicial system, which has a huge pendency of complaints filed Under Section 138 of the NI Act. In *Damodar S. Prabhu (supra)* this Court had emphasised that the compensatory aspect of the remedy Under Section 138 of the NI Act must be preferred and has encouraged litigants to resolve disputes amicably."

14. Moreover, the aforesaid view of the Hon'ble Supreme Court of India while compounding offences under section 138 of the N.I.Act has also been relied upon and referred to by a learned Single Judge Bench of this court in ***Khirod Kumar Sahu Vs. State of Odisha and Ors.*, reported in *2022(I) OLR 42*.** Where in the guidelines issued by the Hon'ble Apex Court has also been reiterated by this Court.

15. There is no doubt that the offence under Section 138 of the N.I. Act can be compounded under Section 147 of the said Act notwithstanding anything contained in the Code of Criminal Procedure, 1973. Further the Hon'ble Supreme Court of India in the aforesaid judgment has observed that the compounding of offences under the Negotiable Instruments Act, 1981 is covered by under Section 147 of the N.I. Act and the scheme contemplated by Section 320 of the Code of Criminal Procedure will not be applicable in the strict sense to the cases covered under the N.I. Act. The provisions under Section 147 of the N.I. Act, 1981 is in the nature of enabling provision which provides for compounding of offences prescribed under the very same Act, therefore, the same is an exception to the general rule incorporated in Section 320, Cr.P.C. Further, the provision under Section 147 of the N.I. Act having been enacted under a special Statute will have a overriding effect over Section 320(9), Cr.P.C. in view of the nonobstinate clause provided in Section 147 of the N.I. Act.

16. Further on the question whether offences under Section 138 of the N.I. Act could be compounded at a later stage of litigation?, the same has been answered by the Hon'ble Supreme Court of India in the matter of ***K.M. Ibrahim vrs. K.P. Mahammed* ; reported in *(2010) 1 SCC 798***. In the said decision, it has been held that Section 147 of the N.I. Act being a provision in a special Statute, the same will have overriding effect over the provisions relating to compounding of offences under Section 138 of the N.I. Act.

17. Having heard the contentions of the learned counsels for both sides and keeping in view the fact that the matter has been amicably settled between the parties and the parties are desirous to compound the offence

under Section 147 of the N.I. Act, this court permits the parties to compound the offence, however, said compounding is subject to payment of cost. Although the petitioner is required to pay cost of Rs.8,250/-(rupees eight thousand two hundred fifty which is 15% of Rs.55,000/- i.e. the cheque amount) as per the guidelines of the Hon'ble Supreme Court, however considering the fact that the petitioner has served the sentence for some days, he is directed to pay a cost of Rs.5,000/-. The cost imposed shall be deposited with the Odisha State Legal Services Authorities, Cuttack within a period of two weeks from today. Resultantly, the order of conviction and the sentence under section 138 of the N.I. Act dated 27.08.2019 passed by the learned Sessions Judge, Balasore in Criminal Appeal No.57 of 2018 and dated 30.07.2018 passed by the learned S.D.J.M., Nilgiri in I.C.C. No.465 of 2013 (New F. No.128 of 2015) are hereby set aside. Further it is directed that the Petitioner be set at liberty forthwith, if it is found that he is in custody and his detention is not required in any other case.

18. Before parting, this Court expresses its displeasure in conduct of the parties in delaying the settlement/compounding of the matter. This Court expects that in future the parties who are litigating a dispute involving a provision under Section 138 of the N.I. Act shall keep this in mind that it is in the interest of justice that the matter should be compounded at the first available opportunity without choking / blocking the criminal justice system unnecessarily by delaying the settlement in such type of cases.

19. Let a copy of this order along with copy of the judgment of the Hon'ble Supreme Court of India in the matter of ***Damodar S. Prabhu vs. Sayed Babalal H*: reported in *(2010) 5 SCC 663*** be communicated by the Registry to the Secretary, State Legal Services Authorities for giving wide publicity to the guidelines laid down by the Hon'ble Supreme Court of India for early settlement of the cases involving the offence under Section 138 of the N.I. Act.

20. The Criminal Revision is accordingly disposed of.

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