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ORISSA HIGH COURT, CUTTACK

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NOMINAL INDEX

ACTS & RULE

Acts & No.

1973- 02	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
1872- 1	Indian Evidence Act, 1872
1860- 45	Indian Penal Code, 1860
1947- 14	Industrial Dispute Act, 1947
1988- 59	Motor Vehicles Act, 1988
1985- 61	Narcotic Drugs And Psychotropic Substances Act, 1985
1972- 21	Orissa Consolidation of Holdings And Prevention of Fragmentation of Land Act, 1972
1999-11	Orissa Entry Tax Act, 1999
1947- 14	Orissa Sales Tax Act, 1947
1959- 7	The Orissa Panchayat Samiti Act, 1959
1960- 16	Orissa Land Reforms Act, 1960
1881- 26	Negotiable Instruments Act, 1881

RULES:- Orissa Civil Services (Rehabilitation Assistance) Rules, 1990

TOPICAL INDEX

SUBJECT INDEX

CRIMINAL PROCEDURE CODE, 1973 – Section 439 – Offences punishable under sections 467, 468, 471, 420, 406 r/w with section 120-(B) of the Indian Penal Code and section - 6 of Orissa Protection of Interest of Depositions (in Financial Establishment) Act, 2011 – Whether the change in definition of 'Deposit' is relevant in present case for grant of bail – Held, in my humble view, this change in definition of the term 'deposit' is no way relevant in this case as most of the deposits were accepted much prior to the Gazette notification dated 11.11.2016 of OPID Amendment Act, 2016 and it would be guided by the earlier definition of "deposit" under the OPID Act.

Prasan Kumar Patra -V- State of Odisha.

2021 (II) ILR-Cut…… 836

CRIMINAL PROCEDURE CODE, 1973 – Section 439 – Provision for bail – Personal liberty and freedom – Held, the freedom of an individual cannot be curtailed for indefinite period, especially when his/her guilt is yet to be proved – It has been further held that a person is believed to be innocent until found guilty – Such sentiments have been echoed in the following words: "A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty – However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences – Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception." Unfortunately, some of these basic principles appear to have been lost sight of as a result of which more and more persons are being incarcerated for longer periods – This does not do any good to our criminal jurisprudence or to our society."

CRIMINAL PROCEDURE CODE, 1973 – Section 439 – Provision for bail and grant thereof – Discretion of the court – Exercise of – Held, Keeping in mind that the normal rule is of bail and not jail, the Courts must also keep in mind that apart from the above considerations, the Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime when considering the question of bail.

INDIAN EVIDENCE ACT, 1872 – Section 9 – Test of Identification parade – Necessity of – Held, the necessity for holding an identification parade arises only when the accused are not previously known to the witness – The test is done to check upon their veracity of the witnesses and the main object of holding an identification parade during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to discard whether all or any of them could be cited as witnesses of the crime or not.

INDIAN EVIDENCE ACT, 1872 – Section 101 – Provision under – Burden of proof – During hearing a plea was taken that by an order of the High Court, a dispute has been settled – But no order produced – Effect of such submission – Held, whoever desires the Court to give any judgment as to any legal right etc. then he has to prove the fact he asserts – In this case in view of the order of the Tahasildar, the undisputed fact that the earlier order passed in OJC No.1225/1997, the dispute has been settled

JUDICIAL REVIEW – When a word phrase, sentence, paragraph, clause or other provisions of a contract would otherwise be unenforceable, illegal, or void, the effect of that provision/clause will so far as possible be limited and read down so that it becomes in conformity with provisions of law – A constitutional court is not precluded from a judicial review and read down a clause of contract, which is otherwise contrary to the provisions of law and make it enforceable in conformity with law without setting aside or rescinding the contract itself.

M/s. Sadguru Metalliks -V- Tata Power Western Odisha Distribution Ltd., Rajgangpur.

2021 (II) ILR-Cut…… 857

MOTOR ACCIDENT CLAIM – Whether major and earning sons are entitled to claim the compensation? – Held, Yes.

Sabitri Padhy & Anr. -V- Bhimasen Mahal & Anr.

2021 (II) ILR-Cut…… 825

MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal against the award by the insurance company – Materials show Insurance Company pleaded many things, but unfortunately there was no examination of a single witness, nor bringing any material particulars to disprove the claim of the claimants on any of the aspect – There is absolutely no attempt at the instance of the Insurance Company to dislodge the material support introduced by the claimants in the trial proceeding – Effect of – Held, in the above situation the only material available for consideration was, the pleadings of the respective parties and the evidence oral and material taken support by the claimants – However looking to the contribution aspect by the deceased towards family, there is requirement of reconsideration of the income aspect vis-à-vis contribution to the family by applying deduction of 1/3rd – Matter remanded for correct calculation.

ORISSA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULES, 1990 – Rules 2(1) (d) & 16 – Appointment under the Rehabilitation Assistance Scheme – "Family members" – Whether it includes married daughter – Held, Yes. – Direction issued to amend the law while including the married daughter as a "family member" in the Rule.

Urbashi Sahoo -V- State of Odisha And Anr.
2021 (II) ILR-Cut…… 709

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 34 and 35 – Provisions under – Transfer of 'chaka' land by way of sale in violation of the provisions of law – Application filed before the Collector to declare the sale deed as void – Application allowed and the purchaser was directed to be evicted – Amendment in sub-section 5 of Section 34 came into force on 08.03.2013 i.e. to the effect that "(5) Nothing in sub-sections (1) and (2) shall apply to- (a) any land which is covered under the approved Master Plan published under the Odisha Town Planning and Improvement Trust Act, 1956 or as the case may be approved development plan published under the Odisha Development Authorities Act, 1982, after the order passed by the Collector – Writ petition – The learned Single judge allowed the writ petition erroneously by applying the provisions of the amendment – Writ appeal – Order of the single judge set aside – Reasons – Explained.

Sanjeeb Barik & Ors. -V- Nilamani Maharana & Ors.
2021 (II) ILR-Cut…… 679

ORISSA ENTRY TAX ACT, 1999 – Section 26(1) of the OET Act, r/w Rule 19(5) OET Rule – Petitioner claimed set off entry tax paid on purchase of coal which is used as raw material in manufacturing of cement in terms of above said 1999 Act – Sales Tax Officer rejected the claim – Assistant Commissioner of Sales Tax rejected the petitioner's claim – The Appellate Tribunal in the full bench upheld the order of ACST – Hence the

SERVICE LAW – Disciplinary proceeding – Non supply of documents – While serving memorandum of charges, the delinquent was not supplied with the relevant documents – The delinquent specifically sought for those documents, not provided – On the other hand enquiry officer was appointed who did not act fairly, reasonably and submitted the enquiry report along with documents to the disciplinary authority, without providing a copy thereof to the delinquent – Effect of such procedure adopted in a disciplinary proceeding – Held, the departmental proceeding initiated against the petitioner suffers from vice of procedural irregularity – Non supply of documents along with memorandum of charges as well as non supply of enquiry report to the petitioner is in gross violation of principle of natural justice – Order of punishment set aside and the matter remanded.

Rama Chandra Parida-V- State of Odisha & Ors.
2021 (II) ILR-Cut…… 767

SERVICE LAW – Removal from service – The petitioner by suppressing the pendency of a criminal case while filling in the application form, in verification roll had committed fraud and such a person could not have been permitted to continue as a member of a disciplined force and accordingly removed from service – Held, no illegality has been committed in removing the petitioner from service.

Jatin Kumar Panjia-V- State of Odisha & Ors.
2021 (II) ILR-Cut…… 758

SERVICE LAW – Self-same allegations both in criminal and departmental proceedings – Criminal investigation dropped as police submitted final report – Whether the departmental proceeding can be dropped due to above reason? – Held, Yes.

Samir Ranjan Sahoo-V-State of Odisha And Ors.
2021 (II) ILR-Cut…… 787

TEST OF IDENTIFICATION PARADE – Inordinate delay – Effect of – Held, where there is an inordinate delay in holding a test identification parade, the Court must adopt a cautious approach so as to prevent miscarriage of justice – In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade – Appeal is allowed.

Tukuna Rauta -V- State of Odisha.

2021 (II) ILR-Cut…… 848

WORDS AND PHRASES – 'Esstopel' – Definition – Explained – Petitioner initially appointed as an Attendant on 44 days contractual basis – Subsequently, after completion of ten years, his services were regularized with the condition that the pension will be guided by the OCS (Pension) Rules 1992 – Thereafter on the basis of a clarification of the Finance department an order was passed to the effect that the petitioner being a contractual employee, the OCS (Pension) Rules 1992 not applicable to him – Whether such an order will stand on scrutiny of law? – Held, No – Once it has been specifically mentioned, vide letter dated 12.12.2012, that the petitioner having completed 10 years of service with a small interruption from 16.08.2000 to 07.12.2001, and that by then under the need of the situation and by virtue of order of the Tribunal the petitioner having completed 10 years and more service in Class-IV, his services have been regularized conditionally stating that the pension will be guided as per provision of OCS (Pension) Rules, 1992, in pursuance of Finance Department letter dated 04.04.2007 – The subsequent letter dated 29.11.2013 under Annexure-6 issued by the Finance Department, with regard to clarification on applicability of New Pension Scheme in case of contractual employees appointed prior to 01.01.2005 and brought over to regular establishment after that date, as well as the letter dated 12.01.2015 under Annexure-7 cannot sustain in the eye of law as the same is hit by principle of estoppel.

Udayanath Rout-V- State of Odisha & Ors.

2021 (II) ILR-Cut…… 777

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2021 (II) ILR - CUT- 673

Dr. S. MURALIDHAR, C.J & S.K. PANIGRAHI, J.

WA NO. 76 OF 2020

BHASKAR CHANDRA MOHAPATRA ……..Appellant

.V.

UCO BANK AND ORS. ……..Respondents

CONSTITUTION OF INDIA, 1950 – Article 226 – Territorial jurisdiction for issuance of writ – Petitioner was communicated with the order arising out of a disciplinary proceeding in his home address within the territorial jurisdiction of the Orissa High Court – Plea that, since the order was passed while petitioner was working at Bihar, Orissa High Court lacks territorial jurisdiction – Held, plea cannot be accepted as part of the cause of action arises here – Doctrine of '*forum conveniens*' considered.

> *"Turning to the case on hand, a part of the cause of action in the present case did arise within the jurisdiction of this Court, as explained earlier. Even applying the doctrine of forum conveniens it was open to the Petitioner to choose to approach either the High Court at Patna or this Court since a part of the cause of action did arise in the jurisdiction of both Courts. Consequently, this Court is unable to agree with the stand of UCO Bank that this Court lacked territorial jurisdiction to entertain the writ petition of the Appellant."* (Para 16)

Case Laws Relied on and Referred to :-

1. (2004) 6 SCC 254 : Kusum Ingots Vs. Union of India
2. (2010) 1 SCC 457 : Rajendran Chingaravelu Vs. Mr. R.K.Mishra
3. AIR 2011 Del 174 : Sterling Agro Industries Vs. Union of India
4. AIR 2010 Delhi 43 : New India Assurance Company Limited Vs. Union of India
5. 2007 (213) ELT 323(SC) : Ambica Industries Vs. Commissioner of Central Excise
6. (2007) 11 SCC 335: Alchemist Ltd. Vs. State Bank of Sikkim
7. (2002) 1 SCC 567 : Union of India Vs. Adani Exports Ltd.

For Appellant : Mr. Surendranath Panda.

For Respondents: Mr. M.S. Sahoo, AGA.

ORDER Date of Order: 13.07.2021

BY THE BENCH

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

2. The present appeal is directed against the judgment dated 28th January, 2020 of the learned Single Judge dismissing the Appellant's Writ Petition (C) No.18129 of 2016 on the ground of territorial jurisdiction and for a direction for restoring the aforementioned writ petition.

3. This is in fact the second round of litigation concerning the appellant's dismissal from the service by the respondent-UCO bank.

4. The background facts are that the Appellant while working as a Branch Manager on ad-hoc basis in Fauzdari Branch in Bihar was placed under suspension in 3rd May, 2007. The disciplinary proceedings commenced and a charge sheet was submitted on 24th September, 2007. The final order of the Disciplinary Authority (DA) was passed on 24th June, 2008 dismissing the Appellant from service. The said order was admittedly communicated to the Appellant in his residential address At-Kantapal, Po-Charampa, District-Bhadrak. This order was confirmed by the Appellate Authority (AA) by the order dated 3rd February, 2010 which again was communicated to the Appellant at his residential address at Charampa Bhadrak.

5. The Appellant challenged the said order in W.P. (C) No.5092 of 2010 before this Court. By a detailed order dated 14th July 2015, the learned Single Judge of this Court disposed of the aforesaid writ petition setting aside the order of dismissal and remitting the matter for a fresh enquiry in consonance with the 1976 Regulations and dispose of the same within a period of four months from the date of receipt of the judgment.

6. Significantly, the UCO Bank which contested the above writ petition does not appear to have raised the issue of lack of territorial jurisdiction. In any event, the learned Single Judge has made no reference to any such submission in the judgment dated 14th July, 2015 in W.P.(C) No.5092 of 2010. UCO bank accepted the said judgment and in fact implemented the directions therein.

7. On remand, the DA again passed a dismissal order on 8th March, 2016. By this time, the Petitioner was placed under suspension. The fresh dismissal order was communicated to the Petitioner at his residential address at Charampa, Bhadrak. The Appellant was by this time said to be suffering

from paralysis and undergoing treatment. The Appellant's appeal was dismissed by the Appellate Authority on 9th September, 2016 at Lucknow and this order too was communicated to the Petitioner at his address at Charampa, Bhadrak through the UCO Bank Bhadrak Branch.

8. Thereafter the Appellant filed the second writ petition, i.e., W.P. (C) No. 18129 of 2016 in this Court. The learned Single Judge by the impugned order dated 28th January, 2020 accepted the plea of UCO Bank and held that this Court lacked territorial jurisdiction. It was further observed that merely because the Court on an earlier occasion entertained the writ petition, without adjudicating the issue, cannot confer territorial jurisdiction on this Court over such disputes since no part of the cause of action arose in this State.

9. Having heard learned counsel for the parties, this Court is of the view that the impugned order of the learned Single Judge cannot be sustained in law for more than one reason.

10. The UCO Bank did not raise the plea of lack of territorial jurisdiction when it contested the earlier W.P. (C) No. 5092 of 2010 filed by the Appellant on merits. UCO Bank accepted the judgment dated 14th July, 2015 of the learned Single Judge in W.P. (C) No.5092 of 2010. The issue of territorial jurisdiction was raised for by it for the first time in the subsequent W.P. (C) No. 18129 of 2016 filed by the Appellant.

11. Secondly it would not be entirely correct to say that no part of the cause of action arose within the jurisdiction of this Court. By the time the order of the DA was passed in the first round, the Appellant had already retired. The order 3rd February, 2010 of the AA dismissing his appeal was communicated to the Appellant at Bhadrak. The orders of the DA and the AA in the second round were communicated to the Appellant at Bhadrak, within the territorial jurisdiction of this Court.

12. Article 226 (1) and (2) of the Constitution of India, which are provisions relevant to the issue at hand, read as follows:

> "226. Power of High Courts to issue certain writs
>
> (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any

> person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
>
> (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
>
> (3) ….
> (4) ….”

13. In ***Kusum Ingots v. Union of India (2004) 6 SCC 254***, the Supreme Court explained: “In view of clause 2 of Article 226 of the Constitution of India now if a part of cause of action arises outside the jurisdiction of the High Court, it would have jurisdiction to issue a writ.”

14. In ***Rajendran Chingaravelu v. Mr. R.K.Mishra (2010) 1 SCC 457***, the facts were that the Petitioner was that the security/ intelligence officials at Hyderabad Airport (in Andhra Pradesh) inspected the cash carried by the Petitioner and alerted their counterparts at the Chennai Airport that Appellant was carrying a huge sum of money, and required to be intercepted and questioned. After he landed in Chennai, the consequential income tax proceedings were initiated against the Appellant, which he challenged in a writ petition before the Andhra Pradesh High Court. Reversing the order of the High Court which rejected the writ petition at the threshold on the ground of lack of territorial jurisdiction, the Supreme Court held:

> “The first question that arises for consideration is whether the Andhra Pradesh High Court was justified in holding that as the seizure took place at Chennai (Tamil Nadu), the appellant could not maintain the writ petition before it. The High Court did not examine whether any part of cause of action arose in Andhra Pradesh. Clause (2) of Article 226 makes it clear that the High Court exercising jurisdiction in relation to the territories within which the cause of action arises wholly or in part, will have jurisdiction. This would mean that even if a small fraction of the cause of action (that bundle of facts which gives a petitioner, a right to sue) accrued within the territories of Andhra Pradesh, the High Court of that State will have jurisdiction. In this case, the genesis for the entire episode of search, seizure and detention was the action of the Therefore, his writ petition ought not to have been rejected on the ground of want of jurisdiction.”

15. In ***Sterling Agro Industries v. Union of India AIR 2011 Del 174***, a five-Judge Bench of the Delhi High Court was called upon to consider the correctness of an earlier ruling of a Full Bench of that High Court in ***New India Assurance Company Limited v. Union of India AIR 2010 Delhi 43 (FB)*** and in particular, the question of territorial jurisdiction of the High Court under Article 226 of the Constitution in light of the doctrine of *forum conveniens*. After discussing the earlier decisions of the Supreme Court in ***Kusum Ingots* (*supra*); *Ambica Industries v. Commissioner of Central Excise, 2007 (213) ELT 323(SC); Alchemist Ltd. v. State Bank of Sikkim (2007) 11 SCC 335* and *Union of India v. Adani Exports Ltd. (2002) 1 SCC 567***, the Five-Judge Bench of the Delhi High Court summarised the legal position thus:

> "(a) The finding recorded by the Full Bench that the sole cause of action emerges at the place or location where the tribunal/appellate authority/revisional authority is situate and the said High Court (i.e., Delhi High Court) cannot decline to entertain the writ petition as that would amount to failure of the duty of the Court cannot be ccepted inasmuch as such a finding is totally based on the situs of the tribunal/appellate authority/revisional authority totally ignoring the concept of *forum conveniens*.
>
> (b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court , however, the cause of action has to be understood as per the ratio laid down in the case of *Alchemist Ltd*. (*supra*).
>
> (c) An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of *forum conveniens*.
>
> (d) The conclusion that where the appellate or revisional authority is located constitutes the place of *forum conveniens* as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the lis in question.
>
> (e) The finding that the court may refuse to exercise jurisdiction under Article 226 if only the jurisdiction is invoked in a malafide manner is too restricted/constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of malafide alone.
>
> (f) While entertaining a writ petition, the doctrine of *forum conveniens* and the nature of cause of action are required to be scrutinized by the High Court depending

upon the factual matrix of each case in view of what has been stated in *Ambica Industries* (*supra*) and *Adani Exports Ltd*. (supra).

(g) The conclusion of the earlier decision of the Full Bench in *New India Assurance Company Limited* (*supra*) "that since the original order merges into the appellate order, the place where the appellate authority is located is also *forum conveniens*" is not correct.

(h) Any decision of this Court contrary to the conclusions enumerated hereinabove stands overruled."

16. Turning to the case on hand, a part of the cause of action in the present case did arise within the jurisdiction of this Court, as explained earlier. Even applying the doctrine of *forum conveniens* it was open to the Petitioner to choose to approach either the High Court at Patna or this Court since a part of the cause of action did arise in the jurisdiction of both Courts. Consequently, this Court is unable to agree with the stand of UCO Bank that this Court lacked territorial jurisdiction to entertain the writ petition of the Appellant.

17. Since the writ petition was dismissed by the learned single Judge solely on the ground of lack of territorial jurisdiction, the impugned order of the learned Single Judge is hereby set aside. The appeal is allowed. W.P.(C) No. 18129 of 2016 is restored to file of the learned Single Judge who shall decide it afresh on merits in accordance with law on the existing pleadings.

18. W.P. (C) No.18129 of 2016 shall be listed before the assigned Bench on 9th August, 2021 for a fresh hearing on merits. The learned Single Judge shall endeavour to dispose of the writ petition on the existing pleadings within a period of four months thereafter.

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

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2021 (II) ILR - CUT- 679

Dr. S. MURALIDHAR, C.J & S.K. PANIGRAHI, J.

WA NO. 7 OF 2017

SANJEEB BARIK AND ORS. ……Appellants

.V.

NILAMANI MAHARANA AND ORS. ……Respondents

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 34 and 35 – Provisions under – Transfer of 'chaka' land by way of sale in violation of the provisions of law – Application filed before the Collector to declare the sale deed as void – Application allowed and the purchaser was directed to be evicted – Amendment in sub-section 5 of Section 34 came into force on 08.03.2013 i.e. to the effect that "(5) Nothing in sub-sections (1) and (2) shall apply to- (a) any land which is covered under the approved Master Plan published under the Odisha Town Planning and Improvement Trust Act, 1956 or as the case may be approved development plan published under the Odisha Development Authorities Act, 1982, after the order passed by the Collector – Writ petition – The learned Single judge allowed the writ petition erroneously by applying the provisions of the amendment – Writ appeal – Order of the single judge set aside – Reasons – Explained.

"The learned Single Judge ought to have first examined, if at all the 2012 amendment would apply, whether in fact the fragment in question within a TP area. This is because the amended Section 34(5) clearly states that only that portion of fragment which is covered under the approved Master Plan" published under the Odisha Town Planning and Improvement Trust Act, 1956" which would stand exempted from the rule against fragmentation contained in Section 34(1) and (2) of the OCH & PFL Act. In the present case since no document was placed by Respondent No.1, the learned Single Judge ought not to have proceeded to examine the applicability of the amended provision at all. Nevertheless even on the question of retrospective applicability of the amended Section 34 (5) of the OCH & PFL Act, the learned Single Judge appears to have erred in accepting the plea of Respondent No.1 that the amendment would have retrospective effect and cover the three registered sale deeds, two of which were dated 12th June, 2001 and one of which was dated 13th October, 2003, i.e., nearly 10 years prior to the amendment itself. There was no warrant for such conclusion particularly since even as per the settled legal position explained by Supreme Court of India the amended provision was not "declaratory" in nature." (*Para 17 and 18*)

Case Laws Relied on and Referred to :-

1. AIR 1985 SC 111 : Lakshmi Narayan Guin Vs. Niranjan Modak.
2. (2000) 7 SCC 357: United Bank of India Vs. Abhijit Tea Co. Pvt. Ltd.
3.2014 (Supp.-I) OLR 1089 : Subash Chandra Panigrahi Vs. Rajib Lochan Panigrahi
4. (1957) 96 CLR 261 @ 637-8 : Maxwell Vs. Murphy.
5. AIR 1957 SC 540: Garikapati Veeraya Vs. N. Subbiah Choudhry.
6. AIR 1966 SC 1423 : Smt. Dayawati Vs. Inderjit.
7. (1994) 4 SCC 602. : Hitendra Vishnu Thakur Vs. State of Maharashtra.
8. AIR 2001 SC 2472 : Shyam Sunder Vs. Ram Kumar.

For Appellants : Mr. A.P. Bose
For Respondents : Mr. S.D. Mohanty, for Respondent No.1
Mr. S.K. Mohanty, for Respondents 3 to 6(e)

ORDER Date of Order: 13.07.2021

Dr. S. MURALIDHAR, C.J.

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

2. This appeal is directed against an order dated 21st December, 2013 passed by the learned Single Judge in W.P.(C) No.15048 of 2016. By the impugned judgment, the learned Single Judge set aside the order dated 1st February, 2013 passed by the Collector, Bhadrak in OCH & PFL Case No.11 of 2012.

3. This Court heard the submissions of Mr. A.P. Bose, learned counsel appearing for the Appellant, Mr. S.D. Mohanty, learned counsel appearing for Respondent No.1 and Mr. S.K. Mohanty, learned counsel appearing for Respondent Nos. 3 to 6 (e).

4. The background facts are that Respondent No.1 Nilamani Maharana purchased a piece of land measuring Ac.0.27 decimals out of Ac.0.60 decimals from Plot No.1446, Chaka No.623, Khata No.691 of Mouza-Berhampur (hereafter 'land in question') by three registered sale deeds – two of them dated 12th June, 2001 and the third dated 31st October, 20003. It was claimed that prior thereto Respondent No.1 was in possession of the land in question since 1995.

5. The case of the present Appellants, on the other hand, is that the land in question was Chaka land and ancestral in nature; it belonging to the undivided joint family and stands recorded in the name of Ratnakar Barik and

other co-sharers of MouzaBerhampur. The Appellants‟ case was that Respondent No.1 Nilamani Maharana had no chaka land adjoining the purchased land that the transfer of the land in question in his favour had been made in contravention of provisions of the Section 34 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (OCH & PFL Act). Accordingly, the Appellants filed Misc. Case No.11 of 2012 before the Collector, Bhadrak praying that the aforesaid three registered sale deeds be declared void and further that Respondent No.1 should be evicted from the land in question.

6. In response to the notice issued in the aforementioned Misc. Case, Respondent No.1 contended, inter alia, that the purchased land was in the Town Planning (TP) area; that in the TP area the chaka could be fragmented and therefore Sections 34 and 35 of the OCH & PFL Act would not apply.

7. The Collector, Bhadrak by an order dated 1st February, 2013 found that Respondent No.1 was not a contiguous chaka owner and no documents on that aspect had been filed by him. It was further held that the transfer of the three parcels of land admeasuring Ac.0.12 decimals, and two parcels of Ac.0.03 decimals each by the registered sale deeds dated 12th June, 2001 and 31st October, 2003 were in contravention of Section 34 of the OCH & PFL Act. Accordingly Respondent No.1 was asked to be evicted from the land in question.

8. Admittedly at the time the Collector, Bhadrak passed the aforementioned order the amendment to Section 34 of the OCH & PFL Act had not become effective. However, by the time Respondent No.1 filed W.P.(C) No.15048 of 2013 in this Court on 5th July, 2013 the said amendment came into effect on 8th March, 2013.

9. Prior to the amendment Section 34 of the OCH & PFL Act read as under:

> “34. Prevention of fragmentation-
>
> (1) No agricultural land in a locality shall be transferred or partitioned so as to create a fragment.
>
> (2) No fragment shall be transferred except a land-owner of a contiguous Chaka;

Provided that a fragment may be mortgaged or transferred in favour of the State Government, a Co-operative Society, a scheduled bank within the meaning of the Reserve Bank of India Act, 1934 (2 of 1934) or such other financial institution as may be notified by the State Government in that behalf as security for the loan advanced by such Government Society, Bank or institution, as the case may be.

(3) When a person, intending to transfer a fragment, is unable to do so owing to restrictions imposed under Sub section (2), he may apply in the prescribed manner to the Tahasildar of the locality for this purpose where upon the Tahasildar shall, as far as practicable within forty-five days from the receipt of the application determine the market value of the fragment and sell it through an auction among the landowners of contiguous Chakas at a value not less than the market value so determined.

(4) (a) Any person aggrieved by an order of the Tahasildar under Sub-section (3) may, within sixty days from the date of such order, prefer an appeal in the prescribed manner before the concerned Sub-divisional Officer, whose decision thereon shall be final.

(5) When the fragment is not sold in course of the auction it may be transferred to the State Government and the State Government shall, on payment of the market value determined under Sub-section (3), purchase the same and thereupon the fragment shall vest in the State Government free from all encumbrances.

(6) Nothing in Sub sections (1) and (2) shall apply to a transfer of any land for such public purposes as may be prescribed by notification in this behalf by the State Government."

10. By the aforementioned Amendment Act, 2012 sub-section 5 of Section 34 of the OCH and PFL Act was substituted as under:

"(5) Nothing in sub-sections (1) and (2) shall apply to-

(a) any land which is covered under the approved Master Plan published under the Odisha Town Planning and Improvement Trust Act, 1956 or as the case may be approved development plan published under the Odisha Development Authorities Act, 1982; or

(b) a transfer of any land for such public purposes, as may be specified, from time to time, by notification in this behalf, by the State Government."

11. The text of the OCH & PFL (Amendment) Act, 2012 as gazetted on 8th March, 2013 reveals that it was notified on 8th March, 2013 there was no indication therein that it was to have retrospective effect from any particular date. Therefore, in the absence of anything to the contrary, the said amendment was intended to be prospective.

12. The learned Single Judge, however, without examining if the land in question which was transferred to Respondent No.1 by way of aforementioned registered sale deeds in fact, while in the TP area straight away proceed to treat them as such and then posed the question whether the aforementioned amendment would have retrospective effect.

13. The learned Single Judge referred to the decisions of the Supreme Court in ***Lakshmi Narayan Guin v. Niranjan Modak AIR 1985 SC 111, United Bank of India v. Abhijit Tea Co. Pvt. Ltd. (2000) 7 SCC 357 and Subash Chandra Panigrahi v. Rajib Lochan Panigrahi 2014 (Supp.-I) OLR 1089*** to conclude that in 2012 Amendment could have retrospective effect and therefore the three parcels of land would not be affected by the rule against fragmentation.

14. The Court in the first place like to observe that at the time when the Collector decided the application filed by the present Appellant, the aforementioned amendment of 2012 had, admittedly, not being notified. In other words there was no occasion for the Collector to have examined whether in terms of the 2012 amendment; the land in question should be exempted from the rule of fragmentation.

15. Section 34 as it stood prior to the 2012 amendment expressly prohibited any agricultural land in a locality from being transferred or partitioned "so as to create a fragment". The expression "fragment" has been defined in Section 2(m) of the OCH & PFL Act as under:

> "Fragment" means a compact parcel of agricultural land held by a land-owner by himself or jointly with others comprising an area which is less than-
>
> (i) one acre in the district of Cuttack, Puri, Balasore and Ganjam and in the Anandpur subdivision in the district of Keonjhar, and
>
> (ii) two acres in the other areas of the State."

16. In the present case the extent of land under each of the the three registered sale deeds was undoubtedly a "fragment" within the meaning of the OCH & PFL Act. Further, in terms of Section 35 (1) of the OCH & PFL Act the transfer or partition in contravention of the provisions of Section 34 was void. In terms of Section 35 (2) of the OCH & PFL Act a person under occupation of any land by virtue of a transfer or partition which is void is

liable to be summarily evicted. Therefore, no fault can be found with the impugned order of the Collector, Bhadrak in proceeding to order the eviction of Respondent No.1 from the land in question.

17. The learned Single Judge ought to have first examined, if at all the 2012 amendment would apply, whether in fact the fragment in question within a TP area. This is because the amended Section 34(5) clearly states that only that portion of fragment which is covered under the "approved Master Plan "published under the Odisha Town Planning and Improvement Trust Act, 1956" which would stand exempted from the rule against fragmentation contained in Section 34(1) and (2) of the OCH & PFL Act. In the present case since no document was placed by Respondent No.1, the learned Single Judge ought not to have proceeded to examine the applicability of the amended provision at all.

18. Nevertheless even on the question of retrospective applicability of the amended Section 34 (5) of the OCH & PFL Act, the learned Single Judge appears to have erred in accepting the plea of Respondent No.1 that the amendment would have retrospective effect and cover the three registered sale deeds, two of which were dated 12th June, 2001 and one of which was dated 13th October, 2003, i.e., nearly 10 years prior to the amendment itself. There was no warrant for such conclusion particularly since even as per the settled legal position explained by Supreme Court of India the amended provision was not 'declaratory' in nature.

19. In Francis Bennion's ***Statutory Interpretation***, 2nd Edn, the legal position is stated as follows:

> "The essential idea of legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex-post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that lex prospicit non respicit (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law."

20. In ***Maxwell v. Murphy (1957) 96 CLR 261 @ 637-8***, Dixon C.J. observed:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had define by reference to the past events."

21. In ***Garikapati Veeraya v. N. Subbiah Choudhry AIR 1957 SC 540***, the Supreme Court of India adopted the same line of reasoning and held:

> "The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

22. In ***Smt. Dayawati v. Inderjit AIR 1966 SC 1423***, it was reiterated as under:

> "Now as a general proposition, it, may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke whose maxim - a new law ought to be prospective, not retrospective in its operation - is off-quoted, Courts have looked with disfavour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance."

23. The legal position was summarized succinctly in ***Hitendra Vishnu Thakur v. State of Maharashtra*** *(1994) 4 SCC 602* thus:

> (i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

> (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
>
> (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
>
> (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
>
> (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

24. In the present case, Section 34 (5) of the OHC & PFL Act carves out an exception to the instances of fragmentation of land that are generally prohibited, and accordingly partakes the character of a substantive change. Also, there is nothing in the language of the amendment that explicitly makes it retrospective.

25. The decisions cited by learned counsel for the Respondent No.1 do not in fact state anything to the contrary. To elaborate, in ***United Bank of India v. Abhijit Tea Co. Pvt. Ltd.*** (supra), the Supreme Court was considering whether Section 13 and 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) should be interpreted to apply to all pending matters before a Civil Court of High Court so that they are decided not by the respective forum but only by the Debts Recovery Tribunal (DRT). In answering the said question, the Supreme Court observed as under:

> "16. But, it is now well settled that an order of remand by the appellate Court to the trial Court which had disposed of the suit revives the suit in full except as to matters, if any, decided finally by the appellate court. Once the suit is revived, it must, in the eye of law, be deemed to be pending from the beginning when it was instituted. The judgment disposing of the suit passed by the Single Judge which is set aside gets effaced altogether and the continuity of the suit in the trial court is restored, as a matter of law. The suit cannot be treated as one freshly instituted on the date of the remand order. Otherwise serious questions as to limitation would arise. In fact, if any evidence was recorded before its earlier disposal, it would be evidence in the remanded suit and if any interlocutory orders were passed earlier, they would revive. In the case of a remand, it is as if the suit was never disposed of (subject to any adjudication which has become final, in the appellate judgment). The position could have been different if the appeal was disposed of once and for all and the suit was not remanded."

26. In the present case there was no pending matter when the aforementioned amendment to the OCH & PFL Act came into force on 8th March, 2013. The Collector had already passed an order on 1st February, 2013. There was no question of therefore the Collector having to apply the amended provision at all.

27. Further, as explained in ***Subash Chandra Panigrahi* v. *Rajib Lochan Panigrahi*** (supra), it is only where the act was a declaratory one that it would have implied retrospective effect. This is because, as explained in ***Shyam Sunder v. Ram Kumar AIR 2001 SC 2472*** "the function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective." However, in the present case the amendment brought out in 2012 by insertion of the new Section 34 (5) of the OCH & PFL Act was not "declaratory" and did not "supply any omission". In fact, it carved out an exception to the Section 34 (1) and (2) which prohibits fragmentation of a land or selling fragmentated pieces of land. It was therefore not "declaratory" of an existing situation or of any ambiguity in law. Therefore the a reliance by Respondent No.1 on the decisions in ***United Bank of India v. Abhijit Tea Co. Pvt. Ltd.*** *(supra)* ***and Subash Chandra Panigrahi v. Rajib Lochan Panigrahi*** (supra) in support of plea for retrospective applicability of 2012 amendment, is misplaced.

28. Again in Lakshmi ***Narayan Guin v. Niranjan Modak*** (supra) the question was whether the first appellate court was bound to take into account the change of law brought out by the West Bengal Premises Tenancy Act, 1956 while deciding the appeal. In the present case the change in law did not take place during the pendency of any petition in a Court. The change in law came into force after the decision of the Collector, Bhadrak and even before the writ petition was filed in this Court. Since the writ petition before the learned Single Judge was to determine the correctness of the order of the Collector, the decision of the Collector could not be invalidated by applying a law that was not in force when the Collector decided the matter.

29. For the aforementioned reasons, the impugned order dated 21st December, 2016 of the learned Single Judge is hereby set aside and the order dated 1st February, 2013 of the Collector, Bhadrak is restored to file.

30. The writ appeal is allowed in the above terms. But in the circumstances, no order as to costs.

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

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2021 (II) ILR - CUT- 688

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

STREV NO. 23 OF 2007

M/s. TRIPURA ENTERPRISERS .....Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

ORISSA SALES TAX ACT, 1947 – Section 5(1) proviso forth – Whether sale of oil exempted under the provisions of 1947 Act alongwith Container (Tin) which is not separately charged, is exigible to sales tax under fourth proviso to Section 5(1) of the Act – Held, No – Since the oil was exempt from the payment of sales tax, the sales tax on the Tin Containers had to be nil.

(Para 9)

Case Laws Relied on and Referred to :-

1. (1989) 74 STC 379: Raj Sheel Vs. State of Andhra Pradesh.
2. (1967) 19 STC 84 : Commissioner of Sales Tax Vs. Prabhat Marketing Co. Ltd.
3. (1996) 102 STC 487 : Universal Agencies Vs. State of Tamil Nadu.
4. (1998) 108 STC 487 : T. Natarajan & Brothers Vs. State of Tamil Nadu.
5. (1998) 108 STC 598 : Premier Breweries Vs. State of Kerala.

For Petitioner : Mr. Jagabandhu Sahoo, Sr. Adv.

For Opp. Party : Mr. Sunil Mishra, SC (CT & GST)

ORDER Date of Order: 18.08.2021

Dr. S. MURALIDHAR, C.J.

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

2. The present petition is directed against an order dated 7th November, 2006 passed by the Sales Tax Appellate Tribunal ('Tribunal') in S.A. No.540 of 1998-99.

3. The following questions were framed by this Court by an order dated 21st September, 2007:

> i. Whether in the facts and circumstances of the case, sale of oil exempted under the provisions of the Orissa Sales Tax Act along with container (tin) which is not separately charged is exigible to sales tax under fourth proviso to Sec.5(1) of the said Act?
>
> ii. Whether in the facts and circumstances of the case, the provisions of fourth proviso to Sec.5(1) of the Orissa Sales Tax Act is applicable to sale of containers of exempted goods u/s.6 of the said Act when sold with such exempted goods but not charged separately ?
>
> iii. Whether in the facts and circumstances of the case what will be rate of Tax in respect of container when sold with exempted goods u/s 6 of the O.S.T. Act?

4. The background facts are that the Petitioner carries on business in edible oil, vanaspati ghee, dal, pulses, cleaning powder, chuda etc. on wholesale basis. For the year 1993-94, the Petitioner Assessee filed returns which were picked up for fix up scrutiny for assessment under Section 12 (4) of the Orissa Sales Tax Act, 1947 (OST Act). The Assessing Officer (AO) held that the Petitioner had effected purchases of 20823 numbers of empty tins from open market and used the tins as containers while selling tax

exempted oil. However, since the Assessee did not separately disclose the sale price of tin containers and did not pay the tax thereon, the AO, relying on the decisions of the Supreme Court in ***Raj Sheel v. State of Andhra Pradesh (1989) 74 STC 379 and Commissioner of Sales Tax v. Prabhat Marketing Co. Ltd. (1967) 19 STC 84***, held that the Petitioner was liable to be pay tax @ 12% on the sale price of tin containers amounting to Rs.2,49,876/- @ Rs.12/- per tin.

5. The Assessee's appeal was allowed by the ACST relying inter alia on the decisions of the ***Universal Agencies v. State of Tamil Nadu (1996) 102 STC 487, T. Natarajan & Brothers v. State of Tamil Nadu (1998) 108 STC 487 and Premier Breweries v. State of Kerala (1998) 108 STC 598***. It was held that the levy of tax on the sale price of tin containers in which the tax exempted oil was sold was not sustainable.

6. The Tribunal, however, reversed the ACST and held that "the mere fact that the consideration for the tin containers was merged with the consideration for the tax exempted oil does not by itself make the sale of tin containers an integral part of the sale of oil". Accordingly, the Department's appeal was allowed and the order of the ACST was set aside.

7. The Court heard the submissions of Mr. Sahoo, learned counsel for the Petitioner Assessee and Mr. Mishra, learned counsel appearing for the Department.

8. Mr. Sahoo refers to the 4th proviso to Section 5(1) of the OST Act, which reads as under:

> "Provided also that the sale of containers of taxable goods, when sold with such goods but not charged separately, shall be subject to payment of tax at the same rate as the goods contained therein."

9. It is therefore claimed that in the present case while the commodity sold, i.e. oil, was itself exempt from payment of sales tax, then the container in which it was would be subject "to the same rate as the goods" sold in them. In other words, since the oil was exempt from the payment of sales tax, the sales tax on the tin containers had to be nil.

10. The Court finds that the AO erroneously observed that "the dealer should have shown the sale price of such container separately and should have also paid the tax. However, the fact remains that the tins in which the exempted oil were sold was not shown separately." The AO himself noted that the sale price of said containers was not to be found in the invoices. Consequently, there was no question of presuming the sale of the tin containers and requiring the Petitioner to be taxed thereon.

11. The decision in ***Raj Sheel*** (supra) has been reiterated by the Supreme Court in ***Premier Breweries*** (supra) both of which support the case of the Petitioner. These decisions were wrongly distinguished by the Tribunal. Here the 4th proviso to Section 5 (1) of the OST Act squarely applied. Accordingly, question No.1 is answered in the negative by holding that the tin containers are exempt from payment of sales tax in terms of the 4th proviso to Section 5 (1) of the OST Act. Question No.2 is answered in favour of the Assessee by holding that that the 4th proviso to Section 5 (1) of the OST Act is applicable to the sale of tin in which exempt oil was sold and the containers were not separately sold. Question No. 3 is answered by holding that nil rate of tax would apply to the sale of tin containers. All the questions are thus answered in favour of the Petitioner Assessee and against the Department.

12. The impugned order of the Tribunal is set aside and the revision petition is allowed.

13. An urgent certified copy of this order be granted as per rules.

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2021 (II) ILR - CUT- 692

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

STREV NO. 28 & 29 OF 2007

M/s ASSOCIATED CEMENT COMPANIES LTD. ……..Petitioner

.V.

STATE OF ORISSA, REPRESENTED BY THE COMMISSIONER OF SALES TAX, ORISSA, CUTTACK. ……..Opp. Party

ORISSA ENTRY TAX ACT, 1999 – Section 26(1) of the OET Act, r/w Rule 19(5) OET Rule – Petitioner claimed set-off of entry tax paid on purchase of coal which is used as raw material in manufacturing of cement in terms of above said 1999 Act – Sales Tax Officer rejected the claim – Assistant Commissioner of Sales Tax rejected the petitioner's claim – The Appellate Tribunal in the full bench upheld the order of ACST – Hence the revision – Whether the Appellate Tribunal is legally competent and correct in giving finding that coal is not a raw material for manufacturing of cement rejecting the report of a technically qualified person ? – Held, No – The Tribunal erred in holding that coal is not a raw material for manufacturing of cement.

Case Laws Relied on and Referred to :-

1. [1990] 77 STC 282 : Collector of Central Excise Vs. Ballarpur Industries Ltd.
2. [2012] 56 VST 50 (Ori) : Bhusan Power & Steel Limited Vs. State of Orissa & Anr.
3. [2004] 134 STC 24 (SC) : Union of India Vs. Ahmedabad Electricity Co. Ltd.
4. (2012) 56 VST 68 (Ori) : National Aluminum Company Limited Vs. Deputy Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda.
5. [1965] 16 STC 563 (SC) : J.K. Cotton Spinning & Weaving Mills Co. Ltd Vs. SalesTax Officer, Kanpur and Ors.
6. [2008] 15 VST 228 (Orissa) : Reliance Industries Ltd. Vs. Asst. Commissioner of Sales Tax and Ors.

For Petitioner : Mr. Siddhartha Ray.
For Opp. Party : Mr. Sunil Mishra, Addl. Standing Counsel.

ORDER Date of Order: 18.08.2021

Dr. S. MURALIDHAR, C.J.

1. Both these revision petitions arise out of an order dated 16th December 2006 passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) in SA Nos.77(E.T.) and 258 (E.T.) of 2004-05, which in turn pertained to orders dated 23rd February 2004 and dated 29th December 2004 of the ACST, Sambalpur Range in Sales Tax Appeal No.AA.10 (SA-II-ET) of 2003-2004 and in AA 14 (SAII-ET) of 2004-2005 respectively.

2. In both these revision petitions, this Court framed the following substantive questions of law on 12th April 2007:

> (A) Whether in the facts and circumstances of the case the Full Bench, Orissa Sales Tax Tribunal is legally competent and correct in giving finding that Coal is not a raw material for manufacturing of cement rejecting the report of a technically qualified person?
>
> (B) Whether in the peculiar facts and circumstances of the case, the Full Bench, Orissa Sales Tax Tribunal is correct to hold that coal cannot be treated as a raw material which direct goes into the composition of finished product, i.e., Cement; and whether such a finding of the Tribunal is not contrary to law laid down by the Hon'ble Supreme Court in case of *Collector of Central Excise vs. Ballarpur Industries Ltd., reported in 77 STC 282*?

3. The background facts are that the Petitioner is engaged in manufacturing and sale of cement. It is stated that for the purposes of its manufacturing activities, the Petitioner requires raw materials like lime stone, iron ore fine, coal, gypsum etc. For the years in question i.e. 1999-2000 and 2000-2001, the Petitioner in its return filed under the Orissa Entry Tax Act, 1999 (OET Act) claimed set off of Entry Tax paid on purchase of coal which it claimed to be used as a raw material in manufacturing of cement in terms of Section 26(1) of the OET Act read with Rule 19 (5) of the Orissa Entry Tax Rules, 1999 (OET Rules).

4. The Sales Tax Officer (STO) completed the assessments for both the years rejecting the claim of set off. Thereafter, the Assistant Commissioner of Sales Tax (ACST), Sambalpur Range, Sambalpur rejected the Petitioner's appeals observing as under:

> "Examining the details of the case and going through the claims of the appellant as per the documents submitted this forum is of the opinion that though the appellant

> claims that the coal is a raw-material which is used for production of cement this matter is not at all convincing as the analysis of cement production submitted by the appellant clearly speaks that "Coal ash" and not the "Coal", is the ingredient of cement. It is an undisputed fact that the appellant had purchased coal on payment of entry tax which was used in the process of manufacturing of cement but as the coal in it's original form or in any of its form as coal does not constitute the ingredient of finished products i.e. cement this forum is not convinced with the submission of the learned advocate. It is opt to note here that in the taxation law "coal" and "Coal Ash" are two different commercial commodities, hence the tax paid on coal cannot be adjusted with the coal ash which directly goes into composition of cement."

5. The Petitioner then challenged the orders passed by the ACST filing the aforementioned appeals before the Tribunal. By the impugned common order dated 16th December 2006, the Full Bench of the Tribunal upheld the conclusion arrived at by the ACST and dismissed the appeals.

6. This Court has heard the submissions of Mr. Siddhartha Ray, learned counsel appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Party-Sales Tax Department.

7. In the first place, the Court would like to recapitulate what constitutes raw material or 'input' in the process of manufacture. In ***Collector of Central Excise v. Ballarpur Industries Ltd (1990) 77 STC 282,*** while answering the question whether sodium sulphate was an 'input' in the manufacture of paper for the reason that in the course of the chemical reactions, sodium sulphate is consumed and burnt up, it was observed by the Supreme Court as under:

> "The ingredients used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those which may retain their dominant individual identity and character throughout the process and also in the end-product; those which as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here, which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "raw material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning-up is its quality and value as raw-material. In such a case, the relevant test is not its absence in the end

> product, but the dependence of the end product for its essential presence at the delivery and of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

8. In the present case, it was noted by the Tribunal that the State representative did not dispute the submission on behalf of the Assessee that limestone and iron ore fines are ground in a mill to fine powder and then with the use of coal the fine powder is burnt in a kiln to get clinker. Then the clinker so obtained is mixed with gypsum and slag and ground in a mill to fine powder to get cement. It is also submitted that when coal is burnt in the kiln, coal ash thereof gets mixed with the clinker which is an intermediate product from which cement is produced. It is further submitted that the ash content of coal thus ultimately forms an ingredient of the end product.

9. The Tribunal further noted the submissions of the Department to the contrary that the coal used in the manufacturing process "plays the role of fuel and it is not used as raw material". In this context, Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Party-Sales Tax Department places reliance on the decision of this Court in ***Bhusan Power & Steel Limited v. State of Orissa and another [2012] 56 VST 50 (Ori)*** where the question whether the coal used for the manufacturing of electricity could be treated as a raw material was answered in the negative. In that case, relying on the decision in ***Union of India v. Ahmedabad Electricity Co. Ltd. [2004] 134 STC 24 (SC),*** the Supreme Court observed that "for the purpose of manufacture, raw material has ultimately to get a new identity by virtue of manufacturing process either of its own or in conjunction with the raw material. Therefore, the coal is not a raw material of end-product, i.e., sponge iron, billets and H.R. coil."

10. In the present case, the coal is used not merely as a fuel but when it gets burnt up in the process of preparation of clinker, it produces coal ash which gets absorbed by clinker. Clinker is a raw material goes into the composition of cement. The report of the Senior Manager (Technical) of the Petitioner which was available with the ACST, explained the use of coal as a raw material in the manufacture of cement. It was pointed out that clinker cannot be produced without coal and the cement cannot be produced without clinker. This makes coal a vital and necessary raw material for manufacturing cement.

11. More relevant in the present context is the decision of this Court in ***National Aluminum Company Limited v. Deputy Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda (2012) 56 VST 68 (Ori)*** where the question was whether coal, alum, caustic soda and other consumables used as inputs for manufacturing of aluminum, aluminum ingots and sheets would enable the Petitioner in that case to avail input tax credit on such inputs. That question was answered in the affirmative in favour of the said Petitioner. It was noted that under Section 2(25) of the OVAT Act (which equally applies under the OET Act) 'input' was defined to mean "any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where such goods directly goes into the composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing." The definitions of "input tax" under Section 2(26) and "input tax credit" under Section 2 (27) of the OVAT Act were also noticed. This Court then concluded as under:

> "It is not disputed that huge quantity of electrical energy is required during electrolysis process to produce aluminium which is a commercial product. Thus, the electrical energy generated in the captive power plant of the petitioner is not the final product which is sold in the market. Electrical energy which is generated with the use of coal and other materials is only an intermediate product which is used in the process of manufacturing of final product, viz., aluminium, aluminium ingots and sheets, etc."

12. In that process, the Court also took note of the decision of the Supreme Court in ***J.K. Cotton Spinning & Weaving Mills Co. Ltd v. Sales Tax Officer, Kanpur and others [1965] 16 STC 563 (SC)*** where it was held that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. It was further observed as under:

> "Where any particular process is so integrally connected with the ultimate production of goods but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods". Undisputedly, in the present case, the generation of electrical energy in the captive power plant is integrally connected with the ultimate production of finished goods. Therefore, the goods required in the process of generation of electrical energy would fall within the expression "in the process of manufacturing."

13. In ***Reliance Industries Ltd. v. Asst. Commissioner of Sales Tax and others [2008] 15 VST 228 (Orissa),*** this Court was considering whether furnace oil was a 'consumable' within the meaning of Section 2(25) of the OVAT Act. Answering the said question in the affirmative, it was observed as under:

> "The contention of the opposite parties that furnace oil used by the dealer is to produce flame and therefore it is fuel and not consumable which is directly used in processing or manufacturing of finished product is totally misconceived and not sustainable in law. On the other hand, it boils down to an irresistible conclusion that furnace oil is one of the primary and essential commodities which has a direct relation in the manufacturing process and "direct relation" means without which the manufacturing of end-product is not possible at all. In that view of the matter, we are of the considered view that furnace oil used by the petitioner in the process of manufacture without which production of PSF is not feasible is nothing but consumable."

14. Viewed in the light of the above legal position, the Court concludes that in the present case, the coal used in the process of manufacture of cement is indeed an input within the meaning of Section 2(25) of the OET Act and therefore qualifies for input tax credit as claimed by the Petitioner.

15. Question A is accordingly answered in favour of the Petitioner and against the Department by holding that the Tribunal erred in holding that the coal is not a raw material for manufacturing cement. Question B is answered by holding that the Tribunal erred in coming to the conclusion that coal could not be treated as a raw material vis-à-vis the finished product i.e. cement. Such conclusion was contrary to the decision of the Supreme Court in ***Ballarpur Industries Ltd*** (*supra*).

16. Accordingly, the impugned orders of the Tribunal, the ACST as well as the STO are accordingly set aside. The revision petitions are disposed of in the above terms.

17. LCR be returned forthwith.

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2021 (II) ILR - CUT- 698

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

WRIT APPEAL NO. 416 AND 418 OF 2020

BERHAMPUR UNIVERSITY & ANR. …….Appellants

.V.

GANESH CHANDRA BEHERA & ORS. ……..Respondents

WRIT APPEAL NO. 418

BERHAMPUR UNIVERSITY & ANR. ……..Appellants

.V.

RAJAT KUMAR PATTANAIK & ORS. ……..Respondents

CONSTITUTION OF INDIA, 1950 – Article 226 – Jurisdiction – Whether the High Court ought to have taken cognizance of subsequent events – Held, Yes – This court in exercise of its jurisdiction under Article 226 of the constitution can take cognizance of the entire facts and circumstances of a case, in a holistic manner in order to pass appropriate orders to do complete and substantial justice.

(Para-17)

MOULDING OF RELIEF – Principles of – The question of moulding of relief being a question of law simpliciter could have been argued at any stage of proceeding – This Court is of the considered view that even if there is no such specific prayer has been made in the writ petition, this Court can and ought to grant such relief in order to do complete justice. (Para-19)

Case Laws Relied on and Referred to :-

1.294 US 600 (1935) : Patterson Vs. State of Albama
2. (1973) 1 SCC 37 : Laxmi & Co. Vs. Anant R. Deshpande
3. (1975) 1 SCC 770 : Pasupuleti Venkateswarlu Vs. The Motor & General Traders.
4. AIR 1976 SC 1111: State Bank of India Vs. N. Sundara Money.
5. (1976) 1 SCC 194 : Rameshwar Vs. Jot Ram.
6. AIR 1987 SC 741 : Amarjit Singh Vs. Smt. Khatoon Quamarain.
7. 1992 SUPP(2) SCC 623 : Ramesh Kumar Vs. Kesho Ram.
8. (2010) 3 SCC 470: Sheshambal (dead) through LRs Vs. Chelur Corporation Chelur Building.
9. (2019) 13 SCC 363 : Hukum Chandra Vs. Nemi Chand Jain.
10. (2002) 2 SCC 256 : Om Prakash Gupta Vs. Ranbir B. Goyal.
11. (2002) 2 SCC 475 : Food Corporation of India Vs. S. N. Nagarkar.
12. (1965) 3 SCR 536 : Dwarka Nath Vs. ITO.
13. (1995) 6 SCC 749 : B.C. Chaturvedi Vs. Union of India.
14. 2019 SCC Online All 2285: Vishwesh Rajratnam Vs. State of U.P.

WRIT APPEAL NO.416

For Appellants : Mr. M.K. Mishra, Sr. Adv.
M/s T.K.Mishra, S.S. Parida, S.Das & A.Mishra.

For Respondents : Mr. J.Patnaik, M/s B.S. Rayaguru, B.Mohanty,
K.C. Sahoo & P.R. Swain.

WRIT APPEAL NO.418

For Appellants : Mr. M.K. Mishra, Sr. Adv.
M/s T.K.Mishra, S.S. Parida, S.Das & A.Mishra

For Respondents : Mr. J.Patnaik, Sr. Adv.
M/s B.S. Rayaguru, B.Mohanty,
K.C. Sahoo & P.R. Swain(For Respondents No 1,3,4,5,6), Mr. S.P.Das (Respondent No.2)

JUDGMENT Date of Hearing:25.02.2021 : Date of Judgment: 11.06.2021

S. K. PANIGRAHI, J.

1. In the present Writ Appeals, the appellants seek to challenge the common judgment and order dated 19.11.2019 passed by the learned Single Judge in W.P. (C) No.29460 of 2011 and W.P.(C) No.30837 of 2011 wherein the learned Single Judge has concluded that;

> " xxxx xxxx xxxx
>
> ***19.*** *Therefore, applying the above mentioned law laid down by the apex Court and also of this Court to the present context, this Court is of the considered view that as the petitioners have worked in the higher post and discharged higher responsibility attached to the said post, being appointed against the vacant posts by following DPC, subsequently reverted, but by following review DPC again promoted to the post of Senior Assistant, therefore, the benefits which they have already received that cannot be curtailed or reduced in any manner. Consequentially, their scale of pay should be fixed accordingly and the direction given, vide order dated 20.12.2011 in Annexure-7, for reducing their salary to the basic minimum scale of pay, cannot sustain in the eye of law and the same is hereby quashed to that extent.*
>
> ***20.*** *Both the writ applications are thus allowed. No order to costs."*

2. Since common question of facts and law are involved in both of these Writ Appeals, the same were heard together and are being disposed of by this common judgment.

3. The factual background of the matter revolves around the fact that in the year 1994, the appellant University decided to upgrade 9 Junior

Assistants to the position of Senior Assistants subject to approval being accorded by the Department of Higher Education, Odisha and the Chancellor of Berhampur University. Similarly, 9 Junior Assistants were additionally promoted to the position of Senior Assistants in the year 1997 subject to the approval as aforementioned.

4. Subsequently, however, the Department of Higher Education, Odisha did not accord approval to the recommendation for such upgradation and instead informed the office of the Chancellor, Berhampur University to revert the candidates in question to their original position as well as to recover the excess payments made consequent to their upgradation as Senior Assistants. Consequently, on 29.07.2004 the Chancellor denied approval for the upgradation for the 18 Junior Assistants who had been promoted and directed that all of them be restored to their position as held by them before the upgradation had taken effect. Therefore, on 06.09.2007, an order was passed by the appellant University reverting such upgraded Senior Assistants to their previous position as was held by them before the upgradation.

5. It is pertinent to note here that the appellant University's order dated 06.09.2007 restoring those upgraded Senior Assistants to their previous posts was challenged before this Hon'ble Court vide W.P.(C) Nos.12854 of 2007, 11368 of 2007, 12562 of 2007, 12564 of 2007 and 12566 of 2007. These Writ Petitions were disposed of by this Court vide a common judgment and order dated 4.08.2011 wherein while upholding the order of reversion, it was directed that the then petitioners, now respondents be placed and adjusted in the gradation list of Junior Assistants as they would have been placed prior to their date of upgradation and not at the bottom of the list. It was further directed therein that if any consequential benefits hadaccrued to such persons from the date of their upgradation to the date of their reversion, the same shall be conferred on them in accordance with the rules as applicable.

6. In light of the said order, the appellant University decided to constitute a review Departmental Promotion Committee (hereinafter referred to as "DPC") and issued a notice to the members of the DPC vide letter dated 31.10.2011. Being aggrieved by the decision of the appellant University to conduct a DPC, the present respondents filed W.P. (C) No.29460 of 2011 and W.P.(C) No.30837 of 2011, whose final order and judgment is assailed in the present Writ Appeals.

7. At the time of admission of the matter, as an interim measure, the learned Single Judge vide its order dated 09.11.2011 in the abovementioned Writ Petitions directed that the appellant University may proceed with the DPC but shall not act upon the result of the DPC till 15.01.2012. Thereafter, the DPC was held on the dates as scheduled, i.e., 11.11.2011 and 12.11.2011 but the result was not published in deference to the interim order passedby the learned Single Judgevide order dated 09.11.2011. After the same, it seems, the said interim order was not extended and the decision of the DPC was implemented, wherein the respondents were again promoted to the position of Senior Assistants, however, their pay was fixed at the basic minimum scale of pay for Senior Assistants due to the renewed date of promotion, discounting their past service rendered. It is noted here that other Junior Assistants who were junior to the present respondents but had been promoted with prior approval after the present respondents were placed at a higher pay than the present respondents due to them being promoted before the present respondents.

8. The present respondents during the course of arguments contended that their scale of pay should be protected, as they have worked in the Senior Assistant post during the relevant point of timefor a substantial period and have discharged the heavier duties attached to the higher post, an argument which has rightly found favourwith the learned Single Judge. The fact that such a contention was not pleaded in the writ petition, as originally filed, which the learned Single Judge has been fully cognizant of during the course of hearing which is well reflected in the impugned order.

9. Learned counsel for the appellantsMr. ManojKumar Mishra, Senior Advocate submits that the prayer for protecting the scale of pay was not made in the earlier proceedings and therefore the learned Single Judge ought not to have proceeded to grant a relief without any prayer being made to that effect. The present respondents had challenged the notice dated 31.10.2011 of the appellant University to hold the DPC but hadn't challenged the review DPC before this Hon'ble Court and therefore were not entitled to the relief granted to them.

10. On the contrary, Mr.Jagannath Patnaik,learned Senior Advocate appearing for the respondents contends that the present Writ Appeals are completely devoid of merit and that have failed to make out a casefor setting aside of the impugned judgment and order. He, further,

submits that the learned Single Judge was conscious of the fact that the relief granted by him was not claimed for by the present respondents. He contendsthat thequestion of moulding of relief being a question of law simpliciter could have been argued at any stage of the proceeding.He has also submitted that the records of the case make it clear that the learned Single Judge has aptly proceeded to apply the law in order tomould the relief only after hearing both sides. Hence, the contentions that the present petitioner was prejudiced have no force.

11. Heard learned counsel for the parties. The elemental grievance of the appellants herein is that the learned Single Judge ought not to have granted relief without any prayer being made to that effect by the present Respondents. It thus necessitates that the law on the subject be looked at so as to appreciate the impugned order better.

12. The origin of the principle of "moulding of relief" can be traced back to ***Patterson v. State of Albama***[1] wherein Hughes C.J. held to the following effect:

> *"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."*

The Hon'ble Supreme Court of India in the case of ***Laxmi & Co. v. Anant R. Deshpande***[2] while determining whether subsequent events can be considered in the interest of justice has held that;

> *"27. It is true that the Court can take notice of subsequent events. These cases are where the court finds that because of altered circumstances like devolution of interest it is necessary to shorten litigation. Where the original relief has become inappropriate by subsequent events, the Court can take notice of such changes. If the Court finds that the judgment of the Court cannot be carried into effect because of change of circumstances the Court takes notice of the same. If the Court finds that the matter is no longer in controversy the court also takes notice of such event. If the property which is the subject-matter of suit is no longer available the court will take notice of such event. The court takes notice of subsequent events to shorten litigation, to preserve rights of both the parties and to subserve the ends of justice."*

1. 294 US 600 (1935), **2.** (1973) 1 SCC 37

In the case of ***Pasupuleti Venkateswarlu v. The Motor & General Traders***[3], the Hon'ble Supreme Court further elaborately dealt with the issue whether the High Court ought to have taken cognisance of subsequent events. It was authoritatively held that;

> *"4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-à-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date of a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink as it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice - subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view.*

13. Following this settled position of law, in the case of ***State Bank of India v. N. Sundara Money***[4], the Hon'ble Supreme Court applied the principle of moulding of relief, by reinstating a bank employee on account of the long period of time that had elapsed, on the condition that his new salary will be the same, as if he were to be appointed in the same post in the present day despite the same not being mentioned in the prayer in order to secure the ends of justice.

Similarly,in the case of ***Rameshwar v. Jot Ram***[5] the Hon'ble Supreme Court held that the Court's procedural delays cannot deprive a litigant of real justice or rights crystallised in the initial cause of action. The Court observed:

3. (1975) 1 SCC 770, **4.** AIR 1976 SC 1111, **5**. (1976) 1 SCC 194

> *"….where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts."*
>
> *"……subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and its made applicable at any stage."*

In the same vein in the cases of ***Amarjit Singh v. Smt. Khatoon Quamarain***[6] and ***Ramesh Kumar v. Kesho Ram***[7] the Hon'ble Supreme Court reiterated its earlierview expressed in the case of ***Pasupuleti Venkateswarlu*** (supra). In ***Ramesh Kumar*** (supra) the Supreme Court, after taking into account the principles enunciated in ***Pasupuleti Venkateswarlu*** (supra) and other judgments, observed that when subsequent events are pleaded, the Court may, having regard to the nature of the allegations of fact on which the plea is based permit evidence by way of affidavits. The Court observed that there cannot be any hard and fast rule governing the procedure to be adopted while bringing on record subsequent events of fact or law which would have material bearing on the entitlement of the parties to relief or aspects which bear on the mouldingof the relief. The Court observed that technicalities should not burden the procedure which is required. It is aptly said that procedural law is nothing but a hand maiden of justice.

14. Taking the principle as laid down in ***Laxmi & Co. v. Anant R.Deshpande***(supra)a step further, the Hon'ble Supreme Court in ***Sheshambal (dead) through LRs v. Chelur Corporation Chelur Building***[8], succinctly laid down the conditions in which the relief can be moulded:

> "(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;
>
> (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and
>
> (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."

6. AIR 1987 SC 741, **7**. 1992 SUPP(2) SCC 623, **8**. (2010) 3 SCC 470

The normal rule as laid down in ***Ramesh Kumar v. Kesho Ram***(supra) is that in any litigation the rights and obligations of the parties are adjudicated upon as obtained at the commencement of the litigation. However and whenever the development with regard to subsequent events of fact or law, which have a material bearing on the rights of the parties to seekthe relief sought or on the aspects of moulding appropriate relief to the parties, the court is not precluded from taking cognizance of the subsequent changes of fact and law to mould the relief. On the contrary, it would be in the interest of justice to take note of such developments and mould the relief accordingly.

In ***Hukum Chandra v. Nemi Chand Jain***[9], the Apex Court surmised that,

> *"15. Rights of the parties stand crystallised on the date of institution of the suit. However, in appropriate cases, court can take note of all the subsequent events. Observing that the court may permit subsequent event being introduced into the pleadings by way of amendment as it would be necessary to do so for the performance of determining the rule in controversy for the parties provided certain conditions are being satisfied…"*

In the case of ***Om Prakash Gupta v. Ranbir B. Goyal***[10]**,** the Apex Court dealing with the earlier line of judgments specifically Pasupuleti (supra) and Sheshambhal (supra) have come to a conclusion as hereunder:

> "11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770], this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition

9. (2019) 13 SCC 363, **10.** (2002) 2 SCC 256

that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv) the rules of fairness to both sides should be scrupulously obeyed."

15. All these aforementioned legion of precedents, cumulativelycrystallizethe position of law that, if this Court drags its feet to mould a relief, which is otherwise necessitated, to secure the ends of justice, it would lead to a sheer travesty of justice. To notice a subsequent event that substantially alters a party's rights and obligations but to do nothing about it would not serve the purpose that constitutional courts are mandated to perform. Instead, it would lead to a collapse of the judicial machinery. It is the Court's onerous and bounded duty to do complete justice between parties in a *lis*.

16. Another facet which needs to delved upon is that of the power of a High Court to mould relief in cases where it feels it is just to do so.The position of law on that aspect remains that a writ court exercising itsjurisdiction under Article 226 of the Constitution is empowered to mould the relief that is claimed by a party as has beenheld in the case of ***Food Corporation of India v. S. N. Nagarkar***[11]**.**In the case of ***Dwarka Nath v. ITO***[12]**,** the Hon'ble Supreme Court has succinctlyopined that:

"4. We shall first take the preliminary objection, for if we maintain it, no other question will arise for consideration. Article 226 of the Constitution reads:

"…every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. … It enables the High Courts to mould the reliefs to meet the peculiar and complicated

11. (2002) 2 SCC 475, **12**. (1965) 3 SCR 536

> *requirements of this country. … To say this is not to say that the High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by this Court in Basappa v. Nagappa [(1962) 2 SCR 169] and Irani v. State of Madras [(1955) 1 SCR 250]"*

Further, the Hon'ble Supreme Court in the case of ***B.C. Chaturvedi v. Union of India***[13] observed that this Court while exercising the jurisdiction under Article 226 of the Constitution has inherent power to do complete justice. Doing complete justice is the requirement of the fact situation of the present case. Technical hurdle of improper drafting of relief clause and pleading should not come in the way to secure justice. The same can be done even by moulding the relief prayed for. The Supreme Court in the aforesaid case has also held that;

> *"The mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material. The High Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. Power to do complete justice also inhere in every court, not to speak of a court of plenary jurisdiction like a High Court."*

17. Thus, on this front also, the Hon'ble Supreme Court in a catena of judgements has time and again clarified that the High Courts in theexercise of their jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of a case, in a holistic manner,in order to pass appropriate orders to do complete and substantial justice. One of the ends of equity is to promote honesty and fair play. It is not only within its power but also the duty of the High Court while exercising such a power to advance the ends of justice and to uproot injustice. While granting relief, the High Court is expected to balance equities by moulding the relief and passing an appropriate order which justice may demand and equities may project. Courts of equity should go much further, both to give and refuse relief in furtherance of public interest. The granting of relief or withholding it would depend upon considerations of justice, equity and good conscience.

18. Moulding of relief is not ordinarily done by the court and it can be done only when during the pendency of the *lis* some change having taken place in such cases, taking a holistic view of the matter, in order to better

serve the ends of justice, the relief can be moulded. As has been held in the case of ***Vishwesh Rajratnam v. State of U.P***[14]***;***

> *"35. Grant of relief is the moment of reckoning in the process of law and the redeeming act of justice by the courts. Relief is not an act of philanthropy by the courts nor is it a windfall for the litigant. Grant of relief is guided by balance of multiple issues and clear and manageable standards. The residual discretion will be exercised in the light of the conscience of the court."*

The powers of an appellate court to do complete justice are to make good such disposition, as justice so necessitates. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the litigation commenced.

19. Therefore, in view of pronouncements of the Apex Court, so far as "moulding of relief" is concerned, this Court is of the considered view that even if there is no such specific prayer has been made in the writ petitions, this Court can and ought to grant such relief.The principle of "moulding of relief" has been rightly invoked by the learned Single Judge because allowing the writ petitions in its original form would have been antithetical to the relief sought in the original form of the writ petitions. Therefore, thelearnedSingle Judge after due consideration of the fact that it was the second round of litigation and in order to thwart any possibility of future litigation arising out of the same issue did well to cut through the clutter and get to the root of the issue in order to do complete and substantial justice between the parties by moulding the relief.

20. The respondents have served in the higher post of Senior Assistant for the duration of their upgradation to the best of their ability and have discharged higher responsibility which comes attached tothe said post. The respondents, subsequently reverted, then once again restored by following a review DPC is not attributable to any fraud or mischief or illegality committed by them. Despite the fact that the present respondents had only challenged the notice dated 31.10.2011 of the appellant University to hold the DPC, the direction by the DPC whereby despite their reinstatement to Senior Assistant, their salary was reduced to the basic minimum scale of pay was grossly incorrect and could not sustain in law. It was unfair and arbitrary. The learned Single Judge has aptly taken note of this subsequent event and moulded the relief claimed to that extent in order to ensure that complete justice was done to the present respondents.

14. 2019 SCC Online All 2285

21. Thus, on perusal of the materials available on record,the settled position of law and considering the submissions of learned counsels for the parties herein, we are not inclined to interfere with the impugned judgment and order dated 19.11.2019 passed by the learned Single Judge in W.P.(C) No.29460 of 2011 and W.P.(C) No.30837 of 2011.

22. Accordingly, the Writ Appeals, being devoid of any merit must fail and the same are dismissed. No order as to costs.

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2021 (II) ILR - CUT- 709

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

W.P.(C) NO. 28966 OF 2011

URBASHI SAHOO ……..Petitioner

.V.

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

(A) ORISSA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULES, 1990 – Rule 2(1) (d) – Provision under – 'Family' – When a married son continues to be a family member, why can't a married daughter be included in the family – Reasons – Explained.

A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (1) (d). But a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. Her exclusion operates by reason of marriage and, whether or not she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is discriminatory. The only basis of the exclusion of married daughter is marriage. But for her marriage, a daughter would not be excluded from the definition of the expression "family". This , in effect , marriage in case of a daughter is taken to be a disqualification which is perse unreasonable and arbitrary as it would also exclude a married daughter who has been deserted by her husband , even if she was staying with and was dependent on the deceased parent.

The world has changed and women have achieved so many milestones and stormed into what was traditionally considered to be the male bastions. Women in our

country have become President , Prime Minister, Defence Minister, Finance Minister, won Olympic medals, climbed Mt. Everest , can join the armed forces . Daughters are giving "*mukha agni*" to the pyres of their parents, looking after their aged parents and/or their orphaned siblings while their brothers often do not. In this pandemic one daughter carried her father across the country on a bicycle. As legal heirs of their parents, they are held liable to discharge the debts of their parents and are considered to be coparceners in ancestral property . They are liable under Section – 125 (1) (d) of the Code of Criminal Procedure to pay maintenance to their parents and have equal responsibility/duty (with their brothers) to maintain their parents under the provisions of Maintenance and Welfare of Parents and Senior Citizens Act., 2007. In these cases , marriage of a daughter is not considered to be a disqualification .

In fact , the Hon'ble Supreme Court in the case of **Dr.(Mrs.) Vijaya Manohar Arbat v. Kashi Rao Rajaram Sawai and another** reported in **(1987) 2 SCC 278** while repelling the argument, that married daughter has no obligation to maintain her parents, have held that a daughter after her marriage does not cease to be a daughter of her father or mother and observed as under:-

…"12. We are unable to accept the contention of the appellant that a married daughter has no obligation to maintain her parents even if they are unable to maintain themselves. It has been rightly pointed out by the High Court that a daughter after her marriage does not cease to be a daughter of the father or mother. It has been earlier noticed that it is the moral obligation of the children to maintain their parents. In case the contention of the appellant that the daughter has no liability whatsoever to maintain her parents is accepted, in that case, parents having no son but only daughters and unable to maintain themselves, would go destitute, if the daughters even though they have sufficient means refuse to maintain their parents.

13. After giving our best consideration to the question, we are of the view that Section 125(1)(d) has imposed a liability on both the son and the daughter to maintain their father or mother who is unable to maintain himself or herself. Section 488 of the old Criminal Procedure Code did not contain a provision like clause (d) Section 125(1). The legislature in enacting Criminal Procedure Code, 1973 thought it wise to provide for the maintenance of the parents of a person when such parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why the daughter should be excluded from such obligation to maintain their (sic her) parents."

This decision also brings to mind Emily Griffith's well known quote:

"*A son is a son till he is gets a wife but a daughter is a daughter all her life*"

Then why this continued discrimination towards a married daughter when it comes to compassionate appointment, especially when the object of the appointment is for

the purpose of maintaining the family when the bread earner (whether it is the mother or father) is snatched away untimely leaving the family in distress.

(B) ORISSA CIVIL SERVICES (Rehabilitation Assistance) RULES, 1990 – Rules 2(1) (d) & 16 – Appointment under the Rehabilitation Assistance Scheme – "Family members" – Whether it includes married daughter – Held, Yes. – Direction issued to amend the law while including the married daughter as a "family member" in the Rule.

Case Laws Relied on and Referred to :-

1. 81 (1996) CLT 423: Chakradhar Das vrs. Orissa Bridge Construction Corporation.
2. (1987) 2 SCC 278 : Dr.(Mrs.) Vijaya Manohar Arbat v. Kashi Rao Rajaram Sawai and another.
3. 1979 SCC (4) 260: C. B. Muthamma Vs. Union Of India & Ors.
4. (2008) 3 SCC 1: Anuj Garg Vs. Hotel Association of India.
5. (2008) 5 SCC 416: A. Satyanarayana Vs. S. Purushotham.
6. AIR 2019 Utr 69: Udham Singh Nagar District Cooperative Bank Ltd. & anr. Vs. Anjula Singh and Ors: Special Appeal No.187 of 2017.
7. 2020 SCC OnLine HP2125:2021 Lab IC 1:Mamata Devi Vs. State of HP.
8. 2021 SCC online MP :State of M.P Vs. Jyoti Sharma.
9. (2018) Lab IC 1522 : State of W.B. and others Vs. Purnima Das and Ors.
10. ILR 1992 Kar 3416 : R. Jayamma Vs. Karnataka Electricity Board.
11. 2013 (8) MLJ 684 : Krishnaveni Vs. Kadamparai Electricity Generation Block, Coimbator District.
12. 2020 (1) GLT 198 : Debashri Chakraborty Vs.. State of Tripura and others.
13. 2005 (104) FLR 271: Manjula Vs. State of Karnataka.
14. WP(S) No.296 of 2014 : Sarojini Bhoi Vs. State of Chattisgarh and others.
15. (2020)SCC Online SC 200 : Secretary,Ministry of defence Vs. Babita Puniya.
16. AIR 2020 MP 60:SCC Online MP 383 : Meenakshi Dubey Vs. M.P Poorva Kshetra Vidyut Vitaran.
17. 2019(2) MPLJ 707 : Bhawna Chourasia Vs. State of M.P.
18. 2015(3) LW 756 : R. Govindammal Vs. The Principal Secretary,Social Welfare and Nutritious Meal Prog. Dept. & Other.
19. 2013 SCC Online Bom 1549 : Sou. Swara Sachin Kulkarni Vs. Superintending Engineer, Pune irrigation Project Circle.
20. 1998(II) OLR 452 : Smt Ketaki Manjari Sahu Vs. State of Odisha.

For Petitioner : Mr. Sidheswar Mallick

For Opp. Parties: Mr. A.R. Dash, AGA,
Mr. B.N. Sarangi (Opp. Party. No. 5)

ORDER Date of Hearing : 06.04.2021 &11.08.2021:Date of Order: 11.08.2021

S.K.MISHRA. J.

1. In this writ petition filed under Article 226 read with Article 227 of the Constitution of India, 1950, the petitioner-Urbashi Sahoo assails the final order passed by the Orissa Administrative Tribunal (OAT), Cuttack Bench, Cuttack on 29.07.2011 in O.A. No.3395(C)/2009 dismissing her prayer of quashing the order of disengagement on 07.12.2009 i.e. Annexure-6 to the O.A.

2. The petitioner happens to be the only child of one Anandananda Sahoo, a fire man working under respondent no.1. He died in harness on 24.07.1983 while working as a fire man. At that time, the petitioner was only four years old. On attaining 18 years age, she applied on 05.04.1999 for Rehabilitation Assistance Scheme (RAS) as per the Orissa Civil Services (Rehabilitation Assistance) Rules, 1990. Her case was rejected alleging delay in filing the application.

She thereafter, submitted a representation to the D.G. & I.G. of Police, respondent no.2 for condonation of delay and after condonation of such delay and on production of distress certificate, she was appointed as a Junior Clerk vide order dated 10.04.2008, Annexure-2 to the O.A.

At the time of submission of application she was a unmarried girl, but as unreasonable delay was occasioned, she was married before the order of appointment was made. She has intimated about her marital status before the competent authority before joining in the post as a Junior Clerk in the Fire Services Department. As per Annexure-3 to the O.A., it is clear that she has intimated this fact to the authority before joining in her services. Moreover, the service book, copy of which has been annexed to the writ petition, as at Annexure-4, reveals that while preparing the service book of the petitioner in the office of the Superintendent of Police, Angul, the name of her husband Sri Sangram Roul has been mentioned as one of the hairs of the petitioner.

After joining the post of Junior Clerk, she worked for one year. On completion of satisfactory qualifying service of one year, she was made regular by the Department. However, without any notice, all on a sudden, by virtue of State Police Headquarters letter No.46598, dated 07.12.2009, Annexure-6 to the O.A., she was discharged from service. She challenged the discharge before the State Administrative Tribunal, Cuttack Bench, Cuttack

on 08.01.2010. Her application was disposed of by the Tribunal on 29.07.2011 giving a direction to the Opposite Party Nos. 1 and 2 to reconsider her case. However, the order of discharge was not quashed by the Tribunal. Such order is assailed in this case.

3. In course of hearing, the learned counsel for the petitioner Mr. Sidheswar Mallik would argue that the order of discharge, i.e. Annexure-6, passed by the opposite parties is liable to be quashed on the ground of violation of principles of natural justice. The 2nd ground on which he assails is that non-inclusion of married daughter in the Rehabilitation Assistance Scheme is violative of Article 14 of the Constitution of India. Alternatively, he submits that as per Rule 16 of the Orissa Civil Services (Rehabilitation Assistance) Rules, 1990, a relaxation could have been given by the authorities on the ground that prior to her appointment, at the time of submitting her application, she was not married and that she is the only child of the Government servant, who died in harness. Therefore, Sri Mallick would argue that writ petition should be allowed, the order passed the Tribunal should be quashed and a writ of mandamus should be issued to the opposite parties, especially opposite party nos. 1 and 2 to re-engage the petitioner in the Police Department.

4. The learned Addl. Government Advocate, on the other hand, would argue that as per the definition 'family' provided in Rule-22 of the Orissa District Police Ministerial Officers Cadre (Method of Recruitment and Conditions of Services) Rules, 1995 and Rule 2(b) of the OCS (Rehabilitation Assistance) Rules, 1990, she is not included in the family of late Anandananda Sahoo and therefore, her employment has been rightly terminated.

5. As far as the violation of principles of natural justice is concerned, the learned Addl. Government Advocate submits that the principles natural justice is not attracted in a case like this. Therefore, he argues to dismiss the writ application. Mr. Bibekananda Sarangi, learned counsel for the opposite party no.5 submits that the application should be allowed as the petitioner happens to be the only child of the late Government employee, who died in harness.

6. Taking up the question of applicability of the Rules to the case in hand, we are of the opinion that since the petitioner was unmarried at the time

of submitting her application on 05.04.1999 and she was given appointment as a Junior Clerk on 10.04.2008, after lapse of 9 years of her application, the authorities should have considered her case as per Rule 16 of the O.C.S. (Rehabilitation Assistance) Rules, 1990 and should have opined that this is not a case fit for termination of her employment. It is also borne out from the record that the petitioner has not suppressed the fact of her marriage at the time of joining the post. In fact, she has given in writing that in the meantime she has married. This fact is also reflected in the service book maintained by the Department. There appears to be no reasonable ground not to consider her case by relaxing the rigors of the provisions of the O.C.S. (Rehabilitation Assistance) Rules, 1990. Moreover, the ratio decided by this Court in the case of ***Chakradhar Das vrs. Orissa Bridge Construction Corporation***, 81 (1996) CLT 423, should have considered by the authorities. Therefore, we are of the opinion that the petitioner is entitled to the relief she has prayed for.

7. It is also borne out from the records that the petitioner was given employment. She joined in Service. After completion of satisfactory discharge of duty for one year, she was regularized in her post. Thereafter, the authorities issued an order of termination without giving a notice of show-cause to her. So, this is a clear violation of principles of natural justice as well as the Provision of Article 311 of the Constitution of India. It is not the case of the opposite parties that it comes within the exception of Clause-2 of Article 311 of the Constitution of India in which case they can dispense with principles of natural justice and issuance of show-cause notice and opportunity of hearing before passing an order of discharge. Hence, we are of the view that this is a meritorious case and it should be allowed.

8. In the result, we hereby allow the writ application and the order of discharge dated 07.12.2009, as at Annexure-6, to the O.A. and the final order passed by the Tribunal on 29.07.2011, as at Annexure-8, are hereby quashed. Issue a writ mandamus to the opposite party nos. 1 to 4 to immediately re-instate her in her post as Junior Clerk within two weeks from the date of receipt of notice of this order or production of certified copy of this order. She is entitled to all service benefits from the date of her discharge on 07.12.2009 till re-instatement, except the salaries and other allowances, etc; as she has not worked for that period. However, her case for notional increments for the entire period, seniority and consideration for promotion shall be considered by the authorities as early as possible, within a period of

four months from the date of her re-instatement. There shall be no orders as to the costs.

This order be communicated to the opposite parties at the cost of the petitioner. Let him file requisites within 30 days hence.

MISS SAVITRI RATHO, J.

9. I have gone through the order passed by my esteemed brother S.K Mishra, J. and whole heartedly agree with it.

10. But I have decided to supplement the order for three reasons:

A. The definition of "*family members*" in Rule 2 (1) (d) of the Odisha Civil Service (Rehabilitation Assistance) Rules ,1990 (in short "1990 Rules"), is offensive of gender equality and the right to equality enshrined in Article 14 , 15 and 16 of the Constitution and the Directive Principles of State policy. The *pari materia provision* in the Odisha Civil Services (Rehabilitation Assistance) Rules , 2020 (in short " the 2020 Rules") continues to exclude a married daughter from the zone of consideration in the matter of compassionate appointment .

B. It has been brought to our notice that even though the Tribunal vide order dated 29.07.2011 had directed the Respondents to consider the case of the petitioner as a special case under Rules-16 of the Orissa Civil Service (Rehabilitation Assistance) Rules 1990 and decide her case of appointment in accordance with the decision of the High Court in the case of **Chakradhar Das vs Orissa Bridge Construction Corporation** reported in **81 (1996) CLT 423**, the same has not been done in spite of elapse of 10 years. Though Mr.Khuntia, learned Addl. Government Advocate submits that this has not been done in view of the pendency of this writ application, we find this submission unacceptable because although notice in this writ application had been issued on 03.11.2011, no interim order has been passed staying operation of the order of the Tribunal. Hence, there was no justification for the Respondents not to consider the case of the petitioner as a special case, more so when they have not challenged the decision of the Tribunal. It is therefore apparent that without making a provision for compassionate appointment of a married daughter in the statute, and expecting the State Government to exercise its discretion in her favour is like adding salt to injury as because when a matter if left to the discretion of the officials of the State Government, more often than not, they do not exercise such discretion even if it is a deserving case .

C. A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (1) (d) . But a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. Her exclusion

> operates by reason of marriage and, whether or not she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is discriminatory . The only basis of the exclusion of married daughter is marriage. But for her marriage, a daughter would not be excluded from the definition of the expression "family". This , in effect , marriage in case of a daughter is taken to be a disqualification which is perse unreasonable and arbitrary as it would also exclude a married daughter who has been deserted by her husband , even if she was staying with and was dependent on the deceased parent .

11. The world has changed and women have achieved so many milestones and stormed into what was traditionally considered to be the male bastions. Women in our country have become President, Prime Minister, Defence Minister, Finance Minister, won Olympic medals, climbed Mt. Everest , can join the armed forces. Daughters are giving "*mukha agni*" to the pyres of their parents, looking after their aged parents and/or their orphaned siblings while their brothers often do not. In this pandemic one daughter carried her father across the country on a bicycle. As legal heirs of their parents, they are held liable to discharge the debts of their parents and are considered to be coparceners in ancestral property. They are liable under Section – 125 (1) (d) of the Code of Criminal Procedure to pay maintenance to their parents and have equal responsibility/duty (with their brothers) to maintain their parents under the provisions of Maintenance and Welfare of Parents and Senior Citizens Act., 2007. In these cases, marriage of a daughter is not considered to be a disqualification .

In fact, the Hon'ble Supreme Court in the case of **Dr.(Mrs.) Vijaya Manohar Arbat v. Kashi Rao Rajaram Sawai and another** reported in **(1987) 2 SCC 278** while repelling the argument, that married daughter has no obligation to maintain her parents, have held that a daughter after her marriage does not cease to be a daughter of her father or mother and observed as under:-

> *…"12. We are unable to accept the contention of the appellant that a married daughter has no obligation to maintain her parents even if they are unable to maintain themselves. It has been rightly pointed out by the High Court that a daughter after her marriage does not cease to be a daughter of the father or mother. It has been earlier noticed that it is the moral obligation of the children to maintain their parents. In case the contention of the appellant that the daughter has no liability whatsoever to maintain her parents is accepted, in that case, parents having no son but only daughters and unable to maintain themselves, would go destitute, if the daughters even though they have sufficient means refuse to maintain their parents.*

13. After giving our best consideration to the question, we are of the view that Section 125(1)(d) has imposed a liability on both the son and the daughter to maintain their father or mother who is unable to maintain himself or herself. Section 488 of the old Criminal Procedure Code did not contain a provision like clause (d) Section 125(1). The legislature in enacting Criminal Procedure Code, 1973 thought it wise to provide for the maintenance of the parents of a person when such parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why the daughter should be excluded from such obligation to maintain their (sic her) parents."

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Then why this continued discrimination towards a married daughter when it comes to compassionate appointment, especially when the object of the appointment is for the purpose of maintaining the family when the bread earner (whether it is the mother or father) is snatched away untimely leaving the family in distress.

12. Rule-2 (b) of the Orissa Civil Service (Rehabilitation Assistance) Rules 1990 is extracted below:-

"2. Definitions.- In these rules, unless the context otherwise requires:-
(a) xxx xxx xxx

*(b) "**Family Members**" shall mean and include the following members in order of preference-*

(i) Wife/Husband;

(ii) Sons or step sons or sons legally adopted through a registered deed;

(iii) Unmarried daughters and unmarried step daughters;

(iv) [Widowed daughter or daughter-in-law residing permanently with the affected family.]

(v) Unmarried or widowed sister permanently residing with the affected family;

[(vi) Brother of unmarried Government servant who was wholly dependant on such Government servant at the time of death.].....

(c) xxx xxx xxx
(d) xxx xxx xxx

(e)	xxx	xxx	xxx
(f)	xxx	xxx	xxx"

There is differentiation between a son and a daughter in the sense that step sons and adopted sons have been included alongwith sons but in case of a daughter, only unmarried daughters and unmarried step daughters, widowed daughter residing permanently with the affected family have been included.

There is no change as regards the right of married daughters in the pari material provision in the Odisha Civil Service (Rehabilitation Assistance) Rules 2020 (in short "2020 Rules"), which is Rule-2 (d) and is extracted below:-

"2. Definitions- (1) In these rules, unless the context otherwise requires-

(a)	*xxx*	*xxx*	*xxx*
(b)	*xxx*	*xxx*	*xxx*
(c)	*Xxx*	*xxx*	*xxx*

*(d) **"Family Members"** means and include the following members:-*

(i) Spouse of the deceased Government servant.

(ii) Sons or step sons or sons legally adopted through a registered deed executed before the death of the Government servant.

(iii) Un-married daughters and Un-married step daughters.

(iv) Widowed daughter or daughters-in-law residing permanently with the family of the deceased Government employee.

(v) Legally divorced daughter".....

(v) Unmarried or widowed sister permanently residing with the affected family;

[(vi) Brother of unmarried Government servant who was wholly dependant on such Government servant at the time of death.].....

In the 1990 Rules, discretion had been given to the State Government by virtue of Rule 16 to relax the provisions in a particular deserving case. Rule 16 of the 1990 Rules is extracted below :

"16. (1) The State Government where satisfied that the operation of all or any provisions of these rules causes undue hardship in any particular case, it may

dispense with or relax the provisions to such extent as it may consider necessary for dealing with the case in a just and equitable manner.

(2) Such cases shall be examined in General Administration Department and orders of Chief minister shall be obtained."

There is no *pari materia* provision in the 2020 Rules but Rule 10 which is extracted below deals with interpretation :

"10. ***Interpretation****:- If any question arises relating to the interpretation of any provision of these rules , it shall be referred to the Government in the General Administration and Public Grievance Department for decision."*

In other words, while some relaxation in respect of deserving cases including a married daughter could be considered by the Government by exercising and with the consent of the Chief Minister, that relaxation is no longer available in the 2020 Rules. The doors for compassionate appointment of a married daughter have been completely closed.

13. As a result of this discrimination against a married daughter in the definition of "*family member*", in the present case the services of the only child of the deceased government servant - a daughter who was a minor at the time of his death and after attaining majority in the year 1999 had applied for appointment and was given appointment as Junior Clerk in the year 2008, were terminated after one year in 2009 because she got married before her appointment as it took the State Government nine long years to give her appointment. Thereafter, in spite of the order of the tribunal to consider her case, ten years have elapsed, but the Government has not considered her case under section 16 of the 1990 Rules. As stated earlier, the 1990 Rules have been replaced by the 2020 Rules.

14. Both in the 1990 Rules and 2020 Rules, while there is no differentiation between a son and a married son, discrimination has been made between a daughter and a married daughter which is discriminatory and offends gender equality. A legally divorced daughter who was earlier not included in the 1990 Rules has now been included in the definition of "family Members" in the 2020 Rules, but a married daughter continues to be excluded.

15. It would be apposite to refer to the **Convention on the Elimination of All Forms of Discrimination against Women** (in short "**CEDAW**"),

adopted in 1979 by the UN General Assembly, which is often described as an international bill of rights for women (emphasis supplied). Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.(emphasis supplied)

The Convention defines discrimination against women as:

> *"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

The Preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity. By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

> to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
>
> to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
>
> to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Government of India was an active participant to CEDAW , ratified it on 19-6-1993 and acceded to CEDAW on 8-8-1993 with reservation on Articles 5(e), 16(1), 16(2) and 29.

The principle of “gender equality” is enshrined in the Indian Constitution and in its Preamble and Fundamental Rights. It also finds mention in the Fundamental duties as well as directive Principles. Our Constitution grants equality to women, ensures their equality before the law,

and prohibits discrimination against any citizen on the basis of religion, race, caste, sex or place of birth. So it is expected that the Government should make endeavour to eliminate obstacles, prohibit all gender-based discriminations which is also mandated by Articles 14 and 15 of the Constitution of India. It should also take all steps possible to modify law and its policies in order to do away with gender-based discrimination in the existing laws and regulations. Unfortunately, everyday, we come across instances of discrimination on the basis of gender in all fields including legislation. This is only one such instance.

Almost half a century back, Justice V.R Krishna Iyer in the case of **C. B. Muthamma vs Union Of India & Ors reported in 1979 SCC (4) 260**, where the petitioner a lady I.F.S officer had challenged two draconian provisions in the service rules; one - which required a woman member of the service to obtain permission in writing of the Government before marriage and the woman member may be required to resign any time after marriage if the Government is satisfied that her family and domestic commitments will hamper her duties as a member of the service and the second – that no married woman shall be entitled as of right to be appointed to the service. She had also stated that she was not being given promotion and had been superseded by male officers because of discrimination against women in the service. The petition was ultimately dismissed as during pendency of the writ petition, the petitioner was promoted, one of the offensive provisions was deleted and another was in the process of being deleted; and the government had agreed to review the seniority of the petitioner. But not before Justice V Krishna Iyer in his inimitable style and without mincing any words had observed a follows :

> *"… 6. At the first blush this rule is in defiance of Article 16 , iIf a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in Action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender parity is inevitable.*

7. We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern…".

In the case of ***Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1,** the provisions of section 30 of the Punjab Excise Act 1914, prohibiting employment of males below the age of 25 years and women on the premises where liquor is sold, were under challenge . Some of the observations of the Hon'ble Apex Court are very pertinent . They are extracted below :

"… 7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid."…

"21. When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefoer would be on the State. While considering validity of a legislation of this nature, the Court was to take notice of the other provisions of the Constitution including those contained in Part IV-A of the Constitution."

"25……. Right to be considered for employment subject to just exceptions is recognized by Article 16 of the Constitution. Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been

representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriage, pilots et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They are now widely accepted both in police as also army services." .....

In the case of **A. *Satyanarayana* v. *S. Purushotham*, (2008) 5 SCC 416**, the Hon'ble Supreme Court has observed as under :

"34. A statutory rule, it is trite law, must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. The Legislature, it is presumed, would be a reasonable one.

Indisputably, the subordinate legislation may reflect the experience of the rulemaker, but the same must be capable of being taken to a logical conclusion."...

The Hon'ble Supreme Court recently , in the case of ***Secretary, Ministry of Defence v. Babita Puniya*** *reported in* ***2020 SCC OnLine SC 200*** *while dealing with appointment of women in short service commissions in the Army has observed as follows : -*

"67. The policy decision of the Union Government is a recognition of the right of women officers to equality of opportunity. One facet of that right is the principle of non discrimination on the ground of sex which is embodied in Article 15(1) of the Constitution. The second facet of the right is equality of opportunity for all citizens in matters of public employment under Article 16 (1)....."

"....

E Stereotypes and women in the Armed Forces

53. Seventy years after the birth of a post-colonial independent state, there is still a need for change in attitudes and mindsets to recognize the commitment to the values of the Constitution....."

16. But Odisha is not the only state whose Rules reek of gender discrimination such discrimination against a married daughter in the matter of compassionate appointment. In many other states of our country, similar discrimination is writ large in the Rules framed for compassionate appointment, for which different High Courts have examined the provisions and there are a catena of decisions pronounced by various High courts which have decried such discrimination and have held that any action/clause of the policy/ Rules/ Regulation which deprive a married daughter from

being considered for compassionate appointment runs contrary to Articles 14, 15, 16 and also Article - 39(a) of the Constitution .

17. While in some cases the offensive clause/provision have been struck down, in others it has been read down to save the provision from being declared unconstitutional, so that a married daughter is included within the definition of Family of family member members and/or held entitled to be considered for compassionate appointment and/or directed to be given appointment.

Some High Courts have ruled that if the daughter was unmarried and dependent on the deceased Government servant at the time of his/her death and the only child, she has a right to be considered for appointment. A few High Court have held that keeping in view the object of the scheme/rules, irrespective of the number of dependent children of the deceased employee at the time of his death, a married daughter has the right to be considered for employment.

In the case of **Udham Singh Nagar District Cooperative Bank Ltd. & another vs Anjula Singh and Others: Special Appeal No.187 of 2017** reported in **AIR 2019 Utr 69,** the following questions had been referred to the Full Bench of the Uttarakhand high Court :

> *"(i) Whether any of the members, referred to in the definition of a "family" in Rule 2(c) of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short "the 1974 Rules") and in the note below Regulation 104 of the U.P. Co- operative Committee Employees Service Regulations, 1975 (for short "the 1975 Regulations") would be entitled for compassionate appointment even if they were not dependent on the Government servant at the time of his death?*
>
> *(ii) Whether non-inclusion of a "married daughter" in the definition of "family", under Rule 2(c) of the 1974 Rules, and in the note below Regulation 104 of the 1975 Regulations, is discriminatory, and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India?"*

After referring to a number of decisions, the reference was answered as follows:

> *"…66. We answer the reference holding that:-*

i. Question No.1 should be answered in the affirmative. It is only a dependent member of the family, of the Government servant who died in harness, who is entitled to be considered for appointment, on compassionate grounds, both under the 1974 Rules and the 1975 Regulations.

ii. Question No.2 should also be answered in the affirmative. Non- inclusion of "a married daughter" in the definition of a "family", under Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though she was dependent on the Government servant at the time of his death, is discriminatory and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India.

iii. We, however, read down the definition of "family", in Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, to save it from being held unconstitutional. As a result a "married daughter" shall also be held to fall within the inclusive definition of the "family" of the deceased Government servant, for the purpose of being provided compassionate appointment under the 1974 Rules and the 1975 Regulations"

A Full Bench of the Madhya Pradesh High Court in the case **of Meenakshi Dubey vs. M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. and others reported in AIR 2020 MP 60 :** SCC Online MP 383 had been called upon to decide the following issue :

"Whether in the matter of compassionate appointment covered by Policy framed by the State Government wherein, certain class of dependent which includes unmarried daughter a widowed daughter and a divorced daughter and in case of a deceased Govt. servant who only has daughter, such married daughter who was wholly dependent on Govt. servant subject to she giving her undertaking of bearing responsibility of other dependents of the deceased Govt. servant, Clause 2.2 and 2.4 can be said to be violative of Article 14, 15, 25 and 51A (e) of the Constitution."

It held as follows:

" ....17 We are not oblivious of the settled legal position that compassionate appointment is an exception to general rule. As per the policy of compassionate appointment, State has already decided to consider claims of the married daughters (Clause 2.4) for compassionate appointment but such consideration was confined to such daughters who have no brothers. After the death of government servant, it is open to the spouse to decide and opt whether his/her son or daughter is best suited for compassionate appointment and take responsibilities towards family which were being discharged by the deceased government servant earlier."

18. xxx xxx xxx

19. xxx xxx xxx

20……."…… In view of catena of judgments referred hereinabove, it can be safely concluded that Clause 2.2 to the extent it deprives married woman from right of consideration for compassionate appointment violates equality clause and cannot be countenanced. By introducing Clause 2.4, the Government partially recognised the right of consideration of married daughter but such consideration was confined to such daughters who have no brothers. Clause 2.2, as noticed, gives option to the living spouse of deceased government servant to nominate son or unmarried daughter. There is no condition imposed while considering a son relating to marital status. Adjective/condition of "unmarried" is affixed for the daughter. This condition is without there being any justification and; therefore, arbitrary and discriminatory in nature.

21. Looking from any angle, it is crystal clear that clause 2.2 which deprives the married daughter from right of consideration cannot sustain judicial scrutiny. Thus, for different reasons, we are inclined to hold that Indore Bench has rightly interfered with Clause 2.2 of the said policy in the case of ***Smt. Meenakshi*** *(Supra)*
.
22. In nutshell, broadly, we are in agreement with the conclusion drawn by Indore Bench in ***Smt. Meenakshi*** *(Supra) and deem it proper to answer the reference as under:*

"Clause 2.2 of the policy dated 29.09.2014 is violative of Articles 14, 15, 16 and 39(a) of the Constitution of India to the extent it deprives the married daughter from right of consideration for compassionate appointment. We find no reason to declare Clause 2.4 of the policy as ultra vires. To this extent, we overrule the judgment of Indore Bench in the case of Meenakshi (Supra)"

23. The issue is answered accordingly."

A Division bench of the Himachal High Court in the case of **Mamata Devi vs State of HP :** 2020 SCC OnLine HP 2125 **:** 2021 Lab IC 1**,** has directed the State to give compassionate employment to the petitioner who was the married daughter if she otherwise fulfilled the eligibility criteria, holding as follows **:**

*"… **22.** Moreover, in the instant case there is no male member in the family, since the father of the petitioner, who died in harness, left behind his widow and two daughters only, the petitioner, being the elder daughter. The aim and object of the policy for compassionate appointment is to provide financial assistance to the family of the deceased employee. In the absence of any male child in the family, the State cannot shut its eyes and act arbitrarily towards the family, which may also be facing financial constraints after the death of their sole bread earner.*

***23.** As held above, the object of compassionate appointment is not only social welfare, but also to support the family of the deceased government servant, so, the*

State, being a welfare State, should extend its hands to lift a family from penury and not to turn its back to married daughters, rather pushing them to penury. In case the State deprives compassionate appointment to a married daughter, who, after the death of the deceased employee, has to look after surviving family members, only for the reason that she is married, then the whole object of the policy is vitiated.

24. *After incisive deliberations, it emerges that core purpose of compassionate appointment is to save a family from financial vacuum, created after the death of deceased employee. This financial vacuum could be filled up by providing compassionate appointment to the petitioner, who is to look after the survivors of her deceased father and she cannot be deprived compassionate appointment merely on the ground that she is a married daughter, more particularly when there is no male child in the family and the petitioner is having 'No Objection Certificates' from her mother and younger sister, the only members in the family.*

25. *In the instant case, in case the petitioner is not given compassionate appointment, who has to take care of her widowed mother and sister, if she is otherwise eligible and she fulfils the apt criteria, the whole family will be pushed to impoverishment, vitiating the real aim of the compassionate employment policy…."*

In a recent decision, the Madhya Pradesh High Court in the case of **State of M.P vs Jyoti Sharma**: **2021 SCC online M.P.**, has found fault with the provision making a married daughter eligible for compassionate appointment only when she is an only child. Referring to the CEDAW and the observations of the Hon'ble Supreme Court in the case of **Babita Puniya** (supra), it has held as follows:

"…By introducing Clause 2.4, the Government partially recognised the right of consideration of married daughter but such consideration was confined to such daughters who have no brothers. Clause 2.2, as noticed, gives option to the living spouse of deceased government servant to nominate son or unmarried daughter. There is no condition imposed while considering a son relating to marital status. Adjective/condition of "unmarried" is affixed for the daughter. This condition is without there being any justification and; therefore, arbitrary and discriminatory in nature."…..

…."In view of catena of judgments referred hereinabove, it can be safely concluded that Clause 2.2 to the extent it deprives married woman from right of consideration for compassionate appointment violates equality clause and cannot be countenanced. By introducing Clause 2.4, the Government partially recognised the right of consideration of married daughter but such consideration was confined to such daughters who have no brothers. Clause 2.2, as noticed, gives option to the living spouse of deceased government servant to nominate son or unmarried daughter. There is no condition imposed while considering a son relating to marital status. Adjective /condition of "unmarried" is affixed for the daughter. This

condition is without there being any justification and; therefore, arbitrary and discriminatory in nature."…..

The Madhya Pradesh High Court in the case of Bhawna Chourasia vs. State of M.P reported in 2019 (2) MPLJ 707 has held as follows :

"… 15. This is a matter of common knowledge that in present days there are sizable number of families having single child. In many families, there are no male child. The daughter takes care of parents even after her marriage. The parents rely on their daughters heavily. Cases are not unknown where sons have failed to discharge their obligation of taking care of parents and it is taken care of and obligation is sincerely discharged by married daughters. Thus, it will be travesty of justice if married daughters are deprived from right of consideration for compassionate appointment."

The Chhatisgarh High Court in the case of **Sarojini Bhoi vs. State of Chattisgarh and others: WP(S) No.296 of 2014 decided on 30.11.2015** has held that the impugned policy of Government prohibiting consideration of married daughter from compassionate appointment to be violative of Article 14 of the Constitution the criteria to grant compassionate appointment should be dependency rather than marriage. A daughter even after marriage remains daughter of her father and she could not be treated as not belonging to her father's family. Institution of marriage was basic civil right of man and woman and marriage by itself was not a disqualification. Paragraphs 16, 28 and 29 of the judgment are extracted below:

"…16. Thus, marriage is an institution/sacred union not only legally permissible but also basic civil right of the man and woman and one of the most important inevitable consequences of marriage is the reciprocal support and the marriage is an institution has great legal significance and right to marry is necessary concomitant of right to life guaranteed under Article 21 of the Constitution of India as right to life includes right to lead a healthy life.

……..

28. Thus, from the aforesaid analysis, it emanates that institution of marriage is an important and basic civil right of man and woman and marriage by itself is not a disqualification and impugned policy of the State Government barring and prohibiting the consideration of the married daughter from seeking compassionate appointment merely on the ground of marriage is plainly arbitrary and violative of constitutional guarantee envisaged in Article 14, 15 and 16(2) of the Constitution of India being unconstitutional.

29. As a fallout and consequence of aforesaid discussion, writ petition is allowed and consequently Clause 3(1)(c) of policy relating to compassionate appointment dated 10/06/2003 and Clause 5(c) of policy dated 14/06/2013 being violative and discriminatory to the extent of excluding married daughter for consideration from compassionate appointment are hereby declared void and inoperative and consequently the impugned order (Annexure-P/3) rejecting the petitioner's case for compassionate appointment is quashed. The respondents/State is directed to reconsider the claim of petitioner for being appointed on compassionate ground afresh in accordance with law keeping in view that her father died on 06/01/2011 and her application was rejected on 28/09/2011, preferably within a period of forty five days from the receipt of certified copy of order. No order as to cost(s)."

A Division Bench of the Chattisgarh High Court in the case of **Bailadila Berozgar Sangh vs. National Mineral Corporation Ltd**. has held as follows :

"....It is not disputed that the Corporation is an instrumentality of the State and comes within the definition of the State under Article 12 of the Constitution and that the equality provisions in Articles 14 and 16 of the Constitution apply to employment under the Corporation. Therefore, a woman citizen cannot be made ineligible for any employment under the Corporation on the ground of sex only but could be excluded from a particular employment under the Corporation if there are other compelling grounds for doing so."

A larger Bench of the Calcutta High Court in the case of State of W.B. and others vs. Purnima Das and others **(2018 Lab IC 1522)** had been called upon to decide the question:

"Whether the policy decision of the State Government to exclude from the zone of compassionate appointment a daughter of an employee, dying- in-harness or suffering permanent incapacitation, who is married on the date of death/permanent incapacitation of the employee although she is solely dependent on the earnings of such employee, is constitutionally valid ?"

Clause 2 (2) provided "For the purpose of appointment on compassionate ground a dependent of a government employee shall mean wife/husband/son/unmarried daughter of the employee who is/was solely dependent on the government employee"

It interalia held that –

".....We are inclined to hold that for the purpose of a scheme for compassionate appointment every such member of the family of the Government employee who is dependent on the earnings of such employee for his/her survival must be considered to belong to 'a class'. Exclusion of any member of a family on the ground that he/she

is not so dependent would be justified, but certainly not on the grounds of gender or marital status. If so permitted, a married daughter would stand deprived of the benefit that a married son would be entitled under the scheme. A married son and a married daughter may appear to constitute different classes but when a claim for compassionate appointment is involved, they have to be treated equally and at par if it is demonstrated that both depended on the earnings of their deceased father/mother (Government employee) for their survival. It is, therefore, difficult for us to sustain the classification as reasonable."

It answered the reference in the following words:

"111. Our answer to the question formulated in paragraph 6 supra is that complete exclusion of married daughters like Purnima, Arpita and Kakali from the purview of compassionate appointment, meaning thereby that they are not covered by the definition of 'dependent' and ineligible to even apply, is not constitutionally valid.

112. Consequently, the offending provision in the notification dated April 2, 2008 (governing the cases of Arpita and Kakali) and February 3, 2009 (governing the case of Purnima) i.e. the adjective 'unmarried' before 'daughter', is struck down as violative of the Constitution. It, however, goes without saying that after the need for compassionate appointment is established in accordance with the laid down formula (which in itself is quite stringent), a daughter who is married on the date of death of the concerned Government employee while in service must succeed in her claim of being entirely dependent on the earnings of her father/mother (Government employee) on the date of his/her death and agree to look after the other family members of the deceased, if the claim is to be considered further."

The Karnataka High Court in **R. Jayamma V.Karnataka Electricity Board reported in ILR 1992 Kar 3416** has held as follows **:** :

"10. This discrimination, in refusing compassionate appointment on the only ground that the woman is married is violative of Constitutional Guarantees. It is out of keeping with the trend of times when men and women compete on equal terms in all areas. The Electricity Board would do well to revise its guidelines and remove such anachronisms."

The Madras High Court in **R. Govindammal V. The Principal Secretary, Social Welfare and Nutritious** Meal **Programme Department & others** reported in 2015 (3) LW 756 :

"14. Therefore, I am of the view that G.O.Ms. No. 560 dated 3-8-1977 depriving compassionate appointment to married daughters, while married sons are provided compassionate appointment, is unconstitutional. In fact, the State can make law providing certain benefits exclusively for women and children as per Article 15(3) of the Constitution. But the State cannot discriminate women in the matter of compassionate appointment, on the ground of marriage."

In **Krishnaveni vs. Kadamparai Electricity Generation Block, Coimbator District** reported in **2013 (8) MLJ 684 in R. Govindammal,** the Madras High Court has inter alia observed that if marriage is not a bar in the case of son, the same yardstick shall be applied in the case of a daughter also.

The Bombay High Court in **Sou. Swara Sachin Kulkrni v. Superintending Engineer, Pune Irrigation Project Circle,** 2013 SCC OnLine Bom 1549 opined as under:

> *"3..... Both are married. The wife of the deceased and the mother of the daughters has nobody else to look to for support, financially and otherwise in her old age. In such circumstances, the stand of the State that married daughter will not be eligible or cannot be considered for compassionate appointment violates the mandate of Article 14, 15 and 16 of the Constitution of India. No discrimination can be made in public employment on gender basis. If the object sought can be achieved is assisting the family in financial crisis by giving employment to one of the dependents, then, undisputedly in this case the daughter was dependent on the deceased and his income till her marriage."*
>
> It was further held as under:
>
> *"3..... We do not see any rationale for this classification and discrimination being made in matters of compassionate appointment and particularly when the employment is sought under the State."*

A larger bench of the Tripura High court in the case of Debashri Chakraborty vs. State of Tripura and others reported in, **2020 (1) GLT 198,** has taken note of various judgments of the High Courts including the judgment of Allahabad High Court in Vimla Shrivastava and others vs. State of UP (supra) and judgment of Karnataka High Court in **Manjula Vs. State of Karnataka, 2005 (104) FLR 271** and answered the question referred to it , as follows;

> *"ii. Question No.2 should also be answered in the affirmative. Non- inclusion of "a married daughter" in the definition of a "family", under Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though she was dependent on the Government servant at the time of his death, is discriminatory and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India.*
>
> *iii. We, however, read down the definition of "family", in Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, to save it from being held unconstitutional. As a result a "married daughter" shall also be held to*

fall within the inclusive definition of the "family" of the deceased Government servant, for the purpose of being provided compassionate appointment under the 1974 Rules and the 1975 Regulations." (Emphasis supplied).

18. In the light of aforesaid decisions, constitutional principles, exclusion of a married daughter from consideration compassionate appointment while at the same time including a married son as one of the dependents eligible for compassionate appointment, is based solely on gender discrimination and there is no other constitutionally permissible basis. Exclusion of a married daughter is not based on any rationale having reasonable nexus with the object sought to be achieved. Such unreasonable exclusion is therefore violative of Article 14 and 16 of the Constitution of India which prohibits discrimination only on the ground of sex.

19. In the case of **Charadhar Das** (supra), which had been filed by the parents of the deceased Government Servant, this Court had directed the Government to consider the case of their unemployed son in law for compassionate as Rule 16 (1) authorised the appropriate authority to relax the Rules to such extent as it may consider necessary for dealing with a case in a just and equitable manner. But as discussed earlier there is no *pari materia* provision in the 2000 Rules.

In **Smt Ketaki Manjari Sahu vs State of Orissa** reported in **1998 (II) OLR 452**, this Court in similar facts referring to Rule 16 of the 1990 Rules had directed the State Government to consider the case of the married daughter on compassionate ground and without making it a precedent**.**

Unfortunately as has happened in the present case, when it is left to the discretions of the authorities, more often than not, they do not exercise it to do render justice. In spite of the tribunal directing the Government to consider the case of the petitioner as a special case under Rule – 16 of the 1990 Rules in accordance with the decision in the case of **Chakradhar Das** (supra), till date, the petitioner has not been reinstated.

20. In the present case, the petitioner was the only child of the deceased Government servant and was a minor at the time of his death. She deserved to be considered for appointment under the 1990 Rules after the death of her father not only because she had been dependent on him and also because she was unmarried at the time of making application in the year 1999. In fact,

after consideration of her case she had been rightly issued appointment order on 10.04.2008 although after nine years of her application . But merely because she had got married by the time she was appointed and had admitted the same before the authorities, she was discharged from service on 09.12.2009, after she had undergone training and her services had been regularized. As this was done unilaterally without any notice to her and we have set aside impugned order discharging her from service on the ground of violation of the principles of natural justice. But it is apparent that the petitioner has been discriminated against and this discrimination will continue to be perpetrated against married daughters in matters of compassionate appointment resulting in injustice to married daughters and harassment to a family which has lost its bread winner and thereby defeating the object of the Rules

Implicit in such definition of family, is the baseless assumption that while a son continues to be a member of the family even after marriage , a daughter upon marriage ceases to be a part of the family of her father . It is discriminatory and constitutionally impermissible for the State to make that assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a married daughter when equivalent benefits are granted to a married son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child with the parents. A son continues to be a son both before and after marriage. A daughter continues to be a daughter. This relationship is not obliterated either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between parents and a son or between parents and their daughter. These relationships are not governed or defined by marital status.

A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (1) (d) . But , a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. This discrimination that is inherent in Rule 2(1) (d) based on the presumption that a daughter by reason of her marriage is excluded from the ambit of the expression "family". Her exclusion operates by reason of marriage not whether she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This

is perse discriminatory. A married daughter who has separated after marriage and may have been dependent on the deceased would as a result of this discrimination stand excluded. Even if she is dependent on her father, she would not be eligible for compassionate appointment only because of the fact that she is not "unmarried". A divorced daughter was similarly excluded. But she has been included in the definition of “family members” in the 2020 Rules The only basis of the exclusion is marriage and but for her marriage, a daughter would not be excluded from the definition of the expression "family".

In the present writ petition, as the exclusion of the definition of “family members” has not been specifically challenged by the petitioner as being discriminatory and unconstitutional, we have refrained from declaring it as striking it down or declaring it as ultra vires, but will not hesitate to do so in an appropriate case . At this juncture it would be appropriate to reiterate the words Justice V.R. Krishna Iyer in the case of **C.B Muthamma** (supra) :

> *“What we do wish to impress upon Government is the need to overhaul all Service Rules to remove the stain of sex discrimination, without waiting for ad hoc inspiration from writ petitions or gender charity*
>
> *We dismiss the petition but not the problem.....”*

India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens. The State should therefore frame policies so that men and women have equal opportunity and women are not discriminated against especially in matter of employment . Thus, we hope and trust that the State Government as a model and ideal employer and in order to implement and safeguard the fundamental rights of equality and the directive state principles, will take a cue from the aforesaid observations m vand the decisions of the Hon’ble Supreme Court and various other High Courts which have been referred to and take appropriate steps to prevent continued violation of gender equality and the right of equality guaranteed under the Constitution of India, in the matter of compassionate appointment.

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2021 (II) ILR - CUT- 735

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

CRA NO. 91 OF 1998

DURYODHANA KHATUA AND ORS. ……..Appellants

.V.

STATE OF ODISHA ……..Respondent

INDIAN PENAL CODE, 1860 – Section 302/149 – Applicability of section 149 – For the purpose of application under section 149 of the Indian penal code, the prosecution has to prove the presence and participation in an unlawful assembly. (Para-21)

*"In the case of **Allauddin Mian and others,Sharif Mian and another-vrs.State of Bihar** reported in AIR 1989 Supreme Court 1456 (1464), the Hon'ble Supreme Court held that in order to invoke Section 149 of the Indian Penal Code, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object they would be liable for the same under section 149 of the Indian Penal Code."*

Case Laws Relied on and Referred to :-

1. AIR 1993 SC 1175 (1177): Nallamsetty Yanadaiah and Ors. Vs.-State of Andhra Pradesh.
2. AIR 1989 SC 1456 (1464) : Allauddin Mian and Ors, Sharif Mian and another- Vs.State of Bihar.

For Appellants : Mr. A.S. Nandy
For Respondent: Mr. A.K.Nanda,AGA

JUDGMENT Date of Hearing: 22.01.2021/23.07.2021:Date of Judgment: 23.07.2021

S.K.MISHRA. J.

In this appeal, 13 appellants assail the judgment of conviction and order of sentence passed by the learned Sessions Judge, in S.T.No.16 of 1997 holding them guilty of offences under sections 148, 302, 307/149 of the Indian Penal Code 1860 (hereinafter referred to as "Penal Code") and sentencing them to undergo imprisonment for life. No separate sentence has been passed for the offence under sections 148, 307/149 of the Indian Penal Code. The sentence has been passed only under section 302/149 of the Indian Penal Code.

The Investigating Officer however had submitted charge sheet for the offence under sections 148, 302, 307/34 of the Indian Penal Code and charges were framed under the aforesaid penal provisions of the Penal Code.

02. Bereft of unnecessary details the prosecution case is that the occurrence took place on 03.05.1996 at about 7 A.M., on the village road of village Kamira in front of the house of one Shyamsundar Dalal. On the preceding day i.e. 02.05.1996 at about 11 A.M. a quarrel ensued between the accused-appellant, Suresh Barik on one hand and deceased Hrudananda Pradhan on the other hand because of the fact that the accused Suresh Barik allegedly assaulted two labourers who worked in the sugarcane field of the deceased.

On the date of occurrence, the deceased being in the company of one Seshadev Pradhan had been to the Medicine shop of that village to purchase medicine. Having purchased the medicine while they were returning, in front of the house of Shyamsundar Dalal the accused persons in a group being armed with weapons came up and surrounded him in order to take revenge relating to the incident occurred on the previous day. All the accused persons, as per the prosecution case assaulted the deceased mercilessly as a result of which he fell down on the ground having sustained bleeding injuries on his body. He succumbed to the injuries. The father of the deceased namely, Tirtha Pradhan went to rescue his son, but he was also assaulted brutally, as a result of which he sustained injuries and his life was at stake. On this incident, Laskar Pradhan (P.W.5) lodged a report before the I.I.C., Boud Police Station. The Investigating Officer took up investigation of the case and after taking necessary steps finding a prima facie case submitted charge sheet against the appellants as stated above.

03. The accused took a plea of complete denial to the allegations. They further took the plea that the case against them has been foisted on false allegations on account of political rivalry.

04. The prosecution examined 11 witnesses to establish its case. P.W.5, Laskar Pradhan is the informant in this case. He along with P.Ws.1 (Basudeb Mahanandia), P.W.2 (Rabindra Pradhan) P.W.3 (Sridhari Pradhan) P.W.4 (Tirtha Pradhan) and P.W.6 (Sajana Naik) are the eye witnesses to the occurrence. P.W.7, Dr.Silla Gangadharan is the Radioilogy Specialist. He has conducted the X-ray examination on P.W.4, Tirtha Pradhan and found that

there was a fracture of shaft of left femur under his report, Ext.4. X-ray Plate is Ext.5. P.W.9, Dr.Rajkishore Sethi had conducted the post mortem examination over the dead body of the deceased and gave his opinion on the weapon of offence i.e., M.O.I. P.W.8, Dibakar Singh, S.I. of Police, took up investigation of the case on being directed by the I.I.C., R.K.Singh. P.W.10, Rajendra Kumar Singh is the Inspector of Police who has taken over charge of the investigation after transfer of P.W.8 and submitted charge sheet. P.W.11, Dr.Arjuna Sahu, Medicine Specialist, District H.Qrs Hospital, Boud examined the injured (P.W.4-Tirth Pradhan) on police requisition. In addition to all these evidences of the witnesses the prosecution has also relied upon 14 documents as exhibits and two material objects, M.O.I being the tangia. M.O.II being a pair of chappals.

The defence on the other hand has examined D.W.1, Jitendra Prasad Bhukta. He speaks about political rivalry and the litigation between Duryodhan Khatua and Laskar Pradhan regarding some landed properties.

05. Learned Sessions Judge, Boud accepted the version of the eye witnesses and the testimony of the Doctors and came to the conclusion that the accused persons did the deceased Hrudananda Pradhan to death in furtherance of their common object and made an attempt on the life of Tirtha Pradhan (P.W.4) by committing rioting with deadly weapons. Therefore, he came to the conclusion that the prosecution has proved its case beyond reasonable doubt. However, there is no discussion in the judgment regarding applicability of Section 34 or Section 149 of the Indian Penal Code in this case.

06. The prosecution in order to establish the homicidal nature of death of the deceased has relied upon the testimony of P.W.9 Dr.Rajkishore Sethi, who has conducted post mortem examination over the dead body of Hrudananda Pradhan. There is no dispute about the identity of the dead body that was subjected to post mortem examination on 04.05.1996 by P.W.9 and on post mortem examination he found the following external injuries:

i) Lacerated wound of size 2” x 1” x 1” situated over the scalp on parietal region 2 cms away from the midline on the left side.

ii) An abrasion of size 2” x 1” over left thigh.

iii) Swelling of size 2” x1” x ½” situated over the occipital region of the skull 1” above the occiput On dissection clotted blood was found present.

iv) Haematoma of size 2" x 1" ½" over the right temporal region just above the right ear. Dissection revealed presence of clotted blood.

v) Bleeding from left ear from inside.

vi) Swelling of size 3 x 2 x 1" over the left ankle joint, Dissection reveals presence of clotted blood.

Fracture of bone.

vii) Incised wound of size around leg except tag of skin size 1" in width in the anterior aspect. The size of the wound 5 x 2 x 2 ½ " i.e. up to the anterior aspect. The bones were cut. All the materials at that place were cut.

The Doctor further opined that the injuries were ante mortem in nature. Death was caused due to massive hemorrhage and nerogic shock and probably caused within 24 hours of the post mortem examination. Ext.11 is the post mortem report prepared by P.W.9.

He further deposed that on 23.05.1996 he examined M.O.I, i.e., tangia and opined that the incised cut injury, described as injury no.7 could be probably caused by that weapon. In cross-examination he has stated that injury Nos. 1 to 6 can be caused by fall. But he did not find any punctured or pierced wound. He further stated that thenta and barchi would cause a pierced injury. He did not find any injury on the backside of the neck. He also did not find any external punctured wound near or at the ear from which blood was coming out.

He further stated that if multiple blows were dealt on the same part of the leg by *tangia* (M.O.I) then only injury no.7 can be caused because the breadth of the blade portion of M.O.I is 1.9 inches whereas the breadth of the injury is 5 inches. It is apparent from the testimony of this witness as well as the contents of Ext.11 that the Doctor has not mentioned whether the death of the deceased was homicidal or not. He has also not opined whether death was caused due to this injury inflicted on the deceased though he has stated that death was caused due to massive haemorrhage and nerogic shock and probably caused within 24 hours prior to the Post Mortem report. It is the duty of the Court to examine that aspect. It is also found from the impugned judgment that the Sessions Judge has not given any specific finding anywhere in the impugned judgment that the death of the deceased was homicidal. We have considered the materials on record and we are of the opinion that the death of the deceased was homicidal in nature.

07. Reverting back to the narration of the witnesses, it is seen that P.W.1, Basudev Mahanandia has stated that he heard a shout coming from the village danda in front of the house of Syamasundar Dalal. He went there and found accused-Basanta Kumar Sahu armed with a tangia, accused, Damana Sahu being armed with a *thenta*, accused Suresh Barik being armed with *thenta* and ten other accused persons being armed with lathies were present there. He found accused Basanta Sahu dealt a blow by a *tangia* on the right leg of deceased Hrudananda Pradhan. Accused Damana Sahu dealt a thenta blow on the backside neck of Hruda. Accused Suresh Barik dealt a thenta blow near the left ear of Hruda. Other accused persons dealt lathi blows of his person as a result of which deceased Hruda sustained injuries and he became senseless. He further stated that due to blow on his leg by tangia, it was almost amputated.

He further stated that Tirtha Pradhan, the father of the deceased, Hrudananda came to his rescue, but accused Damana Sahu dealt a blow by *Thenta* on his left ear. So there was a cut of that ear. Tirtha sustained injuries and became senseless.

In the cross-examination he has admitted that he has not stated before the I.O. that 10 (ten) other accused persons dealt lathi blows on Hrudananda.

08. P.W.2, Rabindra Pradhan has also deposed in the same manner attributing specific axe blow on accused Basanta Sahu and attributing *thenta* blows on accused Damana Sahu and Suresh Barik and that all other accused persons assaulted by means of lathies. In cross-examination he has admitted that he has not stated before the I.O. that all other accused persons dealt blows by lathi on the deceased Hrudananda. He also admitted that he has not stated before the I.O. that accused Jogi, Dirja, Sada and Bidya and all other accused persons dealt blows on Tirtha Pradhan.

09. P.W.3, Sridhari Pradhan has also stated in the similar manner, but he has admitted that he has not stated before Police that other accused persons dealt blows by lathi on Hrudananda.

10. P.W.5, Laskar Pradhan denied the defence suggestion that he has not mentioned in the F.I.R. that he found accused persons dealing blows on his brother and his father.

The evidence of P.W.6, Sajana Naik is also similar. She deposed that accused Basanta Sahu has given a blow on the right leg of Hrudananda.

Accused Damana Sahu dealt a barchi blow on the backside neck of Hrudananda and accused Suresh dealt a barchi blow on his left ear and other accused persons dealt blows on him. He denied the suggestion that he has not stated before the I.O. that all other accused persons dealt blows on Hrudananda.

11. P.W.4, Tirtha Pradhan is the injured. He happens to be the father of the deceased. He has stated that when he went to rescue his son, accused Bida, Sada, Dujya and Abhi dealt blows by lathies on his leg for which he sustained fracture of bone. Accused Suresh Barik dealt a thenta blow on his left ear. He admitted in the cross-examination that he did not have good relationship with Khatua family and that they have excommunicated him on the allegation that the deceased Hrudananda eloped and lived with a girl belonging to a Scheduled Caste.

12. It is apparent from the record that there was some fraction between the villagers of Kamira and some of the witnesses have admitted about pendency of the cases between them and also there is material on record to show that there was rivalry between the informant and other prosecution witnesses on one hand and the accused-appellants on the other hand. In this background, the evidence has to be assessed.

13. First it is noticed that though there is specific allegation against three accused persons namely Basanta Sahu, Damana Sahu and Suresh Barik. The allegation as far as the offence under section 307/149 of the Indian Penal Code against all other accused persons are omnibus and that too there is major contradictions in the evidence of the eye witnesses as far as their complicity in the crime is concerned and that they have not stated before the I.O. that all other accused persons assaulted the deceased, Hrudananda by means of lathi blow.

14. However, there are evidences on record to show that appellant No.12, Basant Kumar Sahu, appellant No.13, Damana Sahu and appellant No.10, Suresh Barik assaulted the deceased by means of an axe and spear respectively. Appellant-Basanta Sahu dealt a blow by means of an axe on the left leg of the deceased. It is apparent from the evidence of Doctor (P.W.9) that he found an incised wound of size 5" x 2" x 2 ½". He has opined that this injury can be caused by M.O.I, the tangia. So the materials available on record reveals that appellant-Basanta Sahu did assault on the deceased by

means of axe on his left leg causing almost severance of the leg of the deceased. The opinion of the Doctor is also fortified by the contents of the post mortem report, Ext.11 and his opinion on examination of M.O.I, which are contemporaneous to the investigation of the case. As far as appellant No.13, Damana Sahu and appellant No.10, Suresh Barik are concerned, all the prosecution witnesses stated that they assaulted the deceased by means of two barchhi or thenta, which are sharp pointed weapon and they can cause stab or pierced injury. It is admitted by the Doctor (P.W.9) that there is no incised or piercing injury on the back of the deceased or on his ear. So, the evidence as far as these two appellants are concerned appears to be shaky in the sense that the eye witnesses deposed that assault on the deceased in a vivid manner, but the Doctor has not found any corresponding injury caused by spear on the body of the deceased. So, there appears some doubt about the complicity of these two appellants in committing the death of the deceased Hrudananda.

15. Coming to the offence under section 307 of the Indian Penal Code or attempt to murder, rioting etc., P.W.4, Tirtha Pradhan has categorically stated that he was assaulted by Bidyadhar Khatua, appellant No.11, Sadananda Khatua, appellant No.2, Duryodhana Khatua, appellant No.1 and Abhimanyu Khatua, appellant No.4. As a result of their assault by lathi, he sustained fracture of a bone. He further stated that accused Suresh Barik, appellant No.10 dealt a *thenta* blow on his left ear for which he sustained a cut injury. Dr.Arjuna Sahu (P.W.11) has stated that he found one lacerated injury of size 1" x ½" situated over the left ear transversely and a fracture of shaft of left femur with swelling of left thigh. The injuries were grievous in nature. The evidence of P.W.7, Radiology Specialist also shows that the injured sustained a grievous injury. In order to establish the case of attempt to commit murder the prosecution must establish two essential ingredients, they are mens *rea and actus reus.*

16. In this case though there is evidence that the appellant namely, Bidyadhar Khatua, appellant No.11, Sadananda Khatua, appellant No.2, Duryodhana Khatua, appellant No.1 and Abhimanyu Khatua, appellant no.4 assaulted Tirtha Pradhan by means of lathi, the prosecution has not brought home any materials to show that the accused persons had the intention to commit murder of Tirtha Pradhan (P.W.4). In our considered opinion, as grievous injuries were caused by these appellants on p.w.4, the appellants are liable for the offences under section 325/34 of the Indian Penal Code. As far

as Section 307 of the Indian Penal Code is concerned, accordingly, the conviction of the appellant Bidyadhar Khatua, appellant No.11, Sadananda Khatua, appellant No.2, Duryodhana Khatua, appellant No.1 and Abhimanyu Khatua, appellant No.4 under section 307/149 of the Penal Code is converted to a conviction under section 325/34 of the Penal Code.

17. As far as the offence under section 302 of the Indian Penal Code is concerned, it is seen that appellant Jogendra Barik and Bidyadhar Khatua have died in the meantime and the appeal abated as far as they are concerned. As far as the offence of committing murder is concerned, the appellant Basant Kumar Sahu has inflicted fatal blow on the leg of the deceased, as a result of which his left leg got almost severed and led to hemorrhagic shock and loss of blood and death. So, the appellant No.12, Basant Kumar Sahu is liable to be punished for the offence under section 302 of the Penal Code.

18. However, the evidence of the prosecution as far as appellant No.13-Damana Sahu and appellant No.10-Suresh Barik are concerned, the evidence available on record do not inspire confidence as the witnesses versions are not supported by medical evidence. Thus, keeping in view the contradiction between medical evidence and oral evidence and the fact that there is litigation between the parties and political rivalry between them, we are of the opinion that benefit of doubt should be given to appellant No.10, Suresh Barik and appellant No.13, Damana Sahu. Hence they are acquitted of the offences under sections 302/149 of the Penal Code.

19. In this case, learned Additional Government Advocate submits that the offence under section 302/149 of the Indian Penal Code is proved against the appellants as it is not disputed by the prosecution that they were present at the spot being armed with different weapons.

20. As far as applicability of section 149 of the Indian Penal code is concerned, this Court relies upon the reported case of **Nallamsetty Yanadaiah and others-vrs.-State of Andhra Pradesh, AIR 1993 Supreme Court 1175 (1177)** wherein the Supreme Court has held that for the purpose of application of Section 149 of the Indian Penal Code, the prosecution has to prove the presence and participation in an unlawful assembly. The presence of these accused was mentioned consistently by all the witnesses. In a case of this nature, particularly, when the occurrence has taken place in a village, several villagers might have gathered and therefore, the further test is

whether their participation has been proved so that they are being members of an unlawful assembly can be accepted safely. In that view of the matter, the trial court accepted the evidence of the injured who consistently deposed that these accused who were convicted under section 302/149 of the Indian Penal Code, were present and also participated in the occurrence by inflicting injuries.

That view was upheld by the High Court and accepted by the Hon'ble Supreme Court.

21. In the case of **Allauddin Mian and others,Sharif Mian and another-vrs.State of Bihar** reported in AIR 1989 Supreme Court 1456 (1464), the Hon'ble Supreme Court held that in order to invoke Section 149 of the Indian Penal Code, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object they would be liable for the same under section 149 of the Indian Penal Code.

22. In applying this principle to the present case, it is seen that there is enough contradiction in the evidence of the eye witnesses namely, P.Ws.1 to 6 about the complicity of all other appellants excepting Suresh Barik and Damana Sahu about the assault on the deceased. In fact all the material witnesses have not stated before the I.O. in their respective statements recorded under section 161 of the Code that the other appellants have assaulted the deceased by means of a lathi. This is a major contradiction which goes to the root of the evidence of the witnesses. So we are of the opinion that the offence under section 302/149 of the Penal Code has not been established against the appellant No.10-Suresh Barik and appellant No.13-Damana Sahu.

23. In the ultimate analysis, we are of the opinion that the conviction of Basanta Kumar Sahu, appellant No.12 under section 302 of the Indian Penal Code though appears to be technically incorrect as he was charged for committing offences under sections 302/34 of the Penal Code, he is guilty of the offence under section 302 of the Penal Code i.e. committing culpable

homicide amounting to murder, we do not disturb his conviction and sentence in view of the provisions of Section 464(1) of the Code. As far as appellant No.10, Suresh Barik and appellant No.13, Damana Sahu are concerned, we set aside their conviction under section 302/307/149 of the Penal Code. But their conviction under section 307 of the Penal Code is converted to an offence under section 325/34 of the Penal Code and they are sentenced to undergo R.I. for two years under section 325/34 of the Penal Code. The sentence of appellant No.12, Basanta Kumar Sahu for life is not disturbed.

24. In the result, the appeal is allowed in part. The conviction under sections 302/307/149 of the Penal Code and sentence to undergo imprisonment for life recorded vide judgment and order dated 09.03.1998 by the learned Sessions Judge, Phulbani in S.T.No.16 of 1997 is set aside. Appellant Basant Kumar Sahu is convicted under section 302 of the Penal Code and not under section 302/149 of the Penal Code and his sentence to undergo imprisonment for life is upheld. The conviction of appellant No.10, Suresh Barik and appellant No.13, Damana Sahu under section 307 of the Penal Code is converted to section 325/34 of the Penal Code and they are sentenced to undergo R.I. for a period of two years.

The period undergone by the appellant No.10, Suresh Barik and Appellant No.13, Damana Sahu be set off unless their detention in any other case is required. Since appellant No.9, Jogendra Barik and appellant No.11, Bidyadhar Khatua died in the mean time, the appeal against them has abated. All other appellants are acquitted from the charges leveled against them. They be set at liberty if they are in custody.

The appellant no.12 stated to be already undergone imprisonment and pre-matured release by the State Government. This dismissal of his appeal shall not be construed as an order for rejecting such pre-mature release.

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2021 (II) ILR - CUT- 745

S.K. MISHRA, J.

WRIT PETITION (CIVIL) N0.12015 OF 2009

RENGUTU NAG .....Petitioner

.V.

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

(A) INDIAN EVIDENCE ACT, 1872 – Section 101 – Provision under – Burden of proof – During hearing a plea was taken that by an order of the High Court, a dispute has been settled – But no order produced – Effect of such submission – Held, whoever desires the Court to give any judgment as to any legal right etc. then he has to prove the fact he asserts – In this case in view of the order of the Tahasildar, the undisputed fact that the earlier order passed in OJC No.1225/1997, the dispute has been settled – That order having not been produced either before the learned Member, Board of Revenue or before this Court, this Court is of the opinion that this is a fit case where the order passed by the Tahasildar should be set aside – The learned Member, Board of Revenue should not have held that the matter has been settled by the High Court in the aforesaid OJC and should not have dismissed the revision application of the Petitioner. (Para 7 & 8)

(B) ORISSA LAND REFORMS ACT, 1960 – Section 67 – Provision under – Bar of suit – Order passed in the competent court or authority in a proceeding under the Land Reforms Act – Whether civil court has jurisdiction in the same subject matter? – Held, No, it is clear that once an order has been passed in the competent court or authority in a proceeding under the Land Reforms Act, the civil court has no jurisdiction to try and decide any matter as far as it relates to a question of fact which any Officer or other competent authorities empowered by or under the OLR Act – Any decision taken by the Consolidation Authorities is also not final as far as the land reforms proceeding is concerned – In other words, the Consolidation Authorities do not have any power to modify, overrule or nullify the order passed by the competent authority under the Land Reforms Act. (Para 11 to 13)

For Petitioner : M/s. Arjuna Charan Behera, S.P. Kar, A.K.Jesty

For Opp. Parties: Addl. Govt . Adv. (Opp. Parties 1 to 5)

M/s. Minati Mishra, S. Mishra, T.Mishra, D.K.Mohapatra & S.N. Sahu (Opp. Parties 6 to 11)

JUDGMENT Date of Hearing: 21.10.2020 & 07.07.2021: Date of Judgment: 07.07.2021

S.K.MISHRA, J.

The petitioner, being a member of the scheduled category, in this writ application has challenged the order passed by the Joint Commissioner, Settlement and Consolidation, Sambalpur-opposite party no.2 in Revision Case No.52/2005 dismissing the revision application filed by the petitioner under Section 37 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as the "OCHPFL Act"). In the revision application, the petitioner prayed to prepare the record of rights with respect to Hal Plot Nos.442/3 and 362 of Khata No.21 of village Dahukbudu, P.S.-Dunguripali, Dist-Sonepur on the ground that a lease has been granted by the learned Tahasildar, Rampur in his favour in O.L.R. Case No.11/1983.

2. The opposite party no.2 without entering into the merits of the claims of the petitioner disposed of the petition observing as follows:

> "It is alleged by the learned counsel for the opposite parties that the issue is related to the outcome of the result passed by the revenue authorities in O.L.R. Case No.527 of 1975 and the present O.L.R. Case No.11/1983 is a part and parcel to the main O.L.R. proceeding of the year 1975. It is argued that in the midst of continuation of the O.L.R. proceeding the matter has even been raised before the Hon'ble High Court and the issues have been settled. It is, therefore, submitted by the opposite parties that the petitioner has suppressed the matter and illegally tries to grab the properties of the opposite parties totally misleading the court. It is vehemently urged by the learned counsel that the surplus land of the opposite parties in the O.L.R. proceeding relates to the lands of village Kapasira but not of village Dahukbud. As such it is stated that the petitioner has got no locustandi in raising the present revision and therefore it is liable to be dismissed.
>
> No satisfactory replies come from the side of the petitioner on the very submission of the opposite parties and therefore he stands as nothing but a silence spectator over the saying of the opposite parties and utterly fails in his submission".

From the aforesaid order, it is clear that the order allegedly passed by this Court in a writ application do not form part of the record. The number of such proceeding, which was stated to have been disposed of by this Court, has not been mentioned in the order. In order to appreciate the case, it is appropriate to take note of certain facts in chronological order.

3. On 15.7.1975 O.L.R. Case No.527/1975 of the court of the learned Tahasildar, Rampur was initiated for determining the ceiling surplus land of one Kunja Padhan who is the predecessor in interest, being the father of opposite party no.6-Krushna Chandra Padhan, of opposite parties 6 to 11. Then notices were issued. The case suffered several adjournments.

On 27.8.1976 the Tahasildar, Rampur recorded that the ceiling surplus holder Sri Kunja Padhan, S/o.Birabara Padhan of village – Kapsira has got Acs.113:858 of land in the village Kapsira and Dahukbudu (Khata Nos.36,37,38,39,40,41 and 42 of village Kapasira and Khata No.21 of village Dahukbudu). After examining the records and taking into consideration various points raised before him, the Tahasildar allowed Kunja Padhan to retain within his ceiling limit, Plot Nos.945,946,996,1018,1397, 1398, 1399, 1398/part total measuring an area of Ac.10.000 of Khata No.36 of village Kapsira. He further allowed, the valid Kunja, homestead land pertaining to Plot Nos.993,994,995, 1453, 1682, 1798,889 measuring an area of 1:050 pertaining to Khata No.36 , 39 and 42 of the Village, Kapsira.

Shri Padmanav Padhan, S/o. Kunja Padhan, was also allowed to retain the land of Ac.12 acres pertaining to Khata Nos.36,37 and 38 of the aforesaid village.

The second son of Kunja Padhan, namely, Gandharba Padhan was allowed to retain Ac.10.000 acres of land pertaining to Khata Nos.39 and 40 of the aforesaid village.

The younger son of Kunja Padhan, namely, Krishna Chandra Padhan was allowed to retain 12 acres of land pertaining to Khata Nos.40 and 41 of the said aforesaid. The Tahasildar held that a total 68:808 acres of land is the ceiling surplus of land and shown as such. They pertains to a various plots of Khata Nos.41,42,43,36,39, 40, 41 and 42 of village Kapsira and various plots of Khata No.21 of Dahukbudu.

It is pertinent to note that Plot No.362 measuring an area of Ac.0.650 and Plot No.442 measuring an area of Ac.1:600 was included in the resumed land of the ceiling surplus holder.

Accordingly, draft statement was published and notices were issued on 29.10.1976 to the objectors. Objections were filed by various persons, but

the same were rejected. The ceiling holdings of Kujna Padhan and his three sons were recast by the learned Tahasildar. Kunja Padhan was allowed to retain Ac.10 .090 of lands of Khata Nos.36, 37 and 225. Padmanav Padhan was allowed to retain about Ac.12:004 of land pertaining to Khata Nos.40 and 36. Gandharva Padhan was allowed to retain Ac.690 of lands pertaining to Khata Nos.36,40 and 42 of village Kapsira. Krushna Padhan was allowed to retain 12:100 acres of land pertaining to Khata Nos.36,40 and 42 of village Kapsira and holding No.21 of village Dahukbudu. This Court carefully examined the plots that were allowed to be retained by Krushna Padhan pertaining to Khata No.21 of Village Dahukbudu they are as follows:

Plot Nos.	Areas
354	0.900
355	0.990
351	0.220
358	0.890
359	0.620

Some plots of Khata Nos.36 and 39 were excluded from the ceiling proceeding and allowed to be retained by the recorded tenants as they were found to be homestead land. Those lands pertained to Khata Nos.36 and 39. As such as against the initial calculation of Ac. 68.808 decimals of lands, the revenue authorities declared that the recorded tenant Kunja Padhan had Ac 64.608 of lands as ceiling surplus lands, and, therefore, the draft statement was confirmed.

On 29.11.1976 the draft statement was prepared, signed and published.

On 4.5.1983 the Tahasildar received intimation that the learned Addl. District Magistrate (LR), Balangir has dismissed the OLR Case No.23/1977 confirming the order dated 25.1.1977 passed by the learned Revenue Officer.

Thereafter on 7.7.1983, the Tahasildar, Rampur received a letter from the office of the Advocate General, Orissa, Cuttack that the recorded tenant/ceiling surplus holder has initiated writ application bearing No.OJC 1225/1975 (Basista Padhan and others Vs. State and others). It is further apparent from the order sheet that the said writ petition has been withdrawn on 9.6.1983. Hence, the Tahasildar, Rampur directed his office to take action for distribution.

On 28.7.1983, the Tahasildar, Rampur received an intimation that the Collector, Balangir in OLR Revision Case No.29/2018 has stayed further proceeding of the ceiling case.

However, on 13.12.1983 further intimation was received that the OLR Revision Case No.29/2028 has been dismissed. On 30.12.1983 the Revenue Inspector, Bhatbahali intimated the Tahasildar, Rampur that he has taken possession of the vested ceiling surplus land measuring an area of Ac.62:458 of lands. The R.I. further intimated that the lands have been distributed to the landless persons of village Kapasira and Dahukabudu.

On 7.1.1984 the Tahasildar, Rampur received intimation from this Court that in OJC No.2859/1983 a stay order has been passed restraining the Tahasildar from distribution of land as per Anexure-1 to the writ application if not already distributed. The record does not show what happened thereafter. So this Court call for the record of OJC No.2589/1983. The Registry of this Court informed that records of the OJC No.2589/1983 has been destroyed.

4. Mr. Arjuna Charan Behera, learned counsel for the Petitioner, first contended that as per Section 45 of the Orissa Land Reforms Act, 1965(hereinafter referred to as the "OLR Act for brevity). The surplus land cannot be recorded in the name of the surplus land holder or his legal heirs. So the orders passed by the Tahasildar impugned before the learned Member, Board of Revenue is not sustainable as it is without jurisdiction. Mr. Behera further pointed out that it is not disputed that the Plot in question has been allotted to the Petitioner and it is found to be surplus land of the predecessor of interest of the private Opposite Parties. He would further argue that the order of the Member, Board of Revenue is a non reasoned one and without referring to the orders of this High Court allegedly passed in O.J.C. No.2859/1983, the learned Member, Board of Revenue committed error on record by dismissing the revision of the Petitioner. He, therefore, prayed that the order should be set aside and direct the Tahasildar to record the land in question in the name of the present Petitioner and possessions of the land to be delivered to him.

5. Learned counsel for the private Opposite Parties 6 to 11, on the other hand, argued that the matter was before the Civil Court in a civil proceeding bearing C.S. No.27/2005 and, therefore, the writ Court should not interfere

with the matter. It is also argued that since the High Court has set aside the original order passed by the Tahasildar in the ceiling surplus proceeding under the OLR Act, this Court should not interfere in the matter.

6. It is not disputed that the learned Member, Board of Revenue , in the cryptic order held that the matter has been settled by the High Court. However, record reveals that the first OJC No.1225/1997 was allowed to be withdrawn on 09.6.1983. Later on in a proceeding the Collector, Bolangir initiated the Revision Case No.29/1983, but the same was dismissed. The case of the Opposite Parties 6 to 11 are that they have challenged the order of the Collector In OJC No.2859/1983 wherein a stay order has been passed, but the Opposite Parties never produced any final order passed by the Court in the said OJC and there is nothing on record to show that the OJC was decided in favour of the predecessor in interest of Opposite Parties 6 to 11.

7. Section 101 of the Indian Evidence Act, 1872 provides for burden of proof, which reads as follows:

> "Burden of proof- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> *Illustrations*
>
> (a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.
>
> A must prove that B has committed the crime.
>
> (b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true."
>
> A must prove the existence of those facts.

8. Thus, whoever desires the Court to give any judgment as to any legal right etc. then he has to prove the fact he asserts. In this case in view of the order of the Tahasildar, Additional District Magistrate(LR), the undisputed fact that the earlier order passed in OJC No.1225/1997, it was the duty of the respondents appearing before the learned Member, Board of Revenue as Opposite Parties to establish that the order of declaring the ceiling surplus land of the original tenant was set aside by the High Court. That order having

not been produced either before the learned Member, Board of Revenue or before this Court, this Court is of the opinion that this is a fit case where the order passed by the Tahasildar should be set aside. The learned Member, Board of Revenue should not have held that the matter has been settled by the High Court in the aforesaid OJC and should not have dismissed the revision application of the Petitioner.

9. Regarding the contentions raised by the learned counsel for the Petitioner regarding vesting of the property that is the ceiling surplus land with the Government, this Court takes note of Section 45 of the Odisha Land Reforms Act, 1960, which provides as follows:-

> "Section 45- Surplus lands to vest in Government- With effect from [the date on which the statement becomes final under Sub-section (3) of Section 44] the interest of the person to whom the surplus lands relate and of all land-holders mediately or immediately under whom the surplus lands were being held shall stand extinguished and the said lands shall vest absolutely in the Government free from all encumbrances."

10. A plain reading of the aforesaid provision leaves no doubt that the surplus lands shall vest absolutely in the Government free from all encumbrances. Thus, the order passed by the Tahasildar, which was impugned before the learned Member, Board of Revenue and the order passed by the Joint Commissioner, Settlement and Consolidation, Sambalpur in Revision Case No.52/2005 dismissing the revision application of the Petitioner filed under Section 37 of the OCHPFL Act was in correct. The lands can never be recorded in the name of ceiling surplus holder. Even if the Court comes to the conclusion that it cannot be settled in the name of the Petitioner, then also it would revert back to the Government, but in no case it can be recorded in the name of the private Opposite Parties.

11. Regarding the plea that in the civil suit regarding this fact, an issue was framed to determine whether the Petitioner was a landless person or not and whether the land has been settled in his name or not. Section 67 of the OLR Act creates a clear bar to such a suit. It reads as follows:-

> "Bar of jurisdiction of Civil Courts-[Save as otherwise expressly provided in this Act], no Civil Court shall have jurisdiction [to try and decide] any suit or proceedings so far as it relates to any matter which any officer or other competent authority is empowered by or under this Act to decide."

12. Thus, it is clear that once an order has been passed in the competent court or authority in a proceeding under the Land Reforms Act, the civil court has no jurisdiction to try and decide any matter as far as it relates to a question of fact which any Officer or other competent authorities empowered by or under the OLR Act. So any order passed by the civil court is of no consequence in this case.

13. Any decision taken by the Consolidation Authorities is also not final as far as the land reforms proceeding is concerned. In other words, the Consolidation Authorities do not have any power to modify, overrule or nullify the order passed by the competent authority under the Land Reforms Act.

14. In that view of the matter, the writ application is allowed. The order passed by the Tahasildar confirmed by the Joint Commissioner and also not interfered by the Member, Board of Revenue are hereby set aside and quashed. Sabik Plot No.442/3 and 362 of Sabik Khata No.21 corresponding to Hal Plot Nos.425,421 & 422 and Hal Khata No.17 of the consolidation settlement be recorded in the name of the Petitioner and the possession thereof be given to him as early as possible, preferably within a period of three months after harvesting of the present Kharif crops if it is found that the private opposite parties 6 to 11 cultivated in the land in question.

15. The matter arose when the village was within the jurisdiction of Collector, Bolangir. In the mean time, the District Subarnapur has been carved out. Hence, the Collector, Surbarnapur is directed to carry out the order passed by this Court without any further delay. He shall direct the Tahasildar, Rampur, to carry out the order passed by this Court as early as possible.

16. The Writ Petition is allowed with the above observations.

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 Mr.Arjuna Charan Behera, learned counsel for the Petitioner or M/s. Minati Mishra, learned counsel for the Opposite 6 to 11 or Mrs. Saswata Pattnaik, learned Addl. Government Advocate appearing for Opposite Parties 1 to 5, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021

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2021 (II) ILR - CUT- 753

S.K.MISHRA, J & B.P. ROUTRAY, J.

WRIT PETITION (CIVIL) NO. 19482 OF 2014

M/s. EVEREST HOMOEO LABORATORY .....Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

INDUSTRIAL DISPUTE ACT, 1947 – SECTION 10(1) – Reference of dispute to boards, courts, tribunal – Scope of challenge to an order of reference – Held, an order of reference can only be assailed on limited grounds – In the facts of the present case when the dispute is clear regarding payment of appropriate wages to the workmen from a specified date, the scope of challenge by the petitioner seems unsustainable. (Para-12)

Case Laws Relied on and Referred to :-

1. AIR 1953 SC 53 : State of Madras Vs. C.P. Sarathy and another .
2. (1978) 2 SCC 353: Shambu Nath Goyal Vs. Bank of Baroda.
3. AIR 1953 SC 53 : Madras State Vs. C.P. Sarthy.
4. AIR 1968 SC 529 : Sindhu Resettlement Corp. Ltd. Vs. Industrial Tribunal.

For Petitioner : Mr. Rajib Ratha.

For Opp. Party : Mr. Tarun Pattnaik, Addl. Standing Counsel.
Mr. Sanjaya Kumar Das.

JUDGMENT Date of Judgment: 10.08.2021

B.P. ROUTRAY, J.

1. The Petitioner has prayed to set aside the reference dated 05.07.2014 of the Government of Odisha, Labour and E.S.I. Department made under the provisions of sub-section (5) of Section 12 read with clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (in short "I.D. Act")

2. The Petitioner is the management of M/s.Everest Homoeo Laboratory, a registered partnership firm situated in the district of Balasore.

3. Opposite Party No.5-Everest Homoeo Employees Union, a union of workers stated to be an unregistered union, raised certain demands relating to hike of wages of the workmen in terms of Minimum Wages Act. Sri Jayanta Kumar Dey and 13 other workmen submitted the demand to the Assistant

Labour Commissioner, Balasore and in course of action in pursuance to the provisions of the I.D. Act, the conciliation proceeding was initiated. As no consensus has been arrived, failure report dated 19.2.2013 was prepared by the Assistant Labour Officer, Balasore and was sent for action in terms of Section 12(4) of the I.D. Act. Subsequently on 6.9.2013, a revised report was prepared and was sent. Basing on the same, the reference dated 5.7.2014 was made and referred for adjudication to the Presiding Officer, Labour Court, Balaosre. The schedule of reference runs as follows:

> "Whether the demand of Sri Jayanta Dey and 13 others workmen of M/s.Everest Homoeo Laboratory, B-3, Industrial Estate, Balasore for wage enhancement of Rs.2400/- per month w.e.f. 1.4.2012 is legal and/or justified ? If not, what should be the details ?"

4. The Petitioner challenges the reference by submitting that the same is complete non-application of mind and lacking subjective satisfaction of the authority. It is contended by Mr. Rajib Rath, learned Advocate for the Petitioner that neither any industrial dispute was existing nor subsisting on the date of reference as the Petitioner was regularly paying the dues and wages to its workmen as per their claim under the law. It is further contended that only six workmen were working in Petitioner's firm on the date of reference and there were eight workmen only on the date of submission of conciliation failure report. The workman, namely, Sri Jayanta Kumar Dey has been superannuated in the year 2012 and Sk. Sahanwaz Ahamad was also not a workman of the Petitioner's firm on the date of reference. It is thus urged that the point of reference is an outcome of total non-application of mind and the satisfaction of State Government in making the point of reference is mis-conceived.

5. The Petitioner has not arrayed the workmen as Opposite Parties in the present writ petition. However, seeking intervention, the workmen have entered their appearance. Along with their intervention application, they have produced a copy of the statement of claim made by them before the Presiding Office, Labour Court, Balasore.

6. The Assistant Labour Commissioner has filed the counter reply on behalf of Opposite Party Nos.1, 2 and 3.

7. Mr.T.Pattnaik learned Additional Standing Counsel for StateOpposite Parties submitted that, non-existence of any industrial dispute on the date of

reference as contended by the Petitioner is totally incorrect on facts and such contention of the Petitioner before this Court in the writ petition is not tenable in the eye of law. The failure reports dated 19.2.2013 and 6.9.2013 are clearly manifesting the dispute between the workmen and management. It is further submitted that the revised failure report dated 6.9.2013 is in continuation of the earlier report dated 19.2.2013, that necessitated due to some clerical mistakes.

8. It reveals from Annexure-7 that the reference is specifically regarding enhancement of wages. The dispute is regarding payment of such enhanced wages of Rs.2400/- per month, whether to be effected from 01.04.2012. The conciliation reports under Annexures-3 and 4 clearly depict that, though the management agreed for enhancement of wages @Rs.2400/- per month from the date of settlement, if any, by the Conciliation Officer, but did not agree to effect the same from 01.04.2012 as demanded by the workmen. In view of such specification in the reference, the contention of the Petitioner that there was total nonapplication of mind by the authority, is not found justified.

9. Admittedly, the Petitioner neither disputes the status of claimants as workman in terms of the definition contained in Section 2(s) of the I.D. Act nor its own status amenable to the I.D. Act. The only contention putforth on behalf of the Petitioner is that, no industrial dispute exists for lack of adequate number of workmen on existence in the firm on the date of reference. These are matters touching of merits of adjudication of the industrial dispute. The workmen in their demand have clearly raised the issue of wage enhancement. As stated above, a bare reading of failure reports reveal the fact that the management of Petitioner's firm is not agreeable to the demands of workmen for payment of revised wages @Rs.2400/- per month w.e.f.1.4.2012. This being the position, by looking to the definition of 'industrial dispute' as enumerated in Section 2(k) of I.D. Act, no merit is found in the contention of the Petitioner.

10. The Supreme Court in the case of **State of Madras vs. C.P. Sarathy and another reported in AIR 1953 SC 53** have observed the scope of challenge to an order of reference. The relevant observation of the Supreme Court runs as follows:

> "(14) This is, however, not to say that the Government will be justified in making a reference under S.10(1) without satisfying itself on the facts and circumstances

brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry. It is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But, it must be remembered that in making a reference under S.10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters. The observations in some of the decisions in Madras do not appear to have kept this distinction in view."

11. The Supreme Court relying on the aforesaid decision, again held in the case of ***Shambu Nath Goyal vs. Bank of Baroda (1978) 2 SCC 353***, as follows:

"The reference in the case before us was made under Section 10(1) which provides inter alia that where the appropriate Government is of opinion that any industrial dispute exists or is apprehended it may at any time by order in writing refer the matter for adjudication as therein mentioned. The power conferred by Section 10(1) on the Government to refer the dispute can be exercised not only where any industrial dispute exists but when it is also apprehended. From the material placed before the Government, Government reaches an administrative decision whether there exists an industrial dispute or an industrial dispute is apprehended and in either event it can exercise its power under Section 10(1). But in making a reference under Section 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal has no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and expediency of making a reference in the circumstances of a particular case are

> matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because in its opinion there was no material before the Government on which it could have come to an affirmative conclusion of those matters, (vide Madras State v. C.P. Sarthy [AIR 1953 SC 53]). The Tribunal, however, referred to the decision of this Court in Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal (AIR 1968 SC 529) in which this Court proceeded to ascertain whether there was in existence an industrial dispute at the date of reference but the question whether in case of an apprehended dispute Government can make reference under Section 10(1) was not examined. But that apart the question whether an industrial dispute exists at the date of reference is a question of fact to be determined on the material placed before the Tribunal with the cautions enunciated in C.P. Sarthy case. In the case before us, it can be shown from the record accepted by the Tribunal itself that there was in existence a dispute which was legitimately referred by the Government to the Industrial Tribunal for adjudication. Undoubtedly, it is for the Government to be satisfied about existence of the dispute and the Government does appear to be satisfied. However, it would be open to the party impugning the reference (to contend) that there was no material before the Government, and it would be open to the Tribunal to examine the question, but that does not mean that it can sit in appeal over the decision of the Government and come to a conclusion that there was no material before the Government."

12. Such being the position of law, an order of reference can only be assailed on limited grounds. In the facts of the present case, when the dispute is clear regarding payment of appropriate wages to the workmen from a specified date, the scope of challenge by the Petitioner seems unsustainable.

13. The further contention of the Petitioner that only 6 workmen were there in employment as compared to 14 workmen, who have raised the demand, is without any basis. It is for the reason that the Petitioner has not substantiated his stand in this regard nor has stated the detailed position of workmen in his firm either on the date of inception or on the date of conciliation or on the date of reference. Such contention has been made only to dilute the dispute. The claim of refund of wages by the workmen relating to their period of duty will subsist even after their superannuation or disengagement.

14. The subsequent failure report of conciliation also cannot be faulted with as the same is for correction of clerical mistake in the earlier report.

15. Thus the order of reference as referred by the State Government for adjudication by the Labour Court does not warrant any interference by this Court. In view of the discussions made above, the writ petition is dismissed being devoid of merit. All interim orders passed stand vacated.

2021 (II) ILR - CUT- 758

BISWAJIT MOHANTY, J.

WPC(OAC) NO. 4378 OF 2012

JATIN KUMAR PANJIA .....Petitioner

.V.

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

SERVICE LAW – Removal from service – The petitioner by suppressing the pendency of a criminal case while filling in the application form, in verification roll had committed fraud and such a person could not have been permitted to continue as a member of a disciplined force and accordingly removed from service – Held, no illegality has been committed in removing the petitioner from service.

(Para -7)

Case Laws Relied on and Referred to :-

1. (2011) 4 S.C.C. 644 : Commissioner of Police & others Vs. Sandeep Kumar
2. A.I.R. 2011 SC 2903 : Ram Kumar Vs. State of U.P and Ors.
3. A.I.R. 2016 S.C. 3598 : Avtar Singh Vs. Union of India.
4. A.I.R. ONLINE 2019 CAL 796 : Bibrata Biswas Vs. Union of India.
5. (2010) 14 S.C.C. 103: Daya Shankar Yadav Vs. Union of India and Ors.
6. (2013) 7 S.C.C. 685 : Commissioner of Police, New Delhi and Another Vs.
7. Mehar Singh.
8. (2013) 9 SCC 363 : Devendra Kumar Vs. State of Uttaranchal & Ors.
9. 2021 S.C.C. Online S.C. 252 :State of Rajasthan & Ors vs. Love Kush Meena.
10. 2016 II ILR CUT 1263 : Sudeb Suna Vs. The Presiding Officer, Labour. Court, Sambalpur and Anr.
11. (1983) 2 SCC 422 : Municipal Corporation of the city of Ahmedabad Vs. Ben Hiraben Manilal.
12. (1985) 1 SCC 196 : State of Karnataka Vs. Muniyalla.

For Petitioner : M/s. Ashok Das, M.R. Dash, S.A.K. Dora, A.K.Mohanty, D.Mohanty & S.K. Samal

For Opp. Parties : Mr. H.K. Panigrahi, Addl. Standing Counsel (OAT)

JUDGMENT Date of Hearing: 09.08.2021 : Date of Judgment: 26.08.2021

BISWAJIT MOHANTY, J.

This petition has been filed praying for quashing the order of removal dated 09.10.2007 under Annexure-2 series passed by the Commandant, 4th

O.S.A.P (S.S) Battalion, Malkangiri (opposite party No.3) by which the petitioner was removed from the service. The petitioner has also prayed that Director General of Police, Odisha (opposite party No.2) be directed to reinstate him in service in view of judgment dated 05.09.2012 passed by the learned J.M.F.C., Nabarangpur in G.R. Case No.409 of 2004/T.R. No.146 of 2011 under Annexure-4 series.

2. The case of the petitioner is that he was selected after undergoing a process of selection and appointed as a Sepoy on 25.12.2006 vide Annexure-1. Thereafter while undergoing training, opposite party No.3 removed him from services vide order dated 09.10.2007 vide Annexure-2 series as during verification of character and antecedents, it was found that he was involved in a criminal case, which was then sub-judice. On 18.10.2007 vide Annexure-3, the petitioner filed a representation before opposite party No.3 praying for reinstatement as he was not actually involved in the said case though his name found place in the F.I.R. But nothing was done on the same. Thereafter vide judgment dated 05.09.2012 under Annexure-4 series as indicated above, the petitioner along with all other accused persons were acquitted. In such background, it is the case of the petitioner that his removal from service on the ground of involvement in the criminal case is illegal and he be reinstated in service.

In reply filed by the opposite party No.3, a stand has been taken that the present petition is barred by limitation as impugned order dated 09.10.2007 under Annexre-2 series has been challenged in 2012. Secondly, his stand is that in the appointment order under Annexure-1, it was specifically mentioned that appointment of the petitioner was provisional subject to satisfactory verification of character and antecedents and in case of any falsity/adverse report; the appointee would be summarily discharged from services. During verification of character and antecedents, it was revealed that the petitioner was involved in a criminal case i.e. G.R. Case No.409 of 2004/T.R. No.146 of 2011. This information was suppressed by the petitioner and accordingly he was rightly removed under Rule 673(c) r/w 668 of Orissa Police Rules. It is also his stand that opposite party No.3 has never received the representation under Annexure-3.

3. Mr. Das, learned counsel for the petitioner submitted that since the petitioner was not actually involved in the case and since such a stand has been fortified by the judgment of acquittal under Annexure-4 series, therefore

in the application/verification form, he had stated accordingly that no criminal case was pending against him. Now since the petitioner has been acquitted in the criminal case, the impugned order of removal be set aside. In this context, he relied on the decisions of the Supreme Court rendered in **Commissioner of Police & others vs. Sandeep Kumar** reported in (2011) 4 S.C.C. 644, **Ram Kumar Vs. State of U.P and others,** reported in A.I.R. 2011 SC 2903 and in **Avtar Singh Vs. Union of India** reported in A.I.R. 2016 S.C. 3598 and decision of Calcutta High Court rendered in **Bibrata Biswas vs. Union of India** reported in A.I.R. ONLINE 2019 CAL 796. He also submitted that since the petitioner was a Sepoy, Orissa Police Rules under which the removal order has been passed, have no application to him as service conditions of Sepoys are governed by Orissa Special Armed Police Act, 1946, Orissa Special Armed Police Rules, 1953 and the Orissa Special Armed Police Battalion and Orissa State Armed Police (Special Security) Battalion Service (Method of Recruitment and Conditions of Service of Sepoys) Order, 2006, "for short" "2006 Order". Since he has not been removed under any of the statutes indicated above, he reiterated that the order of removal be set aside and he be reinstated in services.

Mr. Panigrahi, learned Additional Standing Counsel (OAT) submitted that apart from the fact that the present petition is barred by limitation also later acquittal of the petitioner is of no consequence, as the petitioner by suppressing the pendency of a criminal case while filling in the application form/Verification Roll had committed fraud and such a person could not have been permitted to continue as a member of a disciplined force and accordingly he was rightly removed from the services as per Rule 673 (c) r/w 668 of Orissa Police Rules. In this context, he drew the attention of this Court to Verification Roll dated 25.12.2006 under Annexure-A where the petitioner had stated at Sl.No.7 that he had neither been accused in a criminal case nor had he ever been in prison, which according to Mr. Panigrahi was palpably false as by then G.R. Case No.409 of 2004 was pending against him. He further submitted that even as per his application form dated 06.11.2006 under Annexure-B at Sl.No.19, petitioner had given a false reply to question requiring him to give information of his involvement in any criminal case and conviction. In this context, he relied upon the decisions of the Supreme Court in **Daya Shankar Yadav Vs. Union of India and Others** reported in (2010) 14 S.C.C. 103, **Commissioner of Police, New Delhi and Another Vs. Mehar Singh** reported in (2013) 7 S.C.C. 685, **Devendra Kumar Vs. State of Uttaranchal & others,** reported in (2013) 9 SCC 363, and **State of**

Rajasthan & others vs. Love Kush Meena, reported in 2021 S.C.C. Online S.C. 252 and the decision of this Court in **Sudeb Suna Vs. The Presiding Officer, Labour Court, Sambalpur and Another,** reported in 2016 II ILR CUT 1263. He also pointed out that the decision of the Supreme Court in **Avtar Singh** (supra) has not taken into account its decision as rendered in **Mehar Singh Case (Supra)** and **Devendra Kumar** case (supra). He also laid great emphasis on language of appointment order under Annexure-1, on Rules 11 & 13 of Orissa Special Armed Police Rules, 1953, which deal with verification of antecedents and discharge of recruits respectively, on Sub-clause (1) of Clause 13 of "2006 Order" which also deals with verification of antecedents and character and on Sub-clause (4) of Clause-13 which according to him permitted the authority to make use of the provisions of Orissa Police Rules, 1940, containing rules and instructions made by the State Government and rules and orders framed by Inspector General of Police with the approval of the State Government which are binding on all police officers. In this context, he drew the attention of this Court to "Preface" of Orissa Police Rules. He also pointed out that the "2006 Order" is a statutory order as the same has been made under Section-2 of the Police, Act, 1861. Accordingly, he contended that the authorities have rightly relied on the relevant provisions of Orissa Police Rules in removing the petitioner from services, who suppressed pendency of a criminal case.

4. Heard learned counsel for the parties.

5. First let us discuss the objection of Shri Panigrahi on limitation point. In the present case, the impugned order of removal was passed on 09.10.2007 vide Annexure-2 series and challenging such an order, this case was originally filed before the erstwhile Orissa Administrative Tribunal on 21.12.2012. Accordingly, Mr. Panigrahi submitted that the petition is barred by limitation and should be dismissed on that ground. This Court is not inclined to accept such submission for the following reasons. Here the petitioner was removed from service on 09.10.2007 on account of involvement in a criminal case. That criminal case ended in an acquittal vide judgment dated 05.09.2012 vide Annexure-4 series. Thereafter, the present case was filed during 2012. Thus sufficient ground/explanation exists for the delay in filing this case. Therefore, the case cannot be thrown out on the ground of delay.

6. Now coming to the merits of the case, it is clear upon perusal of materials on record that while applying & filling in the verification form, the

petitioner had suppressed that he was an accused in a pending criminal case. Further, no rejoinder has been filed disputing the arguments relating to suppression made in the counter. The appointment order clearly indicated that the appointment of the petitioner was provisional and subject to satisfactory verification of character and antecedents. It was also indicated that in case of any falsity and adverse report, he would be discharged from services summarily and whenever necessary criminal proceeding will be initiated against him. Further a perusal of Verification Roll under Annexure-A clearly shows that in reply to Question Nos.7 & 8 of the Verification Roll, wherein he was required to state whether he had ever been an accused in any criminal case and whether any criminal case was pending against him, he had replied in the negative through at that point of time G.R. Case No.409 of 2004/T.R. No.146 of 2011 was pending against him. Also at Sl. No.19 in the Application form at Annexure-B he has given a false answer that he is not involved in any criminal case. Therefore, suppression of material information in this case is writ large. The appointment order under Annexure-1, Rule-11 of Orissa Special Armed Police Rules, 1953 & Sub-clause (1) of Clause 13 of "2006 order" clearly speaks of requirement of verification of character and antecedents and appointment being made subject to clearance from character and antecedents angle.

In such background, impugned order has been passed involving Clause (c) of Rule 673 r/w Rule 668 of Orissa Police Rules. Let us now discuss as to whether a removal order can be passed relying on the above noted rules so far as a Sepoy is concerned. For this, we may note that as per Section 4 of the Orissa Special Armed Police Act, 1946, Sepoys fall under the category of Special Armed Police Officer. Sub-clause (4) of Clause 13 of "2006 Order" makes it clear that terms and conditions of service of Sepoys shall be same as assigned to them in the Police Act, 1861, Orissa Special Armed Police Act, 1946 & Rules and orders framed under this Act and in the instruction of the Government, issued from time to time. "PREFACE" to Orissa Police Manual/Rules, 1940 makes it clear that it contains both Rules made by State Government as well as Rules and Orders framed by Inspector General of Police with the approval of the State Government under the provisions of the Police Act, 1861 and those are binding on all police officers. Since Sepoy is a police officer as indicated earlier, there is no doubt the Rules under Orissa Police Rules will apply to the Sepoys. Therefore, this Court has no hesitation in coming to a conclusion that no illegality has been committed by the authority in invoking the provision of Orissa Police Rules, 1940 to pass the impugned order.

Now coming to para-673 of the Orissa Police Rules, 1940, the same is quoted hereunder for the sake of convenience.

> **"673. (a)** A verification roll shall be prepared in P.M. Form No.11 and sent for verification to the home district of every candidate for the post of sub-inspector, constable or any ministerial post.
>
> **(b)** In the case of men literate in their vernacular only, the questions on the roll shall be put to the candidate by the reserve inspector or an officer nominated by the Superintendent and that officer shall write down the answers, sign them and produce them together with the candidate, before the Superintendent. English-knowing persons shall fill in and sign the answers. The Superintendent, if satisfied with the answer, will sign the roll, have the impression of the man's left thumb taken in the space provided and pass an order for enlistment.
>
> **(c) Enlistment order :** The order for enlistment shall then be entered in the order book, the service book shall be prepared and the verification roll despatched to the Superintendent of the recruit's home district is situated. The number and date of despatch shall be noted in the proper place in the service book, and on return of the roll with a report that the men bears a good character and has made a truthful statement as to his antecedents the Superintendent shall initial this entry have the necessary entry made in the service book and order the verification roll to be filed in. If the character of the man is reported to be bad or his statement false, he shall be removed from the force."

Clauses (a) & (b) of Rule 673 deal with mode of preparation of verification roll in P.M. Form No.101. Clause (c) of Rule 673 makes it clear that if the character of the person is reported to be bad or his statement as made is found to be false, then he shall be removed from the force. In such background, since during verification of character and antecedents, it was found that the petitioner has suppressed pendency of a criminal case against him, Rule 673(c) of Orissa Police Rules is clearly attracted to this case. In fact in the Verification Roll under Annexure-A, the petitioner has made a false statement with regard to pendency of the criminal case. As indicated earlier, Rule 673(c) clearly mandates that if a person has given a false statement, he shall be removed from the services. Since the impugned order was accordingly passed, such order cannot be described as legally vulnerable. Conceding for a moment but not admitting that the above rules do not apply, even then it can be seen that Rule 11 of Orissa Special Armed Police Rules, 1953 also envisages preparation of verification of Roll under P.M. Form 101 for the verification of antecedents and Sub-clause (1) of Clause 13 of "2006 Order" which is a statutory order also speaks of verification of antecedents

and appointment being dependant upon verification of character and antecedents. Thus even otherwise power is there with the authority to remove a Sepoy from services if his character and antecedent were found to be bad. Here suppression of material facts clearly reflects poorly on the character of the petitioner. It is also settled that a wrong reference to the power under which action is taken by the authorities will not per se vitiate that action if it can be justified under some other power under which the authority can do that act. Thus a recital of wrong provision of law will not invalidate an order, which is otherwise within the power of authority making it. All these things have been made clear by the Supreme Court in **Municipal Corporation of the city of Ahmedabad Vs. Ben Hiraben Manilal** reported in (1983) 2 SCC 422 & **State of Karnataka Vs. Muniyalla** reported in (1985) 1 SCC 196. Further as per Clause 13(2) of "2006 Order" a person, who is appointed, shall be on probation for a period of two years. Here the petitioner was removed from the services within ten months of his appointment after finding suppression of material facts. Apart from all these, since the appointment order under Annexure-1 made it clear that the appointment of the petitioner was provisional and was subject to satisfactory verification of character and antecedents and since in case of falsity and adverse report, he can be summarily discharged and further since during verification suppression of pendency of criminal case came to light, it cannot be said that the impugned order has been passed in an illegal or arbitrary manner. Later acquittal cannot efface or obliterate the fraud committed by the petitioner.

7. Now coming to the decisions cited by the petitioner, this Court is of the opinion that the decision cited in **Sandeep Kumar** case (supra), **Ram Kumar** case (supra) are factually distinguishable. In both the cases, the person was acquitted prior to issuance of advertisement and more importantly there do not exist any reference to any Rule or Statutory Order under which the impugned actions were taken. Here, admittedly the impugned action has been taken under Rules 668 & 673 of Orissa Police Rules which explained earlier are fully applicable to Sepoys. Here Rule 673 (c) of Orissa Police Rules clearly says that in case of false statement made by a candidate, he shall be removed from service. Even otherwise also as explained earlier there exists other statutory backing for taking the impugned action. Similarly, the decision of Calcutta High Court in the case of **Bibrata Biswas** (supra) is also factually distinguishable. There on the date of incident, the petitioner was a minor and he was not aware of the pendency of a criminal case. Further, though the High Court has referred to Rule 52.1 & Rule 67.2 of Railway

Protection Force Rules, 1987, however, language contained therein is different from the language of Rule 673(c) of Orissa Police Rules, which commands removal of a person, who has given a false statement and language of Clause 13(1) of "2006 Order" which makes it clear that appointment of a Sepoy is always subject to clearance from character and antecedent angle. Further, Rules 52.1 & 67.2 deal with pre-appointment stage, whereas Rule 673(c) deals with post-appointment stage. In the last decision cited by the learned counsel for the petitioner i.e. **Avtar Singh** case (supra), a three Judge Bench decision also does not come to the rescue of the petitioner while answering the reference, the Supreme Court has authoritatively laid down the following guidelines:

> "**30.** We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:
>
> (1) Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.
>
> (2) While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.
>
> (3) The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.
>
> (4) In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before (*emphasis supplied*) filing of the application/ verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted:-
>
> (a) In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.
>
> (b) Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature terminate services of the employee.
>
> (c) If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider

all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

(5) In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

(6) In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

(7) In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

(8) If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

(9) In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

(10) For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

(11) Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

For the purpose of this case, keeping in mind the factual ground, paras 1, 2 & 3 are only relevant. In para-1, the Supreme Court has made it clear that the candidate must give true information to the employer before or after entering into service with regard to pendency of a criminal case and there should be no suppression or false mention on this. While passing order of termination for giving false information, the employer may take note of special circumstances of the case if any, while giving such information and should take into consideration government Orders/Instructions/Rules applicable to the employee at the time of taking decision. In the instant case, there is no dispute that the petitioner who was interested in joining a

disciplined force suppressed pendency of a criminal case. He has neither pointed out nor pleaded any special circumstance standing in his favour at the time the impugned order of removal was passed. Thus on the whole, in the opinion of this Court, no illegality has been committed in passing the impugned order under Annexure-2 series removing the petitioner from the services.

In view of the above opinion, this Court is of the view that no fruitful purpose would be served by discussing the decisions cited by learned Additional Standing Counsel. Accordingly, writ petition is dismissed. No cost.

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2021 (II) ILR - CUT- 767

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 1239 OF 2014

RAMA CHANDRA PARIDA …….. Petitioner

.V.

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

SERVICE LAW – Disciplinary proceeding – Non supply of documents – While serving memorandum of charges, the delinquent was not supplied with the relevant documents – The delinquent specifically sought for those documents, not provided – On the other hand enquiry officer was appointed who did not act fairly, reasonably and submitted the enquiry report along with documents to the disciplinary authority, without providing a copy thereof to the delinquent – Effect of such procedure adopted in a disciplinary proceeding – Held, the departmental proceeding initiated against the petitioner suffers from vice of procedural irregularity – Non supply of documents along with memorandum of charges as well as non supply of enquiry report to the petitioner is in gross violation of principle of natural justice – Order of punishment set aside and the matter remanded. (Para -16)

Case Laws Relied on and Referred to :-

1. AIR 1991 S.C.471: Union of India Vs. Ramzan Khan.
2. (2009) 2 SCC 570: Roop Singh Negi Vs. Punjab National Bank.
3. (2009) 12 SCC 78: Union of India Vs. Gyan Chand Chattar.
4. (1998) 7 SCC 84 : AIR 1998 SC 2713 : Punjab National Bank Vs. Kunj Behari Misra.
5. (2009) 2 SCC 541 : Union of India Vs. Praskash Kumar Tandon.
6. (2010) 2 SCC 772 : AIR 2010 SC 3131 : U.P. Vs. Saroj Kumar Sinha.
7. (1994) 5 SCC 267 : Rash Lal Yadav (Dr) Vs. State of Bihar.

For Petitioner : M/s. Dhuliram Pattanayak, N.S. Panda and N. Biswal.
For Opp. Parties: Mr. M. Balabantray (Standing Counsel for State)

JUDGMENT Date of Judgment: 05.08.2021

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the memorandum of charges dated 24.04.2001 in Annexure-1, the order dated 02.06.2001 in Annexure-2/1 appointing enquiry officer, the order dated 21.08.2003 in Annexure-3 imposing punishment by the disciplinary authority, and also the entire proceedings, being violative of principles of natural justice. He further seeks to quash the order dated 19.08.2009 of the appellate authority in Annexure-5, as without jurisdiction as there was no approval by opposite party no.1 after retirement of the petitioner, as well as the order dated 07.11.2013 issued by the Government in Forest and Environment Department in Annexure-7, by which direction was given to file review petition under Rule 31 of the OCS (CCA) Rules, 1962.

2. The factual matrix of the case, in brief, is that the petitioner, while working as a Forester under the Divisional Forest Officer, Keonjhar Division, a departmental proceeding was initiated against him by issuing a memorandum of charges alleging misuse of power, loss of government property and connivance with offenders in illicit felling. Pursuant to the memorandum of charges, the petitioner sought for relevant documents to enable him to give show cause. But, without supplying such documents, an enquiry officer was appointed, who caused enquiry and submitted enquiry report on 08.08.2003, along with other documents. Basing on such enquiry

report, the disciplinary authority imposed punishment of stoppage of five increments with cumulative effect and he should not be posted to any territorial section during the remaining period of his service, against which the petitioner preferred appeal, wherein the appellate authority modified the order of punishment imposed by the disciplinary authority by awarding stoppage of three increments with cumulative effect and waived the second part of the punishment since he has already retired from Government service. Then, petitioner filed a memo on 28.10.2010 and three years thereafter, i.e., on 07.11.2013 vide Annexure-7 the petitioner was directed by the Government in Forest and Environment Department to file review application under Rule-31 of the OCS (CCA) Rules, 1962. Hence this application.

3. Mr. N. Biswal, learned counsel for the petitioner vehemently contended that while issuing memorandum of charges on 24.01.2001, no documents, basing upon which the misconduct was alleged to be committed by the petitioner, were enclosed thereto, nor, even when the petitioner sought, those documents were supplied to enable him to file show cause. Thereby, such action of the authority is arbitrary, unreasonable and contrary to the provisions of law. More so, the enquiry officer, who submitted the enquiry report to the disciplinary authority, also did not supply the copy thereof to the petitioner along with other documents. That itself is in gross violation of the judgment of the apex Court in ***Union of India v. Ramzan Khan***, AIR 1991 S.C.471. It is further contended that the disciplinary authority, on the basis of the enquiry report submitted by the enquiry officer, imposed the punishment of stoppage of five increments with cumulative effect and further directed that the petitioner should not be posted to any territorial section during the remaining period of his service. Against such order of punishment, the petitioner preferred an appeal and the appellate authority though came to a definite finding that the petitioner was not given opportunity of being heard and thereby no equity had been meted out to him, and that he was also not supplied with the copy of the enquiry report, but only modified the order of punishment by reducing the stoppage of five annual increments to three with cumulative effect and waived the second part of the punishment, that the petitioner cannot be posted to any territorial section during the remaining period of his service, since the petitioner had already retired from service by then. It is further contended that the appellate authority has not applied its mind, while passing the order impugned, therefore the same is liable to be quashed. It is also contended that although the petitioner filed a memorial before opposite party no.1, the same was not entertained vide Annexure-7

dated 07.11.2013 by observing that there is no provision of second appeal in the OCS (CCA) Rules, 1962 and, therefore, the petitioner may file review petition under Rule 31 of the OCS (CCA) Rules, 1962 along with proper grounds, if he so desires, which amounts to non-application of mind, thereby, he seeks for quashing of the same.

4. Mr. M. Balabantray, learned Standing Counsel for the State, admitting the factum of initiation of proceeding against the petitioner, contended that when memorandum of charges was served on the petitioner, he could have requested for supply of documents, but, instead of doing so, he filed a written statement of defence on 17.05.2001 in the departmental proceeding drawn up on 24.04.2001. Accordingly, on 02.06.2001, the enquiry officer was appointed, who proceeded with the enquiry and after its conclusion submitted the report on 08.08.2003. The disciplinary authority, on receipt of the enquiry report, passed the order impugned in Annexure-3 dated 21.08.2003 imposing punishment of stoppage of five annual increments with cumulative effect, and that during remaining period of service the petitioner shall not be posted in any territorial section. However, the said order of punishment, having been appealed against, was modified by the appellate authority vide Annexure-5, whereby the punishment of stoppage of five increments was reduced to three with cumulative effect and the second part of the punishment order restraining posting of the petitioner in any territorial section was waived as he has retired from service. Thereby, no illegality or irregularity has been committed by the authorities so as to warrant interference by this Court.

5. This Court heard Mr. N. Biswal, learned counsel for the petitioner and Mr. M. Balabantaray, learned Standing Counsel for the State through hybrid mode, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. Admittedly, the petitioner was working as a Forester under the D.F.O., Konjhar Division. He was proceeded with a departmental proceeding on the allegation of misuse of power, loss of government property and connivance with offenders in illicit felling, vide office order dated 24.04.2001. While serving memorandum of charges on the petitioner, no document was appended thereto. Even when the petitioner sought for, those documents were also not supplied to him. Finding no way out, the petitioner submitted his written statement of defence denying the allegations made

against him. Having not satisfied with such written statement of defence, the enquiry officer was appointed, who caused an enquiry and submitted his report to the disciplinary authority, without providing a copy thereof to the petitioner. On the basis of such enquiry report, the disciplinary authority imposed punishment, vide order dated 21.08.2003 in Annexure-3, to the following effect:

> *"Finding of the Divisional Forest Officer, Keonjhar Division.*
>
> *Perused the Departmental proceeding drawn up vide O.O. No. 122 dt. 24.04.01 and other relevant reports.*
>
> *I have gone through the contents of the enquiry report. The misuse of power on the part of the Forester has been fully established in light of such felling of trees in the Forests.*
>
> *I agree with the finding with the Enquiry Officer. The following punishments are awarded on the Forester.*
>
> *1. Five increments stopped with cumulative effect.*
>
> *2. He should not be posted to any territorial section during the remaining period of his service."*

Against such order of punishment imposed by the disciplinary authority, the petitioner preferred an appeal under Rule-22 of the OCS (CCA) Rules, 1962, and the appellate authority, while dealing with the appeal, in paragraphs- 4, 5 and 6 of its order under Annexure-5 observed as follows:

> *"4. The appellate Sri Rama Chandra Parida, Forester made out his written statement of defence vide his explanation dated 17.05.2001 against the charges. The DFO, Keonjhar Division vide his O.O. No. 189 dated 02.06.2001 appointed Sri S.K. Mohanty, ACF of his Division as Enquiring Officer to enquire into the case.*
>
> *However, the Enquiring Officer, completed his enquiry by 18.05.2002 and submitted the report on 08.08.2003. The delinquent vide his application dated 06.12.2003 alleged that the enquiry was held without going into h is defence statement and thus overlooked the same and requested for another enquiring officer for the sake of equity and justice. Despite such allegation from the delinquent, no other enquiring officer was appointed for no further enquiry was ordered to be held under the provision of O.C.S. (CC & A) Rules, 1962 which eventually led the appellant to be charge sheeted.*

But on 22.05.2003 and 18.06.2003 notice was issued to the delinquent to attend the enquiry to be conducted by the same enquiring officer. The delinquent Forester did not attend it as because the enquiry by the same enquiring officer had already been completed on 18.05.2002.

Even though the delinquent has requested for modification of the mode of enquiry, there was no such reasonable necessity to issue further notice again on 22.05.2003 and 18.06.2003 which amounts that the appellant was given no opportunity to be heard and thus it clearly shows no equity has been meted out to the appellant.

5. However, the Divisional Forest officer, Keonjhar Division on receipt of the conclusion of the enquiry dt.08.08.2003 issued his final order vide his O.O. No. 283 dt. 21.08.2003 and did not supply a copy of it to the delinquent for which he is entitled.

6. The period from which the 5 (five) increments stopped with cumulative effect has not been mentioned in the officer order of the Division Forest Officer where in punishment has been awarded

Considering the above facts and circumstances of the case, the appellate authority feel inclined to hold that the contention of the final order of the Divisional Forest Officer are not acceptable in totality.

FINDING *:The finding of the appellate authority is that Divisional Forest Officer, Keonjhar has issued O.O. No. 283 dt. 21.08.2003 in violation of procedural guidelines of O.C.S. (C.C.A.) Rules, 1962 as narrated above and therefore, the appeal has been deprived from natural justice. However, the appellant is not completely free from the charges.*

ORDER : *(1) 3 (three) annual increment is stopped with cumulative effects. (2) Punishment mentioned in sl. No.2 of the O.O. No. 283dt. 21.08.2003 of DFO is waived since the appellant has already retired from Govt. service."*

7. On perusal of the above order of the appellate authority, it is evident that the appellate authority has inter alia come to a definite finding that even though the petitioner had requested for modification of the mode of enquiry, but he was not given opportunity to be heard, which shows that no equity was meted out to the petitioner, and that the disciplinary authority, while passing final order on 21.08.2003, did not supply a copy thereof to the delinquent, which he was entitled to, and that the period, from which five increments were to be stopped with cumulative effect, was not mentioned in the office order of the disciplinary authority wherein punishment was awarded. On careful reading of the above observation, it would be seen that the appellate authority has not accepted the final order of the disciplinary authority in totality and thus categorically held that the disciplinary authority issued the

order dated 21.08.2003 in violation of procedural guidelines of OCS (CCA) Rules, 1962 and by that the petitioner has been deprived of natural justice. While coming to such conclusion, the appellate authority, instead of remitting the matter for re-adjudication, has given a finding "However, the appellant is not completely free from the charges". Once the appellate authority came to a definite finding that principle of natural justice has not been complied with and, as such, the disciplinary authority violated the procedural guidelines of OCS (CCA) Rules, 1962, he should not have imposed punishment of stoppage of three annual increments with cumulative effect. This is an outcome of non-application of mind by the appellate authority. Against the said order passed by the appellate authority, the petitioner filed a memorial before opposite party no.1 in Annexure-6, but the same was not entertained and the petitioner was directed to file review petition under Rule 31 of the OCS (CCA) Rules, 1962.

8. The cumulative effect of the above analysis would go to show that the departmental proceeding initiated against the petitioner suffers from vice of procedural irregularity. The reason being, while serving memorandum of charges, the petitioner was not supplied with the relevant documents. When the petitioner specifically sought for, even then the documents were not provided to him, and on the other hand enquiry officer was appointed. As such, the enquiry officer has not acted fairly and reasonably, which he is required to do, but submitted the enquiry report along with documents to the disciplinary authority, without providing a copy thereof to the petitioner, which he is entitled to in view of the judgment of the apex Court in ***Ramzan Khan*** (supra), and the disciplinary authority imposed the punishment without giving an opportunity of hearing to the petitioner. Thereby, the same is in gross violation of the principles of natural justice. Furthermore, against the order of punishment when the petitioner preferred appeal, the appellate authority though gave a finding in favour of the petitioner, but imposed punishment modifying the punishment imposed by the disciplinary authority, that itself also cannot sustain in the eye of law. As such, the order declining to entertain the memorial preferred by the petitioner against the order passed by the appellate authority, has not been communicated to the petitioner to enable him to file review application under Rule 31 of the OCS (CCA) Rules, 1962, and such action of the authority is contrary to the settled principles of law.

9. Disciplinary proceedings are held in exercise of the domestic jurisdiction of the employer. The holding of such proceedings of which

enquiry into the misconduct of the employee (generally referred to as a departmental enquiry) is the most important feature, is a precondition to the imposition of any punishment on a public servant. The universality of this principle in the law relating to public services is reflected by the fact that almost all Government servants and employees of statutory corporations or Government Companies are governed by rules which generally provide for a scheme detailing the procedure to be followed in such proceedings and essentiality of following them before imposing any punishment.

10. In ***Roop Singh Negi v. Punjab National Bank***, (2009) 2 SCC 570, the apex Court held that a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties.

11. In ***Union of India v. Gyan Chand Chattar, (2009) 12 SCC 78***, the apex Court, while discussing about the essential features and elements of disciplinary proceeding, held that an enquiry is to be conducted against any person in strict adherence to the statutory provisions and the principles of natural justice. The charges should be specific, definite and setting out the details of the incident which formed the basis of the charges. No enquiry can be sustained on vague charges. Enquiry has to be conducted fairly, objectively and not subjectively. Finding should not be perverse or unreasonable, nor the same should be based on conjectures and surmises. The Court reiterated that there is a distinction between proof and suspicion. Every act or omission on the part of the delinquent cannot be a misconduct. The authority must record reasons for arriving at the findings of fact in the context of the statute defining the misconduct. Evidence adduced should not be perfunctory. Even if the delinquent does not take the defence or raise any protest saying that the charges are vague, that does not absolve the enquiring authority from being vitiated for the reason that there must be fair play in action, particularly, in respect of an order involving adverse or penal consequences.

12. In ***Punjab National Bank v. Kunj Behari Misra***, (1998) 7 SCC 84 : AIR 1998 SC 2713, the apex Court held that when the enquiry is conducted by the inquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded with the completion of the enquiry. The

disciplinary proceedings stand concluded with the decision of the disciplinary authority.

13. In ***Union of India v. Praskash Kumar Tandon***, (2009) 2 SCC 541, the apex Court held that an enquiry officer is a person who enquiries into the allegation contained in the charge sheet and ascertains as to what extent they are correct. He is a quasi-judicial authority and should perform his functions fairly and reasonably.

The role of an enquiry officer and the enquiry itself commences after disciplinary authority frames charges.

14. In State of ***U.P. v. Saroj Kumar Sinha***, (2010) 2 SCC 772 : AIR 2010 SC 3131, the apex Court held that an employee should be treated fairly in any proceeding which may culminate in punishment being imposed on him.

15. In ***Rash Lal Yadav (Dr) v. State of Bihar***, (1994) 5 SCC 267, the apex Court emphatically held that the rules of natural justice supplement the enacted law and do not supplant it. Accordingly, explained:

> *"The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (i) no one shall be a judge in his own cause and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage. Therefore, when the legislature confers power on the State Government to be exercised in certain circumstances or eventualities, it would be right to presume that the legislature intends that the said power be exercised in the manner envisaged by the statute. If the statute confers drastic power it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time-consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules of natural justice are, therefore, devised for ensuring fairness and promoting satisfactory decision-making. Where the statute is silent and a contrary intention*

cannot be implied the requirement of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Natural justice has thus secured a foothold to supplement enacted law by operating as an implied mandatory requirement thereby protecting it from the vice of arbitrariness. Courts presume this requirement in all its width as implied unless the enactment supplies indications to the contrary as in the present case. This Court in A.K. Kraipak v. Union of India, after referring to the observations in State of Orissa v. Dr. (Miss) Binapani Dei, observed as under:

'The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.' (emphasis supplant)."

16. Applying the above principles to the present context, it is made clear that due to non-supply of documents along with memorandum of charges to the petitioner to give an effective reply and subsequently due to non-providing of the enquiry report by the inquiry officer, along with the documents relied upon, to the petitioner is in gross violation of the principles of natural justice. Subsequently, the disciplinary authority, without giving opportunity of hearing to the petitioner, imposed the punishment, which also violates the principles of natural justice. More so, the inquiry officer has not acted, as a quasi-judicial authority, in a free and fair manner. Subsequently, when the appellate authority, while passing the order, has come to a definite finding that there was non-compliance of the principle of natural justice, he should not have modified the punishment imposed by the disciplinary authority by substituting the same, and by that the appellate authority has acted in contravention of the rules, which cannot sustain in the eye of law. Thereby, the order dated 21.08.2003 in Annexure-3 passed by the disciplinary authority and the order dated 19.08.2009 in Annexure-5 passed by the appellate authority cannot sustain in the eye of law and the same are liable to be quashed and hereby quashed. The matter is remitted back to the disciplinary authority with the direction to supply a copy of the enquiry report to the petitioner calling upon him to give effective reply in compliance of the principle of natural justice and thereafter follow up action shall be taken in accordance with law. Needless to say, since the petitioner has retired from the service in the meantime, the disciplinary authority shall do well to conduct the proceeding on day to day basis and conclude the same as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment.

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

2021 (II) ILR - CUT- 777

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 2408 OF 2015

UDAYANATH ROUT .....Petitioner

.V.

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

WORDS AND PHRASES – 'Esstopel' – Definition – Explained – Petitioner initially appointed as an Attendant on 44 days contractual basis – Subsequently, after completion of ten years, his services were regularized with the condition that the pension will be guided by the OCS (Pension) Rules 1992 – Thereafter on the basis of a clarification of the Finance department an order was passed to the effect that the petitioner being a contractual employee, the OCS (Pension) Rules 1992 not applicable to him – Whether such an order will stand on scrutiny of law? – Held, No – Once it has been specifically mentioned, vide letter dated 12.12.2012, that the petitioner having completed 10 years of service with a small interruption from 16.08.2000 to 07.12.2001, and that by then under the need of the situation and by virtue of order of the Tribunal the petitioner having completed 10 years and more service in Class-IV, his services have been regularized conditionally stating that the pension will be guided as per provision of OCS (Pension) Rules, 1992, in pursuance of Finance Department letter dated 04.04.2007 – The subsequent letter dated 29.11.2013 under Annexure-6 issued by the Finance Department, with regard to clarification on applicability of New Pension Scheme in case of contractual employees appointed prior to 01.01.2005 and brought over to regular establishment after that date, as well as the letter dated 12.01.2015 under Annexure-7 cannot sustain in the eye of law as the same is hit by principle of estoppel. (Para 8 & 9)

Case Laws Relied on and Referred to :-

1. 2006 AIR SCW 1991:Uma Devi Vs. State of Karnataka..
2. CWP No.2371 of 2010: Harbans Lal Vs. State of Punjab
   7th Edn. at page 570 :Black's Law Dictionary.
3. (2003) 2 SCC 355 (365) : B.L. Sreedhar Vs. K.M. Munireddy.
4. (2010) 12 SCC 458 (469): H.R. Basavaraj Vs. Canara Bank.
5. AIR 1968 SC 718 : Union of India v. M/s. Anglo Afghan Agencies etc.
6. AIR 1971 SC 2021: Chowgule & Company (Hind) Pvt. Ltd. Vs. Union of India.
7. AIR 1979 SC 621 : M/s Motilal Padampat Sugar Mills Co. LtdVs. The State of Uttar Pradesh.
8. AIR 1986 SC 806 : Union of India Vs. Godfrey Philips India Ltd.
9. AIR 1987 SC 2414: Delhi Cloth & General Mills Ltd. Vs. Union of India.

10. AIR 1987 SC 2414 : Bharat Singh Vs. . State of Haryana.
11. 2019 (I) ILR-CUT-214: M/s Balasore Alloys Ltd. Vs. State of Odisha.

For Petitioner : M/s. S.N. Patnaik, P. Mohapatra, S. Mohapatra & A.A. Mohanty,
For Opp. Parties: Mr. M. Balabantaray,Standing Counsel

JUDGMENT Date of Judgment: 09.08.2021

Dr. B.R.SARANGI, J.

The petitioner, while working as Attendant (Class-IV) under the Medical Officer, Community Health Centre, Bankoi, Khurda, has filed this writ petition seeking to quash the letter dated 29.11.2013 under Annexure-6 issued by Finance Department, Government of Odisha, clarifying the applicability of New Pension Scheme in case of contractual employees appointed prior to 01.01.2005 and brought over to regular establishment after that date; as well as order no.3331 dated 12.01.2015 under Annexure-7 issued by the office of opposite party no.3-Principal Accountant General (A&E), Odisha cancelling the GPF accounts numbers in respect of those employees working on contractual basis prior to 01.01.2005 and regularized after 01.01.2005 and directing to stop GPF deduction of such employees and forward the concerned FP application for settlement; and further to issue direction to the opposite parties to deduct the GPF from his salary as per OCS (Pension) Rules, 1992 and G.P.F. (Orissa) Rules, 1938 and not to cancel the GPF account number allotted in his favour.

2. The factual matrix of the case, in brief, is that the petitioner was initially engaged as Attendant (Class-IV) under the Medical Officer, Community Health Centre (CHC), Bankoi, Khurda, pursuant to order dated 26.03.1999 under Annexure-1 for a period of 44 days purely on temporary basis, and the same was extended from time to time. Claiming regularization of his service, the petitioner filed O.A. No.1246(C) of 2001 before the Odisha Administrative Tribunal, Cuttack Bench, Cuttack, which has been disposed of, along with batch of cases, vide order dated 16.04.2012 with the following direction:-

> *"8. In view of the submissions advanced by the learned counsel for the applicants and the learned standing counsel these O.As are disposed of with a direction to the respondents to examine the case of each of the applicants on individual basis keeping in view the decisions cited above. The respondents are further directed to prepare a list of those candidates on the basis of their seniority in cases covered*

> *under the said decisions and take up the regularization of only those candidates as per term and seniority, if they are still continuing in service. The respondents are directed to complete the process and issue appropriate orders in the matter within a period of three months from the date of receipt of a copy of this order. Till the process is completed the applicants shall not be removed from service."*

2.1. In pursuance of such order of the tribunal, the CDMO, Khurda, vide letter dated 18.06.2012 sought clarification from opposite party no.1 as well as opposite party no.4. Consequentially, opposite party no.1 referred the matter to the Administrative Department as well as Law Department for examination and after obtaining the views, opposite party no.1, vide order dated 05.12.2012, directed the CDMO, Khurda to comply with the order dated 16.04.2012 passed by the Tribunal in O.A. No. 1246(C) of 2001. On receipt of the said letter, the CDMO, constituted a selection committee, vide office order dated 10.12.2012. The selection committee considered the case of the petitioner and keeping in view the decision of the apex Court, the seniority of the petitioner as well as the period of service rendered by him, recommended his name for regularization of his service against regular Class IV post. Consequently, on the basis of the recommendation made by the selection committee, the CDMO, Khurda issued regular appointment order in favour of the petitioner on 12.12.2012. The relevant portion of the said appointment order reads as follows:

> *"In view of orders of Hon'ble O.A.T. & instruction of Govt. issued thereon Udaynath Rout who is continuing as Attendant on 44 days basis at PHC (N) Manibandha under CHC Bankoi is hereby appointment on regular basis as Attendant in the scale of pay Rs.S-1, Rs.4750-14680/- with G.P. Rs.1500/- as well as D.a. as may be sanctioned by Govt. from time to time & allowed to continuing as such at PHC(N) Manibandha under CHC Bankoi on regular basis with effect from the date of issue of the order.*
>
> *The appointment is also subject to the following conditions.*
>
> *1. The pension will be guided as per provision of OCS (Pension) Rules 1992 in pursuance to Finance Deptt. Letter No.17114 (255)-Pen-7/07/F dt. 4.4.2007.*
>
> 2. *The regularization is purely temporary and terminable at any time if the incumbent is found to be unsuitable/ineligible, after observing the relevant rules in vogue."*

In view of the aforementioned order and after regularization of service of the petitioner, necessary service book was opened and subscription was deducted towards GPF account and the petitioner was enjoying all the benefits as due and admissible to him being a regular Government employee.

2.2 Thereafter, opposite party no.1 issued an order on 22.05.2013 directing the CDMO, Khurda to cancel the regular appointment issued in favour of the petitioner with an observation that the petitioner has not completed 10 years of continuous service before the date of decision of the apex Court in ***Uma Devi v. State of Karnataka***, 2006 AIR SCW 1991. Challenging the said order, the petitioner filed O.A. No.2318 (C) of 2013 and the Odisha Administrative Tribunal, Cuttack Bench, Cuttack, while issuing notice passed the interim order directing to keep the order dated 22.05.2013 in abeyance. Pursuant to the said order, the petitioner is continuing against the regular post. As the salary of the petitioner was not released, the tribunal also directed to release the salary. Ultimately, after due adjudication, the tribunal, vide order dated 05.01.2017, disposed of O.A. No.2318 (C) of 2013 and batch by passing the following order:-

> *"6. Pursuant to order of the Tribunal, a clarification was sought for by the CDMO, Khurda from the Government as well as respondent no.2-Director of Health Services vide letter dated 18.6.2012. The respondent no.1 vide order dated 5.12.2012 directed the CDMO, Khurda to look into the matter and ensure for compliance of the order of the Tribunal. Getting confirmation from the Government, the CDMO, Khurda constituted a selection committee vide office order dated 10.12.2012. The cases of the applicants were placed before the duly constituted selection committee dated 12.12.2012 and keeping in view the decision of the Hon'ble Apex Court, seniority of the candidates as well as period of service rendered by them, the Committee recommended all the candidates for regularization of their services against regular Class-IV posts. Consequent upon the recommendation of the Selection Committee, the CDMO, Khurda issued regular appointment order in favour of the applicants vide order dated 12.12.2012. Perused the proceeding of the selection committee dated 12.12.2012. The selection committee held that the engagement of candidates in different medical institutions against single sanctioned post was irregular but not illegal. Their engagement were considered originally to meet the urgent need of the medical institutions and their service appears in public interest and need. They were continuing 10 years and more with some gap due to termination of their services because of imposition of ban which was subsequently concurred by Finance Department on their UOR No.79 SSI dated 20.11.2002. It is found that the Selection Committee taking all aspects in view had taken a rational decision to regularize the services of the applicants. It is pertinent to mention here that whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection committee which has the expertise in the particular filed. The decision of the Selection Committee can be interfered only on limited grounds, such as illegality or patent material irregularity in the constitution of the committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. it is not disputed that in the present case the CDMO, Khorda had properly constituted the selection committee which recommended the cases of the applicants for their regularization in service after*

> *going through all the relevant materials before it. Based on the report of the selection committee; the CDMO, Khorda issued the order of appointment on regular basis to the applicants thereby regularizing their services. Once the applicants were regularized through a selection committee, an adverse order cannot be passed against them as that would go against the basic tenet of the principles of natural justice. Hence, we do not find any force in issuing order dated 22.5.2013 and order dated 1.6.2013 cancelling the regularization of the services of the applicants."*

2.3 Challenging the order dated 05.01.2017 passed by the tribunal in O.A. No.2318 (C) of 2013 and batch of cases, the State and its functionaries filed W.P.(C) No.5666 of 2018 before this Court and vide order dated 17.07.2018, while disposing the said cases, the Division Bench of this Court passed the following order:-

> *"As it appears pursuant to the order passed by the Tribunal earlier, Selection Committee was constituted and on the recommendation of the said Selection Committee, the CDMO issued regular appointment order in favour of the applicant on 12.12.2012. Thereafter his service book was opened and subscriptions have been deducted towards GPF and the applicant was enjoying all the benefits as due and admissible to a regular government servant. However unilaterally and without following the principle of natural justice and without any reason and in contravention of Article 311 of the Constitution of India, order has been issued cancelling the regularization of the service of the applicant. The Tribunal taking into consideration of the same and in the facts and circumstances discussed above, passed the impugned order. There is no error apparent in the face of the impugned order, for which, we are not inclined to interfere with the same in exercise of the jurisdiction conferred under Article 227 of the Constitution of India."*

The aforesaid order clearly indicates that the Division Bench of this Court has confirmed the order of the tribunal holding that the regular appointment made in favour of the petitioner dated 12.12.2012 is well justified.

2.4 In the meantime, the order impugned dated 29.11.2013 has been passed by the Government of Odisha, Finance Department under Annexure-6 by way of clarification on applicability of New Pension Scheme in case of contractual employees appointed prior to 01.01.2005 and brought over to regular establishment after that date, and consequentially, the order dated 12.01.2015 under Annexure-7 has been passed by the Principal Accountant General (A & E), Odisha cancelling the GPF accounts numbers of those employees working under contractual basis prior to 01.01.2005 and regularized after 01.01.2005 and requesting to stop deduction of GPF and forward the concerned FP application for settlement at its end.

2.5 Challenging the aforesaid orders, the petitioner preferred O.A. No.2408(C) of 2015 before the Odisha Administrative Tribunal, Cuttack Bench, Cuttack, but due to abolition of the tribunal the said Original Application has been transferred to this Court and renumbered as WPC(OAC) No.2408 of 2015.

3. Mr. S.N. Patnaik, learned counsel for the petitioner contended that by virtue of order dated 16.04.2012 passed by the Odisha Administrative Tribunal in O.A. No.1944(C) of 2001 and batch, due scrutiny was made with regard to service rendered by the petitioner and consequentially, a selection committee was constituted which recommended for giving regular appointment, basing upon which the petitioner's service was regularized vide order dated 12.12.2012. It is contended that regularization of services of the petitioner was made subject to condition that the pension would be guided as per provisions of OCS (Pension) Rules, 1992 in pursuance of Finance Department letter No.17114 (255) pen-7/07/F dated 04.04.2007. It is further contended that once regular appointment has been made with the above condition, now the opposite parties cannot turn around and contend that the petitioner has not completed 10 years of service, and that his appointment was on contractual basis prior to 01.01.2005 and, therefore, he is not entitled to be covered under the OCS (Pension) Rues, 1992. This is absolutely misconceived one. Therefore, interference of this Court is warranted.

To substantiate his contentions, he has relied upon the judgment in ***Harbans Lal v. State of Punjab*** (CWP No.2371 of 2010 decided on 31.08.2010), which has been upheld by the apex Court dismissing SLP (C)…CC No.17901 of 2011 [SLP (C)…CC No.11570 of 2012] vide order dated 30.07.2012 and subsequently dismissing the Review Petition (C) No.2038 of 2013 arising out of SLP (C) …CC No.11570 of 2012.

4. Mr. M. Balabantaray learned Standing Counsel for the State raised a preliminary objection with regard to maintainability of the writ petition on account of non-joinder of proper party. He, however, contended that the Finance Department notification dated 17.09.2005 is not applicable to the contractual employees, inasmuch as OCS (Pension) Rules, 1992 is applicable to regular State Government employees. The OCS (Pension) Rules, 1992 has been amended and Orissa Civil Services (Pension) Amendment Rules, 2005 came into force w.e.f. 01.01.2005. Therefore, since the petitioner's services have been regularized w.e.f. 12.12.2012, i.e. much after 01.01.2005, the

petitioner is not entitled to be covered under the OCS (Pension) Rules, 1992 and GPF (Odisha) Rules, 1938. It is further contended that regular appointment of the petitioner, being made on 12.12.2012, he is covered under Orissa Civil Services (Pension) Amendment Rules, 2005. Consequentially, he is not entitled to get any pension as per OCS (Pension) Rules, 1992 and seeks for dismissal of the writ petition filed by the petitioner.

5. This Court heard Mr. S.N. Patnaik, learned counsel for the petitioner and Mr. M. Balabantaray, learned Standing Counsel for the State. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties the writ petition is being disposed of finally at the stage of admission.

6. Before delving into the merits, it is worthwhile to deal with at the outset the preliminary objection raised by Mr. M. Balabantaray, learned Standing Counsel for the State as to whether the writ petition is maintainable due to non-joinder of proper party. His specific contention is that the petitioner though sought to challenge the order dated 12.01.2015, he has not made the Accounts Officer, Odisha, who has issued such order, as a party to the writ petition, and therefore, for non-joinder of proper party, the writ petition is liable to be dismissed.

Mr. S.N. Patnaik, learned counsel appearing for the petitioner contended that the petitioner has impleaded Principal Accountant General (A&E), Odisha as opposite party no.3, from whose office the impugned communication dated 12.01.2015 was issued. The Accounts Officer, Odisha, being the officer concerned, has only communicated the letter of cancellation of GPF account numbers of those employees, who were working under contractual basis prior to 01.01.2005 and regularized after 01.01.2005. Thereby, the objection raised by the learned Standing Counsel for the State cannot sustain in the eye of law.

Having considered the contentions raised by learned counsel for the parties, this Court finds sufficient force in the contention of learned counsel for the petitioner. As a matter of fact, the impugned communication dated 12.01.2015 was issued from the office of the Principal Accountant General (A&E), Odisha, whom the petitioner has arrayed as opposite party no.3 in this writ petition. The Accounts Officer, Odisha, being the officer concerned, has only communicated the said letter. In such circumstance, the objection

raised by the learned Standing Counsel for the State, that the writ petition should be dismissed for non-joinder of party, is overruled and the writ petition is held to be maintainable.

7. Now, coming to the merits of the case, on the basis of the undisputed factual matrix delineated above, the only question to be considered by this Court as to whether, in view of the conditional appointment made on 12.12.2012 vide Annexure-2 putting a condition under clause-1 that the pension will be guided as per provision of OCS (Pension) Rules 1992 in pursuance to Finance Department Letter No.17114(255)-Pen-7/07/F dated 04.04.2007, the impugned order under Annexure-7, so far as petitioner is concerned, will sustain or not.

8. In order to effectively answer the above question, it is pertinent to recapitulate that admittedly the petitioner was appointed initially as an Attendant (Class-IV) on 44 days basis and his appointment was due to urgent need of the medical institution and under the need of the situation and, as such, his work and conduct as Class-IV is satisfactory. His services, as a Class-IV employee, appear to be essentially in public interest and need. The petitioner had completed 10 years of service, by the time regularization order was passed on 12.12.2012, excepting a small interruption from 16.08.2000 to 07.12.2001, as per the need of the situation. However, by virtue of the interim orders passed by the tribunal, he had completed more than 10 years of service in Class-IV post and managed the need of the institution satisfactorily. By virtue of direction of the tribunal, as mentioned above, his service record was verified and on being satisfied, that he had completed 10 years of service, his services were regularized as he was working against the sanctioned post with scale of pay admissible to the post. As such, the order dated 12.12.2012 regularizing the services of the petitioner was passed, in compliance of the direction given by the tribunal, and the said order is a conditional one that the pension will be guided as per provision of OCS (Pension) Rules, 1992 in pursuance to Finance Department Letter No.17114(255)-Pen-7/07/F dated 04.04.2007. It is true, by the time the order dated 12.12.2012 under Annexure-2 was passed, Odisha Civil Services Amendment (Pension) Rules, 2005 had already come into force w.e.f. 01.01.2005. By applying the same, it was construed that the petitioner being a contractual appointee, the OCS (Pension) Rules 1992 is not applicable, in view of clarification issued on 04.04.2007. That itself is a misconceived one. The reason being, while issuing the order dated 12.12.2012 under Annexure-2, the authority knowing

fully well that the order dated 16.04.2012 was passed by the tribunal in O.A. No.1246(C) of 2001 and subsequent instruction issued by the Government dated 05.12.2012, passed the order of regularization applying the OCS (Pension) Rules, 1992 in favour of the petitioner. Therefore, the authority subsequently cannot turn around and state that by the time letter dated 12.12.2012 was issued, the petitioner had not completed 10 years of service.

9. Further, once it has been specifically mentioned, vide letter dated 12.12.2012, that the petitioner having completed 10 years of service with a small interruption from 16.08.2000 to 07.12.2001, and that by then under the need of the situation and by virtue of order of the tribunal the petitioner having completed 10 years and more service in Class-IV, his services have been regularized conditionally stating that the pension will be guided as per provision of OCS (Pension) Rules, 1992, in pursuance of Finance Department letter dated 04.04.2007. The subsequent letter dated 29.11.2013 under Annexure-6 issued by the Finance Department, with regard to clarification on applicability of New Pension Scheme in case of contractual employees appointed prior to 01.01.2005 and brought over to regular establishment after that date, as well as the letter dated 12.01.2015 under Annexure-7 cannot sustain in the eye of law as the same is hit by principle of estoppel.

10. In ***Black's Law Dictionary, 7th Edn. at page 570*** 'estoppel' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true,

11. In ***B.L. Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 (365) it has been held by the apex Court that 'estoppel' is based on the maxim *allegans contrarir non est audiendus* (a party is not to be heard contrary) and is the *spicy of presumption juries et de jure* (absolute, or conclusive or irrebuttable presumption) The said judgment has been relied on by the apex Court in ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458 (469).

12. It has been clarified in the case of ***H.R. Basavaraj*** mentioned supra that in general words, 'estoppel' is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. The

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

13. The principle of promissory estoppel has been considered by the apex Court in ***Union of India v. M/s. Anglo Afghan Agencies etc***., AIR 1968 SC 718; ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India***, AIR 1971 SC 2021; ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh***, AIR 1979 SC 621; ***Union of India v. Godfrey Philips India Ltd.***, AIR 1986 SC 806; ***Delhi Cloth & General Mills Ltd. v. Union of India***, AIR 1987 SC 2414; and ***Bharat Singh v. State of Haryana***, AIR 1988 SC 2181 and many other subsequent decisions also.

A Division Bench of this Court had taken into consideration the above principles in ***M/s Balasore Alloys Ltd. v. State of Odisha***, 2019 (I) ILR-CUT-214.

14. Similar question had come up for consideration before the Pubjab & Haryana High Court in ***Harbans Lal*** (supra) and the a Division Bench, while deciding the said case on 31.08.2010, held as follows:-

> *"16. From the above discussion, we have come to the conclusion that the entire daily wage service of the petitioner from 1988 till the date of his regularization is to be counted as qualifying service for the purpose of pension. He will be deemed to be in govt. service prior to 1.1.2004. The new Re-structured Defined Contribution Pension Scheme (Annexure P-1) has been introduced for the new entrants in the Punjab Government Service w.e.f. 01.01.2004, will not be applicable to the petitioner. The amendment made vide Annexure P-2 amending the Punjab Civil Services Rules, cannot be further amended by issuing clarification/instructions dated 30.05.2008 (Annexure P-3). The petitioner will continue to be governed by the GPF Scheme and is held entitled to receive pensionary benefits as applicable to the employees recruited in the Punjab Govt. Services prior to 1.1.2004.*
>
> *17. In view of the above, the writ petition is allowed. Accordingly respondents are directed to treat the whole period of work charge service as qualified service for pension because accordingly to clarification issued on 30.05.2008 (Annexure P-3), the new defined Contributory Pension Scheme would be applicable to all those employees who have been working prior to 1.1.2004 but have been regularized thereafter. Let his pension and arrears be calculated and paid to him expeditiously, preferably within a period of three months from the date of receipt of copy of this order."*

The aforesaid judgment of the Punjab & Haryana High Court was challenged before the apex Court by the State of Punjab in SLP (C) CC

No.11570 of 2012, which was dismissed vide order dated 30.07.2012. Again, Punjab & Haryana Government filed Review Petition No.2038 of 2013, which was also dismissed, thereby confirming the order passed by the Division Bench of the Punjab & Haryana High Court.

15. In view of such position, there is no iota of doubt to come to a conclusion that the petitioner is covered by the conditional regularization order dated 12.12.2012 to the extent that the pension will be guided as per provision of OCS (Pension) Rules, 1992 in pursuance to Finance Department Letter No.17114(255)-Pen-7/07/F dated 04.04.2007. As a result, the order No.35655/F dated 29.11.2013 under Annexure-6 issued by the Government of Odisha in Finance Department and consequential order dated 12.01.2015 under Annexure-7 issued by the Principal Accountant General (A&E), Odisha cannot sustain and are hereby quashed. The petitioner is entitled to be covered under the OCS (Pension) Rules, 1992, in pursuance of the Finance Department Letter No.17114 (255)-Pen-7/07/F dated 04.04.2007.

16. Thus, the writ petition is allowed. However, there shall be no order as to costs.

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2021 (II) ILR - CUT- 787

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 1052 OF 2013

SAMIR RANJAN SAHOO .....Petitioner

.V.

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

SERVICE LAW – Self-same allegations both in criminal and departmental proceedings – Criminal investigation dropped as police submitted final report – Whether the departmental proceeding can be dropped due to above reason? – Held, Yes. (Para-7,8)

Case Laws Relied on and Referred to :-

1. (1999) 3 SCC 679: Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd.
2. (2013) 11 SCC 67: State Bank of India Vs. Mohammed Abdul Rahim.
3. (2013) 4 SCC 301: Nirmala J. Jhala Vs. State of Gujarat.

For Petitioner : M/s. Sidheswar Mallik, P.C. Das & M.Mallik

For Opp. Parties: Mr. H.K. Panigrahi, Addl. Standing Counsel.

JUDGMENT Date of Judgment: 10.08.2021

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order of suspension dated 14.02.2012 under Annexure-4, the charge memo under Annexure-5 and the order of punishment dated 28.02.2017 imposed by the disciplinary authority vide Annexure-11.

2. The factual matrix of the case, in brief, is that one Bimal Prakash Dash, an UTP (Under Trial Prisoner), after being released on bail, lodged an FIR against the petitioner, which was registered as Kendrapara P.S. Case No.176 of 2012, corresponding to G.R. Case No.1036 of 2012 in the court of learned S.D.J.M., Kendrapara under Sections 341/323/ 324/506 of the Indian Penal Code ("IPC" for short). He also filed an application before the National Human Rights Commission, New Delhi, and the said Commission, on 12.03.2012, submitted a report that the allegations levelled against the petitioner were found false. Though a preliminary enquiry was conducted by one Niranjan Das, Superintendent District Jail, Dhankanal and in his report submitted on 20.10.2012 he fixed the responsibility on the petitioner, but, thereafter, on the FIR allegations an inquiry was conducted by the SDPO, Kendrapara, who submitted his report on 22.10.2012 which proved that the allegations in the FIR were false.

2.1 In spite of that, the petitioner was placed under suspension on 12.12.2012, pending drawal of departmental proceeding, and his headquarter was fixed at Koraput, but, subsequently, on 23.03.2013. he was reinstated in service pending finalization of the proceeding. On 17.12.2012, the petitioner submitted representation praying for fixing his headquarter at Kendrapara. When such representation was pending, on 03.01.2013, Departmental Proceeding No.15/2012 was drawn and charges were framed on the basis of the FIR allegations. The charges in the departmental proceeding and the criminal proceeding are similar and same set of documents and witnesses were sought to be relied upon and examined. His representation for change of headquarter was rejected on 22.01.2013. Then, he again submitted his representation on 25.01.2013 for supply of documents.

2.2 After investigation, the police submitted final form (report) on 28.02.2013 before the learned S.D.J.M., Kendrapara stating that the allegations made in the FIR are disproved and returned the case as false. Thereby, challenging the departmental proceeding, the petitioner filed O.A. No.1052 (C) of 2013 before the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (which has been transferred to this Court on abolition of the tribunal and registered as the above noted writ petition) to quash the proceeding. The tribunal, vide interim order dated 13.05.2013, directed that the opposite parties may go ahead with enquiry but final order shall not be passed without leave of the tribunal.

2.3 Consequently, the petitioner filed written statement of defence on 20.03.2014 denying the charges. The Additional DGP, as the disciplinary authority, directed for a regular enquiry under Rule-15(4) of CCA Rules and appointed one Prasanna Kumar Nayak, Superintendent, District Jail, Sundargarh as enquiring officer on 14.05.2014. After conducting enquiry, the enquiring officer submitted his report on 06.05.2016 to the disciplinary authority that the charges framed in the departmental proceeding against the petitioner were not established. But, a second show-cause notice was issued to the petitioner on 19.09.2016 differing with the findings of the enquiring officer and the basis of such note of difference was the preliminary enquiry report. A representation, as against the note of difference and the findings of the enquiring officer, was submitted by the petitioner on 25.10.2016, which was forwarded to the disciplinary authority.

2.4 Thereafter, a show-cause notice proposing punishment issued, vide letter no.27789 dated 10.11.2016, was communicated to the petitioner. On receipt of the same, the petitioner submitted his reply to the show-cause on 29.11.2016. Even though the interim order passed by the tribunal directing not to pass any final order in the proceeding, was in force, the final order of punishment was passed on 28.02.2017 in gross violation of the interim order. In any case, the petitioner filed appeal on 22.06.2017 stating that the order of punishment passed on the basis of preliminary enquiry report has lost its significance after regular enquiry was directed and reported was submitted in favour of the petitioner. The appellate authority, vide order dated 21.03.2018, set aside the order of punishment and directed the disciplinary authority to continue with the proceeding after obtaining leave from the tribunal.

2.5 The wife of UTP Bimal Prakash Das filed a complaint case and the same was rejected on 26.04.2018 for want of sanction. It is to be noted that after submission of final report by the police, notice was issued to the informant Bimal Prakash Das. As he was died by that time, his widow Urmila Das submitted objection petition, which was registered as ICC Case No.399 of 2016. The said complaint case was arising out of G.R. Case No.1036 of 2012, which was the corresponding G.R. case, which had arisen out of the FIR lodged by the UTP Bimal Pradash Das and registered as Kendrapara P.S. Case No.176(26) dated 26.09.2012.

3. In the above backdrop, Mr. S. Mallik, learned counsel for the petitioner contends that the departmental proceeding, which has been initiated on the basis of the charges alleged in the FIR, should be dropped, as the final report in the criminal case has been submitted. He further contended that for the self same charges, since the departmental proceeding and the criminal proceeding are continuing and the petitioner has been abdicated in the criminal proceeding, as after the investigation police disproved the allegations made in the FIR lodged by the appointing authority, who is the disciplinary authority, in that case departmental proceeding should be dropped, as its further continuance would cause prejudice to the petitioner.

In support of his contention, learned counsel for the petitioner has relied upon the judgments of the apex Court in ***Capt. M. Paul Anthony v. Bharat Gold Mines Ltd***., (1999) 3 SCC 679; ***State Bank of India v. Mohammed Abdul Rahim***, (2013) 11 SCC 67; and ***Nirmala J. Jhala v. State of Gujarat***, (2013) 4 SCC 301.

4. Mr. H.K. Panigrahi, learned Additional Standing Counsel for the State contended that since the departmental proceeding is continuing, let the petitioner approach the said authority stating all the facts, who shall take steps in accordance with law.

5. This Court heard Mr. S. Mallik, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Additional Standing Counsel for the State by hybrid mode. Pleadings having been exchanged between the parties and with the consent of learned counsel for the parties the writ petition is being disposed of finally at the stage of admission.

6. Having regard to the rival contentions raised by learned counsel for the parties and on perusal of the records, this Court finds that for the self-

same allegations both criminal and departmental proceedings were initiated against the petitioner. It is well settled in law that once on conclusion of the investigation the police disproved the allegations made in the FIR and submitted final form, in that case, the disciplinary proceeding initiated for the self same charges should be dropped. In the present case, when the interim order passed by the tribunal was continuing, in the departmental proceeding punishment was imposed and against that an appeal having been preferred the appellate authority, taking into consideration the grievance of the petitioner, set aside the punishment imposed and remitted the matter back to the disciplinary authority. Meanwhile, a development has taken place with regard to submission of final form by the police authority indicating that the allegations in the FIR were found to be false. Furthermore, the appointing authority, who is the disciplinary authority, did not give sanction for the criminal proceeding. The departmental proceeding is therefore liable to be dropped.

7. In ***Capt. M. Paul Anthony*** and ***Mohammed Abdul Rahim*** (supra), the apex Court has categorically held that where departmental and criminal proceedings are based on similar charges and same set of documents and witnesses are relied on, it would be unjust, unfair and oppressive to continue the departmental proceeding after the delinquent is acquitted in the criminal proceeding. The ratio decided in the above case is squarely applicable to the present case. When the FIR lodged and ICC case instituted, due to want of sanction, the criminal proceeding initiated against the petitioner has been dropped, in that view of the matter, if on the selfsame allegation disciplinary proceeding is continuing then that should be dropped.

8. In the case of ***Nirmala J. Jhala*** (supra), the apex Court held that the preliminary inquiry and its report loses significance once regular enquiry is initiated by issuing charge sheet to delinquent. Thereby, once the memorandum of charge has been submitted, the preliminary enquiry has lost its force. Consequentially, the disciplinary proceeding cannot sustain in the eye of law.

9. In the above view of the matter, this Court directs that let the petitioner file a comprehensive application indicating all the facts before disciplinary authority, within a period of two weeks hence, to drop the departmental proceeding, and in such event, the disciplinary authority shall do well to consider the same in accordance with law and pass appropriate order within a period of eight weeks from the date of receipt of the application.

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

2021 (II) ILR - CUT- 792

Dr. B.R.SARANGI, J.

W.P.(C) NO. 23267 OF 2021

SHANTILATA BEHERA ……..Petitioner

.V.

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

THE ORISSA PANCHAYAT SAMITI ACT, 1959 – Sections 40-A, 46-B and 54-A – Provisions under – Removal of Chairman and Vice-Chairman of Samiti by way of no confidence motion – Essential ingredients to be satisfied – Held, the provisions as envisaged under Section 46-B contains different parts. The procedure has been dealt with under Section 46-B(2) of the Act, which clearly specifies in convening a special meeting under Sub-section (1) and in the conduct of business at such meeting the procedure has been envisaged that no such meeting shall be convened except requisition signed by at least one third members with right to vote, along with copy of the resolution proposed to be moved at the meeting – Therefore, the provision is very clear that sending a requisition to convene a special meeting for which Section 46-B(2), one third member has to be signed having right to vote to send the requisition, along with a copy of the resolution proposed to be moved in the said meeting – The procedure envisaged under Section 46B(1) shall be followed where at a meeting of the Samiti specially convened in that behalf a resolution is passed supported by a majority of two-third of the total number of members having a right to vote, recording want of confidence in the Chairman and the same should be read along with the provisions contained under Sub-sections 2(g) and 2(h), where it has been specifically mentioned if the member present at the meeting is less than a majority of two-thirds of members, having a right to vote, the resolution shall stand annulled and if the resolution passed at the meeting supported by a majority of two-thirds of members having a right to vote, the Sub-Divisional Officer shall forward the resolution to the authority prescribed in pursuance of Sub-section (1), which shall be done by such authority and in such manner as may be prescribed with effect from the date of such publication, the Chairman shall be deemed to have vacated the office – All the requirement satisfied – No interference warranted. (Para 11 and 12)

Case Laws Relied on and Referred to :-

1. 2006 (I) OLR 685: Parbati Hembram Vs. State of Odisha.
2. 2001 (II) OLR 44 : Smt. Kanti Kumbhar Vs. State of Orissa.
3. (2014) 118 CLT 1146 : Manaswini Baliarsingh Vs. State of Odisha.
4. AIR 2018 Ori. 17: Sulochana Behera Vs. State of Odisha.
5. (2014) 7 SCC 633 : Usha Bharati Vs. State of Uttar Pradesh.
6. 2016 (II) OLR 882 : Jogeswar Bhoi Vs. State of Odisha.
7. 2001 II OLR 44 : Smt. Kanti Kumbar Vs. State of Orissa.
8. 64 (1987) CLT 359 : Jagdish Pradhan & Ors Vs. Kapileswar Pradhan & Ors.
9. (2010) 12 SCC : Bhanumati Vs. State of U.P.

For Petitioner : Mr. S.P. Mishra, M/s. S.P. Sarangi, A.Patnaik and P.K. Dash.

For Opp. Parties: Mr. A.K.Mishra,Addl. Govt. Adv.
G. Mishra, Sr. Advocate M/s. A. Dash, J.R. Deo, S. Jena, A.K. Das & Mr. A.K. Mishra,
M/s. H.S. Mishra, A.K. Mishra S.K. Dwibedi, [for Intervenor]
M/s. S.K. Dwivedi, K. Mohanty, & K. Hota, [for intervenors]
Mr. Ashis Kumar Mishra, [for Intervenor]

JUDGMENT Date of Judgment: 17.08.2021

Dr. B.R.SARANGI, J.

The petitioner, who is an elected Chairman of Bhapur Panchayat Samiti constituted in consonance with the provisions under Section 16 of the Odisha Panchayat Samiti Act, 1959, has filed this writ petition seeking to quash the no confidence notice no. 696 dated 30.07.2021 under Annexure-5 issued by the Sub-Collector, Nayagarh, and to issue direction to the opposite parties to allow her to continue in office as the Chairman of Bhapur Panchayat Samiti till completion of her tenure of five years and further to construe Section 16 and 18 of the Odisha Panchayat Samiti Act, 1959 harmoniously so as to give proper effect to both the provisions, in so far as the election of the Chairman and her ouster is concerned.

2. The factual matrix of the case, in brief, is that the Sub-Collector, Nayagarh issued notification no. 1050/G.P. dated 31.08.2016, to hold the election for the post of Chairman, Panchayat Samiti for the year 2017 for three tire system, as per the reservation applicable after inviting objection in prescribed form-19. So far as Bhapur Gram Panchayat is concerned, the seat was reserved for Schedule Tribe (Woman). Accordingly, the election to the post of Chairman of Bhapur Panchayat Samiti was conducted and said Samiti was constituted in consonance with the provisions under Section 16 of the Odisha Panchayat Samiti Act, 1959 (hereinafter referred to "Act, 1959"). As per the provisions contained under sub-Section (4) of Section 16 of the Act, 1959, the term of the office of the elected members of the Samiti including the Chairman and the Vice-Chairman shall be five years commencing on the date of the first meeting, as provided in Sub-section (3) of Section 16 of the Act, 1959. The first meeting of the Panchayat Samiti was held on 11.03.2017 in terms of the directive issued by the State Election Commission, Odisha and accordingly, the tenure of the petitioner, i.e., five years period would expire with effect from 10th day of March, 2022. After duly being elected, the petitioner has already completed four and half years in the office. As the

elections to the panchayat bodies in the State were held in the month of March, 2017, the succeeding panchayats are to be constituted before completion of the said five years in accordance with Article 243E(3)(a) of the Constitution of India. The process of holding elections of panchayat bodies of the State has already been initiated by the State Government in its Panchayati Raj Department for undertaking delimitation of wards and reservation of seats in consonance with provisions engrafted in the Act, 1959.

2.1 Bhapur Panchayat Samiti consists of 42 members including M.L.A. and M.P. On 13.07.2021, eighteen Sarpanchs and Panchayat Samiti Members of Bhapur Panchayat Samiti submitted a requisition duly signed by one-third members with right to vote, along with proposed resolution, to the opposite party no.3, i.e. Sub-Collector, Nayagarh with respect to taking steps for having an extraordinary meeting of the Panchayat Samiti for adopting vote of no confidence against the petitioner, who is the Chairperson of Bhapur Panchayat Samiti. Along with the letter addressed to the Sub-Collector, a resolution dated 13.07.2021 was attached wherein eighteen Sarpanchas and Samiti Members have resolved that they have no confidence on the Chairman. On receipt of the above mentioned requisition, along with proposed resolution, the opposite party no.3-Sub-Collector, Nayagarh, vide letter no. 542 dated 14.07.2021, requested the opposite party no.4, BDO, Bhapur Block to take necessary steps in verifying the genuineness of signatures of members, who have moved the requisition and further requested to provide the requisite postal address of all members of Samiti having right to vote within three days. After receipt of the letter sent by opposite party no.3, the opposite party no,4- BDO, Bhapur immediately constituted a committee consisting of himself along with ABDO, AE and PA in order to verify the genuineness of the signatures and providing the requisite postal address of the members thereof. The report was prepared on 14.07.2021 and was sent to opposite party no.3, which was received by him on 15.07.2021. In the meantime, one Tofan Kumar Pradhan and seven others filed W.P.(C) No. 21045 of 2021 with a prayer to take steps for convening the meeting regarding no confidence against the Chairperson of Bhapur Panchayat Samiti on receipt of requisition and proposed resolution from more than one-third members of total membership of Bhapur Panchayat Samiti, as per the provisions contained under Section 46-B(2)(c) of the Act, 1959. This Court, vide order dated 27.07.2021, directed the Addl. Government Advocate to obtain instructions in the matter from the Sub-Collector, Nayagarh as to why no action has yet been taken in spite of receipt of requisition and the copy of

resolution for no confidence motion against the Chairperson. On 30.07.2021 under Annexure-5, the Sub-Collector, Nayagarh issued notice to all the members of the Panchayat Samiti, Sarpanchs including the petitioner requesting them to participate in the special meeting to consider the requisition and proposed resolution of no confidence motion moved against the petitioner. Hence this application.

3. Mr. S.P. Mishra, learned Senior Counsel appearing along with Mr. S.P. Sarangi, learned counsel for the petitioner argued with vehemence that the notice of no confidence issued to the petitioner, along with all the members of the panchayat samiti and sarpanchs, requesting them to participate in the special meeting to consider the requisition of no confidence motion moved against the petitioner, was received by her, without any enclosure. Though such notice clearly indicates that the requisition was sent, enclosing therewith a requisition along with proposed resolution duly signed by one-third members of the samiti. It is further contended that the petitioner is discharging her duty diligently. Therefore, the proposed no confidence motion is a result of political vengeance and collective conspiracy of the members, when hardly five months are to go to complete the tenure of five years. It is further contended that the procedure for initiating no confidence motion is provided in Section 46-B of the Act, 1959, which makes it clear that the minimum requirement to initiate no confidence motion against the Chairman or Vice-chairman of the Samiti should be moved by majority of members not less than two-thirds of the total number of members having a right to vote and basing on such proposed resolution a requisition may be moved before the Sub-Collector having majority of one-third members. Thereby, it is mandatory that in order to send requisition, a proposed resolution must have been passed with two-thirds majority members present for no confidence motion. The proposed resolution attached with the requisition sent by the Sarpanchs and members vide Annexure-2 clearly indicates that it contains the signature of only one-third members who have affirmed for moving the no confidence motion. As the proposed resolution was not signed by two-thirds majority of members having right to vote, the initiation of no confidence motion cannot sustain and is liable to be quashed. It is further contended that opposite party no.3-Sub-Collector had shown undue haste to the extent that if requisition was passed with due abiding of the provisions of the Act, 1959, it remains inexplicable and unresolved that entire process of submission of requisition, verification of signature and postal address, compiling of entire report again submitting it back to the Sub-

Collector could be concluded within a span of two days and entire process was wound up between 14.07.2021 and 15.07.2021. It is further contended that there is no allegation of malfeasance and misfeasance committed by the petitioner during her tenure as Chairman of Panchayat Samiti and had it been done so the State Government is empowered under Section 40-A of the Act, 1959 for initiation of the proceeding for removal of the Chairman on the grounds specified therein. As the petitioner had lodged an FIR regarding misconduct and ill-treatments and illegal activities done by the Vice-Chairman of the Samiti and other entities, the steps have been taken against her for convening the no confidence motion in Annexure-5, which cannot sustain and the same should be quashed. A further contention was raised that the State Government in Department of Panchayati Raj issued instructions on 30.09.2009 stating therein that during the session of Parliament and Assembly meeting of either Panchayat Samiti or Zilla Parishad will not be convened in order to facilitate the Member of Parliament (MP) and Member of Legislative Assembly (MLA) to take part in the meeting.

To substantiate his contention, reliance has been placed on ***Parbati Hembram v. State of Odisha***, 2006 (I) OLR 685.

4. Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State contended that the impugned notice in Annexure-5 has been issued in consonance with the provisions contained in Section 46-B of the Act, 1959 on receipt of requisition duly signed by one-third members with right to vote, along with a copy of the resolution proposed to be moved at the meeting, and only when this Court directed to the learned Addl. Government Advocate in W.P.(C) No. 21045 of 2021 to get instructions with regard to the steps taken on requisition signed by the members of the Samiti, the action has been taken by issuing notice under Annexure-5 to convene a special meeting, in which a resolution is to be passed supported by a majority of not less than two-thirds of the total number of members having right to vote, recording regarding want of confidence in the Chairman, the petitioner herein. Thereafter, the resolution shall forthwith be published in accordance with the provisions contained in Section 46-B(1) of the Act, 1959. In support of his contention, he has relied upon ***Smt. Kanti Kumbhar v. State of Orissa;*** 2001 (II) OLR 44; ***Manaswini Baliarsingh v. State of Odisha***., (2014) 118 CLT 1146; and ***Sulochana Behera v. State of Odisha***, AIR 2018 Ori. 17.

5. Mr. G. Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned counsel appearing for the caveator, resorting to the provisions contained in Section 46-B(1) and (2) of the Act, 1959, contended that in the instant case the meeting of the Samiti has been convened on the requisition

signed by at least one-third of the members with a right to vote, along with copy of the resolution proposed to be moved at the meeting, and as such, the requisition having been given by one-third members of the Samiti, the requirement of requisition, as provided under Sub-section (2)(a) of Section 46-B is satisfied. It is further contended that the proposed resolution incorporating the requisition should be addressed to the Sub-Divisional Officer and on receipt of such requisition the Sub-Divisional Officer shall fix the date, hour and place of such meeting and give notice of the same to all the members with a right to vote, along with a copy of the requisition and of proposed resolution at least seven clear days before the date so fixed. Therefore, for the purpose of convening the meeting of the Samiti specially where resolution is to be passed for no confidence, that should be supported by majority of not less two-thirds of total number of members having right to vote recording want of confidence in the Chairman or Vice-chairman of such Samiti and the said resolution shall forthwith be published by the authority in the manner as may be prescribed and with effect from date of such publication the Chairman or Vice-chairman shall be deemed to have vacated the office. Since action has been taken by the Sub-Collector in consonance with the provisions contained in Section 46-B, no illegality or irregularity has been committed by him in issuing Annexure-5, the notice dated 30.07.2021, so as to warrant interference by this Court. It is further contended that as per the provisions contained in the Act, 1959 the petitioner can only stay in power so long as she enjoys the support of majority of the elected members, because at the time of election the petitioner was the chosen one, but at the time when the motion of no confidence against the petitioner was passed, she was not wanted. It is further contended that the institution must run on democratic principle. In democracy, all persons heading public bodies can continue, provided they enjoy the confidence of the persons who comprise such bodies, which is essence of the democratic republicanism. When opposite party no.3 had not acted on the basis of the requisition signed by one-third members, the caveator, Tofan Kumar Pradhan along with seven other members, approached this Court by filing W.P.(C) No. 21045 of 2021 and when this Court, vide order dated 27.07.2021, directed the Additional Government Advocate to obtain instructions as to why no action has been taken in spite of receipt of requisition and copy of the proposed resolution for no confidence motion against the petitioner, the opposite party no.3 had acted upon it in consonance with the instructions sought by the Addl. Government Advocate to apprise the Court in pending writ petition. Thereby, no illegality or irregularity has been committed by issuing such notice in Annexure-5 in order to warrant interference by this Court at this stage. To substantiate his arguments, reliance has been placed on ***Usha Bharati v. State of Uttar Pradesh***, (2014) 7 SCC 633 and ***Jogeswar Bhoi v. State of Odisha,*** 2016 (II) OLR 882.

6. Mr. H.S. Mishra, learned counsel appearing for the intervenor raised preliminary objection with regard to maintainability of the writ application, in view of the provisions contained in Section 54-A of the Act, 1959 and supported the arguments advanced by Mr. G. Mishra, learned Senior Counsel appearing for the caveator. He further contended that Section 46-B(2) of the Act, 1959 provides a procedure to be followed for passing a vote of no confidence by the members of the Panchayat Samiti. No form is required for the requisition along with the proposed resolution to be sent to the Sub-Divisional Officer and in absence of rules or form prescribed for the purpose, the requirement of Section 46-B(2) of the Act, 1959 is to be satisfied, if they are substantially complied with. Therefore, contended that the writ petition is to be dismissed at the threshold, as there is sufficient compliance of the provisions contained in Section 46-B of the Act, 1959.

7. Mr. S.K. Dwibedi and Mr. Ashis Kumar Mishra, learned advocates, who have entered appearance for intervenors supported the contention raised by Mr. G. Mishra, learned Senior Advocate and Mr. H.S. Mishra, learned advocate for the caveator as well as the intervenor, and contended that they are appearing for 30 members, Mr. H.S. Mishra, learned Advocate is appearing for one member and Mr. G.Mishra, learned Senior Advocate is appearing for one member and, thereby, they have got majority of 32 members before the Court, out of total 42 and they comprise more than two-thirds members, which satisfies the requirement. Consequentially, the initiation of no confidence motion by one-third member by sending requisition along with proposed resolution, is well justified and pursuant to the same the Sub-Collector having issued notice dated 30.07.2021 under Annexure-5, the same does not warrant interference by this Court and, therefore, the writ petition should be dismissed.

8. This Court heard Mr. S.P. Mishra, learned Senior Counsel appearing along with Mr. S.P. Sarangi, learned counsel for the petitioner; Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State; Mr. G. Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned counsel for the caveator; Mr. H.S. Mishra, learned counsel appearing for one of the intervenors; Mr. S.K. Diwbedi, learned counsel appearing for 29 intervenors; and Mr. Ashis Kumar Mishra, learned counsel appearing for one of the intervenors. Though intervention applications filed by respective intervenor petitioners have not been allowed, but they have been permitted to address the Court and to participate in the process of hearing, without filing any reply by them, as the matter is very urgent in nature and the date has been fixed to today (17.08.2021 at 11.00 A.M.) for no confidence motion as per the notice under Annexure-5. Therefore, with the consent of the parties, the matter has been heard and disposed of.

9. By the Constitution (Seventy-third Amendment) Act, 1992, which has come into effect w.e.f. 24.04.1993, Part-IX containing Articles 243, 243A to 243O has been inserted. Article 243E deals with duration of panchayats, etc., which indicates that every panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. Similarly, Article 243F deals with disqualifications for membership of panchayats. Article 243K deals with elections to the panchayats and Article 243N deals with Continuance of existing laws and panchayats, whereas Article 243O deals with bar to interference by Courts in electoral matters.

10. Whereas it is expedient to provide for the establishment of Panchayat Sanmitis in the State of Odisha and for matters connected therewith or incidental thereto, the State Legislature of the State of Odisha has enacted a law, called, "The Odisha Panchayat Samiti Act, 1959". Section 3(e) defines "Panchayat Samiti", which means the Panchayat Samiti constituted under Section 16. Section 16 deals with constitution of the Panchayat Samiti. Section- 40-A, which has been inserted vide Odisha Act No. 24 of 1961, deals with removal of Chairman and Vice-Chairman of Samiti, which reads as follows:

> ***"40-A. Removal of Chairman and Vice-Chairman of Samiti -*** *(1) If in the opinion of the Government the Chairman [the Vice-Chairman or any member elected under Clause (h) of Sub-section (1) of Section 16 or nominated under Section 45-C] of the [* * *] Samiti wilfully omits or refuses to carry out or, violates the provisions of this Act or any rules, bye-laws or orders, made or issued thereunder or abuses the powers vested in him and Government are satisfied that further continuance of such person in office would be detrimental to the interest of the [* * *] Samiti they may, by order, published in the prescribed manner, remove such Chairman, [Vice-Chairman or member, as the case may be,] from office :*
>
> *Provided that no such order for removal shall be made without giving the person concerned a reasonable opportunity of being heard.*
>
> *(2) No person removed from the office of Chairman, Vice-Chairman or an elected member under this section shall for a period of four years from the date of the removal, be eligible to hold any of the said offices."*

Section 46-B deals with vote of no confidence against Chairman and Vice-Chairman of Samiti, which reads as follows:

> *"**46B. Vote of no confidence against Chairman and Vice-Chairman of Samiti** - (1) Where at a meeting of the [* * *] Samiti specially convened in that behalf a resolution is passed, supported by a majority of [not less than two-thirds of] the total number of members having a right to vote, recording want of confidence in the*

Chairman or Vice-Chairman of such [* *] Samiti the resolution shall forthwith be published by such authority and In such manner as may be prescribed and with effect from the date of such publication the Chairman or Vice-Chairman, as the case may be, shall be deemed to have vacated office.*

(2) In convening a meeting under Sub-section (1) and in the conduct of business at such meeting the procedure herein specified shall be followed, namely :

(a) no such meeting shall be convened except on a requisition signed by at least one-third of the members with a right to vote, along with a copy of the resolution proposed to be moved at the meeting;

[(b) the requisition shall be addressed to the Sub-divisional Officer;]

(c) [the Sub-divisional Officer] on receipt of such requisition shall fix the date, hour and place of such meetings and give notice of the same to all the members with a right to vote, alongwith a copy of the requisition and of the proposed resolution, at least seven clear days before the date so fixed;

[(d) the Sub-divisional Officer or when he is unable to attend any other Gazetted Officer not below the rank of a [Class-II Officer of the State Civil Service], authorised by him, shall preside over and conduct the proceedings of the meeting;]

(e) the voting at all such meetings shall be by secret ballot;

(f) no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Chairman or the Vice-Chairman shall be taken up for consideration at the meeting;

[(f-1) no such resolution shall be taken up for consideration [unless it has been proposed by one member and has been seconded by another member at the meeting;]]

[(f-2) after the resolution is taken up for consideration the member proposing the resolution may open the discussion thereon and other members may speak on the resolution in the order in which they are called upon by the Presiding Officer :

Provided that no member shall, unless so permitted by the Presiding Officer, have the right to speak more then once and if any member who is called upon does not speak he shall not be entitled, except by the permission of the Presiding Officer, to speak at a later stage of the discussion;

(f-3) where the Chairman or as the case may be, the Vice-Chairman, against whom the resolution has been tabled, is present, he shall be given an opportunity to speak by way of reply to the resolution and the discussion made at the meeting;

(f-4) the Presiding Officer may fix the time within which each member, including the Chairman and Vice-Chairman, shall conclude his speech;

(g) if the number of members present at the meeting is less than [a majority of two-thirds] of members having a right to vote the resolution shall stand annulled ; and

(h) if the resolution is passed at the meeting supported by [a majority of two-thirds] of members having a right to vote, [the Sub-divisional Officer] shall forward the resolution to the authority prescribed in pursuance of Sub-section (1).]

[(3) When a meeting has been held in pursuance of Sub-section (2) for recording want of confidence in the Chairman or Vice-Chairman, as the case may be, no fresh requisition for a meeting shall be maintainable-

(a) in eases falling under Clauses (g) and (h) of the said Sub-section or where the resolution is defeated after being considered at the meeting so held, before the expiry of one year from the date of such meeting; or

(b) where the notification calling for general election to the Samiti has already been published under or in pursuance of Sub-section (2) of Section 49.]

[(4) Without prejudice to the provisions of Sub-section (3) no requisition under Sub-section (2) shall be maintainable in the case at a Chairman or Vice-Chairman, as the case may be, before the expiry of [two years] from the date on which such Chairman or Vice-Chairman enters office :]

[Provided that all requisitions received under Sub-section (2) prior to the date of commencement of the Orissa Panchayat Samiti (Second Amendment) Act, 1993 on which no meeting for recording want of confidence has been held by the said date, shall stand abated.]"

Section-54-A deals with Revision and Review, which reads as follows:

*"**54A. Revision and review** - (1) The Government may, either suo motu or on an application from any person interested, call for and examine the record of a [* * *] Samiti in respect of any proceeding [(including any proceeding under Section 46-B)] or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the Government that any such decision or order should be modified, annulled or reversed or remitted for reconsideration, they may pass orders accordingly :*

Provided that the Government shall not pass any order prejudicial to any party unless such party has had an opportunity of making a representation.

(2) The Government may stay the execution of any such decision or order pending the exercise of their powers under Sub-section (1) in respect thereof.

(3) The Government may, suo motu at any time or on an application received from any person interested within ninety days of the passing of any order under Sub-

section (1) review any such order if it was passed by them under any mistake, whether of fact or of law, or in ignorance of any material fact. The provisions contained in the proviso to Sub-section (1) and in Subsection (2) shall apply in respect of any proceeding under this Sub-section as they apply to a proceeding under Sub-section (1).

(4) Every application preferred under Sub-section (11) or Sub-section (3) of this section shall be accompanied by a fee of fifteen rupees."

On perusal of the aforementioned provisions, it is made clear that the Chairman and Vice-Chairman shall be removed, if in the opinion of the Government the Chairman of Samiti willfully omits or refuses to carry out or, violates the provisions of the Act or any rules, bye-laws or orders, made or issued thereunder or abuses the powers vested in him and Government are satisfied that further continuance of such person in office would be detrimental to the interest of the Samiti they may, by order, published in the prescribed manner, remove such Chairman from office. No person removed from the office of Chairman, under this section shall for a period of four years from the date of the removal, be eligible to hold any of the said offices. But the present case does not come under the provisions contained under Section 40-A of the Act, rather, the petitioner, being an elected Chairman, is continuing the office. On requisition being sent along with the proposed resolution, signed by one third members with a right to vote, a special meeting has been convened to be held on 17.08.2021 at 11.00 A.M. in the Conference Hall of Bhapur Panchayat Samiti pursuant to notice dated 30.07.2021 vide Annexure-5 so as to pass a resolution supported by majority of two third members having a right to vote regarding want of confidence against the Chairman, the petitioner herein.

11. The provisions as envisaged under Section 46-B contains different parts. The procedure has been dealt with under Section 46-B(2) of the Act, which clearly specifies in convening a special meeting under Sub-section (1) and in the conduct of business at such meeting the procedure has been envisaged that no such meeting shall be convened except requisition signed by at least one third members with right to vote, along with copy of the resolution proposed to be moved at the meeting. Therefore, the provision is very clear that sending a requisition to convene a special meeting for which Section 46-B(2), one third member has to be signed having right to vote to send the requisition, along with a copy of the resolution proposed to be moved in the said meeting. The procedure envisaged under Section 46B(1) shall be followed where at a meeting of the Samiti specially convened in that

behalf a resolution is passed supported by a majority of two-third of the total number of members having a right to vote, recording want of confidence in the Chairman and the same should be read along with the provisions contained under Sub-sections 2(g) and 2(h), where it has been specifically mentioned if the member present at the meeting is less than a majority of two-thirds of members, having a right to vote, the resolution shall stand annulled and if the resolution passed at the meeting supported by a majority of two-thirds of members having a right to vote, the Sub-Divisional Officer shall forward the resolution to the authority prescribed in pursuance of Sub-section (1), which shall be done by such authority and in such manner as may be prescribed with effect from the date of such publication, the Chairman shall be deemed to have vacated the office.

12. The sequence of events, which have been narrated above, clearly indicate that a requisition was sent to draw no confidence motion against the petitioner duly signed by one-third of the members with right to vote in Annexure-1 dated 13.07.2021, along with a copy of the resolution proposed to be moved in the special meeting vide Annexure-2. The same has also been signed by one-third members, which may not be required for the purpose of Section 46-B(2)(a) of the Act, 1959. Thereby, the requirement of provisions contained under Section 46-B (2)(a) has been complied with by sending a requisition signed by at least one-third members with right to vote, along with copy of the resolution proposed to moved at the special meeting. On receipt of the same, the Sub-collector has acted upon on 14.07.2021 on the same calling upon the B.D.O., Bhapur to make verification of the genuineness of the signatures of the members with reference to first general meeting of the Samiti for the term in force within a period of three days. But the B.D.O. Bhapur on the very same day constituted a committee consisting of himself along with ABDO, AE & PA of the Block, verified signatures in the requisition with proposed resolution copy of no confidence motion and also the postal address of the members of the Samiti and communicated the same on 14.07.2021 to opposite party no.3. Since no action was taken thereon, the caveator, namely, Tofan Kumar Pradhan & seven others field W.P.(C) No. 21045 of 2021 seeking direction to act upon the requisition singed by one-third members with a right to vote along with copy of the proposed resolution. Consequentially, this Court sought for instruction on 27.07.2021 through the learned Addl. Government Advocate as to why no action has yet been taken in spite of receipt of requisition and copy of the resolution for no confidence motion against the petitioner. In response to the same, on 30.07.2021, the Sub-Collector issued the notice specially convening a meeting of the Samiti to pass a resolution of no confidence under Section 46-B of the Act,

1959 to be held on 17.08.2021 at 11 a.m. in the conference hall of the Panchayat Samiti office at Bhapur and said notice of no-confidence has been communicated to the petitioner as well as all the members enclosing the requisition sent by one-third members duly signed along with the proposed resolution.

13. In course of hearing, Mr. S.P. Misha, learned Senior Counsel appearing for the petitioner contended that notice under Annexure-5 dated 30.07.2021 cannot sustain as the petitioner has not been communicated the notice along with the requisition sent by one-third members as per the proposed resolution, thereby, it suffers from infirmity and seeks for quashing of the same. Since no counter affidavit has been filed, at the stage of admission, the matter is taken up for final disposal. This Court called upon Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State to obtain necessary instructions immediately due to urgency of the matter, as the no confidence motion has been fixed to today at 11 a.m. and whether the Sub-Collector has communicated the copy of the requisition duly signed by one–third members having right to vote along with proposed resolution. Mr. Lagnajit Rout, Sub-Collector, Nayagarh informed to the Addl. Government Advocate to appraise the Court that notice issued to the petitioner has been communicated with the requisition duly signed by one-third members with a right to vote along with proposed resolution not only to the petitioner alone but also to all other members of the Panchayat Samiti to participate in the specially convened meeting to be held on 17.08.2021. Thereby, the arguments advanced to this extent has no locus to stand, as the requirement of Section 46-B (2)(c) has been complied with.

14. The second limb of argument, which was advanced, that along with the requisition, the proposed resolution has to be signed by two-third members, is absolutely misconceived one, in view of the fact that the procedure for convening a special meeting under Sub-section (1) and in the conduct of business at such meeting the procedure has been envisaged under Sub-section (2) of Section 46-B. Sub-section 2(a) of Section 46-B clearly indicates that meeting shall be convened on a requisition signed by at least one-third of the members with a right to vote, along with a copy of the resolution proposed to be moved at the meeting. On the basis of the documents available on record, the requisition has been signed by one-third members i.e., 18 members and the same has been submitted along with a copy of the resolution proposed to be moved in the meeting. Meeting means, the specially convened meeting as provided under Sub-section (1) of Section 46-B of the Act. In the said meeting, the proposed resolution, which was to be moved, be passed supported by a majority of two-third of total members having right to vote recording want of confidence on the Chairman, the petitioner herein. That stage will come today, i.e. 17.08.2021 at 11

a.m. pursuant to notice issued under Annexure-5 dated 30.07.2021. As such, there are 32 members, who have right to vote, have appeared before this Court either by way of filing Caveat to this writ petition or by way of intervention raising objection to the writ petition, which has been filed challenging the notice of no confidence issued by the Sub-Collector in Annexure-5 dated 30.07.2021. Thereby, the arguments advanced that the proposed resolution is required to be singed by two-third members does not support the provisions of law as mentioned under Section 46-B(1) of the Act, 1959. Thereby, such argument cannot sustain.

15. Further contention was raised that the proposed resolution, as indicated in Annexure-2, was passed at the meeting held at Hanuman Temple of Bhapur, which was disowned by Jitendra Kumar Ransingh, acting as Vice-President, and Kartik Chandra Nayak, acting as president of the Hanuman Temple Bije at Sri Ram Vihar Bhapur Management Committee under Annexure-8 dated 30.07.2021. As such, there is no requirement of law to have a formal meeting at a particular place.

16. In ***Smt. Kanti Kumbar vs. State of Orissa,*** 2001 II OLR 44, this Court in paragraph-6 held as follows:

> *"6. The petitioner in this case has asserted that the requisition along with the proposed resolution was adopted at a meeting on 3.9.2000 without observing the due procedure laid down Under Section 46-B of the Act. This contention is without any substance. For submitting a requisition for holding a specially convened meeting for discussing about no-confidence motion, no formal meeting of the Panchayat Samiti is necessary. Section 46-B (2) (a) only requires that a special meeting for discussing about the no-confidence motion can be convened only on the basis of a requisition signed by at least one-third of the members with a right to vote and along with such requisition, a copy of the resolution proposed to be moved at such meeting is required to be sent. There is no requirement in the Act that before sending such a requisition, there has to be a formal meeting of the Panchayat Samiti. It is, of course, true that in the present case, the proposed resolution relating to no-confidence was also purported to have been adopted in a meeting held on 3.9.2000. Such a meeting of some of the members of the Panchayat Samiti does not have any statutory force and is not required to be held in a particular manner. It can be considered to be a convenient method for preparing requisition along with proposed resolution (the no-confidence motion). Therefore, even assuming that such a meeting had been held without following any procedure contemplated Under Section 46-B, the requisition on the basis of so-called resolution adopted in such meeting does not become illegal and on the basis of such requisition the meeting contemplated Under Section 46-B (1) could be legally convened by the prescribed authority if other conditions are fulfilled. In this context, it is also contended that no reason had been given in the proposed resolution for moving the no-confidence*

motion against the Chairperson. The provisions contained in Section 46-B of the Act do not require any particular reason to be given for sending a requisition for the purpose of considering a no-confidence motion. It is also not necessary that in the proposed resolution, the reasons for moving the no-confidence motion against the Chairman or the Vice-Chairman, as the case may be, should be indicated.

17. In ***Manaswini Baliarsingh*** (supra), the Division Bench of this Court in paragraph-7 held as follows:

"7. With reference to the aforesaid contention a query was made by this Court whether in the writ petition such a plea was taken or not. On perusal of the records and considering the admission made by Mr. P. Acharya, it reveals that no such pleading was advanced before the learned Single Judge. Therefore, there was no occasion on the part of the learned Single Judge to deal with such aspect. This Court therefore refrains from given any finding on that score because such contention was neither pleaded before the learned Single Judge nor done so in the present proceeding. It is further pleaded that the respondent-opposite party did not file any counter to the writ petition and, therefore, the learned Single Judge could not have proceeded with the matter in absence of any counter filed by the State justifying the Circular issued by the Government dated 30.09.2009. Even if no counter is filed since pure question of law was involved for interpretation and consideration, in absence of any counter filed, the learned Single Judge proceeded on the basis of the materials available on record and categorically stated that while issuing the impugned notification fixing the date of recording "No Confidence Motion" during Parliament session, the Sub- Collector had no scope to know about the date of session of the Parliament as by the said date the impugned notification vide Annexure-3 had been issued. Even otherwise, if the Parliament Session was continuing, 7th June, 2014 being the off day of the Lok Sabha, the Hon'ble Member of the Parliament, Mr. Pinaki Mishra attended the meeting and participated in the same. Therefore, no infirmity otherwise is evident in the impugned notification, Annexure-3 and the effect of the Circular, Annexure-1 cannot stand in the way if otherwise it has not affected the procedure itself. In this background, it can be concluded that by the time Annexure-3 was issued, the Parliament Summon, Annexure-2, had not been notified. Therefore, the Circular, Annexure-1, has no relevance to the present context. Accordingly the contention to this effect is nagatived."

18. In ***Sulochana Behera*** (Supra), this Court in paragraph-8, held as follows:

"8. Taking up the contentions raised by Mr. Acharya, learned Senior Counsel, one by one, it is seen that the first contention raised is that the meeting has to be convened on a requisition. There is no dispute that a requisition has been sent to the authority. It is further seen that the requisition has been signed by 1/3rd members, which is also not disputed in this case. The third contention is that the requisition should be annexed with a copy of the proposed resolution and the fourth contention that the requisition shall be addressed to the District Magistrate and the proposed resolution should be based on sound reasoning. As far as issuing the requisition for convening a meeting, the matter has already been set at rest by the judgment of this Court in the case of Bhagabat Sahoo Vs. Collector, Angul and others (supra). So there is

no need to answer that issue. The main question, that is the provision of Section 54 of the Act is ultra vires of Constitution. Learned Senior Counsel for the petitioner argues that Articles 243Q and 243T provide for constitution of Municipalities and Reservation of seats and, therefore, the petitioner being a candidate of the reserved category, her tenure should not be curtailed by a resolution of 2/3rd of the members. Firstly, it is noted that the vires of Section 54 of the Act has not been challenged in this writ petition. Even if the same is challenged, the matter has to be decided by a Division Bench and it cannot be decided by a single Bench of this Court. Thirdly, it seen nowhere in Articles 243-Q and 243-T of the Constitution of India that there is embargo for removal of a person who lost the confidence of the council. Moreover in the case of Padmini Nayak Vs. State of Orissa and others (supra), a Division Bench of this Court has already decided that Section 24 of the Odisha Grama Panchayat Act is not ultra vires of the Constitution. This rulling has been given based on the ratio decided by this Court in the case of Bhagabat Sahoo Vs. Collector, Angul and others (supra). Section 24 of the Odisha Grama Panchayat Act provides for removal of Sarpanch or Naib Sarpanch on loss of confidence of the Panchayat. Section 54 of the Act provides for vote of no confidence against a Chairperson or Vice Chairperson. Even though Section 54 of the Act and Section 24 of the Odisha Grama Panchayat Act are not pari material, they are in essence providing similar forum and provision for removal of the elected head of the institution because of no confidence motion of the members of the House, the Grama Panchayat or the Municipal Council. So this Court is of the opinion that the provision of Section 54 of the Act is not ultra vires of the Constitution."

19. In ***Jagadish Pradhan and Ors. V. Kapileswar Pradhan and Others,*** 64 (1987) CLT 359, in paragraph-7 this Court held that Section 46-B(2) of the Act, 1959 provides the procedure to be followed in passing the vote of no confidence by the members of the Panchayat Samiti. It does not provide for any proforma and, as such, the State Government did not consider that a form would be necessary for the requisition to be sent to Sub-Divisional Officer or for the proposed resolution along with such requisition or for the notice by the Sub-Divisional Officer in the absence of rules or form prescribed for the purpose, the requirement of Section 46-B(2) of the Act, 1959 will be satisfied, if they are substantially complied.

20. In ***Usha Bharati*** (supra*),* while considering the U.P. Kshettra Panchayats and Zilla Panchayats Act, 1961, which is *pari materia* to Panchayat Samiti Act, 1959, the apex Court clearly held that an elected representative can only stay in power so long as such person enjoys the support of majority of the elected members of the Zilla Parishad and in the present case at the time of election, the petitioner was the chosen person but at the time when motion of no confidence in the petitioner was passed she was not wanted.

21. The apex Court also referring to the judgment of the apex Court in ***Bhanumati v. State of U.P.*** (2010) 12 SCC, in paragraphs 43 and 44 held as follows:

*"**43.** Upon examination of the entire Scheme of the Seventy-third Amendment, in the context of framing of the Constitution of India, this Court in Bhanumati [(2010) 12 SCC 1] , observed as follows: (SCC p. 18, para 54)*

"54. The argument that as a result of the impugned amendment stability and dignity of the Panchayati Raj institutions has been undermined, is also not well founded. As a result of no-confidence motion the Chairperson of a panchayat loses his position as a Chairperson but he remains a member, and the continuance of panchayat as an institution is not affected in the least."

We are in respectful agreement with the aforesaid conclusion.

***44.** We reiterate the view earlier expressed by this Court in Bhanumati [(2010) 12 SCC 1] , wherein this Court observed as follows: (SCC p. 19, paras 57-58)*

"57. It has already been pointed out that the object and the reasons of Part IX are to lend status and dignity to Panchayati Raj institutions and to impart certainty, continuity and strength to them. The learned counsel for the appellant unfortunately, in his argument, missed the distinction between an individual and an institution. If a no-confidence motion is passed against the Chairperson of a panchayat, he/she ceases to be a Chairperson, but continues to be a member of the panchayat and the panchayat continues with a newly-elected Chairperson. Therefore, there is no institutional setback or impediment to the continuity or stability of the Panchayati Raj institutions.

58. These institutions must run on democratic principles. In democracy all persons heading public bodies can continue provided they enjoy the confidence of the persons who comprise such bodies. This is the essence of democratic republicanism. This explains why this provision of no-confidence motion was there in the Act of 1961 even prior to the Seventy-third Constitution Amendment and has been continued even thereafter. Similar provisions are there in different States in India."

22. So far as the declaration of ***Bhanumati*** mentioned supra, whether *per incurium* or not in paragraph-56 it has held as follows:

*"**56.** In the face of these findings, it would not be possible to accept the submission of Mr Bhushan that the judgment in Bhanumati [(2010) 12 SCC 1] is either per incuriam or requires reconsideration."*

23. On the cumulative effect of the judgments cited above, it can safely be concluded that the Samitis must run on democratic principles. In democracy, all persons heading public bodies can continue provided they enjoy the confidence on the persons who comprise such bodies. This is the essence of democratic republicanism. Thereby, if a majority of members, who have right to vote no confidence on present petitioner, and they have

sent a requisition duly signed by one third member with right to vote along with the proposed resolution to the Sub-Collector, who in response to the same cnvened a special meeting by issuing Annexure-5 dated 30.07.2021 enclosing the requisition as well as proposed resolution to have the meeting on 17.08.2021 at 11 a.m., no illegality or irregularity has been committed by issuing such notice so as to warrant interference of this Court in this present writ petition. Even otherwise also, in view of the provisions contained in Section 54-A of the Act, 1959, this writ petition may not be maintainable before this Court.

24. So far as the applicability of the judgment of this Court in ***Parbati Hembram*** (supra), relied upon by learned Senior Counsel appearing for the petitioner, which relates procedural irregularity committed for issuance of notice under Section 46-B(2)(c) of the Act, which requires seven days clear notice before the date has to be fixed and that has got no connection with the present issue. Thereby, the said case is distinguishable from the present one.

25. Considering both factual and legal aspects, as mentioned above, this Court is of the considered view that notice dated 30.07.2011 under Annexure-5 convening a special meeting for no confidence motion fixing 17.08.2021 at 11 a.m. in the conference hall of the Panchayat Samiti Office of Bhapur is in accordance with the provisions contained under Section 46B of the Act, 1959, which does not require interference of this Court. Accordingly, the writ petition merits no consideration and the same stands dismissed. There shall be no order as to costs.

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2021 (II) ILR - CUT- 809

DEBABRATA DASH, J.

R.S.A. NO.174 OF 2005

RAMA KRISHNA RATHO (SINCE DEAD) THROUGH HIS LRS. .....Appellants

.V.

P. UMA MAHESWAR RAO .....Respondent

ADVERSE POSSESION – Acquisition of title by way of adverse possession – Sustainability questioned – Held, mere long possession never matures with the claim of acquisition of title by way of

adverse possession unless all the ingredients remain fulfilled – Faced with these infirmities in the pleadings, the Courts below cannot be said to have committed any wrong in not framing the specific issue on that score – Even then, it is seen that the Courts below have not completely turned their eyes to such a case as placed from the side of the Defendant or deaf ears to the contention raised on the score by the Defendant – The evidence on the score has been discussed and that claim of the Defendant has been negated as to have not been so established through clear, cogent and acceptable evidence which is also seen to be free from the vice of perversity – Appeal stand dismissed. (Para-12)

For Appellants : Mr. S.S.Rao, Sr. Adv.
For Respondent : Mr. B.Baug and D.Tripathy

JUDGMENT Date of Hearing: 09.08.2021: Date of Judgment: 25.08.2021

DEBABRATA DASH, J.

1. The Appellant, by filing this Second Appeal, under Section 100 of the Civil Procedure Code (for short, 'the Code') has assailed the judgment dated 12.01.2005 followed by the decree passed by the learned Additional District Judge, Nabarangpur in Title Appeal No.25 of 2000 in the First Appeal filed under section 96 of the Code. By the same, the First Appeal having been dismissed, the Court below has confirmed the judgment and decree dated 29.04.2000 and 11.5.2000 respectively passed by the learned Civil Judge, Senior Division, Nabarangpur in Title Suit No.12 of 1996.

2. Be it stated here that the Appellant (Plaintiff) having died during pendency of this Appeal, his legal representatives have come to be substituted and are now pursuing the present Appeal against the Respondent (Defendant).

3. 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.

4. The Plaintiff has filed the Suit for declaration of his right, title and interest over the suit land with further prayer of recovery of possession.

It is his case that one Goria Kandha, a member of Scheduled Tribe community, was the erstwhile owner of suit land which stood recorded in his name in the record of right published in the year 1955 (Ext.2). It is stated that

after the death of said Goria, his son, namely, Somanath Kandha succeeded to his property and sold the suit land to one Arjuna Bhotra, a member of Scheduled Tribe Community in the year 1983 by registered sale deed (Ext.3). Said Arjuna obtained permission as required under the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956 (hereinafter called as "Regulation 2 of 1956'') under Ext.1 from the competent Authority (Ext.G) sold the said suit land to the Plaintiff by executing registered sale deed dated 26.08.1884.

According to the case of the Plaintiff, the Defendant has no manner of right, title and interest over the suit land and he being a purchaser of the land adjoining to the suit land which belonged to Rama Gouda, created disturbances in the possession of the suit land by the Plaintiff. The Defendant had purchased the said land adjoining the suit land by registered sale deed dated 10.02.1968 (Ext.A). The dispute with regard to possession over the land between the parties having taken place in the month of February, 1986. there arose a situation of breach of peace which ultimately led to initiation of a proceeding under section 145 of the Code of Criminal Procedure (in short, 'the Cr.P.C.'). The Executive Magistrate, in Misc. Case No.190 of 1986, made the inquiry as provided in Cr.P.C. The Plaintiff as well as the Defendant advanced the claim as to their respective possession over the suit land. The Executive Magistrate, in concluding the said proceeding by order dated 20.07.1992, declared the possession of the Defendant over the suit land.

The Plaintiff, being aggrieved by the said order of declaration of the possession as passed by the Executive Magistrate in that proceeding under section 145 Cr.P.C. had carried a revision to the Court of the learned Additional Sessions Judge, Jeypore. The Revisional Court, by order dated 25.08.19954, refused to interfere with the impugned order passed by the learned Executive Magistrate. The Plaintiff then filed the suit for declaration of his right, title and interest over the suit land in claiming his right to possess the suit land as such. Given further detail in the plaint, the Plaintiff has stated that the Defendant claimed that he has purchased the suit land with other lands from Rama Gouda and three others since 10.02.1968 as under Khata No.321, Plot No.112 measuring an area of Ac.2.88 cents as per the description and boundary given by him which is false and those aspects have not been properly delved into by the Executive Magistrate in deciding as to which of the party is in possession of the suit land either on the date of

preliminary order or within two months next before the same and therefore the order as to declaration of the possession as passed is questioned as to be not in order. So, the Plaintiff asserts that such possession of the Defendant is unauthorized and the Plaintiff when has the title and is the rightful owner of the suit land, is entitled to possess the same.

5. The Defendant, in his written statement, while traversing the plaint averments, has asserted that the Plaintiff's claim about the purchase of the land under Plot No.110, Khata no.181 by registered sale deed from one Goria Kandha by registered sale deed is false. It is stated that the possession over the suit land has been rightly declared by the Executive Magistrate in the proceeding under section 145 Cr.P.C. in the Misc. Case No.190 of 1986. It is his case that he purchased the suit land along with the land under Plot No.112 pertaining to Khata No.321 in Mouza Nabarangpur from that Rama Gouda son of Baraja Gouda, Keshaba Gouda son of Rama Gouda, Harish Chandra Gound son of Keshaba Gouda and Kailash Goud by registered sale deed dated 10.02.1968. It is asserted that said vendors had delivered the possession of the lands under Khata Nos.110 and 112 to him on said date of sale, i.e, 10.02.1968. It is stated that since then he is in possession of the suit land all along by raising crops thereon. It is his case that the possession of the land was delivered to him strictly in accordance with and as per the boundaries stated in the sale deed; however, due to ignorance, there had been an omission to mention/indicate Plot No.110 in the said sale deed. According to the Defendant, there was no person in the name of Goria Kandha and he was never in possession of the suit land prior to the sale as stated by the Plaintiff. Rather the suit land was possession of Rama Gouda and others, i.e, his vendors. It is his case that the Plaintiff has created the document in the name of that Arjuna Bhotra and taking advantage of the entry in the record of right, permission for sale of the land being applied for and granted; he has obtained the deed in his favour. Arjuan is said to be a resident of Village-Mahul Padar. It is stated that he had never been in possession of the suit land.

The Defendant claims to have purchased the land in the year 1968 and possessed the same according to the boundaries, i.e, East-Road, West-Dongor of Govinda Brahma, North-Top of Trinath Gantayat and Sout-Dongor of Majhia Kandha. It is stated that he is the absolute owner and in rightful possession of the suit land as such. Alternatively, he having been in open, peaceful, continuous and uninterrupted possession for much more than required period, he also asserted to have perfected title by adverse possession. With all these above, the Defendant prayed for non-suiting the Plaintiff.

6. The Trial Court, on the above rival pleadings framed in total eight (8) issues. As it appears, the crucial issues are Issue No.3 and 5, which concern with the Plaintiff's claim as to purchase of the suit land from Arjuna by registered sale deed dated 24.08.1984 and his right, title and interest over the suit land. Both the issues having been answered by the Trial Court in favour of the Plaintiff, the suit stood decreed granting all the reliefs as prayed for to the Plaintiff.

7. The first Appellate Court has held that the documents, i.e, Ext.C and E relied upon by the Defendant do not reveal that there was no person named Goria Kandha. It has also on detail analysis of evidence on record has recorded that the document (Ext.A) which is the basis of claim of the Defendant in claiming the right over the suit land does not cover the suit land. Delving upon the claim of adverse possession, the lower Appellate Court has recorded the answer that the Defendant has failed to establish the same through evidence in fulfilling the essential ingredients thereof.

Thus in the First Appeal, carried by the aggrieved Defendant, those answers recorded by the Trial Court again being reiterated, the judgment and decree passed by the Trial Court have been confirmed.

8. The present Second Appeal has been admitted on the following substantial questions of law:-

> "(A) Whether the finding of the courts below that the Plaintiff has proved his over title over the suit property is against the weight of evidence on record and the outcome of perverse appreciation of evidence; and
>
> (B) Whether the courts below, on the face of the rival pleadings, were called upon to frame any issue on the question of acquisition of title by adverse possession by the Defendant and accordingly, were under the obligation to render the decision and that the failure thereof has caused grave prejudice to the Defendants."

9. Heard Mr.S.S.Rao, Learned Counsel for the Appellants and Mr.B.Baug, Learned Counsel for the Respondent at length. Perused the judgments passed by the Courts below. Carefully gone through the oral as well as the documentary evidence let in by the Parties.

10. The concurrent finding of the Courts below that the Plaintiff has the title over the suit land and that the Defendant has failed to prove his claim of title in so far as the suit land is concerned are questioned here in this Appeal.

The Plaintiff has brought the suit after being unsuccessful in a proceeding under section 145 Cr.P.C. where the Defendant has been declared to be in possession of the suit property as on the date of the preliminary order and is possessing the suit land. In such a suit, as per the settled position of law, the Plaintiff has to establish his subsisting title first and upon said declaration, he becomes entitled to possess the same and the order of the Executive Magistrate declaring the possession would no more stand to hold the field in reality as in that event the decree passed in the Suit would have the superiority and sole recognition/acknowledgement in the eye of law.

Thus, here it is to be seen how far the Plaintiff's claim title over the suit land has been established. The Courts below made analysis of evidence and arrived at a conclusion on the score. The Plaintiff's case is that he has purchased the suit land by registered sale deed dated 26.08.1884 from one Arjuna Bhotra who had purchased the land from Somanath Kandha, the son of Goria Kandha. Then this Goria was the recorded owner of the suit land in the record of right of the year 1955, which has been admitted in evidence and marked as Ext.2. The sale deed executed by Somanath Kanda in favour of Arjuna Bhotra has been admitted in evidence and marked as Ext.3. The Courts below have concurrently found the sale deeds to have been duly proved. First one has been executed by that Somanath Kanda and his minor son being so represented by him as the father guardian. It finds mention therein that they being the son and grandson of Goria Kandha, the true owner, have inherited the same and as such being the rightful owners have sold the land to Arjuna Bhotra. Next, the sale deed executed by Arjuna Bhotra in favour of the Platintiff has been proved and marked as Ext.3. This registered deed of sale has come into existence after about sixteen (16) years and not so quickly so as to give rise to an adverse inference in mind in support of the involvement of the Plaintiff in that matter. The record of right standing in the name of Goria Kandha after the final purchase of the land by the Plaintiff has been mutated in his favour under Ext.4 which contains the land assigned with the very plot no.110.

It is not in dispute that said land is the land in suit and was also the subject matter of proceeding under section 145 Cr.P.C. where the parties lay their claim and counter claim. It is also not in dispute that the total land which stood recorded under three plots in the name of Goria Kandha under Ext.2 has come to be so recorded in the name of the Plaintiff. The purchase made by the Plaintiff is also with prior permission of the competent authority

as required under the provision of Regulation 2 of 1956 since his vendor was a member of Scheduled Tribe community. The permission letter is (Ext.1) and it is seen that the permission had been granted by the Officer on Special Duty, Nabarangpur, which has been duly accepted by the Sub-Registrar in acting thereupon in registering the sale deed in respect of the suit land in favour of the Plaintiff.

The Trial Court has made detail discussion as to the execution of both the sale deeds and their registration. The permission having been taken on 13.08.1984, the Vendor, Arjun Bhotra has sold the land to the Plaintiff on 24.08.1984 and there appears no such long gap between the two so as to infer/comment anything as to its effectiveness. When it has been stated in the letter of permission that the consideration for the purpose should not be less than Rs.10,840/-, the sale consideration for the transaction standing in favour of the Plaintiff is in conformity with the same.

11. Given a glance at the evidence with regard to the proof tendered from the side of the Defendant in establishing his competing claim over the suit land, it is seen that the Defendant has stated that there was no person named Goria Kandha and the preparation of record of right in his name in respect of the suit land is wholly erroneous. The Defendant's case is that he has purchased the property from one Rama Gouda in the year 1968 by registered sale deed (Ext.A). Interestingly, this Ext.A refers to plot no.112 under khata no.321. The suit land is under plot no.110. The Plaintiff has proved that this land under plot no.112 was recorded in the name of Rama Gouda, son of Bairagi as per the record of right of the year 1955 which is marked as Ext.10. The Defendant is not denying that he has not purchased the land under plot no.112. On the other hand, it is his case that the boundary given in respect of the land under plot no.112 is the boundary in respect of both plots, i.e, plot no.110 and plot no.112 taken as a compact block. Although it is said that Rama Gound was also the owner of the land under plot no.110, no document has been proved form the side of the Defendant to that effect. There is also no explanation of any sort that when the sale deed in favour of the Defendant contains plot no.112, how could this plot no.110 stood omitted and it is also not explained as to why no step on that account has ever been taken by the Defendant thereafter during the life time of his vendor or from his successors in interest. To say that the description of the boundary given in the said sale deed relates to plot no.110 and plot no.112 being taken together in compact block was not a mistake and then the reality, the evidence is wanting and that

could have only been established on proof of title of Rama Gouda over the suit land. It having been found that the very plot under plot no.110 was not recorded in the name of Rama Gouda and that is not a small piece of land; it is difficult to fathom for a moment that he had the alienable right over the said land and as such did so and the non-mention of that plot of land under plot no.110 was an inadvertent omission/mistake. It measures an area of Ac.2.710 decimals whereas the land under plot no.112 concerns with bigger area of Ac.2.880 decimals. Moreover, in the absence of proof of title of land in favour of that Rama Gouda over the land under plot no.110 even if the claim of omission of that plot in the said sale deed of the Defendant is accepted to be a bilateral one and a bona fide mistake and it is taken that the vendor had intended to sell and in fact sold and the vendees had intended to purchase and purchased; which finds expressed in the boundary; it makes no sense at all and its impermissible. Furthermore, said registered sale proved from the side of the Defendant and projected as the trumph card does not contain the recital as to record position as it stood then in respect of the land under plot no.110 which runs with no such explanation With such evidence on record, the Courts below having accepted the Plaintiff's case that the title over the suit land was resting with Goria Kandha in repelling the claim of competing title over the suit land as laid by the Defendant that it was Rama Gouda who was the title holder, this Court finds no reason/justification to tinker with the same.

12. Coming to the alternative plea of acquisition of title over the suit land by adverse possession taken by the Defendant; admittedly, the land under plot no.110 and plot no.112 adjoin one another. The settled position of law is that a person in order to establish his claim of acquisition of title over the land by adverse possession, has to deny the title of the true owner and claiming the ownership of said land unto himself must start to possess and continue as such openly, peacefully and continuously for more than the required/prescribed period. The most essential ingredient is the hostile animus that knowing it to be the land of another, the possessor staked his claim over the land as its owner and continued to so possess denying the title of the true owner all through and claiming to be having the ownership remained in possession as such. There is no legal strict bar to take an alternative plea of adverse possession. However, the alternative plea which wholly contradicts or in opposition to the main stand is not taken cognizance of as that is not permissible which is founded upon the strong common sense that one cannot breathe hot and cold at the same time. Here the Defendant

having not admitted the title of Goria Kandha or after him, his son Somanath Kandha and when the Courts now find that the property originally belong to Goria Kandha and it had come to the hands of Somanath Kandha and then to the hands of Arjun Bhotra, a question arises as to whose ownership the Defendant denied either in beginning to possess and so denying is continuing. The Defendant is silent as to whose ownership and possession he denied, first of all in the year 1968. So, even if the possession of the suit land by the Defendant is taken to be from the year 1968 onwards, the same is of no avail to say that he has perfected the title over the suit land by such possession, as the settled position of law stands that mere long possession never matures with the claim of acquisition of title by way of adverse possession unless all the ingredients remain fulfilled although in doing so. Faced with these infirmities in the pleadings, the Courts below cannot be said to have committed any wrong in not framing the specific issue on that score. Even then, it is seen that the Courts below have not completely turned their eyes to such a case as placed from the side of the Defendant or deaf ears to the contention raised on the score by the Defendant. The evidence on the score has been discussed and that claim of the Defendant has been negated as to have not been so established through clear, cogent and acceptable evidence which is also seen to be free from the vice of perversity. In view of all the aforesaid, the non-framing of any specific issue on that score pales into insignificance. Moreover, the Courts below having proceeded to answer the said contention by discussing the evidence, in the backdrop of the pleadings with which this Court does not find any fault; no prejudice appears to have been caused thereby to the Defendant so as to a remand of the matter on that score.

The aforesaid discussion and reasons thus provide answers to the substantial questions of law against the case of the Defendant (Appellant)

13. In the result, the Appeal stands dismissed. The Parties are directed to bear their respective cost throughout.

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2021 (II) ILR - CUT- 818

S. PUJAHARI, J.

CRLA NO 506 OF 2014

RAKESH KUMAR BARIK …….. Appellant

.V.

STATE OF ODISHA ……..Respondent

CRLA NO 695 OF 2014

BIJAYA KUMAR BARIK …….. Appellant

.V.

STATE OF ODISHA ……..Respondent

CRLA NO 416 OF 2014

SAMARESH BANERJEE ……..Appellant

.V.

STATE OF ODISHA ……..Respondent

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Provisions of section 42 – Whether mandatory – Held, while total non-Compliance with requirement of sub sections (1) & (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with section 42, [as held by the Hon'ble apex court in a constitutional bench in the case of KARNAIL SINGH vs. STATE OF HARYANA , reported in (2009) 8 SCC 539].

(Para-9)

Case Laws Relied on and Referred to :-

1. (2009) 8 SCC 539: Karnail Singh Vs. State of Haryana
2. 2018 SCC Online S.C. 974: Mohan Lal Vs. State of Punjab
3. 2019 SCC Online S.C. 170: Varinder Kumar Vs. . State of Himachal Pradesh

FOR CRLA NOS 506, 695 & 416 OF 2014

For Appellant : Mr. B.C. Ghadei, N. Panda,R.B. Mishra.

For Respondent: : Addl. Govt Adv.

JUDGMENT Date of Judgment: 20.07.2021

S. PUJAHARI, J.

1. All these three criminal appeals having arisen out of the common judgment and order passed by the learned Sessions Judge-cum-Special Judge, GanjamBerhampur in 2(a) C.C. No.7 of 2010 are taken up together for disposal by the common judgment to follow.

2. Vide the impugned judgment and order, the respective appellants in CRLA Nos.506 of 2014 and 695 of 2014 have been convicted under Section 20(b)(ii)(C) of the N.D.P.S. Act and sentenced to undergo R.I. for ten years and pay fine of Rs.1 lakh, in default, to further R.I. for two years each, and the seized vehicle owned by the appellant in CRLA No.416 of 2014 has been directed to be confiscated to the State. Hence, the appeals by the appellants.

3. Heard the respective learned counsel for the appellants and the learned Addl. Government Advocate appearing for the Respondent-State.

4. Prosecution case is that on 14.08.2010 at about 6.30 a.m. Sri Sarat Chandra Bhanja, the then S.I. of Excise, E.I. & E.B. (Sadar Division), Berhampur and staff while performing patrolling duty at Padarabali Chhak under Berhampur Sadar Police Station, detained one Indigo L.S. Car bearing registration No.W.B.-02S1711 coming towards Berhampur town. Suspecting transportation of 'Ganja' by the appellants – Bijay and Rakesh, who were occupants of the said car, the S.I. immediately sent a written intimation to his superior officer – Sri S.P. Gantayat, the then I.I.C., Excise and thereafter on following the required legal formalities, he conducted search inside the car, and recovered five number of jerry bag from the rear seat and three more jerry bags from the dickey of the car containing contraband articles, and on conducting preliminary test he came to know the contents to be 'Ganja'. On weighment he found the contents to be one quintal and sixty kilograms in toto. Thereafter, he effected seizure of the said articles, so also the Indigo car. He arrested the appellant – Bijay who was on the steering of the car and the co-occupant – Rakesh, and produced them along with the seized 'Ganja' before the Special Court and under the order of the Court the sample on being collected from the bulk 'Ganja' was sent to the SDTRL, Bhubaneswar under seal for chemical examination, and as per the report of the chemical examiner, the sample was confirmed to be 'Ganja'. On completion of investigation, the S.I. of Excise submitted the prosecution report against the appellants – Bijay and Rakesh.

As the above named appellants pleaded not guilty to the charge framed under Section 20(b)(ii)(C) of the N.D.P.S. Act, trial was held, in course of which the prosecution produced six witnesses and oral evidence vide Exts.1 to 9. The sample packets of the seized substance were also produced during the trial as M.Os.I to VIII. The appellants, however, did not choose to adduce any evidence in defence. On evaluating the evidence on

record, the learned Sessions Judge-cumSpecial Judge, Ganjam-Berhampur found both the said appellants guilty under Section 20(b)(ii)(C) of the NDPS Act and sentenced them, as stated earlier. The seized 'Ganja' as well as the Indigo L.S. car has been directed to be confiscated to the State. The appellants – Bijay and Rakesh are in appeal against their conviction and sentence while the appellant – Samaresh Banerjee has preferred the appeal as against the order of confiscation of the aforesaid car owned by him.

5. The impugned judgment and order are assailed mainly on the ground that there being no independent corroboration to the evidence of P.W.6, i.e., the S.I. of Excise, who conducted the search and seizure, the prosecution cannot be said to have proved its case beyond reasonable doubt. It is further submitted by the learned counsel for the appellants that the mandatory provisions under Sections 42 and 57 of the NDPS Act having not been duly complied with, the conviction is bad in law. They further pointed out that the same Excise Officer (P.W.6) who detected the incident having conducted the investigation, gross prejudice has been caused to the appellants, inasmuch as the investigation cannot be treated to have been fairly conducted.

6. The learned counsel appearing for the State on the other hand submits that the points raised by the appellants before this Court have already been duly dealt with by the learned trial Court, and the impugned judgment having been passed with award of minimum sentence against the accused-appellants after due scrutiny and evaluation of the materials on record, no interference therewith in appeal is called for. According to him, the prosecution has proved its case against the accused-appellants beyond reasonable doubt.

7. Independent corroboration is not a sine-qua-non for appreciation or acting upon the evidence of the official witnesses. In view of Section 134 of the Indian Evidence Act it is not the quantity, but the quality of the evidence which has to be weighed in while judging the veracity of a case upon trial. In the case at hand although the independent witnesses cited by the prosecution have turned hostile during the trial, the same ipso facto has not affected the efficacy or credibility of the evidence adduced by the prosecution through the official witnesses. The evidence of the P.W.6 has been corroborated by his official companion, namely, P.W.4 and the documents produced, and the evidence so adduced by the prosecution, as it appears, is clear, cogent and credible so as to bring home the charge to the accused-appellants.

8. According to the prosecution, the offence, i.e., transportation of 'Ganja' was detected by the P.W.6 while he was on patrolling duty at a public place. The P.W.6 has categorically deposed that while on patrolling at Padarabali Chhak on Berhampur-Digapahandi road, on suspicion he detained the vehicle in question which was coming from Digapahandi side towards Berhampur. He has further deposed that when he smelt 'Ganja' emitting from inside the vehicle, he intimated the said fact in writing vide Ext.7 to his superior officer, i.e., the Inspector, Excise and obtained his written order vide Ext.7/2 to take the follow up.

9. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that while Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 of the NDPS Act does not contain any such provisions, and as such while acting under Section 43, the empowered officer has the power of seizure and arrest in a public place. In the case of ***Karnail Singh vrs. State of Haryana***, reported in (2009) 8 SCC 539, the Constitution Bench of the Apex Court while answering a reference held as follows:-

> "35. In conclusion, what is to be noticed is that *Abdul Rashid* did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the gods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.
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> (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer . But in special circumstances involving emergent situations, the

> recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.
>
> (d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result n the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

10. Reverting to the case at hand, there was no prior information with the P.W.6 before his leaving office for the spot for the purpose of patrolling, regarding the illegal possession or transportation of the contraband substance, and as such, there was no occasion much less any necessity for him to comply with the provision under sub-section (2) of Section 42 of the NDPS Act. As stated by the P.W.6, the detection was made while the 'Ganja' was in transit in a public place. Hence, it was Section 43 of the NDPS Act which came into play. Be that as it may, it is also proved that at the spot the P.W.6 intimated the detection to his superior authority in writing and obtained the order of the latter. In the facts and circumstances, the contention of the appellants concerning Section 42 of the NDPS Act is not accepted.

11. Admittedly, the same officer, i.e., P.W.6 who detected the incident and set the law into motion also took up investigation. In the case of ***Mohan Lal vrs. State of Punjab***, reported in 2018 SCC Online S.C. 974 (decided on 16th August, 2018), the Apex Court held that in cases where the complainant and the Investigating Officer were the same, trials would be vitiated as this would deny the accused his right to a fair investigation. However, in the case of ***Varinder Kumar vrs. State of Himachal Pradesh***, reported in 2019 SCC Online S.C. 170 (decided on 11th February, 2019), the Apex Court clarified that the rule laid down in Mohan Lal's case would apply prospectively only.

While ruling so, the Apex Court in the case of Varinder Kumar (supra) stated as follows:-

> "18. The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it unidirectional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal (supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal (supra) shall continue to be governed by the individual facts of the case."

12. In the present case, there is nothing on record to show or suggest that the P.W.6 had any personal bias or grudge towards the appellants to bring them to book or put them behind the bar in any false prosecution. In course of the patrolling he detected the offence and took up investigation in course of his official performance with intimation to his superior officer. In the facts and circumstances, no prejudice can be said to have been occasioned to the appellants on account of the P.W.6 being the Investigating Officer.

13. The learned trial Court on appreciating the evidence in right perspective has convicted the appellants, namely, Rakesh Kumar Barik and Bijaya Kumar Barik for the offence under Section 20(b)(ii)(C) of the NDPS Act and awarded the minimum sentences.

14. As to the vehicle owned by the appellant – Samaresh Banerjee, the trial Court directed for confiscation of the same in view of the provision under sub-section (3) of Section 60 of the NDPS Act which reads as follows:-

> **"60. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation.-**
>
> (1) Xxxxx xxxxxx
>
> (2) Xxxxx xxxxxx
>
> (3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance (or controlled substance), or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

The appellant-owner had entered the witness box as prosecution witness no.3 during the trial and deposed, inter-alia, that his driver – Bijaya Kumar Barik had taken the vehicle on 13.08.2010 to one unknown destination without his knowledge and that he had tried to contact him over phone and that on the following day he lodged a report at Police Station. There is, however, on evidence on record to show lodging of any report by him with police. Otherwise also, absence of knowledge or connivance of the owner of the vehicle only is not sufficient. Besides the same, the owner of the vehicle must show that the vehicle in question was used for the aforesaid illegal purpose not only without his knowledge or connivance but also without the knowledge or connivance of his agent or person in charge, if any, of the vehicle to wriggle out from an order of confiscation. But, here in this case, it is seen that the driver of the vehicle who happens to be in charge of the vehicle, has also been convicted for commission of the offence using the vehicle in question. That apart, there is nothing on record much less at his instance to show that he had taken all reasonable precautions against misuse of the vehicles by the driver or anybody else. Hence, his challenge to the order of confiscation is found to be bereft of merit.

15. In the result, all the three criminal appeals stand dismissed with confirmation of the impugned judgment and order.

L.C.R. along with a copy of this judgment be sent back forthwith.

As the restrictions due to resurgence of COVID19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 825

BISWANATH RATH, J.

MACA NO. 848 OF 2019
WITH
MACA NO. 458 OF 2020

SABITRI PADHY & ANR. …….. Appellants
.V.
BHIMASEN MAHAL & ANR. ……..Respondents

MACA NO. 458 OF 2020
SENIOR DIVISIONAL MANAGER,
M/s NATIONAL INSURANCE COMPANY LTD. **……..** Appellants
.V.
SABITRI PADHY & ANR. ……..Respondents

MOTOR ACCIDENT CLAIM – Whether major and earning sons are entitled to claim the compensation? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2009(2) TAC 677 (SC): Sarala Verma & Ors. Vs. Delhi Transport Corporation & anr.
2. Civil Appeal Nos.242 & 243 of 2020: National Insurance Company Ltd. Vs. Birender & Ors.
3. 2018(4) TAC 345 (SC) : Magma General Insurance Company Ltd. Vs. Nanu Ram Alias Chuhru Ram and Ors.

MACA NO.848 OF 2019

For Appellants : Mr.D.C.Dey
For Respondents : M/s.A.Tripathy, M.Pagal & A.K.Behera (Respondent No.1)
Mr.S.K.Sarangi (Respondent No.2)

MACA NO. 458 OF 2020

For Appellants : M/s S.K. Sarangi,A.K. Nayak,I.C. Pradhan & S.K.Sarangi
For Respondents: M/s.D.C. Dey

JUDGMENT Date of Hearing & Judgment: 26.08.2021

BISWANATH RATH, J.

1. These are two Appeals; MACA No.848/19 is at the instance of the Claimants for enhancement of the award involved and MACA No.458/20 is at the instance of the Insurance Company challenging the quantum of compensation.

2. Background involving the case is that while the deceased was proceeding towards Purusottampur Market on the left side of the road by riding his bicycle at that time, the offending vehicle came from the side of Bhubaneswar towards Purusottampur at a breakneck speed driven in a rash and negligent manner suddenly dashed against the deceased from his back side resulting the deceased fell down on the road sustaining severe bleeding injury. He was immediately shifted to the Government Hospital, Nayagarh where he succumbed to his injuries. On the premises the deceased was 69 years of age and was getting pension at Rs.10,333/- per month, as he was working as a Jeep Driver in the Office of Executive Engineer (Agriculture CAD Division) at Malkanagiri, the Claimant-Wife and the son of the deceased filing the claim application claimed appropriate compensation.

3. On their appearance, the Owner filed Written Statement stating that there was no cause of action for the Claimants to file the claim case and the vehicle in question was since duly insured by the Insurance Company, for the Driver in possession of valid and effective driving licence, the Owner claimed that he was not liable to pay compensation, as it becomes the responsibility of the Insurance Company for the coverage of the insurance policy.

4. The Insurance Company on its appearance filed its objection denying the allegations, inter alia, contending that the Claimants are to prove their case by filing relevant documents. It further alleged that the offending vehicle was no way connected with the accident. Insurance Company contended that there is no contribution on the part of the Owner or the Insurance Company. A further plea is also taken by the Insurance Company that the Driver of the alleged offending vehicle was not holding a valid and affective driving licence at the time of alleged accident. On the above premises, the Insurance Company claimed that it is not liable to pay compensation, in the worst case it prayed for fixing liability on the Owner.

5. Based on the pleadings of the Parties, the Tribunal framed the following Issues :-

> "I. Whether the claim application is maintainable ?
>
> II. Whether due to rash and/or negligent driving of the driver of the offending vehicle bearing registration no.OR-25-B4277 the accident took place and in that accident the deceased, Jagannath Padhy succumbed to injuries ?

III. Whether the petitioners are entitled to get the compensation. If so, what would be the extent ?

IV. Whether both the Opposite Parties or either of them is/are liable to pay the compensation ? and

V. To what relief(s), if any, the petitioners are entitled to ?"

6. Based on the pleadings and the materials disclosed and submission advanced by the respective parties, the Tribunal ultimately finding the Issues in favour of the Claimants granted compensation of Rs.4,83,320/- with simple interest @ 6% per annum from the date of filing of the claim application, i.e., 25.4.2016 to be paid within two months. The Tribunal also directed that in the event of failure of payment within two months, the Claimants will be entitled to interest @ 12% per annum after completion of two months from the date of award till the payment is made. The Tribunal in disposal of the Claim Application also adopted the sharing distribution, as recorded therein.

7. The Claimants in MACA No.848/2019 in an attempt for enhancement of the award pleaded that even though the Tribunal has granted compensation looking to the income and age of the deceased, but however there has been no payment of compensation towards parential consortium to the child involved for losing his father.

8. Similarly the Insurance Company in MACA No.458/2020 advanced their submission on three grounds. Firstly, the deceased was already 69 years of age, which has not been taken into account by the Insurance Company and contended that there is grant of high compensation. Ground No.2 appears to be Claimant No.1 was in receipt of Rs.8000/- per month as family pension. It is thus contended that had the Tribunal taken into account this aspect, there would have been lesser compensation. Ground No.3 appears to be Claimant No.2 was since major at the time of accident, he was not entitled to any compensation.

Mr.S.Sarangi, learned counsel for the Insurance Company submitted that had the Tribunal taken into account the Claimant No.2 attaining majority, the family contribution aspect on account of the deceased's income would have been 50% rather than as assessed by the Tribunal at 2/3rd income of the deceased.

9. Considering the challenge to the common award involved herein by both the Parties, this Court first takes up the grounds of challenge by the Insurance Company. Reading the plea of the Insurance Company in the Tribunal and the statement made in Sub-Para 3 of the counter affidavit of the Insurance Company, this Court finds, the grounds raised herein so far as Ground Nos.2 & 3 have not been raised at all. It is in this view of the matter, this Court finds, for there is no foundation in the objection of the Insurance Company before the Tribunal, the Tribunal has not been provided with an opportunity to take decision on such issue, these are surprised grounds in the present Appeal, which cannot be entertained. So far as Ground No.1 is concerned involving the age of the deceased being 69 years at the time of accident, from the discussions on Issue Nos.III, IV & V, this Court here finds, based on the claim and counter claim on the age of the deceased by both the Parties, the Tribunal entering into threadbare discussion on the claim of both sides, referring to the decision of the Hon'ble apex Court in ***Sarala Verma & Ors. Vrs. Delhi Transport Corporation & another*** : 2009(2) TAC 677 (SC) has come to observe that minimum five multipliers can be applied and accordingly assessed the compensation taking into account five multipliers. In the circumstance and for the decision of the Tribunal having support of the decision of the Hon'ble apex Court, this Court finds, ground no.1 taken here is not sustainable in the eye of law. Even assuming that the Insurance Company contested the trial on the ground on the aspect of Claimant No.2's attaining majority, therefore, he is not entitled to any compensation, this Court from the decision of the Hon'ble apex Court in ***National Insurance Company Ltd. vrs. Birender & Ors.*** (Civil Appeal Nos.242 & 243 of 2020 disposed of on 13th January, 2020 discussing on the same issue, Hon'ble apex Court in paragraph-15 has come to hold as follows :-

> "15. It is thus settled by now that the legal representatives of the deceased have a right to apply for compensation. Having said that, it must necessarily follow that even the major married and earning sons of the deceased being legal representatives have a right to apply for compensation and it would be the bounden duty of the Tribunal to consider the application irrespective of the facts whether the concerned legal representative was fully dependant on the deceased and not to limit the claim towards conventional heads only. The evidence on record in the present case would suggest that the claimants were working as agricultural labourers on contract basis and were earning meager income between Rs.1,00,000/- and Rs.1,50,000/- per annum. In that sense, they were largely dependant on the earning of their mother and in fact, were staying with her, who met with an accident at the young age of 48 years."

For the legal position settled through the decision of the Hon'ble apex Court, the contention raised by Sri Sarangi, learned counsel for the Insurance Company indicated herein above has no substance. This Court, therefore, finds, there is no merit in MACA No.458/2020.

10. Now coming to the claim of the Claimants on the score of parential consortium, reading the entire judgment, this Court finds, there has been no grant of compensation on this head. Looking to the settled position of law on this aspect through the decision in ***Magma General Insurance Company Ltd. vrs. Nanu Ram alias Chuhru Ram & others*** : 2018(4)TAC 345 (SC), this Court finds, the Claimants are justified on the claim of parential consortium of Rs.40,000/- to Claimant No.2 at least and their such claim also gets support through the above decision of the Hon'ble apex Court.

11. For the support of the decision of the Hon'ble apex Court, this Court involving the Appeal by the Claimants modifies the award involved herein only with addition of payment Rs.40,000/- (rupees forty thousand) to Claimant No.2 towards parential consortium further also observing that Claimant No.2 shall also be entitled to interest as awarded by the Tribunal on such compensation from the date of application. This Court also clarifies that on the default interest aspect, the Claimants will be entitled to 6% interest from the date of application on the awarded amount as well as modified awarded amount. The whole entitlement be deposited within a period of one and half months and released accordingly in favour of the Claimants accordingly.

12. MACA No.458/2020 filed by the Insurance Company fails and MACA No.848/2019 filed by the Claimants succeeds partly. No cost.

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2021 (II) ILR - CUT- 829

BISWANATH RATH, J.

MACA NO. 334 OF 2020

THE DIVISIONAL MANAGER,
M/s ORIENTAL INSURANCE CO. LTD. …….. Appellant

.V.

GEETANJALI BHUTIA & ORS. ……..Respondents

MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal against the award by the insurance company – Materials show Insurance Company pleaded many things, but unfortunately there was no examination of a single witness, nor bringing any material particulars to disprove the claim of the claimants on any of the aspect – There is absolutely no attempt at the instance of the Insurance Company to dislodge the material support introduced by the claimants in the trial proceeding – Effect of – Held, in the above situation the only material available for consideration was, the pleadings of the respective parties and the evidence oral and material taken support by the claimants – However looking to the contribution aspect by the deceased towards family, there is requirement of reconsideration of the income aspect vis-à-vis contribution to the family by applying deduction of 1/3rd – Matter remanded for correct calculation. (Para 10)

Case Law Relied on and Referred to :-

1. 2017(4) T.A.C.673(S.C.): National Insurance Company Ltd. Vs. Pranay Sethi & Ors.

For Appellant : M/s. A.A. Khan, S.K. Mishra, S.K. Sahoo
For Respondents: Mr.T.Ch.Mohanty, Sr. Adv. & J. Mohanty.

JUDGMENT Date of Hearing: 03.08.2021 Date of Judgment: 17.08.2021

BISWANATH RATH, J.

1. This appeal is filed at the instance of the Oriental Insurance Company Ltd. challenging the judgment & award passed by the 1st Addl.Dist.Judge-cum-1st M.A.C.T., Cuttack in MAC No.596 of 2015.

2. Factual background involved in this case is that on 18.12.2013 at about 11 P.M. while the deceased was returning in the offending vehicle from Bhubaneswar to his village at Talcher, the driver of the said vehicle driving in rash and negligent manner suddenly dashed against a loaded truck from its backside, resulting the deceased sustained grievous injuries. Immediately after such accident the deceased was shifted to S.C.B. Medical College & Hospital, Cuttack in an ambulance for treatment, where he succumbed to injuries during course of treatment. The claimants have the specific case that the mishap took place due to rash and negligent driving of the driver of the offending vehicle. On the premises that the deceased was only 28 years age at the time of death and by profession was a contractor earning minimum Rs.30,000/- per month from his contractor profession, the claimants claimed

for appropriate compensation making both the Insurance Company involving the offending vehicle and the owner of the vehicle as Opposite Parties therein.

3. The owner i.e. the Opposite Party No.1 therein contested the proceeding by filing written statement, on the premises that the claimants have no cause of action against the Opposite Party No.1, the Opposite Party No.1 with an alternate plea submitted therein that even assuming that there is entitlement of compensation, but since the vehicle was insured under the Opposite Party No.2 therein i.e. the present appellant, there may be a direction for payment of compensation by the Insurance Company and the claim case should be dismissed against the owner. Similarly the present appellant being the Opposite Party No.2 therein contested the case by filing independent objection. The Insurance Company while denying the allegations made by the claimants contended that it is for the claimants to prove their case by filing relevant documents. It is also pleaded by the Insurance Company that there was no involvement of alleged offending vehicle in the accident. It is thus contended that there is no claim involving the policy relied on therein and thus the claim made by the claimants is not entertainable against the Insurance Company. The claim was also contested on the point of liability. Pleadings therein further disclose that even otherwise the driver of the alleged offending vehicle was not holding valid and effective driving license at the time of alleged accident and in alternate the Insurance Company also challenged the claim of compensation being at higher side.

4. On completion of pleadings the Tribunal framed the following issues:

I S S U E S

1. Whether the claim application in the present form is maintainable?

2. Whether due to rash and (or) negligent driving of the driver of the offending vehicle (Mahindra Bolero) bearing registration No.OR-19-K-2164 the accident took place and in that accident the deceased, Ajaya Kumar Bhutia, succumbed to injures?

3. Whether the petitioners are entitled to get the compensation. If so, what would be the extent?

4. Whether both the Opposite Parties and either of them are/is liable to pay the compensation? And

5. To what relief(s), if any, the petitioners are entitled to?

5. Parties to strengthen their case more particularly, the claimants examined two witnesses and exhibited Ext.1 to 11. The Opposite Party No.1 therein has neither produced any witnesses nor relied on any documents. The Opposite Party No.2, however, entered into cross-examination involving the claimant's witnesses. Basing on the pleadings and the submissions of the respective parties, the Tribunal attending to issue no.2 has come to hold that the deceased died on a vehicular accident caused due to rash and negligent driving of the driver of the offending vehicle bearing No.OR-19-K-2164 a Bolero. Similarly, answering on the issue nos.1, 3, 4 & 5 the Tribunal taking into account the pleadings and the material particulars as a whole and more particularly claim of the claimants since based on income tax returns for the assessment year 2010-2011 and 2011-12, came to observe that average income of the deceased after deduction of tax per annum comes to Rs.2,52,176/- adding thereto 40% towards future prospect, as the deceased was below 40 years, the Tribunal after entering into the contribution aspect involving the deceased family, came to observe that annual package towards compensation comes to Rs.2,64,785/-. Taking into consideration the age of the deceased the Tribunal applied 17 multipliers and further taking into consideration the compensation granted towards loss of estate, loss of consortium and funeral expenses, the Tribunal granted a further sum of Rs.70,000/- towards conventional heads namely loss of estate, loss of consortium and funeral expenses. The entitlement of compensation of Rs.45,01,345/-, therefore, comes to Rs.45,71,345/-. Further also while granting 6% interest on the compensation amount from the date of claim, the Tribunal also directed, failure of making payment within particular time, interest will be added 12% per annum. The Tribunal also fixed some modalities for release of the compensation.

6. Assailing the judgment impugned herein, Mr. Khan, learned counsel for the Appellant taking this Court to the grounds taken in the memorandum of appeal contested the judgment on several counts.

7. Mr. Khan, learned counsel for the Appellant submitted that for the claim of the claimants that the accident took place due to the sudden break used by the front running goods loaded trucks, liability of making payment of the compensation involving such accident should not have been fixed on the Insurance Company. Mr. Khan, learned counsel for the Appellant also claimed that even though the claimants claim that the deceased was a contractor and had filed income tax return of the assessment year 2010-11

and 2011-12, however, there was no filing of tax return to connect the accident, which took place on 18.12.2013. Mr. Khan, learned counsel for the Appellant thus challenged the judgment on the premises that there has been wrong consideration of the materials available on record. Mr. Khan, learned counsel for the Appellant, therefore, contended that for no filing of the income tax return of the assessment year 2012-13, there was absolutely no materials available disclosing the income of the deceased at the time of accident and there was even no production of bank details of the particular period. For some disclosures through the document at Ext.9 and unregistered documents, the Insurance Company contested the award on the premises that the document vide Ext.9 is manufactured to shoot the claim of the claimants. Mr. Khan, learned counsel for the Appellant also contested the award on the premises that the Tribunal should have considered 1/3rd deduction of the assessed income of the deceased under the heading of the personal expenditure. Therefore it went wrong in applying 1/4th deduction. For the involvement of a joint family business Mr. Khan, learned counsel for the Appellant also contended that none of the claimants would have been entitled to anything on the head of family expenditure for their share involving partnership business and therefore, deduction on this head in the minimum should have been 1/3rd .

8. Taking this Court to the decision of the Hon'ble apex Court in the case of ***National Insurance Company Limited*** versus ***Pranay Sethi and others*** as reported in **2017(4) T.A.C.673(S.C.).** Mr. Khan, learned counsel for the Appellant also challenged the award of 40% on the head of future prospect and in the process Mr. Khan, learned counsel for the Appellant requested this Court for interfering in the award and suitably modifying the compensation.

9. Mr. Mohanty, learned Senior Advocate appearing on behalf of the Respondents 1 to 3, on the other hand, referring to the pleadings already taken in the trial process and the evidence available on record both oral and material, while contesting the plea of the Insurance Company submitted that in fact the Insurance Company did not have any evidence oral or material to establish their case, as they have neither examined anybody nor produced any document to disprove the claim of the claimants. On the score of the Tribunal relying on the assessment of income tax of the assessment year 2010-11 & 2011-12, Mr. Mohanty, learned Senior Advocate for the Respondents 1 to 3 contended that there was at least some piece of materials to establish the

income of the deceased and for the material establishment through the documents prior to the accident, there is no illegality in assessing the compensation on the basis of assessment orders being produced. Taking this Court to the decision of the Hon'ble Apex Court in the case of **National Insurance Company Limited versus Pranay Sethi and others** as reported in 2017(4) T.A.C.673(S.C.). Mr. Mohanty, learned Senior Advocate appearing on behalf of the Respondent Nos.1 to 3 claimed that the award gets support through the said judgment requiring no interference therein. On the plea of the Insurance company on the basis of nonfiling of return for the assessment year 2012-13 Mr. Mohanty, learned Senior Advocate contended that since the accident took place on 18.12.2013, return, if any, for the assessment year 2012-13 could not be filed, as the same was to be filed only after March-2014 and therefore, there was no scope of filing return of the deceased for the assessment year 2012-13 considering the death of the deceased taken place on 18.12.2013. Mr. Mohanty, learned Senior Advocate seriously objected to the claim of the Appellant on the score of deduction and on the other hand referring to the cross appeal by the claimants Mr. Mohanty, learned Senior Advocate appearing on behalf of the Respondents 1 to 3 taking this Court to the plea taken therein and the decisions taken support therein, while requesting this Court to dismiss the appeal at the instance of the Insurance company prayed this Court for enhancement of the compensation.

10. Considering the rival contentions of the parties, this Court finds, the trial court basing on the pleadings of the parties framed the issues as indicated hereinabove in paragraph no.3. Looking to the observation made by trial court, this Court observes, even though the Insurance Company pleaded so many things, but unfortunately there is no examination of single witnesses, nor bringing any material particulars to disprove the claim of the claimants on any of the aspect. This Court again vetting through the cross examination process finds, there is absolutely no attempt at the instance of the Insurance Company to dislodge the material support introduced by the claimants in the trial proceeding. This Court, therefore, observes, in the above situation the only material available for consideration is, the pleadings of the respective parties and the evidence oral and material taken support by the claimants. Now coming to the challenge of the Insurance Company on the basis of orders being passed on the tax assessment of the year 2010-11 & 2011-12, this Court finds, for the accident taking place on 18.12.2013, these were the two returns available for consideration and have been rightly relied on,

besides this there cannot be any dispute also in taking into account the income of a businessman / contractor some time prior to the accident taken place. This Court, therefore, does not find any scope for interfering on the issue of income aspect involving the deceased. Similarly on the score of responsibility of the liability aspect involving the vehicle vis-à-vis the Insurance Company, this Court finds, the claimants here claimed that the accident caused due to the rash and negligent driving of the driver of the offending vehicle resulting death of the deceased, here even though the Insurance Company took a stand that the offending vehicle got into accident for the use of sudden break of the front goods loaded vehicle, there is in fact no attempt by the Insurance Company to establish their such claim. Therefore, there remains no foundation on the claim of the Insurance Company that the front vehicle becomes a reason of the accident involved herein. Now coming to the question of deduction towards self expenditure, for the involvement of the contribution to the family, this Court finds, there is material disclosures to establish that the deceased was one amongst the members of the partnership business, which undisputedly includes other family members. It is apparent that there is involvement of other family members in the partnership business and this Court, therefore, finds force in the submission of Mr. Khan, learned counsel for the Appellant that instead of adopting deduction of 1/4th from the income of the deceased under the heading of personal leaving expenditure, it should have been 1/3rd deduction of the same. This Court, therefore, finds, there is requirement of reconsideration of the income aspect vis-à-vis contribution to the family by applying deduction of 1/3rd from the contributing the expenditure of Rs.3,53,046/- even after taking 40% as future prospect. The submission so far grant of a sum of Rs.70,000/- on conventional head namely loss of estate, loss of consortium and funeral expenditure is concerned, this Court finds, grant of a sum of Rs.70,000/- on the above head is strictly in terms of the decision of the Hon'ble apex Court in the case of National Insurance Company Limited versus Pranay Sethi and others as reported in 2017(4) T.A.C.673(S.C.). It is, in this view of the matter, this Court partly allowing the present appeal, remits the matter to the 1st Addl. District Judge-cum-1st MACT, Cuttack to revisit the calculation aspect taking into account the deduction of 1/3rd from Rs.3,53,046/- and applying 17 multiplier. It is also open to the Tribunal to revisit on the interest aspect as well as the modality of releasing of the compensation amount and the entire exercise is directed to be completed within a period of one & half months from the date of communication of an authenticated copy of this judgment.

11. The Appeal succeeds to the extent indicated hereinabove. In view of the above, this Court finds, the cross-appeal needs no further order and is disposed of, accordingly.

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2021 (II) ILR - CUT- 836

S.K. SAHOO, J.

BLAPL NO. 8813 OF 2019

PRASAN KUMAR PATRA …….. Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Offences punishable under sections 467, 468, 471, 420, 406 r/w with section 120-(B) of the Indian Penal Code and section - 6 of Orissa Protection of Interest of Depositions (in Financial Establishment) Act, 2011 – Whether the change in definition of 'Deposit' is relevant in present case for grant of bail – Held, in my humble view, this change in definition of the term 'deposit' is no way relevant in this case as most of the deposits were accepted much prior to the Gazette notification dated 11.11.2016 of OPID Amendment Act, 2016 and it would be guided by the earlier definition of "deposit" under the OPID Act. (Para -8)

> Since the petitioner was the Managing Director of the company and the oral as well as documentary evidence available on record prima facie indicates that he along with his wife and others have collected huge amount of deposits in a pre-planned and organized manner in the name of providing developed plots to the depositors and then cheated them and misappropriated more than twelve crores of rupees and the money receipts, agreements etc. issued by the company were found to be fake and fabricated, the manner in which the offence has been committed and the innocent poor persons were cheated of their hard earned money, availability of documentary evidence relating to money trailing from the company's accounts to the accounts of the petitioner and his wife, absence of change in the circumstances after the rejection of the earlier bail applications and reasonable apprehension of tampering with the evidence, in the larger interest of public and State, I am not inclined to release the petitioner on bail.
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> (Para-10)

Case Law Relied on and Referred to :-

1. (2013) 2 Supreme Court Cases 435 : Udai Shankar Awasthi Vs. State of U.P.

For Petitioner : M/s. Ashwini Kumar Das, Sonali Das.
For Opp. Party : Mr. Bibekananda Bhuyan

ORDER Date of Order: 23.08.2021

S.K. SAHOO, J.

The petitioner Prasan Kumar Patra has approached this Court for the third time seeking for bail under section 439 of Code of Criminal Procedure in connection with E.O.W., Odisha, Bhubaneswar P.S. Case No.17 of 2018 corresponding to C.T. Case No.14 of 2018 pending on the file of Presiding Officer, Designated Court, O.P.I.D. Act, Cuttack for offences punishable under sections 467, 468, 471, 420, 406 read with section 120-B of the Indian Penal Code and section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (hereafter 'O.P.I.D. Act').

2. On 30.07.2018 one Manoranjan Mishra of Kanan Vihar, Phase-II, P.S.- Chandrasekharpur, Bhubaneswar lodged the first information report before the Superintendent of Police, E.O.W., Odisha, Bhubaneswar alleging therein that during November 2012 after going through the advertisement of M/s. Z-Infra Construction Pvt. Ltd. (hereafter 'the company') about availability of plots under Jatani Tahasil near IIT relatively at a lower price in the Pragyan Vihar Project, he contacted the petitioner who was the Managing Director of the company at his office located at IRC Village, Nayapalli to purchase a plot measuring an area of 2400 sq. ft. in the project. The petitioner along with his officials showed the project site to the informant and assured him to give absolute right and title of the land after conversion and making boundary wall around the plot with approachable road to the plot. They also told the informant that the total project area has been purchased by them. The cost of the plot was Rs.3,60,000/- and they charged Rs.35,000/- for conversion of the land and Rs.60,000/- for constructing boundary wall around the plot. The informant paid an amount of Rs.10,000/- (rupees ten thousand only) on 11.08.2012 as booking amount and obtained a receipt from the company. It is the further case of the informant that on 05.11.2012 he paid another sum of Rs.3,50,000/- (rupees three lakh fifty thousand only) and obtained a receipt whereafter the petitioner registered the land on 06.11.2012 in favour of the informant by way of a registered sale deed. The land corresponds to Mouza- Kansapada, P.S.-Jatani, Khata No.76, Plot No.154, Sub Plot Nos.441 and 442, Area-Ac.0.055 dec. out of Ac.0.730 decimals. Thereafter, the informant paid a sum of Rs.95,000/- (rupees ninety five

thousand only) on different dates for conversion and boundary wall of the plot. It is the further case of the informant that though the registration of the plot was made in November 2012 but there was no approach road to the said plot and the petitioner and others of his company falsely told the informant that they have right and title over entire Pragyan Vihar Project. They had the knowledge that they were not having right, title over the area and in spite of that they had received the payment from the informant with an intention to deceive him and thus in spite of registration of the land in favour of the informant, the same served no purpose. It is stated that the petitioner and other officers of the company deceived the informant an amount of Rs.4,55,000/- on the basis of false and fabricated documents. It is stated that in spite of repeated approach by the informant to the petitioner and other officials of the company, they did not construct the boundary wall around the plot as promised even though they received the amount since last six years. It is further stated that the petitioner as the Managing Director and others have cheated about five hundred persons and misappropriated an amount of rupees twenty crores. In some cases, registration of a plot has been done but there is no approach road and in some cases, registration has not been made even though payment has been received and in some cases, a particular plot has been sold to number of persons creating problems in mutation of land. The accused persons after misappropriating the amount absconded by closing their office.

3. On the basis of such first information report, E.O.W., Odisha, Bhubaneswar P.S. Case No.17 of 2018 was registered under sections 420, 406, 467, 468, 471 read with section 120-B of the Indian Penal Code and section 6 of the O.P.I.D. Act against the petitioner and Soumendra Narayan Dalabehera, Chief General Manager and others.

During course of investigation, it was found that the company was registered under the Companies Act by ROC, Odisha, Cuttack on 07.05.2009 having registered office at Plot No.209, Saheed Nagar, Bhubaneswar. One Smt. Rasmita Patra was the Director and the petitioner who is her husband was the Managing Director of the Company. During November 2012, the company made wide publicity about the availability of plots near IIT under Jatani Tahasil in lower price. Being induced by the advertisement of the Company, the informant contacted the petitioner to purchase a plot in the project. The Directors of the Company along with their officials showed the project site to the informant and assured him to give absolute right and title

over the land after conversion and making boundary wall around the plot with approachable road. The informant paid Rs.4,55,000/- to the Company and the petitioner registered land on 06.11.2012 in favour of the informant knowing very well that the company had not purchased the land which was required for construction of approach road to the plot. It was found that in some cases, registration of a plot has been made even though there was no approach road, in some cases registration was not made even though payment had been received and in some cases, excess lands were sold in a plot to many persons creating problems in mutation of land. The petitioner and other accused persons absconded by closing their office after misappropriating the amount.

Investigation further revealed that in the similar fashion, the petitioner and others of the company cheated about six hundred persons and misappropriated an amount more than twelve crores. The documents/registers seized from the petitioner showed that the company had collected cash of Rs.12,27,31564/- from six hundred sixty two investors. The documents such as brochures, money receipts, sale deeds, agreement etc. were seized from the witnesses. The office of petitioner located at Nayapalli was searched and many incriminating documents, investors entry registers were seized. Investigation further revealed that the petitioner was sixty percent share holder in the company whereas his wife Smt. Rashmita Patra was forty percent share holder in the company.

It was also found during investigation that the company represented through the petitioner and Director Smt. Rasmita Patra with an intention to defraud the investors, collected more than rupees twelve crores from them in a pre-planned manner under false assurance to provide plotted land in Bhubaneswar area at a reasonable rate with boundary and approaching road under different schemes but subsequently cheated them by not providing the same as promised.

It was also found during investigation that petitioner as Managing Director of the company and others have collected huge amount from the prospective buyers and executed sale deeds of plots over which the company had no right, title, interest or possession. In some cases, they had not registered any plot in favour of the investors. In this process, the Directors of the company have defaulted to return the deposits and also failed to render service for which the deposits were made and as such the petitioner and other

Directors of the Company being responsible for the management of the affairs of the financial establishment were also liable for prosecution under section 6 of O.P.I.D. Act, 2011.

During course investigation, on scrutiny of bank account statements in favour of the company and its Directors, it was found that cash of Rs.8,42,10,203/- had been entered in the accounts of the petitioner and cash of Rs.6,66,748/- have been entered in the account of Rasmita Patra during this period. Cash of Rs.3,38,000/- had also been transferred from the company's account to the account of Rasmita Patra.

During investigation, it further revealed that the money receipts, agreements etc. issued by the company in favour of the investors were fake and fabricated and the same were prepared in order to cheat the investors. The petitioner along with others had collected more than rupees twelve crores from the informant as well as other investors.

The investigating officer came to hold that the company represented through the petitioner and others, with an intention to defraud the investors, collected crores of rupees from them in a pre-planned manner under the false assurance to provide plots with boundary wall and approachable road at Kansapada area at reasonable rate under different schemes but subsequently cheated them by not providing the same as promised. The petitioner and others connived with each other, created fake documents and issued fake agreement, money receipts to the investors by not giving them plot with boundary wall and approach road at Kansapada area.

The investigating officer found prima facie evidence against the petitioner and others under sections 467, 468, 471, 406 read with section 120-B of the Indian Penal Code and section 6 of the O.P.I.D. Act and accordingly, he submitted charge sheet on 29.11.2018 against them keeping further investigation open under section 173(8) of Cr.P.C. to trace out movable and immovable properties of the company so also its Directors and associates, for scrutinisation of the bank accounts, to ascertain the money trailing and to collect the certified copies of sale deeds pertaining to the landed property standing in the name of the company and its Directors and to examine many more witnesses.

4. The petitioner approached this Court first time in BLAPL No.439 of 2019 and vide order dated 06.03.2019, the prayer for bail was rejected on the ground that the petitioner was the Managing Director of the company and as prima facie it appeared that the petitioner along with his wife and others had collected huge amount of deposits in a pre-planned and organized manner in the name of providing developed plots to the depositors and then cheated them and misappropriated more than twelve crores of rupees and that the money receipts, agreements etc. issued by the company were found to be fake and fabricated during investigation. This Court also took into account the manner in which the offence has been committed, the nature and gravity of the accusation, the nature of supporting evidence, the severity of punishment in case of conviction, the manner in which the innocent poor persons were cheated of their hard earned money, availability of documentary evidence relating to money trailing from the company's accounts to the accounts of the petitioner and his wife, reasonable apprehension of tampering with the evidence and the fact that further investigation on some important aspects was under progress and accordingly, in the larger interest of public and State, rejected the bail application.

The petitioner again approached this Court in BLAPL No. 5727 of 2019 for interim bail on the ground of his ailment, but vide order dated 28.08.2019, after going through the medical documents as well as the reports produced, this Court held that there was no allegation of any negligence relating to the treatment of the petitioner. While rejecting the prayer for bail, this Court directed the Senior Superintendent of Circle Jail, Cuttack at Choudwar to take steps for treatment of the petitioner as was taken earlier in case any health complication is reported.

Challenging the aforesaid order dated 28.08.2019 passed by this Court in BLAPL No. 5727 of 2019, the petitioner moved the Hon'ble Supreme Court of India in Special Leave to Appeal (Crl.) No.9116 of 2019 but the same was dismissed as the petitioner withdrew the same with liberty to move this Court for regular bail.

Then the petitioner approached this Court for the third time in this application. During pendency of this application, the petitioner moved an interim application bearing I.A. No. 840 of 2020 for interim bail on the ground of attending the obsequies ceremony of his deceased mother and this Court vide order dated 14.09.2020, granted him interim bail for the period

from 15th September 2020 to 28th September 2020 with certain terms and conditions. When the matter came up on 11.12.2020, it was submitted on behalf of the petitioner that due to order of the Division Bench of this Court extending the interim orders at different times on account of the situation arising out of Covid-19 pandemic, the petitioner did not surrender on the date fixed. Since the petitioner did not surrender on the date fixed, this Court as per order dated 11.12.2020 called for a report from the trial Court as to what steps have been taken to arrest the petitioner. Challenging the said order dated 11.12.2020, the petitioner again moved the Hon'ble Supreme Court of India in Special Leave to Appeal (Crl.) No.1349 of 2021 and vide order dated 10.03.2021, while setting aside the portion of the order calling for the report from the learned trial Court regarding the steps taken for the arrest of the petitioner, disposed of the Special Leave Petition requesting this Court for early disposal of the bail application. However, the petitioner surrendered before the learned trial Court on 18.02.2021.

5. Mr. Ashwini Kumar Das, learned counsel appearing for the petitioner in his own inimitable elegant style contended that the petitioner was taken into judicial custody since 7th August 2018 and he is a victim of wrong implication of law as none of the alleged offences under the Indian Penal Code are made out against him. He further urged that the petitioner and his company do not come under the category of 'financial establishment' as per OPID Act but comes under real estate promoter category as per the Real Estate (Regulation and Development) Act, 2016 (hereafter 'RERA Act'). According to him, the informant and the witnesses do not come under the category of investors/depositors but they come under the category of allottees/purchasers as per RERA Act and the amount they have paid was towards the cost of land in the project of the petitioner and against such consideration amount, so far as the informant is concerned, sale deed was executed on 06.11.2012 and subsequently record of right was also issued in his favour. The payment made by the informant and others do not come under the category of 'deposit' as per the OPID Act. He laid down emphasis on the change of definition of 'deposit' as per the Odisha Protection of Interests of Depositors (in Financial Establishments) Amendment Act, 2016 (hereafter 'OPID Amendment Act, 2016') which was notified in the Odisha Gazette on 11.11.2016 that any credit given by a seller to a buyer on the sale of any property (whether movable or immovable) shall not be deemed to be deposit for the purpose of the clause 'chit' under the Chit Funds Act, 1982. He further argued that when there is a special and specific law as to how to

protect the interest of the allottee/purchaser and also the interest of the promoters and real estate brokers, a case under the Indian Penal Code or OPID Act is not maintainable and the Designated Court under the OPID Act lacks jurisdiction to try the case. Relying upon the different provisions of the OPID Act, he contended that the initiation of the proceeding against the petitioner as per the provisions of the OPID Act and the Indian Penal Code is bad in the eyes of law as the petitioner and his company comes under the category of promoter and deals with real estate project as per RERA Act. While concluding his argument, Mr. Das laid emphasis on the delayed trial of the petitioner as in spite of the fact that the charge was framed since 06.01.2020, only three witnesses out of sixty eight witnesses have been examined so far in the trial Court and he argued that since there is no chance of absconding of the petitioner or tampering with the evidence and the petitioner has not misutilised his liberty while on interim bail, his bail application deserves favourable consideration.

Mr. Bibekananda Bhuyan, learned Special Counsel appearing for the State of Odisha in OPID Act matters on the other hand vehemently opposed the prayer for bail and contended that almost identical contentions were raised earlier in the first bail application of the petitioner in BLAPL No.439 of 2019 which were dealt with by this Court and findings have been given and the petitioner has not challenged such order in the Hon'ble Supreme Court and thus such findings have attended its finality. Mr. Bhuyan further contended that the change of definition of 'deposit' is no way relevant in this case particularly when most of the deposits were accepted much prior to the Gazette notification dated 11.11.2016 and thus it would be guided by the earlier definition of 'deposit' under the OPID Act. He further argued that the delayed trial was not on account of any fault of the prosecution but the same was due to the situation arising out of COVID-19 pandemic when the examination of the witnesses could not be taken up in the trial Courts in the State of Odisha as per the orders of this Court issued from time to time and moreover the petitioner was released on interim bail on 15th September 2020 and he surrendered only on 18.02.2021. It was argued that there is no change in the circumstances after rejection of the first bail application on 06.03.2019 and the petitioner is a white-collar offender and crores of rupees have been cheated from the poor investors and the petitioner's key role in the commission of economic offence is prima facie apparent and there was deep rooted criminal conspiracy to cheat public with an eye on personal profit, large number of innocent depositors have been duped of their hard-earned

money and at this stage when important witnesses are yet to be examined in the trial Court, if the petitioner is enlarged on bail, there is every likelihood of tampering with the evidence and therefore, the bail application should be rejected.

6. Economic offences are always considered as grave offences as it affects the economy of the country as a whole and such offences having deep rooted conspiracy and involving huge loss of public fund are to be viewed seriously. Economic offences are committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. In such type of offences, while granting bail, the Court has to keep in mind, inter alia, the larger interest of public and State. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail applications.

Detailed examination of evidence and elaborate discussion on merits of the case should not be undertaken while adjudicating a bail application. The nature of accusation, the severity of punishment in case of conviction, the nature of supporting evidence, the criminal antecedents of the accused if any, reasonable apprehension of tampering with the witnesses, apprehension of threat to the witnesses, reasonable possibility of securing the presence of the accused at the time of trial and above all the larger interests of the public and State are required to be taken note of by the Court while granting bail.

There is no dispute that the first bail application of the petitioner in BLAPL No.439 of 2019 was rejected by this Court vide order dated 06.03.2019 and the petitioner has not approached the Hon'ble Supreme Court against such order. The second bail application of the petitioner in BLAPL No. 5727 of 2019 for interim bail was rejected by this Court vide order dated 28.08.2019 and though the petitioner challenged such order in the Hon'ble Supreme Court of India in Special Leave Petition but the same was dismissed as withdrawn and the petitioner was given liberty to move this Court for regular bail. It is the settled position of law that successive bail applications are permissible under the changed circumstances. The change of circumstances must be substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Without the change in the circumstances, the subsequent bail

application would be deemed to be seeking review of the earlier rejection order which is not permissible under criminal law. While entertaining such subsequent bail applications, the Court has a duty to consider the reasons and grounds on which the earlier bail application was rejected and what are the fresh grounds which persuade it warranting the evaluation and consideration of the bail application afresh and to take a view different from the one taken in the earlier application. There must be change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which the application for bail of an accused that has been rejected earlier can be reconsidered. If a bail application is rejected considering some grounds urged by the counsel for the accused and on the self same materials and without any change in the circumstances, the successive bail application is moved taking some other grounds and the Court is asked to reconsider the prayer of bail, it would be an endless exercise for the Court and entertaining such application would be a sheer wastage of valuable time of the Court.

7. It is seen that almost identical contentions were raised in BLAPL No.439 of 2019 except that the informant and the witnesses do not come under the category of investors/depositors but they come under the category of allottees/purchasers as per RERA Act. This Court held as follows:

> ".....Prior to the amendment made in the year 2016, the term 'deposit' as per section 2(b) of the O.P.I.D. Act meant the deposit of money either in one lump sum or by installments made with the Financial Establishment for a fixed period for interest or for return in any kind or for any service. After the amendment which came into force on 11.11.2016 as per Odisha Act 15 of 2016, the term 'deposit' as per section 2(b) of the O.P.I.D. Act included any receipt of money or acceptance of any valuable commodity, to be returned after a specified period or otherwise, either in cash or in kind or in the form of a specified service, by any Financial Establishment, with or without any benefit in the form of interest, bonus, profit or in any other form. The term 'deposit' excluded certain amounts from its purview which have been enumerated under clauses (i) to (vii) of section 2(b) of the O.P.I.D. Act.
>
> The term 'Financial Establishment' as appears in section 2(d) of the O.P.I.D. Act means an individual or an association of individual, a firm or a company registered under the Companies Act, 1956 carrying on the business of receiving deposits under any scheme or arrangement or in any other manner. This term excludes a corporation or a co-operative society owned or controlled by any State Government or the Central Government or a Banking Company as defined under clause (c) of section 5 of the Banking Regulation Act, 1949.

Since the company in this case was registered under the Companies Act by ROC, Odisha, Cuttack on 07.05.2009 and it was carrying on the business of receiving money from the public under Pragyan Vihar Project for providing developed plots to the investors and the terms and conditions of such business have been indicated in the brochure issued by the company, in my humble view, the company comes under 'Financial Establishment' as per section 2(d) of the O.P.I.D. Act. The money which was deposited with the company either in one lump sum or by installments was for getting developed plots as per the assurance given in the brochure. Therefore, such money paid to the company would come within the term 'deposit' as per section 2(b) of the O.P.I.D. Act.

Section 6 of the O.P.I.D. Act, inter alia, states that if any Financial Establishment fails to render service for which the deposit has been made then every person responsible for the management of the affairs of the Financial Establishment shall be punished with imprisonment and fine as provided under the said section and such Financial Establishment is also liable to pay fine. The fine amount of rupees 'one lakh' and 'two lakh' were enhanced to 'ten lakh' and 'one crore' respectively by virtue of the amendment which was made in the year 2016. Even though the deposits were received prior to the enactment of the O.P.I.D. Act, as the company failed to render service in providing developed plots to the depositors under Pragyan Vihar Project, after the O.P.I.D. Act came into force, non-rendering of service makes it a 'continuing offence'. According to the Blacks' Law Dictionary, Fifth Edition (Special Deluxe), 'continuing' means "enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences". A continuing offence is the type of crime which is committed over a span of time. It is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arise out of a failure to comply certain requirements and it continues until the requirements are obeyed or complied with. On every occasion the disobedience or non-compliance occurs and reoccurs, the offence is committed. It constitutes a fresh offence every time. In case of **Udai Shankar Awasthi -Vrs.- State of U.P. reported in (2013) 2 Supreme Court Cases 435**, Hon'ble Supreme Court held that in the case of a continuing offence, the ingredients of the offence continue, i.e. endure even after the period of consummation whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue.

So long as the Financial Establishment fails to render service for which the deposit has been accepted, it would be a continuing offence irrespective of the fact whether deposit was accepted prior to enactment of O.P.I.D. Act, if failure to render service continues after the Act came into force. In my humble view, the prima facie ingredients of offence under section 6 of the O.P.I.D. Act are attracted in the case. Therefore, the contention of the learned counsel for the petitioner that the registration of the F.I.R. and submission of charge sheet under section 6 of the O.P.I.D. Act was not proper and justified cannot be accepted."

8. The change in the definition of term 'deposit' as per the OPID Amendment Act, 2016 which was notified in the Odisha Gazette on 11.11.2016 on which the learned counsel for the petitioner has laid emphasis is Explanation II to clause (vii) of section 2(b). Clause (vii) of section 2(b) states that any amount received by way of subscriptions in receipt of a Chit shall not be included within the term 'deposit'. Explanation II to clause (vii) states that any credit given by a seller to a buyer on the sale of any property (whether movable or immovable) shall not be deemed to be deposit for the purposes of the clause (vii). The meaning of 'Chit' is adopted from its definition in clause (b) of section 2 of the Chit Funds Act, 1982 in Explanation I. In my humble view, this change in definition of the term 'deposit' is no way relevant in this case as it is rightly contended by Mr. Bhuyan that most of the deposits were accepted much prior to the Gazette notification dated 11.11.2016 of OPID Amendment Act, 2016 and thus it would be guided by the earlier definition of 'deposit' under the OPID Act. The definition of allottees/purchasers as per RERA Act would have no effect on the commission of offences in this case because of its commencement and continuity.

9. It is true that the right of speedy trial is a fundamental right under Article 21 of the Constitution of India and denial of this right corrode the public confidence in the justice delivery system and it is also not in dispute that the charge in this case was framed on 06.01.2020 and only three witnesses out of sixty eight witnesses have been examined so far in the trial Court, but it cannot be lost sight of the fact that the delayed trial was not on account of any fault of the prosecution but the same was due to the situation arising out of COVID-19 pandemic when the examination of witnesses could not be taken up in the trial Courts in the State of Odisha as per the orders of this Court issued from time to time. The petitioner was released on interim bail on 15th September 2020 and he surrendered only on 18.02.2021. It has been brought to my notice that the physical hearing has already commenced in the trial Courts and examination of witnesses are also being taken up and therefore, it is expected that the learned trial Court shall expedite the trial keeping in view the provision under section 309 of Cr.P.C.

10. In view of the foregoing discussions, since the petitioner was the Managing Director of the company and the oral as well as documentary evidence available on record prima facie indicates that he along with his wife and others have collected huge amount of deposits in a pre-planned and

organized manner in the name of providing developed plots to the depositors and then cheated them and misappropriated more than twelve crores of rupees and the money receipts, agreements etc. issued by the company were found to be fake and fabricated, the manner in which the offence has been committed and the innocent poor persons were cheated of their hard earned money, availability of documentary evidence relating to money trailing from the company's accounts to the accounts of the petitioner and his wife, absence of change in the circumstances after the rejection of the earlier bail applications and reasonable apprehension of tampering with the evidence, in the larger interest of public and State, I am not inclined to release the petitioner on bail. Accordingly, the bail application sans merit and hence stands rejected.

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2021 (II) ILR - CUT- 848

S.K. SAHOO, J.

JCRLA NO. 47 OF 2018

TUKUNA RAUTA …….. Appellant

.V.

STATE OF ODISHA ……..Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 9 – Test of Identification parade – Necessity of – Held, the necessity for holding an identification parade arises only when the accused are not previously known to the witness – The test is done to check upon their veracity of the witnesses and the main object of holding an identification parade during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to discard whether all or any of them could be cited as witnesses of the crime or not. (Para-9)

(B) TEST OF IDENTIFICATION PARADE – Inordinate delay – Effect of – Held, where there is an inordinate delay in holding a test identification parade, the Court must adopt a cautious approach so as to prevent miscarriage of justice – In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test of identification parade – Appeal is allowed. (Para-9)

Case Laws Relied on and Referred to :-

1. A.I.R. 2007 Supreme Court 676: Amitsingh Bhikamsing Thakur Vs. State of Maharashtra
2. (2003) 12 Supreme Court Cases 554: Lal Singh and others Vs. State of Uttar Pradesh

For Appellant : Mr. Arun Kumar Budhia, Amicus Curie

For Respondent: Mr. Sibani Sankar Pradhan, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 26.08.2021

S.K. SAHOO, J.

The appellant Tukuna Rauta along with co-accused Rabi Sahu @ Kali and Tukuna @ Narayan Bisoi faced trial in the Court of learned Sessions Judge, Ganjam, Berhampur in Sessions Trial No.81 of 2013 for offences punishable under sections 394/397/120-B of the Indian Penal Code.

The learned Trial Court vide impugned judgment and order dated 19.03.2018 though acquitted the co-accused Rabi Sahu @ Kali and Tukuna @ Narayan Bisoi of all the charges and also the appellant of the charge under section 120-B of the Indian Penal Code but found the appellant guilty under section 394 and 397 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of eight years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo rigorous imprisonment for six months more for the offence under section 397 of the Indian Penal Code and rigorous imprisonment for a period of four years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for three months more for the offence under section 394 of the Indian Penal Code and both the substantive sentences were directed to run concurrently.

2. The prosecution case as per the first information report lodged by L. Somesh Patra (P.W.4), in short, is that on 21.12.2007 at about 10.00 p.m. while he and K. Golla Babu (P.W.7) were coming from the side of Bada Bazar and going towards Railway Station in the Honda Activa vehicle of the informant bearing Registration No.OR-07K-7027 and P.W.7 was the pillion rider and he was sitting holding his attaché, on the way, in front of the State Bank of Hyderabad at Station Road, three unknown persons came from the front side in a motorcycle and dashed against the vehicle of the informant. Those three persons were of different stature and they were wearing winter

dresses and caps on their heads. Two of them got down from the motorcycle and abused the informant and P.W.7 in filthy language and attacked P.W.7 with the sword which they were holding and snatched away the attaché from P.W.7. It is the further prosecution case as per the first information report that P.W.7 was dealing with ghee business and he had come to Berhampur in connection with his business and was returning back with cash in the attaché. The informant (P.W.4) took P.W.7 to the hospital where he was treated.

On the report of the P.W.4, Gosaninuagaon P.S. Case No.52 dated 22.12.2007 was registered under sections 394 and 397 of the Indian Penal Code against three unknown persons.

3. P.W.14 Jyoti Ranjan Samantaray, the Officer in-charge of Gosaninuagaon police station after registration of the case, took up investigation and he seized one broken briefcase, one train ticket of East Coast Express from Berhampur to Mandapeta and one Pan Card of P.W.7. It was ascertained that cash of Rs.3,52,768/- was collected and in support of that, money receipts were also seized. The informant was examined while he was under treatment in a hospital at Rajmandri and the medical documents relating to the examination of the injured (P.W.7) were seized by the Investigating Officer. On 18.02.2008 cash of Rs.1,00,000/- was seized from one K. Rama Babu under the seizure list vide Ext.3/1 and on 20.02.2008, the appellant was arrested and cash of Rs.1,29,260/-, one finger ring, motorcycle were recovered from him and it was produced before the Investigating Officer and seized. On 30.03.2008, the Investigating Officer made a prayer for holding test identification parade in respect of the appellant, which was allowed and the test identification parade was conducted on 04.04.2008 and on 25.05.2005, P.W.14 handed over the charge of investigation to S.I. Manoranjan Mishra, who arrested the co-accused Tukuna @ Narayan Bisoi and on completion of investigation, charge sheet was submitted against the appellant as well as two co-accused persons, namely, Rabi Sahu @ Kali and Tukuna @ Narayan Bisoi under sections 394/397/120-B/34 of the Indian Penal Code and the case abated against the co-accused Santosh Patra @ Santosh Bijay Patra @ Spot on account of his death.

4. After submission of charge sheet, the case was committed to the Court of Session after observing necessary formalities where the appellant and the co-accused persons were charged under various offences as already indicated on 12.08.2013 and since they refuted the charges, pleaded not

guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. The defence plea of the appellant is one of denial and it is pleaded that he had been falsely implicated in the case.

6. During course of trial, in order to prove its case, the prosecution examined as many as fifteen witnesses.

P.W.1 Brundaban Padhi, P.W.2 Kashinath Sahu, P.W.3 Srinivas Patra, P.W.5 Sriram Badatia, P.W.6 Umashankar Patra, P.W.9 K. Ramababu and P.W.13 Subash Chandra Rout did not support the prosecution case for which they were declared hostile by the prosecution.

P.W.4 L. Somesh Patra is the informant of the case and he stated that on 21.12.2007 at about 10.00 p.m. he was going to Berhampur Railway Station from Bada Bazar along with P.W.7 in a Honda Activa vehicle when the occurrence in question took place near the State Bank of Hyderabad Station Road and three persons came in a motorbike and committed the crime. He further stated that on account of assault by the culprits, P.W.7 sustained injuries and he shifted P.W.7 to M.K.C.G. Medical College and Hospital, Berhampur for treatment.

P.W.7 K. Golla Babu is the injured and also the pillion rider of the Honda Activa vehicle. He stated that he knew the accused persons, namely, Tukuna Rauta (appellant), Rabi Sahu @ Kalia, who were standing in the dock and he also knew the other accused, namely, Tukuna @ Narayan Bisoi. He further stated that the appellant assaulted him on his right side head by means of a ‘kati’ for which he was shifted to M.K.C.G. Medical College and Hospital, Berhampur by P.W.4. He also took zima of cash of Rs.1,29,260/-, one gold ring, Hero Honda bike and money receipt under zimanama Ext.2.

P.W.8 S. Rajan Raju stated about P.W.7 taking zima of cash of Rs.1,29,260/-, one gold ring, Hero Honda bike and money receipt etc. under zimanama Ext.2.

P.W.10 Dr. Bijaya Kumar K. examined the injured (P.W.7) and proved the discharge certificate (Ext.4) and the case sheet of the patient maintained in hospital vide Ext.5.

P.W.11 Bailochan Das was the Assistant Jailor of Circle Jail, Berhampur and in his presence, test identification parade was conducted in respect of the appellant and he proved the test identification parade report (Ext.6).

P.W.12 Jagannath Mohanty was the A.S.I. of Police attached to Gosaninuagaon police station, Berhampur and he recorded the statement of the appellant in presence of P.W.14 and proved the same as Ext.7.

P.W.14 Jyoti Ranjan Samantaray was the Officer in-charge of Gosaninuagaon police station, who was the Investigating Officer of the case. He stated that after registration of the case, he took up investigation and on 25.05.2008 and on his transfer, he handed over the charge of the case to S.I. Manoranjan Mishra who on completion of investigation, submitted the charge sheet.

The prosecution exhibited eleven numbers of documents. Ext.1 is the F.I.R., Ext.2 is the zimanama, Ext.3/1, 8, 10 and 11 are the seizure lists, Ext.4 is the discharge certificate, Ext.5 is the case sheet of the patient maintained in hospital, Ext.6 is the T.I. Parade report, Ext.7 is the statement of accused recorded by I.O. and Ext.9 is the spot map.

7. The learned trial Court after analyzing the evidence on record has been pleased to hold that though number of persons were examined as occurrence witness like P.W.1, P.W.2, P.W.3, P.W.5, P.W.6, P.W.9 and P.W.13 but they did not support the prosecution case. It is further held that the prompt lodging of the F.I.R. itself guarantees the genuineness and authenticity of the allegation made therein about the robbery by using violence and thus qualifies the test of section 394 of the Indian Penal Code. After analyzing the evidence of P.W.7 so also P.W.11, who proved the test identification parade report (Ext.6), it is held by the learned trial Court that there is no reason to disbelieve the evidence of P.W.7 that he correctly identified the appellant as the perpetrator of the crime. The learned trial Court further held that in view of the illustration (a) of section 114 of the Evidence Act, a presumption has to be drawn against the appellant that he was in possession of the stolen cash after robbery and he could not account for such possession, which was recovered from the house of his aunt at his instance. The learned trial Court further discussed the evidence relating to the share of money of the appellant to be Rs.1,80,000/- and that he purchased motorcycle

and a gold ring and kept the balance amount with his aunt at Minabazar. It was further held that the prosecution has successfully established the charges under section 394 and 397 of the Indian Penal Code against the appellant but failed to establish the charge under section 120-B of the Indian Penal Code against him.

8. Mr. Arun Kumar Budhia, learned Amicus Curiae appearing for the appellant contended that from the evidence of the injured (P.W.7), it appears that the appellant was a known person to him and in spite of that the first information report, which was lodged by P.W.4 who was accompanying P.W.7 at the time of occurrence and also accompanied him to the hospital does not contain the name of the appellant and the same has been lodged against unknown persons which creates doubt about the participation of the appellant in the alleged crime. It is further contended that the appellant was arrested on 20.02.2008 and he was produced in Court on the next day i.e. on 21.02.2008 but the prayer for test identification parade was made only on 30.03.2008 which was conducted on 04.04.2008. No explanation has been offered by the prosecution for the delay in conducting test identification parade. There is no material on record that after the arrest of the appellant, he was produced in Court with his face covered to prevent others from noticing the same and thus, the test identification parade loses its sanctity. He further submitted that there is no clinching material that the gold ring and the motorcycle, which were seized from the appellant were purchased out of the stolen cash and though some cash was also seized from the appellant but since it is not an identifiable property, it can be said that the prosecution has successfully established its case against the appellant beyond all reasonable doubt.

Learned counsel for the State, on the other hand, placed the impugned judgment and supported the same.

9. Adverting to the contentions raised by the learned counsel for the respective parties, it appears that P.W.4 and P.W.7 are the star witnesses on behalf of the prosecution. P.W.4 is the informant, who has stated that on 21.12.2007 at about 10.00 p.m. he was going to Berhampur Railway Station from Bada Bazar with P.W.7 in a Honda Activa vehicle when the occurrence in question took place near the State Bank of Hyderabad Station Road where three persons coming in a motorbike committed the crime. He further stated that on account of assault by the culprits, P.W.7 sustained injuries and he

shifted P.W.7 to M.K.C.G. Medical College and Hospital, Berhampur for treatment and then lodged the report before police officials, who were present at M.K.C.G. Medical College and Hospital, Berhampur. P.W.7, on the other hand, while giving evidence stated that he knew the accused persons, namely, Tukuna Rauta (appellant), Rabi Sahu @ Kalia who were standing in the dock and he also knew the other accused, namely, Tukuna @ Narayan Bisoi. While giving his evidence, P.W.7 named the appellant and stated that he assaulted him on the right side of head by means of a 'kati'. If the injured (P.W.7) was aware about the name of the appellant prior to the occurrence and according to the prosecution case, the appellant committed the crime, then in ordinary course, he would have disclosed the name of the appellant before P.W.4 (the informant), in the event of which the name of the appellant would have been reflected in the first information report. The omission of the name of the appellant in the first information report affects the probabilities of the case and such omission is relevant under section 11 of the Evidence Act in judging the veracity of the prosecution case and rather presupposes that the appellant was not a participant in the crime, which was committed on 21.12.2007 at 10.00 p.m. near the State Bank of Hyderabad Station Road.

The order sheet of the learned Magistrate indicates about the production of the appellant along with co-accused Rabi Sahu @ Kalia through escort party with documents like forwarding memo, memo of arrest, statement recorded under section 27 of the Evidence Act and on the prayer of the Investigating Officer, the appellant and the co-accused were remanded to judicial custody. Nothing has been mentioned as to in what condition the appellant was produced. There is no material on record that his face was kept under covers to conceal his identity. Law is well settled that in a case where the identity of the accused is to be ascertained through holding test identification parade after arrest of the accused, all precaution should be taken to keep the face of the accused under covers at the time of production in Court. Since the same has not been done, the possibility of others noticing the appellant in an uncovered face cannot be ruled out and in absence of such precaution, the evidentiary value of the test identification parade is diminished.

Even though the appellant was remanded to judicial custody since 21.02.2008 but the prayer for test identification parade was made only on 30.03.2008 which is more than a month after remand is made and no explanation is coming from the side of the prosecution as to why there was

inordinate delay on the part of the Investigating Officer in making prayer for holding the test identification parade.

Law is well settled as held in case of **Amitsingh Bhikamsing Thakur -Vrs.- State of Maharashtra** reported in A.I.R. 2007 Supreme Court 676 that the necessity for holding an identification parade arises only when the accused are not previously known to the witnesses. The test is done to check upon their veracity of the witnesses and the main object of holding an identification parade during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to discard whether all or any of them could be cited as witnesses of the crime or not. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. the prosecution has to be cautious to ensure that there is no scope for making such allegation, however if the circumstances are beyond control and there is some delay, it cannot be fatal the prosecution.

In the case of **Lal Singh and others -Vrs.- State of Uttar Pradesh** reported in **(2003) 12 Supreme Court Cases 554**, the Hon'ble Court held that where there is an inordinate delay in holding a test identification parade, the Court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the Court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It depends upon the facts and circumstances of each case.

10. In the case in hand, it is apparent from the first information report that the offence was committed in a winter night and the culprits were wearing winter dresses and they had put on caps on their heads and the occurrence seems to have been over within a short time. The F.I.R. was lodged against unknown persons. In such a scenario, when the holding the test identification

parade got delayed and no explanation is forthcoming from the prosecution side, it seriously affects the identity aspect of the appellant.

Though one motorcycle and one gold ring have been seized from the possession of the appellant along with cash of Rs.1,29,260/- but since the money is not identifiable property and there are no material on record to show that the motorcycle and the finger ring were purchased from out of the stolen cash of P.W.7, no importance can be attached to the such recovery.

11. In view of the foregoing discussions, when the appellant being a known person to P.W.7, his name has not been reflected in the first information report, which is lodged against unknown persons and when no precaution to conceal the identity of the appellant is taken by the Investigating Officer when he was produced in Court from police custody and when the prosecution has not offered any satisfactory explanation about the delay in holding the test identification parade and when there is no material that the finger ring and motorcycle seized from the possession of the appellant were purchased out of the stolen cash, I am of the humble view that it cannot be said that prosecution has established its case beyond all reasonable doubt.

12. Accordingly, the Jail Criminal Appeal is allowed. The impugned judgment and order of conviction of the appellant under sections 394 and 397 of the Indian Penal Code and the sentence passed thereunder is hereby set aside and the appellant is acquitted of such charges. He shall be set at liberty forthwith, if his detention is not otherwise required in any other case.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Arun Kumar Budhia, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

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2021 (II) ILR - CUT- 857

K.R. MOHAPATRA, J.

W.P.(C) NO. 6458 OF 2020

M/s. SADGURU METALLIKS …….. Petitioner

.V.

TATA POWER WESTERN ODISHA DISTRIBUTION LTD., RAJGANGPUR ……Opp. Party

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of mandamus – Power of the High Court – Held, the power of High Court to issue a writ of mandamus is neither abridged nor crippled or clipped to issue a writ of mandamus requiring any person, corporation, authority to do a particular thing in accordance with law when it is discharges any public duty.

In this case the licensee discharging a public duty is amenable to Writ jurisdiction and a mandamus in exercise of jurisdiction under Article 226 of the constitution of India can be issued to it to act or perform in a lawful manner, when it failed to exercise its obligation under law – As such this Writ petition is maintainable. (Para-12.1)

(B) JUDICIAL REVIEW – When a word phrase, sentence, paragraph, clause or other provisions of a contract would otherwise be unenforceable, illegal, or void, the effect of that provision/clause will so far as possible be limited and read down so that it becomes in conformity with provisions of law – A constitutional court is not precluded from a judicial review and read down a clause of contract, which is otherwise contrary to the provisions of law and make it enforceable in conformity with law without setting aside or rescinding the contract itself. (Para-9)

Case Laws Relied on and Referred to :-

1. 2021 (2) OLR 152: Nirmal Chandra Panigrahi & Ors. Vs. State of Odisha & Ors.
2. (2012) 2 SCC 108 : Executive Engineer, Southern Electricity Supply Company of Odisha Limited (SOUTHCO) and another Vs. Sri Seetaram Rice Mill.
3. 1986 (II) SCC 679 : Comptroller and Auditor General of India, GIAN Prakash, New Delhi and another Vs. K.S. Jagannathan & Anr.
4. AIR 1996 SC 2054: B.V. Nagaraju Vs. M/S. Oriental insurance Co. Ltd., Divisional Office, Hassan.

For Petitioner : Mr. Sourya Sundar Das, Sr. Adv. & Miss Shalaka Das.

For Opp. Party : Mr. Prasanta Kumar Tripathy.

JUDGMENT Date of Judgment: 27.08.2021

K.R.MOHAPATRA, J.

1. The Petitioner, a Company incorporated under the Companies Act, 1956 (for convenience referred as 'the Consumer'), calls in question the legality and propriety of Letter No. WESCO 563 dated 17th December, 2019 (Annexure-1) issued by the Chief Operating Manager (Opposite Party No.2), WESCO Utility (now Tata Power Western Odisha Distribution Limited and for convenience referred as 'the Licensee'), *inter alia* refusing to accept the request of the Consumer to give benefit of Reduction in Contract Demand (for convenience referred as 'RCD') with effect from 1st December, 2015 and consequently rejecting the representation filed by the Consumer.

2. Short narration of facts relevant for proper adjudication of this case are stated thus:

2.1. The Consumer made an application to the Licensee on 26th November, 2015 for RCD from 5700 KVA to 3900 KVA (Annexure-2). The Superintending Engineer, Electrical Circle, Rourkela of the Licensee, vide its letter dated 22nd January, 2016 recommended RCD as requested. Though the contract demand was reduced but the said letter reducing the contract demand was communicated to the Consumer by ordinary post vide letter dated 19th May, 2016 (Annexure-3) in which along with other conditions, it was specifically mentioned that the Consumer has to execute an agreement with the Authorized Officer of the Licensee for RCD within a period of thirty days, failing which the permission granted will be cancelled. The said letter under Annexure-3 was not received by the Consumer. Consequently, the Licensee, vide its letter dated 18th July, 2016 (Annexure-4) conveyed the Consumer about cancellation of permission for reduction of the contract demand. Upon receipt of the said letter, the Consumer, vide its letter dated 25th July, 2016 (Annexure-5) conveyed the Licensee about non-receipt of the said letter and requested to execute the agreement. Said request was turned down by the Licensee, vide letter dated 2nd August, 2016 (Annexure-6) and the Consumer was requested to apply afresh for RCD. Subsequent request of the Consumer, vide letter dated 25th August, 2016 (Annexure-7) was also turned down by the Licensee in their letter dated 31st August, 2016 (Annexure-8) informing the Consumer to make fresh application for RCD.

2.2 Thus, the Consumer approached the Odisha Electricity Regulatory Commission (for convenience referred as 'OERC') and the Consumer has been advised to move the President of Grievance Redressal Forum (for short, 'GRF) under the provisions of OERC (Grievance Redressal Forum-Ombudsman) Regulations, 2004 (for convenience referred as 'Regulations, 2004'). On being moved, the GRF, vide its order dated 20th January, 2017 (Annexure-9) directed the Consumer to make fresh application for RCD before the competent authority of the Licensee. The Consumer being aggrieved moved the Ombudsman under the provisions of Regulations, 2004 in Consumer Representation Case No.OM (II) (W)-04 of 2017. Upon hearing the Consumer and the Licensee and on consideration of the materials on record, the Ombudsman by its order dated 27th February, 2017 (Annexure-10) passed the following order:-

"O R D E R / A W A R D

From the above findings and records submitted by both the parties, this Forum pronounces the following order:

1. *The Respondent is directed to allow reduction of contract demand from 5700KV to 3900KVA w.e.f. December 2015 and execute necessary agreement for the same.*

   The Respondent is directed to implement the above order within 15 days from the date of receipt of letter of acceptance from the Petitioner and file compliance to this Forum within 30 days.

   The case is disposed of and closed."

2.3 Being not satisfied, the Licensee moved this Court in W.P.(C) No.4550 of 2017 assailing the order under Annexure-10. Upon consideration of the submissions of learned counsel for the parties, the writ petition was disposed of vide order dated 15th May, 2017 (Annexure-11) with the following direction:-

"*Considering the contentions raised by learned counsel to the parties and after going through the records, it appears that in direction of the Ombudsman contained in the impugned judgment/award the application for reduction of contract demand has been allowed, but agreement has not been executed. The specific case of the petitioners is that though notice was issued, the same could not be served on opposite party no.2 due to change of its address, as a result of which the agreement could not be executed within the time stipulated by the Ombudsman. In order to sort out this problem, without entering into the merits of the case, this Court directs opposite party no.2 to appear before the petitioners on 18th May, 2017, on which*

date the Supply Engineer shall fix at date for execution of the agreement and also grant the benefit of reduction of contract demand and billing will be made accordingly.

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

2.4 Pursuant to direction of this Court under Annexure-11, the Consumer approached the Licensee for execution of the agreement. Although the agreement was executed on 19th May, 2017, but the Licensee did not adhere to the direction of the Ombudsman under Annexure-10. Hence, the Consumer filed Misc. Case No.9591 of 2017 in the disposed of writ petition for a direction to the Licensee for ante-dating the RCD in accordance with the provisions of Clause-71 of the OERC Distribution and Conditions of Supply Code, 2004 (for convenience referred as 'OERC Code') as well as the judgment/award passed by the Ombudsman. In course of hearing of the Misc. Case, learned counsel for the Consumer prayed for withdrawal of the Misc. Case to approach the appropriate forum ventilating its grievance in accordance with law and accordingly the Misc. Case was disposed of as withdrawn vide order dated 24th July, 2017 (Annexure-12). The Consumer, therefore, submitted representations before the competent authority of the Licensee-Opposite Party No.1. The same being not considered within a reasonable period, the Consumer had to move this Court again in W.P.(C) No.18879 of 2017, which was disposed of vide order dated 29th October, 2019 (Annexure-13) with a direction to Opposite Party No.1 to take a decision on the request of the Consumer-Petitioner within a period of one and half months from the date of the communication of the order along with copies of enclosures. Annexure-1 is the outcome of such direction of this Court in W.P.(C) No.18879 of 2017.

3. Mr. Das, learned Senior Advocate appearing on behalf of the Consumer-Petitioner, at the outset referred to Clauses-70 and 71 of the OERC Code, which are as follows:-

"70. *Decision on Consumer's application for reduction of contract demand shall be taken by the designated authority within ninety days of receipt of complete application. No application shall be rejected without recording reasons. The order on application shall be communicated to the Consumer by registered post.*

71. *When reduction of contract demand is permitted by the designated authority of the licensee the effective date of such reduction shall be reckoned from the first date of the month following the month in which the application, complete in all respects, was received by the Engineer."*

3.1 It is his submission that application for RCD complete in all respects was submitted on 26th November, 2015 (Annexure-2). On the basis of recommendation of Superintending Engineer, Electrical Circle, Rourkela vide letter No.165 dated 22nd January, 2016, the Chief Operating Officer of the Licensee allowed the application and communicated the said decision to the Petitioner on 19th May, 2016 (Annexure-3) reducing the contract demand. Since the said application was allowed by the designated authority, the effective date of RCD should have been reckoned from 1st December, 2015 as per Clause-71 of the OERC Code. He further submitted that Clause-70 of the OERC Code makes it obligatory on the designated authority of the Licensee to communicate the order of RCD to the Consumer by '*registered post*'. But, the same was communicated to the Consumer by ordinary post. However, the Consumer on enquiry came to know from the office of the Executive Engineer (Electrical), Rajgangpur- Opposite Party No.3 that permission for RCD has already been granted stipulating therein that '*the permission shall be valid for a period of thirty days from the date of issue of this letter. If the Consumer does not come forward….. and reduction of contract demand shall be treated cancelled.*' As the Consumer-Petitioner was not communicated with the said letter, it could not execute the agreement within the stipulated date. Thus, a request was made to the Licensee to execute the agreement. In spite of repeated requests of the Consumer, the Licensee did not come forward to execute the agreement. On the other hand, vide letter dated 31st August, 2016 (Annexure-8), it intimated the Consumer to apply for RCD afresh. Finding no other alternative, the Consumer approached the OERC on 21st September, 2016 under the provisions of OERC Regulations, 2004, but the GRF, vide its order dated 20th January, 2017, directed the Consumer to make fresh application for RCD before the competent authority. Being aggrieved, the Consumer moved the Ombudsman who directed the Licensee to allow RCD with effect from December, 2015 and execute necessary agreement for the same. Assailing the same, the Licensee moved this Court in W.P.(C) No.4550 of 2017. This Court, without interfering with the order of the Ombudsman, directed the Consumer to appear before the Licensee on 18th May, 2017 to fix a date for execution of the agreement. Ultimately, the agreement was executed only on 19th May, 2017. Taking advantage of the situation, the Licensee put a Clause in the said agreement to the effect that the effective date of RCD shall be the date of execution of the agreement as mutually agreed upon. Reacting to such illegality, the Consumer immediately made a representation to the Licensee to ante date the RCD to 1st December, 2015, but the same was not paid any

heed. Accordingly, the Consumer filed W.P.(C) No.18879 of 2017, which was disposed of on 29th October, 2019, directing the Licensee to dispose of the representation of the Petitioner. Consequently, impugned letter dated 17th December, 2019 (Annexure-1) was issued rejecting such representation.

4. It is his submission that the authority constituted under the Electricity Act are required to act in accordance with the provisions so laid down in the Act as well as the Rules and Regulations framed there under and not otherwise. Due to lapses of the Licensee, as aforesaid, the Consumer did not receive the letter under Annexure-3 in time. Moreover, the agreement for RCD under no circumstance can be made effective from a different date than provided under the OERC Code. The Ombudsman considering the same, directed to execute the agreement making it effective from December, 2015. As such, the impugned letter under Annexure-1 is not sustainable in the eyes of law and is liable to be set aside.

4.1 Mr. Das, learned Senior Advocate placed reliance upon the case laws reported in ***Nirmal Chandra Panigrahi and others Vs. State of Odisha and others***, reported in 2021 (2) OLR 152, wherein this Court in para-19 has held as under:-

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

Thus, this Court has ample jurisdiction to issue a direction to the Licensee to make the RCD effective from 1st December, 2015. Refuting the stand taken by the Licensee in their counter affidavit to the effect that the Consumer has an alternate remedy under Section 146 of the Electricity Act, 2003, it is submitted that the said provision stipulates punitive measure for non-compliance of the order by the authority but not to set an illegal act right by antedating the RCD. In support of his case, he relied upon a decision of the Hon'ble Supreme Court in the case of ***Executive Engineer, Southern Electricity Supply Company of Odisha Limited (SOUTHCO) and another Vs. Sri Seetaram Rice Mill***, reported in (2012) 2 SCC 108, in paragraph-80 of which it is held as under:-

> *"80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India*

> *where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the Civil Courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the Courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised."*
>
> (*emphasis supplied*)

He, therefore, prayed for allowing the writ petition by setting aside the letter under Annexure-1 and directing the Licensee to antedate the RCD to 1st December, 2015.

5. Mr. Tripathy, learned counsel for the Opposite Party-Licensee in his submission emphasized on the principles of estoppel by contending that when an agreement has been executed between the parties in which the parties have mutually agreed to make the RCD effective from 19th May, 2017, i.e., from the date of execution of such agreement, the Consumer cannot turn round and claim otherwise, until the agreement itself is set aside by a competent court of law.

5.1. It is his submission that the order of the Ombudsman was assailed by the Licensee before this Court in W.P.(C) No. 4550 of 2017 which was disposed of taking into consideration the rival contentions of the parties. Accordingly, this Court disposed of the writ petition directing the Consumer to appear before the Licensee on 18th May, 2017 and the Supply Engineer was directed to fix a date for execution of the agreement and also to grant the benefit of RCD. Thus, it is not correct to allege that this Court has not interfered with the order of the Ombudsman. Further, the Consumer had also filed an application for modification of the said order in Misc. Case No.9591 of 2017 seeking a direction to the Licensee to comply with provision of Clause-71 of the OERC Code. But, the said application was disposed of as withdrawn on 24th July, 2017 (Annexure-12). As such, this Court taking into

consideration the facts and circumstances of the case did not accede to the prayer of the Consumer to execute an agreement for RCD from a retrospective date. He further contended that the present situation arose because of the lapses at the end of the Consumer. The Consumer changed the place of its office without intimating the Licensee for which letter under Annexure-3 could not reach the Consumer in time. Thus, the Consumer has no *locus standi* to move this Court to claim a benefit which is lost due to latches on its part. It is further contended that the Consumer has an alternate and efficacious remedy under Section 146 of Electricity Act, 2003 (for convenience referred as 'the Act'). As such, the writ petition is not maintainable. Hence, Mr. Tripathy, learned counsel for the Licensee prayed for dismissal of the writ petition.

6. Taking into consideration the rival contentions of the parties, the following issues arise for consideration;

> *(i) Whether the Consumer is entitled to the benefit of RCD from 1st December, 2015?*
>
> *(ii) Whether the Consumer is estopped to claim benefit of RCD from a retrospective date, when the agreement was executed on 19th May, 2017 on the terms and conditions mutually agreed upon?*
>
> *(iii) Whether the writ petition is maintainable in view of availability of the alternate remedy?*

Issue No.(i):

7. Clause-71 of the OERC Code makes it clear that the RCD, if permitted by the designated authority of the Licensee, shall be reckoned from the 1st day of the month following the month in which the application, complete in all respect, was received by the Engineer. Admittedly, the application of the Consumer, complete in all respect was received by the Engineer on 26th November, 2015. Recommendation for RCD was made on 22nd January, 2016. Although Clause-70 mandates the designated authority to take a decision within 90 days from the date of receipt of complete application, the authority took almost 170 days in taking a decision in that regard. Further, Clause-70 mandates the designated authority to communicate the order on the application of the Consumer by registered post. But, in the instant case, the communication was made by ordinary post. Although a plea of change of place of office was taken by the Licensee, the same was rejected

by the Ombudsman and by judgment dated 27th February, 2017 (Annexure-10) the Ombudsman directed the Licensee to allow RCD from 5700 KVA to 3900 KVA with effect from 1st December, 2015 and execute necessary agreement for the same. The said order was assailed in W.P.(C) No. 4550 of 2017. But, this Court without entering into the merits of the case, directed the Consumer to appear before the Licensee on 18th May, 2017 to receive instruction with regard to execution of agreement. There is nothing in the order dated 15th May, 2017 passed in W.P.(C) No. 4550 of 2017 to assume that this Court had interfered with the order of the Ombudsman. On the other hand, this Court did not enter into the merits of the case of the Licensee and thereby refused to interfere with the direction of the Ombudsman. It is a fact that the Consumer had filed Misc. Case No.9591 of 2017 for a direction to the Licensee to comply with the Clause-71 of the OERC Code as well as to comply with the judgment and award dated 27th February, 2017 of the Ombudsman. However, in course of hearing, the Licensee prayed for withdrawal of the Misc. Case with a liberty to approach the Licensee for redressal of its grievances and this Court by order dated 24th April, 2017 (Annexure-12) disposed of the Misc. Case as withdrawn with the liberty as sought for. Accordingly, the Consumer filed a detailed representation before the Licensee to comply with the direction of the Ombudsman as well as of this Court and make the RCD effective from 1st December, 2015. Since it was not paid any heed, the Consumer approached this Court in W.P.(C) No. 18879 of 2017, which was disposed of on 29th October, 2019 (Annexure-13) directing the Licensee to take a decision on the request of the Consumer. However, the authority in their impugned letter under Annexure-1 intimated the Consumer that since the agreement was executed on 19th May, 2017 on the terms and conditions mutually agreed upon, the request to give a retrospective effect to the RCD would not be tenable and accordingly, rejected the petition.

8. Admittedly, the agreement to give effect to RCD was executed on 19th May, 2017 on the terms and conditions mutually agreed upon to give effect to the agreement from the date of execution, i.e., from 19th May, 2017. But Clause-70 of the OERC Code specifically provides that the RCD, if permitted by the designated authority of the Licensee, shall be effective from the 1st day of the month following the month in which the application, complete in all respects, was received by the Engineer. Since the application for RCD was made on 26th November, 2015, the RCD should have been made effective from 1st December, 2015. The Ombudsman under Annexure-10 has also

passed order in that light directing the Licensee to allow RCD with effect from December, 2015 (Annexure-10) and execute necessary agreement for the same.

9. In view of the provision of law, the RCD can only be made effective from 1st December, 2015 and not otherwise. The terms and conditions on mutual agreement cannot take away the effect of law. The Licensee being the creature of the statue has to act in accordance with the provision of law and not otherwise. When a word, phrase, sentence, paragraph, clause or other provisions of a contract would otherwise be unenforceable, illegal or void, the effect of that provision/clause will so far as possible be limited and read down so that it becomes in conformity with the provisions of law. A constitutional Court is not precluded from a judicial review and read down a clause of the contract, which is otherwise contrary to the provisions of law and make it enforceable in conformity with law without setting aside or rescinding the contract itself. The following observation of Hon'ble Supreme Court in the case of ***B.V. Nagaraju Vs. M/S. Oriental insurance Co. Ltd., Divisional Office, Hassan,*** reported in AIR 1996 SC 2054 is relevant for discussion, which runs thus:-

> *"7. ....In Skandia case [(1987) 2 SCC 654] this Court paved the way towards reading down the contractual clause by observing as follows: (SCC pp. 665-66, para 14)*
>
> *"... When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of 'reading down' the exclusion clause in the light of the 'main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose."*
>
> *(emphasis supplied)*

In the case at hand, the effective date of RCD as per the agreement dated 19th May, 2017 is not in conformity with law. As such, this Court is not precluded from reading down the said clause in order to give it a meaningful interpretation in conformity with law by directing the Licensee to make the RCD effective from a retrospective date, i.e., 1st December, 2015.

Issue No. (ii):

10. Law is well-settled that there is no estoppel against law. As discussed earlier, in the present case the law requires the RCD to be effective from 1st December, 2015. By executing an agreement on mutual terms or otherwise, providing a different date in the agreement which is not in conformity with law, cannot be accepted, more particularly when the Consumer raises an objection to the same. It is also submitted by learned counsel for the Consumer that due to the prolonged legal battle and continued loss of the Consumer, it was compelled to sign the agreement. However, immediately after signing the agreement, the Consumer had raised objection to the same and moved this Court. In that view of the matter, it cannot at all be held that upon signing the agreement on the mutually agreed terms and conditions, the Consumer is estopped to challenge the same.

Issue No. (iii):

11. It is submitted by Mr. Tripathy, learned counsel for the Licensee that the Consumer has an alternate statutory remedy under Section 146 of Electricity Act, for redressal of its grievances with regard to non-compliance of the order and direction of the Ombudsman and therefore the writ petition is not maintainable.

12. Section 146 of the Act, deals with plenary measure for non-compliance of the orders or directions. In the instant case, the prayer of the Consumer is not to impose punishment on the Licensee for non-compliance of the order of the Ombudsman. On the other hand, this writ petition has been filed seeking a direction to make the RCD effective from 1st December, 2015 and not from any subsequent date. The scope and ambit of Section 146 of the Electricity Act, does not empower the authorities under the said Act either to entertain or grant the prayer made in this writ petition. Further, the question raised in this writ application is a pure question of law. Thus, in view of the ratio in ***Sri Seetaram Rice Mill (supra)*** this Court has the power to adjudicate upon the prayer made by the Consumer-Petitioner in this writ petition. Hence, the objection with regard to availability of alternate remedy raised by Mr. Tripathy is not sustainable.

12.1 As held in the case of ***Nirmal Chandra Panigrahi (supra***), power of this Court to issue a writ of mandamus is neither abridged nor crippled or

clipped to issue a writ of mandamus requiring any person, Corporation, authority to do a particular thing in accordance with law, when it discharges any public duty. The Hon'ble Supreme Court in the case of ***Comptroller and Auditor General of India, GIAN Prakash, New Delhi and another –v- K.S. Jagannathan and another***, reported in 1986 (II) SCC 679, held as follows:

> *"20……. the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."*

In this case, the Licensee discharging a public duty is amenable to writ jurisdiction and a mandamus in exercise of jurisdiction under Article 226 of the Constitution of India can be issued to it to act or perform in a lawful manner, when it failed to exercise its obligation under law. As such, this writ petition is maintainable.

CONCLUSION

13. In view of the discussions made above, this Court has no hesitation to quash and set aside the letter dated 17th December, 2019 issued by the Licensee under Annexure-1.

14. Accordingly, the letter under Annexure-1 is set aside. The Licensee is directed to give effect to the RCD from 1st December, 2015 and communicate the same to the Consumer within a period of one month from the date of production of certified copy of this order.

15. The writ petition is allowed to the aforesaid extent, but in the facts and circumstances of the case, there shall be no order as to costs.

2021 (II) ILR - CUT- 869

S.K. PANIGRAHI, J.

BLAPL NO. 4447 OF 2021

JUGASAI BHATRA …….. Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Grant of regular bail – Principles to be borne in mind while deciding a petition for bail – Indicated.

> "(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail." (Para 5)

Case Laws Relied on and Referred to :-

1. (20100 14 SCC 496 : Prasanta Kumar Sarkar Vs. Ashis Chatterjee.
2. (1978) 1 SCC 118 : Gurcharan Singh Vs. State (Delhi Administration)
3. 1994 Supp (1) SCC 304 : B.N. Kavatakar Vs. State of Karnataka.
4. (2005) 13 SCC 422 : Abani K. Debnath Vs. State of Tripura.

For Petitioner : M/s. Basudev Mishra & B. Mishra.

For Opp. Party : Mr. Manoj Kumar Mohanty, Addl. Standing Counsel

JUDGMENT Date of Hearing: 30.07.2021 : Date of Judgment: 11.08.2021

S.K. PANIGRAHI, J.

1. The present petitioner, who is in custody, has filed the instant bail application under Section 439 of Cr.P.C. in connection with C.T. No.36 of 2020 arising out of G.R. Case No.476 of 2020 pending in the court of the learned Sessions Judge, Nabarangpur. The petitioner herein is the accused in connection with alleged commission of offence punishable under Section 302 of the I.P.C. Prior to the instant application, the petitioner also approached the learned Sessions Judge, Nabarangpur in C.T. No.36 of 2020 for grant of bail which was rejected on 19.04.2021.

2. Shorn of unnecessary details, the facts of the present case are that AFR on 03.06.2020, the deceased got into an altercation with the petitioner when the deceased went to ask for his wages. The altercation led to a heated fight and due to the sudden provocation, the petitioner pushed the deceased and dealt fist blows to him. The deceased was then taken to his home, where he stayed for the next five days. After suddenly experiencing pain in his chest on 08.06.2020, he was rushed to the DHH, Nabarangpur, but he succumbed to death enroute. Following his death, the niece of the deceased filed the FIR at Kodinga P.S. on 08.06.2020. Investigation commenced and the present petitioner was arrested for the alleged commission of offence under Section 302 of the I.P.C.

3. The learned Counsel for the petitioner contends that that the petitioner cannot be said to have committed an offence under Section 302 of IPC. The Court attention was drawn to the post mortem report which records that no injury was found on the body of the deceased. In fact, the deceased was an alcoholic due to which his liver was said to be found in a state of cirrhosis. It was also vehemently argued by the learned counsel for the petitioner that the act was done on account of sudden and grave provocation and no motive can be attributed to it. Moreover, there was a delay of five days between the date of the incident and his death during which time period the deceased was okay considering he or his family members had not thought of seeking any medical help.

4. Per contra, the learned counsel for the State vehemently opposed the release of the petitioner on bail on the ground of seriousness of the allegation.

5. The principles with regard to grant of bail are well settled, which have been reiterated by the Hon'ble Supreme Court in numerous pronouncements especially in **Prasanta Kumar Sarkar v. Ashis Chatterjee**[1] wherein it has been laid down the following principles which are to be borne in mind, while deciding petition for bail:

> "(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
>
> (ii) nature and gravity of the accusation;
>
> (iii) severity of the punishment in the event of conviction;

1. (2010) 14 SCC 496

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail."

6. Furthermore, the Hon'ble Supreme Court in **Gurcharan Singh v. State (Delhi Administration)**[2], has laid down the following criteria for grant of bail:

> "24. Section 439 (1) Cr.PC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1) there is no ban imposed under Section 439 (1) Cr PC against granting of bail by the High Court or the Court of session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so the High Court or the Court of session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439 (1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437 (1) and Section 439 (1) Cr PC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence, of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out".

7. Bearing in mind of these principles in law for the bail under Section 439 Cr.P.C., the materials on record require scrutiny. It is true that there is no hard and fast rule regarding the grant or refusal of regular bail. Each case has to be considered on the basis of the facts and circumstances of that case. Deprivation of freedom by refusal of bail is of course not for punitive purpose. Prima facie, in the present case, the petitioner had intended to cause death of the deceased except the injuries due to fall caused the strong push by the petitioner. The Hon'ble Supreme Court in both **B.N. Kavatakar v. State of Karnataka**[3] **and Abani K. Debnath v. State of Tripura**[4] has considered

2. (1978) 1 SCC 118 **3**. 1994 Supp (1) SCC 304 , **4**. (2005) 13 SCC 422

it relevant to take into account the intention to cause death coupled with a factual scenario wherein there is a lapse of time between the occurrence and the death of the deceased, albeit when posed with a different question. Further, from the perusal of the evidence, in the case on hand, it prima facie shows that there is no premeditation or pre-plan and the petitioner/accused has not taken undue advantage or acted in a cruel or unusual manner and the incident had happened in a heat of passion during a quarrel. Of course, things may change during the course of trial.

8. It is evident from the facts placed before this Court that the death was not instantaneous, rather the deceased died five days after the day of the occurrence. There is also no evidence on record to show that the petitioner had either intention or motive to commit an offence punishable under Section 302 of the I.P.C. This prima facie reveals that there is the remoteness of the injury being the cause of death considering the time lapsed in the meantime. However, the same is left open to be examined during trial.

9. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, it is held that the instant petitioner deserves to be enlarged on bail. Hence, this Court hereby directs that the petitioner be released on bail in connection with C.T. No.36 of 2020 arising out of G.R. Case No.476 of 2020 by the learned Court in seisin over the matter on such terms and conditions as deemed just and proper.

10. However, it is made clear that the observations made hereinabove are prima facie in nature and are restricted to the application under Section 439 of the Code of Criminal Procedure and shall not influence or be taken into consideration during trial.

11. The Bail Application is accordingly disposed of.

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2021 (II) ILR - CUT- 873

S.K. PANIGRAHI, J.

BLAPL NO. 3623 OF 2021

SAFI @ SOMANATH SAHU …….. Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Provision for bail – Personal liberty and freedom – Held, the freedom of an individual cannot be curtailed for indefinite period, especially when his/her guilt is yet to be proved – It has been further held that a person is believed to be innocent until found guilty – Such sentiments have been echoed in the following words: "A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty – However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences – Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception." Unfortunately, some of these basic principles appear to have been lost sight of as a result of which more and more persons are being incarcerated for longer periods – This does not do any good to our criminal jurisprudence or to our society." (Para 6)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Provision for bail and grant thereof – Discretion of the court – Exercise of – Held, Keeping in mind that the normal rule is of bail and not jail, the Courts must also keep in mind that apart from the above considerations, the Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime when considering the question of bail. (Para 6)

(C) INDIAN PENAL CODE, 1860 – Section 306 – Offence under – Grant of bail – Principles to be considered – Discussed.

(Para 7 to 13)

Case Laws Relied on and Referred to :-

1. (2018) 3 SCC 22 : Dataram Singh Vs. State of Uttar Pradesh.
2. (2012) 1 SCC 40 : Sanjay Chandra Vs. Central Bureau of Investigation.
3. 3 (2001) 9 SCC 618 : Ramesh Kumar Vs. State of Chhattisgarh.
4. MLJ CRL 240(2016) : Manikandan Vs. State.
5. Crl. O.P No. 8320/2014 : Rajamannar Vs. State Rep. by the Inspector of Police, Sewapet Police Station, Thirruvallur District.
6. ILR 2005(3) Kerala 646 : Cyriac Vs. The S.I. of Police.
7. (2017) 1 SCC 433 : Gurcharan Singh Vs. State of Punjab.
8. (1994) 1 SCC 73 : West Bengal Vs. Orilal Jaiswal.

For Petitioner : M/s. R.L. Patnaik, S.K. Panda, K. Panda, A.K. Jena, R.C.Patnaik & A. Biswal.
For Opp. Party : Mr. Manoj Kumar Mohanty, Addl. Standing Counsel.

JUDGMENT Date of Hearing:30.07.2021: Date of Judgment: 11.08.2021

S.K. PANIGRAHI, J.

1. The present petitioner, who is in custody, has filed the instant bail application under Section 439 of Cr.P.C. in connection with Chhendipada P.S. Case No.199 of 2020 corresponding to C.T. (S) Case No.11 of 2021 which is now pending before the learned District & Sessions Judge, Angul. The petitioner herein is the accused in connection with alleged commission of offence punishable under Section 306 of the I.P.C. Prior to the instant application, the petitioner also approached the learned Sessions Judge, Angul, vide Bail Application No.66 of 2021 which was rejected on 23.02.2021.

2. Shorn of unnecessary details, the facts of the present case are that one Artatrana Sahu lodged an FIR on 17.06.2020 at 5.00 P.M. before the Chhendipada P.S. stating that his daughter, namely Puspanjali (now deceased) had left her home on 14.06.2020 saying that she had to attend nature's call at a nearby river. However, unfortunately, she did not return. The complainant searched for his daughter in the vicinity as well as relatives houses but could not find her. On 17.06.2020 at 12 noon, the body of the deceased was found hanging from a tree on the said river bank. Pursuant to filing of the FIR, the Investigating Officer commenced investigation. The post mortem report revealed that the cause of death was asphyxia as a result of hanging and in the absence of any signs of force, sexual assault, the death was opined to be suicidal in nature. It was also noted that the *"whole body was distinctively decomposed"* to the extent that the body was covered with maggots, flies and larva. A chiffon dupatta belonging to the deceased was

used for the hanging which left a V shaped ligature mark around her neck. No other discernible marks or injuries were found on the body of the deceased. During the course of investigation, a phone was recovered which was belonging to the deceased from which it was found that three numbers were frequently contacted. The three numbers belonged to the present petitioner, one Sanjay Behera and one Sunil Dehury. It is relevant to note here that Sanjay Behera has been absconding since then and a non-bailable warrant has been issued against him. Acting purely on suspicion and in the light of uncovering of facts from a few people of the area, it was suspected that the petitioner and the deceased had probably shared a relationship. Thereafter, the present petitioner was arrested and forwarded to judicial custody on 06.07.2020 for allegedly abetting the suicide of the deceased.

3. The learned counsel for the petitioner contends that there is no *prima facie* case made out against the present petitioner. The petitioner is in no way directly connected to the offences and has been falsely implicated in the matter. It was also submitted that no incriminating material is available against the petitioner and, therefore, he should not be kept in custody. In the absence of any direct evidence to the contrary and keeping in mind that on the date of occurrence the petitioner was not present in the village, the petitioner is liable to be released on bail. It was also contended that charge-sheet has been submitted and there is no chance of the petitioner tampering with any evidence.

4. Per contra, the learned counsel for the State opposed the bail application and prayed for its rejection by contending that the petitioner is the prime accused who compelled the victim to commit suicide and exploited her by falsely assuring of their marriage.

5. Heard learned counsel for the parties. It becomes necessary, at this juncture, to examine the scope of bail in cases involving Section 306 of the I.P.C. Recently the Hon'ble Supreme Court in **Dataram Singh v. State of Uttar Pradesh**[1], held that the freedom of an individual cannot be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held in the aforesaid judgment that a person is believed to be innocent until found guilty. Such sentiments have been echoed in the following words:

1. (2018) 3 SCC 22

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception."

Unfortunately, some of these basic principles appear to have been lost sight of as a result of which more and more persons are being incarcerated for longer periods. This does not do any good to our criminal jurisprudence or to our society.

6. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by the Hon'ble Apex Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

"4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including

> *maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In ReInhuman Conditions in 1382 Prisons."*

Furthermore, the Hon'ble Apex Court in **Sanjay Chandra v. Central Bureau of Investigation**[2], has held as under:

> *"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."*

Keeping in mind that the normal rule is of bail and not jail, the Courts must also keep in mind that apart from the above considerations, the Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime when considering the question of bail.

7. The offence of abetment to suicide under Section 306 of IPC has twin essential ingredients: (i) a person commits suicide (ii) such suicide was abetted by the accused. This offence involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. To hold a person liable for abetting suicide, active role is required which can be described as instigating or aiding in doing thing.

2. (2012) 1 SCC 40

8. A person can be said to have abetted in doing of a thing, who "instigates" any person to do that thing. The word "instigate" is not defined in IPC. The meaning of the said word was considered by the Hon'ble Supreme Court in **Ramesh Kumar v. State of Chhattisgarh**[3], wherein Mr. R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

9. It is only where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide,"instigation" may be inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be established that:

> *(i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and*
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> *(ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above.*

10. In the background of this legal position, this Court may advert to the case at hand. There is no answer as to why suicides occur because it is impossible to ever fully comprehend or analyze what goes on inside a person's mind. Suicidal ideation and behaviors in human beings are complex and multifaceted. Human beings by their very intrinsic nature of being individualistic react and behave differently in different situations because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide.

3. (2001) 9 SCC 618

11. The Madras High Court in **Manikandan v. State**[4] relying on a judgment of the same High Court in **Rajamannar v. State Rep**. by the Inspector of Police, **Sewapet Police Station, Thirruvallur District**[5] observed that:

> *"If a lover commits suicide due to love failure, if a student commits suicide because of his poor performance in the examination, a client commits suicide because of his case is dismissed, the lady, examiner, lawyer respectively cannot be held to have abetted the commission of suicide. Sometimes, the decision to commit suicide might be taken by the victim himself/herself, unaccompanied by any act or instigation etc. on the part of the accused."*

12. Furthermore, the Kerala High Court in **Cyriac v. The S.I. of Police**[6] has put the issue very succinctly:

> *"A fatal impulse or an ill-fated thought of the deceased, however unfortunate and touchy it may be, cannot unfortunately, touch the issue. Those cannot fray the fabric of the provision contained in section 306 of IPC. In short, it is not what the deceased 'felt', but what the accused 'intended' by his act which is more important in this context. Of course, the deceased's frail psychology which forced him to suicide also may become relevant, but it is only after establishing the requisite intention of accused."*

13. The Supreme Court in ***Gurcharan Singh v. State of Punjab***[7] held that the basic ingredients of Section 306 of IPC are that a suicide death and abetment thereof, and absence of any of these conditions could vitiate the indictment. The judgment derived its strength from ***State of West Bengal v. Orilal Jaiswal***[8] wherein it was observed by the Hon'ble Supreme Court that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial of the parties.

14. In the instant case, the prima facie view is that although some witnesses seem to suggest a love relationship between the petitioner and deceased, the nature of evidence that has been forthcoming does not meet the standards required to prove that the petitioner abetted the suicide of the accused. The fact as to what the degree of intimacy and affinity of the petitioner and deceased shared is a matter that can only be unearthed at the stage of trial. At this stage, for the purpose of this application, the same does not need to be gone into.

4. MLJ CRL 240(2016) **5.** Crl. O.P No. 8320/2014 **6.** ILR 2005 (3) Kerala 646, **7.** (2017) 1 SCC 433,
8. (1994) 1 SCC 73

15. It is also relevant to note that there is a complete lack of any proof produced before this Court showcasing how or which acts of the petitioner led him to allegedly commit the offence of abetting the deceased's suicide.

16. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, this Court comes to the conclusion that the petitioner shall be released on bail in connection with Chhendipada P.S. Case No.199 of 2020 corresponding to C.T. (S) Case No.11 of 2021 by the learned court in session over the matter with imposition of certain stringent terms and conditions as deemed fit and proper. It is clarified that the trial court shall proceed with a fair trial uninfluenced by any of the prima facie observations made hereinabove.

17. The Bail Application is accordingly disposed of.

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