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In view of the amicable settlement between the parties who belong to the same village, lack of criminal antecedents against the petitioners, even though three of the petitioner have evaded arrest, as chances of conviction of the petitioners in the case are bleak, I am of the opinion that in the peculiar facts of the case, the proceedings against all the petitioners should be quashed.

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2022 (I) ILR - CUT- 465

FULL BENCH

Dr. S. MURALIDHAR, C.J, K.R. MOHAPATRA & B.P. ROUTRAY, J.

W.P.(C) NOS. 16957 OF 2009, 5085 AND 5087 OF 2014, 8484 OF 2015 AND 19127 OF 2016

M/s. PAL CONSTRUCTION ……..Petitioner

.V.

THE ASSESSING AUTHORITY, BHUBANESWAR & ORS. ……Opp. Parties

IN W.P.(C) NOS. 5085 AND 5087 OF 2014

M/S. KANAKADHARA MINING & MINERALS PVT. LTD. ……Petitioner

.V.

COMMISSIONER OF COMMERCIAL TAXES, ODISHA, CUTTACK & ANR. ……Opp Parties

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M/S. KRISHAK SATHI ……Petitioner

.V.

STATE OF ODISHA AND ORS. ……Opp. Parties

IN W.P.(C) NO. 19127 OF 2016

M/s. DLF LTD. ……Petitioner

.V.

STATE OF ORISSA AND ORS. ……Opp. Parties

PRACTICE AND PROCEDURE – Reference of any matter to a larger Bench – Law on the issue – Indicated.

> *"In the considered view of the Court, a Division Bench of two learned Judges of this Court is bound to follow a judgment of a coordinate Bench of same strength and if it chooses to differ from the said judgment, it is only then that the matter can be referred to a Larger Bench by stating the points of difference with the judgment of the coordinate Bench. This rule of stare decisis is well settled and has been explained by the Supreme Court of India in Union of India v. Raghubir Singh (1989) 2 SCC 754. With the order dated 20th October 2014, not stating the reasons for differing from the judgment in Jindal Stainless Ltd. (supra) which is by a co-ordinate Bench and is therefore binding, the question of a larger Bench considering the issue does not arise. A referral order properly framed should ideally set out the point of difference from an earlier binding judgment with which the Bench is differing."* *(Para- 6 & 7)*

Case Laws Relied on and Referred to :-

1. (2012) 54 VST 1 (Orissa : Jindal Stainless Ltd. (now JSL Ltd.) Vs. State of Orissa.
2. (1989) 2 SCC 754 : Union of India Vs. Raghubir Singh.

IN W.P.(C) NO.16957 OF 2009
For Petitioner : Mr. B. Panda, Sr. Adv.
For Opp. Parties : Mr. Sunil Mishra, Additional Standing Counsel

IN W.P.(C) NOS. 5085 AND 5087 OF 2014
For Petitioner : Mr. Sidhartha Ray
For Opp. Parties : Mr. Sunil Mishra, Additional Standing Counsel

IN W.P.(C) NO. 8484 OF 2015
For Petitioner : Mr. S.K.Acharya.
Opp Parties : Mr. Sunil Mishra, Additional Standing Counsel

IN W.P.(C) NO. 19127 OF 2016
For Petitioner : Mr. R.P. Kar
For Opp. Parties : Mr. Sunil Mishra, Additional Standing Counsel

ORDER Date of Order: 31.03.2022

BY THE BENCH

1. The present petitions are listed before this Larger Bench on account of an order passed by a Division Bench of two learned Judges of this Court on 20th October 2014 in W.P.(C) No.16957 of 2009 which reads as under:

> "This Writ Petition has been filed challenging the validity and legality of assessment order dated 31.03.2009 passed by the Assessing Authority, Bhubaneswar I Circle, Bhubaneswar, under Section 42 of Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act') for the period 01.04.2005 to 30.04.2008.
>
> 2. Although several grounds have been taken in the writ petition to challenge the assessment order, Mr. B. Panda, learned Senior Advocate for the petitioner confined his argument to one of those grounds. According to Mr. Panda, the audit in the business premises of the petitioner was conducted on 29.04.2008 and the said report was signed by the Sales Tax Officer, Audit Unit, Bhubaneswar on 06.09.2008 as reveals from the Audit Visit Report (Annexure-1). The said report was received by the Assessing Authority from the Sales Tax Officer, Audit Unit on 16.10.2008. Since the Authorized Officer has not submitted the Audit Visit Report to the Assessing Authority within seven days from the date of completion of audit as contemplated under Section 41 (4) of the OVAT Act, the said Audit visit Report dated 06.09.2008 is non est/ invalid in the eyes of law and therefore, the assessment

made on the basis of such Audit Visit Report is not sustainable in law. In support of his contention, reliance is placed by Mr. Panda on the judgment of this Court in the case of Jindal Stainless Ltd. v. State of Orissa and others (2012) 54 VST 1 (Orissa), more particularly paragraphs 37, 38 and 39 thereof, which are quoted hereunder:

"37. Question No. (iii) is whether the Authorized Officer has not submitted audit visit report to the Assessing Authority within seven days from the date of audit as contemplated under Section 41(4) of the OVAT Act and thereby the impugned audit visit report dated 31.03.2008 and audit assessment dated 20.08.2008 would be non est / unsustainable in the eye of law. Normally, it is a mixed question of fact and law. But the documents annexed to the writ petition reveal that there is infraction of the provision and time provided under Section 41(4) has not been adhered to. Section 41(4) provides that after completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes.

38. In the instant case, notice issued in form VAT 306 and the accompanying audit visit report reveal that the audit of the business of the petitioner was undertaken by the officers of the audit unit on 01.10.2007 and audit visit report was to be submitted within seven days from 01.10.2007 as contemplated in Section 41(4). But the audit visit report was submitted on 31.03.2008, i.e., after six months of the completion of the audit. This is in clear violation of the statutory provision contained in Section 41(4) since there is a time limit prescribed for submission of audit visit report and the same has not been complied with. Therefore, the said audit visit report has no validity.

39. It is unfortunate that while under OVAT Act Section 41(4) provides for submission of audit visit report within seven days from the date of audit and audit assessment is to be completed within six months Page 4 of 8 from the date of receipt of AVR by assessing authority, the action of the Authorised Officer in submitting the AVR to Assessing Authority after six months from the date of audit visit not only violates the statutory provisions contained in Section 41(4) but also is against the scheme and spirit of audit visit and audit assessment provided under the OVAT Act."

3. Per contra, Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue submits that Sub-Section (4) prescribes no adverse consequence in the event of noncompliance of seven days period stipulated therein and, therefore, the same ought to be inferred as directory and not mandatory. He further contends that the period of "seven days" as prescribed in Sub-Section (4) refers to the period within which the "Audit visit Report" is required to be submitted to the Assessing Officer and such period is in no way connected to the dealer in any manner. Such audit report once received by the Assessing Officer, a copy thereof is required to be sent

> to the assessee under Section 42 (1) and, therefore, consequently no right of a dealer accrues nor stands extinguished, even if the aforesaid period stipulated is crossed or lapsed.
>
> 4. The points of issue involved in the present case are extremely important, especially the issue raised on behalf of the Revenue vis-à-vis the impact of judgment relied upon by learned counsel for the petitioner and interpretation of Sub-Section (4) of Section 41 of the OVAT Act.
>
> 5. On the above backdrop, the following question is referred to the Larger Bench.
>
> Whether non-submission of Audit Visit Report to the Assessisng Officer within seven days from the date of completion of audit as contemplated under Section 41 (4) of the OVAT Act renders the Audit Visit Report invalid and assessment made on the basis of such Audit Visit Report is illegal? Place the matter before the Hon'ble Chief Justice."

2. The question involved in the present petitions concern interpretation of Section 41 (4) of the Odisha Value Added Tax Act, 2004 as it stood prior to its amendment by virtue of the Odisha Value Added Tax (Amendment) Act 2015 with effect from 1st October, 2015. Section 41 (4) of the OVAT Act reads as under:

> "41(4) After completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of audit, submit the audit report, to be called ***"AUDIT VISIT REPORT***", to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes.

3. A question is whether the requirement of the Authorized Officer having to submit the audit report to the Assessing Authority within seven days from the date of completion of the audit is mandatory or directory?

4. Learned counsel for the Petitioner had cited before the Division Bench of this Court, the decision of another Division Bench of this Court comprising two learned Judges in ***Jindal Stainless Ltd. (now JSL Ltd.) v. State of Orissa (2012) 54 VST 1 (Orissa).***

5. After noticing the said judgment, the Division Bench of two learned Judges in the referral order proceeded to state that the points of issue involved in the case "are extremely important, especially the issue raised

on behalf of Revenue vis-à-vis the impact of the judgment relied upon by the learned counsel for the Petitioner." That judgment is the one in ***Jindal Stainless Ltd.*** (supra) regarding the interpretation of Section 41 (4) of the OVAT Act as it stood prior to the 2015 amendment.

6. In the considered view of the Court, a Division Bench of two learned Judges of this Court is bound to follow a judgment of a coordinate Bench of same strength and if it chooses to differ from the said judgment, it is only then that the matter can be referred to a Larger Bench by stating the points of difference with the judgment of the coordinate Bench. This rule of stare decisis is well settled and has been explained by the Supreme Court of India in ***Union of India v. Raghubir Singh (1989) 2 SCC 754*** in the following passage:

> "What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the Courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. ……
>
> We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court."

7. With the order dated 20th October 2014, not stating the reasons for differing from the judgment in ***Jindal Stainless Ltd***. (supra) which is by a

co-ordinate Bench and is therefore binding, the question of a larger Bench considering the issue does not arise. A referral order properly framed should ideally set out the point of difference from an earlier binding judgment with which the Bench is differing. That however has not been done in the referral order dated 20th October, 2014.

8. In that view of the matter, the Court declines to answer the reference made to this Larger Bench and places all these matters before the Roster Bench on 13th April 2022 to be dealt with on merits in accordance with law. The interim order passed earlier in the respective writ petitions shall continue till then.

9. Urgent certified copy of this order be issued as per rules.

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2022 (I) ILR - CUT- 470

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

W.P. (C). NO. 10446 OF 2006

VICE CHAIRMAN, B.D.A. .....Petitioner

.V.

AJAY KUMAR PARIDA .....Opp. Party

INDUSTRIAL DISPUTES ACT, 1947 – Section 25-F – Compliance thereof before termination of the service of a workman – Workman has voluntarily abandoned his service and not in continuous service – The question thus arose as to whether the provision of section 25-F would apply? – Held, No – With the Management having led evidence to show that the Workman had abandoned service, the compliance of Section 25-F of the ID Act could not have been insisted upon by the Labour Court – Award set aside.

Case Laws Relied on and Referred to :-

1. 2004 (Suppl.) OLR 694 : Boudh Commercial Division Vs. Kanista Bisoi.
2. (2019) 2 SCC 628 : Manju Saxena Vs. Union of India.

For Petitioner : Mr. Dayananda Mohapatra
For Opp. Party : Mr. Srikar Kumar Rath

ORDER Date of Order: 06.01.2022

Dr. S. MURALIDHAR, C.J.

1. The challenge in this petition is to an Award dated 29th April, 2006 passed by the Labour Court, Bhubaneswar in I.D. Case No. 24 of 1997. By the impugned Award the Labour Court held that the action of the Petitioner Bhubaneswar Development Authority (BDA) in terminating the services of the Opposite Party Mali with effect from 12th February, 1993 was neither legal nor justified. It was further held that he was entitled to be reinstated in service, but without back wages.

2. While issuing notice in this petition on 7th May, 2009 the impugned Award was stayed by this Court subject to compliance with Section 17-B of the Industrial Disputes Act, 1947 (ID Act).

3. The background facts are that the Opposite Party Workman claimed to have joined the establishment of the BDA with effect from 16th September, 1989 as Mali. He claimed to have worked continuously as such till 12th February, 1999 when his services were terminated.

4. The question referred to the Labour Court for adjudication read as under:

> "Whether the action of the management of Bhubaneswar Development Authority in terminating the service of Sri Ajay Kumar Panda, Mali with effect from 12.2.93 is legal and/or justified? If not, what relief the workman is entitled to?"

5. The stand of the Management before the Labour Court on the other hand was that the workman had voluntarily abandoned from his service with effect from 12th February, 1993 and did not turn up for joining his duty. It was categorically pleaded that the workman was a casual worker and was engaged as and when work was available for him. It was further contended that the workman has never worked for more than 240 days as a regular employee and therefore Section 25-F of the ID Act would not apply.

6. The Workman examined himself as W.W.1 and relied on certificate Ext.1. The Management examined one Sri Sankar Sahoo as M.W.1 and relied on documents such as the authorization letter, xerox copies of the extract of the field diary and bank challan.

7. In the impugned Award, while noting the evidence of the Workman, the Labour court recorded that the workman "during cross examination clearly admits that he has not filed any document with regard to his appointment order as Mali and the receipt letters from the management for the above period." The Labour Court's Award further recorded that "the management on the other hand through M.W.1 Sankar Sahoo as led evidence to the effect as the workman working under the management since 1989 till 11.02.1993 he did not turn up for joining his duty w.e.f. 12.02.1993 onwards." The evidence of M.W.1 to the effect that "the management used to pay the wages to the casual workers once in a month but on daily wage basis" was also noted by the Labour Court. Further, the fact that the wages for the Workman for the period 12th February 1993 to 11th March, 1993 was deposited in the Workman's Bank account and that the bank challan was also placed on record as Ext. 3 was also taken note of by the Labour Court.

8. While analysing the evidence, the Labour Court referred to the decision of the Supreme Court in ***Divisional Manager, O.F.D.C. Ltd., Boudh Commercial Division v. Kanista Bisoi 2004 (Suppl.) OLR 694*** where it is observed as under:

> "To constitute 'abandonment of service' there must be total or complete giving up duties and/or expression of the intention not to serve any further. This being a question of fact, onus lay on the management which took such a plea to prove with cogent evidence that in fact the workman had abandoned his service. Retirement of an employee without following the mandatory pre-conditions of Section 25-F of the Act is not only unsustainable but also illegal."

9. Yet, strangely, the Labour Court recorded that "in the case in hand, the management has totally failed to adduce any evidence to the effect that the workman had abandoned the service with effect from 12.2.1993". This was the obviously erroneous since the Labour Court itself had recorded the earlier (as extracted hereinbefore) the evidence led by the Management through M.W.1 to the effect that the workman had abandoned his service and did not report for duty after 12th February, 1993. This is definitely one fundamental error in the Award.

10. The Labour Court than proceeded to observe as under:

> "Admittedly, the management has taken a stand before this Court that the workman and voluntarily abandoned the job, but its my considered view, even if the case set up by the management is taken to be correct that the workman has abandoned, then

> also his services cannot be terminated in the manner as it has been done without complying with the provisions of Section 25-F of the Act."

11. The above proposition appears to be legally flawed in terms of the decision of the Supreme Court of India in Manju Saxena v. Union of India (2019) 2 SCC 628 where in para 6.5 it has been held as under:

> "6.5. Once it is established that the appellant had voluntarily abandoned her service, she could not have been in 'continuous service' as defined under Section 2(00) the ID Act, 1947. Section 25-F of the ID Act, 1947 lays down the conditions that are required to be fulfilled by an employer, while terminating the services of an employee, who has been in 'continuous service' of the employer. Hence, Section 25-F of the ID Act, would cease to apply on her."

12. With the Management having led evidence to show that the Workman had abandoned service, the requirement of compliance Section 25-F of the ID Act could not have been insisted upon by the Labour Court.

13. For the aforementioned reasons, the Court finds the impugned award of the Labour court to be unsustainable law and it is hereby set aside. The petition is allowed and the interim order is vacated but with no order as to costs.

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2022 (I) ILR – CUT- 473

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

WRIT PETITION (CIVIL) NO.19322 OF 2014

ASHOK KUMAR AGARWALA .....Petitioner

.V.

REGISTRAR GENERAL OF ORISSA HIGH COURT, CUTTACK & ORS. .....Opp. Parties

SERVICE LAW – COMPULSORY RETIREMENT – Compulsory retirement of a judicial officer – Petitioner was compulsorily retired on attaining the age of 50 years in terms of Rule 44 of the OSJS and OJS Rules, 2007 as he was not found suitable for promotion on repeated consideration by the Standing Committee – He was also not found suitable to get ACP-II scale and only granted ACP-I scale in the year 2002 – Scope of Judicial interference – Indicated.

"The overall assessment of all the materials including the ratings of performance in the CCRs, the nature of allegations, charges in the pending disciplinary proceeding against him, the report of the review committee, his performance on judicial as well as administrative side, his reputation as such during entire service period are among the several factors considered by the authority before recommending his compulsory retirement. An overall consideration of all those factors, tested on the touchstone of the standard of efficiency of the Petitioner as a Judicial Officer reveals that the decision of authority cannot be said to be as mala fide or arbitrary or based on no evidence. Considering the scope of judicial interference in such matters involving compulsory retirement, we do not find any reason to interfere"

(Para-26)

Case Laws Relied on and Referred to :-

1. 2017 (II) ILR-CUT-1289 : Indramani Sahu Vs. State of Orissa.
2. 2014 (II) OLR-381 : Epari Vasudeva Rao Vs. State of Odisha.
3. 2017 (II) OLR 628 : Subhendra Mohanty Vs. High Court of Orissa.
4. AIR 2008 SC 2513 : Dev Dutt Vs. Union of India.
5. 2012 (Supp.-II) OLR-689 : Dr. Durga Prasanna Choudhury Vs. State of Orissa.
6. (2013) 9 SCC 566 : Sukhdev Singh Vs. Union of India.
7. (1992) 2 SCC 299 : Baikuntha Nath Das Vs. Chief District Medical Officer, Baripada
8. AIR 1984 SC 630 : J. D. Shrivastava Vs. State of M.P.
9. AIR 1995 SC 111 : S. Ramachandra Raju Vs. State of Orissa.
10. JT 1996 (3) S.C.754 : Narasingh Patnaik Vs. State of Orissa.
11. (1981) 1 SCC 490 : Brij Behari Lal Agarwal Vs. Hon'ble High Court of Madhya Pradesh
12. (1992) 2 SCC 299 : Baikuntha Nath Das Vs. Chief District Medical Officer, Baripada
13. (2002) 3 SCC 641 : State of U.P. Vs. Vijay Kumar Jain.
14. (2003) 6 SCC 545 : Chandra Singh Vs. State of Rajasthan.
15. (2003) 8 SCC 117 : Nawal Singh Vs. State of U.P.
16. (2015) 13 SCC 156 : Punjab State Power Corporation Limited Vs. Hari Kishan Verma
17. 1994 Supp.(3) SCC 424 : S. Ramachandra Raju Vs. State of Orissa.
18. AIR 1982 SC 149 : Supreme Court in S.P.Gupta Vs. Union of India.
19. AIR 1994 SC 268 : SC Advocates-on-Record Association Vs. Union of India.
20. AIR 1966 SC 447 : The State of West Bengal Vs. Nripendra Nath Bagchi.
21. (2000) 4 SCC 640 : State of Bihar Vs. Bal Mukund Sah.

For Petitioner : Mr. Manoj Kumar Mohanty
For Opp. Parties : Mr. P.K. Muduli, A.G.A.

JUDGMENT Date of Judgment : 19.01.2022

B.P. ROUTRAY, J.

1. The Petitioner- a Judicial Officer, has challenged the order of compulsory retirement dated 23rd August, 2012 under Annexure-1 and prayed for consequential reliefs.

2. The Petitioner was given compulsory retirement on attaining the age of 50 years in terms of Rule 44 of the OSJS and OJS Rules, 2007. He was an Officer in the cadre of Civil Judge and last worked as JMFC, Motu.

3. The Petitioner initially joined as Probationary Munsif, OJS-II on 17th November, 1997. He then worked in different capacities as Civil Judge (Jr. Division) and Judicial Magistrate First Class at different places in Odisha. On 21st June, 1999 the Petitioner joined as Civil Judge (Jr. Division)-cum-JMFC, Sorada in the judgeship of Ganjam–Gajapati and relieved on 6th May, 2002. He joined as JMFC, Daringibadi on 10th May, 2002 in the judgeship of Kandhamal-Phulbani and relieved from Daringibadi on 13th June, 2005. He served as Munsif at Sambalpur, Additional Civil Judge-cum-JMFC at Bhubaneswar, Sorada, Daringibadi, Cuttack and lastly at Motu. He also served as Inspector of Process-cum-JMFC at Dhenkanal and Sambalpur.

4. While serving at Sorada, an inquiry was conducted by the then District Judge, Ganjam in respect of the allegations regarding passing of discriminatory orders. The High Court directed that he should be let off with a warning to be careful in future and guard against such type of mistake. This was duly communicated to him.

5. Further while serving at Daringibadi, similar allegations were received against him. Based on the report of the District Judge, Kandhamal–Phulbani and the explanation offered by the Petitioner, disciplinary proceeding No.10 of 2006 was initiated against him as per the charges communicated in letter No.4428 dated 3rd July, 2007. In the said disciplinary proceeding, four charges were framed. Those were to the effect that the Petitioner dealt with bail petitions indiscriminately in different cases showing favour to a particular advocate. Secondly, he rejected the prayer for bail of an applicant arbitrarily and again granted him bail after one day. Thirdly, the Petitioner passed orders for release of property in a particular case arbitrarily. Fourthly, the Petitioner advanced the date in a criminal case, framed charges, examined witnesses, dispensed with accused examination, heard arguments and posted for judgment in one single day without giving any notice to the prosecutor.

6. The disciplinary proceeding continued and the District Judge, Kandhamal was appointed as the Inquiry Officer. As the order of compulsory

retirement was issued during pendency of said proceeding, the same was dropped.

7. During his entire service career, the Petitioner was graded as "Good" in the year 1999, 2004 and second part of the year 2010 only. For rest of the periods from 1997 to 2010, he was rated with average grading. The details as found from the personal file and CCRs of the Petitioner are as follows:

Year	Grading
1998 -	Average
1999 -	Good
2000 -	Average
2001 -	Average
2002 -	Average
2003 -	Average
2004 -	Good
2005 -	Average
2006 -	Average
2007 -	Average
2008 -	Average
2010(I) -	Average
2010(II) -	Good

8. The Petitioner was not found suitable for promotion on repeated consideration by the Standing Committee. He was also not found suitable to get ACP-II scale and only granted ACP-I scale in the year 2002.

9. These are the admitted facts on record.

10. It is contended on behalf of the Petitioner that neither District Judge, Ganjam nor District Judge, Kandhamal have ever reported anything touching on the integrity of the Petitioner during his incumbency at Sorada and Daringibadi respectively. It is also submitted that such allegations against him with regard to irregularity and illegality are not correct and no adverse remark in the confidential report has ever been communicated to him.

11. Shri Mohanty, learned counsel for the Petitioner submitted that in absence of any adverse remark in the confidential report of the Petitioner touching on his integrity or about his inability to achieve the prescribed

yardstick, the recommendation of the Full Court for his compulsory retirement is arbitrary. It is also submitted that such uncommunicated entries in the CCRs cannot be relied upon for compulsory retirement of the Petitioner as held in ***Deb Dutt v. Union of India AIR 2008 SC 2513***. It is further contended that the recommendation of the Full Court has been concurred with by the Government mechanically without an independent assessment.

12. Opposite Party No.1, the Registrar General of High Court of Orissa is the main contesting party. Mr.Muduli, learned counsel for Opposite Parties 1 and 2 submitted that the Full Court after taking into account the totality of the circumstances, the CCRs and the report of the review committee has recommended the Petitioner's premature retirement in public interest after forming an opinion that the Petitioner does not possess the standard efficiency required to discharge the duty of the post held by him. The Petitioner, a Judicial Officer, during his service carrier failed to earn even three consecutive 'Good' ratings. He was also found unsuitable for promotion and ACP-II scale. It is not that only CCRs for a particular period of performance was taken into consideration. An overall assessment was made of the performance of the Petitioner during his entire service period and he was found unsuitable for being continued as such. It is also submitted that the scope of judicial review in matters of compulsory retirement is limited.

13. In support of his submissions Mr. Mohanty, learned counsel for the Petitioner relies on the decisions in ***Indramani Sahu v. State of Orissa 2017 (II) ILR-CUT-1289, Epari Vasudeva Rao v. State of Odisha 2014 (II) OLR-381, Subhendra Mohanty v. High Court of Orissa 2017 (II) OLR 628, Dev Dutt v. Union of India AIR 2008 SC 2513, Dr. Durga Prasanna Choudhury v. State of Orissa 2012 (Supp.-II) OLR-689, Sukhdev Singh v. Union of India (2013) 9 SCC 566, Baikuntha Nath Das v. Chief District Medical Officer, Baripada (1992) 2 SCC 299, J. D. Shrivastava v. State of M.P. AIR 1984 SC 630, S. Ramachandra Raju v. State of Orissa AIR 1995 SC 111, Narasingh Patnaik v. State of Orissa JT 1996 (3) S.C.754 and Brij Behari Lal Agarwal v. Hon'ble High Court of Madhya Pradesh (1981) 1 SCC 490***.

14. Mr. Muduli, learned counsel for the Opposite Parties relies on the decisions in ***Baikuntha Nath Das v. Chief District Medical Officer,***

Baripada (1992) 2 SCC 299, State of U.P. v. Vijay Kumar Jain (2002) 3 SCC 641, Chandra Singh v. State of Rajasthan (2003) 6 SCC 545, Nawal Singh v. State of U.P. (2003) 8 SCC 117 and Punjab State Power Corporation Limited v. Hari Kishan Verma (2015) 13 SCC 156.

15. The entire personal record of the Petitioner including his CCRs have been produced before this Court and have been perused.

16. Rule 44 of the OSJS and OJS Rules 2007 (hereinafter referred to as '2007 Rules') authorizes the High Court to retire in public interest any member of the service who has attended the age of 50 years. Such consideration for all the Officers in service shall be made at least three times i.e., when he is about to attend the age of 50, 55 & 58 years.

17. Judicial Officers of the subordinate courts in the State are under the administrative control of the High Court and such power of the High Court on administrative jurisdiction to recommend compulsory retirement of a member of judicial service in accordance with the Rules framed have been reiterated by the Supreme Court in ***Registrar, High Court of Madras v. R.Rajiah, (1988) 3 SCC 2011***. The Supreme Court has further observed that the High Court while exercising its power of control over the subordinate judiciary is under a constitutional obligation to guide and protect Judicial Officers from being harassed.

18. The object of compulsory retirement is to weed out the dishonest, the corrupt and the deadwood. It is true that if an honest Judicial Officer is compulsorily retired it might lower the morale of his colleagues and other members in the service. In matters of compulsory retirement in public interest, the Supreme Court has laid down the governing legal principles in ***Baikuntha Nath Das v. Chief District Medical Officer, Baripada*** (supra) as under:

> "34. The following principles emerge from the above discussion:
>
> (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.
>
> (ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary – in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

19. In Rajasthan ***State Road Transport Corporation v. Babulal Jangir (2013) 10 SCC 551***, it was held that;

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

20. The Supreme Court in ***S. Ramachandra Raju v. State of Orissa, 1994 Supp.(3) SCC 424*** further held as follows:

"9…… The entire service record or character rolls or confidential reports maintained would furnish W.P.(C) No.19322 of 2014 Page 9 of 12 the back drop material for consideration by the Government or the Review Committee or the appropriate authority. On consideration of the totality of the facts and circumstances alone, the government should form the opinion that the government officer needs to be compulsorily retired from service. Therefore, the entire service record more particular the latest, would form the foundation for the opinion and furnish the base

> to exercise the power under the relevant rule to compulsorily retire a government officer. When an officer reaching the age of compulsory retirement, as was pointed out by this Court, he could neither seek alternative appointment nor meet the family burdens with the pension or other benefits he gets and thereby he would be subjected to great hardship and family would be greatly affected. Therefore before exercising the power, the competent appropriate authority must weigh pros and cons and balance the public interest as against the individual interest. On total evaluation of the entire record of service if the government or the governmental authority forms the opinion that in the public interest the officer needs to be retired compulsorily, the court may not interfere with the exercise of such bona fide exercise of power but the court has power and duty to exercise the power of judicial review not as a court of appeal but in its exercise of judicial review to consider whether the power has been properly exercised or is arbitrary or vitiated either by mala fide or actuated by extraneous consideration or arbitrary in retiring the government officer compulsorily from service."

21. On a careful perusal of the record, it is seen that the authority was of the opinion that the Petitioner does not possess the standard efficiency required to discharge the duty of the post held by him. As per the notification of the State Government in G.A. Department dated 24th November, 1987, it is prescribed that it will not be in public interest to retain an employee in service, if he lacks in the standard of efficiency required to discharge the duties of the post he presently holds.

22. On an overall assessment of the personal record of the Petitioner, the emerging picture is not favourable to him. During his service career spanning fourteen years and eight months, he was not able to get a 'good' grading for at least three consecutive years. He was earlier also let off with a warning to be careful in future. He was not found suitable either for promotion to the higher post or for getting higher pay in ACPII scale. His performance was often rated 'average'. There have been allegations of his passing indiscriminate orders in particular cases or failing to maintain uniformity or consistency in passing judicial orders. Charges on the above score were framed against him in the departmental proceedings.

23. The overall assessment of the Petitioner's entire service carrier is that his performance failed to meet the expected standards of competency. The contention made on behalf of the Petitioner that no adverse entry is against him touching to his integrity or inefficiency is not found correct upon a perusal of the records. It is true that he was not retired compulsorily for being dishonest but for being inefficient and not meeting the required

standards. The question therefore of noncommunication of adverse entries in the CCRs does not, in the circumstances, arise.

24. The submission put forth with regard to lack of subjective satisfaction of the Governor in the process of consultation is not found convincing. Rule 44 of 2007 Rules postulates that, the Governor shall in consultation with the High Court, if he is of the opinion that it is in the public interest so to do, have absolute right to retire any member of the service who has attained the age of fifty years, by giving him/her notice of not less than three months in writing or three months pay and allowances in lieu of such notice. The scope, meaning and process of consultation between the High Court and the Governor has been explained in the decisions of the Supreme Court in ***S.P.Gupta v. Union of India AIR 1982 SC 149, SC Advocates-on-Record Association v. Union of India AIR 1994 SC 268, The State of West Bengal v. Nripendra Nath Bagchi AIR 1966 SC 447, State of Bihar v. Bal Mukund Sah (2000) 4 SCC 640 and in Supreme Court Advocates-onRecord Association v. Union of India (2016) 5 SCC 1***.

25. Further, as stated earlier, in the case of ***Registrar, High Court of Madras v. R.Rajiah*** (supra), the Supreme Court held as follows:

> "22. It is true that the High Court in its administrative jurisdiction has power to compulsorily retire a member of the judicial service in accordance with any rule framed in that regard, but in coming to the conclusion that a member of the subordinate judicial service should be compulsorily retired, such conclusion must be based on materials. If there be no material to justify the conclusion, in that case, it will be an arbitrary exercise of power by the High Court. Indeed, Article 235 of the Constitution does not contemplate the exercise by the High Court of the power of control over subordinate courts arbitrarily, but on the basis of some materials. As there is absence of any material to justify the impugned orders of compulsory retirement, those must be held to be illegal and invalid."

26. The Petitioner is not correct in contending that only the entries in the CCRs have been taken into account by the authority. The overall assessment of all the materials including the ratings of performance in the CCRs, the nature of allegations, charges in the pending disciplinary proceeding against him, the report of the review committee, his performance on judicial as well as administrative side, his reputation as such during entire service period are among the several factors considered by the authority before recommending his compulsory retirement.

An overall consideration of all those factors, tested on the touchstone of the standard of efficiency of the Petitioner as a Judicial Officer reveals that the decision of authority cannot be said to be as mala fide or arbitrary or based on no evidence.

27. Considering the scope of judicial interference in such matters involving compulsory retirement, we do not find any reason to interfere. The writ petition is dismissed being without merit. No order as to costs.

28. 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 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- 482

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

WRIT PETITION (CIVIL) NO. 32580 OF 2021

STATE OF ODISHA .....Petitioner

.V.

REGISTRAR GENERAL,
ORISSA HIGH COURT, CUTTACK .....Opp. Party

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition by the State of Orissa through the Superintendent of Police, Special Task Force, CID CB seeks directions to the Registrar General of this Court for taking appropriate measures towards seizure, sampling, safe keeping and disposal of seized drugs, narcotics and psychotropic substances in terms of the judgment of the Supreme Court in Union of India v. Mohanlal (2016) 3 SCC 379, which was delivered on 28th January, 2016 – Directions issued. Para-25

Case Laws Relied on and Referred to :-
1. (2016) 3 SCC 379 : Union of India Vs. Mohanlal.
2. AIR 1961 SC 1107 : M. Pentiah Vs. MuddalaVeeramallapp.
3. (1984) 2 SCC 500 : A. R. Antulay Vs. Ramdas Sriniwas Nayak.
4. (1979) 4 SCC 5 : State of Tamil Nadu Vs. V. Krishnaswami Naidu.
5. (2012) 1 SCC 500 : Bangaru Laxman Vs. State.
6. (2004) 3 SCC 453 : State of Punjab Vs. Makhan Chand
7. (2008) 16 SCC 417: Noor Aga Vs. State of Punjab.
8. (2018) 4 SCC 334 : Union of India Vs. Jarooparam.

For Petitioner : Mr. Janmejaya Katikia, A.G.A.
For Opp. Party: Mr. P. K. Muduli, A.G.A.

JUDGMENT Date of Judgment :31.01.2022

Dr. S. MURALIDHAR, C.J.

Introduction

1. This petition by the State of Orissa through the Superintendent of Police, Special Task Force, CID CB seeks directions to the Registrar General of this Court for taking appropriate measures towards seizure, sampling, safe keeping and disposal of seized drugs, narcotics andpsychotropic substances in terms of the judgment of the Supreme Court in ***Union of India v. Mohanlal (2016) 3 SCC 379***, which was delivered on 28th January, 2016. In particular, it is pointed out that despite the insertion of Section 52-A in the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) by the NDPS (Amendment) Act, 2014(Act 16 of 2014), not enough has been done for actual disposal of the seized drugs in the State of Orissa and that there is a huge inventory of such seized drugs in the Malkhanas of various police stations as well as in the Courts. Reference is also made to the Notification dated 16th January, 2015 issued by the Department of Revenue, Ministry of Finance, Government of India, regarding disposal of narcotic drugs, psychotropic substances,controlled substances and conveyances immediately after their seizure. Clauses 4 and 9 of the said Notification set out the manner and mode of disposal of the drugs. These two have been interpreted by the Supreme Court in its judgment in ***Mohanlal*** *(supra)*. The Court has formulated guidelines in this regard.

2. It is stated that pursuant to the directions issued by the Supreme Court, the Home Department of the Government of Orissa formed Drugs Disposal Committees (DDCs) for every district by a Notification dated 29th December, 2016, which was later modified by a Notification dated 23rd May, 2017.

3. The grievance is that despite the concerned Investigating Officers (IOs) filing applications under Section 52-A of the NDPS Act before the Special Courts, orders are not being passed thereon except in a lone case being the Balasore Special Case No.221 of 2020 before the learned Special Judge, Balasore. Annexure-3 to the petition gives a list of pending applications in the various districts, which are yet to be disposed of. As an illustration, the Petitioner has enclosed as Annexure-4 series to the petition, a copy of an application filed under Section 52-A (2) of the NDPS Act before the Sessions Judge-cum-Special Judge, Khurda at Bhubaneswar, which has been pending since 16th November, 2020. It is pointed out that subsequent certification by learned Magistrate is yet to be made in the case.

4. The Petitioner has highlighted a few difficulties faced in the implementation of Section 52-A of the NDPS Act and the guidelines issued by the Supreme Court in ***Mohanlal*** *(supra).* Some of these issues read as under:

> "i. When certification of the drugs, required to be disposed of, is to be made by any Magistrate, no specified list of Magistrates, to carry out the work has been prepared till now;
>
> ii. In absence of any specified/notified Magistrates, the respective IOs are placing the inventories before the jurisdictional Special Courts, for certification under section 52A(2), finding no other alternatives;
>
> iii. The jurisdictional Special Courts have not been directed specifically to empower any of the Magistrates to carry out the job of certification as required under section 52A(2);
>
> iv. As the samples of drugs, drawn under sub-section-2 of section 52A and certified by the Magistrates, is to be treated as a primary evidence, by the learned Court, trying an offence under the Act, as stated in section 52A(4), the very process of certification might be considered as quite delicate and hence the learned Special Courts might be under a state of confusion in absence of any specified directions;"

5. The purpose of the present petition is to persuade this Court to exercise the power of superintendence over the Special Courts to achieve the purpose of the statute and ensure that the disposal of the drugs in terms of the guidelines issued in ***Mohanlal*** *(supra)* takes place within a definite time frame. In response to the notice issued in the petition, the Opposite Party initially filed an affidavit dated 16th November, 2021 not countering the actual aspects or even the need for urgent directions. A note of suggestions

was filed on behalf of the State on 6th December, 2021 followed by two convenience notes—one by the Opposite Party and the other by the State on 22nd December, 2021. The thrust of submissions by the State is that confusion has been created by Section 52-A requiring certification by the 'Magistrate' whereas the power to take cognizance of the offences is with the Special Courts in view of Section 36-A (1)(d) of the NDPS Act. The power to order remandhas also been vested with the Special Court under Section 36-A (1)(c) of the NDPS Act. It was accordingly submitted on behalf of the State that the word 'Magistrate' should be read as 'Special Court' in order to avoid any anomalies in the implementation of the guidelines in ***Mohanlal*** *(supra).*

6. As far as the Opposite Party is concerned, the contention seems to be that the language of Section 52-A (2) envisages the Magistrate to whom an application is made, to allow the application as soon as possible since under Section 52-A (3)of the NDPS Act, no discretion in that regard is left with the Magistrate. According to the Opposite Party, the constitution of Special Courts under Section 36 of the NDPS Act and certification of the correctness of the inventory under Section 52-A (2) of the NDPS Act, 1985 "are altogether two different aspects."

7. The NDPS Act, 1985 came into force on 14th November, 1985 and has since undergone several amendments. Among the earlier amendments brought about by the Amending Act of 1988 (Act No.2 of 1989), provisions were inserted to provide for "pre-trial disposal of seized drugs". As a result, Section 52-A of the NDPS Act titled "Disposal of seized narcotic drugs and psychotropic substances" was inserted in the NDPS Act. However, with passage of time, it was realized that not much was happening. In 2014, further amendments were made to Section 52-A of the NDPS Act, which now reads as under:

> **"52-A. Disposal of seized narcotic drugs and psychotropic substances.—**
>
> (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

8. The above provision came up for interpretation before the Supreme Court in ***Mohanlal*** *(supra)*. The said judgment took note of the fact that although a Standing Order No.1 of 1989 dated 13th June, 1989 has been issued to prescribe the procedure to be followed for seizure, sampling, safe keeping and disposal of the seized drugs, narcotics and psychotropic substances and making it mandatory that they should be stored in "safes and vaults" provided with a double-locking system and that designated godowns for storage of contraband should be placed under gazetted officers of the enforcement agency, the general tendency was to keep all the seized contraband in Malkhanas of police stations specific to Odisha. It was reported to the Supreme Court that there were no storage facilities for seized NDPS substances. In response to a query as to the steps taken at the time of storage to determine the nature and quantity of the substances being stored

and measures to prevent substitution and pilferage from stores, the Odisha Government responded as under:

> "Seized drugs are sealed in such a manner as to minimize the chances of pilferage. After producing the seized goods with permission of court the drugs are deposited in Malkhana in sealed condition with proper entry and under the custody of Malkhana Officer."

9. Even as regards the steps being taken at the time of destruction to determine the nature and quantity of the substances being destroyed, the Supreme Court found that the report submitted by the State Governments gave "varying answers". It was observed as under:

> "….The reports suggest as if adequate steps are taken to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances from the point of search to the point of destruction but there is no uniformity or standard procedure prescribed or followed in that regard."

10. On analyzing Section 52-A of the NDPS Act, the Supreme Court observed as under:

> "16. Sub-section (3) of Section 52A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct."

11. It was noted that although the Standing Order issued by the Central Government required sample to be taken at the time of seizure, there was no provision in the NDPS Act itself to that effect. On the contrary, Section 52-A (4) of the NDPS Act envisaged the samples being drawn and certified by the Magistrate in compliance with Section 52-A (2) and (3) of the NDPS Act. According to the Supreme Court, it was the Central Government which had to dispel the confusion. Nevertheless, the Supreme Court was clear that the entire process could not brook any delay. It was observed as under:

> "….There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as

> contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."

12. Thus, the expectation of the Supreme Court was that the Magistrates entrusted with the responsibility under Section 52-A would act without delay and further that the High Court would keep a close watch on the performance of the Magistrates. On the three aspects that the Supreme Court was concerned with in ***Mohanlal*** *(supra)* viz., (i) seizure and sampling of narcotic drugs and psychotropic substances, (ii) the storage and (iii) their destruction, the following detailed directions were issued:

> "31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.
>
> 31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.

> 31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.
>
> 31.4. Disposal of the seized drugs currently lying in the Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".
>
> 32. Keeping in view the importance of the subject we request the Chief Justices of the High Courts concerned to appoint a Committee of Judges on the administrative side to supervise and monitor progress made by the respective States in regard to the compliance with the above directions and wherever necessary, to issue appropriate directions for a speedy action on the administrative and even on the judicial side in public interest wherever considered necessary."

13. On the specific topic of disposal of narcotic drugs, psychotropic substances, controlled substances and conveyances, the Supreme Court in para 30 of the ***Mohanlal*** *(supra)* categorized them as "1. Cases where the trial is concluded and proceedings in appeal/revision have all concluded finally prior to 29thMay, 1989;2. Drugs that are seized after May 1989 and where the trial and appeal and revision have also been finally disposed of; and 3.Cases in which the proceedings are still pending before the Courts at the level of trial court, appellate court or before the Supreme Court."

14. Following the decision in ***Mohanlal*** *(supra),* the Special Task Force, Orissa Police, Bhubaneswar issued a circular dated 26th April, 2016 reproducing the directions of the Supreme Court *inter alia* substituting references to the earlier Central Government Notification dated 10thMay, 2007 with another one dated 16th January 2015, which prescribed the procedure for disposal of seized controlled substances and conveyances. As already noted pursuant to the above judgment, the Home Department, Government of Orissa issued a Notification dated 23rd May, 2017 constituting DDCs in each district in Orissa under the Chairmanship of the SP with Members being the Superintendent of Excise, Deputy Collector as nominated by the Collector and the Deputy Superintendent of Police, Crime or any other DSP. Further, a High Level Drug Disposal Committee (HLDDC) was constituted by a Notification dated 10th May, 2007 for disposal of high valued substances.

15. Under Section 36-A, all offences under the NDPS Act are triable by the Special Courts constituted under Section 36. Under Section 36(3) of the

NDPS Act, a person will not be qualified for appointment as Judge of the Special Court unless he is, immediately before such appointment, "a Sessions Judge or an Additional Sessions Judge."Section 36-A (3) of the NDPS Act provides that so far as the special powers of the High Court regarding bail under Section 439 of the CrPC is concerned, the word 'Magistrate' used in Section 439 is to be read as 'Special Court' constituted under Section 36 of the NDPS Act.

16. The contention of the Petitioner-State as advanced by Mr. J. Katikia, learned Additional Government Advocate, and as reiterated in their written submissions, is that for the purpose of Section 52A(2) to (4) of the NDPS Act, this Court should interpret the word 'Magistrate' to read as 'Special Court' since in any event it is only the 'Special Court' that has been entrusted the power under the NDPS Act to take cognizance of the offences committed and to try all the offences thereunder. It was submitted that the directions issued by the Supreme Court of India in ***Mohanlal*** *(supra)* to the Chief Justices of the High Courts to pass appropriate directions on the administrative side should also be understood as directions on the 'judicial side' and if so done, it would speed up the taking of samples and verification.

17. The above contention of the Petitioner-State in fact is based the 'Mischief Rule' in the law relating to interpretation of statutes. Accordingly, Mr. Katkia places relianceon the decisions of the Supreme Court in ***M. Pentiah v. MuddalaVeeramallapp, AIR 1961 SC 1107*** as well as ***A. R. Antulay v. Ramdas Sriniwas Nayak (1984) 2 SCC 500, State of Tamil Nadu v. V. Krishnaswami Naidu (1979) 4 SCC 5*** and ***Bangaru Laxman v. State (2012) 1 SCC 500***.

18. The question that arises, therefore, for consideration is whether under Section 52-A (2) read with (3) the power in regard to preparation of inventory and allowing applications for disposal of the seized narcotic drugs which is vested on the 'Magistrate', can be interpreted to be exercised by the Special Court constituted under Section 36 of the NDPS Act, 1985?

19. Having carefully considered the above contention, this Court is not persuaded to accept it particularly in view of the judgment of the Supreme Court in ***Mohanlal*** *(supra),* which interprets Section 52-A of the NDPS Act.

20. It isseen that apart from ***Mohanlal*** *(supra)* there were earlier decisions of the Supreme Courtwhich appear to have reiterated the above

interpretation as emanating from a plain reading of Section 52A(4) of the NDPS Act. In ***State of Punjab v. Makhan Chand (2004) 3 SCC 453***, it was held as under:

> "10. This contention too has no substance for two reasons. Firstly, Section 51A, as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under Sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substance's having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in Sub-sections (2) & (3). If the procedure prescribed in Sub-sections (2) & (3) of Section 52A is complied with and upon an application, the Magistrate issues the certificate contemplated by Sub-section (2), then Sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under Sub-section (2) of Section 52A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances."

21. In ***Noor Aga v. State of Punjab (2008) 16 SCC 417***, it was observed as under:

> "92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. Respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time any prayer had been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory etc. The same does not contain within its mandate any direction as regards destruction.
>
> 93. The only course of action the prosecution should have resorted to is to obtain an order from the competent court of Magistrate as envisaged under Section 52A of the Act in terms whereof the officer empowered under Section 53 upon preparation of an inventory of narcotic drugs containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the

packing in which they are packed, country of origin and other particulars as he may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings thereunder make an application for any or all of the following purposes :

"(a) Certifying correctness of the inventory so prepared; or

(b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or

(c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn."

Sub-section (3) of Section 52A of the Act provides that as and when such an application is made, the Magistrate may, as soon as may be, allow the application. The reason wherefor such a provision is made would be evident from sub-section (4) of Section 52A which reads as under:
……
Concededly neither any such application was filed nor any such order was passed. Even no notice has been given to the accused before such alleged destruction.

94. We must also notice a distinction between Section 110(1B) of the 1962 Act and Section 52A(2) of the Act as sub-section (4) thereof, namely, that the former does not contain any provision like sub-section (4) of Section 52A. It is of some importance to notice that paragraph 3.9 of the Standing Order requires pre-trial disposal of drugs to be obtained in terms of Section 52A of the Act."

22. Even after the decision in ***Mohanlal*** (*supra*), more recently in ***Union of India v. Jarooparam (2018) 4 SCC 334***, it was held as under:

"10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is to for its disposal is to obtain an order from the competent Court of Magistrate as envisaged under Section 52A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application ".

23. The legislative intent being clear and the decisions of the Supreme Court having consistently interpreted Section 52 A (2) to (4) in the manner

indicated hereinabove, there is no scope for invoking 'mischief rule' to read the word 'Magistrate' in the above provision as 'Special Court'. It is further seen that in ***Bangaru Laxman*** *(supra)* it was held that the expression 'Magistrate' would include a 'Special Judge' only for the purpose of grant of pardon under Section 306 CrPC. The observation in ***V. Krishnaswami Naidu*** *(supra)* that the Magistrate defined under Section 3(32) of the General Clauses Act includes a Special Judge for the purposes of remand under Section 167 CrPC is also for that limited purpose. Section 36-A to 36-C of the NDPS Act which specifies the powers of the Special Judge do not expressly statethat such Special Judge can exercise the powers of the Magistrate for the purposes of Section 52-A (2) to (4) NDPS Act. Therefore, it is not possible for this Court to direct that the powers exercisable by the Magistrate under Section 52-A of the NDPS Act could be exercised by the Special Judge under Section 36 of the NDPS Act.

24. Before concluding, the Court would like to note that there have been decisions of the learned Single Judges of this Court on the subject of release of vehicles seized after being found carrying the narcotic drugs. In ***Jitendra Kumar Digal v. State of Odisha*** by judgment dated 22nd October 2020 in Criminal Revision No. 281 of 2020, it was held that when the accused is the owner of the seized vehicle carrying the narcotic goods, the vehicle should not be released in his favour.

It is clarified that the directions issued in the present judgment would prevail hereafter.

Concluding directions

25. Nevertheless, in order to speed up the process under Section 52-A (2) to (4) NDPS Act, the following directions are issued:

(i) All pending applications shown in Annexure-3 to the petition shall be taken up forthwith by a FirstClass Magistrate specifically nominated in each of the respective districts by the District and Sessions Judge, who will deal with such applications exclusively on all working Saturdays of the month till the entire backlog is cleared. If the numberof such pending cases is large in a particular district, the concerned District and Sessions Judge will nominate more than one Magistrate for that purpose who will take up the applications likewise.

(ii) All such applications will be taken up chronologically with the oldest applications being listed first. Of course, wherever the urgent directions are required because of the possibility of the seized substances deteriorating, such applications can be taken up out of turn for reasons to be recorded in writing by the concerned Magistrate.

(iii) There shall be strict compliance with the guidelines issued by the Supreme Court of India in ***Mohanlal*** *(supra).* All the applications under Section 52-A (2) to (4) NDPS Act pending before the learned Magistrates in the different judgeships in Odisha should be disposed of within a period of three months from todayi.e. in any event on or before 1st May, 2022and all fresh applications filed hereafter will be endeavoured to be disposed of within a period of ten days from the date of their filing.

(iv) The State Forensic Science Laboratory (FSL) is requested to cooperate with the concerned Magistrates' Courts for the purposes of the implementation of the above directions in a time bound manner and correspondingly submit the test result reportsto the concerned Courts within a period of two weeksof the receipt of the samples sent hereafter. As regards pending samples, the State FSL will clear the backlog and send their reports to the concerned Courts within a period of two months from today and in any event not later than 1st April, 2022.

(v) On receipt of the test report, the Magistrate shall complete the remaining part of the exercise of taking photographs/videograph (of not more than 1 minute duration)that revealthe dimensions of the seized conveyance from all angles in digital format and encrypting them with the hash value in the presence of counsel for the parties within ten days from the date of receipt of the test report. In this regard, the Registry of the High Court will communicate to each District Judge, the detailed Standard Operating Procedure (SoP) and this part of the direction will take effect immediately after the receipt of the SoP by the District Judge. The Registry of the High Court is requested to circulate to all the District Judges, the detailed SoP to be followed by each of the Magistrates.

(vi) A monthly statement on the disposal of all such applications will be submitted to the concerned District Judge by the Magistrates and in turn such monthly statement should be forwarded simultaneously to the corresponding HLDDC and the Committee constituted by the Chief Justice of the High Court of Odisha on the administrative side. Both the HLDDC as

well as the High Court Committee will meet with fair regularity to monitor implementation of these directionson the administrative side and call for an explanation from the concerned Magistrate if there is an inordinate delay in disposal of the application.

26. The High Court Committee will place before this Court a status report as regards the implementation of the above directions by the next date.

27. List on 25th April, 2022 for directions. Copies of this order be delivered forthwith to each of the District Judges in whose jurisdiction the applications mentioned in Annexure-3 are pending, to the corresponding HLDDCs and to the Director, State FSL forthwith for compliance.

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

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2022 (I) ILR - CUT- 495

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

W.P.(C) NO. 31622 OF 2021

ASHIS RANJAN MOHANTY (ADV.) ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Public Interest Litigation concerning ever-growing stock of seized vehicles and other properties in the various police stations in the State of Odisha – Plea that the seized vehicles dumped in police stations are causing encroachment on the public road adjoining the police stations and are also turning to junk on account of neglect over several years – Plea considered – Directions issued.

Case Laws Relied on and Referred to :-

1. (1977) 4 SCC 358 : Basavva Kom Dyamangouda Patil Vs. State of Mysore.
2. (2002) 10 SCC 283 : Sunderbhai Ambalal Desai Vs. State of Gujarat.
3. (2010) 6 SCC 768 : General Insurance Council and others Vs. State of Andhra Pradesh.
4. (2019) 1 OLR 275 : Ghasana Mohapatra Vs. State of Odisha.
5. (2021) 81 OCR 635 : Ramakrushna Mahasura Vs. State of Odisha.
6. (1977) 4 SCC 358 : Basavva Kom Dyamangouda Patil Vs. State of Mysore.
7. (2002) 10 SCC 283 : Sunderbhai Ambalal Desai Vs. State of Gujarat.
8. (2010) 6 SCC 768 : General Insurance Council Vs. State of A.P.

For Petitioner : In person
For Opp. Parties : Mr. S.N. Das, Additional Standing Counsel

JUDGMENT Date of Judgment: 31.01.2022

Dr. S. MURALIDHAR, C.J.

1. A practicing Advocate has instituted this Public Interest Litigation concerned about the ever-growing stock of seized vehicles and other properties in the various police stations in the State of Odisha.

2. A sampling of the photographs of all kind of vehicles including two wheelers and three wheelers lying dumped outside the various police stations in Odisha have been enclosed with the petition's Annexure-1 series. It is stated that the seized vehicles dumped in police stations are causing encroachment on the public road adjoining the police stations and are also turning to junk on account of neglect over several years.

3. Apart from the vehicles, there are a range of other articles that have been seized in connection with various cases which are lying unattended to in the malkhanas of the various police stations. It is pointed out that despite the provisions in the Code of Criminal Procedure, 1973 (Cr PC) and the decisions of the Court, including the Supreme Court of India, from time to time, the spirit of law has not been adhered to and this has led to an impossible situation where most police stations in Odisha are left with a large inventory of abandoned vehicles and other materials. Urgent directions are accordingly sought in the present petition.

4. In the reply filed to the petition, the Additional Superintendent of Police, CID, Crime Branch, Odisha has disclosed that apart from a large number of vehicles lying for years together in the police station premises,

there are other seized items including liquor, arms and ammunitions etc. which are lying at the police malkhana awaiting disposal. It is disclosed by the police that 19,149 vehicles have been seized in motor vehicle accident cases, dacoity cases, cases relating to the transportation of illicit narcotic drugs and psychotropic substances. Then there are vehicles that are abandoned.

5. It is pointed out that although in accordance with the provisions of Section 457 Cr PC read with Section 452 Cr PC, some of the vehicles do get released during the pendency of the case, there are still a large number of vehicles which are awaiting disposal pursuant to the orders to be passed by the Courts. Annexure-A/3 to the counter affidavit gives a list of a number of vehicles i.e. two, three and four wheelers, involved in cases in each of the Districts and offices of the Special Forces in different cities. This table indicates that there are a total of 19,149 vehicles of which 1,536 are unclaimed vehicles spread over as many as 37 police stations/offices of the police.

6. The problem of accumulation of seized vehicles at police stations is not new. The issue has come up before the High Courts and the Supreme Court time and again and a series of directions have been issued from time to time.

7. An early acknowledgement of the problem was in a decision of the Supreme Court in ***Basavva Kom Dyamangouda Patil v. State of Mysore (1977) 4 SCC 358*** where the court stated that:

> "4. The object and scheme of the various provisions of the Code (CrPC) appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice….The object of the Code (CrPC) seems to be that any property which is in the control of the Court either directly or indirectly, should be disposed off by the court and a just and proper order should be passed by the Court regarding its disposal. In this broad sense, therefore, the court exercises an overall control on the actions of police officers in every case where it has taken cognizance."

8. Thereafter, in ***Sunderbhai Ambalal Desai v. State of Gujarat (2002) 10 SCC 283***, the court after analyzing the relevant provisions of the CrPC directed as under:

> "17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.
>
> 18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the court. If the said vehicle is insured with the insurance company then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."

9. In 2010 in ***General Insurance Council and others v. State of Andhra Pradesh (2010) 6 SCC 768***, the Supreme Court directed as under:

> "14. It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only do they occupy substantial space in the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its roadworthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, we direct that all the State Governments/ Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further direct that the activities of each and every police stations, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the division/Commissioner of Police concerned of the cities/Superintendent of Police concerned of the district concerned."

10. The Delhi High Court in ***Manjit Singh v. State*** *(decision dated 10th September 2014 in CRL.M.C.4485 of 2013)* after analyzing all the judgments in the field, including the statutory provisions under the CrPC, issued a series of directions to tackle the problem. It ordered for compliance in terms of the

decisions of the Supreme Court and passed detailed directions relating to the time limit for release, currency notes, vehicles, liquor and narcotic drugs, counterfeit coins, arms and ammunitions, disposal of property at conclusion of trial, unclaimed properties as well as loss/theft/destruction of the case property in police custody.

11. Although there exist statutory provisions in the Cr PC and allied statutes to deal with the problem, and orders have been passed by the Supreme Court for their implementation, very little in actual terms has been done in Odisha to ease the pressure on the police malkhanas and thereby the Courts. This area appears to be by and large a neglected one and warrants immediate attention.

12. The Court's attention has been drawn to a judgment dated 4th January, 2019 passed by the learned Single Judge of this Court in ***Ghasana Mohapatra v. State of Odisha***, (2019) 1 OLR 275, wherein it was held that in excise cases when the accused is the owner of the seized vehicle, the same cannot be released in his favour. In another judgment dated 2nd November, 2020 in ***Ramakrushna Mahasura v. State of Odisha***, (2021) 81 OCR 635 it was held that when the vehicle that caused the accident has no third party insurance, it cannot be released without taking deposit of the money to which the victim is entitled to.

13. It is clarified that hereafter as far as release of the vehicle is concerned, the directions issued in this order would prevail.

14. In light of the decisions of the Supreme Court referred to hereinbefore, and the directions issued in ***Manjit Singh v. State*** (*supra*), the following specific directions are issued:

Articles/properties in general

15. (i) Within **one week** of their seizure, properties seized by the police during investigation or trial are to be produced before the Court concerned;

(ii) the concerned Court shall expeditiously, and not later than two weeks thereafter, pass an order for its custody in terms of the directions of the Supreme Court in ***Basavva Kom Dyamangouda Patil v. State of Mysore (1977) 4 SCC 358; Sunderbhai Ambalal Desai v. State of Gujarat (2002) 10 SCC 283***, and ***General Insurance Council v. State of A.P. (2010) 6 SCC 768***.

(iii) In any event, no property will be retained in the malkhana of the Court or in the police station longer than a period absolutely necessary for the purposes of the case; if it has to be longer than three months, the Court concerned will record the reasons in an order but on no account will the period of retention exceed six months.

(iv) In the event the property seized is perishable in nature, or subject to natural decay, or if cannot for any reason be retained, the Court concerned may, after recording such evidence as it thinks necessary, order the said property to be disposed of by way of sale, as the Court considers proper, and the proceeds thereof be kept in a separate account in a nationalized bank subject to orders of the concerned court.

Vehicles

16. As regards the vehicles, the following directions are issued:

(I) Vehicles involved in an offence may be released either to the rightful owner or any person authorised by the rightful owner after

(a) preparing a detailed *panchnama*;

(b) taking digital photographs and a video clip of not more than 1 minute duration of the vehicle from all angles;

(c) encrypting both the digital photograph and the video clip with a hashtag with date and time stamp with the hash value being noted in the order passed by the concerned court;

(d) preserving the encrypted digital photograph and video clip on a pen drive to be kept in a secure cover in the file and preferably also uploading it simultaneously on a server kept either in the concerned Court premises or in the server of the jurisdictional District Court

(e) preparing a valuation report of the vehicle by an approved valuer;

(f) obtaining a security bond.

(II) the concerned court will record the statements of the complainant, the accused as well as the person to whom the custody of the vehicle is handed over affirming that the above steps have taken place in their presence.

(III) Subject to compliance with (I) and (II) above, no party shall insist on the production of the vehicle at any subsequent stage of the case. The *panchnama*, the encrypted digital photograph and video clip along with the valuation report should suffice for the purposes of evidence.

(IV) The Courts should invariably pass orders for return of vehicles and/or accord permission for sale thereof and if in a rare instance such request is refused, then reasons thereof to be recorded in writing should be the general norm rather than the exception.

(V) In the event of the vehicle in question being insured, the concerned Court shall issue notice to the owner and the insurance company prior to disposal of the vehicle. If there is no response or the owner declines to take the vehicle or informs that he has claimed insurance/released his right in the vehicle to the insurance company and the insurance company fails to take possession of the vehicle, the vehicle may be ordered to be sold in public auction.

(VI) If a vehicle is not claimed by the accused, owner, or the insurance company or by a third person, it may be ordered to be sold by public auction.

General directions

17. The following general directions shall also be adhered to:

(i) The concerned Court may impose any other appropriate conditions which it may consider necessary in the facts and circumstances of each case.

(ii) The Court shall hear all the concerned parties including the accused, complainant, Public Prosecutor and/or any third party concerned before passing the order. The Court shall also take into consideration the objections, if any, of the accused.

(iii) If the Court is of the view that evidence in relation to the condition of the vehicle is necessary to be recorded even before its disposal in terms of the directions in paras 9 and 10 above, then such evidence be recorded, in the presence of the parties, forthwith and prior to disposal of the property.

(iv) Special features of the property in question could be noted in the Court's order itself in the presence of parties or their counsel. Besides, a

mahazar clearly describing the features and dimensions of the movable properties which are the subject matter of trial could be drawn up.

(v) If a person to whom the interim custody of the property/vehicle is granted is ultimately found not entitled to it, and is unable to return it, its value shall be recovered by enforcing the bonds and the security taken from such person or recovering the monetary value from him as arrears of land revenue.

(vi) As regards the directions issued in 16 (I)(c) and (d) is concerned, the Registry of the High Court will communicate to each of the District Judges the detailed Standard Operating Procedure (SoP) that is required to be followed. The directions issued in 16(I) (c) and (d) will become operational as soon as the said SoP is received by the concerned District Judge.

(vii) Similar directions concerning the encryption of digital photographs and video clips will become effective on receipt of the SOP by District Judge from the registry of the High Court.

Directions specific to the case on hand

18. Specific to the case on hand, the Court directs as under:

(i) All pending applications before the Courts as indicated in Annexure-A/3 shall positively be disposed of within three months from today and in any event not later than 2nd May, 2022.

(ii) Intimation will be sent by each of the concerned Courts before whom the applications are placed as indicated in Annexure-A/3, once in a fortnight beginning 15th February, 2022 to the Registrar General of this Court enclosing the orders passed in the pending applications permitting disposal of the seized properties.

(iii) The Registry of the High Court is requested to circulate to all the District Judges the detailed SoP to be followed by each of the Magistrates.

(iv) The Secretary, OSLSA and the Director General of Police (DGP) are directed to co-ordinate with the concerned District Courts and the Superintendents of Police respectively to ensure strict compliance with this order.

(v) This case shall be listed for further directions on 4th April, 2022.

(vi) A certified copy of this order shall be communicated forthwith by the Registry to the Secretary OSLSA and the DGP for compliance.

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

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2022 (I) ILR - CUT- 503

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

ITA NO. 20 OF 2017

PRINCIPAL COMMISSIONER OF INCOME TAX, BHUBANESWAR .....Appellant

.V.

ORISSA MINING CORPORATION LTD. .....Respondent

INCOME TAX ACT, 1961 – Section 143(2) – Assessment – Whether assessment can be made without the notice to the Assessee? – Held, No – Reasons – Indicated.

Case Laws Relied on and Referred to :-

1. (2011) 337 ITR 389 (Del) : Commissioner of Income Tax Vs. Madhya Bharat Energy Corporation Ltd
2. 2016) 383 ITR (Del) 448 : Pr. Commissioner of Income Tax-08 Vs. Shri Jai Shiv
3. (1996) 3 SCC 525 : Shankar Traders Pvt. Ltd. (Commissioner of Income Tax, Shillong Vs. Jai Prakash Singh.
4. (2010) 321 ITR 362 (SC) : Assistant Commissioner Income Tax Vs. Hotel Blue Moon.

For Appellant : Mr. T.K.Satapathy, Sr.Standing Counsel Income Tax Deptt.
For Respondent : Mr. S. Ray.

ORDER Date of Order: 25.02.2022

Dr. S. MURALIDHAR, C.J.

1. The matter is taken up through hybrid arrangement (virtual/physical mode).

2. This is an appeal filed by the Revenue against an order dated 21st April, 2017 passed in ITA No.372/CTK/2015 for the assessment year 2008-09. The question of law sought to be urged by the Revenue is: 'whether the Tribunal is correct in quashing the reassessment order dated 30th January, 2015 of the Assessing Officer (AO) on the ground that it was completed without issuing notice to the assessee under Section 143 (2) of the Income Tax Act, 1961 (for short 'the Act')?

3. Mr. T.K. Satpathy, learned counsel for the Revenue placed reliance on the judgment of the Delhi High Court in the case of ***Commissioner of Income Tax v. Madhya Bharat Energy Corporation Ltd (2011) 337 ITR 389 (Del)***, which purportedly supports the Revenue's point of view.

4. In response to the same, Mr. S. Ray, learned counsel for the assessee draws attention of this Court to the subsequent judgment in the case of ***Pr. Commissioner of Income Tax-08 v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR (Del) 448***, wherein in para-9 it has been noted as under:

> "9. Dr. Rakesh Gupta, learned counsel appearing for the Assessee, at the outset drew the attention of this Court to an order passed by this Court on 17th August, 2011 in Review Petition No.441/2011 in ITA No.950/2008 (CIT v. Madhya Bharat Energy Corporation) whereby this Court reviewed its main judgment in the matter rendered on 11st July, 2011 on the ground that the said appeal had not been admitted on the question concerning the mandatory compliance with the requirement of issuance of notice under Section 143(2) of the Act. In its review order, this Court noted that at the time of admission of the appeal on 17th February, 2011 after noticing that in the said case that no notice under Section 143(2) had ever been issued, the Court held that no question of law arose on that aspect. The upshot of the above discussion is that the decision of this Court in CIT v. Madhya Bharat Energy Corporation (supra) is not of any assistance to the Revenue as far as the issue in the present case is concerned."

5. As a result, the decision in Madhya Bharat Energy Corporation Ltd (supra) does not any longer support the case of the Revenue.

6. Mr. Satpathy next relied on the decision of the Supreme Court in the case of ***Commissioner of Income Tax, Shillong v. Jai Prakash Singh (1996) 3 SCC 525.*** The Court notes the said a case arose out of a challenge to an assessment order and not a re-assessment order and examined the effect of non-service of notice under Section 143 (2) of the Act in that context.

7. However, in the context of reopening of assessment, as a result of block assessment proceedings, the Supreme Court in ***Assistant Commissioner Income Tax v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*** has held that the completion of an assessment pursuant to block assessment proceedings without notice under Section 143(2) of the Act and within the time prescribed therein is fatal to such assessment. The said decision of the Supreme Court that was relied on in the decision of the Delhi High Court in ***Shri Jai Shiv Shankar Traders Pvt. Ltd***. (supra), which has answered the very question raised by the Revenue here against it and in favour of the Assessee.

8. Finally it was submitted by Mr. Satapathy, that although the Assessing Officer did not issue notice under Section 143 (2) of the Act, he had issued a letter to the Assessee beyond the time within which the notice should have been issued. This Court is not able to accept that the sending of such letter belatedly constitutes compliance with the mandatory requirement of a notice under Section 143 (2) of the Act.

9. Consequently, this Court is not inclined to entertain the appeal by framing the question urged by the Revenue. The appeal is accordingly dismissed.

10. Issue urgent certified copy as per rules.

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2022 (I) ILR - CUT- 505

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

W.P.(C). NO. 4937 OF 2022

SALIMAR CHEMICAL WORKS (P) LTD. ……...Petitioner

.V.

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

A) ORISSA VALUE ADDED TAX ACT, 2004 – Sections 77 and 79 – Provisions under – Appeal and Revision – Assessment order passed u/s 42 – Assesssee filed revision – Maintainability of revision questioned – Held, reading both the provisions would manifest

that against the assessment order passed U/s 42, the aggrieved assessee is conferred with the right to appeal U/s 77(1) – The provisions contained in Section 77(1) and Section 79(2) operate in different fields. It is trite that where a statute provides for a thing to be done in a particular manner, then it is to be done in that manner, and in no other manner – When the State Legislature says that the word 'prescribed' means prescribed by the Rules then whatever is to be prescribed for making each and every section or any section of the Act workable must be prescribed under the Rules. (Para 5)

(B) PRACTICE AND PROCEDURE – Whether mere filing of an appeal can operate as stay of the impugned order? – Held, No.

> *"Even otherwise, it is a well known principle of law established that appeal shall not operate as a stay of proceeding or an order unless the Appellate Authority or Court passes an order of stay during the pendency of the appeal. This principle of law is also incorporated in the provisions of Rule 5(1) of Order 41, of the Code of Civil Procedure, 1908 which stipulate that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason of only an appeal having been preferred from the decree".* *(Para 8)*

(C) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the show cause notice in a tax recovery proceeding – No stay operates against the assessment order – Whether writ petition is maintainable? – Held, No, law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice cannot be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution. (Para 10)

Case Laws Relied on and Referred to :-

1. AIR 1999 SC 3558 : Chandra Kishore Jha Vs. Mahavir Prasad.
2. AIR 2001 SC 1512 : Dhananjaya Reddy Vs. State of Karnataka.
3. 2004 (II) OLR 523 : IPISTEEL Ltd. Vs. Central Electricity Supply Company of Orissa Ltd.
4. (2019) 20 SCC 446 : Union of India Vs. Coastal Container Transporters Association.
5. (2006) 148 STC 144 (SC) : Star Paper Mills Ltd. Vs. State of Uttar Pradesh.
6. (2008) 23 VST 8 (SC) : South India Tanners & Dealers Association Vs. Deputy Commissioner of Commercial Taxes.
7. (2010) 11 SCC 593 : Supreme Paper Mills Limited Vs. Assistant Commissioner of Commercial Taxes.

8. 2015 SCC OnLine Ori 53 : Bhubaneswar Development Authority Vs. Commissioner of Central Excise.
9. 2012 SCC OnLine Ori 90 : National Aluminium Company Ltd. Vs. Employees State Insurance Corporation.

For Petitioner : Mr. S. Banerjee & Mr. Satya Ranjan Pati
For Opp. Parties : Mr. Sidharth Sankar Padhy

ORDER Date of Order : 08.03.2022

BY THE BENCH

1. This matter is taken up by virtual/physical mode.

2. Assailing the notice bearing No.352/CT, dated 09.02.2022 for recovery of arrear demand issued by Joint Commissioner of CT and GST, CT & GST Circle, Cuttack-I Central, Cuttack for an amount of Rs.42,34,209/- under the Odisha Value Added Tax Act, 2004 ("OVAT Act", for brevity) pertaining to the tax periods from 01.04.2013 to 30.09.2015, the Petitioner sought to invoke the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India with the following prayers:

> "*** *** *** *** *** ***
>
> It is therefore, humbly prayed that this Hon'ble Court may graciously be pleased to admit this writ petition, issue rule nisi calling upon the Opposite Parties as to;
>
> (A) why the recovery of Arrear demand notice dated 09.02.2022 under Annexure-1 shall not be quashed and
>
> (B) why the assessment order dated 14.07.2017 under Annexure-2 shall not be quashed. And
>
> (C) why the Opposite Party No. 2 shall not be directed to dispose of the Revision within a stipulated period.
>
> If the opposites fail to show cause or show insufficient cause the Hon'ble Court may be pleased to make the rule absolute by quashing the Annexure-1 and 2.
>
> And/or pass any other order/orders as this Hon'ble Court may deem fit and proper in the ends of justice."

3. Mr. S. Banerjee, Advocate for the Petitioner submits that recovery of arrear demand pertaining to the tax periods from 01.04.2013 to 30.09.2015 raised in the assessment order dated 14.07.2017 formulated U/s 42 of the OVAT Act should not have been issued inasmuch as the question whether Jasmine Coconut Oil is to be treated as Ayurvedic hair oil is pending

consideration before this Hon'ble Court in STREV No. 49/2015, which was relating to tax periods from 01.04.2005 to 30.09.2009. Placing reliance on the interim order dated 10.12.2015 passed in Misc. Case No.161 of 2015 arising out of STREV No. 49/2015, the counsel for the Petitioner further submits that since the Petitioner has challenged the assessment order dated 14.07.2017 (Annexure-2) by way of revision invoking Section 79(2) of the OVAT Act before the Opposite Party No. 2, i.e., Deputy Commissioner of Commercial Taxes, Cuttack-I Central Circle, Cuttack, the Joint Commissioner of CT&GST Circle, Cuttack-I should have awaited outcome of sales tax revision pending before this Court. Said Authority committed illegality in proceeding with the recovery of arrear demand by issue of notice *vide* Annexure-1.

4. Mr. Sidhartha Shankar Padhy, Advocate appearing for the Opposite Parties vehemently objected to the contention of the Petitioner. He submits that the interim order passed in STREV No. 49/2015 relating to the tax periods from 01.04.2005 to 30.09.2009 does not reveal that this Court has granted stay of operation of order passed by the Odisha Sales Tax Tribunal in the second appeal while admitting the STREV bearing No.49/2015. Essentially, therefore, he contends that the finding and observation of the Tribunal are very much binding on the Revenue Authorities so long as the same is not overturned.

The counsel for the Opposite Parties further advanced argument that as per Section 77(1) of the OVAT Act, aggrieved by the assessment order passed U/s 42, dealer-assessee has the remedy of appeal. Since specific provision of appeal being provided in the statute to challenge the assessment order, revision U/s 79(2) is not the recourse available for the petitioner. The counsel for the Opposite Parties has taken us to Annexure-3 wherein the petitioner has stated thus:-

> "Revision under Section 79(2) of the Orissa Value Added Tax Act, 2004 challenging the assessment order dated 14.07.2007 for the period 01.04.2013 to 30.09.2015 of Shalimar Chemical Works Pvt. Ltd. Assessed under Tin No. 21891201533 passed by the Sales Tax Officer Cuttack-1, Central Circle Cuttack."

The counsel for the opposite parties has referred to the following reason cited by the Joint Commissioner of CT&GST in the notice for recovery of demand *vide* Annexure-1:

> "*** The correct remedy was to go for appeal with pre-deposit. However, you have no stay order in your favour. So, kindly reply by 17.02.2022 why recovery proceedings will not be initiated against you in the given circumstances. ***"

Therefore, Mr. Padhy, counsel for the Opposite Parties submits that since revision petition U/s 79(2) is not maintainable to question the assessment framed U/s 42 of the OVAT Act, 2004, the demand raised in the assessment *vide* order dated 14.07.2017 (Annexure-2) stands. For the said reason, no infirmity or invalidity can be attributed to the notice dated 09.02.2022 (Annexure-1).

5. At this juncture it is fruitful to notice sub-section (1) of Section 77 and sub-section (2) of Section 79 which are reproduced hereunder:-

> Section 77(1):
>
> "(1) Any dealer aggrieved by an order passed under **Section** 34, 40, **42,** 42A, 43, 44, 45, 49 or 52 may prefer an appeal to such authority as may be prescribed.]
> Section 79(2):-
>
> "(2) Subject to rules and for reasons to be recorded in writing, the Commissioner may, upon application filed within the prescribed period, revise any order, other than an order of the Tribunal, passed by any person appointed under sub-section (2) of Section 3 to assist the Commissioner."

Reading both the provisions as extracted above would manifest that against the assessment order passed U/s 42, the aggrieved assessee is conferred with the right to appeal U/s 77(1). The provisions contained in Section 77(1) and Section 79(2) operate in different fields. It is trite that where a statute provides for a thing to be done in a particular manner, then it is to be done in that manner, and in no other manner [*Chandra Kishore Jha vrs. Mahavir Prasad; AIR 1999 SC 3558 and Dhananjaya Reddy vrs. State of Karnataka; AIR 2001 SC 1512*]. When the State Legislature says that the word 'prescribed' means prescribed by the Rules then whatever is to be prescribed for making each and every section or any section of the Act workable must be prescribed under the Rules. The Odisha Value Added Tax Rules, 2005 provides for modalities for filing, entertainment and disposal of appeal.

6. Be that as it may, turning to attack made to the notice dated 09.02.2022 for recovery of arrear demand along with the prayer to quash the assessment order dated 14.07.2017 under Annexure-2 to the writ petition, it is to be

stated that such a prayer is unwholesome, more so when the petitioner-assessee has filed the revision petition under Section 79(2) of the OVAT Act challenging the assessment order. Nothing is brought on record even to suggest that the petitioner has at any point of time moved the competent authority for grant of stay of the demand raised in the impugned assessment order dated 14.07.2017.

7. Matter would have been different had the petitioner invoked provisions of Section 77 of the OVAT Act to ventilate its grievance by way of filing appeal before the proper authority. The provisions of sub-sections (4) and (5) thereof after amendment by virtue of the OVAT (Amendment) Act, 2017 stand as follows:

> "(4) No appeal against any order shall be entertained by the appellate authority, unless it is accompanied by satisfactory proof of payment of admitted tax in full and ten per centum of the tax or interest or both, in dispute.
>
> (5) On admission of appeal, realization of the balance tax, interest or penalty, as the case may be, under dispute shall be deemed to be stayed in full till disposal of the appeal."

8. Even otherwise, it is a well known principle of law established that appeal shall not operate as a stay of proceeding or an order unless the Appellate Authority or Court passes an order of stay during the pendency of the appeal. This principle of law is also incorporated in the provisions of Rule 5(1) of Order 41, of the Code of Civil Procedure, 1908 which stipulate that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason of only an appeal having been preferred from the decree. Reference may be had to *IPISTEEL Ltd. Vrs. Central Electricity Supply Company of Orissa Ltd., 2004 (II) OLR 523*. In the instant case, it is not the case of the petitioner that it had obtained stay of demand raised in the assessment order dated 14.07.2017 (Annexure-2) from the competent authority.

9. The impugned Notice dated 09.02.2022 *vide* Annexure-1 further reveals that the petitioner has not deposited any amount *qua* the demand of Rs.42,34,209/- raised in the assessment *vide* order dated 14.07.2017 (Annexure-2). Since no stay order is operating against said demand, there is no constraint on the part of the Joint Commissioner of CT&GST to call upon the petitioner to file its reply as regards recovery is concerned. It may be

necessary to notice relevant provisions contained in sub-sections (4), (5), (6) and (7) of Section 50 which are to the following effect:

> "(4) The amount of—
>
> (a) tax due where returns have been filed without full payment of tax due; or
>
> (b) tax assessed under Sections 39, 40, 42, 42A, 43, 44, or 45 less the sum already paid in respect of any tax period, together with interest required to be paid and the penalty, if any, imposed under Section 42, 43 or Section 44; or
>
> (c) penalty imposed under any provision of this Act not covered by clause (b); or
>
> (d) any other dues under this Act,
>
> shall be paid by the dealer in the manner provided under sub-section (2) within thirty days from the date of service of the notice issued by the assessing authority for the purpose.
>
> (5) Where a dealer fails to make payment of the tax assessed, interest payable or penalty imposed or any other amount due from him under this Act within thirty days of the date of service of the notice of demand, the assessing authority shall, after giving the dealer a reasonable opportunity of being heard, direct that such dealer shall pay, in addition to the amount due for payment, by way of penalty, a sum equal to two per centum of such amount of tax, interest, penalty or any other amount due, for every month for which payment has been delayed by him after the date on which such amount was due to be paid:
>
> Provided that where any appeal under Section 77 or 78 or revision under Section 79 has been filed,—
>
> (i) such penalty shall be payable from the date so specified on the amount ultimately found due from the dealer; and
>
> (ii) if the tax or penalty, if any, is enhanced in such appeal or revision, such penalty on the excess amount shall be payable from the date by which the dealer is required to pay such excess amount.
>
> (6) When a dealer is in default in making the payment of any amount payable by him under sub-sections (4) and (5) he shall be liable to pay simple interest on such amount at the rate of two per centum per month with effect from the date of such default till the payment of the amount.
>
> (7) All amounts that remain unpaid after the due date of payment in pursuance of the notice issued under sub-section (4) and sub-section (5) shall be recoverable as arrears of public demand or in accordance with the provisions contained in Schedule E."

Since no stay is shown to have been in operation restraining the recovery of demand of Rs.42,34,209/- pertaining to the tax periods from 01.04.2013 to 30.09.2015 raised in the assessment *vide* order dated 14.07.2017 (Annexure-2), we are not inclined to entertain the writ petition and interfere in the matter.

10. Looking at the matter in different angle, it is apt to say that writ petition is not entertainable against the Show Cause Notice in view of parameters laid down in *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446; Star Paper Mills Ltd. Vrs. State of Uttar Pradesh, (2006) 148 STC 144 (SC); South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC); Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593; Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53; National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90.*

This Court in the case of *National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90* has observed as follows:

> "24. This Court in the case of *Rohit Kumar Behera vs. State of Orissa, 2012 (II) ILR-CUT-395*, held as under:
>
> '21. Law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice cannot be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution.' "

It may be noteworthy to have glance at the notice for recovery which has directed as follows:

> "*** However, you have no stay order in your favour. So, kindly reply by 17.02.2022 why recovery proceedings will not be initiated against you in the given circumstances. If you fail to give any reply by 17.02.2022, it will be assumed that you have nothing to say in this regard in your favour and recovery proceedings will be made without any further communication to you. ***"

From the aforesaid it is clear that the writ petition challenging the notice in Annexure-1 is premature inasmuch as the notice impugned in the writ petition is a notice contemplating initiation of recovery proceeding.

Thus, it is open for the petitioner to appear before the Joint Commissioner of CT&GST-opposite party No.3 and file its reply/objection, and participate in the proceeding for recovery, in case the same has not yet been concluded.

11. With the aforesaid observation, the writ petition is disposed of.

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2022 (I) ILR - CUT- 513

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

W.P.(C) NO. 38475 OF 2021

M/s. HINDUSTAN AGENCIES …….Petitioner

CHAIRMAN, DEBTS RECOVERY APPELLATE TRIBUNAL, KOLKATA AND ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition seeking a direction to Debt Recovery Appellate Tribunal, Kolkata for early disposal of appeal – Whether the High Court of Orissa has the jurisdiction to direct the DRAT, Kolkata? – Held, Yes.

> *"Clause (2) of Article 226 read with Article 227 of the Constitution of India indicates that the High Court exercises its discretionary jurisdiction over the orders passed by the subordinate courts within its territorial jurisdiction. Even if any part of the cause of action has arisen within its territory that would confer jurisdiction, but this principle cannot be applied when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State [Ambica Industries Vrs. Commissioner of Central Excise, (2007) 6 SCC 769]. When the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State, then the High Court in the State where the first court is located should be the proper forum. In the present case, the first or the primary forum is the Debts Recovery Tribunal, Cuttack. Therefore, this Court has the jurisdiction to exercise its supervisory jurisdiction over the Debts Recovery Appellate Tribunal, Kolkata."*
>
> *(Para 8)*

Case Laws Relied on and Referred to :-

1. (2007) 6 SCC 769 : Ambica Industries Vs. Commissioner of Central Excise.

For Petitioner : Mr. B.N. Mohapatra
For Opp. Parties : Mr. K.M.H. Niamati

ORDER (ORAL) Date of Order :14.03.2022

BY THE BENCH

1. This matter is taken up by virtual/physical mode.

2. In the writ petition it is fervently prayed for invocation of extraordinary jurisdiction under Article 227 to issue writ of *mandamus* vested under Article 226 of the Constitution of India to the Chairman, Debts Recovery Appellate Tribunal, Kolkata, 9, Old Post Office Street, 7th Floor, Kolkata – 700001-opposite party No.1 requesting it to dispose of the Appeal bearing No.26/2020 filed at the behest of the petitioner-auction purchaser pending before it. The petitioner has made following prayer in the writ petition:-

> *"It is therefore prayed that this Hon'ble Court may be pleased to admit the writ application and give a direction to the Debt Recovery Appellate Tribunal Kolkata (opposite party No.1) may disposed up the Appeal No.26/2020 within a stipulated period, more specifically within a period of one month from the date of receipt of order for ends of justice."*

3. It is the considered opinion of this Court that such a prayer at the behest of the auction-purchaser is unwholesome.

4. As the facts unfurled in the writ petition by the petitioner, M/s. Hindustan Agencies, partnership firm represented by its Managing Partner Sri Vikash Kumar @ Vikash Kumar Bhoot, would show that Securitization Application bearing SA No.37/2018 was filed by the defaulting borrower, namely Sri Taraknath Das, son of Dinesh Chandra Das, Bahalda Road, Tiring P.S. in the district of Mayurbhanj-opposite party No.2 before the Debts Recovery Tribunal, Cuttack under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter be referred to as "SARFAESI Act" for brevity). The relief claimed therein has been recorded by the Debts Recovery Tribunal, Cuttack *vide* Order dated 29.02.2020 in said Securitization Application as follows:-

> *"This SA is filed by the applicant under Section 17 of SARFAESI Act with a prayer that notice issued by the respondent-Bank under Section 13(4) of the SARFAESI Act dated 13.01.2017 for the properties mortgaged is without compliance of the minimum formalities and not considering the representation and part payment made to that effect in the reply to the Section 13(2) notice under SARFAESI Act and be quashed and such actions are violation of natural justice and illegal as well as bad in law etc."*

4.1. It is the case of the Bank of Baroda, Boring Canal Road, Patna before the Debts Recovery Tribunal at Cuttack that after the e-auction sale being concluded the borrower-opposite party No.2 could not maintain the Securitization Application by amending it to question the correctness of valuation of mortgaged property auctioned; moreso, when physical possession has been handed over after sale deed having been executed in favour of the auction purchaser.

4.2. As is apparent from the Order dated 29.02.2020 of the Debts Recovery Tribunal at Cuttack passed in SA No.37 of 2018 *vide* Annexure-1 that entire dispute boiled down to the aspect for consideration is whether the auction sale by the Bank to the petitioner at Rs.3,35,31,000/- could be confirmed whereas one Ashok Kumar Agarwal who had offered more than Rs.5,00,00,000/- and ready to purchase the property at Rs.4,00,00,000/-. The Debts Recovery Tribunal having regard to facts, made the following observation:-

> *"12. Therefore, in view of Article 300A of the Constitution of India, it is clear that no person shall be deprived of his own property and the Tribunal, after considering the facts and circumstances of the case and upon submissions of applicant and respondents, this Tribunal to deposit the balance amount of Rs.2 crores before the respondent-bank and the applicant is directed to take steps to deposit Rs.2 crores from Ashok Kumar Agarwal, who is interested to purchase the property and the respondent-bank and auction purchaser are directed to take steps to register the property in favour of Mr. Ashok Kumar Agarwal after Rs.2 crores deposited within 1 month. In case applicant and Sri Mr. Ashok Kumar Agarwal failed to pay Rs.2 crores, the auction purchaser-R4 is at liberty to deal with the property which is purchased through auction after one month. The applicant along with Mr. Ashok Kumar Agarwal are at liberty to deposit Rs.2 crore within one month and the respondent-bank is directed to return the amount of Rs.3,35,31,000/- with fixed deposit rate of interest from the date of deposit till payment is made and all the expenses for registering the sale deed and further costs are directed to debit from the account of the applicant and pay the same to the auction purchaser (i.e., R4) after one month from the date of this order. In case the applicant deposits the amount the proceedings are hereby set aside on the ground that the high value property is sold for lesser price and notices which are issued under Section 13(2) are not proper and subsequent notices are also followed the Section 13(2) notices.*
>
> ***
>
> *14. Under these circumstances and as stated supra, in order to give an opportunity to the applicant to discharge the loan liability, granted one month time to applicant to deposit the balance amount of Rs.2 crores before the respondent-bank and the applicant is directed to take steps to deposit Rs.2 crores and the*

respondent-bank and auction purchaser are directed to take steps to register the property in favour of Mr. Ashok Kumar Agarwal or in favour of applicant after deposit o Rs.2 crores within 1 month. In case applicant failed to pay Rs.2 crores, the auction purchaser-R4 is at liberty to deal with the property which is purchased through auction after one month from the date of this order. The applicant deposits Rs.2 crore within one month the respondent bank is directed to return the amount of Rs.3,35,31,000/- with fixed deposit rate of interest from the date of deposit till payment is made and all the expenses for registering the sale deed and further costs are directed to debit from the account of the applicant and pay the same to the auction purchaser after one month from the date of this order.

In case the applicant deposits the amount of Rs.2,00,00,000/- (Rupees two crores only) the proceedings are hereby set aside on the ground that the high value property is sold for lesser price and notice under Section 13(2) also not a valid notice. Here is no any document is filed to show that notice under Section 13(2) was served to guarantor who mortgaged the property in favour of bank.

*With these observations this SA 37/2018 is disposed. ***"*

4.3. The petitioner being aggrieved by the Order 29.02.2020 of the Debts Recovery Tribunal, Cuttack filed Appeal bearing No.26/2020 before the Debts Recovery Appellate Tribunal, Kolkata.

4.4. Perusal of Orders dated 10.12.2020 and 17.12.2020 *vide* Annexures-2 and 3 respectively, it is revealed that the learned Appellate Tribunal has granted stay of operation of Order of the learned Debts Recovery Tribunal, Cuttack.

5. The petitioner contends that though it filed a petition before the Debts Recovery Appellate Tribunal, Kolkata praying for early hearing of the matter citing that having purchased the property in auction, it is unable to utilize the same and it suffers loss day by day.

6. Since the petition is not given attention to by the learned Debts Recovery Appellate Tribunal, it is submitted by the counsel for the petitioner that with constraint it approached this Court invoking Article 227 of the Constitution of India for a direction to said Tribunal to dispose of Appeal bearing No.26/2020 within a stipulated period.

7. While *moto* of the statute is to bring about expeditious disposal of recovery applications, which is underlying intention of expediting recovery of public money. It is also aimed at to curb misuse of public money by borrowers. It is beyond comprehension to prolong hearings by granting

adjournments. Counsel for the petitioner attempted to demonstrate that the matter before the Appellate Tribunal got adjourned and thereby huge amount of money of his client-auction purchaser got locked up.

8. Clause (2) of Article 226 read with Article 227 of the Constitution of India indicates that the High Court exercises its discretionary jurisdiction over the orders passed by the subordinate courts within its territorial jurisdiction. Even if any part of the cause of action has arisen within its territory that would confer jurisdiction, but this principle cannot be applied when the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State *[Ambica Industries Vrs. Commissioner of Central Excise, (2007) 6 SCC 769]*. When the High Court exercises its jurisdiction over a Tribunal extending its jurisdiction over more than one State, then the High Court in the State where the first court is located should be the proper forum. In the present case, the first or the primary forum is the Debts Recovery Tribunal, Cuttack. Therefore, this Court has the jurisdiction to exercise its supervisory jurisdiction over the Debts Recovery Appellate Tribunal, Kolkata.

9. Though this Court has the supervisory jurisdiction over the Debts Recovery Appellate Tribunal, Kolkata to issue writ, the petitioner's prayer to issue *mandamus* to the Appellate Tribunal to dispose of the appeal early may not be apt. This Court is not oblivious of the fact of pandemic situation that prevailed in entire world during the last two years and normalcy has not yet been achieved in all walks of life including the Courts and Tribunals. Therefore, to set impracticable period for hearing and disposal of appeal would be inappropriate and onerous.

10. In the above circumstances, taking into consideration that the auction purchaser has already parted with huge of amount of money, the writ petition is disposed of with a request to the Debts Recovery Appellate Tribunal, Kolkata to look into the feasibility of early disposal of Appeal bearing No.26/2020. The petitioner is at liberty to move fresh petition before said Appellate Tribunal.

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2022 (I) ILR - CUT- 518

C.R. DASH, J.

RVWPET NO. 240 OF 2016

THE MANAGEMENT OF MAIN DAM DIVISION, BEING REPRESENTED BY THE EXECUTIVE ENGINEER, BURLA .....Petitioner

.V.

SESHADEV KUMBHAR .....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 114 read with order 47 Rule 1 – Review – Scope, ambit and power – Principles – Discussed.

"In view of the above discussion, the law of review can be summarized that, "Review" proceeding have to be strictly confined to the ambit and scope of Order 47, Rule 1 CPC. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. The order, review of which is sought for suffers from error apparent on the face of the record and permitting the order to stand will lead to failure of justice. An error apparent on the face of record or proceeding is such an error which is a patent error and not a mere wrong decision. It must be one which must be manifested on the face of the record. An error which is not self evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record. An order or decision or judgment cannot be corrected in review merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of fact or law. A party filing a review application on the ground of ***"any other sufficient reason"*** *must satisfy that the said reason is sufficiently analogous to the conditions specified in Order 47, Rule 1 CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged innings for making submissions nor review lies merely on the ground that it may be possible for the Court to take a view contrary to what had been taken earlier. Review power can be exercised for correction of a mistake but not to substitute a view. If a counsel has argued a case to his satisfaction and he had not raised the particular point for any reason whatsoever, it cannot be a ground of review for the reason that he was the master of his case and might not have considered it proper to press the same or could have thought that arguing that point would not serve any purpose. If a case has been decided after full consideration of arguments made by a counsel, he cannot be permitted, even under the garb of doing justice or substantial justice, to engage the Court again to decide the controversy already decided. If a party is*

aggrieved by a judgment, it must approach the Higher Court but entertaining a review to re-consider the case would amount to exceeding its jurisdiction, conferred under the Statute for the purpose of review. Review cannot be treated like an appeal in disguise. A decision or order or judgment cannot be reviewed under Order 47, Rule 1 CPC on the basis of subsequent decision of a coordinate or larger Bench of the same Court or of a superior Court. Justice, as explained above, connotes different meaning to different persons in different contexts, therefore, Courts cannot be persuaded to entertain a review application to do justice unless it is confined to the scope and ambit of the statutory provisions, i.e., Order 47, Rule 1 CPC." *(Para 11)*

Case Law Relied on and Referred to :-

1. 2020 SCC OnLine SC 896 : Ram Sahu Vs. Vinod Kumar Rawat.

For Petitioners : Mr. S.S.Kanungo, A.G.A.

For Opp. Parties : Mr. Agasti Kanungo.

JUDGMENT Date of Judgment : 30.03.2022

C.R. DASH, J.

The present petition has been filed by the petitioner seeking review of the Order/Judgment dated 16.04.2015 passed by this Court in W.P.(C) No.13399 of 2012.

2. The aforesaid writ petition was filed before this Court challenging the legality and propriety of the order dated 21.07.2011 passed by the learned Presiding Officer, Labour Court, Sambalpur in I.D. Case No.01 of 2011.

3. This Court disposed of the aforesaid writ petition with the following observation:-

"In the present case, taking into consideration the oral evidence and the documentary evidence on record, learned P.O., Labour Court has come to the categorical finding that the workman was working since 1992 till the date of award under the Hirakud Dam Division. I do not find any infirmity or error apparent on the face of record in the findings of the learned Labour Court. In absence of such infirmity or error, it is not required to embark upon re-appreciation of evidence. On reappreciation of evidence even if I take a different view, such view cannot be substituted for the one arrived at by the learned Labour Court.

Taking into consideration the evidence in its entirety and the findings of the learned Labour Court, I do not find any infirmity in the impugned order, and the writ petition for that reason must fail. Accordingly, the writ petition is dismissed, but without cost in the facts and circumstances of the case."

4. Against the Order passed by this Court in the aforesaid writ petition, the petitioner preferred Leave to Appeal before Hon'ble the Supreme Court vide SLP(C) CC No(s).2580/2016. It was disposed of on 29.02.2016 as withdrawn by passing the following order:-

> "The learned counsel for the petitioner seeks permission to withdraw this petition, so as to file a review application before the High Court.
>
> Permission is granted.
>
> The special leave petition is disposed of as withdrawn. If the review application is filed, we are sure that the High Court will look into it."

5. In the review petition, it is asserted that the petitioner filed an affidavit before the learned Presiding Officer, Labour Court, Sambalpur stating therein that the present Opp. Party is not a workman under the present petitioner-management. He was engaged by an agency/contractor for watch and ward duty in different gauge discharge sites. The Opp. Party was not an NMR/ DLR/CLR worker of the Division. The documents/receipts/vouchers submitted by the Opp. Party are forged.

It is also averred that, this Court, without considering the case in its proper perspective and on the basis of wrong assumption of fact, has passed the impugned order in the writ petition.

6. The petitioner has relied on the documents dated 27.07.1993 vide Annexure-3 to show that the payment vide hand receipt in Annexure-3 was made to one Basisth Ojha, an agency and not the petitioner, but the petitioner has interpolated the said document having forged the same to take the benefit.

7. It is argued with all vehemence by Mr. S.S. Kanungo, learned Addl. Government Advocate that, fraud vitiates everything and in the present 4 case, the Opp. Party, having practised fraud on Court by forging the documents to get the relief in his favour, it is a fit case for reviewing the order dated 16.04.2015 passed by this Court in the aforesaid writ petition to preserve the sanctity of law.

8. The Opp. Party has filed a counter affidavit and in paragraph-5 of the counter, it is specifically averred that the alleged document vide Annexure3 was never produced before the Labour Court, nor the same has any relevance to the case, because the document shown is dated 27.07.1993 and the Opp.

Party is claiming regular absorption on the basis of the fact that, he was working on and before 01.04.1993.

9. It is submitted by Mr. Agasti Kanungo, learned counsel for the Opp. Party that, having regard to the provisions contained in Section- 114 read with Order 47, Rule 1 CPC, the review petition as laid by the petitioner is not at all maintainable in as much as the Opp. Party has not taken any benefit on the basis of the document vide Annexure-3 to the review petition and the Opp. Party having marked eight documents as exhibits without objection by the petitioner-management, learned Labour Court has taken into consideration all the documents to return his findings regarding the absorption of the Opp. Party as an NMR worker before 01.04.1993 in the Hirakud Main Dam.

10. Before proceeding to discuss the submissions made by learned counsel for the parties, it is apposite to discuss the Judgment of Hon'ble the Supreme Court relied on by Mr. Agasti Kanungo, learned counsel for the Opp. Party in the case of ***Ram Sahu v. Vinod Kumar Rawat 2020 SCC OnLine SC 896***. Hon'ble the Supreme Court in the aforesaid case has discussed in detail the power of review from paragraphs- 25 to 34 by relying on umpteen decisions rendered by Hon'ble the Supreme Court in various cases on the subject. Paragraphs-25 to 34 of the Judgment are reproduced below for ready reference and understanding:-

> "25. While considering the aforesaid question, the scope and ambit of the Court's power under Section 114 read with Order 47 Rule 1 CPC is required to be considered and for that few decisions of this Court are required to be referred to.
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> 26. In the case of Haridas Das v. Usha Rani Banik (Smt.), (2006) 4 SCC 78 while considering the scope and ambit of Section 114 CPC read with Order 47 Rule 1 CPC it is observed and held in paragraph 14 to 18 as under:
>
> "14. In Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 it was held that:
>
> "8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In connection with the limitation of the powers of the court under Order 47 Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution, this Court, in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 speaking through Chinnappa Reddy, J. has made the following pertinent observations:

'It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct 20 all manner of errors committed by the subordinate court.'

15. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought : (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

16. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 : AIR 1979 SC 1047, this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under : (SCC p. 390, para 3)

"It is true as observed by this Court in Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909 there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate 21 powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

17. The judgment in Aribam case has been followed in Meera Bhanja. In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any longdrawn process of reasoning. The

following observations in connection with an error apparent on the face of the record in Satyanarayan Laxminarayan Hegde v. Millikarjun Bhavanappa Tirumale, AIR 1960 SC 137 were also noted:

"An error which has to be established by a longdrawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

18. It is also pertinent to mention the observations of this Court in Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715. Relying upon the judgments in Aribam and Meera Bhanja it was observed as under:

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

27. In the case of Lily Thomas v. Union of India, (2000) 6 SC 224, it is observed and held that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power.

28. It is further observed in the said decision that the words "any other sufficient reason" appearing in Order 47 Rule 1 CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram v. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526.

29. In the case of Inderchand Jain v. Motilal, (2009) 14 SCC 663 in paragraphs 7 to 11 it is observed and held as under:

7. Section 114 of the Code of Civil Procedure (for short "the Code") provides for a substantive power of review by a civil court and consequently by the appellate courts. The words "subject as aforesaid" occurring in Section 114 of the Code mean subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in Order 47 of the Code must be taken into consideration. Section 114 of the Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under:

"17. The power of a civil court to review its judgment/decision is traceable in Section 114 CPC. The grounds on which review can be sought are enumerated in Order 47 Rule 1 CPC, which reads as under:

'1. Application for review of judgment.—(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order.'"

8. An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In Rajendra Kumar v. Rambai this Court held : (SCC p. 514, para 6)

"6. The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed."

9. The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake. Furthermore, an application for review shall also lie for any other sufficient reason.

10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India this Court held : (SCC p. 251, para 56)

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise."

30. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. In the case of Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844, this Court has held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise.

31. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by this Court in the case of T.C. Basappa v. T. Nagappa, AIR 1954 SC 440. It is held that such an error is an error which is a patent error and not a mere wrong decision. In the case of Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 233, it is observed as under:

"It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated."

32. In the case of Parsion Devi v. Sumitri Devi, (Supra) in paragraph 7 to 9 it is observed and held as under:

7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372 this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'. The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam

Pishak Sharma (supra) this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

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

33. In the case of State of West Bengal v. Kamal Sengupta, (2008) 8 SCC 612, this Court had an occasion to consider what can be said to be "mistake or error apparent on the face of record". In para 22 to 35 it is observed and held as under:

"22. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

23. We may now notice some of the judicial precedents in which Section 114 read with Order 47 Rule 1 CPC and/or Section 22(3)(f) of the Act have been interpreted and limitations on the power of the civil court/tribunal to review its judgment/decision have been identified.

24. In Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao (1899-1900) 27 IA 197 the Privy Council interpreted Sections 206 and 623 of the Civil Procedure Code and observed : (IA p.205)

"… Section 623 enables any of the parties to apply for a review of any decree on the discovery of new and important matter and evidence, which was not within his knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is not necessary to decide in this case whether the latter words should be confined to reasons strictly ejusdem generic with those enumerated, as was held in Roy Meghraj v. Beejoy Gobind Burral, ILR (1875) 1 Cal 197. In the opinion of Their Lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event." (emphasis added)

25. In Hari Sankar Pal v. Anath Nath Mitter, 1949 FCR 36 a five-Judge Bench of the Federal Court while considering the question whether the Calcutta High Court was justified in not granting relief to non-appealing party, whose position 28 was similar to that of the successful appellant, held : (FCR p. 48)

"That a decision is erroneous in law is certainly no ground for ordering review. If the court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. When, however, the court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47 Rule 1, Civil Procedure Code."

26. In Moran Mar Basselios Catholicos v. Mar Poulose Athanasius (supra) this Court interpreted the provisions contained in the Travancore Code of Civil Procedure which are analogous to Order 47 Rule 1 and observed:

"32. … Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.

It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason.

It has been held by the Judicial Committee that the words 'any other sufficient reason' must mean 'a reason sufficient on grounds, least analogous to those specified in the rule'.

27. In Thungabhadra Industries Ltd. v. Govt. of A.P. (supra) it was held that a review is by no means an appeal in disguise whereof an erroneous decision can be corrected.

28. In Parsion Devi v. Sumitri Devi (Supra) it was held as under : (SCC p. 716)

"Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be 'an appeal in disguise'."

29. In Haridas Das v. Usha Rani Banik, (supra) this Court made a reference to the Explanation added to Order 47 by the Code of Civil Procedure (Amendment) Act, 1976 and held:

"13. In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it 'may make such order thereon as it thinks fit'. The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing 'on account of some mistake or error apparent on the face of the records or for any other sufficient reason'. The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection."

30. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (Supra) this Court considered the scope of the High Courts' power to review an order passed under Article 226 of the Constitution, referred to an earlier decision in Shivdeo Singh v. State of Punjab (Supra) and observed : (Aribam Tuleshwar case (Supra), SCC p. 390, para 3)

"3. It is true as observed by this Court in Shivdeo Singh v. State of Punjab (Supra), there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

31. In K. Ajit Babu v. Union of India, (1997) 6 SCC 473, it was held that even though Order 47 Rule 1 is strictly not applicable to the tribunals, the principles contained therein have to be extended to them, else there would be no limitation on

the power of review and there would be no certainty or finality of a decision. A slightly different view was expressed in Gopabandhu Biswal v. Krishna Chandra Mohanty, (1998) 4 SCC 447). In that case it was held that the power of review granted to the tribunals is similar to the power of a civil court under Order 47 Rule 1.

32. In Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596, this Court reiterated that power of review vested in the Tribunal is similar to the one conferred upon a civil court and held : (SCC p. 608, paras 30-31)

"30. The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression 'any other sufficient reason' used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the Rule.

31. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."

33. In State of Haryana v. M.P. Mohla, (2007) 1 SCC 457 this Court held as under : (SCC pp. 465-66, para 27)

"27. A review petition filed by the appellants herein was not maintainable. There was no error apparent on the face of the record. The effect of a judgment may have to be considered afresh in a separate proceeding having regard to the subsequent cause of action which might have arisen but the same by itself may not be a ground for filing an application for review."

34. In Gopal Singh v. State Cadre Forest Officers' Assn., (2007) 9 SCC 369 this Court held that after rejecting the original application filed by the appellant, there was no justification for the Tribunal to review its order and allow the revision of the appellant. Some of the observations made in that judgment are extracted below : (SCC p. 387, para 40)

"40. The learned counsel for the State also pointed out that there was no necessity whatsoever on the part of the Tribunal to review its own judgment. Even after the microscopic examination of the judgment of the Tribunal we could not find a single reason in the whole judgment as to how the review was justified and for what

reasons. No apparent error on the face of the record was pointed, nor was it discussed. Thereby the Tribunal sat as an appellate authority over its own judgment. This was completely impermissible and we agree with the High Court (Sinha, J.) that the Tribunal has travelled out of its jurisdiction to write a second order in the name of reviewing its own judgment. In fact the learned counsel for the appellant did not address us on this very vital aspect."

35. he principles which can be culled out from the abovenoted judgments are:

(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party 33 seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

34. To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of Section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of Court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. From the bare reading of Section 114 CPC, it appears that the said substantive power of review under Section 114 CPC has not laid down any condition as the condition

> precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review.

11. In view of the above discussion, the law of review can be summarized that, "Review" proceeding have to be strictly confined to the ambit and scope of Order 47, Rule 1 CPC. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. The order, review of which is sought for suffers from error apparent on the face of the record and permitting the order to stand will lead to failure of justice. An error apparent on the face of record or proceeding is such an error which is a patent error and not a mere wrong decision. It must be one which must be manifested on the face of the record. An error which is not self evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record. An order or decision or judgment cannot be corrected in review merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of fact or law. A party filing a review application on the ground of ***"any other sufficient reason"*** must satisfy that the said reason is sufficiently analogous to the conditions specified in Order 47, Rule 1 CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged innings for making submissions nor review lies merely on the ground that it may be possible for the Court to take a view contrary to what had been taken earlier. Review power can be exercised for correction of a mistake but not to substitute a view. If a counsel has argued a case to his satisfaction and he had not raised the particular point for any reason whatsoever, it cannot be a ground of review for the reason that he was the master of his case and might not have considered it proper to press the same or could have thought that arguing that point would not serve any purpose. If a case has been decided after full consideration of arguments made by a counsel, he cannot be permitted, even under the garb of doing justice or substantial justice, to engage the Court again to decide the controversy already decided. If a party is aggrieved by a judgment, it must approach the Higher Court but entertaining a review to re-consider the case would amount

to exceeding its jurisdiction, conferred under the Statute for the purpose of review. Review cannot be treated like an appeal in disguise. A decision or order or judgment cannot be reviewed under Order 47, Rule 1 CPC on the basis of subsequent decision of a coordinate or larger Bench of the same Court or of a superior Court. Justice, as explained above, connotes different meaning to different persons in different contexts, therefore, Courts cannot be persuaded to entertain a review application to do justice unless it is confined to the scope and ambit of the statutory provisions, i.e., Order 47, Rule 1 CPC.

12. With the aforesaid principles in the background, if I look at the Review Petition filed by the petitioner, it is found that the aforesaid Annexure3 to the review petition was filed as Annexure-2 to the writ petition. But there is no pleading to the effect that, Annexure-2 is a forged document.

13. In paragraph-3 of the order dated 21.07.2011 passed by the learned Presiding Officer, Labour Court (Annexure-1 to the writ petition), the written statement filed by the management has been summed up, which reads thus:-

> "3. The management has filed written statement and as per the written statement the claim of the second-party workman is not sustainable under the law as he is not eligible to be engaged in the category of the work charged establishment. The secondparty workman is not a NMR/DLR/HR workman engaged by the first-party as claimed by him. As per Government of Orissa in Water Resources Department in their Notification No.7323/WR Dtd. 28.02.2009, 5702 numbers of NMR employees of the Department of Water Resources recruited prior to the year 1993 are to be brought over to the work charged Establishment. Since the second-party workman is not a NMR workman under the first-party, he is not entitled to get the benefits under the said order of the Government. The second-party has been engaged by a Labour contractor namely M/s. K.K. Electrical & Electronics, Burla and his conditions of service is being controlled by the said contractor. The contractor by whom the second-party has been engaged in the Establishment of the first-party is responsible for the service rendered by the second-party. So, as per the case of the first-party management, the second-party workman is not entitled to get the benefits as claimed by him."

14. Same is the averment by the petitioner in the writ petition as found from paragraph-2(a) & (b). In paragraph-5 of the writ petition, the petitioner has relied on payment made to the Opp. Party by the labour supplier M/s. K.K. Electrical & Electronics for the months of April & May, 2011. From the R.T.I. information annexed to the counter affidavit filed by the Opp.

Party to the review petition as well as to the writ petition, it is found that, M/s. K.K. Electricals & Electronics came to the light only in the year 2000.

15. The workman-Opp. Party has filed eight documents as found from paragraph-6 of the order of the learned Presiding Officer, Labour Court, Sambalpur vide Ext.W-1 to Ext.W-8 and those documents have been marked as exhibits without objection by the petitioner-management. From the discussion in the Judgment of the learned Presiding Officer, Labour Court, it is found that, throughout the case, the stand of the petitioner-management is that the Opp. Party-workman was engaged by labour supply contractor, namely, M/s. K.K. Electrical & Electronics and his condition of service was being controlled by the contractor.

In the discussion from paragraph-7 of the order of the learned Presiding Officer, Labour Court, Sambalpur, it is found that, the petitioner management has taken a stand that, the Opp. Party- workman has forged the hand receipt voucher dated 01.09.1992, but there is nothing on record to show that there is any allegation to the effect that, the Opp. Party workman has forged Annexure-3 to the review petition (which is also Annexure-2 to the writ petition). Learned Presiding Officer, Labour Court, taking into consideration all the documents exhibited before him, has come to categorical finding to the effect that, the Opp. Party-workman was an NMR under the control of Hirakud Dam Division.

16. In the writ petition, same stand was taken and it was contended by Mr. Somanath Mishra, the then Addl. Government Advocate (who eventually also filed the review petition and had got it admitted) that the Opp. Partyworkman was working under M/s. K.K. Electrical & Electronics, Burla and had approached several times to the management for his engagement as DLR/NMR. No stand was taken however, to the effect that, Annexure-2 to the writ petition (which is filed as Annexure-3 to the review petition) was a forged document and the Opp. Party-workman has taken benefit out of that.

17. On going through the entire record, I find that, a faint objection was made to the effect that, hand receipt voucher dated 01.09.1992 submitted by the Opp. Party-workman is a forged document and such a stand by the petitioner management has however been eschewed by the learned Presiding Officer, Labour Court, Sambalpur in his order. There is nothing on record to

show whether Annexure-3 to the writ petition was ever an exhibit before the learned Presiding Officer, Labour Court. There is no averment to that effect either in the writ petition or review petition. It is the specific stand of the Opp. Party workman in his counter that, Annexure-3 was not on record before the learned Presiding Officer, Labour Court, Sambalpur. Further, that is a document dated 27.07.1993, but the relevant date for consideration of absorption in the work charged establishment is 01.04.1993 as per the Government Circular dated 28.02.2009. There is nothing on record to show whether Annexure-3 of the review petition (which was filed as Annexure-2 to the writ petition) was ever relied on by the learned Presiding Officer, Labour Court to return his finding. Learned Presiding Officer, Labour Court has relied on eight documents filed by the petitioner to return a finding on his entitlement to be promoted to the work-charged establishment and, if, a lone document therein is forged but not relied on, cannot be a basis to reverse the finding especially when the workman is fighting for his right since a decade.

18. Mr. Somanath Mishra, the then Addl. Government Advocate had argued the writ petition and he had also argued the review petition at the time of admission. He had knowledge about Annexure-3 to the review petition and the same document was Annexure-2 to the writ petition. A review can only be entertained, when there is error apparent on the face of the record and that fallibility is by the over-sight of the Court. It is not the case here. Learned counsel for the petitioner, i.e., the then Addl. Government Advocate argued the writ petition to his satisfaction and he had not raised the particular point raised now in the review petition for any reason whatsoever. Therefore, it cannot be a ground of review for the reason that, he was the master of his case while arguing the writ petition and might not have considered it proper to press forgery of Annexure-2 to the writ petition or could have thought that, arguing that point would not serve any purpose.

19. Taking into consideration the discussions (supra) and especially the limited jurisdiction vested on this Court by Section-114 read with Order 47, Rule 1 CPC, I do not feel persuaded to review my earlier order dated 16.04.2015 passed in W.P.(C) No.13399 of 2012. 20. The review petition accordingly stands dismissed, but without cost.

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2022 (I) ILR - CUT-535

BISWAJIT MOHANTY, J.

C.R.P. NO. 6 OF 2022

KAILASH CHANDRA PANDA & ORS. .....Petitioners

.V.

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

CODE OF CIVIL PROCEDURE, 1908 – Section 115 – 'Other Proceeding' meaning and interpretation – Suit for declaration of right title and interest and confirmation of possession was decreed – Appeal filed along with a petition under Section 5 of the Limitation Act, 1963 for condonation of delay – Delay condoned – CRP filed against the order condoning the delay – Whether maintainable? – Held, No – Reasons indicated that the impugned order cannot be construed to have been passed in the appeal, this Court is of the opinion that such a contention cannot be accepted as limitation petition has no independent existence bereft of appeal – It may be noted here that even the petition for condonation of delay was not separately numbered – So order passed therein cannot be segregated from the appellate jurisdiction of the learned District Judge – Even otherwise it cannot be said that order passed in the limitation petition was passed in any original or independent proceeding – For all these reasons the civil revision petition is not maintainable – Further conceding for a moment but not admitting that the impugned order is covered by the phrase 'other proceedings' as used in Sub-Section(1) of Section 115 of 'the Code, then also the present civil revision is not maintainable as it arises in connection with an original suit whose valuation is less than Rs.5/- lakhs – For all these reasons the civil revision is not maintainable and is accordingly dismissed – However the dismissal of civil revision will not be a bar for the petitioners to file appropriate application before appropriate forum for redressal of their grievances, if they are so advised.

Case Laws Relied on and Referred to :-

1. OLR Full Bench (1984)- 470 : Ainthu Charan Parida Vs. Sitaram Jayanarayan Firm and Anr.
2. AIR 1999 SC 999 : Mathew M.Thomas and Ors. Vs.Commissioner of Income-tax.
3. 2019(Supp.II) OLR-129 : Laxmidhara Samantasinghara & Ors Vs. the Alarnath Dhanda Mulaka Mahavidyalaya Managing Committee represented through its Secretary-cum-Principal & Ors.
4. AIR 1966 S.C. 1988 : Ram Chandra Aggarwal and another V. State of Uttar Pradesh & Anr.

For Petitioners : Mr. B.P.Pradhan.
For Opp. Parties: Mr. Sk. Zafrulla, Addl. Standing Counsel.

JUDGMENT Date of Hearing: 21.03.2022: Date of Judgment: 30.03.2022

B. MOHANTY, J.

This civil revision has been filed challenging the order dated 22.12.2021 passed by the learned Additional District Judge, Dharamgarh in R.F.A. No. 6 of 2017 allowing the petition filed by the opposite parties under Section 5 of the Limitation Act, 1963.

2. The case of the petitioners according to Mr.Pradhan, learned counsel for the petitioners is that the petitioner Nos. 1 to 8 have filed C.S. No. 186 of 2012 valued at Rs.49,000/- in the Court of learned Civil Judge (Jr.Divn.), Dharamgarh for declaration of their right title and interest and confirmation of possession over the suit schedule tank. Further they have prayed for declaration of their right to fish, water for irrigation and improvements over the suit tank. They also prayed for permanent injunction against present opposite parties from interfering with the possession and ownership of the plaintiffs. The said suit was decreed. Challenging the judgment and decree dated 25.12.2014 the present opposite parties filed R.F.A. No. 6 of 2017 making the present petitioners as respondents along with a petition under Section 5 of the Limitation Act, 1963 for condonation of delay. The delay condonation petition having been allowed subject to payment of cost of Rs.10,000/- vide order dated 22.12.2021 passed in R.F.A. No. 6 of 2017, the said order has been challenged here in this civil revision.

3. At the outset when Mr.Pradhan, learned counsel for the petitioners was asked about the maintainability of the civil revision on the ground that the impugned order does not arise out of a out of a original suit or other original proceeding in the background of the decision of Supreme Court as rendered in ***Vishnu Awatar V. Shiv Autar and others reported in (1980) 4 SCC 81*** and the judgment of this Court as rendered in ***Smt. Banarasi Devi Saha V. Basudev Lal Dhanuka reported in Vol. 34(1992) O.J.D. 462(Civil)*** and also on the ground that the valuation of the original suit does not exceed Rs.5/- lakhs, Mr. Pradhan contended that the impugned order under Annexure-5 passed in a petition for condonation of delay is clearly covered by the phrase 'other proceedings' as used in Section 115 of the Code of Civil Procedure, 1908 for short, "the Code" as is presently in force in the State of

Odisha pursuant to the Code of Civil Procedure (Orissa Amendment) Act, 2010. He further contended that the impugned order cannot be construed as an order passed in an appeal as no appeal exists in the eyes of law unless the petition under Section 5 of the Limitation Act, 1963 is allowed condoning the delay. Accordingly he reiterated that the present civil revision is maintainable. In this context he relied upon following three decisions which are as follows:-

(1) **Ainthu Charan Parida V. Sitaram Jayanarayan Firm and another** reported in **OLR Full Bench (1984)-470.**

(2) **Mathew M.Thomas and others V. Commissioner of Income-tax reported in AIR 1999 SC 999.**

(3) **Laxmidhara Samantasinghara and others V. the Alarnath Dhanda Mulaka Mahavidyalaya Managing Committee represented through its Secretary-cum-Principal & others reported in 2019(Supp.II) OLR-129.**

4. With regard to decision of the Supreme Court in Vishnu Awatar (supra) and of this Court in ***Smt. Banarasi Devi Saha***(supra), Mr.Pradhan submitted that these decisions are factually distinguishable and have no application to the present case.

5. In order to understand the submissions advanced, this Court thinks it appropriate to quote Section 115 of the Code of Civil Procedure, 1908 as is in force in the State of Odisha today.

"115. Revision-(1) The High Court, in cases arising out of original suits or other proceedings of the value exceeding five lakhs rupees and the District Court in any other cases, including a case arising out of an original suit or other proceedings instituted before the commencement of the Code of Civil Procedure (Orissa Amendment) Act, 2010 may call for the record of any case which has been decided by any Court subordinate to the High Court or the District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction to vested; or

(c) to have acted in exercise of its jurisdiction illegality or with material irregularity, the High Court or the District Court, as the case may be, may make such order in the cases as it thinks fit;

Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the District Court, the High Court alone shall be competent to make an order under this Section.

(2) The High Court or the District Court, as the case may be, shall not under this section, vary or reverse any order, including an order deciding an issue, made in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court or District Court, as the case may be.

Explanation- In this section, the expression "any case which has been decided" includes any order deciding an issue in the course of a suit or other proceeding."

6. In the instant case this Court is concerned with the meaning and interpretation of the phrase 'other proceedings' as used in Section 115 as quoted above.

7. With regard to ***Ainthu Charan Parida (supra***) it may be noted here that in that case the issue involved was as to whether an order rejecting memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring an appeal is a decree. Thus the said decision is factually distinguishable. There was also no issue relating to interpretation of the phrase 'other proceedings' as used in Section 115 C.P.C. and accordingly no discussion exists there about maintainability of Civil Revision petition on the basis of such issue. Therefore this case no way helps in resolving the issue of maintainability with which this Court is presently concerned. Rather the decision of the Supreme Court in ***Vishnu Awatar (supra***) and this Court in ***Smt. Banarasi Devi Saha (supra***) which relies on Vishnu Awatar case does make it clear that 'other proceedings' cannot include decisions rendered in appeals and revisions.

8. With regard to the decision of the Supreme Court in ***Mathew M.Thomas and others(supra)***, it may be noted that in the said case there exists no reference to Section 115 of "the Code" and interpretation of the phrase 'other proceedings' as used in that Section. Thus the said case where the issue was applicability of a beneficial CBDT Circular to the proceeding at appellate stage is factually distinguishable. Further as indicated in ***Ram Chandra Aggarwal and another V. State of Uttar Pradesh and another reported in AIR 1966 S.C. 1988*** the word "proceeding" does not have a fixed meaning. Its meaning depends upon the way it is used in a particular statute and the context of such use. Thus this decision cannot be of any help to the petitioners. Moreover in view of the authoritative pronouncement of the Supreme Court in the case of Vishnu Awatar (supra) to the effect that the phrase 'other proceedings' occurring in Section 115 of "the Code" can only mean proceedings of an original nature and the same will not cover decisions pronounced in appeals and revisions, the decision as rendered in ***Mathew M.Thomas and others (supra)*** dealing with applicability of a beneficial circular at an appellate stage will be of no help to the petitioners to make the present civil revision maintainable.

9. With regard to ***Laxmidhara Samantasinghara and others*** (supra) though this Court interfered with an order passed by the learned District Judge, Puri allowing an application under Section 5 of the Limitation Act arising out of RFA No. 31 of 20116 entertaining the appeal however the question of maintainability vis- à-vis the impugned order was not raised there. There also exists no issue relating to interpretation of the phrase 'other proceedings' as occurring in Section 115 of "the Code". Further the attention of this Court in that case was not drawn to the case of ***Vishnu Awatar (supra***) and Smt. ***Banarasi Devi Saha (supra***). Accordingly, this decision is of no help to the petitioners. Rather a holistic reading of the judgment of Supreme Court as rendered in ***Vishnu Awatar (supra)*** makes it clear that the phrase 'other proceedings' can only mean proceedings of an original nature which are not of the nature of suits, like arbitration proceeding. This phrase cannot include decisions pronounced in appeals and revisions. The words "or other proceedings" have to be read ejusdem generis with the words "original suits". In other words the phrase 'other proceedings' will not cover cases arising out of decisions made in the appeals or revisions. If the District Court has not decided in its original jurisdiction then such order is not amenable to the revisional jurisdiction of High Court. While referring to the language of Section 115 of the Code of Civil Procedure (Uttar Pradesh Amendment) Act,

1978, which is almost in pari materia with the provision of Section 115 of "the Code" as in force in State of Odisha so far as the use of phrase "other proceeding" is concerned, the Supreme Court pronounced clearly that the decisions of the District Courts rendered in appeal or revision are beyond revisional jurisdiction of High Court. But where original decision has been made by the District Court, the High Court's revisional power will come into play. The same thing was reiterated by this Court in ***Smt. Banarasi Devi Saha (supra)*** where issue involved was whether a civil revision under Section 115 of "the Code" would lie against a revisional order passed by the District Judge exercising the jurisdiction under the same section as amended. There this Court held that a revision does not lie to this Court against a revisional order passed by the High Court. In such background since in the present case the impugned order pertains to an order passed in connection with appeal styled as R.F.A. No. 6 of 2017, this Court is of the opinion that Civil Revision is not maintainable.

10. To the contention of Mr.Pradhan that the impugned order under Annexure-5 cannot be construed to have been passed in the appeal, this Court is of the opinion that such a contention cannot be accepted as limitation petition has no independent existence bereft of appeal. It may be noted here that even the petition for condonation of delay was not separately numbered. So order passed therein cannot be segregated from the appellate jurisdiction of the learned District Judge. Even otherwise it cannot be said that order passed in the limitation petition was passed in any original or independent proceeding. For all these reasons the civil revision petition is not maintainable. Further conceding for a moment but not admitting that the impugned order is covered by the phrase 'other proceedings' as used in Sub-Section(1) of Section 115 of 'the Code, then also the present civil revision is not maintainable as it arises in connection with an original suit whose valuation is less than Rs.5/- lakhs. For all these reasons the civil revision is not maintainable and is accordingly dismissed. However the dismissal of civil revision will not be a bar for the petitioners to file appropriate application before appropriate forum for redressal of their grievances, if they are so advised. For such purposes certified copies enclosed to this petition can be taken back after the same are substituted by authenticated Xerox copies.

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2022 (I) ILR - CUT- 541

Dr. B.R. SARANGI, J & V. NARASINGH, J.

W.P.(C) NO. 17239 OF 2021

M/s. DURGA ELECTRICALS AND ELECTRONICS .....Petitioner

.V.

MAHANADI COALFIELDS LTD. AND ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Black listing – Challenge is made to the order banning the petitioner for 2 (two) years from being eligible to submit bids in CIL – No opportunity given before passing such order – Effect of – Held, if State or its instrumentality takes decision on blacklisting then such decision is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination under Article 14 of the Constitution of India, therefore a prior show cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted – Therefore, furnishing of a valid show cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.

(Para 13 & 14)

Case Laws Relied on and Referred to :-

1. AIR 1995 SC 1057 : Nova Steel (India) Ltd Vs. M.C.D. And Ors.
2. AIR 1975 SC 266 : Urusian Equipment & Chemicals Ltd. Vs. State of West Bengal.
3. (2006) II SCC 548 : AIR 2007 SC 437 : Mr. B.S.N. Joshi & Sons Ltd Vs. Nair Coal Services Ltd. & Ors.
4. AIR 2014 SC 3371 : Gorkha Security Services Vs. Government (NCT of Delhi).
5. (2014) 14 SCC 731 : Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. & Ors.

For Petitioner : Mr. Manmaya Kumar Dash.

For Opp. Parties : M/s D. Mohanty, A. Mishra, B.P. Panda and D. Behera.

JUDGMENT Date of Hearing and Judgment : 15.02.2022

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 26.05.2021 in Annexure-5, by which the bid of the petitioner has been

rejected and the petitioner has been banned for 2 (two) years from being eligible to submit bids in CIL and its subsidiaries from the date of its issuance, taking recourse to Clasue-14(E) of the NIT; as also the consequential work order dated 26.05.2021 issued in favour of opposite party no.5 (inadvertently numbered as '4') vide Annexure-6; and to issue direction to the opposite parties to consider the representation of the petitioner dated 30.05.2021 under Annexure-7, within a stipulated period.

2. The factual matrix of the case, in brief, is that the petitioner is a proprietorship firm and participated in the process of tender, pursuant to the online bid invited by opposite party no.3, having digital signature certificate authorized by the Controller of Certifying Authority (CCA), Government of India, in respect of the work "*Conversion of 3.3 kV overhead line (Pump feeder) to 33 kV overhead line to feed power to proposed temporary field substation near stock No-6 of Ananta OCP of Jagannath Area*". Following due procedure of selection, the petitioner was declared as L-1 bidder. When the petitioner was waiting for the work order, on 26.05.2021, it was issued with a letter intimating that with reference to the NIT, the petitioner has participated in the tender and became L-1 bidder, but it failed in submitting the requisite document online as per NIT. Therefore, as per Clause-14(E) of the NIT, the bid of the petitioner was rejected and it was banned for 2 (two) years from being eligible to submit bids in CIL and its subsidiaries from the date of issue of the said letter. The very fact, that the petitioner was declared as L-1, establishes that it had produced all the relevant documents. Therefore, it was urged that subsequent rejection of its bid and banning the petitioner from participating for two years in the bids of CIL and its subsidiaries, vide Annexure-5 dated 26.05.2021, which amounts to blacklisting, is illegal, arbitrary and contrary to the settled position of law, and so also the consequential issuance of work order vide Annexure-6 in favour of opposite party no.5. Hence this writ petition.

3. Mr. M.K. Dash, learned counsel for the petitioner contended that the impugned communication/ order, vide Annexure-5 dated 26.05.2021, banning the petitioner for two years from being eligible to submit bids in CIL and its subsidiaries, cannot be sustained in the eye of law, having been passed without giving opportunity of hearing to the petitioner, which amounts to gross violation of principles of natural justice. To substantiate his contention, he has placed reliance on ***TELSA Transformers Limited v. Odisha Power Transmission Corporation Limited***, 2016 (II) ILR CTC-237

and ***UMC Technologies Private Limited v Food Corporation of India*** (Civil Appeal No. 3687 of 2020 disposed of on 16.11.2020).

4. Mr. Debraj Mohanty, learned counsel appearing for the opposite parties, vehemently contended that since the petitioner had not submitted the requisite documents through online as per NIT, taking recourse to Clause-14(E) of the NIT, the bid of the petitioner has been rejected. As the petitioner has not adhered to the terms and conditions of the bid, it is not entitled to participate in the future bids. Therefore, the order impugned dated 26.05.2021 has been passed, for which no fault can be found with the authorities.

5. This Court heard Mr. M.K. Dash, learned counsel for the petitioner and Mr. D. Mohanty, learned counsel appearing for the opposite parties by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with their consent this writ petition is being disposed of finally at the stage of admission.

6. Though multiple reliefs have been sought before this Court, in course of hearing, Mr. M.K. Dash, learned counsel for the petitioner contended that the petitioner is aggrieved by that part of the order dated 26.05.2021, whereby it has been banned for two years from being eligible to submit bids in CIL and its subsidiaries, and he confined the writ petition to such relief only, as in the meantime, the work in question has already been allotted in favour of opposite party no.5 vide Annexure-6 and he has no knowledge whether he has progressed with the work or not.

7. On the basis of the factual matrix as delineated above, there is no dispute that the petitioner was selected by the opposite parties for award of the work "*Conversion of 3.3 kV overhead line (Pump feeder) to 33 kV overhead line to feed power to proposed temporary field substation near stock No-6 of Ananta OCP of Jagannath Area*", pursuant to the Tender ID No. 2021_MCL_204099_1. The petitioner, having participated in the tender and declared as L-1, the work would have been allotted in his favour, but taking recourse to Clause-14(E) of the NIT, the bid of the petitioner has been rejected, vide Annexure-5 dated 26.05.2021, on the ground that the petitioner has failed to submit the required documents through online as per NIT, and simultaneously the petitioner has been banned for two years from being eligible to submit bids in CIL and its subsidiaries.

8. Clause- 14(E) of the NIT, being relevant for the purpose of effective adjudication of this case, is extracted hereunder:-

> *"In case the L-1 bidder fails to submit requisite documents online as per NIT or if any of the information/declaration furnished by L-1 bidder online is found to be wrong by Tender Committee during evaluation of scanned documents uploaded by bidder, which changes the eligibility status of the bidder, then his bid shall be rejected and the bidder will be banned for two years from being eligible to submit bids in CIL and its subsidiaries."*

On perusal of the aforementioned clause, it is made clear that if the L-1 bidder fails to submit requisite documents online as per NIT, then his bid shall be rejected and the bidder will be banned for two years from being eligible to submit bids in CIL and its subsidiaries. But nothing has been placed on record to show as to which document the petitioner was required to submit online as per NIT. Merely referring to Clause-14(E) of the NIT, the bid of the petitioner could not have been rejected and, as such, the petitioner could not have been banned for two years from being eligible to submit bids in CIL and its subsidiaries from the date of issuance of the letter dated 26.05.2021 in Annexure-5. By issuing such letter, the petitioner has been blacklisted by the opposite parties. As a matter of course, while blacklisting the petitioner, the minimum requirement of compliance of natural justice had to be followed. As such the petitioner has been condemned without being given an opportunity of hearing.

9. In ***Nova Steel (India) Ltd vs M.C.D. And Ors***, AIR 1995 SC 1057 the apex Court held that the question of blacklisting of the contracts have been considered by the Courts time and again and it has categorically been held that such order cannot be passed without giving opportunity of hearing to the party.

10. In ***Urusian Equipment & Chemicals Ltd. v. State of West Bengal***, AIR 1975 SC 266, the apex Court held that a fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of offence is similarly examinable by a writ Court. The apex Court also declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and the authority passing any such order is required to give a fair hearing before passing an order of blacklisting in certain entity.

11. In ***Mr. B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd. & Ors***, (2006) II SCC 548 : AIR 2007 SC 437 and a long line of decisions have followed the ratio of that decision and applied principle of *audi alteram partem* to the process that may eventually culminate in the blacklisting of a contractor.

12. In ***TELSA Transformers Limited*** (supra), this Court also taking into consideration the ratio of ***Gorkha Security Services v. Government (NCT of Delhi)***, AIR 2014 SC 3371 held that merely because clause in notice inviting tender empowers the department to impose such penalty that does not mean that such penalty can be imposed without putting defaulting contractor to notice to this effect.

13. In ***Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others***, (2014) 14 SCC 731, the apex Court held, if State or its instrumentality takes decision on blacklisting then such decision is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination under Article 14 of the Constitution of India.

14. In ***UMC Technologies*** (supra), the apex Court has also taken note of the decision of the apex Court in ***Erusian Equipment*** & ***Gorkha Security*** (supra) and has come to a conclusion that a prior show cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. Therefore, furnishing of a valid show cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.

15. Taking into consideration the factual matrix and the propositions of law, as discussed above, this Court is of the considered view that, since the order impugned dated 26.05.2021 in Annexure-5 has been passed banning the petitioner for two years from being eligible to submit bids in CIL and its subsidiaries from the date of issue of the letter, without complying the principle of natural justice, the same cannot be sustained in the eye of law and, as such, the same is liable to be quashed and hereby quashed.

16. The writ petition is allowed to the extent indicated above. No order as to costs.

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2022 (I) ILR - CUT- 546

Dr. B.R. SARANGI, J & V. NARASINGH, J.

W.P.(C) NO. 24940 OF 2021

RAMA CHANDRA MOHAPATRA .....Petitioner

.V.

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

WORDS AND PHRASES – "JURISDICTION" – Definition – Held, jurisdiction does not mean the power to do or order in the act impugned, but generally means the authority of judicial officer to act in the matter. (Para-10)

Case Laws Relied on and Referred to :-

1. (1969) 2 AC 147 : Anisminic Ltd. Vs. Foreign Compensation Commission.
2. (1972) 2 SCC 427 : M.L. Sethi Vs. R.P. Kapur.
3. AIR 1965 SC 1651 : In Anowar Hussain Vs. Ajay Kumar Mukherjee.

For Petitioner : M/s. Basudev Pujari and P.K. Sahoo.

For Opp. Parties : Mr. A.K. Mishra, AGA (Opp Parties 1 to 4, 6 & 8)
Mr. O. P. Sahu, (Opp Parties 9 & 10)

JUDGMENT Date of Hearing and Judgment: 15.02.2022

Dr. B.R. SARANGI, J.

The petitioner, who is the Ex-Chairman of Notified Area Council (NAC), Pipili and also a local inhabitant, has filed this writ petition to quash the order dated 31.05.2021 passed by opposite party no.4-Collector-cum-District Magistrate, Puri in Annexure-5, by which the Executive Officer, Pipili NAC was instructed not to execute the projects sanctioned earlier in favour of him and to refund Rs.237.50 lakh to the Project Director, District Rural Development Agency (DRDA), Puri for re-release of funds to B.D.O., Pipili for execution of the projects. He further seeks to quash Annexure-10 series, the work orders dated 02.07.2021 issued by opposite party no.8-Block Development Officer, Pipili for execution of various projects. He also seeks direction to opposite party no.4 to pass an order to execute the works under the list of Annexure-5 through line department, i.e. Housing and Urban Development Department by e-tendering process as per the Special Problem Funds (SPF) guidelines under Annexure-2. The further prayer of the petitioner is to direct opposite party nos. 4 and 5 to execute the 94 numbers

of projects through tender process basing on the letters of the learned Advocate General and opposite party no.1, based on the judgment of this Court vide Annexure-9 series.

2. The background facts leading to filing of the present writ petition, succinctly put, are as follows:-

2.1 For development of the inhabitants of NAC, Pipili in the district of Puri, 94 numbers of development works had been sanctioned by opposite party no.4 under the Special Problem Funds (SPF) scheme. But due to the by-election for the Pipili Assembly Constituency, model code of conduct was imposed. As a consequence thereof, execution of the works was stopped. Due to the death of a candidate of a National Political Party, the election process was deferred for indefinite period and the model code of conduct was also withdrawn. For taking up small and essential projects of local importance involving special nature of problems, in the absence of which the development process would remain incomplete, the Government of Odisha had introduced a scheme styled as Special Problem Funds in the year 1997-98.

2.2 The scheme aimed at taking up small and essential projects of local importance involving special nature of problems. The works were of the nature of providing missing links to the existing development infrastructure as well as repair, modernization and expansion works, particularly for the purposes of improvement of existing educational institutions- both Government as well as Private-, roads, culverts, bridges, embankments, public religious places, cultural organizations as well as construction of new projects which would contribute to the overall development of community and well being of the general public for which funds are not available. The funds for the Scheme "Special Problem Funds" were to be provided in the State Plan Budget of the Planning and Coordination Department in the form of grant-in-aid each year. The rules and procedures laid down thereunder would be applicable to sanction and utilization of funds under the scheme provided in the State Budget from 2003-04 and onwards.

2.3 After due approval and sanction from the department of Planning and Convergence, Government of Odisha for implementation of various approved projects under Special Problem Funds (SPF)-11th Phase during the year 2020-21, the works were going to be executed within NAC, Pipili. For

approval from the Accountant General (A&E) Odisha, Bhubaneswar, the department of Planning and Convergence had issued a letter on 13.02.2021 with some specific terms and conditions for execution of works. Serial No. 1 of the specific terms and conditions indicates that the approved projects should be implemented through executing agencies as per the approved rules. The Executive Officer, NAC, Pipili-opposite party no.7, due to dearth of manpower, issued a letter on 24.05.2021 to the Project Director, DRDA-opposite party no.5 with a request to withdraw and place the sanctioned funds under SPF 2020-21 with some other agency for smooth implementation of work.

2.4 Coming to know about the incapacity, inability and inefficiency and also inadequate staff of opposite party no.7, i.e., Executive Officer, NAC, Pipili to execute the work under the scheme of SPF, the Collector, Puri passed an order on 31.05.2021 that 94 numbers of projects worth Rs. 185.00 lakhs and Rs. 52.50 lakhs respectively are to be executed through BDO, Pipili, instead of Executive Officer, NAC, Pipili, for smooth execution of projects. The projects were going to be executed under the scheme of SPF. Therefore, the Collector, Puri-opposite party no.4 also instructed the Executive Officer, NAC, Pipili-opposite party no.7 not to execute the projects sanctioned earlier in favour of him and refund the sanctioned fund to the tune of Rs.237.50 lakhs to the Project Director, DRDA-cum,-DUDA, Puri, opposite party no.5 for re-release of the funds to Block Development Officer, Pipili-opposite party no.8. It was further stated that the projects need to be executed adhering to the guidelines of SPF and the Financial Procedures of the State Government and all the terms and conditions to remain unaltered. As per the direction of the Director, Municipal Administration- opposite party no.3 in its letter dated 03.01.2018, the works under all the Municipalities and NACs will have to be executed by following the procedure of e-tendering, if the project amount is Rs.1.00 lakh to Rs.2.00 lakhs, which shall also come into force with immediate effect by modifying the earlier instructions issued to the above extent. A guideline was issued by opposite party no.1-the Housing and Urban Development Department, vide letter dated 10.10.2017 addressed to all the Collectors and District Magistrates of the State of Odisha, for release and utilization of grants under UNNATI programme by urban local bodies of the State, clause-3 whereof was meant for selection of executing agencies. The scheme of SPF indicates that the urban area works can be entrusted on their recommendation. Therefore, there is no distinction between the process of selection of

executing agencies under both UNNATI Scheme and Scheme of SPF. But without adhering to the same, the works have been allotted by Block Development Officer, Pipili-opposite party no.8 by issuing work orders in Annexure-10 series. Hence this writ petition.

3. Mr. Basudev Pujari, learned counsel appearing for the petitioner contended that since projects had been sanctioned under the SPF scheme of Housing and Urban Development Department, the Collector, Puri is not the competent authority to pass an order in Annexure-5 dated 31.05.2021. Rather as per the conditions stipulated under the Scheme of SPF, it is the NAC, who is the competent authority to pass an order. As the NAC has been superseded and the Sub-Collector has remained in its charge as Administrator, as such he is the competent authority. Thereby, the Collector, Puri has no jurisdiction to issue such an order dated 31.05.2021 to stop the projects sanctioned under the scheme of SPF 2020-21. It is further contended that since the projects, which were sanctioned, come under the jurisdiction of the NAC, Pipili, which is an urban area, it should be routed through the Line Department, namely, Housing and Urban Development Department by following due procedure of law, and for transparency, it should be through a process of tender. The same having not been done, the order impugned cannot be sustained in the eye of law. It is further contended that the stand taken by the State authorities in their counter affidavit that it should be done by the Panchayat Samiti or Gram Panchayat, cannot also be sustained, as the projects come under the jurisdiction of the NAC Pipili. Thereby, reliance placed on the resolution dated 13.07.2018 of the PR & DW Department for execution of developmental works of Panchayat Samiti or Gram Panchayat, has no application to the present context. Hence, he seeks for quashing of the office order dated 31.05.2021 under Annexure-5 and also the consequential work orders dated 02.07.2021 issued under Annexure-10 series.

4. Mr. A.K. Mishra, learned Additional Government Advocate for the State raised a preliminary objection with regard to the *locus standi* of the petitioner and emphatically submitted that pursuant to the resolution dated 13.07.2018 of PR & DW Department on the subject- revised guidelines on "*execution of developmental works at Panchayat Samiti and Gram Panchayat level*", the work orders were issued in favour of the Junior Engineer of Pipili Block for departmental execution of works as the cost of each of the projects was less than Rs.10.00 lakhs. Thereby, justifying the

order under Annexure-5 issued by the Collector, Puri and the consequential work orders issued by the Block Development Officer, Pipili under Annexure-10 series, he contended that the Collector, Puri has got the authority to pass order impugned, which does not warrant interference by this Court at this stage.

5. This Court heard Mr. Basudev Pujari, learned counsel for the petitioner and Mr. A.K. Mishra, learned Additional Government Advocate appearing for the state opposite parties by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with their consent this writ petition is being disposed of finally at the stage of admission.

6. Before delving into the core issues involved in this case, it is worthwhile to mention here that for smooth running of the Municipal Council, NACs and Urban Local Bodies an Act had been enacted called "Orissa Municipal Act, 1950" (Orissa Act 23 of 1950). In exercise of the powers conferred by clauses-(i) and (ii) of sub-Section (2) of Section 387 of the Orissa Municipal Act, 1950, the Governor of Orissa was pleased to frame the Orissa Municipal Rules, 1953. Chapter-VI thereof dealt with public works and Rule 338, which comes under the said chapter and has been substituted vide OGE No. 2251 dated 12.12.2008, reads as follows:-

> *"All municipal works to be executed by the Urban Local Bodies either out of their own fund or with the funds received from the Government including SRC grants and Finance Commission Grants will be only through publication of the open tender.*
>
> *Provided that the Urban Local Bodies may take up any work departmentally during an urgent and calamitous situation such as flood, drought, cyclone and fire accident for maintenance and restoration of the public safety/service in the interest of the State, with prior approval of the Collector of the District which is subject to his satisfaction that the same is in the exigency of public service to be recommended for ex-post facto Government approval without calling for tender, as provided in the Appendix-VII, Volume-II of the OPWD Code.*
>
> *Provided further that for the purpose of the Developmental Works to be undertaken by the Urban Local Bodies in such situation, the financial limit for the Municipality would be Rs. 3 lakh and for the Notified Area Council Rs. 2 lakh."*

7. In exercise of powers conferred by sub-Section (1) of Section 387 of the Orissa Municipality Act, 1950, the State Government in Housing &

Urban Development Department made further amendment to the Orissa Municipal Rules, 1953 in the year 2017, vide notification dated 22.11.2017, and formulated "The Odisha Municipal (Amendment) Rules, 2017". Clause-11 of the said notification is extracted hereunder:-

> *"11. In the said rules, in rule 352,-*
>
> *a) for sub-rule (1) including the proviso thereto, the following sub-rule shall be substituted, namely-*
>
> *(1) Any contract or the execution of the work or the supply of any materials or goods which will involve an expenditure exceeding such sum, as the Government may specify, from time to time, the Executive Officer, shall invite tender for such contract.*
>
> *Provided, that the Council shall have the power to dispense with tenders if the work is emergent in nature.*
>
> *(b) in sub-rule (2), in the proviso thereto, for the words and figure "Rs.1,500 (fifteen hundred)", the words and figure "Rs.10,000 (ten thousand)" shall be substituted."*

In terms of the aforesaid statutory provisions governing the field, the developmental works within the Municipal or NAC area are to be executed.

8. The "Rules and Procedures for sanction of funds under the Scheme of Special Problem Funds", which have been annexed to this writ petition as Annexure-2, specifically prescribe the procedure, as per which the funds for the projects shall be sanctioned and released, and the mode, in which the executing agencies shall be selected, respectively under the headings "Sanction and Release of Funds" and "Executing Agency", which are extracted hereunder:-

> ***"Sanction and Release of Funds**: Once the priority list of projects is approved by the Government, the projects in order of their priority shall be sanctioned keeping in view the provision of funds available under the scheme in the State budget. Requisite funds relating to such of the projects pertaining to a district shall be released to the District Rural Development Agency (DRDA) of that district / other Government Departments / Govt. Agencies. However, release of funds in respect of projects costing more than RS. 10.00 lakhs shall be made in instalments from the State level keeping in view the resource position of the State. The Project director, DRDA shall draw the amount in grant-in-aid bill with the counter-signature of the District Collector and keep the same necessarily in PL account of the DRDA.*

> ***Executing Agency****: As soon as the sanction order is received from Government, the District Planning Officer shall follow the established procedures of the State Government, process the proposals, select the executing agencies and issue work orders in their favour with the approval of the Collector. For projects located in rural areas, the procedure followed by DRDAs shall be followed which lays down that executants shall be selected by the Pallisabha. However, Pallisabha has to keep these guidelines in view in selecting an executant Established procedures of the Government shall be followed when execution of a project is entrusted to an organisation under a line Department. However, for projects / works covering more than one district, their execution shall be entrusted to an appropriate agency / Department to which the property belong by the Planning and Coordination Department.*
>
> *As regards work / Projects relating to urban areas priority would be given to urban local bodies. On their recommendations, such works can be entrusted to Government line Departments or to a registered non-Governmental agency having adequate professional expertise, proven track record."*

9. Adhering to the above mentioned scheme and with the concurrence of the Planning and Convergence Department, sanction of funds, for implementation of various approved projects under the Special Problem Fund (SPF)-11th Phase during the year 2020-21, was accorded on 13.02.2021, which includes the approved projects sanctioned under SPF 2020-21 to NAC Pipili, vide letter dated 24.05.2021 issued by the Executive Officer, NAC, Pipili in Annexure-4. But due to dearth of manpower to implement the work, by observing financial procedure of the NAC, the Executive Officer, NAC, Pipili, vide letter dated 24.05.2021, intimated to the Project Director, DRDA-cum-DUDA, Puri for withdrawal of sanctioned funds and to place the same with some other agency for smooth implementation of the work. As such, the said letter has also been communicated to the Administrator-cum-Sub-Collector, Puri, as the elected body of the NAC has completed its tenure and the Sub-Collector, Puri being the Administrator has remained in charge. As a consequence thereof, the Collector, Puri, vide letter dated 31.05.2021, instructed the Executive Officer, NAC Pipili not to execute any projects which were sanctioned earlier in favour of him and to refund Rs.237.50 lakhs to P.D. DRDA Puri for re-release of funds to B.D.O., Pipili for execution of the projects. The projects need to be executed adhering to the guidelines of SPF and financial procedure of the State Government, remaining all other terms and conditions unaltered. The Scheme of SPF is only applicable to the urban areas. Therefore, the Collector, Puri could not and should not have diverted the same in favour of the B.D.O., Pipili, instead of carrying out the same through

the concerned department, namely Housing and Urban Development Department. More so, as per letter dated 03.01.2018, the Government in Housing and Urban Development Department had been pleased to enhance the financial limit from Rs.1.00 lakh to Rs.2.00 lakhs for e-tendering of all works in respect of the Urban Local Bodies. Without adhering to the said letter, the Collector, Puri, by passing an order on 31.05.2021 under Annexure-5, diverted the same to the B.D.O., Pipili as an Executing Agency for utilization of Special Problem Funds 2020-21. As has already been stated, as per the Scheme of SPF 2020-2021, as regards execution of the works/ projects relating to urban areas, priority should have been given to the urban local bodies. On their recommendations, such works can be entrusted to Government Line Departments, namely, Housing and Urban Development Department or to a registered non-Governmental agency having adequate professional expertise and proven track record. The Collector, Puri, without adhering to the Scheme of Special Problem Funds 2020-21, diverted the same to the B.D.O., Pipili, who cannot be an executing agency under the said scheme Thereby, the action taken by the Collector, Puri, choosing B.D.O., Pipili as the executing agency, by passing order dated 31.05.2021 under Annexure-5, is without jurisdiction, as he is not the competent authority to do so and also the B.D.O., Pipili is not the competent executing agency to implement the work within the Pipili NAC, which comes under the jurisdiction of urban local bodies.

10. It is well settled principle of law that the term "jurisdiction" generally means the authority of an officer to act in the matter. In ***Anisminic Ltd. v. Foreign Compensation Commission***, (1969) 2 AC 147, it is held that the jurisdiction is a verbal coat of many colors. "Jurisdiction" originally seems to have had the meaning, i.e. the entitlement to enter upon the enquiry in question. The same view has also been taken by the apex Court in ***M.L. Sethi v. R.P. Kapur,*** (1972) 2 SCC 427. In ***Anowar Hussain v. Ajay Kumar Mukherjee***, AIR 1965 SC 1651, the apex Court held that the expression "jurisdiction" does not mean the power to do or order the act impugned, but generally the authority of the Judicial Officer to act in the matter.

11. Since the Collector, Puri has no jurisdiction to nominate the B.D.O., Pipili as the executing agency to execute the projects sanctioned under the Scheme of Special Problem Funds 2020-21, and the B.D.O., Pipili has also no authority to do so, the impugned order dated 31.05.2021 under Annexure-5 cannot be sustained in the eye of law. As a consequence thereof, the work

orders issued by the B.D.O., Pipili under Annexure-10 series for construction of some projects, without following due procedure, also cannot be sustained.

12. Mr. A.K. Mishra, learned Additional Government Advocate though raised the question of *locus standi* of the petitioner stating that he is the Ex-Chairman of the NAC, Pipili and also a local inhabitant and at his instance the application cannot be maintained, but the same cannot have any justification for the following reasons. "*Locus standi*" means a place of standing; a right of appearance in a Court of justice; right to bring an action and to be heard. Therefore, the meaning of word "*locus standi*" for the purpose of maintaining the writ petition has been widened very much. In exceptional cases, a person who has been prejudicially affected by an act or an omission by an authority can file a writ petition even though he has no proprietary or fiduciary interest in the subject matter thereof. Rather a person must have a sufficiency of interest to sustain his standing to sue. In view of such proposition of law and applying such rationale to the facts of the present case, it cannot be said that the petitioner has no *locus standi* to file this writ petition.

13. The argument, which has been advanced with reference to the counter affidavit filed by the opposite parties 4, 5 and 6 relying upon the resolution dated 13.07.2018 of the P.R. & D.W. Department on the subject-revised guidelines on "execution of developmental works at Panchayat Samiti and Gram Panchayat level", is not acceptable, as the projects belonged to NAC, Pipili, which is an urban area. Therefore, the reliance placed on the resolution dated 13.07.2018 is misconceived in the factual matrix of the case at hand and the stand so taken is liable to be rejected.

14. It is brought to the notice of this Court that, out of 94 projects, which had been sanctioned under Special Problem Funds 2020-21, 35 projects have already been completed. Since those 35 projects have been completed in all respect, at this stage, this Court does not want to dislodge the same in any manner, even though certain irregularities had been committed during the process of allotment of such work. But for execution of rest of the projects, the competent authorities should strictly adhere to the Scheme of Special Problem Funds 2020-21 and utilize the funds, for the purpose for which they were sanctioned, in conformity with the provisions of law and also within the time specified.

15. In view of the discussions made above, this Court is of the considered opinion that the order dated 31.05.2021 passed by the Collector, Puri in Annexure-5 and the consequential work orders dated 02.07.2021 issued by the B.D.O., Pipili vide Annexure-10 series cannot be sustained in the eye of law. Accordingly, the same are liable to be quashed and hereby quashed. As a consequence thereof, this Court directs the competent authorities to execute the rest 59 projects [94 (sanctioned projects) – 35 (projects already completed)] adhering to the Scheme of Special Problem Funds 2020-21 and the government rules applicable thereto, so far as NAC, Pipili is concerned, by issuing work orders through the competent authority.

16. In the result, the writ petition is allowed. No order as to costs.

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2022 (I) ILR - CUT- 555

Dr. B.R. SARANGI, J & SAVITRI RATHO, J.

W.P.(C) NO. 11764 OF 2014

BIJAY KUMAR SAHOO .....Petitioner

.V.

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

(A) Appointment – The petitioner has got appointment by fraudulent manner – His initial appointment under UR (PH) category was made against four vacancies which were advertised for UR category – That entry itself to the service, cannot sustain in the eyes of law. (Para-22)

(B) Fraud – No judgment of a Court, no order of a minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything. (Para-16 to 21)

(C) Legal Maxim – 'Sublato fundamento credit opus' – Meaning thereby in case a foundation is removed, the super structure falls. (Para-12)

Case Laws Relied on and Referred to :-

1. AIR 2000 SC 3243 : Badri Nath Vs. Government of Tamil Nadu.
2. (1956) 1 All ER 341 (CA) : Lazarus Estate Ltd. Vs. Beasley.
3. (1994) 1 SCC 1 : AIR 1994 SC 853 : S.P. Chengalvaraya Naidu Vs. Jagannath.
4. (1994) 2 SCC 481 : State of Maharastra Vs. Prabhu.
5. AIR 1994 SC 2151: Andhra Pradesh State Financial Corporation Vs. GAR Re-Rolling Mills.
6. (2000) 3 SCC 581 : AIR 2000 SC 1165 : United India Insurance Co. Ltd. Vs. Rajendra Singh.
7. (2009) 8 SCC 751 : Mohammed Ibrahim Vs. State of Bihar.
8. (2019) 6 SCC 477 : Sasikala Pusbpa and others Vs. State of Tamil Nadu.

For Petitioner : M/s. M.K. Mohanty, S.C. Panda and T. Pradhan.

For Opp. Parties : Mr. A.K. Mishra, Addl. Govt. Adv. [O.P.Nos.1 to 3 and 5]
Mr. S. Rout, [O.P. No.4]

JUDGMENT Date of Hearing and Judgment: 25.03.2022

Dr. B.R. SARANGI, J.

The petitioner, who belonged to Socially Economically Backward Class (SEBC) category and was an applicant under the Unreserved (UR) category for the post of Pharmacist, has filed this writ petition seeking to quash the order dated 08.05.2014 passed in O.A. No. 1267 of 2012 under Annexure-7, by which the Orissa Administrative Tribunal, Bhubaneswar has directed the opposite parties to take action on the inquiry report dated 03.08.2013 of Dr. Deepak Kumar Prusty, Addl. Director of Health Services (PMS&R)-cum-Enquiring Officer under Annexure-5 within a period of two months.

2. The factual matrix of the case, in brief, is that pursuant to advertisement for filling up of the post of Pharmacist, a guidelines was issued vide Annexure-1 to the writ petition for contractual appointment to the paramedical posts under Chief District Medical Officer, Khordha, according to which, five posts of Pharmacists were to be filled up, out of which one post was meant for Scheduled Tribe (ST) and other four were meant for UR category. It was also provided in the said guidelines that the candidates must have passed diploma in Pharmacy and have registered their names in the Odisha Pharmacy Council; the age limit of the candidates should be as per the State Government norms; the salary for the said post would be Rs.5200/- per month; and the selection would be made according to the merit in the D. Pharma examination. In pursuance of such guidelines,

even though the petitioner applied against four UR category posts, he was selected under UR (PH) category post.

2.1 Since the petitioner was selected under UR (PH) category, which post was not advertised as per the guidelines issued under Annexure-1, the selection and appointment of the petitioner was challenged by opposite party no.4 before this Court by filing W.P.(C) No. 22923 of 2012 praying for an enquiry to be made with regard to issuance of handicapped certificate in favour of the petitioner. The said writ petition was disposed of, vide order dated 11.12.2012, directing the opposite parties to consider the representation of opposite party no.4 in accordance with law within a period of three months by affording opportunity of hearing to all the parties. In compliance of the same, an enquiry was conducted by Dr. Deepak Kumar Prusty, Addl. Director Health Services (PMA&R), Odisha for allegation against Bijoy Kumar Sahoo, Pharmacist, Capital Hospital, regarding his recruitment as Pharmacist in 2012-2013 and a report was submitted on 03.08.2013 vide Annexure-5 by holding that the petitioner had suppressed the truth of caste certificate and disability certificate and, therefore, he should be terminated from service and appointment order should be issued in favour of opposite party no.4. As no action was taken on such report, O.A. No.1267 of 2012 was filed by opposite party no.4, which was disposed of by the tribunal, vide order dated 08.05.2014, directing opposite party no.1 to take action on the enquiry report of Dr. Deepak Kumar Prusty, Addl. Director Health Services (PMA&R) within a period of two months, which is subject matter of challenge in this writ petition.

3. Mr. M.K. Mohanty, learned counsel for the petitioner contended that in the enquiry, which was conducted by Dr. Deepak Kumar Prusty, Addl. Director of Health Services (PMS&R)-cum-Enquiring Officer, no opportunity of hearing was given to the petitioner and, as such, the consequential direction issued by the tribunal also cannot sustain in the eye of law. It is thus contended that the enquiry report submitted by the Enquiring Officer under Annexure-5 dated 03.08.2013 and consequential order dated 08.05.2014 passed by the tribunal in O.A. No.1267 of 2012 should be quashed.

4. Mr. A.K. Mishra, learned Addl. Government Advocate contended that the guidelines under Annexure-1 issued to fill up the Paramedical Posts, including the post of Pharmacist in Capital Hospital under Chief District

Medical Officer, Khordha, does not contemplate with regard to appointment of PH category candidate under UR category, rather it only envisages with regard to filling up of four nos. of UR category posts. It is contended that the appointment of the petitioner under UR (PH) category was disputed by opposite party no.4 by filing original application before the tribunal and, as such, an enquiry was conducted pursuant to the order dated 11.12.2012 passed by this Court in W.P.(C) No. 22923 of 2012, and the Enquiring Officer, by observing that the petitioner had suppressed the truth of caste certificate and disability certificate, recommended for termination of his service. Accordingly, steps were taken by opposite party no.1 for termination of service of the petitioner and, as such, vide Annexure-C/4 dated 20.06.2014, he was required to appear before the appellate medical board in order to examine the authenticity of the disability certificate. It is contended that the petitioner, instead of appearing before the appellate medical board, has approached this Court by filing the present writ petition.

5. Mr. S. Rout, learned counsel for opposite party no.4 contended that since the petitioner was appointed under UR (PH) category, as against four posts advertised under the UR category, such appointment was illegal, arbitrary and unreasonable. Therefore, opposite party no.4 approached this Court by filing W.P.(C) No. 22923 of 2012, which was disposed of by order dated 11.12.2012 directing the opposite party no.1 to consider the grievance of opposite party no.4, as a consequence thereof an enquiry was conducted by the authority, in which proceeding the petitioner deliberately and willfully did not participate. After completion of the enquiry, the Enquiring Officer, vide enquiry report dated 03.08.2013, came to a conclusion that the petitioner had suppressed the truth of caste certificate and disability certificate and, therefore, recommended for termination of appointment of the petitioner and also opined to give appointment to opposite party no.4. It is further contended that opposite party no.4 had also challenged the selection/ appointment of the petitioner before the tribunal by filing O.A. No. 1267 of 2012, which was disposed of, by order dated 08.05.2014, taking into consideration the enquiry report dated 03.08.2013, with the direction that opposite party no.1 shall take action on the inquiry report of Dr. P.K. Prusty, Additional Director, Health Services (P&MR) within a period of two months. Pursuant to such order of the tribunal, notice was issued to the petitioner to appear before the appellate medical board, but, instead of appearing before the appellate medical board, the petitioner has approached this Court by filing the present writ petition, wherein this Court, vide order

dated 30.07.2014, passed interim order that the enquiry report dated 03.08.2013 and the order dated 08.05.2014 passed by the tribunal in O.A. No.1267 of 2012 would remain in abeyance and the petitioner's employment shall not be terminated without leave of this Court. It is contended that though the relief has already been granted to opposite party no.4 by the tribunal, but the same has not been availed of till now.

6. This Court heard Mr. M.K. Mohanty, learned counsel for the petitioner; Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State-opposite parties; and Mr. S. Rout, learned counsel appearing for opposite party no.4 by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. The materials available on record evident that a guidelines was issued vide Annexure-1 for filling up of five posts of Pharmacists under the CDMO, Khordha, out of which, one post was reserved for ST and four posts were reserved for UR category. The petitioner, though belonged to SEBC category, applied for appointment under UR category. He was appointed under UR (PH) category, as against one of the four vacancies meant for UR category. Had the petitioner been appointed under UR category, then there would not have been any dispute. As such, the selection and appointment of the petitioner was challenged by the opposite party no.4 before the tribunal by filing O.A. No. 1267 of 2012. As a doubt was entertained with regard to the physically handicapped certificate used by the petitioner in availing the benefits, the same being not obtained in the manner prescribed under law, opposite party no.4 approached this Court by filing W.P.(C) No. 22923 of 2012, which was disposed of, vide order dated 11.12.2012, with the direction that in the event opposite party no.4 filed a fresh representation, the opposite party no.1 shall consider and dispose of the same in accordance with law within a period of three months thereafter. On consideration of the said representation, direction was issued by opposite party no.1 to cause enquiry with regard to the physically handicapped certificate issued in favour of the petitioner. Pursuant thereto, though an enquiry was conducted on 25.07.2013, but the petitioner did not appear on the date fixed. The enquiry report clearly indicates that the petitioner had applied for both Pharmacist and MPHW (M) and, as such, he had applied as a general (UR) candidate for the post of Pharmacist and as SEBC for the post of MPHW (M). His caste certificate was examined, and it was proved that he is (Teli) by caste, which

comes under SEBC category and, as such, he had suppressed the truth for his appointment as UR (PH) candidate. When this was revealed, the then CDMO, vide letter no.2091/02-03-13, had asked for a show cause, but further action pursuant to such show cause has not been placed on record.

8. During course of enquiry, it was further revealed that the date of birth of the petitioner is 18.06.1974 and he had applied at Capital Hospital, Bhubaneswar for PH certificate on 01.07.2009, i.e., after a period of 35 years. The recruitment age is 21 to 32 years and, therefore, issuance of PH certificate on 01.07.2009 was a matter of question. If that is accepted, then the petitioner was appointed as Pharmacist at the age of 39 years, i.e., on 15.09.2012 and, as such, the petitioner had manipulated to receive the disability certificate of 50% from Capital Hospital on 01.07.2009. As per letter no.25384/G dated 20.09.2005 of General Administration Department of Govt. of Odisha, the persons with disabilities, when selected as per the reservation applied for them, shall claim the vacancies reserved for the categories to which they belong, which means that persons with disabilities who do not belong to either of the reserved categories would claim the unreserved vacancies. The petitioner though belonged to SEBC category, intentionally suppressed the fact and by non-production of caste certificate claimed appointment under UR category. Therefore, the Enquiring Officer came to hold that the petitioner had suppressed the truth of caste certificate and disability certificate and, as such, he should be terminated from service and appointment order should be issued in favour opposite party no.4.

9. Consequentially, the tribunal, taking into consideration the inquiry report, disposed of O.A. No. 1267 of 2012, vide order dated 08.05.2014, by observing that opposite party no.1 is required to take action on the enquiry report, directed the opposite party no.1 to take action on the inquiry report of Dr. P.K. Prusty, Additional Director, Health Services (P&MR) within a period of two months from the date of receipt of a copy of that order and communicate the order thereon to the opposite party no.4 within a period of 15 days thereafter. In compliance thereof, notice was issued to the petitioner to appear before the appellate medical board, vide letter dated 20.06.2014. But the petitioner, instead of appearing before the appellate medical board, approached this Court by filing the present writ petition challenging the order dated 08.05.2014 passed by the tribunal and, as such, obtained an interim order in his favour and till date he has not appeared before the appellate medicate board on the scheduled date, i.e., 02.09.2014.

10. But fact remains, the appointment of the petitioner has been made under UR (PH) category post, when such post was not advertised/ indicated in the guidelines (Annexure-1), rather the posts were meant for UR category. Therefore, it creates grave doubt as to how the authority could give appointment to the petitioner under UR(PH) category. So far as disability part is concerned, when opportunity was given to the petitioner, pursuant to the order passed by the tribunal, the petitioner did not appear before the appellate medical board and, as such, the enquiry report indicates that the petitioner has suppressed the truth of caste certificate and disability certificate. Therefore, recommendation was made for his termination and to issue appointment order in favour of opposite party no.4. Accordingly, when steps were to be taken by the authority, the petitioner approached this Court by filing the present writ petition.

11. In the above view of the matter, this Court is of the considered view that if the petitioner claims appointment on the basis of UR (PH) category, it is incumbent upon him to satisfy the authority that he is really entitled to such benefit in terms of the disability certificate issued in his favour, pursuant to guidelines issued vide Annexure-1. But, when notice was issued to him on 20.06.2014 vide Annexure-C/4 to appear before the appellate medical board, he did not appear. Therefore, on 17.10.2014, the Deputy Secretary to Government wrote a letter to the Director for Welfare of PWDs to furnish the authenticity report of the disability certificate of the petitioner immediately, so that the contempt case can be avoided. Thereafter, though the petitioner was directed to appear before the appellate medical board on 02.09.2014, but till date the petitioner has not appeared before the medical board.

12. In this case legal maxim, "*sublato fundamento cedit opus*" is squarely applicable, meaning thereby in case a foundation is removed, the superstructure falls.

13. In ***Badri Nath v. Government of Tamil Nadu***, AIR 2000 SC 3243, the apex Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders.

14. The inquiry report of Dr. Deepak Kumar Prusty, Addl. Director of Health Services (PMS &R)-cum-Enquiring Officer, who conducted the

enquiry on 25.07.2013, clearly reveals that the person with disabilities who do not belong to either of the reserved categories would claim the unreserved vacancies and, as such, the petitioner though belonged to SEBC category suppressed the fact by not producing his caste certificate deserving himself to be considered as a candidate under UR category. Further, on the basis of Employment Exchange Card of Junior Employment Officer, Khordha, it has been indicated that the petitioner belonged to PH (HI) of SEBC category. In paragraphs-7 and 8 of the enquiry report, it has been stated as follows:-

> *"7. A persons with hearing impairment having difficulty of various degrees in hearing sounds is an impaired person. The criteria for hearing disability certificate are-*
>
> *(a) Person should have hearing loss of 60 db HL or more in the better ear for conversational range of frequencies.*
>
> *(b) Word recognition score (speech discrimination) should be less than 50% in better ear.*
>
> *(c) The suggestion and recommendation for issue of Hearing Disability Certificate is in the proposed criteria 40% disability is kept as minimum to be called as PARTIALLY DEAF though as per PWD act only those above 53% (60 dbHL above) become eligible for social benefits.*
>
> *(d) Partially Deaf are those whose hearing loss in the better ear is 43 to 70 db HL in the better ear and binaural percentage of hearing disabilities is 40 to 68%.*
>
> *8. Sri Bijoy Kumar Sahoo had also submitted an undertaking to the effect that document if found incorrect will disqualify and the authority has every right to cancel the candidature."*

Thereafter, conclusion was made by the Enquiring Officer to the following effect:

> *"**CONCLUSION**-*
>
> *From the above backdrop of facts, it is crystal clear that Sri Bijoy Kumar Sahoo has suppressed the truth of caste certificate and disability certificate. Hence, we may terminate the delinquent Mr. Bijoy Kumar Sahoo and issue appointment order to Mr. Ashribad Mohapatra accordingly. CDMO, Khurda and the erring official should be tasked."*

15. In view of the conclusion arrived at by the Enquiring Officer, it appears that there was suppression of truth of caste certificate and disability

certificate by the petitioner and, therefore, the Enquiring Officer recommended for termination of service of the petitioner and to issue appointment order in favour of opposite party no.4. The Enquiring Officer also suggested that CDMO, Khordha and the erring official should be tasked. Further, the disability certificate which has been produced by the petitioner before this Court as at Annexure-2 itself creates suspicion, in view of the fact that nothing has been mentioned with regard to note 1 and 2 prescribed in the certificate which was issued under Rule-4(2) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and full participation) Rules, 1995 and as per the guidelines given by the Ministry of Welfare, Government of India, Gazette Notification No.4-2/83, H.W. III dated 6th August, 1986. The petitioner having entered into service, pursuant to such certificate issued under Annexure-2, which according to the Enquiring Officer was obtained by suppressing the truth, it is evident that he has got the benefit fraudulently.

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

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

18. In ***State of Maharastra v. Prabhu***, (1994) 2 SCC 481, the apex Court held that a writ Court while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. Equity is also known to prevent the law from the crafty evasions and sub-letties invented to evade law."

The same view has also been taken in ***Andhra Pradesh State Financial Corporation v. GAR Re-Rolling Mills***, AIR 1994 SC 2151.

19. In ***United India Insurance Co. Ltd. v. Rajendra Singh***, (2000) 3 SCC 581 : AIR 2000 SC 1165, the apex Court observed that "fraud and

justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

20. In ***Mohammed Ibrahim v. State of Bihar***, (2009) 8 SCC 751, the apex Court held that the ratio laid down by Supreme Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud.

21. In ***Sasikala Pusbpa and others v. State of Tamil Nadu***, (2019) 6 SCC 477, the apex Court held that fraud implies intentional deception aimed or achieving some wrongful gain or causing wrongful loss or injury to another.

22. In view of the fact and law, as discussed above, this Court is of the considered view that if the petitioner has got appointment by fraudulent manner, as his initial appointment under UR (PH) category was made against four vacancies which were advertised for UR category, that entry itself to the service, cannot sustain in the eye of law, as because no such post was advertised by the authority and, as such, nothing has been placed on record to substantiate the same nor any such fact has been pleaded in the writ petition. More so, the disability certificate which has been issued in favour of the petitioner creates a doubt and in paragraphs-7 and 8 of the inquiry report though explanation was offered, but in conclusion the Enquiring Officer opined that the petitioner has suppressed the truth of caste certificate and disability certificate. As such, the petitioner has not participated in the enquiry itself which was conducted in compliance of the direction given by this Court in W.P.(C) No.22923 of 2012 disposed of on 11.12.2012. Therefore, before taking any drastic action of removal from service, in the line of the impugned order dated 08.05.2014 passed by tribunal in O.A. No. 1267 of 2012, this Court is of the considered view that opportunity should be given to the petitioner to satisfy the authority, with regard to his appointment under UR (PH) category against the post meant for UR category, by justifying his disability on appearing before the appellate medical board. Accordingly, this Court directs the petitioner to appear before the appellate medical board, SCB Medical College and Hospital, Cuttack on 11.04.2022, so that the appellate medical board can examine him with regard to his disability and furnish a report in accordance with law. Needless to say, on the basis of the report to be furnished by the appellate medical board, the opposite party-authority shall take follow up action in accordance with law,

as expeditiously as possible, preferably within a period of four weeks therefrom.

23. With the above observation and direction, the writ petition stands disposed of.

24. A free copy of this judgment be handed over to Mr. A.K. Mishra, learned Addl. Government Advocate for compliance.

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2022 (I) ILR - CUT- 565

ARINDAM SINHA, J.

W.P.(C) NO. 32749 OF 2021

M/s. BALIMELA HYDRO ELECTRIC PROJECT (UNIT OF ODISHA HYDRO POWER CORPORATION LTD.) .....Petitioners

.V.

DISTRICT CONSUMER REDRESSAL COMMISSION & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ jurisdiction – Scope and ambit – Writ petition against the order passed by the Consumer Forum – Whether maintainable? – Held, No. – Reason indicated. (Para 9,10)

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 1274 : Govinda Menon Vs. Union of India.
2. AIR 2000 SC 2966 : Navinchandra N. Majithia Vs. State of Maharashtra.
3. AIR 1999 SC 22 : Whirlpool Corporation Vs. Registrar Of Trade Marks, Mumbai.
4. (1990) 2 SCC 533 : A. M. Mathur Vs. Pramod Kumar Gupta.
5. (2012) 6 SCC 491 : Amar Pal Singh Vs. State of Uttar Pradesh.

For Petitioners : Mr. D.P.Nanda, Sr.Adv.

For Opp. Parties : Mr. V.Mishra.

ORDER Date of Order: 15.12.2021

ARINDAM SINHA, J.

1. Mr. Nanda, learned senior advocate appears on behalf of petitioner and submits, counter has not been filed by opposite party no.2 inasmuch as his client has not received copy. What was sent by opposite party is **order dated 6th August, 2012** of the Supreme Court in **S.L.P.(C) nos.24228-24229 of 2012 (CC nos. 12891-12892 of 2012) (Cicily Kallarackal v. Vehicle Factory).**

2. Mr. Mishra, learned advocate appears on behalf of opposite party no.2 and on query from Court submits, his client has not filed counter in spite of direction given in paragraph 3 of order dated 16th November, 2021 because the case can be disposed of on the point of law decided by **order dated 6th August, 2012** (supra). He relies on paragraphs 2 and 7 of the order. It will be sufficient to reproduce paragraph-7.

> "7. While declining to interfere in the present Special Leave Petition preferred against the order passed by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, we hereby make it clear that the order of the Commission are incapable of being questioned under the writ jurisdiction of the High Court, as a statutory appeal in terms of Section 27 A (1)(c) lies to this Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of the Commission.
>
> A copy of this order may be sent to the Registrar General of all the High Courts, for bringing the same to the notice of Hon'ble the Chief Justices and Hon'ble Judges of the respective High Courts."

He submits, the Supreme Court in a **Petition for Special Leave to Appeal no.14434 of 2021 (STUC Awasiya Grahak Kalyaan Association vs. M/s Supertech Ltd.) by order dated 21st November, 2021** directed issuance of notice, on petitioner relying on **Cicily Kallarackal** (supra).

3. He submits further, his client invoked jurisdiction of the district Commission by filing the complaint as his client resides or personally works for gain within its local limits of jurisdiction. This has been provided under clause (d) in subsection (2) of section 34, Consumer Protection Act, 2019. If petitioner is aggrieved, there is statutory remedy of appeal against order of district Commission, provided in section 41 On query from Court he submits, the case was heard and reserved for judgment on 8th November,

2021. This was not told to Court earlier as he didn't have that instruction, when on 16th November, 2021, his client was directed to file counter. According to him, both omissions, regarding the district Commission case heard ex-parte and reserved for judgment and his client not filing counter, cannot be held against his client since no High Court has jurisdiction to entertain writ petitions against orders of the Commission as declared in **Cicily Kallarackal** (supra) and relied upon in **Kalyaan Association** (supra). When interference against orders of National Commission is barred, the bar covers all Commissions. His client is not obliged to comply with any direction issued in exercise of writ jurisdiction, having had approached the district Commission.

4. Text of order dated 16th August, 2021 is reproduced below:-

> "1. Mr. Nanda, learned senior advocate appears on behalf petitioner and submits, a frivolous complaint has been lodged in the Regional Branch of the State Commission of Uttar Pradesh (UP), at Aligarh. Opposite party is complainant, who rendered service to his client under a tender. The work was executed in Odisha. Impugned notice stands issued by the Commission, against which his client seeks issuance of writ of prohibition under clause (2) in article, 226 of the Constitution of India.
>
> 2. Mr. Mishra, learned advocate appears on behalf of opposite party no.2 complainant and submits, this Court does not have territorial jurisdiction over the Regional Branch of the State Commission at Aligarh. No writ can be issued against opposite party no.1. Furthermore, section 34 in Consumer Protection Act, 2019 enables a person such as his client to invoke jurisdiction of the Regional State Commission. He submits, his client has provided service to petitioner and seeks payment therefor.
>
> 3. This Court will decide on the question of jurisdiction, both of itself and thereafter, if necessary, of the Regional State Commission. For purpose of adjudication, opposite party no.2 will file counter disclosing the complaint made to the Regional State Commission and English translation, if same is in vernacular. Copy of the counter must be served on petitioner by 30th November, 2021. Petitioner will be entitled to use rejoinder on advance copy served. Affidavits will be accepted on adjourned date.
>
> 4. List on 6th December, 2021.
>
> 5. Mr. Nanda, prays for stay of proceeding in the State Commission at Aligarh. Petitioner has liberty to produce this order before the Commission and pray for adjournment."

The situation in absence of the information as on 16 th November, 2021 was, Court given to understand that only a notice had been issued by the district Commission, impugned in the writ petition. Now it appears, judgment has been reserved on ex-parte hearing.

5. Today Mr. Nanda points out from impugned notice that address of opposite party no.2, complainant in the case before the Commission at Aligarh, was given at New Delhi being, according to him, registered office of said party. Therefore, on the face of impugned notice there is clear indication that the Commission at Aligarh could not be moved by opposite party no.2, on claiming it resides or personally works for gain within local limits of jurisdiction of that Commission. He relies on following judgments of the Supreme Court:

(i) **Govinda Menon Vs. Union of India reported in AIR 1967 SC 1274**, paragraph 4 reproduced below:

> "The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. It is well-settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural justice (See Halsbury's Laws of England, 3rd Edn., Vol. II, p. 114). It was held for instance by the Court of Appeal in The King v. North 1927 (1) K.B. 491 that as the order of the judge of the consistory court of July 24, 1925 was made without giving the vicar an opportunity of being heard in his defence, the order was made in violation of the principles of natural justice and was therefore an order made without jurisdiction and the writ of prohibition ought to issue. But the writ does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. It is also well-established that a writ of prohibition cannot be issued to a court or an inferior tribunal for an error of law unless the error makes it go outside its jurisdiction (See Regina v. Comptroller-General of Patents and Designs, 1953 (2) W.L.R. 760, 765 and Parisienne Basket Shoes Proprietary Ltd. v. Whyte 59 C.L.R. 369). A clear distinction must therefore be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction then the matter is coram non Judice and a writ of prohibition will lie to the court or inferior tribunal forbidding it to continue, proceedings therein in excess of its jurisdiction."

(ii) **Navinchandra N. Majithia Vs. State of Maharashtra, reported in AIR 2000 SC 2966**.

He submits, the learned Judges in the Division Bench gave separate concurring views. It will be sufficient to extract and reproduce paragraph 13 from view expressed by K.T. Thomas, J.

> "We make it clear that the mere fact that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another State. Nor are we to be understood that any person can create a fake cause of action or even concoct one by simply jutting into the territorial limits of another State or by making a sojourn or even a permanent residence therein. The place of residence of the person moving a High Court is not the criterion to determine the contours of the cause of action in the particular writ petition. The High Court before which the writ petition is filed must ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends upon the facts in each case."

6. In **Navinchandra** (supra) it is noticed that the FIRs were registered in places outside territorial limits of Bombay High Court but, the writ petition was filed in that Court. Paragraph 13 reproduced in the last preceding paragraph is to be seen in context of such facts, for the declaration of law on 'cause of action' referred in article 226 in the Constitution of India. In **Govinda Menon** (supra), there was declaration of law regarding issuance of writ of prohibition.

7. In spite of record in order dated 16th November, 2021, opposite party no.2 chose to obstruct adjudication on the question of jurisdiction of this Court and thereafter whether or not the Commission at Aligarh is to be served writ of prohibition, by not disclosing its complaint. It also suppressed that the case was already heard ex-parte and judgment reserved. Obviously the party is so emboldened as armed with **Cicily Kallarackal** (supra).

8. It appears from **Cicily Kallarackal** (supra), in deciding the controversy, reference to factual controversy was said as not necessary. The Special Leave Petitions, though dismissed on ground of delay, following, reproduced below and extracted paragraph 7 reproduced earlier, were said.

> "Despite this, we cannot help but to state in absolute terms that it is not appropriate for the High Courts to entertain writ petitions under Article 226 of the Constitution of India against the orders passed by the Commission, as a statutory appeal is provided and lies to this Court under the provisions of the Consumer Protection Act, 1986. Once the legislature has provided for a statutory appeal to a higher court, it cannot be proper exercise of jurisdiction to permit the parties to bypass the statutory appeal to such higher court and entertain petitions in exercise of its powers under Article 226

> of the Constitution of India Even in the present case, the High Court has not exercised its jurisdiction in accordance with law. The case is one of improper exercise of jurisdiction. It is not expected of us to deal with this issue at any greater length as we are dismissing this petition on other grounds."

On query from Court parties have not been able to point out the provision, neither in Consumer Protection Act, 1986 nor Consumer Protection Act, 2019, on ouster of jurisdiction of Courts exercising writ jurisdiction.

9. Article 226 in the Constitution is a provision notwithstanding anything in article 32. Article 32 of the Constitution provides for remedies for enforcement of rights conferred by Part-III. Clause (2) in the article gives power to the Supreme Court to issue directions or orders or writs for enforcement of those rights. It is, therefore, clear that article 226 confers wider power on the High Courts. The Supreme Court in numerable decisions has said that the High Courts can be moved under article 226 of the Constitution although statutory alternative remedy is available, depending on the criteria declared, inter alia, in **Whirlpool Corporation vs. Registrar Of Trade Marks, Mumbai, reported in AIR 1999 SC 22**.

10. The High Courts are constitutional Courts while the Consumer Forums/Councils and the National Commission are authorities created by legislation on act of Parliament. It does not appear from **Cicily Kallarackal** (supra) that there was adjudication whether the Division Bench of the Kerala High Court entertained the writ appeal against the judgment and order passed by the National Consumer Disputes Redressal Commission, on a question within or without the scope of article 226 in the Constitution of India. There could not have been. The Special Leave Petitions were dismissed without issuance of notice. The dismissal was on the ground of inordinate delay, yet the caution, as seen and relied upon by opposite party no.2 to be a severe reprimand for exercising writ jurisdiction in matters under the Act of 1986 and now 2019. On the Special Leave Petitions dismissed, there was no appeal before the Supreme Court, for the order to be law declared as under article 141. However, there was direction in said order for circulation to all High Courts.

11. This Court notes with dismay, conduct of opposite party no.2. It is exactly that, which the Supreme Court said would happen unless appellate Courts exercise restraint. In **A. M. Mathur v. Pramod Kumar Gupta**, reported in **(1990) 2 SCC 533**, said Court said in paragraph 13 of the judgment, reproduced below.

> "13. Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is respect by the judiciary. Respect to those who come before the court as well to other coordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the Judge has failed in these qualities, it will be neither good for the Judge nor for the judicial process."

12. The High Courts are not subordinate to the Supreme Court as the Constitution did not provide an article empowering superintendence of the Supreme Court, corresponding to article 235. In this context may be seen judgment of the Supreme Court in **Amar Pal Singh vs. State of Uttar Pradesh**, reported in **(2012) 6 SCC 491**, paragraphs 1 and 15 reproduced below.

> "1. The present appeal frescoes a picture and exposits a canvas how, despite numerous pronouncements of this Court, while dealing with the defensibility of an order passed by a Judge of subordinate court when it is under assail before the superior court in appeal or revision, the imperative necessity of use of temperate and sober language warranting total restraint regard being had to the fact that a judicial officer is undefended and further, more importantly, such unwarranted observations, instead of enhancing the respect for the judiciary, creates a concavity in the hierarchical system and brings the Judiciary downhill, has been totally ostracised. Further, the trend seems to be persistent like an incurable cancerous cell which explodes out at the slightest imbalance. xx xx xx 15. In Ishwar Chand Jain v High Court of P & H it has been observed that while exercising control over the subordinate judiciary under Article 235 of the Constitution, the High Court is under a constitutional obligation to guide and protect the subordinate judicial officers."

13. Facts in this case are glaring. On behalf of opposite party no.2, there was no dispute to the submission of petitioner that said opposite party executed work under a contract and everything in relation thereto happened in Odisha. Clause (ii) in sub-section (7) under section 2 of Consumer Protection Act, 2019 makes the hirer or person availing service for consideration, to be consumer. Opposite party no.2 appears to be service provider. Nevertheless, this Court is bound by the caution in **Cicily Kallarackal** (supra) and will not entertain the writ petition.

14. The writ petition is dismissed.

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2022 (I) ILR - CUT- 572

D. DASH, J.

R.S.A. NO. 590 OF 2005

RAMESWAR LAL AGARWAL ……..Appellant

.V.

BANWARILAL SAHU …….Respondents

HINDU SUCCESSION ACT, 1956 – Section 15 – Provisions under – Suit for right, title and interest by way of adverse possession – The question arose as to whether the expression that "son and daughter"; used in clause-(a) of sub-section-(1) of section -15 of the HS Act would include the son and daughter of the female Hindu whom she had begotten from another husband, other than the present husband – Held, Yes.

"Thus, what has been stated as regards expression "sons" and 'children of predeceased sons' in clause-(a) of section-15(1) of the HS Act would also so hold and said in respect of the expression "daughters" and children of predeceased daughters' appearing in section-15(1)(a) of the HS Act. Therefore, in my considered view, the conclusion has to be that Basumati being the daughter born out of womb of Surji by her first husband, her children would fall within the expression "children of predeceased daughter" appearing in section-15(1)(a) of the HS Act so as to succeed to the interest of Surji which she had inherited from her husband Surju. For Basumati, the mother; children begotten through her first husband and the children begotten through her second husband are all her children for all purpose whatsoever when she stands under same relationship with moral duty/obligation and bindings towards all those children; the children from the side of both the husbands also stands equally. Thus, when there arises the question of succession to the property of the mother, all the children have to pay without any discrimination amongst them looking at the sources from where mother inherited the same. The view taken in the negative as suggested by the learned Counsel for the Appellant would in my view be wholly unfair, unjust and unacceptable; this having been clearly realized the Parliament in its wisdom while bringing the limited change. The Provision of subsection- 1 of section-15 by placing clauses such as (a) and (b) in subsection- 2 even with the non-obstante clause as placed "in the absence of any son or daughter (including the children of any pre-deceased son or daughter). In view of all these above, I find myself with the agreement taken by the learned Brother Judge in case of Sashidhar Barik & others (supra). In view of the aforesaid discussion and reasons, the answer in clear terms is recorded that on the death of Surji, her interest over the property of her husband namely, Surju inherited by her devolved upon the children of her predeceased daughter Basumati who are the Plaintiffs."

Case Laws Relied on and Referred to :-

1. AIR 2002 SC 1 : Bhagat Ram (D) Vs. Teja Singh (D).
2. AIR 1987 SC 1616 : Lachman Singh Vs. Kripa Singh and Ors.
3. AIR 2014 Ori 202 : Sashidhar Barik & Others Vs. Ratnamani Barik & Anr.
4. AIR 1985 HP 8 : Roshan Lal and another Vs. Dalipa.
5. AIR 1971 MP 129 : Keshri Parmai Lodhi and Anr Vs. Harprasad and Ors.

For Appellant : Mr. Ramaksnt Mohanty,S.N.Biswal, A.P.Bose, P.K.Samantaray, S.K.Mohanty & D.R.Mohanty

For Respondents : Mr. S.J.Pradhan, B.Sahoo, P.K.Patnaik,P.K.Patel, A.Tripathy

JUDGMENT Date of Hearing : 04.01.2022 : Date of Judgment :10.01.2022

D.DASH, J.

The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as 'the Code') has assailed the judgment and decree passed by the learned 2nd Adhoc Addl. District Judge, Sundargarh in RFA No.74 of 2004.

By the said judgment and decree, the First Appellate Court having allowed the Appeal filed by the Respondents (Plaintiffs) under Section-96 of the Code has set aside the judgment and decree passed by the learned Civil (Senior Division), Sundargarh in Title Suit No. 61 of 2001. The Trial Court having dismissed the suit filed by the Respondents as the Plaintiffs has decreed the suit in part; declaring his right, title and interest over the undivided half share which is his vendor had over the land in Schedule-A of the Plaint and directing that he cannot be dispossessed by the Respondents (Plaintiffs) from the suit schedule property or any part thereof without taking recourse to law; further keeping it open for the Appellant (Defendant) to get his half share and separate possession over the suit property worked out seeking partition.

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 assigned with the position in the Trial Court.

3. **Case of the Plaintiffs:-**

The land described in Schedule-A of the plaint had been purchased by one Surju Sahoo and he was residing in the house standing over there which he had constructed. He had two wives namely, Ramdulari and Surji @ Surya. Basumati being the daughter of Surji born through her first husband was also residing there. It is said that Surju Sahoo married to Surji when she

was leading the life of a widow having a daughter and that was when no issue was born out of his wedlock with his first wife i.e., Ramdulari. It is further stated that Surju had also brought Basumati, the daughter of Surji through her deceased-husband and she was given in marriage by him with one Rameswar Sahoo. That Basumati and Rameswar then also stayed with them in that house.

Plaintiffs are the sons of Basumati and Rameswar. They were born and brought up in the house of Surju and have been in possession of the said house as its owner, since Surji had no other heir.

Surju died in the year, 1972 and his interest in the suit property devolved upon his two widows. Five years thereafter, Ramdulari went to her father's house in the State of Bihar and thereafter she never turned back. Surji, the grandmother of the Plaintiffs had executed a Will in respect of her half interest in the suit property in favour of their daughter - Basumati (mother of the Plaintiffs). However, Basumati having predeceased Surji, the Will lost all its significance being of any assistance. Being the heirs of Surji as the sons of her predeceased daughter upon the death of Surji, the Plaintiffs claimed to have succeeded to her interest over the suit property. It is further stated that Ramdulari having been ousted from the suit property, Surji had acquired absolute right, title and interest over the suit property which has devolved upon the Plaintiffs on the death of Surji by virtue of her possession althrough by way of adverse possession.

Surji instituted a suit impleading Ramdulari and Basumati as the Defendants, when the suit land was recorded jointly in their name in the Hal Settlement Record of Right along with one Hiralal Sahoo who then claimed to have purchased the suit land along with Surju. The finding in the Appeal arising out of the said suit was to the effect that the Hiralal was not the co-purchaser. It was held therein that Surji being the wife of Surju Sahoo was competent to maintain the suit. Those, findings have been confirmed by this Court in Second Appeal. The status of Surji as the wife of Surju is said to have been conclusively established in that suit.

On 04.05.2001, the Plaintiffs received notice in Mutation Case No.242 of 2001, filed by the Defendant on the strength of a Registered sale-deed dated 23.02.1994 purportedly executed by the Ramdulari in favour of the Defendant in respect of the entire suit property. Thereafter, when the

order was passed in his favour, he threatened to dispossess the Plaintiffs from the suit property. So the suit has come to be filed. It is stated that Ramdulari had no subsisting right, title and interest over the suit property; she has not executed the sale-deed and even if it is so, the same has been by way of perpetration of fraud. It is also stated that there has been impersonation of someone else as Ramdulari in creating the said sale-deed. The Plaintiffs also in the alternative have claimed to have acquired title over the entire suit property by adverse possession.

4. The Defendant in his written statement has asserted that the marriage between Surju with Surji during the subsistence of Surju's marriage with Ramdulari, who was then living is void. Thus, it is stated that Surji did not acquire any right, title and interest over the suit property and as such, the Plaintiffs being the heirs i.e. the grandsons of Surji being the sons of Basumati who was born through her first husband have not acquired any interest over the suit property. It is further stated that Ramdulari being the sole heir of Surju, was the absolute owner having the right, title and interest over the suit land and thus she has rightly sold the same in favour of the Defendant by executing the sale-deed which has been registered which is valid and operative. The Defendant claims to have been purchased the suit land from Ramdulari for valuable consideration accompanied by due delivery of possession. The allegation as regards fraud, impersonation etc. have been denied.

The claim of the Plaintiffs that they have acquired title over the suit by adverse possession has also been denied. It is stated that the possession of the Plaintiffs over the suit land, if any, was permissive all through and there being no ouster, the claim of the Plaintiffs on that score of acquisition of title over the suit land by the party by adverse possession has no foundation. It is also stated that the sale-deed being not challenged within the period of limitation as prescribed under Article-58 of the Limitation Act, the suit as framed for the reliefs claimed being wholly barred by limitation is not entertainable.

5. On the face of the rival pleadings, the Trial Court had framed in all eight (8) issues.

Answering issue nos.6 & 8 which are important as to the claim of title of the Defendant by virtue of the registered sale-deed dated 23.02.1994

and that of the Plaintiffs by way of adverse possession; the answer has been recorded against the Plaintiffs. It is held that the Plaintiffs being the children of Basumati, the daughter born to Surji through her first husband when marriage of Surji with Surju is void, they stand as strangers to the property of Surju and Surji had never succeeded to the same, whereafter they have no right to challenge the sale-deed. It is held that the Defendant has the right, title and interest over the suit land, because Ramadulari being the sole heir of Surju has rightly sold the same to the Defendant by executing the registered sale-deed clothing the Defendant with the right, title and interest in so far as suit land is concerned.

The suit has been also held to be barred by limitation, while answering issue no.3. Answers to the other issues have followed the same path.

6. The lower Appellate Court being moved by the unsuccessful Plaintiffs has gone for independent appreciation of evidence on record in the backdrop of the rival case as projected by the parties.

It has held that:-

i) That the marriage of Surji with Surju is not void but valid as it had then place prior to the coming into force of the HS Act;

ii) that the suit is not barred by limitation. When the Defendant took steps for mutation of the land on the strength of the said registered sale-deed in the year, 2001 and then the cause of action having arisen, the suit has been filed in the same year;

iii) the Plaintiffs being the children of the predeceased daughter of that Surji through her first husband are not excluded from having any the share in the property inherited by Surji from her husband Surju as upon death of Surju; Ramdulari and Surji succeeded to his property as tenants-in-common and upon death of Surji, the Plaintiff's being the children of her predeceased daughter Basumanti succeeded to Surji's interest that she succeeded over the property of Surju which was absolute in the hands of Surji; and

iv) the Plaintiffs claim in respect of entire suit property cannot be sustained for the reason that Surji from whom they claim to have inherited the property had only half interest over their whereas Ramdulari had her half interest which she had transferred to the Defendant.

7. The present Appeal has been admitted on the following substantial question of law:-

> (i) Whether on the death of the second wife of Surju namely, Surji, the property of Surju inherited by her from that Surju would devolved upon his surviving heir namely, Ramdulary, the first wife, not on Basumati; the daughter of Surji in consolance with the provisions of section-15(2)(b) of the Hindu Succession Act, 1956?

8. Mrs. S. Mohanty, learned Counsel for the Appellant inviting the attention of this Court to the provision of sub-section-(1) and (2) of section-15 of the Hindu Succession Act, 1956 (hereinafter, called as 'the HS Act') submitted that the source of claim of inheritance of the suit property by the Plaintiffs is through Surju and after Surju's death in the year, 1972, his widows Ramdulari and Surji inherited the suit property as tenants in common. She further submitted that on the death of Surji in the year, 1988, Ramdulari succeeded to the interest that Surji had inherited over her husband Sarju's property in consonance with the provision of section-15 (2)(b) of the HS Act as the children of predeceased daughter of Surji born through her first husband cannot be taken to be falling within the expression of 'children of predeceased daughter' as finds mention in clause (a) of sub-section-(1) of section-15 of the HS Act. She submitted that the law has been well settled in case of *Bhagat Ram (D) Vrs. Teja Singh* (D); AIR 2002 SC 1, that the source from which she inherited the property is always important and that would thus govern the situation. She, therefore, submitted that the Plaintiffs cannot claim, to be the children to predeceased daughter of Surji through Surju who originally held the property. Placing much reliance on the decision of Gauhati High Court in case of *Smt. Dhanistha Kalita Vrs. Ramakanta Kalita and others;* AIR 2003 Gauhati 92, she submitted that the expression son or daughter "including the children of any also predeceased son or daughter" of such Hindu female; here, it is Surji would mean son and daughter begotten by Surji from her husband Surju, interest in whose property she had inherited and not the son or daughter whom she had begotten from her erstwhile husband who has no in connection at all with the suit property. She thus, submitted that the Plaintiffs have no such right, title and interest over the suit land and they are complete strangers to the same and thus have no locus to maintain the suit in questioning the sale made on 23.02.1994 by the Ramdulari in favour of the Defendant.

9. Mr. B. Sahoo, learned Counsel for the Respondents submitted that upon the death of Surju, his properties were inherited by Surji and Ramdulari as tenants-in-common and they become the absolute owner in possession of the same in half and half, since Surju died without any issue from both of his wives. He submitted that therefore, the share / interest of Surji, one of the wives of Surju would devolve upon the present Plaintiffs who admittedly are the children of Basumati, the daughter of Surji who had predeceased Surji. He submitted that Basumati, the mother of the Plaintiffs being the daughter born to Surji through her first husband for all purpose is her daughter falling within the expression "daughter" appearing in section-15(1)(a) of the HS Act and therefore the provision of section-15(2)(b) of HS act would not yet attracted to govern the field of succession of the interest that Surji had over the properties of Surju.

In support of his submission, he placed reliance on the decision of the Hon'ble Apex Court in case of Lachman Singh Vrs. Kripa Singh and others; AIR 1987 SC 1616 and a decision of this Court in case of *Sashidhar Barik & Others Vrs. Ratnamani Barik & Another;* AIR 2014 Ori 202. In view of the above, he contended that the answer to the substantial question of law must receive the answer in favour of the view taken by the lower Appellate Court and as such, according to him, the judgment and decree passed by the said Court are not liable to be interfered with.

10. In order to address the above rival contentions, first it would be apt to place section-15 of the HS Act, The same runs as under:-

General rules of succession in the case of female Hindus.-

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-

(a) firstly, *upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;*

(b) secondly, *upon the heirs of the husband;*

(c) thirdly, *upon the mother and father;*

(d) fourthly, *upon the heirs of the father; and*

(e) lastly, *upon the heirs of the mother.*

(2) Notwithstanding anything contained in sub-section (1),-

> (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
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> (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased - (including the children of any predeceased son or daughter) not upon the other heirs referred to in subsection (1) in the order specified therein, but upon the heirs of the husband.

What has been stated about the expression 'sons' in Clause (a) of Section 15(1) of the Act can equally be stated about the expression 'daughters' appearing in Section 15(1)(a) of the Act. Therefore, the inevitable conclusion is that being a daughter born out of the womb of Lata by her first husband the plaintiff-respondent No.1 comes within the expression 'daughters' appearing in Section 15(1)(a) of the Act and with the application of Rule-1 of Section 16 of the Act, the Appellants, who are coming within the expression 'heirs of the husband', are to be kept away/ behind from succeeding to the properties left behind by Lata even though she inherited the same from her second husband-Kalakar and he is not the father of plaintiff-respondent No.1.

When once a property becomes the absolute property of a female Hindu, it shall devolve first on her children (including children of the predeceased son and daughter) as provided in section-15(1)(a) of the HS Act and then on other heirs subject only to the limited change introduced in section-15(2) of the HS Act.

11. The question now stands to be determined is whether the expression that "son and daughter"; used clause-(a) of sub-section-(1) of section-15 of the HS Act would include the son and daughter of the female Hindu whom she had begotten from a husband other than the husband; interest in whose property she had inherited and is now the subject matter of the suit.

12. The factual settings of the case before Apex Court in *Bhagat Ram Vrs. Teja Singh* (supra) were the followings:-

In lieu of property of one Kehar Singh in Pakistan, his widow Kirpo was allotted some land in India. Kirpo died leaving behind two daughters namely, Santi and Indro who inherited said property equally. Santi died in

1960. So, the property left by her was mutated in the name of Indro who had entered into an agreement for sale with Bhagat Ram for sale and that Bhagat Ram having filed a suit for specific performance was decreed. One Teja Singh (brother of Santi's predeceased husband) filed the suit alleging that on the death of Santi in 1960, the property in question devolved on him by virtue of section-15(1)(b) of the HS Act. The Trial Court decreed the suit filed by Teja. The First Appeal and Second Appeals were also dismissed. The Apex Court held as under:-

> "8. We do not find any merit in the contention raised by the counsel for the respondents. Admittedly, Smt Santi inherited the property in question from her mother. If the property held by a female was inherited from her father or mother, in the absence of any son or daughter of the deceased including the children of any predeceased son or daughter, it would only devolve upon the heirs of the father and, in this case, her sister Smt. Indro was the only legal heir of her father. The deceased Smt Santi admittedly inherited the property in question from her mother. It is not necessary that such inheritance should have been after the commencement of the Act. The intent of the legislature is clear that the property, if originally belonged to the parents of the deceased female, should go to the legal heirs of the father. So also under clause (b) of sub-section (2) of Section 15, the property inherited by a female Hindu from her husband or her father-in-law, shall also under similar circumstances, devolve upon the heirs of the husband. It is the source from which the property was inherited by the female, which is more important for the purpose of devolution of her property. We do not think that the fact that a female Hindu originally had a limited right and later, acquired the full right, in any way, would alter the rules of succession given in sub-section (2) of Section 15.
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> 9. A question of similar nature was considered by this Court in *Bajaya v. Gopikabai;* AIR 1978 SC 793. In that case, the suit land originally belonged to G, son of D. G died before the settlement of 1918 and thereafter, his land was held by his son, P who died in the year 1936. On P's death, the holding devolved on P's widow, S. S died on 6-11-1956, and thereupon dispute about the inheritance to the land left behind by S arose between the parties. The plaintiff claimed that she being the daughter of T, a sister of the last male holder, P was an heir under Section 15 read with the Schedule referred to in Section 8 of the Hindu Succession Act, 1956, whereas the defendants claimed as 'sapindas' of the last male holder under Mitakshara law. Speaking for the Bench, Hon'ble R.S. Sarkaria, J. held that the case would fall under clause (b) of sub-section (2) of Section 15 because S died issueless and intestate and the interest in the suit property was inherited by her from her husband and the property would go to the heirs of the husband.
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> 10. In *State of Punjab v. Balwant Singh*; AIR 1991 SC 2301, also, a question of similar nature was considered. In that case, the female Hindu inherited the property from her husband prior to the Hindu Succession Act and she died after the Act. On being informed that there was no heir entitled to succeed to her property, the

Revenue Authorities effected mutation in favour of the State. There was no heir from her husband's side entitled to succeed to the property. The plaintiff, who was the grandson of the brother of the female Hindu claimed right over the property of the deceased. The High Court held that the property inherited by the female Hindu from her husband became her absolute property in view of Section 14 and the property would devolve upon the heirs specified under Section 15(1). The above view was held to be faulty and this Court did not accept that. It was held that it is important to remember that female Hindu being the full owner of the property becomes a fresh stock of descent. If she leaves behind any heir either under sub-section (1) or under sub-section (2) of Section 15, her property cannot be escheated.

11. In *Amar Kaur v. Raman Kumari*; AIR 1985 P & H 86, a contra view was taken by the High Court of Punjab and Haryana. In this case, a widow inherited property from her husband in 1956. She had two daughters and the widow gifted the entire property in favour of her two daughters. One of the daughters named Shankari died without leaving husband or descendant in 1972. Her property was mutated in favour of her other sister. At the time of death of Shankari, her husband had already died leaving behind another wife and a son. They claimed right over the property left by the deceased female Hindu. In para 4 of the said judgment, it was held as under:

"Smt. Shankari succeeded to life estate, which stood enlarged in her full ownership under Section 14(1) of the Act. Since smaller estate merged into larger one, the lesser estate ceases to exist and a new estate of full ownership by fiction of law came to be held for the first time by Smt. Shankari. The estate, which she held under Section 14(1) of the Act, cannot be considered to be by virtue of inheritance from her mother or father. In law it would be deemed that she became full owner of this property by virtue of the Act. On these facts it is to be seen whether Section 15(1) of the Act will apply or Section 15(2) of the Act will apply. Section 15(2) of the Act will apply only when inheritance is to the estate left by father or mother, in the absence of which, Section 15(1) of the Act would apply".

12. We do not think that the law laid down by the learned Single Judge in the above said decision is correct. Even if the female Hindu who is having a limited ownership becomes full owner by virtue of Section 14(1) of the Act, the rules of succession given under sub-section (2) of Section 15 can be applied. In fact, the Hindu Succession Bill, 1954 as originally introduced in the Rajya Sabha did not contain any clause corresponding to sub-section (2) of Section 15. It came to be incorporated on the recommendations of the Joint Committee of the two Houses of Parliament. The reason given by the Joint Committee is found in clause 17 of the Bill, which reads as follows:

"While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that, properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would

> prevent properties passing into the hands of persons to whom justice would demand they should not pass".
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> 13. The source from which she inherits the property is always important and that would govern the situation. Otherwise persons who are not even remotely related to the person who originally held the property would acquire rights to inherit that property. That would defeat the intent and purpose of sub-section (2) of Section 15, which gives a special pattern of succession."

Having held as above, the Hon'ble Apex Court finally refused to take a different view as held earlier in that case on 31.03.1999 and said in that case that the property held by Santi was the property inherited by her from her mother and therefore clause (a) of sub-section-2 of section-15 of the HS Act is the appropriate rule to be applied for succession of the property left by the deceased-Santi and Teja Singh had no right in the property left by Santi and that would devolve on her sister Indro. In the given case, Santi died intestate leaving behind no issue born from her womb.

13. In the case before Gauhati High Court in Smt. Dhanistha Kalita (supra), which has been v ery much relied upon by the learned Counsel for the Appellant, one Shyamrai had two wives. The first wife predeceased him, leaving a daughter Taveli and Shyamrai married Maheswari who was then a widow and she had a son namely, Jagat Kalita begotten from her predeceased husband Shyamrai died in the year 1946 when Teveli was having any share in the property left by her father Shyamrai by virtue of the provisions of Hindu women's Right to Property Act, 1937 under which no right of inheritance was given to the married daughter over the property of her deceased father. After death of the second wife of Shyamrai, that son of second wife through her first husband occupied the suit properties and he sold some to various persons. So, the question arose as to whether upon the death of Shyamrai, the suit lands which had devolved upon his second wife, after her death would be inherited by the heirs of the daughter of Shyamrai on the heirs of the daughter of Shyamrai on the heirs of the second wife of Shyamrai i.e. Teveli born through her first wife, or the heirs of the second wife of Shyamrai through her first husband. The Court answered that it would devolve upon the heirs of Shyamrai i.e. the children of his daughter born through the first wife and not on the son of the second wife Maheswari born through her first husband.

14. It appears that the conclusion of Gauhati High Court in case of *Smt. Dhanistha Kalita* (supra) that son or daughter of a female would mean the

son and daughter begotten by her from the husband whose property she has inherited, is based on the observation made by the Hon'ble Apex Court in case of Bhagat Singh (supra). The facts of the said case of Bhagat Singh (supra) when gone through would reveal that the observation of the Hon'ble Apex Court have been made in the given situation, where the female Hindu died intestate leaving behind no issue born from her womb.

In our case, upon the death of Surju, his two wives namely, Ramdulari and Surji, inherited the properties of Surju absolutely and they become the absolute owners taking half and half interest therein. So that, interest of the wife(s) shall devolve first upon her children (including the children of predeceased son and daughter) as provided in section-15(1)(a) of the HS Act then on other heirs subject only to the limited change introduced in section-15(2) of the HS Act. So, only in the absence of any son or daughter of Surji who inherited property from her husband-Surju, the said inherited interest would have been succeeded to by that Ramdulari by virtue of section-15(2) of the HS Act.

In case of *Lachman Singh* (supra), the Hon'ble Apex Court have decided that once property become absolute property of female Hindu, it shall devolve first upon the children (including children of predeceased son and daughter) as provided in section-15(1)(a) of the HS Act and then on other heirs except only to the limited change introduced in section- 15(2) of the HS Act. It has also been decided that the stepson and stepdaughter of the female Hindu would come as heir only under clause- (b) of section-15(2) of the HS Act. It has next been observed that the rule of devolution under section-15 of the HS Act applies to all kinds of properties left behind by a female Hindu except those dealt by clause-(a) and (b) of section-15 of the HS Act which makes a distinction as regards property inherited from her parents and the property inherited from her *husband or father-in-law and that too when she leaves no son and daughter including children of predeceased sons and daughters.*

15. In case of *Roshan Lal and another Vrs. Dalipa*; AIR 1985 HP 8, the Respondent was the son of one Pari born during her wedlock with her first husband Kithu. Subsequently, after the death of Kithu, Pari contacted a second marriage with Punnu, who died intestate in 1959 leaving behind Pari. No issue was born during the second marriage of Pari. The Respondent filed a suit claiming the share of Punnu. The defendants, who are the collaterals of

Punnu, resisted the suit on the ground, inter alia, that the Respondent being the son of Kithu could not claim to succeed to the estate of Pari. The High Court of Himanchal Pradesh held that since the Respondent is found to be the son of Pari, *sub-section (2) of Section 15 of the Act is not attracted in as much as the said section operates 'in the absence of any son or daughter of the deceased'*. It is further observed that for the purposes of succession to Pari's estate under Section 15(1)(a) of the Act it is immaterial whether the Respondent was the offspring of the marriage of Pari with Kithu or of her illicit relationship with Punnu.

16. In *Keshri Parmai Lodhi and another* -Vrs.- Harprasad and others; AIR 1971 MP 129, the question to be answered was whether the word 'son' should be restricted to the son of the husband from whom the Hindu female inherited the property or it should include sons of the Hindu female irrespective of whether they are born of the husband whose property is in dispute. While answering this question, it was observed that from the language used in sub-section (1) and (2) of Section 15 of the Act it is clear that the intention of the Legislature is to allow succession of the property to the sons and daughters of the Hindu female and only in the absence of any such heirs the property would go to the husband's heirs. In Mulla Hindu Law by Sir D.F. Mulla (24th Edn.), it is commented on Section 15(1)(a) of the Act that in case of a female intestate who had remarried after the death of her husband or after divorce her sons by different husbands would *also be her natural sons and entitled to inherit the property left by the female Hindu regardless of the source of the property*.

17. The Gauhati High Court's conclusion that son or daughter of a female will mean the son or daughter begotten by her from the husband whose property she has inherited, is based on the observations made by the Hon'ble Apex Court in *Bhagat Ram's* case (supra). This Supreme Court judgment has been cited by both the parties. Learned counsel for the Appellants puts much stress on the Hon'ble Apex Court's observation that the source from which the Hindu female inherits the property is always important, otherwise, persons who are not even remotely related to the person who originally held the property would acquire rights to inherit the property and that would defeat the intent and purpose of subsection (2) of Section 15. In my considered view, the said observation of the Hon'ble Apex Court applies to a situation where the female Hindu has died *intestate leaving behind no issue born from her womb.*

18. In the given case, Basumati being the daughter born to Surji through her first husband is certainly her daughter coming within expression "daughter" appearing in section-15 of the HS Act, so also her children, the Plaintiffs as "the children of predeceased daughter" and thus the provision of sub-section-(1) of section-15 of the HS Act would govern the situation. In the very case of *Lachman Singh* (supra), it has been observed that the word "sons" in clause-(a) of section-15(1) of the Act includes; (i) sons born out of womb of female by the same husband or different husband including illegitimate sons too in view of section-3(j) of the HS Act and adopted sons who are deemed to be sons for the purpose of inheritance and children of any predeceased son or adopted son also fall within the meaning of the expression.

Thus, what has been stated as regards expression "sons" and 'children of predeceased sons' in clause-(a) of section-15(1) of the HS Act would also so hold and said in respect of the expression "daughters" and children of predeceased daughters' appearing in section-15(1)(a) of the HS Act. Therefore, in my considered view, the conclusion has to be that Basumati being the daughter born out of womb of Surji by her first husband, her children would fall within the expression "children of predeceased daughter" appearing in section-15(1)(a) of the HS Act so as to succeed to the interest of Surji which she had inherited from her husband Surju. For Basumati, the mother; children begotten through her first husband and the children begotten through her second husband are all her children for all purpose whatsoever when she stands under same relationship with moral duty / obligation and bindings towards all those children; the children from the side of both the husbands also stands equally. Thus, when there arises the question of succession to the property of the mother, all the children have to pay without any discrimination amongst them looking at the sources from where mother inherited the same. The view taken in the negative as suggested by the learned Counsel for the Appellant would in my view be wholly unfair, unjust and unacceptable; this having been clearly realized the Parliament in its wisdom while bringing the limited change. The Provision of subsection-1 of section-15 by placing clauses such as (a) and (b) in subsection-2 even with the non-obstante clause as placed "in the absence of any son or daughter (*including the children of any pre-deceased son or daughter*). In view of all these above, I find myself with the agreement taken by the learned Brother Judge in case of Sashidhar Barik & others (supra).

In view of the aforesaid discussion and reasons, the answer in clear terms is recorded that on the death of Surji, her interest over the property of her husband namely, Surju inherited by her devolved upon the children of her predeceased daughter Basumati who are the Plaintiffs.

19. Coming to address the submission of the learned Counsel for the Appellant as to formulation of one more substantial question of law; here the sale deed in view of the above answer when is held to be valid as to the extent of the share that Ramdulari, the vendor of the Defendant had over the suit property when she had no such authority for sale of entire property being a co-sharer, taking in moiety; this Court is of the view that there arises no need also to formulate the substantial question of law as urged by the learned Counsel for the Appellant as to if the sale deed in question dated 23.02.1994 being not questioned within the period prescribed in Article-58 of the Limitation Act, the suit for said relief is barred.

20. Resultantly, the Appeal stands dismissed. There shall however be no order as to cost.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No. 4587 dated 25th March, 2020 as modified by Court's Notice No. 4798 dated 15th April, 2021 and Court's Office order circulated vide Memo No.514 and 515 dated 7th January, 2022.

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2022 (I) ILR - CUT- 586

D. DASH, J.

S.A. NO.116 OF 2002

LALA PRAHALAD LALA (SINCE DEAD) ……..Appellant.

.V.

Sk. TAJMUL HOSSEIN AND ORS. ……...Respondents.

TRANSFER OF PROPERTY ACT, 1882–Section 58(c), 60 – When the deed/transaction as a mortgage with a conditional sale and not a sale

with condition to repurchase – Wether execution and registration of a deed of re-conveyance is required after the payment of mortgage money within due period – Held, Not the legal need.

For Appellant **:** M/s. S.K. Dash, Sr. Adv, S.Dash, D. Priyanka, S. Kar, M/s. S.P. Misra, Sr. Adv., S.K.Mishra, S. Modi, S.K. Sahoo, B. Mohapatra, B.S. Panigrahi, S. Mishra, M/s. B.P. Mohapatra, Miss A. Dhalasamanta

For Respondents : M/s.Akhil Mohapatra, Sr. Adv.,G. Mukherji, Sr. Adv., B. Mallik, R.C. Sahoo, P. Mukherji, S.R. Patra, S. Patnaik, M/s. J.K. Patra, A. Pradhan, A. Panda.

JUDGMENT Date of Hearing:14.02.2022:Date of Judgment:16.03.2022

D. DASH, J.

The Appellant by filing this Appeal under Section 100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned Additional District Judge (First Track Court-2), Bhubaneswar in Title Appeal No.26/16 of 2000/2001.

By the same, the judgment and decree passed by the learned Civil Judge (Junior Division), Bhubaneswar in Title Suit No.195 of 1998 have been set aside.

The Appellant as the Plaintiff had filed the suit for declaration that the Defendant had no right, title and interest over the suit land described in Schedule-'B' of the plaint with further prayer of recovery of the property described in Schedule-A and A-1 which are part of Schedule-'B' property.

The suit having been decreed, the Defendant being aggrieved by the same, filed the Appeal under Section-96 of the Code. The Appeal being allowed, the judgment and decree passed by the Trial Court have been set aside and the Plaintiff has thus been non-suited.

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 Suit.

3. The Plaintiff's case is that he and his three sons are the owners of the suit land described under Schedule-C of the plaint. Their name finds so recorded in the records of 1965 settlement in respect of three plots in total

measuring Ac.0.235 decimals. They have their residential house with the backyard on two plots. They have constructed some houses over the three plots in order to rent out. It is stated that Defendant is residing as the tenant over an area Ac.0.19 decimals out of Ac.0.50 decimals under Plot No.108 as shown in Schedule-A and has been paying rent to the Joint Hindu family of the Plaintiff.

Lala Jagannath and Lala Jaman being in need had borrowed a sum of Rs.1,200/- (Rupees one thousand two hundred) from the Defendant. For the purpose, they had executed the deed mortgage with conditional sale in respect of Schedule-B land. There was no prior partition of the joint family property and therefore, there was no delivery of possession of Schedule-B property pursuant to the said transaction. It is stated that before expiry of the mortgage period of two years, the Plaintiff on 25.03.1975 returned the mortgage money of Rs.1,200/- to the Defendant through his brother. The redemption was endorsed by the Defendant on the back page of the deed and then the Defendant returned the original deed of mortgage to the Plaintiff and his brother. After that the Defendant however continued to remain as a tenant in so far as Schedule-A property is concerned. The Plaintiff who having the ownership as of his 1/4th share became full owner of the suit land described in Schedule-C when the other co-owners alienated their 3/4th share to him by registered sale-deed dated 27.06.1977. The property described in Schedule-A & B of the plaint are part of the Schedule-C property. The Plaintiff has made repair work in the house standing on the western portion of the land under Plot No.108 from which the tenant was evicted through Court. One P. Keshav Rao who is the tenant in the room on the western portion of Plot No.108, vacated his house on 25.05.1998, which the Plaintiff kept under lock and key. It is stated that when he had been to Vishakhapatnam with his family to attend the marriage function, the Defendant forcibly occupied the said house and did not vacate despite demand. Sometime in the month of December, 1997, the Plaintiff requested the Defendant to vacate the suit house as it was badly needed for repair and his personal use thereafter. The Defendant then stopped paying monthly rent to the Plaintiff and advanced claim of his right, title, and interest over the same by virtue of the mortgage deed dated 17.06.1974. The Plaintiff terminated the tenancy, serving notice under section-106 of the Transfer of Property Act, 1882 (for short, the 'TP Act')

It is further stated that the Plaintiff is in peaceful possession over the Schedule land and Defendant is a tenant having no right, title and interest over the property described in Schedule-B.

4. The Defendant entering appearance contested the suit, disowned the relationship of the landlord and tenant as pleaded by the Plaintiff. It is described that he has been possessing the portion of the house from 17.06.1974 on the strength of conditional mortgage deed executed by the Lala Jagannath and Lala Jaman being so delivered with the physical possession of the land measuring Ac.0.117.1/2 decimals. It is stated that there was no redemption of the mortgage by payment of Rs.1,200/- and there was no instrument of re-conveyance. He alleged that the Plaintiff stealthily took away the original mortgage deed and claiming title over the said property without any basis. The Defendant asserted to have never handed over the possession of the land under mortgage deed. In this way, the Defendant claims to have been in possession of the said land for more than 12 years.

5. The Trial Court on the above rival pleadings framed as many as eight issues.

First coming to answer issue no.5 as to the relationship of landlord and tenant between the Plaintiff and Defendant as pleaded and upon examination of evidence on their assessment, answer has been recorded that the Defendant was a tenant under the Plaintiff's joint family property.

Next proceeding to answer issue no.6 as to the claim of right, title and interest as advanced by the Defendant on the strength of the registered deed of mortgage (Ext.2); taking into consideration the oral evidence let in by the parties and on through the documents mainly Ext.2 and other related documents, the answer has been recorded against the case/ claim of the defendant.

6. Above answers have led the Trial Court to decree the suit by the following order:-

ORDER

"The suit is decreed on contest against the Defendant, but without cost. It is hereby declared that the Defendant has no right, title interest over the Schedule-B land as

> per the mortgage deed executed on 17.6.74. The defendant is hereby directed to handover the vacant possession of the suit house as per the Schedule-A and Schedule-A/1 to the Plaintiff within three months hence, failing which, the Plaintiff shall be at liberty to recover the same through process of law."

7. The Defendant being aggrieved by the same having filed the First Appeal has been successful in non-suiting the Plaintiff. The Appellate Court has first of all taken the view that the disputed endorsement Ext.2/a which purports to extinguish the mortgage since has not been registered, the redemption is invalid. It has next said that the Defendant has come to possess the suit property by virtue of the deed of mortgage and not as a tenant.

Having concluded as above, the suit filed by the plaintiff has been dismissed.

8. The Appeal by order dated 02.02.2009 has been admitted on the following substantial question of law:-

> "(a) Whether the mortgage created by the Plaintiff in favour of the Defendant over a portion of the suit property can be treated to be redeemed without execution and registration of a deed of re-conveyance as contemplated under the mortgage deed?

9. Learned Counsel for the Appellant inviting the attention of the Court to Ext. 2/a, the endorsement at the back of the document submitted that the entire mortgage money here has been repaid within a period of two years and as endorsed by the Defendant, there being acknowledgement of the receipt of the mortgage money by him and return of the original document to the Plaintiff, the same has been produced and proved. He submitted that when the Defendant has said that the deed had been stealthily taken away from him, he has utterly failed to prove the same by leading acceptable evidence. He therefore submitted that the First Appellate Court having not taken all the above aspects into consideration, has taken the views which are wholly contrary to law. According to him, the First Appellate proceeded to decide the dispute without keeping in view the law holding the field. It was submitted that in view of the evidence on record, the deed of mortgage Ext.2 having spent all its legal force on repayment of the mortgage money much ahead of the period fixed, the Trial Court had rightly granted the reliefs to the Plaintiff as prayed for. He further submitted that even if it is said that the Plaintiff and Defendant had no such relationship of landlord and tenant; the Defendant's having no right to possess the suit land when undisputedly the

title of the suit land rests with the Plaintiff; the reliefs as prayed for are to be allowed.

10. Learned Counsel for the Respondent submitted all in favour of the views taken by the First Appellate Court. He submitted that the First Appellate Court has rightly taken the view that the endorsement Ext.2/a is not to be taken cognizance of as the same is not in accordance with law and that should have been by a separate registered instrument.

11. In order to find out the answer to the substantial question of law first of all the contents of the document in question, Ext.2 are to be gone through. The document contains the recital to the effect that the money had been lent/ advanced as against the mortgage of Schedule-B property and the money if not paid within a period of two years; the transaction would be treated as that of sale. So, when the deed/ transaction is a mortgage with a conditional sale and not a sale with the condition to repurchase; here the execution and registration of any conveyance by the mortgager do not stand as the legal need.

The endorsement on the back of the document Ext.2/a and 2/b reveal that the entire money has been repaid well within the stipulated period of two years and that has been so endorsed by the Defendant himself. So, the contingency that it would amount to sale if the Plaintiff does not pay within the time stipulated even had not by then arisen. The original document i.e. Ext.2 has been so produced and proved by the Plaintiff, which he says to have been returned to him by the Defendant. The date of execution of the document being on 17.06.1974, as against the period allowed for repayment by two years, the mortgage money has been repaid on 25.03.1975.

12. Chapter-IV of the T.P. Act provides the heading "of Mortgage of Immovable Property and Charges". Section-58 of the said Act defines 'Mortgage', 'Mortgager', 'Mortgagee', 'Mortgage money' and 'Mortgage deed'. Clause-(c) of said section is relevant for our case since it deals with Mortgage by Conditional Sale. It reads as under:-

> "*Section-58 (c) Mortgage by condition sale*:- where, the mortgagor ostensibly sells the mortgaged property- on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made the sale shall become void,

> or on condition that on such payment being made the buyer shall transfer the property to the seller,
>
> the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale."

13. Section-60 of the Act provides the right of mortgagor to redeem. It says that in the event, the mortgage-money is paid by the mortgagor, the mortgagee is under obligation to (a) deliver the mortgage deed and all documents relating to the mortgaged property which are in possession or power of the mortgage (b) where the mortgagee is in possession of the mortgaged property and at the cost of mortgagor, either to retransfer the mortgaged property to him or to such third person as he may direct; or to execute and (where the mortgage has been effected by registered instrument to have registered acknowledgement in writing that any right in redemption of his interest transferred to the mortgagee has been extinguished; with the rider that the right so conferred by the provision of section-60 of the Act has not been extinguished by the act of the parties or by decree of a Court.

14. In our given case, there has been an endorsement with regard to the receipt of entire mortgage-money and return of original document in evidencing the payment of the mortgage money from the side of the mortgagor to the mortgagee. But as there is no separate deed/ document to that effect, the First Appellate Court has said that the recital of the mortgage deed when states that on payment of mortgage money, the defendant shall execute the deed of re-conveyance as required under section-60 (a) of the T.P. Act, the mortgagee was required to execute such deed of re-conveyance, and therefore non-execution of re-conveyance document creates doubt over the alleged redemption of the mortgage. This has already been answered as not the legal need. Secondly, it has been said that the endorsement Ext.2/a is a case of receipt of money which extinguishes the mortgage, it would not fall within the ambit of section-17(2)(ix) of the Indian Registration Act, 1908 (for short I.R. Act) as not required to be registered and the same thus having not been registered, the purported redemption is invalid.

15. The mortgage in the given case squarely comes under the ambit of section-58(c) of the T.P. Act. The provision of section-17(2)(xi) of the Indian Registration Act refers to the documents which do not require registration. It runs as follows:-

> "any endorsement on a mortgage deed acknowledging the payment of whole or any part of mortgage money and any other receipt for payment of money due under a mortgage when receipt does not purport to extinguish the mortgage."

On the face of the above, the view taken by the First Appellate Court that the endorsement Ext.2/a which purports to extinguish the mortgage being not registered, the redemption is invalid is not sustainable. The endorsement in this case when concerns with the acknowledgement of the payment of the mortgage money by the Plaintiff to the Defendant in citing that as the reason/circumstance for return of the original deed of mortgage, it is not understood for a moment as to how the First Appellate Court has gone to express the view that it was required to be registered. The same in my opinion runs contrary to the provisions of section-60 of the T.P. Act and is untenable. So, the answer to the substantial question of law stands returned in favour of upsetting said finding of the First Appellate Court standing against the Plaintiff. In view of the above, the mortgage having stood discharged, the Defendant being under legal obligation to deliver the possession of the mortgaged property to the Plaintiff has thus, no more the right to possess the same. In that view of the matter, the Plaintiff being the right, title and interest holder of the suit land is entitled to a decree of recovery of possession of the suit property from the Defendant.

For all these aforesaid, the substantial question of law is answered in favour of the restoration of the judgment and decree passed by the Trial Court in decreeing the suit of the Plaintiff granting the reliefs as aforestated.

16. In the result, the Appeal stands allowed. The judgment and decree passed by the first Appellate Court are hereby set aside and those passed in Title Suit No.195 of 1998 are hereby restored.

The Defendant is hereby directed to leave the vacant possession of the suit property on or before 31st August, 2022 failing which the plaintiff would be at liberty to execute the decree for obtaining the possession of the suit property.

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2022 (I) ILR - CUT- 594

BISWANATH RATH, J.

CMP NO. 445 OF 2021

MALAYA KUMAR DAS ……..Petitioner

.V.

MRS. SWATISHREE DAS ……Opp.Party

(A) PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 19, 26 and 29 – Provisions under – Application filed under these sections – Again revision petition filed U/s.115 of the CPC – Maintainability of such petition questioned – Held, maintainable.

(B) PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 2 (s) and 19 – Right to residence – Whether it includes only matrimonial home? – Held, No – Wider interpretation given even shared household also included.

(C) MATRIMONIAL DISPUTE – Case pending before the family Court – Further revision petition filed U/s.115 of the CPC – Jurisdiction of the Civil Court questioned? – Held, the Civil Court has the jurisdiction.

For Petitioner : M/s.P.K.Lenka, P.Lenka & D.P.Pattnaik

For Opp.Party : M/s.D.P.Dhal, Sr.Adv.,S.Mohapatra, R.Mohanty, M.K.Agarwal, A.Pradhan, B.S.Dasparida & S.S.Lenka.

JUDGMENT Date of Hearing & Judgment : 12.01.2022

BISWANATH RATH, J.

1. This Civil Misc. Petition filed by the Father-in-law involves a challenge to the order dated 6.8.2021 passed by the 2nd Additional District Judge, Bhubaneswar in Civil Revision No.01/01 of 2021 under Annexure-13 reversing the order of the Senior Civil Judge, Bhubaneswar passed in I.A. No.2/2021 under the provision of Section 151 of C.P.C. read with Sections 26 & 29 of the Protection of Women from Domestic Violence Act, 2005 (in short, "the Act, 2005") at the instance of the Daughter-in-law, the present Opposite Party under Annexure-9.

2. Undisputed fact remains and as has been categorically admitted in course of submission by Mr.P.K.Lenka, learned counsel for the Petitioner

that the Opposite Party remains to be the Daughter-in-law of the present Petitioner and for there exists dissention between Wife and Husband, both are staying away from the other. Learned counsel for the Petitioner in his attempt to assail the impugned order at Annexure-13 challenged the same on the following grounds :-

A. For the nature of dispute involved herein and looking to the manner of disposal of the Interlocutory Application under Annexure-9, no Revision under Section 115 of C.P.C. lies to the District Forum.

B. Even assuming such an Application is entertainable looking to the definition of "shared household" (Section 2(s), learned counsel for the Petitioner submitted that for her own pleading the Opposite Party in no case is entitled to right to residence in the house at Bhubaneswar, as in the maximum it should be construed to be matrimonial home may be a house at Balasore.

C. Further on the premises that there has been pendency of some family court disputes; one being at the instance of the Husband and the other being at the instance of the Plaintiff, the Wife even the Civil Suit is not entertainable.

Advancing his submission, taking this Court to the pleadings in the Plaint involved herein and reading through Paragraph-8 of the same, Mr.Lenka, learned counsel for the Petitioner attempted to submit on his dispute to the impugned action under the premises that the Plaintiff referring therein to be in matrimonial home, the entire action appears to be misdirected as ultimately the order involved a residence at Bhubaneswar.

Coming to assail the entertainability of the Revision, taking this Court to the provision of Section 115 of C.P.C., learned counsel for the Petitioner attempted to submit that the Revision does not lie involving the order at Annexure-9 and it is reading through the provision indicated herein above, Mr.Lenka attempted to justify his such claim.

Referring to the disclosures of pendency of a number of family court proceedings before the Family Court, Bhubaneswar, learned counsel for the Petitioner also advanced his submission in resistance of the impugned order.

3. Mr.D.P.Dhal, learned senior counsel for the Opposite Party in his opposition while objecting to the stand of the Petitioner on all the three grounds again referring to the provision under Section 115 of C.P.C. submitted that it is wrong to claim that no Revision lies involving the order at Annexure-9. Similarly referring to the averments in other paragraphs of the Plaint accompanying the same, Mr.Dhal, learned senior counsel submitted that the Plaintiff has a clear case of her residence involved herein at Bhubaneswar. So far as the submission of the learned counsel for the Petitioner involving pendency of family court proceedings becoming an impediment in the entertainability of the Interlocutory Application involved in the trial court decided under Annexure-9, Mr.Dhal, learned senior counsel submitted that all such proceedings are aiming to different reliefs, therefore, pendency of family court proceedings cannot come on the way in moving the Application under the Act, 2005. In the above circumstance, Mr.Dhal, learned senior counsel prayed for dismissal of the Civil Misc. Petition for having no merit.

4. Considering the rival contentions of the Parties, this Court from the factual scenario finds, Civil Suit No.1911/2020 involving the Parties involved herein involves the following relief :-

> "i) Declaring the Plaintiff's right of possession, use and occupation and free enjoyment over the suit land;
>
> ii) To restrain the Defendant, his agent(s), representative(s) or any person claiming through him or under his authority permanently by way of a decree of perpetual injunction to drive the plaintiff out of the suit house and/or alienate the suit house or to create any third party interest over the suit house or to change the nature and character of the suit house in any manner;
>
> iii) To direct the defendant not to create any hindrances/obstacles/barriers of free stay/occupancy in the suit house not limited to her room but all other common facility available in or attached with the Flat No.403-A, Bishnu Residency, Injana, Bhubaneswar by way of mandatory injunction;
>
> iv) Any other relief(s) in favour of the Plaintiff and against the Defendants as would be deemed fit and proper in the interest of justice may be passed."

Looking to the pleadings in the Plaint, this Court from the disclosures in Paragraphs-11 & 12 of the Plaint finds, the Opposite Party herein being the Plaintiff has the following disclosures :-

> "11. That after transfer to Bhubaneswar the Plaintiff is staying in the said house and her husband was also staying with her till December, 2019 however after December, 2019 the son of the Defendant started maintaining distance with the Plaintiff without any reason and the Plaintiff discovered from the behavior and conduct her husband and in-laws that they are aggrieved for not getting dowry to their expectation and chalked out a plan to sever the marital relationship with the Plaintiff. In order to execute their such plan the son of the Defendant pressurized the Plaintiff to leave the job and to work like a maid in her house. The Plaintiff however tolerated all harassment and cruelty inflicted on her with an expectation that they may change and accept the Plaintiff as one of their family member and goodness to prevail on passage of time but all in vein.
>
> 12. That the husband of the Plaintiff although staying in his sister house at Baramunda, Bhubaneswar however is not coming to the Plaintiff for consummation of marriage for which the Plaintiff constrained to file case in the Family Court, Bhubaneswar vide C.P. No.663/2020 seeking a decree of restitution of conjugal rights in her favour."

5. Before proceeding to decide the merit involved here in this Court, looking to the maintainability of the proceeding aspect takes into account the provision at Sections 19 & 26 of the Act, 2005, which are reflected herein below as follows :-

> "19. Residence orders. - (1) While disposing of an application under sub-section (1) of section12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order - (a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared house hold, whether or not the respondent has a legal or equitable interest in the shared household; (b) directing the respondent to remove himself from the shared household; (c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides; (d) restraining the respondent from alienating or disposing off the shared household or encumbering the same; (e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or (f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require: Provided that no order under clause (b) shall be passed against any person who is a woman. 9 (2) The Magistrate may impose any additional condition or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person. (3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence. (4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly. (5) While passing an order under sub-section (1), sub-section (2) or sub-section (3),

> the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order. (6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties. (7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order. (8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.
>
> 26. Relief in other suits and legal proceedings.—(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act. (2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. (3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

Now taking into account the provision at Section 19 read with Section 26 of the Protection of Women from Domestic Violence Act, 2005, this Court finds, for the provision indicated herein gives a scope to the disturbing wife to apply for an order for residence and involving any suit of such issue pending. It is in this view of the matter, this Court observes, there is no doubt on the maintainability of such Application being decided by both the courts.

6. Coming to the challenge of the learned counsel for the Petitioner on the maintainability of the proceeding in the Revisional Court, this Court takes into account the provision at Section 115 of C.P.C., which reads as follows :-

> "115. Revision - 2 [(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears— (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit: 3 [Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party

> applying for revision would have finally disposed of the suit or other proceedings.] 4 [(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. 5 [(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court."

Reading the aforesaid provision, this Court finds, a Revision can very well be maintained against an order either taking out the suit or taking out even a proceeding. Finally on disposal of such proceeding, for the opinion of this Court, the Interlocutory Application involved herein since involves a proceeding and by finality of such proceeding, it ultimately took away such proceeding in the present scenario, there is no difficulty in maintaining a Revision under Section 115 of C.P.C. This Court, therefore, rejects the contentions of the learned counsel for the Petitioner on this score.

7. Coming to the challenge to the impugned order on the aspect of the Act providing protection in respect of "matrimonial home" and "shared house" mean "matrimonial home", for the submission of the learned counsel for the Petitioner, this Court keeping in view the pleading of the Plaintiff in Paragraphs-11 & 12, as taken note herein above, in the suit taking into account the provision of Section 2(s) of the Protection of Women from Domestic Violence Act, 2005, finds the same reads as follows :-

> "Section 2(s)-"shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

Reading the aforesaid definition, this Court finds, the provision nowhere reflects the claim of residence only on the matrimonial home, as it also includes a shared house having interest to stay even belonging to joint family accommodating the aggrieved person. Thus undisputedly, it includes a shared household. Reading the definition quoted herein above on specific claim of the Petitioner pertaining to shared household at Bhubaneswar and the Plaintiff/ Daughter-in-law has clear pleading through the Plaint, this Court finds, there is justified claim by the Wife involving right to residence

in the shared household, particularly at Bhubaneswar. It is in this view of the matter, this Court finds, there is no force in the submission of the Petitioner and further there is no infirmity in deciding such issue in the manner by the Revisional Court.

8. Coming to challenge the impugned order on the premises of pendency of the family court proceedings, this Court observes, the issues in all three proceedings the suit and the family court proceedings are completely different and clearly aiming for different orders. For the opinion of this Court, there is no impediment in deciding the issue involved herein in the pendency of the suit and even in pendency of the matrimonial proceeding.

9. In the given scenario and the married Wife being deprived of right to residence, this Court observes, the Husband has a duty to maintain his Wife and having failed to cast such duty in the present and for the contest so far on the issue of residence of a married Wife, for the opinion of this Court, minor discrepancies here and there should not be given a handle to the Husband and Father-in-law to deprive the deserted Wife to at least get minimum dignity in maintaining her life.

10. It is in the light of above discussions, this Court looking to the reasoning of the 2nd Additional District Judge, Bhubaneswar finds, there is appropriate consideration of the issue involved, which does not require any interference. As required under law, copy of the order at Annexure-13 and judgment of this Court be served on the concerned Magistrate and also on the protection office functionaries under the Act, 2005 by the Opposite Party for effective implementation of the direction therein.

11. While parting away, this Court however observes, whatever observations and findings arrived at involving the Miscellaneous Proceeding involved herein shall not stand on the way for ultimate decision in the suit.

12. It is in the above view of the matter, this Court finds no substance in the ultimate submission of the learned counsel for the Petitioner requiring to interfere in the impugned order. The Civil Misc. Petition is therefore, dismissed but however there is no order as to cost.

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2022 (I) ILR - CUT- 601

BISWANATH RATH, J.

W.P.(C) NO. 41993 OF 2021

STATE OF ODISHA & ANR.. ……..Petitioner (s)

.V.

PARAMESHWAR MAHANTA ……Opp. Party

PROTECTION OF HUMAN RIGHTS ACT, 1993 – Section 18 (a)(i) – Steps during and after inquiry – Whether the Commission has the authority to direct for payment of compensation after completion of enquiry? – Held, No.– It is not permissible, it may recommend to the concerned Government or authority. (Para - 6&7)

For Petitioner : Mr. S.P.Panda, AGA.

For Opp. Party: None

ORDER Date of Order : 04.02.2022

BISWANATH RATH,J.

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

2. This writ petition involves a challenge to the order dated 8.03.2021 passed by the National Human Rights Commission in a Case No.4082/18/7/2017.

3. Mr. Panda, learned State Counsel assails the direction part in the impugned order dated 8.03.2021 passed by the Human Rights Commission thereby instead of recommending straightway directing the Chief Secretary to release a some of Rs.2,00,000/- (rupees two lakhs) in favour of the next of kin (NOK) of the deceased victim. Referring to the provision at Section 18 of the Protection of Human Rights Act, 1993 hereinafter in short be reflected as "the Act, 1993" Mr. Panda, learned State Counsel contended that once the Commission has come to close an inquiry, it may at best take steps in the manner prescribed U/s. 18 of the Act, 1993. Coming to the direction portion Mr. Panda, learned State Counsel reading through the Section 18(4)(i) of the Act, 1993 claimed that in the worse the Commission could have recommended and directed to the Government. It is, at this stage of the matter, taking this Court to the direction part Mr. Panda, learned Addl. Govt. Adv. Contended that since the Commission has the authority to recommend,

it cannot issue direction. It is, in the above background of the matter and taking help of the provision referred to hereinabove Mr. Panda, learned Addl. Govt. Adv. claims for interfering in the impugned order and setting aside the same.

4. Considering the submission made by Mr. Panda, learned Addl. Govt. Adv. and since there is relevancy to the provision at Section 18(a)(i) of the Act, 1993, this Court takes note of the said provision as hereunder :

> **"18. Steps during and after inquiry** :- The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:-
>
> (a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority-
>
> (i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary;
>
> (ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons;
>
> (iii) to take such further action as it may think fit;
>
> (b) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;
>
> (c) recommend to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;
>
> (d) subject to the provisions of clause (e), provide a copy of the inquiry report to the petitioner or his representative;
>
> (e) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
>
> (f) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission."

5. On close reading of the aforesaid provision this Court finds, for the language used therein, the Commission is authorized to take any of the steps prescribed therein or upon completion of inquiry as indicated hereinabove more particularly keeping in view the development taken place in the proceeding involved herein, the Commission may take steps in the manner prescribed U/s.18(a)(i) of the Act, 1993. A close reading of the aforesaid provision this Court also finds, the Commission is within his authority to take steps even recommending for making payment of compensation or damages to the complaint or to the victim or to the members of the family, by the concerned Government or authority. On close reading of the provision at section 18(A) of the Act, 1993, this Court finds, the direction, if any, to be issued by the commission should be in the nature of recommendation. In the circumstance, this Court here takes note of the ultimate direction of the Commission, which reads as follows :

> " The Commission has considered the material placed on record. As already Commission has stated earlier that it's the duty of State Govt. Hospital to attend their patient appropriately and provide all necessary medical care to them. Further when patient was referred from DHH Keonjhar to SCB Cuttack then there must be a prior communication in this regard and SCB Cuttack must be prepared to attend the patient accordingly. However, in this case when the patient arrived to SCB Cuttack, no bed was found to be arranged for the patient in the ICU, as the prior information must be with SCB Cuttack, in case if no prior information to SCB, Cuttack then it's the fault of DHH Keonjahr. Hence, in this case the gross negligence is apparent on part of Govt. hospitals, as they have not taken seriously the situation & health of patient , leading to which the patient failed to get the rightful treatment from govt. hospitals even after struggling & spending lot of time for getting the same. Hence in the end the patient has to look at the other option for getting the treatment but by the time it's too late and she died. Therefore Commission again directs Chief Secretary, Govt. of Odisha has to release amount to Rs.2,00,000/- to the NOK of the deceased victim i.e. Basanti Mahanta W/o. Parameswar Mahanta R/o. Dhudurapal, P.O.- Maidankel, Via.-Naranpur, P.S.- Sadar, Dist. Keonjhar, Odisha and submit a report along with proof of payment to the commission within six weeks."

6. On reading of the aforesaid order, it appears, the Commission in exercise of power U/s.18(a) (i) of the Act, 1993 instead of recommending for making the payment of compensation in favour of the NOK, has given a direction for the said purpose, which is not permissible under the provision of Section 18(a)(i) of the Act, 1993. For the interference of this Court partially interfering in the order to bring it to the fold of Section 18(a)(i) of the Act, 1993, the amount since to be released in favour of the NOK, this

Court finding the NOK not likely to be prejudiced, declines to issue notice to the NOK and disposes of the writ petition at the admission stage.

7. In the above circumstances, while disposing of the writ petition with modification as indicated hereinabove following provisions at Section 18 of the Act, 1993, the competent authority shall report compliance of the recommendations on payment of Rs.2,00,000/- to the NOK at least by completing the entire exercise within a period of nine months from the date of communication of an authenticated copy of this order. A copy of this order be served on Mr. Panda, learned Additional Government Advocate for communication purpose.

8. With the aforesaid direction the writ petition stands disposed of.

9. 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 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 & 515 dated 7th January, 2022.

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2022 (I) ILR - CUT- 604

S.K. SAHOO, J.

CRLA NO. 14 OF 2007

SACHIDANANDA MISHRA ……..Petitioner

.V.

STATE OF ODISHA(VIG.) ……..Respondent

(A) CRIMINAL TRIAL – Whether prosecution case becomes doubtful if the Informant becomes the I.O? – Principles – Discussed.

> *"Ordinarily if a police officer is the informant in a case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other Senior police officer as the informant police officer is likely to be interested in the result of the case projected by him. However, if the*

informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. Thus the investigating agency should not be influenced by any extraneous influence and investigation must be done judiciously, fairly, transparently and expeditiously to secure the rule of law. The defence has to prove in what way such investigation is impartial, unfair, biased or has caused prejudice to the accused." *(Para10.i)*

(B) CRIMINAL TRIAL– Offence punishable under sections 409, 468, 471, 477-A of the Indian Penal Code and section 13(1)(c) read with section 13(2) of the Prevention of Corruption Act, 1988 – Appellant Committed criminal breach of trust by forged vouchers intending that those would be used for the purpose of cheating and fraudulently or dishonestly used those documents as genuine and also altered certain Book Accounts Register with intent to defraud the employer Govt. of Odisha – Non seizure of relevant documents – Effect of – Held, prosecution case is defective.

"Non-seizure of the stock register of the Central Stock, stock registers of gardeners and non-examination of the in-charge of Central Stock was deliberately done by the Investigating Officers for which adverse inference is to be drawn against the prosecution as attempts are being made to suppress the truth from the Court."

In the case of Prahallad Sethy (supra), this Court has held that in order to secure conviction for offence punishable under section 468 of Indian Penal Code, one must be found to have done forgery within the meaning of section 463 of Indian Penal Code which again implies that there has to be the making of a false document in terms of section 464 of Indian Penal Code. It is further held that a conjoint reading of section 463 and 464 of the Indian Penal Code goes to show that two essential elements of forgery contemplated under section 463 of Indian Penal Code are (i) the making of a false documents or part of it and (ii) such making is with such intention as is specified in the section. These aspects are required to be established. Since I have already held that prosecution has failed to prove that Ext.11 is a forged document, the ingredients of the offence under section 468 of the Indian Penal Code are not attracted and therefore, the charge for such offence fails.

Section 471 of the Indian Penal Code deals with using a forged document as a genuine one. 'Forged document' has been defined in section 470 of the Indian Penal Code which states that a false document as described in section 464 made wholly or in part by forgery is a forged document. Fraudulent or dishonest use of a document as genuine and knowledge or reasonable belief on the part of the person using the document that it is a

forged one are the essential ingredients of the offence under section 471 of the Indian Penal Code. Since I have already given the findings that Ext.11 is not a forged document, therefore, the charge under section 471 of the Indian Penal Code also fails.

(v) Charge under section 13(2) read with section 13(1)(c) of the 1988 Act :

In the case of K.R. Purushothaman (supra), the Hon'ble Supreme Court has held that to constitute an offence under clause (c) of section 13(1) of the Act, it is necessary for the prosecution to prove that the accused has dishonestly or fraudulently misappropriated any property entrusted to him or under his control as a public servant or allows any other person to do so or converts that property for his own use. The entrustment of the property or the control of the property is a necessary ingredient of section 13(1)(c).

Since Ext.11 is a genuine document and after receipt of the advance from P.W.4, the appellant not only purchased banana suckers spending Rs.3,990/- but also deposited the banana suckers in the Central Stock with Shyam Sundar Sethi, the in-charge of Central Stock and relevant entry has been made in the stock register (Ext.B) of the Central Stock and banana suckers were given to the gardeners from the Central Stock who sold it to the cultivators in a subsidized rate and deposited the sale amount in the Central Stock, therefore, there is no material regarding dishonest or fraudulent misappropriation of Rs.3,990/- by the appellant and as such, the charge under section 13(2) read with section 13(1)(c) also fails.

(10.ii)

Case Laws Relied on and Referred to :-

1. A.I.R. 2006 SC 35 : K.R. Purushothaman Vs. State of Kerala.
2. 2014 CLJ 4378 : Prahallad Sethy Vs. State of Orissa.
3. (2018) 72 OCR (SC) 196 : Mohan Lal Vs. The State of Punjab.
4. (2004) 5 SCC 223 : State represented by Inspector of Police Vs. V. Jayapaul
5. (2020) 79 OCR (SC) 924 : Mukesh Singh Vs. State (Narcotic Branch of Delhi)
6. A.I.R. 1960 SC 889 : Jaikrishnadas M. Desai Vs. State of Mumbai.
7. A.I.R. 1967 Orissa 135 : Brahmananda Mohanty Vs. The State.
8. A.I.R. 2004 SC 2317 : Bhargaban Pallai Vs. State of Kerala.
9. Vol. 73 (1992) CLT 312 : Minaketan Das Vs. State of Orissa.
10. (1994) 7 OCR 594 : Harish Chandra Singh Vs. State of Orissa.

For Petitioner : Mr. Trilochan Nanda
For Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vig.)

JUDGMENT Date of Judgment : 31.01.2022

S.K. SAHOO, J.

The appellant Sachidananda Mishra faced trial in the Court of learned Special Judge, Vigilance, Sambalpur in T.R. Case No.61 of 1995 for

offences punishable under sections 409, 468, 471, 477-A of the Indian Penal Code and section 13(1)(c) read with section 13(2) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') on the accusation that he being employed as a Junior Horticulture Officer, Bolangir under the Government of Odisha and being a public servant abused his position as such, dishonestly or fraudulently misappropriated or otherwise converted a sum of Rs.19,047/- (rupees nineteen thousand forty seven only) entrusted to him or under his control or dominion to his own use and thereby committed criminal breach of trust and also forged certain vouchers intending that those would be used for the purpose of cheating and fraudulently or dishonestly used those documents as genuine and also altered certain Book Accounts Register with intent to defraud the employer Govt. of Odisha.

The learned trial Court vide impugned judgment and order dated 23.12.2006 though acquitted the appellant of the charge under section 477-A of the Indian Penal Code but found him guilty under sections 409, 468, 471 of the Indian Penal Code and section 13(2) read with section 13(1)(c) of 1988 Act and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default, to undergo R.I. for three months on each count and the substantive sentences of imprisonment were directed to run concurrently.

2. The prosecution case, in short, as per the first information report (Ext.34) dated 05.11.1994 lodged by Sri Umesh Chandra Panda (P.W.19), Inspector of Vigilance, Bolangir before the Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur is that he received reliable information that the appellant who was the Junior Horticulture Officer in the Office of the Horticulturist, Khariar was posted at J.H.O., Bolangir from 29.08.1985 to 01.09.1992. During his incumbency as such, a sum of Rs.2,10,000/- was allotted by the Director of Horticulture, Odisha, Bhubaneswar during the year 1991-92 and placed at the disposal of Horticulturist, Bolangir for purchase of 1,50,000 Dwarf Cavendish banana suckers from the farmers @ Rs.1/- per sucker and distribution of the same to the farmers at the highly subsidized rate of Rs.0.15 per sucker. The allotted amount of Rs.2,10,000/- included Rs.45,000/- towards transportation charges and Rs.15,000/- towards chemical pre-treatment of the banana suckers. The appellant was entrusted with Rs.47,310/- for purchase of suckers and transportation, out of the allotted amount of Rs.2,10,000/-. He purchased 27,200 banana suckers and paid a sum of Rs.23,200/- to the farmers those

who had supplied the suckers but falsely showed purchase of 36,500 banana suckers from the farmers @ Rs.1/- per sucker and thereby misappropriated a sum of Rs.13,300/- by preparing false vouchers. He also showed expenditure of Rs.10,810/- towards transportation charges of the banana suckers though he actually utilized Rs.5,062.40 paisa for that purpose and thus misappropriated the rest amount of Rs.5,747.60 paisa. In that process, the appellant misappropriated a total sum of Rs.19,047.60 paisa out of the entrusted amount of Rs.47,310/-. The enquiry revealed that the appellant prepared and manufactured false money receipts in the name of farmers and vehicle owners and used the same as genuine and committed criminal breach of trust in respect of an amount of Rs.19,047.60 paisa obtaining pecuniary advantage for himself and thereby he misconduct himself.

Basing on such first information report lodged by P.W.19, Sambalpur Vig. P.S. Case No.42 of 1994 was registered under sections 467, 471, 409 of the Indian Penal Code and section 13(2) read with section 13(1)(c) of 1988 Act. On the direction of the S.P. Vigilance, Sambalpur, P.W.19 took up investigation of the case. During course of investigation, he examined witnesses and seized seven vouchers on production by Nabin Kumar Chhatria (P.W.4), Jr. Accountant in the office of the Horticulturist, Bolangir. On 11.07.1995 P.W.19 handed over the charge of investigation of the case on his transfer to Sri K.B. Pani (P.W.20) who continued with the investigation, examined some more witnesses, seized some documents and on completion of the investigation, he submitted charge sheet against the appellant on 10.12.1995 under sections 467, 468, 471, 420, 409 of the Indian Penal Code and section 13(2) read with section 13(1)(c)(d) of 1988 Act after obtaining the requisite sanction.

3. The defence plea of the appellant as appears from the statement recorded under section 313 of Cr.P.C. is that he personally purchased most of the banana suckers @ Rs.1/- per sucker and also purchased some banana suckers through Shiba Prasad Mishra and Kambhupani Mishra, Gardeners by giving them some money out of the advance taken by him. He brought the banana suckers to the Central Godown of the Horticulturist's office, Bolangir by the trucks of Muni Banchhor (P.W.5) and Prabhat Ranjan Nial (P.W.7). The Store Keeper of the Central Godown after counting the banana suckers received the same. He also paid transportation charges of the banana suckers to P.W.5 and P.W.7 and the fact of his purchase of banana suckers and bringing the same to the office of the Horticulturist, Bolangir was known to

the then Horticulturist Gokula Charan Tripathy (P.W.10). After making stock entry of the banana suckers in the stock register, those were given to the gardeners and grafters of the office on obtaining signatures from them to sell the same to the cultivators @ Rs.0.15paisa per sucker and the gardeners and grafters after selling the banana suckers deposited the sale proceeds in the office of the Horticulturist, Bolangir.

4. In order to prove its case, the prosecution examined twenty witnesses.

P.W.1 Kishore Meher stated that he did not sell banana suckers to the Horticulture Department nor received any payment by selling it and he had never granted any receipt to the appellant acknowledging receipt of Rs.3,990/- towards price of banana suckers.

P.W.2 Dhruba Chandra Mishra was a cultivator who stated that he sold banana suckers to the Horticulture Deptt., Bolangir and received a sum of Rs.3,810/- towards price of 3810 banana suckers @ Rs.1/- each. He was declared hostile by the prosecution.

P.W.3 Kali Prasad Das was the Head Clerk in the office of Dist. Election Officer, Bolangir and he stated about the seizure of one Electoral roll of village Gardi and another Electoral roll of village Danamal as per seizure list vide Ext.7 by the Inspector Vigilance.

P.W.4 Nabin Kumar Chhatria was the Accountant -cum- Head Clerk in the office of Horticulturist, Bolangir and stated about receipt of fund of Rs.2,10,000/- from the Government in their office for purchase of banana suckers. He further stated about the appellant submitting applications for taking advance for purchase of banana suckers and receiving Rs.16,500/-, Rs.20,000/- and Rs.5,900/- on three occasions as advance as per the orders of Horticulturist Gokulananda Tripathy (P.W.10) by making endorsement in the advance ledger which was seized by the Inspector Vigilance. He also stated about the vouchers submitted by the appellant after utilisation of advance which were also seized the Inspector Vigilance.

P.W.5 Muni Banchhar and P.W.6 Madhu Mangal Sahoo did not support the prosecution case.

P.W.7 Prabhat Ranjan Nihal was the driver of a Mini Truck and he stated to have granted a receipt to the Horticulture Deptt., Bolangir showing receipt of transportation charges. He was declared hostile by the prosecution.

P.W.8 Debaraj Gadtia was a cultivator who stated that there was no person by name Debraj Bhoi residing in village Gerdi at any point of time.

P.W.9 Pareswar Barik stated that he had not supplied 4000 nos. dwarf variety of banana suckers to the appellant nor received Rs.4000/- towards the cost thereof. He stated that the signature appearing in Ext.30 is not that of his brother Dambarudhar Barik.

P.W.10 Gokula Chandra Tripathy was in-charge Horticulturist at Bolangir who stated about passing orders on the application of the appellant and the appellant receiving advance for the purpose of purchase of banana suckers and submitting procurement vouchers vide Exts.11 to 17 towards the advance taken by him.

P.W.11 Budhadev Gadtia was a villager of Gerdi and he stated that there was no person by name Debraj Bhoi living in his village Gerdi at any point of time.

P.W.12 Dambarudhar Barik was a cultivator and he stated that he had never supplied any banana suckers to the Horticulture Department of Bolangir nor supplied any banana suckers to the appellant or received any amount from him by putting his signature in any voucher as token of receipt of money.

P.W.13 Harisankar Patra was the Asst. Horticulture Officer, Bolangir who is a witness to the seizure of some vouchers by vigilance police as per seizure list Ext.18.

P.W.14 Madan Mohan Purohit was the Jr. Clerk, Dist. Election Office, Bolangir who stated about the seizure of voter list of the year 1995 of village Danamal, Patnagarh Assembly constituency and also voter list of village Gerdi under Loisingha Assembly constituency by vigilance police as per seizure list Ext.7.

P.W.15 N.S. Bhanu Patnaik who was the Govt. Examiner of questioned documents examined the vouchers received from Vigilance Inspector, Bolangir and gave his opinion vide Ext.32.

P.W.16 Prahallad Sethy was the Head Clerk in Fisheries Office, Bolangir who stated about taking of specimen signatures of Prabhat Ranjan Nial (P.W.7) and Dambarudhar Barik (P.W.12) in his presence by the vigilance police.

P.W.17 Sri Jagadananda Panda was the Director of Horticulture, Bhubaneswar who stated that after perusal of all the relevant documents produced by Inspector of Vigilance and holding pre-sanction discussion with him and on being satisfied, he accorded sanction for prosecution of the appellant vide sanction order Ext.33.

P.W.18 Sri Alekh Barik did not support the prosecution case and he was declared hostile by the prosecution.

P.W.19 Umesh Chandra Panda was the Inspector of Vigilance, Bolangir Squad who took up investigation of the case on the direction of S.P. (Vig.), Sambalpur on 05.11.1994 and investigated the case till 11.07.1995 when he handed over charge of investigation to P.W.20.

P.W.20 Kunja Bihari Pani was the Inspector of Vigilance, Bolangir who on 11.07.1995 took charge of investigation of the case from his predecessor Sri Umesh Chandra Panda (P.W.19) and on completion of investigation, submitted charge sheet.

The prosecution exhibited thirty six documents. Exts.1 to 6 are the papers containing specimen signatures, Exts.7, 18 and 19 are the seizure lists, Exts.8 and 9 are the applications filed by the appellant, Ext.10 is the Advance ledger entry showing payment of advance to the appellant, Exts.11 to 17 are the vouchers, Exts.20 to 25 are six sheets of papers containing specimen signatures, Exts.26 to 31 are the specimen signatures of Parameswar Barik (P.W.9) in six sheets of paper, Ext.32 is the opinion given by P.W.15, Ext.33 is the sanction order, Ext.34 is the written report (F.I.R.), Ext.35 is the advance ledger and Ext.36 is the statement of reason.

The prosecution proved two material objects. M.O.I is the negatives and M.O.II is the enlarged photographs

5. The defence examined three witnesses in support of the defence plea.

D.W.1 Karunakar Meher stated about the appellant was having talk with P.W.1 for supply of banana suckers @ Rs.1/- per sucker and taking delivery of such suckers from D.W.1 after a few days and the latter putting his signature on a voucher.

D.W.2 Santosh Kumar Gadtia stated about the appellant contacting Debraj Bhoi of his village to purchase banana suckers @ Rs.1/- per sucker and ultimately Debraj Bhoi selling banana suckers to the appellant after receiving cost towards it.

D.W.3 Sobha Chandra Bhoi stated about supply of 4000 banana suckers to the appellant by P.W.9 and receiving money for such supply.

6 The learned trial Court framed the following points for determination:-

> (i) Whether the accused being a public servant and having been entrusted with a sum of Rs.47,310/-, dishonestly or fraudulently misappropriated or otherwise converted to his own use a sum of Rs.19,047/- out of the said amount and thereby misconduct himself?
>
> (ii) Whether the accused being a public servant and in such capacity entrusted with a sum of Rs.47,310/-, for purchase of banana suckers and for transportation of the same, committed criminal breach of trust in respect of Rs.19,047/-?
>
> (iii) Whether the accused forged the vouchers intending that those shall be used for the purpose of cheating?
>
> (iv) Whether the accused fraudulently or dishonestly used as genuine certain documents (vouchers) which he knew or had reason to believe at the time he used the same to be forged documents?
>
> (v) Whether the accused being a servant of the Government willfully and with intent to defraud, made entries in the book of accounts belonging to his employer?

7. The learned trial Court after assessing the oral and documentary evidence on record came to hold that there is no dispute over the fact that the appellant was working as a Junior Horticulture Officer in the office of the Horticulturist, Bolangir during the relevant period and as such he was a public servant and that the evidence of P.W.4 goes unchallenged by the

defence which revealed that during the Financial Year 1991-92, Government had placed funds of Rs.2,10,000/- for purchase of banana suckers. It was further held that the appellant had taken the advances mentioned in Ext.10 and submitted the vouchers Exts.11 to 17 in the office of the Horticulturist, Bolangir. The defence plea that P.W.1 had sold 3990 banana suckers to the appellant and in lieu of that he received Rs.3990/- from the appellant and also granted the voucher (Ext.11) putting his signature in English thereon was disbelieved by the learned trial Court. However, the prosecution case that P.W.2 had not sold 3810 numbers of banana suckers for a price of Rs.3810/- to the appellant and that the appellant dishonestly created the voucher Ext.12 to misappropriate the amount mentioned therein, was not accepted by the learned trial Court. Similarly, the prosecution case that the appellant had not purchased 4000 banana suckers from P.Ws.9 and 12 for a price of Rs.4000/- and dishonestly prepared the voucher to misappropriate the amount was not accepted by the learned trial Court. It was further held that the appellant committed misappropriation of Rs.3990/- towards purchase of banana suckers and prepared and submitted the voucher Ext.11 for the said amount with dishonest intention to make wrongful gain for himself, however it was held that the prosecution has failed to prove that the appellant had misappropriated any amount towards transportation charges banana suckers. It was further held that the prosecution has successfully proved that the appellant committed criminal breach of trust in respect of a sum of Rs.3,990/- towards purchase of banana suckers and as such he committed an offence under section 409 of the Indian Penal Code. It was further held that the evidence on record revealed that the appellant being a public servant misappropriated a sum of Rs.3,990/- out of the amount entrusted to him in his capacity as a public servant and thus, he committed the offence of criminal misconduct as laid down under section 13(1)(c) punishable under section 13(2) of the 1988 Act. It was further held that the appellant committed forgery intending that the voucher (Ext.11) would be used for the purpose of cheating and used the said voucher as genuine knowing the same to be a forged voucher and as such, he committed the offences under sections 468 and 471 of the Indian Penal Code. However, the learned trial Court found that there are no evidence on record showing that the appellant was maintaining any book of accounts in the office of Horticulturist, Bolangir at the relevant time or that he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account belonging to or in the possession of his employer and thus the ingredients of the offence under section 477-A of the Indian Penal Code against the appellant are not

established by the prosecution against the appellant. Holding that the prosecution has failed to establish the charge under section 477- A of the Indian Penal Code against the appellant, the learned trial Court convicted the appellant under section 13(2) read with section 13(1)(c) of the 1988 Act and also under sections 409, 468 and 471 of the Indian Penal Code.

8. Mr. Trilochan Nanda, learned counsel appearing for the appellant contended that P.W.19 being the informant of the case should not have investigated the case which has caused serious prejudice to the appellant and it creates a cloud of doubt on the fairness of the investigation. The charge is not specific as required under section 212 of the Cr.P.C. as to what amount the appellant misappropriated showing purchase of banana suckers from which person and in absence of such specific charge, the appellant has been seriously prejudiced and conviction of the appellant is bad in law. The conviction of the appellant is based on the finding of the learned trial Court that the appellant committed criminal breach of trust and dishonestly misappropriated Govt. fund to the tune of Rs.3,990/- towards purchase of banana suckers from P.W.1, prepared and submitted the voucher under Ext.11 for the said amount with dishonest intention to make wrongful gain for himself. P.W.19, the Investigating Officer has admitted in his deposition that the fact of purchase of the banana suckers by the appellant under the vouchers Exts.11, 12, 13 and 14 have been noted in the stock register of the Horticulturist, Bolangir but for the best reason known to the I.O, he has not seized the stock register. One Shyamsundar Sethi was in-charge of the Central Stock and also the register of the Horticulturist, Bolangir but the I.O. has not examined him in the case nor has he made him an accused. P.W.19 has stated that it was the practice then that after purchase of banana suckers, the staff of the Horticulture Department were sending the same to Central Godown of the Horticulturist, Bolangir after furnishing stock certificates on the vouchers and as per the procedure, the gardeners were to sell banana suckers to the cultivators, obtain their signatures in their stock registers and also mention the receipt of money from them in the stock registers. The I.O. stated that the gardeners had deposited the actual sale price of the suckers in the office of Horticulturist, Bolangir as per the quantity of suckers shown to have been sold by them to the cultivators which was mentioned in the Central Stock Register in the office of Horticulturist, Bolangir. The I.O. (P.W.19) has not seized the stock registers of the gardeners in this case. Mr. Nanda further argued that P.W.10 Gokula Chandra Tripathy who was the in-charge Horticulturist, Bolangir at the relevant point of time has stated in his

deposition that after procurement, the stock was entered in the stock register and the said stock was then issued to the field staff of the department for supply to the Farm/Agriculturist and he as the Head of the Office, after being satisfied about the genuineness of the voucher submitted before him with respect to the advance payment or the excess payment, passed the voucher for payment. According to Mr. Nanda, the I.O has not intentionally seized the stock registers inasmuch as had he seized the same, it would have demolished the case of the prosecution in its entirety and as such adverse inference under section 114(g) of the Evidence Act is to be drawn against the prosecution. He drew the attention of this Court to the attested copies of Stock Book Register of banana suckers, 1991-92, Page Nos.3 to 7 obtained from the office of the Deputy Director of Horticulture, Bolangir under R.T.I Act vide letter No.690 dtd.20.03.2018 which has been marked as Ext.B by order dtd.11.11.2021 passed by this Court in I.A. No.1118 of 2021 by way of acceptance of additional evidence under section 391 of the Cr.P.C. He argued that by way of voucher Ext.11, the appellant purchased 3990 banana suckers from P.W.1 on 26.02.1992 and paid a sum of Rs.3,990/- @ of Rs.1/- per banana sucker to him. This fact has been clearly reflected and certified at the back portion of Ext.11 and this particular voucher was passed for payment of Rs.3,990/- by the Horticulturist, Bolangir on 25.03.1992 and the signature of the Horticulturist, Bolangir has been marked as Ext.11/3. It is argued that the prosecution deliberately did not prove the stock register of banana suckers 1991-92 during trial, however, on a perusal of the Ext.B, it is crystal clear that the fact of the purchase and deposit of the banana suckers by the appellant from P.W.1 has been clearly mentioned therein and it is clearly stated therein that on 26.02.1992 banana suckers were purchased from Kishore Meher (P.W.1) and the number of banana suckers is mentioned as 3990. He argued that on a harmonious reading of all the evidence on record goes to show that the appellant had purchased 3990 banana suckers and deposited the same in the godown as reflected in the stock register and thus there was no misappropriation of any government money by the appellant nor any wrongful pecuniary gain for himself. He further argued that D.W.1 Karunakar Meher had given his lands in the year 1991-92 on rent basis to P.W.1 Kishore Meher for cultivation and D.W.1 in his deposition has clearly stated that P.W.1 was doing banana cultivation in his lands in those years and that the appellant came to his village and took delivery of banana suckers from P.W.1 and took a receipt bearing signature of P.W.1 from him. While concluding his argument, Mr. Nanda, learned counsel for the appellant contended that the impugned judgment and order of conviction and sentence

passed by the learned trial Court is not sustainable in the eye of law and should be set aside. Reliance was placed on the decisions of **K.R. Purushothaman -Vrs.- State of Kerala reported in A.I.R. 2006 Supreme Court 35, Prahallad Sethy -Vrs.- State of Orissa reported in 2014 Criminal Law Journal 4378 and Mohan Lal -Vrs.- The State of Punjab reported in (2018) 72 Orissa Criminal Reports (SC) 196.**

9. Mr. Sanjay Kumar Das, learned Standing Counsel appearing for the Vigilance Department, on the other hand, supported the impugned judgment and submitted that merely because P.W.19 being the informant conducted investigation to an extent cannot be a ground to discard the prosecution case, particularly when he is having proper authority and jurisdiction to investigate the case. The charge was framed that the appellant dishonestly or fraudulently misappropriated Govt. fund of Rs.19,047.60 which obviously includes Rs.3,990/- which the learned trial Court found the appellant misappropriated towards purchase of banana suckers from P.W.1 by preparing and submitting voucher Ext.11 for the said amount with dishonest intention to make wrongful gain for himself. It is argued that charge is rolled-up one involving the total amount of misappropriation reflected in various vouchers without specifying amount involved in each voucher and the name of the person relatable to such vouchers and in such a situation, it cannot be said to be fatal by itself unless prejudice is shown to have been caused to the appellant. Relying on section 464 of Cr.P.C., it is argued that a finding or sentence of a Court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. He argued that entry in the stock Book Register regarding purchase of 3990 banana suckers from P.W.1 on 26.02.1992 and payment of sum of Rs.3,990/- @ of Rs.1/- per banana sucker to him cannot be ground to prove the innocence of the appellant particularly when P.W.1 himself has stated that he never took up banana plantation nor sold any banana suckers to Horticulture Department nor received any payment for the same nor executed any receipt with his signature. It is further argued that defence evidence has been rightly rejected by the learned trial Court and the appellant has been rightly found guilty by the learned trial Court and therefore, the appeal should be dismissed. He placed reliance in the cases of **State represented by Inspector of Police -Vrs.- V. Jayapaul reported in (2004) 5 Supreme Court Cases 223, Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (SC) 924, Jaikrishnadas M. Desai -Vrs.- State of Mumbai reported in A.I.R.**

1960 Supreme Court 889, Brahmananda Mohanty -Vrs.- The State reported in A.I.R. 1967 Orissa 135, Bhargaban Pallai -Vrs.- State of Kerala reported in A.I.R. 2004 Supreme Court 2317, Minaketan Das -Vrs.- State of Orissa reported in Vol. 73 (1992) Cuttack Law Times 312 and Harish Chandra Singh -Vrs.- State of Orissa reported in (1994) 7 Orissa Criminal Reports 594.

10. Adverting to the contentions raised by the learned counsel for the respective parties, let me deal with the issues point-wise.

(i) <u>Whether prosecution case becomes doubtful as P.W.19 being the informant investigated the case</u>*:*

It is not in dispute that P.W.19 Umesh Chandra Panda, Inspector of Vigilance, Bolangir Squad lodged the first information report before the Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur on 05.11.1994 and accordingly, Sambalpur Vigilance P.S. Case No.42 of 1994 was registered against the appellant. It is also not in dispute that the Superintendent of Police, Vigilance, namely, Surendra Panwar directed the Officer in-charge, Vigilance Police Station, Sambalpur to register the case and further directed P.W.19 to take up investigation of the case. P.W.19 investigated the case from 05.11.1994 to 11.07.1995 whereafter he handed over the charge of investigation to P.W.20 Kunja Bihari Pani on his transfer and the latter on completion of investigation submitted chargesheet.

The question that now crops up for consideration is whether the prosecution case becomes doubtful as investigation in part was conducted by P.W.19, the informant in the case.

Learned counsel for the appellant placed reliance in the case of **Mohan Lal** (supra), wherein the Hon'ble Supreme Court has held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

On the other hand, learned Standing Counsel for the Vigilance Department placed reliance on two decisions to counter the submission of learned counsel for the appellant i.e. **V. Jayapaul** (supra) and Mukesh Singh (supra).

In the case of **V. Jayapaul** (supra), it has been held as follows:

> "6.....We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased. In the present case, the police officer received certain discreet information, which, according to his assessment, warranted a probe and therefore made up his mind to investigate. The formality of preparing the FIR in which he records the factum of having received the information about the suspected commission of the offence and then taking up the investigation after registering the crime, does not, by any semblance of reasoning, vitiate the investigation on the ground of bias or the like factor. If the reason which weighed with the High Court could be a ground to quash the prosecution, the powers of investigation conferred on the police officers would be unduly hampered for no good reason. What is expected to be done by the police officers in the normal course of discharge of their official duties will then be vulnerable to attack."

In the case of **Mukesh Singh** (supra) which is a fiveJudge Constitution Bench decision constituted to decide the correctness of the ratio laid down in the case of **Mohan Lal** (supra), it was held that whether the investigation conducted by the concerned informant was fair investigation or not is always to be decided at the time of trial. The concerned informant/investigator will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant -cum-investigator but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. It has also been held that there is no reason to doubt the credibility of the informant and

doubt the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. While concluding, it was observed that in a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. It was held that merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. It was held that a contrary decision in the case of **Mohan Lal** (supra) and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.

Ordinarily if a police officer is the informant in a case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other Senior police officer as the informant police officer is likely to be interested in the result of the case projected by him. However, if the informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. Investigation into criminal offences should be fair, unobjectionable and should not percolate the apprehension in the minds of the accused that it is carried out unfairly and with designed motive. An onerous and responsible duty is cast on the investigating officer to conduct the investigation avoiding any kind of fabrication of evidence and his impartiality must dispel any suspicion. His prime duty is to bring out the real truth to instill confidence of the public and rule out the sense of being partitioned or to suppress. Any extraneous force and/or influence in the investigation process may result into tainted and unfair investigation. Thus the investigating agency should not be influenced by any extraneous influence and investigation must be done judiciously, fairly, transparently and expeditiously to secure the rule of law. The defence has to prove in what way such investigation is impartial, unfair, biased or has caused prejudice to the accused.

Learned counsel for the appellant though contended that non-seizure of Central stock register from the office of Horticulturist, stock registers of the gardeners and nonexamination of in-charge of Central Stock indicates about the unfairness on the part of P.W.19 while investigating the case, but in my humble view since he is not the person who on completion of investigation submitted chargesheet, entire blame cannot be thrown on him. Each and every omission made by the Investigating Officer will not enure to the benefit of the accused if the other materials which are available on record justify arriving at a conclusion to the positive nature of the prosecution case. The learned counsel for the appellant has failed to place any material to suspect the investigation by P.W.19 as biased and impartial and in absence of anything that the informant -cum- investigating officer was personally interested to get the appellant convicted, I am not inclined to accept that since P.W.19, the informant conducted investigation for a substantial period, the prosecution case should be held doubtful.

(ii) **Whether the appellant has been prejudiced on account of non-framing of specific charge:**

The learned counsel for the appellant urged that framing of charge that the appellant being a public servant and having been entrusted with a sum of Rs.47,310/-, dishonestly or fraudulently misappropriated or otherwise converted to his own use a sum of Rs.19,047/- out of the said amount and thereby misconduct himself, was not proper and justified. According to him, the charge should have been specific as required under section 212 of the Cr.P.C. as to what amount the appellant misappropriated showing purchase of banana suckers from each person and in absence of such specific charge, the appellant has been seriously prejudiced.

The learned Standing counsel for the Vigilance Department, on the other hand, submitted that charge is rolledup one involving the total amount of misappropriation reflected in various vouchers without specifying amount involved in each voucher and the name of the person relatable to each such voucher and in such a situation, it cannot be said to be fatal by itself unless prejudice is shown to have been caused to the appellant.

The object of framing a charge is to give notice of the essential facts which the prosecution proposes to establish to bring home against the accused so that he should not be prejudiced in his defence. The provisions of

section 212 of the Code are meant to give a notice to the accused to meet the charge framed against him. Sub-section (2) of section 212 of Cr.P.C. does not provide the normal rule with respect to framing of charges in cases of criminal breach of trust, misappropriation etc. It is only in the nature of an exception to meet a certain contingency. Non-observance of any of the conditions under section 212 of Cr.P.C., unless cause prejudice to the accused or result in miscarriage of justice, cannot be a ground to vitiate the order of conviction. By non-specification of the amount misappropriated in the charge, trial cannot be held to be vitiated unless there is failure of justice. Sub-section (2) does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate sum without specifying the details. It dispenses with the necessity for amplification, does not prohibit the enumeration of the particular items in the charge. In a charge of criminal misappropriation, it is enough to mention the gross sum of money in respect of which the offence was committed. All the items of misappropriation included in the gross sum need not be specified. They can be grouped into one lump sum and that can be shown as the sum misappropriated.

Omission to give particulars in the charge can be cured by section 465 of Cr.P.C. unless the defect occasions a failure of justice. The question of prejudice is ultimately one of inference from all the facts and circumstances of each case. To say that there was prejudice, is not enough; it should further be pointed out as to how or in what manner the accused was prejudiced. Defect, irregularity, omission, or error in framing of charges would not render sentence or order of the Court as invalid.

After going through the framing of charge under each heading, I am not inclined to accept the contention raised by the learned counsel for the appellant that on account of nonmentioning of the exact amount the appellant misappropriated showing purchase of banana suckers in each case from each person, the appellant has been seriously prejudiced.

(iii) **Charge under section 409 of Indian Penal Code**:

The appellant was charged under section 409 of the Indian Penal Code on the accusation that during the years 1991 and 1992, being a public servant employed as Junior Horticulture Officer, Bolangir under the Government of Odisha and in such capacity entrusted with or dominion over

a sum of Rs.19,047/- committed criminal breach of trust in respect of such amount.

It is not disputed that the appellant was working as Junior Horticulture Officer, Bolangir during the years 1991-1992 and on his applications which are dated 30.03.1992 and 06.04.1992, P.W.10 Gokul Chandra Tripathy, Horticulturist, Bolangir directed P.W.4 Nabin Kumar Chhatria, Accountant -cum- Head Clerk of the office of Horticulturist, Bolangir to pay Rs.20,000/-and Rs.5,900/- for purchase of banana suckers and towards transportation charges of the same, which was received by the appellant by making endorsement on his own applications as well as in the advance ledger and that apart the appellant had also taken an advance of Rs.16,500/- for purchase of banana suckers from P.W.4 and he had also submitted vouchers marked as Exts.11 to 17 making endorsement thereon that he had paid the amount and also endorsed certificates on the reverse of those vouchers. In that respect, questions have been put to the appellant in the accused statement recorded under section 313 of Cr.P.C. and the appellant has admitted the same. Thus, in my humble view, the finding of the learned trial Court in paragraph 8 of the impugned judgment that the appellant had taken the advances mentioned in Advance Ledger Ext.10 and had submitted the vouchers Exts.11 to 17 in the office of the Horticulturist, Bolangir is quite justified.

The learned trial Court accepted the prosecution case that the appellant had not purchased 3990 banana suckers from P.W.1 nor paid Rs.3990/- to him i.e. @ Rs.1/- per sucker and that P.W.1 had not granted voucher (Ext.11) putting his signature in English thereon. The learned trial Court has discussed the evidence of P.W.1 and D.W.1 to arrive at such a conclusion. In fact, the evidence of D.W.1 supporting defence plea of the appellant has been disbelieved.

Let me now analyse the evidence of P.W.1 and D.W.1.

P.W.1 Kishore Meher has stated in his evidence that he was having no land and he was not a cultivator and he never took up banana plantation and he did not sell banana suckers to the Horticulture Department, Bolangir and did not receive any payment by selling banana suckers. He further stated that he had never executed any receipt with his signature showing receipt of payment. He further stated that he is an illiterate person and had never

granted any receipt to the appellant acknowledging receipt of Rs.3990/- towards price of banana suckers. He disowned the signature appearing on the receipt which was shown to him by the Special Public Prosecutor marked as 'X'. Suggestion has been given by the learned defence counsel that he was cultivating the lands of others on 'Bhag' basis and earning his livelihood by cultivating land of others, but P.W.1 has denied it. Specific suggestion has also been given to him by the defence that he had sold banana suckers to the appellant worth of Rs.3,990/- @ Rs.1/- per sucker and granted receipt to the appellant to that effect but he has denied the same. Ext.11 is the particular voucher in which signature of one 'Kisor Meher' on a revenue stamp with date 26.02.92 is appearing. This particular voucher Ext.11 and signature appearing thereon should have been shown to P.W.1 by the Special Public Prosecutor. Nothing on Ext.11 has been marked as 'X' and thus it is clear that Ext.11 has not been shown to P.W.1.

At this stage, the evidence of D.W.1 Karunakar Meher is required to be considered, who has stated that he was having a medicine shop where P.W.1 was working as a salesman from 1988-89 till 1994. He further stated that P.W.1 was writing the cash memos in English and giving it to the customers. He further stated that in 1991-92, he had given his land on 'bhag' basis to P.W.1 for cultivation and P.W.1 was doing banana cultivation. He further stated that the appellant came to his medicine shop and enquired from him about supply of banana suckers for which he called P.W.1 and the appellant talked with him (P.W.1) regarding supply of banana suckers to him @ Rs.1/- per sucker. He further stated that P.W.1 suggested to the appellant to come after four to five days with a vehicle to take the banana suckers and accordingly, the appellant came and took delivery of banana suckers from P.W.1 and also took receipt with signature of P.W.1 from him. D.W.1 was cross-examined by the learned Special Public Prosecutor and he stated that he had not seen the educational certificate of P.W.1. However, he stated that P.W.1 was a non-matric. He further stated that he could not produce any document bearing the signature of P.W.1. He stated that he could not say the khata no. and plot no. of his lands and could not produce any document showing P.W.1 to be cultivating his lands on 'Kar' basis. Suggestion was given to D.W.1 by the learned Special Public Prosecutor that P.W.1 was an illiterate person and he was also a landless person and he never worked in his shop to which D.W.1 had denied.

The learned trial Court has disbelieved the evidence of D.W.1 on the ground that he could not produce any document showing that P.W.1 was cultivating his land on Kar basis and could not produce any document showing that P.W.1 was cultivating banana on his land. It was further held that when D.W.1 was not selling banana suckers, it is hard to believe that the appellant had gone to his shop to contact him for purchase of banana suckers in the month of March 1992.

While judging the veracity of witnesses, there cannot be any different yardstick for judging the prosecution witnesses and defence witnesses. The defence witnesses are to be given equal treatment like the prosecution witnesses. Defence witnesses cannot be said to be untruthful, merely because they support the case of the accused. The evidence of a defence witness carries the same weight as that of the prosecution. His credibility should not be doubted merely because his attendance has been procured by the accused. Prosecution witnesses are not necessarily truthful and the defence witnesses are false witnesses. When two versions are before the Court, one by the prosecution and the other by the defence adduced by examining defence witnesses or proving some documents or eliciting something from the prosecution witnesses in support of defence plea, it is for the Court to appreciate both the versions, scrutinize it carefully and minutely and find out as to which of them is more probable and believable. The Court should always keep in mind that accused has only to establish his defence on a preponderance of probability not by proving the same beyond reasonable doubt as the prosecution is required to prove its case. If on assessment of the evidence led by the parties, probability factor echoes in favour of the defence, the Court should give benefit of doubt to the accused.

P.W.1 was a co-villager of D.W.1 and according to D.W.1, he had given his land to P.W.1 to cultivate on Kar basis. D.W.1 also stated that P.W.1 was serving in his medicine shop for about six years. Merely because D.W.1 could not produce any document showing P.W.1 was cultivating his land or that P.W.1 had raised banana plantation on his land, the same cannot be ground to discard the evidence of D.W.1. In villages, ordinarily nobody keeps any document for entrusting his land to someone as bhag-chasi. Similarly, there is no improbability feature in the appellant coming to know from some sources that there was banana cultivation in the land of D.W.1 and accordingly approached him, who in turn called P.W.1 who had raised banana plantation to contact the appellant.

P.W.4, the Accountant -cum- Head Clerk in the office of Horticulturist, Bolangir has stated that the appellant took advance of Rs.20,000/- on 30.03.1992, Rs.16,500/- on 22.01.1992 and Rs.5,900/- on 06.04.1992. The same was reflected in Advance Ledger (Ext.10) and it was acknowledged by the appellant. After utilisation of the advance, the appellant submitted vouchers vide Exts.11 to 17. The voucher which is relevant for adjudication of this appeal is Ext.11. P.W.4 has stated that in Ext.11, the endorsement 'paid by me' with signature was given by the appellant and that has been marked as Ext.11/1 and Ext.11/2 is the certificate with signature of the appellant given on the reverse of the voucher. P.W.4 further stated that all the vouchers were in his custody which was seized by the Inspector, Vigilance on his production as per seizure list Ext.18. In the cross-examination, he has stated that a sum of Rs.42,900/- was advanced to the appellant under the Scheme, out of which Rs.36,500/- was advanced for purchase of banana suckers and Rs.5,900/- was advanced for transportation of banana suckers. The appellant had given the vouchers showing utilization of the advance taken by him and the Horticulturist, Bolangir verified those vouchers. He further stated that the drawing officer passed order for payment after he was satisfied about the authenticity of the vouchers.

P.W.10, the in-charge Horticulturist at Bolangir stated that in the reverse of the procurement vouchers, the appellant had endorsed that he had received the stock in good condition and made entry thereof in the stock register and he had also put his signature under his endorsement. He further stated that in Ext.11, there is endorsement of the appellant that he had received the goods in good condition and the same was entered in the stock register at page 4 and the appellant had also certified that he had made payment of the cost amounting to Rs.3,990/- under the said voucher. Ext.11/2 is the certificate of the appellant and Ext.11/3 is the endorsement of P.W.10 passing the amount for payment to the appellant. He further stated that after procurement, the stock was entered in the stock register and the said stock was issued to the field staff of the department for supply to the Farm/Agriculturist. He further stated that as Head of the office, after being satisfied about the genuineness of the vouchers submitted before him with respect to the advance payment or excess payment, he had passed the voucher for payment.

P.W.19, the Inspector of Vigilance has stated in his cross-examination that the fact of purchase of banana suckers under the voucher

Ext.11 had been noted in the stock register of the Horticulturist, Bolangir, but he had not seized the stock register. He further stated that Shyam Sundar Sethi was the incharge of the Central Stock Register of the Horticulturist, Bolangir, but he had not examined him in the case. He further stated in the cross-examination that as per the procedure, the gardeners were to send the banana suckers to the cultivators and obtain their signature in their stock register and also mention the receipt of money from them in the stock register. The gardeners had deposited the actual sale price of the suckers in the office of the Horticulturist, Bolangir as per the quantity of suckers shown to have been sold by them to the suckers and they had deposited the sale price of the suckers said to have been received by them as per Central Stock Register in the office of the Horticulturist, Bolangir and that he had not seized the stock registers of the gardeners. When the documentary evidence as well as oral evidence indicates that banana suckers purchased under Ext.11 were received in good condition and to that effect entry has been made at page 4 of the stock book (banana suckers), 1991-92 and the said stock book register of banana suckers has been marked as Ext.B as per the order dated 11.11.2021 passed in I.A. No. 1118 of 2021, which was an application filed by the appellant under section 391 of Cr.P.C. mark the same as additional evidence and when the stock register (Ext.B) clearly indicates about receipt of 3,990 banana suckers on 26.02.1992 purchased from Kishore Meher, Village/ P.O.-Jarsingh, P.S.-Tusra, District-Bolangir vide S.V. No.2, therefore, it is difficult to doubt that Ext.11 is not a genuine one particularly when P.W.10 has stated that as Head of the office, after being satisfied about the genuineness of the voucher submitted before him with respect to the advance payment or the excess payment, he had passed the voucher for payment. No explanation has been given as to why the person who was in charge of the central stock and register of the Horticulturist, namely, Shyam Sundar Sethi was not examined by the I.O. and as to why the stock register was not seized by the I.O. It presupposes that since proving of the stock register and examination of Shyam Sundar Sethi would have strengthened the defence plea, the same was not done deliberately, which reflects that the Investigating Officers were not fair while investigating the case. The documents further revealed that not only 3990 banana suckers were received in the Central Stock but those were also issued to the gardeners for selling the same to the cultivators at a subsidized rate of Rs.0.15 paise per sucker. The gardeners also received the banana suckers from the Central Stock and sold the same to the cultivators and deposited the sale proceeds in the Central Stock and to that effect the stock registers of the

gardeners were very much relevant, which were also not seized by the Investigating Officer. The contention of the learned counsel for the appellant that the I.O has not intentionally seized the stock registers inasmuch as had he seized the same, it would have demolished the case of the prosecution in its entirety and as such, adverse inference under section 114(g) of the Evidence Act is to be drawn against the prosecution, has got substantial force.

Illustration (g) to section 114 of the Evidence Act deals with the presumption that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The rule on which this illustration is based is contained in the well-known maxim i.e. 'omnia praesumuntur contra spoliatorem' i.e. if a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. The essence of the rule contained in illustration (g) lies in the fact that if a party to lis is in possession of the best evidence, which one way or other is decisive on the fact in issue, then there is heavy duty cast upon him to assist the Court with the same that notwithstanding what the abstract doctrine of the onus of proof may suggest about and the case he fails to produce it without any reasonable justification, whether called upon to do so or not then in law, it is open to the Court to draw an adverse inference against him for that reason. A presumption under section 114(g) is a question of fact and not a question of law. An adverse inference can be drawn against a party if there is withholding of evidence and not merely on account of the failure of the party to obtain evidence. The function of the prosecution is to bring the truth before the Court and it is the duty of the Public Prosecutor to ensure with all diligence and carefulness required to see that all the details are brought on record and that the prosecution does not fail due to such neglect. The prosecutor must not suppress or keep back from the Court evidence relevant to the determination of the guilt or innocence of the accused. He must present a complete picture and not one-sided picture. He has to be fair to both the sides in the presentation of the case. If relevant documents admitted to have been in existence were not placed before the Court by the party concerned, adverse inference has to be drawn against that party. In the case of ***Union of India - Vrs.- Ibrahim Uddin and another reported in (2012) 8 Supreme Court Cases 148,*** it is held that generally it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may

draw adverse inference under section 114(g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. The Hon'ble Supreme Court placed reliance on the decisions in the cases of ***Murugesam Pillai -Vrs.- Manickavasaka Pandara, A.I.R 1917 PC 6; Hiralal -Vrs.- Badkulal, A.I.R 1953 SC 225; A. Raghavamma -Vrs.- A. Chenchamma, A.I.R 1964 S.C 136; Union of India -Vrs.- Mahadeolal Prabhu Dayal, A.I.R 1965 S.C 1755; Gopal Krishnaji Ketkar -Vrs.- Mohd. Haji Latif, A.I.R 1968 S.C 1413; M/s. Bharat Heavy Electrical Ltd. -Vrs.- State of U.P., A.I.R 2003 SC 3024; Mussauddin Ahmed -Vrs.- State of Assam, A.I.R 2010 SC 3813 and Khatri Hotels(P) Ltd. -Vrs.- Union of India, (2011) 9 Supreme Court Cases 126***.

Thus, in my humble view non-seizure of the stock register of the Central Stock, stock registers of gardeners and non-examination of the in-charge of Central Stock was deliberately done by the Investigating Officers for which adverse inference is to be drawn against the prosecution as attempts are being made to suppress the truth from the Court.

Now, coming to the charge under section 409 of Indian penal Code, let me discuss the citations placed by Mr. Das, the learned Standing Counsel for the vigilance department.

In the case of ***Jaikrishshnadas M. Desai*** (supra), it is held that the principal ingredient of the offence under section 409 of the Indian Penal Code being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made.

In the case of ***Bhargaban Pallai (dead) by L.Rs. and another(supra),*** the Hon'ble Supreme Court has held that in a case under

section 409 of the Indian Penal Code, the actual mode of entrustment or misappropriation is not to be proved by the prosecution. Once entrustment is proved, it is for the accused to prove as to how the property entrusted was dealt with.

In the case of ***Minaketan Das*** (supra), this Court has held that the onus lies on the prosecution to prove entrustment by adducing cogent evidence. It is not, however, necessary to prove that any specific sum of money, received on particular dates from particular persons, has been dishonestly misappropriated. Once it is proved that the money was entrusted to a person, the burden rests on him to show as to what he did with the money and if he, completely denied having received money the presumption is that he misappropriated or converted it to his own use. In a prosecution for criminal breach of trust, direct evidence of dishonest conversion to the accused's own use of the money, entrusted to him, can seldom be found and such dishonest intention and conversion have to be inferred from relevant facts and circumstances.

In the case of ***Brahmananda Mohanty*** (supra), it is held that:-

> "16. The settled position in law is that it is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or appropriated the goods, the question is one of intention and not a matter of direct proof but giving a false account of what he has done with the goods received by him may be treated as a strong circumstance against the accused person. In such a case the elements of criminal offence of misappropriation will be established if the prosecution proves that the accused received the goods, that he was under duty to account for the same and had not done so. It is not the law that the prosecution has to eliminate all possible evidences or circumstances which may exonerate him. If the facts are within the knowledge of the accused then he was to prove them. Of course, the prosecution has to establish a prima facie case in the first instance. It is enough to establish facts which give rise to a suspicion; and then by reason of section 106 of the Evidence Act, the onus is thrown on the accused to prove his innocence.

In the case of Harish Chandra Singh (supra), this Court has held as follows:

> "10....That is because, law is well settled that it is neither necessary nor possible in every case of criminal breach of trust to proved the precise mode of criminal breach of trust to prove the precise mode of misappropriation or conversion to one's own use of the entrusted property, by the accused, the same being ordinarily not capable

> of proof by direct evidence. It does not mean thereby that the prosecution is absolved from the burden of proving misappropriation. This burden can be discharged by proof of circumstances which lead to the irresistible conclusion of misappropriation. Then again mere proof of misappropriation is not enough. The further burden that lies on the prosecution is to prove that the accused was actuated by dishonest intention while misappropriating the entrusted property. In other words, misappropriation with intention of causing wrongful gain or wrongful loss cannot be assumed and must be proved either by positive evidence or may be presumed from proved circumstances. Wrongful gain includes wrongful retention and wrongful loss includes being kept out of the property and being deprived of the same. It is, however, not necessary to prove either actual wrongful gain or actual wrongful loss. Mere failure on the part of the accused the account for the property entrusted is not enough since it is only a piece of evidence pointing dishonest intention and must be considered along with other facts and circumstances appearing in a case. Where however an accused is unable to account or renders a false explanation for failure to account, an inference of misappropriation with dishonest intention may readily be inferred."

In this case, the prosecution has successfully proved the entrustment of the advance money with the appellant for purchasing banana suckers which is also not disputed by the appellant, but since in view of the documentary evidence Ext.11, Ext.B and the evidence of P.W.4, P.W.10 and P.W.19 so also the evidence of D.W.1, it is apparent that not only 3990 banana suckers were purchased by the appellant but the same were also deposited in the Central Stock and thereafter, those were given to the gardeners who in turn sold the same to the cultivators, obtained the sale price and deposited the same in the Central Stock, in my humble view the appellant had offered proper explanation as to what he did after receiving advance of Rs.3,990/- towards purchase of banana suckers from P.W.4 and there is no wrongful gain on the part of the appellant and therefore, the appellant has not committed criminal breach of trust and as such the charge under section 409 of the Indian Penal Code fails.

(iv) <u>Charges under section 468 and 471 of the Indian Penal Code :</u>

Section 468 of the Indian Penal Code deals with forgery for the purpose of cheating. The prosecution must prove that the document is a forged one and that the accused forged the document and that he did it for the purpose that the forged document would be used for the purpose of cheating.

In the case of **Prahallad Sethy** (supra), this Court has held that in order to secure conviction for offence punishable under section 468 of Indian

Penal Code, one must be found to have done forgery within the meaning of section 463 of Indian Penal Code which again implies that there has to be the making of a false document in terms of section 464 of Indian Penal Code. It is further held that a conjoint reading of section 463 and 464 of the Indian Penal Code goes to show that two essential elements of forgery contemplated under section 463 of Indian Penal Code are (i) the making of a false documents or part of it and (ii) such making is with such intention as is specified in the section. These aspects are required to be established.

Since I have already held that prosecution has failed to prove that Ext.11 is a forged document, the ingredients of the offence under section 468 of the Indian Penal Code are not attracted and therefore, the charge for such offence fails. Section 471 of the Indian Penal Code deals with using a forged document as a genuine one. 'Forged document' has been defined in section 470 of the Indian Penal Code which states that a false document as described in section 464 made wholly or in part by forgery is a forged document. Fraudulent or dishonest use of a document as genuine and knowledge or reasonable belief on the part of the person using the document that it is a forged one are the essential ingredients of the offence under section 471 of the Indian Penal Code. Since I have already given the findings that Ext.11 is not a forged document, therefore, the charge under section 471 of the Indian Penal Code also fails.

(v) Charge under section 13(2) read with section 13(1)(c) of the 1988 Act :

In the case of **K.R. Purushothaman** (supra), the Hon'ble Supreme Court has held that to constitute an offence under clause (c) of section 13(1) of the Act, it is necessary for the prosecution to prove that the accused has dishonestly or fraudulently misappropriated any property entrusted to him or under his control as a public servant or allows any other person to do so or converts that property for his own use. The entrustment of the property or the control of the property is a necessary ingredient of section 13(1)(c).

Since Ext.11 is a genuine document and after receipt of the advance from P.W.4, the appellant not only purchased banana suckers spending Rs.3,990/- but also deposited the banana suckers in the Central Stock with Shyam Sundar Sethi, the in-charge of Central Stock and relevant entry has been made in the stock register (Ext.B) of the Central Stock and banana

suckers were given to the gardeners from the Central Stock who sold it to the cultivators in a subsidized rate and deposited the sale amount in the Central Stock, therefore, there is no material regarding dishonest or fraudulent misappropriation of Rs.3,990/- by the appellant and as such, the charge under section 13(2) read with section 13(1)(c) also fails.

Conclusion:

11. In view of the foregoing discussions, I am of the humble view that the impugned judgment and order of conviction of the appellant passed by the trial Court is not sustainable in the eye of law and the same is hereby set aside. The appellant is acquitted of the charges under sections 409, 468, 471 of the Indian Penal Code and section 13(2) read with section 13(1)(c) of 1988 Act.

Accordingly, the Criminal Appeal is allowed. The appellant is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Lower Court records with a copy of this judgment be sent down to the learned trial court fourthwith for information

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2022 (I) ILR - CUT- 632

K.R. MOHAPATRA, J.

OJC NO. 9002 OF 1995

SUKADEV NAYAK & ORS. ……..Petitioners

.V.

CHARAN NAYAK & ORS. ……..Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – Section 9 (1) – Requirements of – Held, In order to claim the benefit under the section, (i) the claimants have to show that they are raiyat or Tenant in respect of land (ii) they have their dwelling house with prior permission of the Land lord (iii) they (claimants)do not have permanent and heritable right (iv) and the construction was made out of their (claimant's) own expenses.

(Para-10)

Most of the findings on the aforesaid requirements are conspicuously absent in the impugned order–The matter is remitted back to the revenue officer to adjudicate the matter afresh in accordance with law keeping in mind the requirements of section 9(1) of the Act. (Para-11)

Case Laws Relied on and Referred to :-

1. 1984 (II) OLR 1045 : Mir Nabiruddin Vs. Mir Salimuddin and Ors.
2. 1970 (1) C.W.R 308 : Sri Santinidhi Lenka and another Vs Shri Jagannath Mohaprabhu, through Biswanth Rajguru, Executive Officer, Jagannath Ballav Endowment Trust Board.

For Petitioners : Mr. Bibhu Bhusan Rath
For Opp. Parties : Mr. Dillip Kumar Mishra Addl. Govt. Adv. (for Opp. Party Nos. 3 and 4)
Mr.Aurovinda Mohanty, (for Opp. Party Nos.1 to 3)

ORDER Order No. 28.03.2022

K.R. MOHAPATRA,J.

This matter is taken up through hybrid mode.

2. The Petitioners in this writ petition seek to assail the order dated 18th March, 1993 (Annexure-7) passed by the Revenue Officer-cum-Tahasildar, Binjharpur - Opposite Party No.3 in O.L.R. Case No.4 of 1998 filed by the Opposite Party Nos. 1 and 2 under Section 9(1) of the Orissa Land Reforms Act, 1960 (hereinafter referred to as 'the Act').

3. The original Opposite Party Nos.1 and 2, namely, Sricharan Nayak and Haricharan Nayak (hereinafter referred to as 'the Claimants') filed a petition under Section 9(1) of the Act before Revenue Officer claiming that they were raiyats under the original Petitioners, namely, Sukadev Nayak, Basudev Nayak, Sahadev Nayak, Golakh Nayak, Kunja Behari Nayak and Sudarsan Nayak (hereinafter referred to as 'the landlords') of Mouza Gamu under Binjharpur Tahasil (now under Bari Tahasil) in the district of Cuttack (now in the district of Jajpur) in respect of Khata No.251 under Plot No.1401 to an extent of Ac.0.64 decimals out of Ac.1.11 decimals. As such, the claimants filed application under Section 9(1) of the Act to declare them as raiyats in respect of the Ac.0. 07.5 decimals out of Ac.0.15 decimals in Plot No.919 and Ac.0.08.5 decimals out of Ac.0.17 decimals in Plot No.929

under Khata No.134 of the said mouza over which they claimed to have constructed their dwelling house. Initially the Opposite Party No.3 allowed the petition vide order dated 13th May, 1988 declaring the claimants to be raiyats of the landlords in respect of an area measuring Ac.0.04.5 Kadi of Plot No. 919(P) under Khata No.134 situated in Mouza Gamu. Assailing the same, the claimants moved this Court in O.J.C. No.3087 of 1989 to declare them as raiyats in respect of rest of the land. This Court allowed the writ petition vide order dated 20th October, 1992 holding as under;

> "In the aforesaid premises we quash the orders of the Revenue Officer underAnnexure-8 and 9 and remit the matter to the Revenue Officer for re-inquiry and re-disposal in accordance with law. It is open for the Opposite Parties Nos. 3 to 8 to raise an objection that the Petitioners are not entitled to any settlement as they are not tenants under the Opposite Parties in respect of any other land in the village and if such a contention is raised, it will be dealt with by Revenue Officer in accordance with law.
>
> The writ application is allowed. There will be no order as to costs."

Thus, the matter was remitted back to the Revenue Officercum-Tahasildar, Binjharpur for fresh adjudication of the petition filed by the claimants under Section 9(1) of the Act.

4. It appears from the record that although the landlords (opposite party Nos. 3 to 8 in OJC No.3087 of 1989) were given opportunity to file objection against settlement of Ac.0.04.5 Kadi in favour of the claimants, but they failed to file any objection. However, the Revenue Officer proceeded with the matter and passed the impugned order dated 18th March, 1993 under Annexure-7. Hence, this writ petition has been filed by the predecessors of the Petitioners.

5. During pendency of the writ petition, the Petitioner Nos. 1 to 3 and 5 died and they were substituted by their legal heirs. Likewise, the Opposite Party Nos.1 and 2 also died during pendency of the writ petition and have been substituted by their legal heirs.

6. Mr. Rath, learned counsel for the landlords submitted that there is no material on record to come to a conclusion that the claimants were raiyats under the landlords. Thus, the provision under Section 9(1) of the Act is not applicable to the case at hand. In order to bring the application filed by the claimants under the purview of Section 9(1) the Act, the claimants have to

admit the title of the landlords. They also have to prove that they have been inducted as raiyats or tenants and are in a permissive possession over the land in question by constructing their dwelling house thereon. It is further incumbent upon them to prove that they have constructed dwelling house out of their own expenses with prior permission of the recorded tenants and they don't have any permanent or heritable right over the same. These material aspects were not taken into consideration by the Revenue Officer while adjudicating the matter. There is no finding on the aforesaid aspect by the Revenue Officer in the order under Annexure-7. As such, the impugned order under Annexure-7 is not sustainable in the eyes of law and is liable to be set aside.

7. Mr. Mohanty, learned counsel for claimants, on the contrary submits that although this Court while disposing of W.P.(C) No.3087 of 1989 granted liberty to the landlords to raise objection with regard to declaration of the claimants as raiyats in respect of a part of the property in question, but no objection whatsoever to that effect was filed by the landlords. They did not also contest the O.L.R. Case No.4 of 1988. In absence of any material to the contrary, the Revenue Officer proceeded with the matter on the materials available on record and declared the claimants as raiyats under Section 9(1) of the Act. Hence, there is no infirmity in the impugned order.

8. Mr. Mishra, learned Additional Government Advocate submits that although there is no detail discussion in the impugned order to satisfy the requirements of Section 9(1) of the O.L.R. Act, but in absence of any material to the contrary, the Revenue Officer has accepted the statements made in the petition under Section 9(1) of the Act as well as the report of the Amin on their local visit and passed the impugned order. As such, the writ petition merits no consideration and is liable to be dismissed.

9. I have heard learned counsel for the parties at length and perused the materials on record. Section 9(1) of the Act clearly stipulates that a person who is a raiyat or a tenant in respect of any land but has no permanent and heritable rights in respect of any site on which his dwelling house or farm stands, shall with effect from the commencement of this Act be deemed to be a raiyat in respect of the whole of such site or a portion thereof not exceeding one-fifth of an acre whichever ever is less if he or his predecessor-in-interest has –

(a) obtained permission, express or implied, from the person having permanent and heritable rights in the site and having right to accord permission for the construction of such house; and

(b) built such house at his own expense.

Thus, in the instant case, the claimants have to establish that they have no permanent and heritable right over the land in question over which they have constructed their dwelling house with permission of the landlords over which the landlords have permanent and heritable right and the construction was made out of their (claimants') own expenses.

10. As held in the case of ***Mir Nabiruddin -vrs.- Mir Salimuddin and Ors. reported in 1984 (II) OLR 1045***, the claimants by filing an application under section 9(1-A) of the Act in the prescribed form and manner within the prescribed period has to prove the following;

"i) the applicant must be a raiyat or tenant in respect of any land:

ii) he must not having any permanent or heritable right in respect of any site on which his dwelling house or farm house stands:

iii) he or his predecessors-interest should have obtained permission, either express or implied, from the person having permanent and heritable right in the site:

iv) grantor of such permission should not only have permanent and heritable right in the site but should have right to accord permission for the construction of the house: and

(v) in pursuance of such permission the grantee, i.e., the raiyat or the tenant, should have built the house at his own expenses."

Moreover, the claimants have also to show that they are raiyat or tenant in respect of land other than that over which they have their dwelling house with prior permission of the landlord over which they (claimants) don't have permanent and heritable right. Mr. Rath, learned counsel for the Petitioners relied upon the case of ***Sri Santinidhi Lenka and another vs Shri Jagannath Mohaprabhu, through Biswanth Rajguru, Executive Officer, Jagannath Ballav Endowment Trust Board, reported in 1970 (1) C.W.R 308***. The relevant portion is reproduced hereunder for ready reference,

"…… Section 9 provides that a person in order to claim the benefit under that section should first be a raiyat or a tenant in respect of some land other

than the site on which the dwelling house or farm house stands. If he is not a tenant or a raiyat in respect of any other land, he cannot claim the benefit of Section 9."

On a perusal of the impugned order it appears that the Revenue Officer has not made endeavour to find out whether the claimants have proved the aforesaid requirements for grant of relief.

11. Most of the findings on the aforesaid requirements are conspicuously absent in the impugned order under Annexure-7.On the other hand, it appears that the Revenue Officer proceeded on a presumption.

12. Thus, the Revenue Officer-cum-Tahasildar, Binjharpur failed to exercise the jurisdiction vested in him under law. Thus, impugned order under Annexure-7 is not sustainable in the eyes of law and is accordingly set aside. The matter is remitted back to the Revenue Officer-cum-Tahasildar, Binjharpur (at present Bari)-Opposite Party No.3 to adjudicate the matter afresh in accordance with law giving opportunity of hearing to the parties concerned keeping in mind the requirements of Section 9(1) of the Act.

13. In order to avoid further delay in the matter, parties are directed to appear before the Revenue Officer-cum-Tahasildar, Bari on 18th April, 2022 along with certified copy of this order to receive further instruction in the matter.

14. This writ petition is allowed to the aforesaid extent.

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2022 (I) ILR - CUT- 637

B.P. ROUTRAY,J.

MACA NO.711 OF 2011

NARSIN BEGUM AND ORS. ……Appellants

.V.

Mr. CHANDESWAR RAY AND ANR. ….....Respondents

MOTOR ACCIDENT CLAIM – Whether the insurer would liable to indemnify the compensation where the negligence was on the part of the driver of the offending truck? – Held, No. – In the instant case, no such evidence is there to reveal if any diligence was taken by the

owner of the offending vehicle for verification of the licence of the offender driver that it has been duly renewed after its expiry. The fact remains that even validity of the DL was expired since 25.5.2009, the same was not renewed till the date of accident i.e. 6.4.2010 – Nothing has also been brought on record to reveal anything if the licence was renewed thereafter or retrospectively. (Para-9)

Thus in the result, no merit is seen in the challenge of the appellants to shift the liability on the insurer to indemnify the compensation amount. As such the appeal is dismissed. (Para-10)

Case Laws Relied on and Referred to :-

1. (2004) 3 SCC 297 : Nirmala Kothari (supra), National Insurance Co. Ltd. Vs. Swaran Singh.
2. 2015 SCC OnLine 6758 : Tata AIG General Insurance Co. Ltd. Vs. Akansha.
3. (2015) 111 ALR 275 : The Oriental Insurance Co. Ltd. Vs. Manoj Kumar.
4. 2012 ACJ 1891 : National Insurance Co. Ltd. Vs. Hem Raj.

For Appellants : Mr. P.K. Rath
For Respondent : Mr. Anirudha Das, for Respondent No.1
Mr. G.P. Dutta, for Respondent No.2

JUDGMENT Date of Judgment: 30.03.2022

B.P. ROUTRAY,J.

1. Present appeal is directed against judgment dated 29th August, 2011 of learned 4th M.A.C.T., Jharsuguda in M.A.C. No.40 of 2010, wherein learned Tribunal has granted compensation to the tune of Rs.3,63,000/- in favour of the claimants on account of death of the deceased – Diwan Farukh Khan in the motor vehicular accident dated 6.4.2010.

2. The claimants are the wife, four children and mother of the deceased. Their case is that the deceased was the driver of a Truck and on 6.4.2010 his Truck was parked behind the offending Truck bearing Registration No.HR-69-A-1264 for unloading coal. As the driver of the offending Truck had slept in the driver seat and did not move after unloading the coal, the deceased climbed up to the driver's cabin of the offending Truck to wake him for moving forward who were in the queue for unloading coal. But the driver carelessly drove the Truck suddenly in a rash and negligent manner resulting

fall of the deceased from the cabin and the wheels of the Truck crushed over him causing his instant death.

3. Learned Tribunal fixed the negligence on the part of the driver of the offending Truck and directed the owner to pay the compensation. It refused to fix the liability on the insurer (present Respondent No.2) to indemnify the compensation amount on behalf of the owner on the ground that the driver of the offending Truck had no valid DL on the date of accident.

4. The negligence on the part of the offender driver is not challenged by any of the parties. The claimants have come up in challenging the exclusion of liability on the part of the insurer. The quantum of compensation is also questioned by the claimants (Appellants) on the ground that fixing notional income of the deceased at Rs.3,000/- per month despite salary certificate of the deceased was produced on record. However in course of hearing the exclusion of liability of the insurer to indemnify the compensation amount has been much pressed.

5. Thus the main question as for determination is that, whether in the given facts and circumstances of the case the insurer would liable to indemnify the compensation amount ?

6. The admitted case of the parties is that the driver of the offending vehicle had a valid licence upto 25.5.2009 and the same was not renewed thereafter. It is not the case of the insurer that the driver was incompetent one or the license was fake, but the fact remains that he did not renew his licence from 25.5.2009 onwards. Nothing has been brought on record to reveal if the owner had no knowledge of expiry of the license period or in good faith he unknowingly permitted the offender to drive the vehicle. Nothing has been brought on record if the owner had taken enough precaution to verify the validity of the DL upon renewal. No evidence was adduced from the side of the owner or the insurer concerning this aspect..

7. The Supreme Court in the case of Nirmala Kothari vs. United India Insurance Company Limited, (2020) 4 SCC 49 have held as follows:

> "12.While hiring a driver the employer is expected to verify if the driver has a driving licence. If the driver produces a licence which on the face of it looks genuine, the employer is not expected to further investigate into the authenticity of the licence unless there is cause to believe otherwise. If the employer finds the

> driver to be competent to drive the vehicle and has satisfied himself that the driver has a driving licence there would be no breach of Section 149(2)(a)(ii) and the insurance company would be liable under the policy. It would be unreasonable to place such a high onus on the insured to make enquiries with RTOs all over the country to ascertain the veracity of the driving licence. However, if the insurance company is able to prove that the owner/insured was aware or had notice that the licence was fake or invalid and still permitted the person to drive, the insurance company would no longer continue to be liable.
>
> 13. On facts, in the instant case, the appellant complainant had employed the driver, Dharmendra Singh as driver after checking his driving licence. The driving licence was purported to have been issued by the licensing authority, Sheikh Sarai, Delhi, however, the same could not be verified as the officer concerned of the licensing authority deposed that the record of the licence was not available with them. It is not the contention of the respondent insurance company that the appellant complainant is guilty of willful negligence while employing the driver. The driver had been driving competently and there was no reason for the appellant complainant to doubt the veracity of the driver's licence."

8. In the case of Beli Ram vs. Rajinder Kumar and another, 2020 SCC OnLine SC 769, the Supreme Court had examined the principle of law decided in the case of Nirmala Kothari (supra). In the case of Beli Ram (supra) it was a claim under the Workmen's Compensation Act, 1923. The sole question for consideration was, whether in a case of valid driving licence, if the licence has expired, the insured is absolved of its liability? The Supreme Court examined the cases of ***Nirmala Kothari (supra), National Insurance Co. Ltd. vs. Swaran Singh, (2004) 3 SCC 297*** and three other cases, viz., ***Tata AIG General Insurance Co. Ltd. vs. Akansha, 2015 SCC OnLine 6758, The Oriental Insurance Co. Ltd. vs. Manoj Kumar, (2015) 111 ALR 275 and National Insurance Co. Ltd. vs. Hem Raj, 2012 ACJ 1891*** of Delhi High Court, Allahabad High Court and Himachal Pradesh High Court respectively. The Supreme Court upon examination of all those cases has concluded that the judgment in the case of *Hem Raj* (supra) of Himachal Pradesh High Court is the correct legal principle. The view in Hem Raj's case as discussed in *Beli Ram's* case by the Supreme Court is that, *Swaran Singh* case did not deal with the consequences if the licence is not renewed within the period of 30 days and in such case, the driver who did not get renewed the validity of the licence after it was expired cannot claim that the licence has deemingly renewed retrospectively. The Himachal Pradesh High Court has further observed that MV Act being a beneficial piece of legislation, if two interpretations were possible, the one which is in favour of the claimants should be given without violating the clear and plain

language of the statute and the right of the victim, not of the owner of the vehicle, has to be protected. The Supreme Court has further observed that in Beli Ram's case they are dealing with the Workmen's Compensation Act and not a third party claim under the MV Act. The relevant observations are as follows:

> "1. The sole question of law for consideration in the present appeals is whether in case of a valid driving licence, if the licence has expired, the insured is absolved of its liability.
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> Xxx xxx xxx
>
> 11. We consider it appropriate to first commence with the view of this Court in the Swaran Singh case, which examined the meaning of the expression "duly licensed", as used in Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'MV Act'). The factual matrix dealt with the claim of a third party and the different eventualities considered were : (a) licence not held; (b) fake licence held; (c) licence held but validity whereof has expired; (d) licence not held for type of vehicle being driven; (e) learner's licence held. We may note here that the facts of the present case relate to eventuality (c) above. A liberal view was taken considering the intent of the legislation in question and that it was a case of a third party claim. xx xx xx
>
> 12. We may next advert to the judgment in the Nirmala Kothari case. The judgment was sought to be canvassed in support of the proposition by learned counsel for the appellant and we reproduce the relevant paragraphs in addition to the one reproduced above, as under:
>
> "10. While the insurer can certainly take the defence that the licence of the driver of the car at the time of accident was invalid/fake however the onus of proving that the insured did not take adequate care and caution to verify the genuineness of the licence or was guilty of willful breach of the conditions of the insurance policy or the contract of insurance lies on the insurer.
>
> 11. The view taken by the National Commission that the law as settled in the PEPSU case is not applicable in the present matter as it related to thirdparty claim is erroneous. It has been categorically held in the case of ***National Insurance Co. Ltd. vs. Swaran Singh*** (SCC p. 341, para 110) that
>
> "110. (iii)….Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time.

" xxx xxx xxx

15. We are of the view that once the basic care of verifying the driving licence has to be taken by the employer, though a detailed enquiry may not be necessary, the owner of the vehicle would know the validity of the driving licence as is set out in the licence itself. It cannot be said that thereafter he can wash his hands off the responsibility of not checking up whether the driver has renewed the licence. It is not a case where a licence has not been renewed for a short period of time, say a month, as was considered in the case of Swaran Singh where the benefit was given to a third party by burdening the insurance company. The licence in the instant case, has not been renewed for a period of three years and that too in respect of commercial vehicle like a truck. The appellant showed gross negligence in verifying the same.

16. We are conscious of the fact that in the present case the beneficiary is the driver himself who was negligent but then we are not dealing with a claim under the MV Act but under the Compensation Act, which provides for immediate succor, not really based on a fault theory with a limited compensation as specified being paid. We are, thus, in the present proceedings not required to decide the share of the burden between the appellant as the owner and the first respondent as the driver as may happen in a proceeding under the MV Act.

17. We now turn to the views of some of the High Courts, which have come to our notice on our own research!

Xxx xxx xxx

20. The last judgment is of the Himachal Pradesh High Court in ***National Insurance Co. Ltd. vs. Hem Raj, 2012 ACJ 1891***. This was, once again, a case of an originally valid licence, which had expired, there was no question of a fake licence. It was opined that the conclusions to be drawn from the observations of the judgment in the Swaran Singh case of this Court, were that the insurance company can defend an action on the ground that the driver was not duly licensed on the date of the accident, i.e., an expired licence having not been renewed within thirty (30) days of the expiry of the licence as provided in Sections 14 & 15 of the MV Act. In this context it was observed that the Swaran Singh case did not deal with the consequences if the licence is not renewed within the period of thirty (30) days. If the driving licence is not renewed within thirty (30) days, it was held, the driver neither had an effective driving licence nor can he said to be duly licenced. The conclusion, thus, was that the driver, who permits his licence to expire and does not get it renewed till after the accident, cannot claim that it should be deemed that the licence is renewed retrospectively.

21. The learned Judge debated the question of the consequences of the MV Act being a beneficial piece of legislation. Thus, if two interpretations were possible, it was opined that the one which is in favour of the claimants should be given, but violence should not be done to the clear and plain language of the statute. Thus, while protecting the rights of the claimants by asking the insurance company to

deposit the amount, the recovery of the same from the insured would follow as the sympathy can only be for the victim of the accident. The right which has to be protected, is of the victim and not the owner of the vehicle. It was, thus, observed in para 18 as under:

"18. When an employer employees a driver, it is his duty to check that the driver is duly licensed to drive the vehicle. Section-5 of the Motor Vehicles Act provides that no owner or person incharge of a motor vehicle shall cause or permit any person to drive the vehicle if he does not fulfil the requirements of Sections 3 and 4 of the Motor Vehicles Act. The owner must show that he has verified the licence. He must also take reasonable care to see that his employee gets his licence renewed within time. In my opinion, it is no defence for the owner to plead that he forgot that the driving licence of his employee had to be renewed. A person when he hands his motor vehicle to a driver owes some responsibility to society at large. Lives of innocent people are put to risk in case the vehicle is handed over to a person not duly licensed. Therefore, there must be some evidence to show that the owner had either checked the driving licence or had given instructions to his driver to get his driving licence renewed on expiry thereof. In the present case, no such evidence has been led. In view of the above discussion, I am clearly of the view that there was a breach of the terms of the policy and the Insurance Company could not have been held liable to satisfy the claim.

" 22. We have reproduced the aforesaid observations as it is our view that it sets forth lucidly the correct legal position and we are in complete agreement with the views taken in all the three judgments of three different High Courts with the culmination being the elucidation of the correct legal principle in the judgment in the *Hem Raj case.*

23. xxx xxx xxx. The only thing we note is that fortunately there has been no accident with a third party claimant but the person who has caused the sufferance and sufferer are one and the same person, i.e., the first respondent driver. We are, however, dealing with the determination under the Compensation Act and those provisions are for the benefit of the workmen like the first respondent, even though he may be at fault, by determining a small amount payable to provide succor at the relevant stage when the larger issues could be debated in other proceedings.

xxx xxx xxx

25. xxx xxx xxx. We have penned down the aforesaid views as such a situation is quite likely to arise in proceedings under the MV Act where a third party is claiming the amount. Proceedings here being under the Compensation Act, the consequences are not flowing to the first respondent as the initial negligent person. In view of the aforesaid, the appeals are dismissed by settling the aforesaid question of law and leaving the parties to bear their own costs."

9. In the instant case, no such evidence is there to reveal if any diligence was taken by the owner of the offending vehicle for verification of the licence of the offender driver that it has been duly renewed after its expiry.

The fact remains that even validity of the DL was expired since 25.5.2009, the same was not renewed till the date of accident i.e. 6.4.2010. Nothing has also been brought on record to reveal anything if the licence was renewed thereafter or retrospectively. Here the argument advanced on behalf of the Appellants that Beli Ram's case being a claim under the Workmen's Compensation Act is not applicable to the facts of the present case where the claim is under the MV Act, has no force in view of the clear observation of the Supreme Court made at paragraph 25 of the Beli Ram's case.

10. Thus in the result, no merit is seen in the challenge of the Appellants to shift the liability on the insurer to indemnify the compensation amount. As such the appeal is dismissed.

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2022 (I) ILR - CUT- 644

S.K. PANIGRAHI, J.

CRLREV NO. 490 OF 2021

PIDIKA SAMBARU …….Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 r/w Section 33(5) of the POCSO Act – Whether the Court has power to recall the witness for further cross examination – Held, Yes. – Cross-examination of the prosecution witnesses being an essential right of the accused, it is evident that non-cross-examination of the said witnesses will put the petitioner into prejudice – In such circumstances, it is not unjust to afford an opportunity to the petitioner to cross-examine P.Ws.1 to 3 by recalling them. (Para-9)

Case Laws Relied on and Referred to :-

1. (2016) 4 SCC 160 : Dharam Pal Vs. State of Haryana
2. (2008) 11 SCC 108 : Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd.
3. 2018 SCC Online Del 11796 (DHC) : Vimal Khanna Vs. State
4. 2018(4) JCC 2291 (DHC) : Mohd. Gulzar Vs. The State (GNCTD)
5. C. A. (Crl.) No.205 of 2001 (S.C.) : B. C. Deva @ Dyava Vs. State of Karnataka the Court

For Petitioner : Mr. Saroj Kumar Padhy.

For Opp. Parties : Mr. M.K. Mohanty, ASC (for O.P. No.1)

JUDGMENT Date of Hearing: 03.01.2022 :Date of Judgment: 04.03.2022

S.K. PANIGRAHI, J.

1. The Petitioner, who is the accused in T.R. Case No.80 of 2018, arising out of Narayanpatna P.S. Case No.72 of 2018, pending in the court of the learned Ad hoc Additional District and Sessions Judge, (FTSC), Jepore instituted by the Opposite Party No.2 for alleged commission of offences punishable under Sections 376(2)(n)/ 450/ 506 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 ((hereinafter referred to as "POCSO Act" for brevity), has made a prayer in this CRLREV under Section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for brevity) to set aside the impugned order dated 01.11.2021 passed by the learned Ad hoc Additional District and Sessions Judge, (FTSC), Jeypore in the aforesaid case rejecting his petition filed on 27.10.2021 under Section 311 of the Code to recall P.Ws.1, 2 and 3 for their cross-examination.

2. Prosecution case in brief is that:

On 15.09.2018 at 05.14 P.M. the opposite party no.2/complainant presented a written report before the Inspector-In-Charge, Narayanpatna Police Station, Narayanpatna alleging that the present petitioner who is resident of his village has committed rape on his daughter seven months ago in his cottage. While his daughter resisted, the present petitioner threatened her to kill. She narrated her daughter's ordeal to the villagers. By that time, her daughter impregnated with about 7 months. The accused also threatened to the complainant and his family members to kill, if they disclose the matter to anybody or report to police. Hence, they remain silent. On 14.09.2018, there was a village panch meeting at their village for amicable settlement. The village gentries, namely Suba Pidika, Chinaya Pidika, Uttara Tadingi, Narsana Pidika, Kate Pidika, Sasai Pidika, Waralu Huika and others were present in the meeting. They called Sambaru Pidika to the meeting, but he did not attend the meeting. The panch members told him to report the matter at police station. Hence, he made a report before the police on 15.09.2018. Based on which, Narayanpatna P.S. Case No.72 of 2018 was registered for commission of offences under Sections 376(3)/ 450/ 506 of the

Penal Code read with Section 4 of the POCSO Act and investigation was initiated. The victim girl was sent to CHC, Narayanpatna for medical examination and subsequently, the Medical Officer, CHC, Narayanpatna referred the victim girl to S.L.N. Medical College and Hospital, Koraput, as there was no lady Medical Officer at CHC, Narayanpatna. After completion of investigation, the Investigating Officer submitted charge-sheet against the present petitioner.

Keeping in view the nature of offences and detention of the accused in custody, the hearing of the case has been started. On 09.01.2020, the trial court examined five persons including the victim girl as P.W.2. On 11.02.2020, the medical officer was also examined by the prosecution, while there was no counsel to cross-examine the prosecution witnesses on behalf of the accused, as the accused-petitioner was in custody during that period. After released on bail, the petitioner engaged his lawyer and moved an application under Section 311 of the Code on 27.10.2021 to recall P.Ws.1 to 3. Having heard both the parties, the trial court vide order dated 01.11.2021 rejected the application of the petitioner on the ground that the discretion under Section 311 of the Code cannot be exercised as there is bar under Section 33(5) of the POCSO Act under which there is clear prescribed limitations recalling witnesses more particularly the victim of crime. Hence, this revision Application has been filed.

3. Learned counsel for the petitioner contended that both P.Ws.1 and 2 are material witnesses. P.W.3 is the victim girl. Unless the petitioner-accused is afforded an opportunity to cross-examine the aforesaid witnesses, he shall be highly prejudiced in his defense. He placed reliance in the case of ***Dharam Pal vs. State of Haryana***[1] and contended that the fundamental right of an accused is for a fair trial presupposes a fair investigation and in absence of fair investigation, there cannot be fair trial. But, in this case the investigation has not been done properly and in the absence of proper investigation, the materials relied on by the prosecution are not sufficient to frame charge. But the, case in hand, is different as here further cross-examination has been denied to the petitioner for examining the prosecution witnesses.

4. Learned Additional Standing Counsel for the State vehemently opposed the present petition and contended that the learned trial court has

1. (2016) 4 SCC 160

rightly rejected the application of the petitioner. He further contended that opportunity was given to the Petitioner to cross examine P.Ws.1 to 3. Moreover, the application for recall of the 14 years minor girl/victim is negating to Section 33 (5) of the POCSO Act which mandates that the child should not be repeatedly called to testify in a Court.

5. Section 311 of the Code provides:

> "Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

On the other hand, Section 33 (5) of the POCSO Act reads as under:

> "Procedure and powers of Special Court: (5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court."

6. It is also contended that the intention behind enacting Section 33 (5) of the POCSO is only to ensure that in a genuine case the child victim is not harassed, but cannot be used as a shield by the trial Court to deprive the accused of a right of proper cross examination and therefore a right of fair trial.

7. It is mandatory for a Court to recall witness for further cross-examination if his evidence appears to be essential for just decision of the case. There is no bar for a court to recall a witness for further cross - examination. In ***Godrej Pacific Tech. Ltd. –v Computer Joint India Ltd.***[2] , which has rightly by referring to Section 311 of the Code, the Hon'ble Apex Court has held:

> "The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the

2. (2008) 11 SCC 108

court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts."

8. In ***Vimal Khanna vs. State***[3] the Court has held that denial of opportunity to cross examine the witnesses violates the Constitutional guarantee to an accused and vitiates the trial. ***Vimal Khanna*** (Supra) has been followed in ***Mohd. Gulzar v. The State (GNCTD)***[4], wherein after recording that the counsel for the accused was not present on three consecutive dates to cross examine the witness, the Court held that since the right of cross examination is a valuable right, the child's right under Section 33 (5) of POCSO Act has to be balanced with the aforesaid rights of the accused and thus permitted one more opportunity to the accused to cross examine the alleged victim. In ***B. C. Deva @ Dyava vs. State Of Karnataka the Court***[5] was clearly of the view that the power to recall a witness at the instance of either party to ensure justice is done is greater than the provisions set out in Section 33 POCSO Act. The provisions of Section 33 laid down a general principle which must guide the trial Court and is similar to Section 309 Cr.P.C, being in the nature of laws to ensure speedy trial. However, by virtue of Sections 4 and 5 of Cr.P.C, Section 311 Cr.P.C shall prevail as no specific procedure is provided under POCSO Act for recall of a witness. Section 42A of POCSO Act clarifies that the Act is not in derogation of any other Law.

9. In that view of the aforesaid, this Court is of the view that cross-examination of the prosecution witnesses being an essential right of the accused, it is evident that non-cross-examination of the said witnesses will put the petitioner to prejudice. In such circumstances, it is not unjust to afford an opportunity to the petitioner to cross-examine P.Ws.1 to 3 by recalling them.

3. 2018 SCC Online Del 11796 (DHC), 4. 2018(4) JCC 2291 (DHC), 5. C. A. (Crl.) No.205 of 2001 (S.C.)

10. In view of the peculiar facts and circumstances of the instant case, the CRLREV is disposed of directing that the learned Additional District and Sessions Judge (FTSC), Jeypore shall recall P.Ws.1 to 3 and the department shall make all endeavours to produce P.Ws.1 to 3 as early as possible for cross-examination by the petitioner preferably within a period of one month from the date of production of certified copy of this order. After giving the petitioner an opportunity to cross-examine P.Ws.1 to 3, the trial court shall proceed for expeditious disposal of the case. It is further clarified that the Court shall take steps to recall the child witness at one go without disturbing him/her again and again.

11. Accordingly, this CRLREV is disposed of.

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2022 (I) ILR - CUT- 649

MISS SAVITRI RATHO, J.

CRLMC NO. 2847 OF 2021

1. BIRANCHI NARAYANA SATPATHY
2. Kananabala Satpathy
3. Sanu @ Charitartha Satpathy
4. Punyasloka Satpathy .....Accused / Petitioners

.V.

1. STATE OF ORISSA .....(Informant)
2. Sampatia Dalei (Injured)
3. Pintu Dalei .....Opp. Parties

CODE OF CRIMINAL PROCEDURE,1973 – Section 482 – Quashing of the FIR / criminal proceeding – Offences punishable under sections 341/294/326/307/452/506/34 of the Indian Penal Code r/w sections 3(1)(r)(s)2(v)(va) of Scheduled Caste and Schedule Tribe (Prevention of Atrocities) Act – Whether can be quashed? – Held, Yes. – Proceedings involving offences punishable under "Special Acts" like the SC and ST Act can be quashed in exercise of power under Article 142 of the Constitution and Section 482 of the Cr.P.C on the basis of compromise but keeping in view the over riding object for which the SC and ST Act was enacted, the Court has to be very vigilant while exercising such power so that the purpose of its enactment is not defeated. (Para 9)

In view of the amicable settlement between the parties who belong to the same village, lack of criminal antecedents against the petitioners, even though three of the petitioner have evaded arrest, as chances of conviction of the petitioners in the case are bleak, I am of the opinion that in the peculiar facts of the case, the proceedings against all the petitioners should be quashed. (Para-16)

Case Laws Relied on and Referred to :-

1. (2019) 5 SCC 688 : State of Madhya Pradesh Vs. Laxmi Narayan.
2. (2021) 84 OCR (SC) 851: 2021 SCC Online 966 : Ramavatar Vs. State of Madhya Pradesh.

For Petitioners : Mr. Priya Ranjan Singh

For Opp. Parties : Mr. Sibani Shankar Pradhan, Addl. Govt. Adv., (For O.P.1)
: Mr. Sitikant Mishra, (For O.P.Nos.2 & 3)

JUDGMENT Date of Judgment : 25.03.2022

MISS SAVITRI RATHO, J.

This application under Section 482 of the Code of Criminal Procedure (in short "the Cr.P.C") has been filed by the accused – petitioners for quashing the F.I.R./Criminal proceeding in C.T. (Special) Case No. 34 of 2021 arising out of Motanga P.S. Case No. 90/2021 for commission of offences punishable under Sections 341/ 294/ 326/ 307/ 452/ 506/ 34 of the Indian Penal Code (in short " IPC") read with Section 3(1) (r) (s) (2) (v) (va) of Scheduled Caste and Schedule Tribe (Prevention of Atrocities) Act (in short the "SC and ST Act") pending in the court of learned Judge, Special Court, Dhenkanal on the ground of compromise amongst the parties.

2. The prosecution case in brief as per the FIR lodged by Opp Party No 2 is that 23.05.2021 at about 4.00pm while he was sleeping in his r house , he received information that Sanu Satpathy had assaulted his son Pintu Dalei with a sharp edged weapon on his head and thereafter absconded . With the assistance of some others, he took his son to Meramandali Hospital .While he was undergoing treatment in the hospital, all the petitioners entered the room and started assaulting him . On receiving information when the police arrived , the accused persons went outside and abused in foul language and threatened to kill them. Then they went to his house and gave threats. Father of Sanu Satpathy holding sword, referring CRLMC No. 2847 of 2021 Page 3 of 27 to their caste threatened to cut them to pieces and wipe out their family.

His wife threatened that they would not allow the informants family to stay in the village .

3. When the matter was listed on 23.12.2021 for fresh admission, Opposite Party Nos.2 & 3 suo motu entered appearance through Mr. Sitikant Mishra, learned counsel and considering the submission that the matter had been amicably settled between the parties , this Court had directed the parties to appear in person on 04.01.2022. On 04.01.2022 , the Petitioner No.1-Biranchi Narayan Satpathy, Petitioner No.2-Kananabala Satpathy , Petitioner No.3- Sanu @ Charitartha Satpathy and Petitioner no.4-Punyasloka Satpathy duly identified by Mr. P.R. Singh, learned counsel for the petitioners and Opposite Party No.2-Sampatia Dalei and Opposite Party No.3-Pintu Dalei duly identified by Mr. Sitikant Mishra learned counsel for the Opposite party Nos.2 & 3 had appeared in Court. They stated that the matter has been settled between them and as all of them belong to one village, the injured and the informant do not want to proceed with the case. The affidavits filed by the petitioners , opposite party no.2 and opposite party no.3 in support of their submission regarding amicable settlement had been directed to be served on Mr. S.S. Pradhan, learned Additional Government Advocate to enable him to obtain instruction from the I.O. if the amicable settlement has been effected voluntarily without any threat and coercion on the Opp parties No 2 and 3.

4. Thereafter the case was listed on 08.02.2022 and Mr. S.S. Pradhan, learned Additional Government Advocate filed the instructions of the I.O. dated 12.01.2022 who has stated that he has enquired into the genuineness of settlement of the matter between the parties in this case and ascertained that as per the statement of victim-Pintu Dalei and complainant-Sampatia Dalei, they have compromised the matter amongst them by way of an affidavit and they have also submitted written petitions before the I.I.C., Motonga P.S. which are enclosed with his instructions.

5. Perusal of the petitions annexed to the instructions of the I.O. reveals that the victim-Pintu Dalei and complainant-Sampatia Dalei have inter alia stated that due to intervention of the village gentlemen and well wishers, the matter had been settled between the parties and they are living peacefully and the relation between them is now cordial for which they have no objection if the proceeding is quashed.

6. Mr. Priya Ranjan Singh, learned counsel for the petitioners submitted that though the case has been registered and preliminary

chargesheet has been submitted for commission of various offences out of which , the offences under Section – 294 and Section - 307 of IPC and the offences under the SC & ST Act are non compoundable under Section 230 of the Crl.P.C , but as per the decision of the Supreme Court in the case of Ram Gopal vrs. State of Madhya Pradesh reported in 2021 (II) OLR SCC 807 , offences punishable under Section SC & ST (PoA) Act, can be quashed on the basis of compromise in exercise of power under Section – 482 Crl.P.C . He also relies on the decisions of the Supreme Court in the case of Narinder Singh v State of Punjab reported in (2014) 6 SCC 466 and in the case of Gian Singh v. State of Punjab reported in (2012) 10 SCC 303 in support of his submissions that proceedings involving non compoundable offences can be quashed on the basis of compromise in exercise of inherent power.

7. Mr. S.S. Pradhan, learned Additional Government Advocate submits that though the proceedings involving non-compoundable offences are being quashed on the basis of compromise in exercise of power under Section – 482 of the Crl.P.C, the Hon'ble Supreme Court in the case of the ***State of Madhya Pradesh vrs. Laxmi Narayan reported in (2019) 5 SCC 688*** has deprecated the practice of quashing of proceedings which involve on offence under Section 307 I.P.C only on the ground of compromise in a mechanical manner and has laid down guidelines which should be followed while considering such a case. He also submits that the case of ***Ram Gopal*** (supra) relied on by the counsel for the petitioners does not relate to any offence under the SC and ST (Prevention of Atrocity) Act as the accused in that case had already been acquitted of the said offences by the trial Court .

8. The decision in B.S Joshi (supra), Nikhil Merchant and Manoj Sharma were doubted by a two judge Bench in Gian Singh vs. State :(2010) 15 SCC 118 on 23.10.2010 and hence the matter was referred to a larger Bench and the reference was answered by a three judge Bench in Gian Singh vs. State of Punjab & Anr.: (2012) 10 SCC 303. After referring to and discussing a vast number of decisions of the Supreme Court and High court, the Supreme Court held that the decisions in B.S. Joshi (supra), Nikhil Merchant (supra) and Manoj Sharma (supra) could not be said to be not correctly decided. The relevant portions of the decision are extracted below:

> …"61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the

power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.:

(i) to secure the ends of justice, or

(ii) (ii) to prevent abuse of the process of any court.

In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceedings."

In the case of Narinder Singh (supra) , the Supreme Court, has held as follows:

" 31. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

(I) Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of

the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

(II)) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

(iii) While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

(III) Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

(IV) On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

(V) While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

(VI) Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the

criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

(VII) While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.

In the case of Laxmi Narayan (supra) this Court has held as follows: “

13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly
those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public

servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of noncompoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

14. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 IPC mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the fire arm also in commission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused.”..

The case of Ram Gopal (supra) cited by Mr P.R. Singh , learned counsel for the petitioner is a not a case where any offence under the SC and ST Act was involved although conviction was under Section 307 IPC amongst other offences . In the said case , though charge had been framed for such an offence but the trial Court had not convicted the accused persons for commission of the said offence. Compromise had been entered into after conviction of the accused for commission of non compoundable offence like Section- 307 IPC and other offences under the I.P.C wherein it interalia held as follows :

> "…18. It is now a well crystalized axiom that the plenary jurisdiction of this Court to impart complete justice under Article 142 cannot ipso facto be limited or restricted by ordinary statutory provisions. It is also noteworthy that even in the absence of an express provision akin to Section 482 Cr.P.C. conferring powers on the Supreme Court to abrogate and set aside criminal proceedings, the jurisdiction exercisable under Article 142 of the Constitution embraces this Court with copious powers to quash criminal proceedings also, so as to secure complete justice. In doing so, due regard must be given to the overarching objective of sentencing in the criminal justice system, which is grounded on the sublime philosophy of maintenance of peace of the collective and that the rationale of placing an individual behind bars is aimed at his reformation.
>
> 19. We thus sum up and hold that as opposed to Section 320 Cr.P.C. where the Court is squarely guided by the compromise between the parties in respect of offences 'compoundable' within the statutory framework, the extraordinary power enjoined upon a High Court under Section 482 Cr.P.C. or vested in this Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations.
>
> 20. Having appraised the afore stated parameters and weighing upon the peculiar facts and circumstances of the two appeals before us, we are inclined to invoke powers under Article 142 and quash the criminal proceedings and consequently set aside the conviction in both the appeals. We say so for the reasons that:
>
> Firstly, the occurrence(s) involved in these appeals can be categorized as purely personal or having overtones of criminal proceedings of private nature;

> Secondly, the nature of injuries incurred, for which the Appellants have been convicted, do not appear to exhibit their mental depravity or commission of an offence of such a serious nature that quashing of which would override public interest;
>
> Thirdly, given the nature of the offence and injuries, it is immaterial that the trial against the Appellants had been concluded or their appeal(s) against conviction stand dismissed; Fourthly, the parties on their own volition, without any coercion or compulsion, willingly and voluntarily have buried their differences and wish to accord a quietus to their dispute(s);
>
> Fifthly, the occurrence(s) in both the cases took place way back in the years 2000 and 1995, respectively. There is nothing on record to evince that either before or after the purported compromise, any untoward incident transpired between the parties;
>
> Sixthly, since the Appellants and the complainant(s) are residents of the same village(s) and/or work in close vicinity, the quashing of criminal proceedings will advance peace, CRLMC No. 2847 of 2021 Page 18 of 27 harmony, and fellowship amongst the parties who have decided to forget and forgive any illwill and have no vengeance against each other; and
>
> Seventhly, the cause of administration of criminal justice system would remain uneffected on acceptance of the amicable settlement between the parties and/or resultant acquittal of the Appellants; more so looking at their present age.

In the case of ***Ramavatar vs State of Madhya Pradesh reported in (2021) 84 OCR (SC) 851: 2021 SCC Online 966*** , the Supreme Court , has held power under Article 142 of the Constitution and Section 482 of the Code of Criminal Procedure can be exercised to quash proceedings which involve offences under the SC and ST Act , but it has given a note of caution that while dealing with such cases, the Court has to be extremely circumspect in its approach as the SC and ST Act has been specifically enacted to deter acts of indignity, humiliation and harassment against members of Scheduled Castes and Scheduled Tribes.It has also held powers under Article 142 or under Section 482 Cr.P.C., can be exercised in post conviction matters only where an appeal is pending before one or the other judicial forum. The relevant portions of the decision are extracted below :

> … *"12. In view of the settled proposition of law, we affirm the decision of this Court in Ramgopal (Supra) and reiterate that the powers of this Court under Article 142 can be invoked to quash a criminal proceeding on the basis of a voluntary compromise between the complainant/victim and the accused.*

13. We, however, put a further caveat that the powers under Article 142 or under Section 482 Cr.P.C., are exercisable in post conviction matters only where an appeal is pending before one or the other Judicial forum. This is on the premise that an order of conviction does not attain finality till the accused has exhausted his/her legal remedies and the finality is subjudice before an appellate court. The pendency of legal proceedings, be that may before the final Court ,is sinequanon to involve the superior court's plenary powers to do complete justice. Conversely, where a settlement has ensued post the attainment of all legal remedies, the annulment of proceedings on the basis of a compromise would be impermissible. Such an embargo is necessitated to prevent the accused from gaining an indefinite leverage, for such a settlement/compromise will always be loaded with lurking suspicion about its bona fide. We have already clarified that the purpose of these extraordinary powers is not to incentivise any hollow hearted agreements between the accused and the victim but to do complete justice by effecting genuine settlement(s)."

…. …"15. Ordinarily, when dealing with offences arising out of special statutes such as the SC/ST Act, the Court will be extremely circumspect in its approach. The SC/ST Act has been specifically enacted to deter acts of indignity, humiliation and harassment against members of Scheduled Castes and Scheduled Tribes. The Act is also a recognition of the depressing reality that despite undertaking several measures, the Scheduled Castes / Scheduled Tribes continue to be subjected to various atrocities at the hands of upper castes The courts have to be mindful of the fact that the Act has been enacted keeping in view the express constitutional safeguards enumerated in Articles 15, 17 and 21 of the Constitution, with a twin fold objective of protecting the members of these vulnerable communities as well as to provide relief and rehabilitation to the victims of caste based atrocities.

16. On the other hand, where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise /settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr.P.C."…. …"

18. We may hasten to add that in cases such as the present, the Courts ought to be even more vigilant to ensure that the complainant victim has entered into the compromise on the volition of his / her free will and not on account of any duress. It cannot be understated that since members of the CRLMC No. 2847 of 2021 Page 21 of 27 Scheduled Caste and Scheduled Tribe belong to the weaker sections of our country, they are more prone to act s of coercion, and therefore ought to be

accorded a higher level of protection. If the Courts find even a hint of compulsion or force, no relief can be given to the accused party . What factors the Courts should consider, would depend on the facts and circumstances of each case…."

9. On a careful reading of the decisions referred to above , the following conclusions can be arrived at :-

(i) The power conferred under Article 142 of the Constitution and Section 482 of Cr.P.C. for quashing of proceeding is very wide and has no statutory limitation but has to be exercised in order to secure the ends of justice or to prevent abuse of the process of any Court.

(ii) It is distinct and different from the power given to a criminal Court for compounding offences under Section 320 of the Cr.P.C.

(iii) Power under Section 482 of the Cr.P.C. for quashing criminal proceeding has to be exercised carefully keeping in mind the nature of the offence, seriousness of the injury, voluntary nature of compromise between the accused and the victim, conduct of the accused persons prior to and after the occurrence, possible effect on society and it is not to be exercised mechanically.

(iv) Where the offences are predominantly civil in nature , arise from commercial, financial, partnership or offences arising out of matrimonial dispute or family dispute where the wrongs are basically private or personal in nature and the parties have resolved their entire disputes.

(v) Possibility of conviction on account of compromise is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

(vi) Normally, offenses under Section 307 of the IPC and Arms Act etc. and fall of category of heinous and serious offences are to be treated the crime of society and individual can't be quashed on the ground of settlement between the parties. But mere mention of Section 307 of IPC in the FIR or in the charge cannot prevent the High Court from examining the nature of injury sustained, location of the injury , nature of weapons used , but this would only be permissible after material is collected after investigation and chargesheet is filed or charge is framed.

vii) The Supreme Court in one of the cases has held in the cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation and even in cases where the charge is framed but the evidence is yet to begin , the High Court can exercise its powers favourably . In few other cases it has been decided that such power should be exercised after investigation is complete and chargesheet is filed.

(viii) Proceedings involving offences punishable under " Special Acts" like the SC and ST Act can be quashed in exercise of power under Article – 142 of the Constitution and Section 482 of the Cr.P.C on the basis of compromise but keeping in view the over riding object for which the SC and ST Act was enacted , the Court has to be very vigilant while exercising such power so that the purpose of its enactment is not defeated.

(ix) While exercising power under Section 482 of Cr.P.C. to quash the criminal proceeding in respect of the private disputes which do not have serious impact society, on the ground there is a settlement between the victim and offender the High Court is required to be consider the antecedents of the accused , conduct of the accused and whether and why the accused is absconding and how he managed to entered into the compromise with the complainant.

10. Adverting to the facts of the present case, the allegations herein are that accused –petitioner Sanu Satpathy assaulted Pintu Dalai with a sharp edged on 23.05.2021 and fled from the spot. While the injured was being treated in the hospital , all the accused persons came and assaulted the injured and abused and threatened him. After that accused Biranchi Narayan Satpathy came to the house of the complainant with a sword and referring to their caste threatened to cut them into pieces. Accused Kananabala threatened that the informant's family would not be allowed to stay in the village. No other person outside the two families appears to be involved in the case, so the dispute is confined to the two families . A counter case is pending.

11. While considering the prayer for bail of petitioner Kananabala, on 30.11.2021 (the certified copy of the order is annexed to the CRLMC application), the learned Special Judge, Dhenkanal, has noted the submission

of the counsel for the petitioner that is an off shoot of G.R case No 624 of 2021 which is a counter case and that investigation in the case is over and the injured had appeared in Court and stated that he is well and free from injuries and the matter had been settled between them and injured and informant had filed affidavits to that effect.

12. It appears from a perusal of the cause title of CRLMC application, FIR and the affidavits filed by the injured and informant that the accused persons and the injured and informant belong to the same village – Kharag Prasad and are neighbours. The incident is therefore in the nature of a private dispute as only the injured Sanu Satpathy has been assaulted. He has stated before the learned Court below and in his affidavit filed in this case that he is well after treatment and the matter has been settled between the parties with the intervention of village gentlemen and in view of the settlement neither he or the informant want to proceed with the case. The injured and the informant have entered appearance in this CRLMC on their own.

13. Investigation in the case is over as preliminary chargesheet has been filed against Petitioner no.2 Kananabala keeping investigation is open in respect of other petitioners under Section 173(8) of the Cr.P.C as they have not been arrested. But being co villagers, while evading arrest , they have settled the matter amicably with the injured and his father, the informant.

14. As a counter case namely is pending between the parties, so it cannot be said that the offence was committed on account of the caste of the injured or his family members. Since both sides belong to one village and no untoward incident has been reported to have taken place either before or after the settlement, the underlying object of the Act would not be contravened if the accused persons are not punished .there is no reason to doubt that the parties themselves have voluntarily settled their differences and in my opinion, in would be in the interest of justice to give effect to the settlement and quash the proceedings as it would help heal the old wounds and help the parties to live in peace and harmony.

15. As the injured and the informant have stated that they do not want to proceed against the accused persons and the matter has been amicably settled between them , it is apparent that the chances of conviction of the accused - petitioners are bleak. So even though Petitioner No 1, 3 and 4 have evaded

arrest till now, no useful purpose will therefore be served by sending them to custody or compel them to face trial.

16. In view of the amicable settlement between the parties who belong to the same village, lack of criminal antecedents of the petitioners, even though three of the petitioners have evaded arrest, as chances of conviction of the petitioners in the case are bleak, I am of the opinion that in the peculiar facts of the case, the proceedings in the case should be quashed against all the petitioners .

17. In view of the above discussion the CRLMC is allowed and the chargesheet and proceedings against in C.T. (Special) Case No. 34 of 2021 arising out of Motanga P.S. Case No. 90/2021 pending in the Court of the Special Judge, Dhenkanal against the petitioners Biranchi Narayana Satpathy, Kananabala Satpathy, Sanu @ Charitartha Satpathy and Punyasloka Satpathy are quashed .

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2022 (I) ILR - CUT- 663

SASHIKANTA MISHRA, J.

CRLMC NO. 2630 OF 2021

LADU PATRO @ LADU KISHORE PATRA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Rejection order passed in the petition filed u/s 227 of Cr.P.C. is under challenged – Offences u/s 420/272/273/34 of IPC read with sections 20 & 24 of the cigarettes and other tobacco products

(Prohibition of advertisement and regulation of trade and commerce, production, suply and distribution) Act, 2003 – Duty of court while framing of charges – Held, At the stage of framing charge, the Court is required to look at the materials on record to see if the necessary ingredients to constitute the alleged offences are prima-facie made out and unless the court arrives at such conclusion, it would be improper, nay illegal on its part to frame charge against the accused person for the said offences. (Para-6,10)

For Petitioner : M/s. Jyotirmaya Sahoo and S.K. Pattaik
For Opp. Party: Mr. S.K. Mishra, Addl. Standing Counsel.

ORDER Date of Order : 03.01.2022

SASHIKANTA MISHRA, J.

In the present application filed under Section 482 Cr.P.C., the petitioner seeks to challenge the order dated 01.11.2021 passed by learned 3rd Addl. Sessions Judge, Berhampur in S.T. Case No. 80/2021 whereby, the petition filed by the petitioner under Section 227 of Cr.P.C. for discharge was rejected.

2. The brief facts of the case are that on 15.03.2021 while the staff of Berhampur Sadar P.S. was on patrolling duty, they received information regarding illegal manufacture of Gutkha in a Mushroom Farm. Accordingly, they proceeded to the spot and raided the farm and found several Gutkha manufacturing machines, packing machines and some Gutkha kept in Jari bags. However, no one present at the spot. As such, the above items were seized in presence of independent witnesses including nine Jari bags containing 50 packets each of pan masala in the name and style of "Bolo Zubaan Keshari Vimal" Pan Masala in every pouch. In course of investigation, it was found that the present petitioner and other persons were carrying out illegal manufacture and sale of pan masala / Gutkha in violation of Government Regulations and were evading tax thereby. Accordingly, an FIR was lodged by the ASI, which relates to registration of Berhampur Sadar P.S. Case No. 69 of 2021 under Sections 420/272/273/34 of IPC and Sections 20 and 24 of the Cigarettes and Other Tobacco Products

(Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (in short "2003 Act"), which corresponds to G.R. Case No. 456 of 2021. Upon completion of investigation, charge sheet was submitted against the accused persons for the aforementioned offences. Subsequently, the case was committed to the Court of Sessions and registered as Sessions Trial No. 80/2021. The petitioner filed a petition on 03.09.2021 under Section 227 of Cr.P.C. for discharge. The said petition was heard by the learned Court below on 01.11.2021 and rejected and on the same day, charge was framed under the aforesaid offences.

3. Heard Mr. J. Sahoo, learned counsel for the petitioner and Mr. S.K. Mishra, learned Addl. Standing Counsel for the State.

4. Assailing the impugned order, Mr. Sahoo contends that the chemical examination report submitted by the Regional Forensic Science Laboratory (RFSL), Berhampur clearly shows that nicotine, tobacco and tar could not be detected from the seized articles and therefore, the offence under Sections 272/273 of IPC read with Section 20/24 of 2003 Act are not made out. Learned court below however despite noting the chemical examination report held that the genuineness and validity thereof is a subject of evidence and trial and cannot be held as final at this stage. The above, according to Mr. Sahoo, is a gross error committed by learned court below, inasmuch as despite absence of the basic ingredients to even prima facie constitute the alleged offences, the petition for discharge was rejected and charge was framed for the said offences.

5. Mr. S.K. Mishra, learned Addl. Standing Counsel, on the other hand has held that at the stage of framing charge or considering the petition for discharge, the court is not required to sift through the evidence or to assess the probative value thereof. Since there are materials on record justifying at least a suspicion regarding commission of the offences, learned court below rightly rejected the petition for discharge. However, on a query by this Court, Mr. Mishra fairly submitted that the prosecution does not dispute the chemical examination report in question.

6. Law is well settled that at the stage of framing charge, the court is required to only consider if there are reasonable grounds to presume the commission of the alleged offence and therefore, is not expected to make a

roving enquiry. There is no dispute as regards the above position of law. It is however, equally well settled that even at such stage, the court is required to look at the materials on record to see if the necessary ingredients to constitute the alleged offences are prima facie made out and unless the court arrives at such a conclusion, it would be improper, nay illegal on its part to frame charge against the accused persons for the said offence.

7. Keeping the legal propositions as above in the background, the facts of the case may now be considered.

Admittedly, some packet of pan masala styled "Bolo Zuuban Kehari" were recovered and seized from the spot house and they were sent for chemical analysis as evident from the forwarding report dated 19.08.2021 to the RFSL, Berhampur, which is available in the case diary produced by the State Counsel for perusal of the Court. In the forwarding report, the nature of examination required was stated as under:

> "1. Whether exhibit "A" is Tabaco product or not?
>
> 2. Whether nicotine and tar contents available in the exhibits or not? If so, what is the percentage?
>
> 3. Any other examination required may kindly be done for the interest of prosecution."

In response to such request made by the I.O., the RFSL, Berhampur through its Reporting Officer-cum- A.C.E. submitted a report duly countersigned by the Deputy Director on 13.04.2021 specifically mentioning the results of the examination as under:

"Nicotine, Tabacco and Tar could not be detected in the exhibit marked as A."

It is therefore clear that the seized products did not contain tobacco, nicotine or tar.

8. A reference to the provisions of the 2003 Act would reveal that "tobacco products" is defined under Section 3(p) of the Act as follows:

> "(p) "tobacco products" means the products specified in the Schedule."

The Schedule appended to the 2003 Act is as follows:

THE SCHEDULE
[See section 3(p)]

1. Cigarettes
2. Cigars
3. Cheroots
4. Beedis
5. Cigarette tobacco, pipe tobacco and hookah tobacco
6. Chewing tobacco
7. Snuff
8. Pan masala or any chewing material **having tobacco as one of its ingredients** (by whatever name called).
9. Gutka
10. Tooth powder containing tobacco."

(Emphasis supplied)

It is therefore, clear that even a pan masala can be treated as a tobacco product, but only if tobacco is one of its ingredients.

8. Now Section 20 of the 2003 Act reads as under:

> "20. Punishment for failure to give specified warning and nicotine and tar contents.–(1) Any person who produces or manufactures cigarettes or tobacco products, which do not contain, either on the package or on their label, the specified warning and the nicotine and tar contents, shall in the case of first conviction be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both, and for the second or subsequent conviction, with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees.
>
> (2) Any person who sells or distributes cigarettes or tobacco products which do not contain either on the package or on their label, the specified warning and the nicotine and tar contents shall in the case of first conviction be punishable with imprisonment for a term, which may extend to one year, or with fine which may extend to one thousand rupees, or with both, and, for the second or subsequent conviction, with imprisonment for a term which may extend to two years and with fine which may extend to three thousand rupees.

Obviously when the product itself is not a tobacco product within the meaning of 2003 Act, the provision of Section 20 will not apply.

Similarly, Section-24 is the penal section for Section-6 of the 2003 Act. Section-6 reads as follows:

> 6. Prohibition on sale of cigarette or other tobacco products to a person below the age of eighteen years and in particular area.–No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product–
>
> (a) to any person who is under eighteen years of age, and
>
> (b) in an area within a radius of one hundred yards of any educational institution.

The analogy applied for Section-20 as above can also be made applicable for the provisions under Section-6 read with Section 24 of the 2003 Act to hold that the product not being tobacco product within the meaning of Section 2003 Act, the provisions of the Act will not apply.

9. Coming to the provisions under Section 272/273 of IPC, it is to be noted that the entire case of the prosecution as per the FIR is that the petitioner was manufacturing and selling Gutkha, which violates the Government guidelines prohibiting the preparation and sale of tobacco pan masala to the general public. However, when the basic ingredient, i.e., tobacco is found to be absent in the composition of the products seized from the spot house, there is no way by which the provisions of Section 272/273 of IPC can be attracted. It goes without saying that to sustain the prosecution under Section 272/273 of IPC, it must be shown that the accused adulterated some article of food or drink; the article so adulterated became noxious as food or drink and he did it with intention to sell the article knowing it to be noxious or unfit for food or drink. It is not the case of the prosecution that apart from the so-called admixture of tobacco in the seized product, it had been rendered noxious and unfit for human consumption by any other means. It is stated at the cost of repetition that except for the allegation of inclusion of tobacco in the seized product there is no other material to even remotely suggest that the same were unfit for human consumption being noxious.

10. From a conspectus of the analysis made hereinbefore, it is crystal clear that none of the ingredients necessary to at least prima facie constitute the offences alleged under the 2003 Act or under Section 272/273 of IPC are found to exist. It mast be kept in mind that the above conclusion can be readily drawn from the materials placed by the prosecution itself and not on any material placed by the defense. Further, the prosecution having submitted the chemical examination report does not disown or dispute it in any manner. On the contrary, the defence has also relied entirely upon the chemical examination report submitted by the prosecution. Such being the factual position, it is not comprehended as to what further evidence is

required to prove the chemical examination report or even if it is formally proved, what would be its probative value. Obviously, the contents of the report cannot change. It is also not the case of the prosecution that there is any other evidence apart from the chemical examination report to show the commission of the alleged offences.

11. This court is therefore of the considered view that the learned court below committed an error in rejecting the petition for discharge by holding that the genuineness and validity of the chemical examination report, which is not disputed by any party, is a subject of evidence and trial. As such, the impugned order warrants interference.

12. In the result, the CRLMC is allowed. The impugned order is quashed. Learned court below is directed to pass appropriate orders to discharge the accused- Ladu Patro @ Ladu Kishore Patra in respect of the offences under Sections 272/273 of IPC read with Sections 20/24 of the 2003 Act. It is made clear that this Court has not expressed any opinion as regards the other offence(s) alleged against the petitioner.

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2022 (I) ILR - CUT- 669

A.K. MOHAPATRA,J.

WPC(OA) NO.1967 OF 2016

SRIDHAR PRADHAN ……Petitioner

.V.

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

WPC(OA) NO.1968 OF 2016

SANTOSH KUMAR MOHAPATRA ……Petitioner

.V.

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

WPC(OA) NO.1969 OF 2016

DHIRAJ KUMAR MOHAPATRA ……Petitioner

.V.

STATE OF ODISHA AND ORS. ……Opp. Parties

WPC(OA) NO.1970 OF 2016

RABINDRANATH MOHARANA ……Petition

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

(A) SERVICE LAW – Model Employer – Role – Discussed.

(Para-15)

(B) SERVICE LAW – Appointment – Whether Substituting a set of existing contractual employees by another set of contractual employees is permissible /tenable under law – Held, No.

(Para-9)

Case Laws Relied on and Referred to :-

1. (1992) 4 SCC 118 : State of Haryana and Ors. Vs. Piara Singh and Ors.
2. 2013 (II) OLR 210 : Dilip Kumar Baral Vs. BPUT & Ors.
3. 2017 (II) OLR 545 : Kartik Chandra Panda Vs. State of Odisha & Ors
4. 1987 Supp SCC 228 : Balram Gupta Vs. Union of India.
5. (2013) 2 SCC 516 : Bhupendra Nath Hazarika & Anr Vs. State of Assam and Ors.
6. (2006) 7 SCC 161 : Mehar Chand Polytechnic Vs. Anu Lamba.

WPC(OA) NO.1967 OF 2016
For Petitioner : Mr. B. Triparthy.
For Opp. Parties : Mr. Y.S.B. Babu, A.G.A.

WPC(OA) NO.1968 OF 2016
For Petitioner : Mr. B. Triparthy
For Opp. Parties : Mr. Y.S.B. Babu, A.G.A.

WPC(OA) NO.1969 OF 2016
For Petitioner : Mr. B. Triparthy
For Opp. Parties : Mr. Y.S.B. Babu, A.G.A.

WPC(OA) NO.1970 OF 2016
For Petitioner : Mr. J.N. Panda
For Opp. Parties : Mr. Y.S.B. Babu, A.G.A.

ORDER Date of Hearing: 23.03.2022 : Date of Order : 31.03.2022

A.K. MOHAPATRA,J.

These matters are taken up through Hybrid Arrangement (Virtual /Physical Mode).

All the aforesaid Original Applications were initially filed before the Odisha Administrative Tribunal by the petitioners with a prayer to regularize their services and with further prayer to quash the impugned decision of the authorities to disengage the services of the PTGI pursuant to order dated 19.04.2016 and 01.08.216. Since the factual background of all the above

noted cases are similar and the reliefs sought for are identical, the above noted four cases, which have been transferred to this Court after abolition of Odisha Administrative Tribunal, are being taken up together analogously for hearing and are being disposed of by this common order.

WPC(OA) No.1967 of 2016

The petitioner, who is having a Diploma qualification, was appointed as Part Time Guest Instructor (in short 'the PTGI') by the order of the Principal, Gapabandhu ITI, Ambaguda dated 07.12.2013 in the ***Trade of Fitter*** w.e.f the Session 2014-15.

WPC(OA) No.1968 of 2016

The petitioner, who is having a Diploma qualification, was appointed as Part Time Guest Instructor (in short 'the PTGI') by the order of the Principal, Gapabandhu ITI, Ambaguda dated 07.12.2013 in the ***Trade of Electrician*** w.e.f the Session 2014-15.

WPC(OA) No.1969 of 2016

The petitioner, who is having a Diploma qualification, was appointed as Part Time Guest Instructor (in short 'the PTGI') by the order of the Principal, Gapabandhu ITI, Ambaguda dated 07.12.2013 in the ***Trade of Draughtman*** w.e.f the Session 2014-15.

WPC(OA) No.1970 of 2016

The petitioner, who is having a Diploma qualification, was appointed as Part Time Guest Instructor (in short 'the PTGI') by the order of the Principal, Gapabandhu ITI, Ambaguda dated 07.12.2013 in the ***Trade of Fitter*** w.e.f the Session 2014-15.

2. Since the facts are identical, the pleadings in the first case, i.e. WPC(OA) No.1967 of 2016 is being taken up for consideration by this Court to decide the common question of law involved in all the aforesaid four matters.

3. As stated above, the petitioner having Diploma qualification was initially appointed as Part Time Guest Instructors (in short 'the PTGI') at Government I.T.I., Ambaguda vide order dated 07.12.2013 in the trade of Fitter w.e.f. the Session 2014-15. The petitioner was regularly taking classes and imparting education to the students in both Theory and Practical papers

on contractual basis against the vacant sanctioned post of Assistant Training Officer (A.T.O.)

4. It is further pleaded on behalf of the petitioner that several similarly situated (PTGIs) had earlier approached the Odisha Administrative Tribunal by filing series of Original Applications. The Odisha Administrative Tribunal while directing for regular appointment of ASTOs, simultaneously directed the State respondents for regularization of services of the PTGIs, who are continuing in service for several years and discharging the very same duties and functions successfully and diligently. It was also stated that many similar cases were also pending before the Tribunal by the time the same was abolished and in most of the cases, Odisha Administrative Tribunal had granted interim protection by directing the respondents to maintain status quo and not to take any coercive action against the petitioner. The petitioner has given a specific reference of O.A. No.1571 (C) of 2016 filed by one ***Ashok Kumar Parida and six others*** wherein the Odisha Administrative Tribunal as an interim measure had directed not to take any coercive action against the petitioners. The present Original Application, which was admitted vide order dated 12.09.2016 by the Odisha Administrative Tribunal. By virtue of the very same order, as an interim measure, the Odisha Administrative Tribunal had also directed the authorities not to take any coercive action against the petitioners till filing of the counter affidavit. On careful scrutiny of records, it is seen that the Opposite Parties have not filed any counter affidavit till date and as such the interim order passed initially by the Odisha Administrative Tribunal continues to be in force even till now.

5. Upon further scrutiny of the pleadings of the petitioners, it is seen that the Government of Odisha through Director, Technical Education and Training, Odisha vide letter dated 19.04.2016 instructed all the Principal of Government I.T.Is. to disengage the services of the existing PTGIs after completion of current academic semester i.e. 2nd, 4th and 6th and further directed not to make any appointment of new PTGI. In the aforesaid letter dated 19.04.2016, it has also been mentioned that there shall be no automatic continuance of PTGI/PTGF.

6. Learned counsel for the petitioner referring to the letter dated 19.04.2016 submits that apprehending non-continuance in services, the petitioner along with similar other persons had approached the Odisha

Administrative Tribunal at the first instance with a prayer for regularization of their services. He further submits that the language and tenor of letter dated 19.04.2016 reveals that the petitioner should be disengaged from his service after his contract comes to an end and he shall not be re-engaged by the Principal of all the I.T.Is. Therefore, apprehending disengagement from services and engagement of a new set of contractual employees in their places, the petitioner had approached the Tribunal with a prayer for regularization of their services.

7. It is further submitted by learned counsel for the petitioner that pursuant to the direction given by the Odisha Administrative Tribunal as well as on the recommendation of several people's representative, the Government of Odisha is considering the proposal for regularization of service of all the PTGIs, who are currently in the I.T.Is. by evolving a special scheme/policy for their regularization, which is otherwise known as rationalization of services of the PTGIs/PTGFs.

8. It is further submitted that pursuant to such rationalization process, the Principal, Government I.T.Is. have already submitted the details recommending the cases of the petitioner and similarly situated persons in proper format to the Government. He further submits that the action of the Government in substituting a set of existing contractual employees by another set of contractual employees is illegal and untenable in law in view of the judgments delivered by this Court as well as by Hon'ble Supreme Court of India. It is further submitted that the action of the Government in continuously engaging Instructor/Faculties on contractual basis against sanctioned post for a paltry consolidated sum amounts to exploitation of work force in the hands of model employer like State of Odisha. He further submits that the action and decision of the Government to disengage the petitioner and similarly placed persons and to engage another set of contractual employees against sanctioned / regular post is grossly illegal, arbitrary and discriminatory.

9. In the aforesaid context, it would be profitable to refer to a judgment of the Hon'ble Supreme Court in the case of ***State of Haryana and others-vrs.-Piara Singh and others*** reported in ***(1992) 4 SCC 118*** at paragraph at paragraphs 47, 48 and 49 has observed as under:

"25. xx xx The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call

for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employees by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee,

> Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee: he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority." (Emphasis supplied by this court)

Therefore, in view of the aforesaid clear and unambiguous pronouncement of law by the Hon'ble Supreme Court which has been followed by many High Courts including this Court, the law on the subject is no more res integra. This Court has followed the above discussed principle of law evolved in Piara Singh's Case (Supra) in ***Dilip Kumar Baral Vs. BPUT & Others : reported in 2013 (II) OLR 210 and in Kartik Chandra Panda Vs. State of Odisha & Ors*** : reported in ***2017 (II) OLR 545.***

10. In the aforementioned two matters i.e. Dilip Kumar Baral (Supra) and Kartik Chandra Panda (Supra), the Biju Pattnaik University of Technology published advertisement to recruit a set of contractual employees substituting an existing set of contractual employees. In Dilip Kumar Baral's Case a Division bench of this Court and in Kartik Chandra Panda's case a Single Judge Bench of this Court quashed the impugned advertisement relying on the judgment of the Hon'ble Supreme Court in Piara Singh's Case (Supra) and holding that a set of contractual employees cannot be substituted by another set of contractual employees. The factual background of the both the above mentioned case somewhat similar to the facts of the present case i.e. BPUT (University) was making an attempt to replace a set of contractual teachers by another set of contractual teachers.

10.1 Learned counsel for the petitioner on instruction further submits that by virtue of interim protection granted by the Odisha Administrative Tribunal, the petitioner is continuing in service and discharging his duties to the utmost satisfaction of the authorities. The duties which have been performed by the present petitioner are perennial and regular in nature. As

such, it is further submitted that the conduct of the Government in engaging contractual employees against the regular sanctioned post is highly illegal and arbitrary. It is further submitted that the action of the Government in directing the Principal of all the I.T.Is. vide letter dated 11.08.2016 to all the Principal of Government I.T.Is. calling upon them for fresh engagement of PTGIs is illegal and arbitrary.

11. Learned counsel for the petitioner further questions the action of the Principal of Gopabandhu I.T.I., Ambaguda for issuance of advertisement dated 29.08.2016 in the website of the institute inviting application for fresh engagement of PTGIs. Further such action has confirmed the apprehension of the petitioner that he will be disengaged from services and in his place a new set of adhoc/temporary/contractual employees are going to be engaged.

12. Per contra, learned counsel for the State although had not filed any counter affidavit in the matter submits that the petitioner was engaged on contractual basis, therefore, the petitioner and similarly placed persons cannot claim for regularization of their services. It is further submitted by leaned counsel for the State that the contractual appointment as has been done in the case of the petitioner to continue in service against the regular sanctioned posts, therefore, the claim of the petitioner for regularization of his service is vague, baseless and untenable in law. Accordingly, it was urged by learned counsel for the State that the present application filed by the petitioner seeking regularization of his service is not maintainable in law and as such, the same should be dismissed,

13. Having heard the rival contentions advanced by the parties in the present case, this Court is of the considered view that the petitioner and similarly placed persons were engaged on contractual basis as PTGIs against the vacant sanctioned posts. However, due to failure on the part of the opposite parties to select and appoint regular Instructors/Faculties, the petitioner was allowed to continue on adhoc/temporary/contractual basis for a long time. It is also not disputed by the parties that the petitioner and similarly placed persons were getting a paltry consolidated sum for the services rendered by them while they were engaged and continuing in service in the above noted I.T.Is.

14. Considering the aforesaid facts and circumstances and particularly, the conduct of the Opposite Parties in allowing the petitioner and similarly

placed persons to continue on adhoc/temporary/contractual basis against regular sanctioned posts attached with duties of regular and perennial nature, this Court disapproves the conduct of the Government and deprecates the practice of engaging employees on adhoc/temporary/contractual basis against the regular sanctioned posts for a duration running into several years. No doubt, it is open for the particular institutions to engage employees on adhoc/temporary/contractual basis to meet the requirement of staff shortfall in the institution in question, absence of staff or vacancy arising due to retirement. However, it is not appropriate and desirable that the Government, being a model employer, after engaging Instructors/Faculties on temporary basis and continues to extend their services for several years and thereafter, finally taking a decision to throw them out according to their sweet will and to engage a different set of adhoc/ temporary employees in place of existing adhoc and temporary employees. Such a practice, according to the considered view of this Court, is neither a healthy practice nor the same is in inconformity with the law laid down by this Court as well as Hon'ble Apex Court.

15. The role of the State as a model employer has come up for consideration on numerous occasions both by the Hon'ble Supreme Court of India as well as this Court. The Supreme Court of India in ***Balram Gupta v. Union of India*** reported in ***1987 Supp SCC 228*** had observed in paragraph 13 of the judgment as follows;

> "13.... As a model employer the Government must conduct itself with high probity and candour with its employees."

Similarly in ***Bhupendra Nath Hazarika and another vs. State of Assam and Others : reported in (2013) 2 SCC 516***, in paragraphs 61 of the judgment the Hon'ble Supreme Court of India has observed as follows;

> "61. Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept."

Similarly in Piara Singh's Case (Supra), the Hon'ble Supreme Court has elaborated the role of the State as a model employer and in paragraph 10 of the judgment it has been held as follows;

> "10.The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long, the Court presumes that there is need and warrant for a regular post and accordingly directs regularization."

In ***Mehar Chand Polytechnic v. Anu Lamba : reported in (2006) 7 SCC 161*** the Supreme Court of India has observed that public employment is a facet of right to equality as envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.

This Court in a very recent judgment has taken a similar view so far the role of State as a model employer is concerned. The judgment was delivered by a coordinate bench in ***Amar Kumar Behera Vs. State of Odisha and Ors. (WPC (OAC) No. 1493 of 2018 : Decided On: 25.02.2022).***

16. Having heard learned counsel for the parties and considering the peculiar facts and circumstances of the present case, this Court is of the considered view that the Opposite Parties shall do well to abandon the current practice of engaging adhoc/temporary employees for a duration running into several years instead they should engage regular employees Instructor/Faculties against the sanctioned posts by following a due procedure of selection particularly where the nature of work to be performed is regular and perennial in nature. Moreover, the temporary/adhoc engagement not exceeding one academic session or a maximum period of one year be adopted in case of necessity. Resultantly, considering the difficulties faced by the petitioners and the entire future as well as the age factor of the petitioner and the similarly placed persons.

17. Finally, taking a holistic view of the matter and keeping in view the principles of law discussed here in above, this court is of the considered view that the impugned advertisement for fresh contractual/adhoc/temporary recruitment is bad in law and accordingly the same is hereby quashed and the

State Govt. is directed to formulate a policy as discussed here in above, if the same has not been framed already in the meanwhile and accordingly the existing PTGIs/PTGFs or contractual employees in any other name working continuously for several years in Govt. ITIs be put under a screening process by a duly constituted screening committee and subject to their suitability and availability of regular posts, the petitioner and similarly placed other persons be selected and appointed against regular vacant posts by either absorbing them/ regularizing their services in the light of the direction issued by the Odisha Administrative Tribunal. The petitioners are directed to approach the Director, Technical Education Training, Odisha (Opposite Party No.2) by filing a detailed representation highlighting their grievances along with supporting documents/policy decision/judgments in support of their cases within a period of four weeks from today. In the event such a representation is filed, the same shall be considered by the Opposite Party No.2 in accordance with law and keeping in view the directions given hereinabove and the Opp. Party No.2 shall do well to dispose of the representations filed by PTGIs/PTGFs by passing a reasoned and speaking order within a period of three months from the date of receipt of a certified copy of this order. It is further directed that the petitioner shall not be disengaged or be substituted by another set of adhoc/temporary contractual employees, i.e. petitioner shall be allowed to continue in duty till regular appointments are made to the sanctioned/regular posts by following a due selection/screening process.

18. With the aforesaid observation, these writ petitions stands disposed of. However, there shall no order as to cost.

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2022 (I) ILR - CUT- 678

A.K. MOHAPATRA, J.

CRA NO.189 OF 1993

SURESH CHANDRA PADHI ……..Appellant

.V.

STATE OF ORISSA ……..Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 394(2) – Application filed after thirty eight month of death of accused/ appellant – Order of

sentence involving is only imprisonment and not fine – Whether maintainable? – Held, No – The appeal having been filed against order of sentence involving only imprisonment and not fine, the same also does not come under sub-section 2 of section 394 CR.P.C – Therefore the present appeal finally abates on those ground.

Case Laws Relied on and Referred to :-

1. AIR 1991 SC 2085 : S.V. Kameswar Rao and Anr Vs. The State (A.C.B. Police), Kurnool District, Andhra Pradesh.
2.(Criminal Appeal No.233 of 2016) disposed of on 7.3.2022 : Yeruva Sayireddy Vs. The State of Andhra Pradesh & Anr.

For Appellant : Mr. D.P. Dhal, Sr. Adv. Mr. B.S. Dasapanda, Mr. S.K. Dash, Mr. S. Mohapatra, Mr. K. Mohanty, Mr. M.K. Agrawalla and Mr. A. Ray

For Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vigilance)

JUDGMENT Date of Hearing : 22.03.2022 :Date of Judgment:31.03.2022

A.K. MOHAPATRA, J.

1. The present appeal under Section 374(2) read with Section 382 of the Criminal Procedure Code, 1973 has been filed by the Appellant challenging the judgment of conviction and sentence dated 26.06.1993 passed by the learned Additional Special Judge (Vigilance), Bhubaneswar in T.R. Case No.39/14 of 1992/88 thereby convicting the Appellant for commission of offences under Sections 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act and Section 161 I.P.C. and sentence him to undergo R.I. for one year on each count. Further directed that the sentences however shall run concurrently.

2. The prosecution case in brief is that P.W.3 filed an application on 20.02.1987 in the office of the Block Development Officer, Ganjam for issuance of a license to sell kerosene oil as a Retail Dealer. The Block Development Officer (P.W.1) advised P.W.3 to meet the Appellant, who was then posted as Inspector of Supplies, Ganjam Block. P.W.3 requested to recommend his case. It is alleged that Appellant demanded Rs.110/- as illegal gratification. It is further stated that on 23.02.1987. P.W.3 paid Rs.40/- to the Appellant at his residence whereafter Appellant directed P.W.3 to pay the balance amount in his office. Since P.W.3 did not agree to pay the

balance amount, he reported the matter in writing to the Vigilance Police Station at Berhampur, Ganjam. Pursuant to which, a vigilance case was registered against the Appellant. It is further stated that on demand of the Appellant, P.W.3 paid the balance amount of Rs.70/- and accordingly, the Appellant was caught by the trap party on the spot.

3. After investigation, the Police filed charge-sheet and in trial the Appellant was convicted by the learned trial court. Thereafter, the present appeal has been preferred in the year 1993. During the pendency of the present appeal, the Appellant died on **25.10.2017**. Thereafter, one Urmila Padhi, wife of Suresh Chandra Padhi approached this Court and filed I.A. No.8 of 2019 along with application for condonation of delay on **16.08.2019** seeking leave to continue the appeal. When the I.A. was taken up, learned counsel for the Appellant prayed before this Court to withdraw the said I.As. to file another application for substitution. Accordingly, I.A. Nos.8 and 10 of 2019 were permitted to be **withdrawn** to file better application on **29.09.2021.**

4. On **07.01.2022**, I.A. No.1 of 2022 has been filed by the legal heirs of the present Appellant wherein a prayer has been made to substitute the legal hairs in place of the deceased Appellant. In the said I.A. it has been stated that the original Appellant, namely, Suresh Chandra Padhi has died on **25.10.2017.**

5. Sri S.K. Das, learned Standing Counsel for the Vigilance Department referring to the provision of Section 394 Cr.P.C. submits that on conviction by the trial court, the Appellant has been sentenced to undergo R.I. for one year on each count which shall run concurrently. Further, it was pointed out that no fine amount has been imposed while convicting the Appellant under the alleged sections of P.C. Act and I.P.C. Mr. Das, learned Standing Counsel further submits that in view of sub-section 2 of Section 394 of I.P.C. that every appeal under the provision of Cr.P.C. shall finally abate on the death of the Appellant except an appeal from a sentence of fine. Therefore, he urges that the appeal has abated since no sentence of fine has been imposed in the present case.

6. It is indeed true that Section 394 of Cr.P.C. provides that every appeal shall finally abate on the death of the accused Appellant. However under sub-section 2 of Section 394 Cr.P.C. an explanation has been carved

out whereby ultimately right to appeal has been conferred upon the legal heirs of the Appellant in an appeal where the sentence involves fine amount. For better understanding of the provision, Section 394 Cr.P.C. has been extracted hereinbelow:

> **394. Abatement of appeals.**
>
> (1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.
>
> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:
>
> Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate. Explanation- In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister."

7. Further, in the proviso appended to sub-section 2, it has been provided, as would be seen from the above extraction of the provision of Section 394 of Cr.P.C. the right has been conferred upon the near relatives of the Appellant, who has preferred an appeal against the conviction and sentence of death or imprisonment and the Appellant dies during pendency of the appeal. The near relative of the Appellant in such case have to approach the appellate court by filing an appeal seeking leave to continue the appeal within 30 (thirty) days from the death of the Appellant. Further said proviso provides that even this Court grants leave, then the appeal shall not abate.

8. In the present case, appeal has been preferred by the accused Appellant against the judgment of conviction wherein only sentence of imprisonment of one year on each count has been imposed against the Appellant and there is no sentence imposing any fine. Therefore, the present appeal shall not be saved under sub-section 2 of Section 394 Cr.P.C.

9. Further, the limited right to appeal which has been conferred by virtue of the proviso on the near relative of the accused Appellant is subject to the condition that the near relative of the accused Appellant shall approach this Court within 30 (thirty) days from the date of death of the Appellant by filing an application seeking leave to continue with the appeal. If such an application has not been filed within 30 days, the appeal shall finally abate.

10. After withdrawal of the two I.As. by order dated 23.09.2021, the legal heirs of the accused Appellant again file another application bearing I.A. No.1 of 2022 for substitution and I.A. No.2 of 2022 filed under Section 5 of the Limitation Act for condonation of delay in filing the appeal. On a perusal of I.A. No.2 of 2022, it is revealed that the delay in seeking leave in the proviso 2 of Section 394(2) has not been properly explained. Moreover, both the I.A. Nos.1 and 2 of 2022 were filed in the 1st week of January, 2022, i.e. a couple of month after the previous I.As. were permitted to be withdrawn by this Court.

11. It is apt to mention here that the I.A. No.1 of 2022 has been filed seeking leave to be substituted in place of the deceased Appellant by filing an application on 07.01.2022, which is almost **38 months** after the death of the accused Appellant, that too without explaining the delay properly. As such, this application needs to be considered seriously and carefully considering the negligence in the appeal cannot be allowed to be continued for the inordinate delay in filing the appeal.

12. Admittedly, there is a delay in filing an application seeking leave to continue with the appeal on the part of the legal heirs. Explanation given in the condonation of delay application according to this Court is not sufficient. Hon'ble Supreme Court of India dealing with similar issues where there was inordinate delay in filing an application seeking leave to continue appeal in the case of ***S.V. Kameswar Rao and another vs. The State (A.C.B. Police), Kurnool District, Andhra Pradesh,*** reported in ***AIR 1991 SC 2085.*** Hon'ble High Court in Paragraph-7 of the said judgment hold as under:

> "7. Further as we have pointed out above, no sufficient cause is shown for condonation of the delay except stating that the petitioner, Ravi Kumar would be deprived of securing the consequential benefits to which he would be entitled in case his application is allowed and his deceased father is notionally acquitted. This reasoning cannot be accepted. Hence we reject his application and hold that the appeal abates so far as the first appellant is concerned."

13. To substantiate his case, learned counsel for the Respondent has cited a judgment of the Hon'ble Supreme Court in the case of ***Yeruva Sayireddy vs. The State of Andhra Pradesh & another (Criminal Appeal No.233 of 2016) disposed of on 7.3.2022,*** wherein the Hon'ble Supreme Court of India while analyzing the provision of Section 394 Cr.P.C. has come to a conclusion that the application for continuance of the appeal having not been made within thirty days or even thereafter by any near

relative, the appeal would abate in view of the proviso contained under Section 394 Cr.P.C.

14. Having heard learned counsel for the parties and considering the facts and circumstances of the present case, this Court is of the considered view that first of all the application bearing I.A. No.2 of 2022 lacks any detail particulars regarding the cause of delay, therefore, this Court is not inclined to condone the delay and grant leave to the near relatives of the deceased Appellant to continue the appeal. Moreover, the present appeal having been filed against an order of sentence involving only imprisonment and not fine, the same also does not come under sub-section 2 of Section 394 Cr.P.C. Therefore the present appeal finally abates on that ground only. This Court is of the considered view that since the appeal is against an order of sentence involving only imprisonment against the deceased Appellant, the same cannot be allowed to continue now as the Appellant has died during pendency of the appeal. Therefore, for all practical purposes, the appeal has become infructuous.

15. Further, this Court is conscious of the fact that a huge number of criminal appeals are pending for adjudication of this Court. Such appeals are not being attained to for many reasons. Criminal appeals filed several decades ago are still pending for adjudication before this Court and in many such cases, the Appellants have died in the meantime. Some cases, applications have been filed by the legal heirs to continue and in some cases such applications have not been filed. However, in many such cases, where applications have been filed seeking leave to continue appeal, the same have been filed at a belated stage without properly explaining the delay in filing such appeal. Therefore, this Court has to examine the details of such applications and where the sentence includes sentence of fine, in such cases, leave may be granted by taking a lenient view. However, where there is no sentence of fine, granting leave would amount to going against the mandate of the Statute. Moreover, the same would also unnecessary prolong the litigation which have become infructuous by reason of the death of the accused Appellant. In such view of the matter, in the present case, where there is no sentence of fine, granting leave would unnecessarily prolong the litigation, it has otherwise become infructuous on the death of the accused Appellant. Therefore, refusing to grant leave in the present case would serve the ends of justice in reducing the heavy burden of litigations.

16. In view of the aforesaid principle of law, in the factual background of the present case, this Court is of the considered view that the appeal has become infructuous in the meantime and therefore no fruitful purpose will be served by keeping the same pending by granting leave to the legal heirs of the deceased Appellant to continue with the appeal as they are not going to be affected in

any manner as the trial court has not imposed any fine as sentence. In such view of the matter, this Court is constrained to dispose of the appeal as infructuous.

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2022 (I) ILR - CUT- 684

V. NARASINGH, J.

CRLMC NO. 2653 OF 2021

CHANCHALA PANDA @ PANIGRAHI .....Petitioner

.V.

STATE OF ORISSA ....Opp. Party

CODE OF CRIMINAL PROCEDURE,1973 – Section 482 – Inherent power – Quashing of criminal trial – Offences under section 498(A), 304(B), 34 of Indian Penal Code along with section 4 of Dowry Prohibition Act – Accuse(husband) faced trial and acquitted – Another accused person didn't face trial due to non filing of charge sheet against her – However the trial court took cognizance against such accused person in spite of non filing of charge sheet against her – Order of cognizance challenged – Held, the criminal proceeding against the petitioner is quashed.

Case Laws Relied on and Referred to :-

1. 2016 (I) ILR - CUT- 491 : Satyaban Pradhan @ Kuna Pradhan Vs. State of Odisha.
2. (2013) 6 SCC 428 : Sheikh alias Gagu versus State of West Bengal
3. 2005 (II) OLR-386 : Kanhu Behera Versus State of Orissa.
4. 2011 (I) OLR 1052 : Surender Kumar @ Surendra Routray Vrs. State of Odisha.

For Petitioner : Mr. Vivekanand Jena, Adv.
For Opp Party : Mr. Karunakar Gaya, ASC

JUDGMENT Date of Hearing & Judgment :21.03.2022

V. NARASINGH, J.

1. This is an application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to " as Cr.P.C." for brevity) for quashing the criminal proceeding arising out of G.R. Case No. 108 of 1992

(S.T. Case No. 99 of 2021 on the file of the learned Sessions Judge, Balasore) and the order of cognizance dtd. 06.02.1996 passed by the Judicial Magistrate First Class, Soro at Annexure-3.

2. The brief facts germane for just adjudication of the lis is stated hereunder.

A written complaint was filed in Khaira Sadar P.S. against the present petitioner along with six (6) others, on 01.03.1992, alleging death on account of torture of one Sakuntala Das (since deceased), who is the sister of the informant-Mayadhar Das. On the basis of such allegation, Khaira Sadar P.S. Case No. 29 of 1992 under Sections-498(A)/ 304-B/34 of the I.P.C, read with Section-4 of the Dowry Prohibition Act was instituted.

3. It was stated in the said F.I.R, that the sister of the informant-Sakuntala was married to one Lalatendu Panda about five (5) years back and was blessed with a daughter and a son. It was alleged that, persistent demand for dowry of Rs.10,000/- (Rupees Ten Thousand) could not be met by the family of the deceased. And, the accused persons kept torturing Sakuntala which she narrated before her parents and her relatives. But keeping the family's honour in mind the matter was never reported to the police. It was further alleged by the informant that, on 19.03.1992 when the informant had been to the house of his sister to meet her, he could not find her in the house of the in-laws and he came to know that, his sister-Sakuntala was undergoing treatment at Agarapada Hospital. When he went to the hospital he found her dead. On enquiry, he found out that Sakuntala has died of poisoning. Suspecting that Lalatendu Panda, the husband along with his parents and their daughters had murdered his sister by administering poison he lodged the complaint and on the basis of such allegation aforesaid, the Khaira P.S. Case No. 29 of 1992 inter alia under Section-304-B, I.P.C was registered.

4. Taking into account the allegation and the sections under which the case was registered, it was investigated into by an Officer in the rank of D.S.P.

5. After thorough investigation on 07.01.1996, the Investigating Agency submitted final report " for insufficient evidence for Charge-sheet ". Copy of which has been annexed as Annexure-2. On perusal of such Final Report, it is seen one of the witnesses examined is Mayadhar Das, the informant and the brother of the deceased.

6. When such Final Report came up for consideration before the J.M.F.C., Soro, the learned Magistrate refused to accept the Final Report and took cognizance by order dtd. 06.02.1996 at Annexure-3 against four persons 1- Lalatendu Panda (husband), 2- Laxmidhar Panda, 3. Smt. Satyabhama Panda, and 4- Kumari Chanchala Panda (sister-in-law of the deceased-present petitioner).

7. It is apt to state here that one of the accused namelyLalatendu Panda, the husband faced trial in which the petitioner is a co-accused. By judgment dtd. 18.05.2009 (Annexure-4) in S.T. Case No. 38/66 of 2009 the learned Adhoc Additional Sessions Judge, Balasore considering the materials on record, more particularly the statement of P.W.1- informant-brother of the deceased, that he suspected his sister might have committed suicide due to stomach pain and suffering and did not support his version that his sister was ill treated on demand of dowry held the accused-husband not guilty and acquitted him under Section 232 Cr.P.C.

8. It is stated at the Bar that such judgment has attained finality.

9. Learned counsel for the petitioner-Mr. Vivekanand Jena, relying on the acquittal of the co-accused seeks for quashing for the cognizance and the trial pending in the Court of the Learned Sessions Judge, Balasore relating to the petitioner relying on the judgment of this Court reported in ***2016 (I) ILR – CUT-491*** in the case of ***Satyaban Pradhan @ Kuna Pradhan Vrs. State of Odisha.***

10. Per contra, the learned counsel for the State refuted such submissions inter alia on the count that the acquittal in respect of a co-accused cannot be taken advantage by the petitioner, who has not faced trial and seeks dismissal of the CRLMC.

11. Duty cast on Court while evaluating the order of acquittal vis-à-vis a co-accused, who has been acquitted while applying the same to an accused who has not faced trial has been succinctly stated by the Apex Court in the case of Yanob ***Sheikh alias Gagu versus State of West Bengal reported in (2013) 6 SCC 428***

Which is quoted hereunder for convenience for ready reference;

" 24. xxx xxx xxx xxx

It is only where the entire case of the prosecution suffers from infirmities, discrepancies and where the prosecution is not able to establish its case, the acquittal of the co-accused would be of some relevancy for deciding the case of the other ". and in Para-26 it has been held thus;

" 26. xxx xxx xxx xxx

The Court has to screen the entire evidence and does not extend the threat of falsity to universal acquittal. The court must examine the entire prosecution evidence in its correct perspective before it can conclude the effect of acquittal of one accused on the other in the facts and circumstances of a given case".

12. The case at hand has to be examined on the touch stone of the principles laid down in the above case that the evidence on record has to be examined before the co-accused who is seeking interference on account of acquittal can be granted relief at par with an accused who faced trial and was acquitted. At the cost of reiteration, it is stated that in the present case after investigation the final form was submitted, for insufficient evidence.

13. On evaluation of materials in the trial relating to the co-accused, i.e., the husband, keeping in view the statement of P.W.1 the informant who is none other than the brother of the deceased, absolving the husband who faced trial of any criminality, order of acquittal was recorded.

14. Hence, this Court finds force in the submission of the learned counsel for the petitioner that, no useful purpose would be served in allowing the criminal proceeding to continue and putting the petitioner who is the sister-in-law of the deceased through the rigours of trial after more than a decade of the judgment of acquittal passed in respect of the husband, who can be said to be the principal accused, in a case of the present nature.

15. In this context, reference can also be made to the judgment of this Court in the cases of ***Kanhu Behera Versus State of Orissa reported in 2005 (II) OLR-386 and of Surender Kumar @ Surendra Routray Vrs. State of Odisha reported in 2011 (I) OLR 1052,*** whose facts are more or less akin to the case at hand.

16. In fact, in the factual matrix of the case at hand, it can be stated that the petitioner is even on a better footing since the Investigating Agency did not file any charge-sheet against her.

17. Taking note of the judgment relied upon by the learned counsel for the petitioner and the judgments of this Court cited above and the law laid down by the Apex Court setting out the contour of consideration of an acquittal of a co-accused to ennure to the benefits of an accused who has not faced trial, this Court is of the considered view that the continuance of the Criminal Proceeding against the present petitioner, who is the sister-in-law of the deceased and directing her to face trial after more than a decade of judgment of acquittal would be an exercise in futility. More so, when there is bleak possibility of any conviction. This Court is of the considered opinion that ends of justice would be sub-served if order of cognizance dt. 06.02.1996 (Annexure-3) passed by the Learned J.M.F.C., Soro in G.R. Case No. 29 of 1996 and the consequent impending trial qua the petitioner is not allowed to linger any further.

18. Accordingly, the order of cognizance dtd. 06.02.1996 passed by Learned J.M.F.C., Soro in G.R. Case No. 29 of 1996 (Annexure-3) and the proceeding pending in the Court of the learned Sessions Judge, Balasore in S.T. No. 99 of 2021 is hereby quashed vis-à-vis the petitioner.

19. The CRLMC is accordingly allowed.

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