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The determination of compensation as made by the Court below is also seen to be based upon just and proper application of evidence on record and as such the same is not liable to be tinkered with in this appeal – Appeal dismissed.

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

STREV NO. 28 OF 2006

M/s. BAJRANGBALLI WIRE PRODUCTS PVT. LTD. ……..Petitioner

.V.

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

ORISSA SALES TAX ACT, 1947 – Whether M.S. wire which is admittedly manufactured from M.S rods would be amenable to sale tax exemption for the assessment year of 1997-1998 in terms of certificate issued in the year 1996 – Held, Yes – The tax liability for each AY had to be decided on the law prevailing in that AY and if for such AY the petitioner fulfilled the condition for taking tax exemption, then such benefit could not be denied to it.

Case Laws Relied on and Referred to :-

1. (1994) 93 STC 187 (SC) :Telengana Steel Industries Vs. State of Andhra Pradesh
2. (1998) 108 STC 258 (SC) : K.A. K. Anwar and Co. Vs. State of Tamilnadu.
3. [2005] 5 RC 295 : Vadilal Chemicals Ltd. Vs. State of Andhra Pradesh.
4. [2008] 16 VST 193 : SREI International Finance Ltd. Vs. State of Orissa.
5. (2018)17 SCC 302 : Commissioner of Trade Tax, U.P Vs. S/S International Electrodes.
6. (2003) 11 SCC : Collector of Central Excise Vs. Technoweld Industries.
7. [1964] 8 SCR 217 : Hajee Abdul Shukoor and Co. Vs. State of Madras.

For Petitioner : Mr. Jagabandhu Sahoo, Sr. Adv.
For Opp. Party: Mr. Sunil Mishra, Addl. Standing Counsel.

JUDGMENT Date of Judgment : 20.04.2021

Dr. S.MURALIDHAR, C.J.

1. This revision petition under Section 24(1) of the Sales Tax Act, 1947 (OST Act) arises from a judgment dated 20th December, 2005 passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) dismissing the Petitioner's appeal i.e. S.A. No.523 of 2001-02 thereby affirming the order dated 17th April, 2001 of the Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar (ACST, Bhubaneswar) dismissing the Petitioner's first appeal i.e. Appeal No. AA. 175/BH.I of 2000-01. In turn the said order of the ACST,

Bhubaneswar had affirmed the assessment order of the Sales Tax Officer, Bhubaneswar (STO) dated 30th January, 2001 enhancing the gross taxable turnover (GTT) by adding Rs.48,28,209.51 thereby resulting in a tax demand of Rs.1,95,829 under Section 12 (4) of the OST Act for the Assessment Year 1997-98.

2. The questions of law that arise for determination in the present revision are as under:

> "(a) Whether in the facts and circumstances of the case, M.S. Wires and M.S. Rods are two different commercial commodities and the Tribunal is justified to hold that Petitioner is not entitled to exemption ?
>
> (b) Whether in the facts and circumstances of the case, the consequential addition of purchase value of M.S.Rod with the gross turnover and taxable turnover in assessment is sustainable in law?"

3. The background facts are that the District Industries Center, Bhubaneswar (DIC) issued a certificate in favour of the Petitioner for eligibility for sales tax concession on raw materials, machinery, spare parts, packing materials and finished products under the Industrial Policy Resolution, 1996 (IPR, 1996) (New Units) for the special claim mentioned in column 2, what was the finished products (M.S. Wire, Wire Nails and L-Hook/J. Hook) whereas column 4 of the title "particulars of machinary, spare parts, raw materials and packing materials", listed out the following:

> "1. M.S. Rod in Coil
>
> 2. Machinery spares like Dies, Nuts, Bolts, V. Balts, Ball, Bearing, Electrical spares etc. L.S.
>
> 3. Packing materials like Gunny Bags/MDPE Bags worth L.S."

4. It is stated that for the periods 1995-96 and 1996-97, the taxing authority granted the Petitioner exemption on the basis of the eligibility certificate. However, for the period 1997-98 the claim for exemption from payment of sales tax was disallowed by the STO. It was held by the STO that M.S. Rods from which the M.S. Wires was manufactured by the Petitioner was not a different commodity in respect of which an exemption could be claimed for the tax already paid on it. Thus, the STO determined that the tax leviable would be @ 4% on the GTT, and that the corresponding tax due would be rounded as Rs.1,95,829/-. In arriving to the above conclusion, the

STO placed reliance on the judgment of the Supreme Court in ***Telengana Steel Industries v. State of Andhra Pradesh, (1994) 93 STC 187 (SC).***

5. Aggrieved by the above order, the Petitioner filed an appeal before the ACST, Bhubaneswar who again referred to the judgment of the Supreme Court in ***Telengana Steel Industries*** (supra) to justify the order of the STO. The aforementioned order was further affirmed by the Tribunal by dismissing the Petitioner's appeal S.A. No.523 of 2001-02

6. The plea of the Petitioner that a judgment of the larger Bench in ***K.A. K. Anwar and Co. v. State of Tamilnadu, (1998) 108 STC 258 (SC)*** had distinguished the judgment in Telengana Steel Industries (supra), was negative by the Tribunal on the ground that it did not to help the case of the Petitioner. Thereafter, the present revision petition was filed.

7. This Court has heard the submission of Mr. Jagabandhu Sahoo, learned Senior Advocate for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Party (Sales Tax).

8. Mr. Sahoo at the outset submitted that it was not open to the sales tax authority to ignore the certification of the DIC as to the grant of exemption in respect of M.S. Wires produced from M.S. Rods. He pointed out that the Petitioner is a registered small scale industrial unit manufacturing M.S. Wires. The notification of the Finance Department dated 26th July, 1996 in terms of the IPR 1996 rendered the Petitioner eligible to avail sales tax exemption on the purchase of raw material, machinery, spare parts, packing materials and on sale of finished products 100% of the fixed capital investment made by it. This exemption was for a period of five years from the date of commencement of the commercial production. Relying on the decision in ***Vadilal Chemicals Ltd. v. State of Andhra Pradesh, [2005] 5 RC 295*** he submitted that it could not be presumed that the DIC had wrongly granted the petitioner exemption from paying sales tax subject to satisfaction of the conditions of such certificate. Mr. Sahoo also relied on the decision in ***SREI International Finance Ltd. v. State of Orissa, [2008] 16 VST 193 (Orissa)*** where, in similar circumstances, it was held that in mere admission of the liability by the Assessee on a wrong presumption would not disentitle the Assessee to relief. He submitted that the decision in K.A. K. Anwar and Co. (supra) was wrongly distinguished by the Tribunal and that it squarely applied to the facts and circumstances of the case.

9. On his part, Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Party relying on the decision of the Supreme Court in ***Commissioner of Trade Tax, Uttar Pradesh v. S/S International Electrodes (2018) 17 SCC 302*** contended that iron rods and iron wires are one and the same commodity and the extraction of wires from iron rods does not amount to manufacture. He relied on the decision of the Supreme Court in Collector of ***Central Excise v. Technoweld Industries, (2003) 11 SCC*** and submitted that obtaining of wire of thinner gauge from wire rod by cold drawing process did not amount to manufacture of a new product. Lastly, he relied on the decision in ***Telengana Steel Industries*** (supra) in support of his plea that the revision petition ought to be dismissed.

10. The above submissions have been considered. Since considerable reliance has been placed by both sides on the decision in ***Telengana Steel Industries*** (supra) and the subsequent decision in ***K.A. K. Anwar and Co***. (supra), the Court takes up the detailed examination of the said two decisions first.

11. In ***Telengana Steel Industries*** (supra), a Bench of two learned Judges of the Supreme Court considered the question whether iron wires were separate commercial goods from wire rods from which they were produced and were therefore exigible to a single point tax even if the wire rods, when purchased had suffered sales tax. This was answered in the negative by holding that iron wires could not be considered to be a separate taxable commodity and, if wire rods which were purchased by the Petitioner had suffered sales tax, the same could not be realised from the sale of wires.

12. It requires to be noticed that the Supreme Court in ***Telengana Steel Industries*** (supra) In ***Telengana Steel Industries*** (supra) observed that it did not propose to decide whether iron wires are separate commercial goods from iron rods from which they were produced, "by trying to answer whether they are one commercial commodity or separate." It noted that the question had arisen for consideration because the Court was concerned with a single point sales tax, which would not allow taxing the 'same commodity'. What according to the Supreme Court was the clinching factor in answering the question was that both were clubbed together in sub-item (xv) of Section 14 of the Central sales tax act, 1956 ('CST Act'). Accordingly the Supreme Court in In ***Telengana Steel Industries*** (supra) concluded that "iron wires cannot be taken as a separate taxable commodity, and, if wire rods which

were purchased by the appellants had suffered sales tax, the same could not be realized from the sale of wires."

13. Subsequently, a three judge Bench of the Supreme Court in ***K.A. K. Anwar and Co.*** (supra) addressed the question whether raw hides and skins were different from dressed hides and skins. It was held that although the appellants there had purchased raw hides and skins on payment of tax, 'it will be liable to payment of sales tax in respect of dressed hides and skins' and such levy will not fall foul of Section 15 of the CST Act as the two goods were different taxable commodities. It was held that it was a trite proposition that the same goods cannot be taxed more than once. In that process while discussing the decision in ***Telengana Steel Industries*** (supra) the Supreme Court in ***K.A. K. Anwar and Co***. (supra) noticed the judgment of the Constitution Bench of Supreme Court ***Hajee Abdul Shukoor and Co. v. State of Madras [1964] 8 SCR 217***, where the Constitution Bench of the Supreme Court held that "hides and skins in the untanned condition are undoubtedly different as articles of merchandise than tanned hides and skins". In para 13, the Supreme Court observed as under:

> "13. From the aforesaid observations it clearly follows that the Constitution Bench had, in no uncertain terms, come to the conclusion that raw hides and skins and dressed hides and skins were not one and the same commodity. Therefore, the first contention raised in the present case by the learned counsel for the appellant cannot be accepted notwithstanding the reliance by them on the aforesaid decision in the case of Telanganna Steel Industries case [1994] 93 STC 187 (SC) : (1994) Supp 2 SCC 259. It may here be noted that in none of these decisions was the attention of the learned Judges drawn to the aforesaid observations of the Constitution Bench in Hajee Abdul Shukoor's case [1964] 15 STC 719 (SC) : [1964] 8 SCR 217." (emphasis supplied)

14. It was further observed by the Supreme Court in ***K.A. K. Anwar and Co.*** (supra) that Section 14 of the CST Act was not a taxing provision but merely classified different commodities under the same species under one entry. It was observed: 'merely because different goods or commodities are listed together in the same sub-heading or sub-items in Section 14 cannot mean that they are regarded as one and the same item."

15. Therefore, it is clear that the subsequent decision of the three-Judge Bench of the Supreme Court in ***K.A. K. Anwar and Co***. (supra) had to prevail over the earlier two Judge Bench decision in Telengana Steel Industries (supra).

16. However, in the instant case, the Tribunal has sought to distinguish ***K.A.K. Anwar and Co.*** (supra) on a rather strange reasoning that "it was no way helpful to the dealer". This is no way to distinguish a binding judgment of the larger Bench of Supreme Court. Consequently, the Tribunal fell in error in proceeding to rely exclusively on the decision in ***Telengana Steel Industries*** (supra).

17. Mr. Sahoo is right in contending that the sales tax authorities cannot ignore the DIC certificate issued in favour of the Petitioner expressly granting it exemption from payment of sales tax on M.S.Wires produced from M.S. Rods as raw material. The decision in ***Vadilal Chemicals Ltd***. (supra) is instructive in this regard. In similar circumstances in that case, the Supreme Court disapproved the approach of the sales tax authorities seeking to override the exemption granted by the Department of Industries and Commerce. It was held that the Deputy Commissioner of Commercial Taxes (DCCT)

> "certainly could not assume that the exemption was wrongly granted nor did he have the jurisdiction under Section 20 of the State Act to go behind the eligibility certificate and embark upon a fresh enquiry with regard to the appellant's eligibility for the grant of the benefits. The counter affidavit filed by the respondents-sales tax authorities is telling. It is said that the Sales Tax Department had decided to cancel the eligibility certificates for sales tax incentives. As we have said the eligibility certificates were issued by the Department of Industries and Commerce and could not be cancelled by the Sales Tax Authorities. [See in this connection Apollo Tyres Ltd. v. CIT (2002) 9 SCC."

18. It was then contended by Mr. Mishra, learned Additional Standing Counsel that once the period of exemption came to an end on March, 2000, the Petitioner had itself been contending to the contrary and on the basis of the decision in in ***Telengana Steel Industries*** (supra) was seeking to avoid payment of tax on the finished product viz., M.S. Wires since it had already paid sales tax on M.S. rods.

19. As rightly pointed out by Mr. Sahoo, learned Senior Counsel for the Petitioner, we are in the instant case concerned with AY 1997-98. The STO, the ACST and the Tribunal were called upon to answer the question whether for the said AY the Petitioner could avail the sales tax exemption on the strength of the DIC certificate and whether it fulfilled the conditions therein?

The fact that in a subsequent year, from 1st April 2000 onwards, when such exemption was no longer available, the Petitioner took a different stand cannot deprive the Petitioner from getting exemption for AY 1997-98 in terms of the certificate of the DIC. The tax liability for each AY had to be decided on the law prevailing in that AY and if for such AY the Petitioner fulfilled the condition for getting tax exemption, then such benefit could not be denied to it. Indeed, this Court in ***SREI International Finance Ltd***. (supra) observed thus:

> "Liability to pay tax has always to be imposed by law: it cannot be imposed on admission. Article 265 of the Constitution is very clear on this point."

20. As far as the decisions cited by Mr. Mishra, learned Additional Standing Counsel are concerned, they would be relevant if the question was whether drawing of M.S. Wires from M.S. Rods amounts to manufacture. Here that is not the question. The only question is whether for the AY in question viz., 1997-98 the Petitioner's products i.e. M.S. Wires which is admittedly manufactured from M.S. Rods would be amenable to sales tax exemption in terms of the certificate dated 26th November, 1996 issued by the DIC, Bhubaneswar subject to fulfilling the conditions therein. The answer to that question, in our considered view, has to be in the affirmative.

21. Consequently, the orders passed by the STO, the ACST and the Tribunal are accordingly set aside.

22. The amount deposited by the Petitioner in this Court pursuant to the order dated 19th May, 2006 will be refunded to it in accordance with law not later than eight weeks from today.

23. The questions of law framed are answered thus:

> (i) question (a) is answered in the negative by holding that the Tribunal is not justified in holding that the Petitioner was not entitled to exemption since M.S. Wires and M.S. Rods are different commodities.
>
> (ii) Consequently, question (b) is answered in the negative by holding that the consequential addition of the purchase value of M.S. Rods in the gross turnover and tax turnover of the Petitioner in the assessment order in question cannot be justified and is hereby set aside.

24. The reference is accordingly decided in favour of the Petitioner Assessee and against the Opposite Party (Department).

25. The revision petition is disposed of in the above terms.

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

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2021 (III) ILR - CUT- 08

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

W.P.(C) NO.15305 OF 2014

VIRESH HEMANI ……..Petitioner

.V.

INCOME TAX OFFICER ……..Opp. Party

THE INCOME TAX ACT, 1961 – Sections 147,148,151 – Escape assessment – Notice U/s.148 issued – Joint Commissioner merely approved/granted sanction to re-assess without assigning any reason – Such re-assess/authorisation challenged – Power of the joint commissioner questioned – Held, such approval was not valid for the two reasons (i) there was no indication of any application of mind by the authority (ii) Joint Commissioner is not empowered U/s.151 to grant sanction.

Case Laws Relied on and Referred to :-

1. (2003) 1 SCC 72 : GKN Driveshafts (India) Ltd. Vs. Income Tax Officer
2. (2017) 391 ITR 11(Del):Principal Commissioner of Income Tax, Kerala Vs. N.C. Cables Ltd.

For Petitioner : Mr. Sidhartha Ray

For Opp. Party: Mr. S.S. Mohapatra, Sr. Standing Counsel for Income Tax

ORDER Date of Order : 23.04.2021

BY THE BENCH

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

2. The challenge in this writ petition is to a notice dated 21st May, 2013 issued by the Income Tax Officer ('ITO'), Ward-3, Rourkela to the Petitioner proposing to reassess the income for the Assessment Year (AY) 2007-08 under Section 147 of the Income Tax Act, 1961 ('the Act') on the ground that the income chargeable to tax for the said AY has escaped assessment.

3. While directing issuance of notice in the present writ petition on 20th October, 2014, an interim order was passed directing that the proceedings against the Petitioner may continue, but no final order shall be passed pursuant to the impugned order.

4. The background facts are that the Petitioner is the proprietor of M/s. Pratik Tours and Travels which is in the business of selling of AIR Tickets and Tour Packages. The Petitioner filed his return of income for the AY 2007-08 on 29th October 2007. More than five years thereafter, the Petitioner received the impugned notice dated 21st May, 2013, in response to which by letter dated 15th July, 2013, the Petitioner assessee requested the ITO to inform him of the reasons for the reopening. Prior thereto on 21st June, 2013 the Petitioner asked the ITO to treat the earlier income filed as return pursuant to the impugned notice.

5. On 25th July, 2013, the ITO furnished the Petitioner the reasons for reopening of the assessment. On receipt of the reasons, the Petitioner made a detailed representation on 8th October, 2013 objecting to the reopening of the assessment.

6. Without deciding those objections, on 2nd July, 2014 the ITO proceeding to issue the show cause notice (SCN) calling upon the Petitioner to explain why the reassessment should not be completed by enhancing the Petitioner's total income by making addition as proposed in the said SCN.

7. The Petitioner replied to the SCN on 30th July, 2013 and soon thereafter filed the present writ petition in this Court.

8. In response to the notice issued, a counter affidavit has been filed by the Opposite Party enclosing *inter alia*, the approval granted by the Joint Commissioner of Income Tax to the ITO to initiate proceeding under Section 148 of the Act.

9. In the counter affidavit there is no response to the averment in paragraphs 3.16 of the petition that the Opposite Party has proceeded with the SCN without disposing of the Petitioner's objections.

10. Mr. S. Ray, learned counsel appearing for the Petitioner, relied on the decision of the Supreme Court in ***GKN Driveshafts (India) Ltd. v. Income Tax Officer (2003) 1 SCC 72*** and submitted that the failure to dispose of the objections of the Petitioner prior to issuing the SCN to reopen the assessment would vitiate the SCN, particularly since it is sought to be reopened more than four years after the return was filed.

11. In response thereto, Mr. S.S. Mohapatra, learned Senior Standing Counsel for the Department submitted that the SCN dated 2nd July, 2014 issued to the Petitioner by the ITO should be construed as the disposal of the Petitioner's objection.

12. The Court is unable to agree with the above submission on behalf of the Department. A perusal of the SCN dated 2nd July, 2014 reveals that there is no mention of the Petitioner's detailed objections given in writing on 8th October, 2013. In fact, even the counter affidavit filed by the Department is silent on disposal of such objections prior to issuance of the impugned SCN. Indeed the requirement spelt out by the Supreme Court in ***GKN Driveshafts*** (supra), that an assessee's objection to the reopening of the assessment should be disposed of by the Assessing Officer by a speaking order is a mandatory requirement that cannot be dispensed with. Admittedly this mandatory requirement has not been complied with in the instant case. On this ground alone the re-assessment proceeding is vitiated.

13. Relying on the decision in ***Principal Commissioner of Income Tax, Kerala v. N.C. Cables Ltd. (2017) 391 ITR 11(Del)***, Mr. Ray submitted that there was a failure by the competent authority in terms of Section 151 of the IT Act to authorize the reopening of the assessment. Factually, the above position has not been able to be disputed by Mr. Mohapatra, learned Standing Counsel on behalf of the Department. Indeed the impugned letter dated 10th /

20th May, 2013 issued by the Joint Commissioner of Income Tax, Rourkela Range, to the ITO simply states 'Approval is hereby accorded u/s. 151(2) of the I.T. Act, 1961 for initiation of proceeding u/s. 147 of the I.T. Act, 1961 in the case of Sri Viresh Hemani…..' There is no indication of any application of mind by the authority. Moreover, the approval under Section 151 of the Act had to be granted by the Principal Chief Commissioner, or the Chief Commissioner, or the Principal Commissioner, or the Commissioner, if the reopening is beyond four years. However, the above approval in the instant case was issued by the Joint Commissioner and therefore, it was not a valid approval under Section 151 of the IT Act.

14. For both the above reasons, the impugned notice dated 21st May, 2013 issued to the Petitioner cannot be sustained in law and is hereby set aside. All consequential proceedings are also hereby set aside.

15. The writ petition is allowed in the above terms, but in the circumstances with no order as to costs.

16. 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 (III) ILR - CUT- 11

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

W.P.(C) NO. 7469 OF 2017 AND BATCH OF WRIT PETITIONS

THE REGISTRAR JUDICIAL, O.H.C. ……..Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Suo Motu Cognizance of the court with regard to construction of illegal "Gheries" in the Chilika Lake causing threat to the ecology of the vicinity/causing damage to the Bio-diversity of the Lake "Chilika" – Several directions issued for the protection of the ecology of the lake "Chilika".

(B) COASTAL AQUACULTURE AUTHORITY ACT, 2005 – Sections 13 & 14 – Registration for coastal aquaculture & punishment – Several illegal Gheries (Prawn culture) in the Chilika Lake – No registration under the Act – Even no action by the Government while protecting to the ecology of the lake – Suo Motu Cognizance taken by the Court – Direction issued to demolish the ghereis without the registration & to impose punishment in accordance with the Law.

Case Laws Relied on and Referred to :-

1. AIR 1994 Ori 91 : Kholamuhana Primary Fishermen Cooperative Society Vs. State of Orissa
2. AIR 1997 SC 811 : S. Jagannath Vs. Union of India.

For Petitioner : Mr. Mohit Agarwal, Amicus Curiae,
Mr. S. K. Dalai, (W.P. (C) No.16974 of 2021)

For Opp. Parties: Mr. P. K. Parhi, Assistant Solicitor General of India
Mr. M. S. Sahoo, Addl. Govt. Adv.
Mr. V. Narasingh, Mr. Manoj Kumar Mohanty,
Mr. Sukant Kumar Nayak, Mr. B. P. Pradhan,S. K. Sarangi.

ORDER Date of Order : 14.08.2021

Dr. S.MURALIDHAR, C.J.

1. This batch of writ petitions has reignited the concerns, that emerged over the three decades ago, of the threats posed to the ecology of the Chilika Lake on account of unregulated, indiscriminate fishing, including the large-scale production of shrimps/prawns on commercial scale.

The Background

2. It requires to be noted that in 1981 the Chilika Lake was designated as the first Indian wetland of international importance under the Ramsar Convention on Wetlands, an inter-governmental treaty entered into by 169 countries of the world, which deals with conservation aspects of inland waters and the near shore coastal areas. The aforementioned Convention,

named after the city of Ramsar in Iran, was signed on 2nd February, 1971 came into force on 21st December 1975. Its mission was *"the conservation and wise use of all wetlands through local, regional and national actions and international co-operations as a contribution towards achieving sustainable development throughout the world"*. India joined the Convention on 1st February, 1982. Of the 26 designated wetland sites in India covered by Ramsar Convention, two are located in Odisha. One is the Chilika Lake which spreads across the districts of Ganjam, Puri and Khurda in Odisha. The second wetland is the Bhitarkanika Wildlife Sanctuary and National Park in Kendrapara district. In the present order this Court proposes to deal with the issues concerning the ecology of the Chilika Lake.

3. A unique feature of the Chilika Lake is that it is adjoining the Bay of Bengal and therefore, there is salt water predominance in the lake during summer. During the rainy season, sweet water displaces the salt water and flows into the sea. Fish of the lake swim to the sea to lay eggs. The juveniles then return to the lake to grow. Chilika fish thus possess a peculiar distinct taste.

4. One of the species of fish found in Chilika and is in great demand worldwide is prawn (interchangeably used with 'shrimp' for the purpose of these matters). There are two recognized methods of cultivation of prawns. One is the traditional 'capture' method of producing prawns like Jano, Dian, Uthapali and Bahanis and Prawn Khanda. This method, also known as traditional 'capture fishery' involves erecting embankments and capturing prawns using bamboo traps and nets of two types: Dhaudi and Boja/Bazza. It involves no technological intervention or use of chemicals. These prawns were said to have soft skin and prone to decaying early. They were not fit for export and therefore were not much in demand.

5. The 1980 saw the advent of 'culture' fishery which involved use of intensive methods to enhance the yield of fish for export markets. Intensive methods required 10% of the water to be drained out every day. This polluted water contained excess of prawn feed, unutilized growth-inducing additives, dead prawns, their sloughings, faecal matters and dead plankton. Whereas the traditional capture method would give a yield of 400 kgs per acre, intensive culture method gave a yield of 1000 to 1100 kgs of prawn/shrimp. The intensive culture method poses grave threat to the environment and the ecology. Two other methods of culturing are the semi-intensive and supra

intensive methods. However, the traditional extensive method of culturing is stated to be the least harmful to the environment.

6. The Chilika Development Authority (CDA) was registered under the Societies Registration Act, 1860 with the Chief Minister of Odisha as its Chairperson. It was created by a resolution dated 20th November, 1981 of the Forest and Environment Department, Government of Odisha. The CDA was created for preservation of ecology of the Chilika Lake and its conservation as well as to bring about all-round development in and around the lake. The objectives of the CDA were to protect the lake ecosystem with all its genetic diversity, to cooperate and collaborate with the institutions, national or international, for the all-round development of the lake and all incidental activities required to protect the lake in all forms.

7. The first significant judicial intervention to deal with the issues concerning preservation of the ecology of the Chilika Lake was in a writ petition brought before this Court by the Kholamuhana Primary Fishermen Cooperative Society and 35 others in 1992. The challenge in these writ petitions was inter alia to a policy of the State brought about by a memo dated 31st December 1991 issued by the Revenue and Excise Department (R&E Department) of the Government of Odisha spelling out the principles of settlement of fisheries in Chilika. The allegation of the Petitioners was that the policy adversely impacted their traditional fishery rights and thereby the livelihood of about lakh of fishermen and that the policy had a "tilt in favour of the non-fishermen" which encouraged "mafia raj in Chilika".

The November 1993 decision of this Court

8. In a detailed judgment in ***Kholamuhana Primary Fishermen Cooperative Society v. State of Orissa AIR 1994 Ori 91*** (judgment dated 23rd November, 1993 in OJC Nos.1653, 5643 and 8433 of 1992), a Division Bench of this Court upheld the policy with some "pruning, trimming and dressing". Acknowledging the adverse effects of intensive prawn culture on ecology and taking into account the recommendation of the Committee constituted by the Court to study the problems, the Court as part of the ‘pruning’, opted for the "lesser evil" of using a technology that *"does not stress the environment in terms or organic and nutrient loading chemical use, and water-power requirements*. This "lesser evil" was the “extensive culture method". Therefore, the other methods were expressly disapproved and asked

to be discontinued. As a process of "trimming", it was directed that the area of culture fishery given to each primary fishermen society should not be less than 100 acres or so. The ratio of capture fishery to culture fishery was asked to be maintained as 60:40. This meant that while an area of 27,000 hectares would be for capture fishery, the balance 20,000 hectares would be earmarked for culture fishery. Of this, an area of 6,000 hectares was meant for non-fishermen and the balance 14,000 for fishermen. As part of the 'dressing', the increase in the lease amount was asked to be re-examined by the State to reduce its effect to "such extent as deemed just and proper". Capture fishery was kept reserved for the "Central Society" to be sub-leased to the Primary Societies.

9. Following the above judgment, the Government of Odisha, the R&E Department issued the revised principles of settlement on 23 May, 1994. The revised Policy clearly defined what was "capture fishery" and "culture fishery" and delineated the areas which were out of bounds for fishermen. It spelt out the terms and conditions of leasing of capture and culture fishery areas. It was inter alia specified in clause 19 that there will be no conversion of capture sources like Dian, Uthapani and Jano to prawn culture henceforth. However, the sources that had already been converted by the date of the judgment of the High Court i.e. 23rd November, 1993 would continue.

10. There was a further modification to the policy on 5th July, 1994 inter alia clarifying that the above capture sources would continue "provided they are not in the prohibited areas".

The Supreme Court decision in S Jagannath

11. The issue was revisited by the Supreme Court of India in ***S. Jagannath v. Union of India AIR 1997 SC 811***. The issue was examined in the context of the Environment (Protection Act), 1986 (EPA) and the notification dated 19th February, 1991 issued thereunder by the Government of India demarcating the Coastal Irrigation Zone (CRZ). Under the CRZ notification the CRZ comprised coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters influenced by tidal action (in the landward side) up to 500 metres from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL.

12. In an order passed in the said petition on 27th March, 1995 the Supreme Court prohibited the setting up of the prawn farms in the coastal areas. This was reiterated on 9th May 1995 with the direction that no part of agricultural lands and salt farms should be converted into commercial aquaculture farms. It was specifically directed "no further shrimp farms or any aquaculture farms be permitted to be set up in the areas in dispute hereafter".

13. In its decision in ***S. Jagannath*** (supra), the Supreme Court acknowledged that "the new trend of more intensified shrimp farming in certain parts of the country - without much control of feeds, seeds and other inputs and water management practices - has brought to the fore a serious threat to the environment and ecology". After discussing the reports of three Expert Committees in the light of the various statutes that were applicable, the Supreme Court issued a large number of directions which inter alia included a direction that no shrimp culture farm shall be set up within the CRZ that they shall not apply to traditional shrimp culture. All existing shrimp culture farms were to be demolished by 31st March, 1997. No shrimp culture was to take place within 1000 meters of Chilika lake and those already operating were to be demolished by 31st March, 1997. Thus, only traditional shrimp culture was allowed in and around Chilika lake. Aquaculture industry/shrimp culture industry/shrimp culture ponds which had been functioning/operating within the CRZ and within 1000 meter in Chilika were to compensate the affected persons on the basis of the "polluter pays" principle.

The CAA Act

14. The extensive directions issued in ***S. Jagannath*** (supra) continued to operate till the enactment of the Coastal Aquaculture Authority Act, 2005 (CAA Act) by the Parliament. Section 2(1)(c) of the CAA Act defines the expression "coastal aquaculture" as under:

> (c) "***coastal aquaculture***" means culturing, under controlled conditions in ponds, pens, enclosures or otherwise, in coastal areas, of shrimp, prawn, fish or any other aquatic life in saline or brackish water; but does not include fresh water aquaculture"

15. Section 2(1)(d) of the CAA Act defines "***coastal area***" as under:

> (d) "***coastal area***" means the area declared as the Coastal Regulation Zone, for the time being, in the notification of the Government of India in the Ministry of Environment and Forests (Department of Environment, Forests and Wildlife) No. S.O. 114(E), dated the 19th February, 1991 and includes such other area as the Central Government may, by notification in the Official Gazette, specify;
>
> "Area of land within a distance of two kilometers from the High Tide Line (HTL0 of seas, rivers, creeks and backwaters."

16. Under Section 4 of the CAA Act, the Coastal Aquaculture Authority (hereafter 'Authority') was established. Under Section 4 (3) it is a 11-member body including the Member Secretary and a Chairperson, 'who is or has been, a Judge of a High Court'.

17. In terms of Section 13(1) of the CAA Act, it is mandatory for a person carrying on coastal aquaculture in a coastal area to get the farm registered with the Authority. Those already in operation on the date of establishment of the Authority, i.e. 22nd December, 2005, may continue to operate only if they apply for registration within three months from the date of establishment of the Authority and in that case till the communication to them of the disposal of such a petition by the Authority.

18. Section 13 (9) of the CAA Act mandates that "traditional coastal aquaculture farm" which is within the CRZ and is not used for coastal aquaculture purposes on the date of the establishment of the Authority i.e. 22nd December, 2005 shall have to obtain registration under Section 13 (5) read with Section 13 (4) of the CAA Act. If such person does not utilize to use the farm within one year of such legislation for coastal aquaculture purposes, the registration shall be cancelled.

19. Under Section 13 (7) of the CAA Act, where the farms are over an area of more than 2 hectares, an appropriate inquiry is to be caused by the Authority before granting registration in order to ensure that the registration shall not be detrimental to the environment.

20. Section 13 (8) of the CAA Act prohibits the carrying on any coastal aquaculture within 200 m from the HTL and within the CRZ in terms of the latest CRZ notification. The first proviso to Section 13 (8) exempts a coastal aquaculture farm already in existence on the appointed day which is the date

of establishment of the Authority i.e. 22nd December, 2005 as well as to non-commercial and experimental coastal aquaculture farms operated by any research institute funded by the Government. The second proviso states that the Authority will, for the purposes of exemption under the first proviso "review from time to time the existence and activities of the coastal aquaculture farms and the provisions of Section 13 (8) shall apply to such farms in view of such review."

21. Section 14 of the CAA Act provides the punishment for failure to register a coastal aquaculture farm or a traditional coastal aquaculture farm. It is imprisonment for a term which may extend to three years or with fine which may extend to one lakh rupees, or with both. Under Section 15 of the CAA Act, no Court can take cognizance of the offence under Section 14 of the CAA Act unless there is a written complaint "by an officer of the Authority authorized in this behalf by it".

22. This Court has been informed that although the CAA Act came into force on 22nd December, 2005 till date no officer has been authorized by the Authority to file written complaints. As a result of Section 14 of the CAA Act has remained a dead letter.

23. Also the Court is informed that in the past two years the post of Chairman of the Authority has remained vacant. Of 11 members of the Authority, there are at present only three comprising the Member-Secretary (stationed in Delhi) and two Expert Members in Chennai. In other words, the effectiveness of the Authority stands seriously undermined, denuding it of all the powers available to it under Section 4 read with Section 11 of the CAA Act. It must be noted at this stage that under Section 12, the Authority can whenever it thinks it necessary to do so, enter on any coastal aquaculture land, pond, pen and enclosure and remove or demolish any structure that has been erected therein in contravention of the provisions of the CAA Act. However, those powers obviously cannot be exercised unless there is a full-fledged and fully staffed Authority.

The CAA Rules

24. Then there are the Coastal Aquaculture Authority Rules, 2005 (CAA Rules) made under Section 24 of the CAA Act. Rule 10 of the CAA Rules provides that in case of a coastal aquaculture authority farm below an area of

2 hectare, the registration application shall be received by any District Level Committee (DLC) which shall be headed by the Collector of the concerned district, and he shall recommend to the Authority for grant of registration. In case of a farm above an area of 2 hectare, the application will be received by the DLC who shall inspect the farm to satisfy it regarding compliance of the CAA Act and the CAA Rules and shall recommend such application to the State Level Committee (SLC) (to be headed by the Secretary in Charge of the Fisheries Dept. of the Government), who shall in turn recommend to the Authority for grant of registration. All farms having an area of 2 hectare and above shall have to conduct an Environment Impact Assessment. Farms having an area of 5 hectares and above are required to install an Effluent Treatment Plant (Clause 5.2 of the Guidelines formulated under Rule 3 of the CAA Rules).

The CAA Guidelines

25. This apart, there are the CAA guidelines issued under Rule 3 of the CAA Rules. The CAA guidelines are meant to ensure "orderly and sustainable development of shrimp aquaculture in the country". The guidelines are also intended to lead to environmentally responsible and socially acceptable coastal aquaculture and also enhance the positive contribution that shrimp farming and other forms of aquaculture can make to socio-economic benefits, livelihood security and poverty alleviation in the coastal areas.

26. It is clarified in the guidelines that “Coastal aquaculture entails managed farming or culture of organisms in saline or brackish water areas for the purpose of enhancing production, both for domestic and export markets. Coastal aquaculture in the broader sense includes culturing of crustaceans like shrimp, prawn, lobsters, crabs, and finfishes like groupers, sea bream, mullets and molluscs like clams, mussels and oysters.” The guidelines emphasize that only traditional/improved traditional and scientific extensive shrimp farming practices shall be permitted in the coastal areas.

27. It may be noted here that in a ‘Preface” to a Compendium of the CAA Rules, CAA Guidelines as well as the Coastal Aquaculture Authority Regulation, 2008 (CAA Regulations) made under Section 25 of the CAA Act, the Member-Secretary of the Authority inter alia noted that the farmers producing black tiger shrimp by the method of Penaeus monodon culture

faced a major problem due to lack of quality seed. This along with other problems compelled them to look for alternative methods of culture. The Government of India decided to allow the commercial scale farming of SPF L. vannamei culture which is used in many South Eastern Asian Countries and in China. It is claimed as under:

> "In view of the regulations, SPF *Litopenaeus vannamei* is taking strong roots in India and the results achieved thus far have been spectacular. Identification of broodstock suppliers based upon evaluation of genetical as well as disease status ensured supply of quality SPF broodstock to Indian shrimp hatcheries. Low productive aquaculture farms have been utilized for high productive SPF *L. vannamei* farming with adequate biosecurity and Effluent Treatment Systems. Cluster farming system was introduced in order to facilitate farmers having small farm holding by having common ETS and biosecurity measures. Many abandoned shrimp farms, closed hatcheries and feed mills have been revived after the introduction of SPF *L. vannamei.* All these have culminated in Indian shrimp production and exports reaching all-time high levels with substantial increase in productivity, increase in employment generation, and promoted many ancillary industries dealing with inputs, equipments and processing."

A plethora of enforcement bodies

28. Apart from the Authority, the SLC and the DLC constituted in terms of Rule 10 of the CWA Rules, we have the Wetlands (Conservation and Management) Rules, 2010 (WCM Rules) made under Section 25 read with Section 3 (1) (v) (2) and (3) of the EPA. Under Rule 5 of the WCM Rules, the Central Wetland Regulatory Authority (CWRA) has been constituted. Correspondingly, under Rule 8 (2) of the above Rules, the Orissa Wetland Development Authority (OWDA) has been set up. This is an autonomous regulatory, planning and policy making body for the protection, conservation, reclamation, restoration, regeneration and integrated development of the wetlands.

29. Then we have the Orissa Coastal Zone Management Authority (OCZMA) set up under Section 3 (1) and (3) of the EPA. This was reconstituted on 1st April, 2015 for a period of three years. The OCZMA is expected to take measures for protecting and improving the quality of coastal environment and preventing, abating and controlling environment pollution. It is to ensure compliance of the conditions laid down in the approved Coastal Zone Management Plan of Odisha and the CRZ Notification.

30. Then there is the Wetland Training and Research Centre (WTRC), Balugaon, Khurda District, which was established in 2002. It is supposed to act as a nodal centre for the CDA for conducting wetland related research. Its main objective is to "constantly monitor the lake health and take precautionary measures and preserve the biodiversity of the lake."

Writ petitions in this Court

31. Despite a plethora of authorities dealing with the issues, the problems have not abated. In 2010, the Ambika Primary Fishermen Cooperative Society in Balugaon, District Khurda approached this Court with Writ Petition (Civil) No.18006 of 2010 seeking to evict unauthorized encroachers; for grant of the lease of the 'Kandokhai Jano' source and for restoration of the source to its original status i.e. as a capture source.

32. In a judgment delivered on 21st December, 2010 in the said petition, this Court noted the submissions made on behalf of the State Government that it had constituted three District Level Monitoring Committees (DLMCs) in the Districts of Puri, Khurda and Ganjam, to supervise the monitoring and functioning of the 'Taskforce' at the district level, by a Notification dated 27th July, 2000. A further Notification dated 9th August, 2000 had been issued providing the necessary guidelines for constitution and operation of the Taskforce. Two Taskforces with separate operational units at Satapada and Balugaon had been constituted for protection of the Chilika lake and these were tasked inter alia with enforcing the Orissa Marine Fishery Regulation Act (OMFRA) by way of "prevention of the Poaching of prawn juvenile regulating the fishery activities in the restricted areas etc. of Chilika Lake."

33. This Court in the above judgment reiterated the directions of the Supreme Court in ***S. Jagannath*** (supra) and ordered as under:

> "(i) Opposite parties shall take effective steps to ensure that no aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 mts of Chilika Lake. If such industry is already functioning, the same shall be closed down/demolished forthwith,
>
> (ii) The District Administration shall ensure that all the encroachments are removed from Chilika and adequate protection is provided to the primary fishermen including the petitioner-society to carry on their traditional/improved traditional fishing for the purpose of earning their livelihood,

(iii) The State Government shall frame a detailed and clear cut Chilika Policy for all round development of Chilika Lake as well as welfare of the traditional fishermen living in and around Chilika in terms of direction of the Hon'ble apex Court in S. Jagannath's case (supra)"

34. This Court was again petitioned two years later with Writ Petition (Civil) No.10066 of 2012 (*Sudam Charan Jena and another v. State of Orissa)*. The grievance was that the Opposite Parties had identified fresh capture sources and allotted them to Primary Fishermen Cooperative Societies contrary to the Government guidelines. The Court again reiterated in an order dated 15th October, 2014 that no fresh capture sources of Chilika lake would be allotted/granted in favour of any individual of Primary Fishermen Cooperative Society in violation of the law or Government Policy in vogue.

35. Writ Petition (Civil) No.23855 of 2012 was filed by Ratnakar Satrusalya complaining against the continuation of illegal prawn gheries inside Chilika lake. A Division Bench of this Court noted the submissions of CDA that "it had not been given the responsibility of protection of the lake"; that it had been providing necessary funds to the Districts Administration in order to facilitate eviction of prawn gheries and that "operation of prawn hatcheries in the wildlife forest area is not regulated by it." The Court concluded that the authenticity of the allegations in the petition could not be established. While reiterating that the directions in **S. Jagannath** (supra) had to be strictly followed, this Court permitted the Petitioner \to make a representation to the Chief Secretary, Government of Odisha, which had to be considered within a time frame.

36. Writ Petition (Civil) No.6275 of 2011 was filed by the Maa Mangala Primary Fishermen Cooperative Society before this Court. The prayer was for a direction to Opposite Parties "not to demolish the obstructions put forth for capturing fish and to conduct an enquiry to find out a method, which can be followed by the non-fishermen to continue their fishing activities within the area leased in their favour." This petition was disposed of with a direction that "if the non¬fishermen are permitted under any policy to capture fish, they may be permitted to do so but all the obstructions in Chilika Lake for the purpose of prawn culture may be demolished and removed. If there is no policy in existence for the non-fishermen to capture fish, such policy decision be taken by the State Government early in the interest of the non-fishermen, who mostly survive on income derived from sale of fish."

37. Then there was a Writ Petition (Civil) No.21803 of 2014 by one Kelucharan Ghadei of Mudirath village in District Puri, a traditional fisherman seeking to evict unauthorised occupants from the land, which they were using for their livelihood in terms of the Chilka policy. A direction to that effect was issued by this Court in its judgment dated 20th April, 2015.

38. A judgment of this Court dated 11th December, 2012 in Writ Petition (Civil) Nos.8083 and 8850 of 2012 (*Braja Behera and another v. State of Orissa and others*) reflects the tension between the traditional fishermen operating in the Chilika lake and those carrying on prawn culture illegally at the behest of prawn mafias. Appropriate directions were issued by this Court to resolve the issue.

39. It is in the above backgrounds that the present batch of writ petitions require to be considered by this Court.

The present petitions

40. The genesis of Writ Petition (Civil) PIL No.7469 of 2017, the lead petition in this batch, was a direction issued by the Supreme Court of India on 3rd April, 2017 in Writ Petition (Civil) No.230 of 2001 (*M. K. Balakrishnan and others v. Union of India*) requiring an affidavit dated 28th March, 2017 filed before it by the Member Secretary, CWRA on the steps taken for conservation of wetlands and the utilization of the funds made available and the impact of those steps on the wetlands to be sent to each of the High Courts to be registered as a suo motu writ petition and for follow up.

41. Accordingly, the present petition was registered and taken up for hearing from 7th July, 2017 onwards. Mr. Mohit Agarwal, Advocate, was appointed as the Amicus Curiae (AC). By an order dated 22nd August, 2017, the CWRA, the OWDA, the CDA, the OCZMA, the WTRC and the State Board for Wildlife were all impleded as Opposite Party Nos.3 to 8. On 30th October, 2017, this Court identified six issues, which were required to be considered by the Court: (i) Illegal prawn/shrimp culture, (ii) Pollution, (iii) Uncontrolled boat operation and oil-spills, (iv) Siltation, (v) Depletion of Mangrove forests of Bhitarkanika and (vi) Poaching. With the consent of learned counsel for the parties, the Court decided to take up the issue relating to "Illegal prawn/shrimp culture" in the Chilika lake area. The Court by the said order impleaded the District Collectors of Puri, Khurda, Ganjam and

Kendrapara as Opposite Party Nos.9, 10, 11 and 12 respectively. The Additional Director of Fisheries, Government of Odisha was impleaded as Opposite Party No.13. The Chilika Mastchhyajibi Mahasangha, which had filed an intervention application was impleaded as Opposite Party No.14. Another Applicant, Chilika Dwipaanchala Pesadar Matchyajibi Mahasangha was impleaded as Opposite Party No.15 by the subsequent order dated 30th November, 2017.

42. On 21st January, 2019, the following order was passed:

> "Pursuant to the direction of this Court dated 27.11.2018, a Committee under the Chairmanship of the Additional Chief Secretary to Government in Forest & Environment Department and other members has been constituted vide notification dated 17.12.2018 issued by the Government of Odisha, Forest & Environment Department, Bhubaneswar, copy of which has been filed before this Court.
>
> The constituted Committee is directed to consider and take appropriate action as per the suggestion made by Amicus Curiae at paragraph-15 of his report dated 26.11.2018 filed before this Court.
>
> We hope, the Committee will take appropriate and prompt action on the suggestions made by Amicus Curiae and the Amicus Curiae appointed by the Court will be called to participate in the proceedings of the committee.
>
> If any aggrieved party wants to make a representation, he can make a representation to the newly constituted Committee.
>
> This matter to come up on 18.02.2019 by which time latest status report shall be filed by the Committee. xxx."

43. On 3rd February, 2020, the following order was passed:

> "Heard learned counsel for the parties.
>
> In pursuance of the earlier direction, learned Addl. Government Advocate submitted that they have filed affidavits of Collectors of Puri, Ganjam and Khurda on 27.01.2020.Registry shall place the affidavits on record. He further submitted that as per the instruction received from the Additional Chief Secretary to Government, Forest and Environment Department vide letter dated 24.01.2020,the Government proposed to constitute a Committee for preparation of a consolidated action plan on eviction of illegal prawn gherries from Chilika. The Chief Secretary, Odisha has passed order for formation of the said Committee where the Additional Chief Secretary, Revenue and Disaster Management Department would be the Chairman of the said Committee and

> accordingly, requested this Court to allow him to be the Chairman of the aforesaid Committee in order to obviate the problems like providing funds, manpower and forces for conducting eviction work.
>
> In view of the above, we direct the Chief Secretary, opposite party no.2 to constitute a Committee consisting the Additional Chief Secretary, Revenue and Disaster Management Department as Chairman of the said Committee along with Secretary, Forest and Environment Department and Secretary, Home as its members for preparation of a consolidated action plan on eviction of illegal prawn gherries in Chilika in respect of Puri, Ganjam and Khurda Districts and the said Committee shall be constituted within a period of seven days hence. The Committee shall furnish the action plan indicating within which time they will complete the eviction process of illegal prawn gherries in Chilika phase wise by next date.
>
> List this matter on 2nd March, 2020."

44. Thereafter, for some reasons, the matter was not listed till 18th February, 2021 and on that date, the following order was passed:

> "1. The Court is informed that the Committee appointed by this Court met on 3rd February, 2021.
>
> 2. The report of the Committee be placed on record not later than 1st March, 2021. It would be open to the counsel for various parties to obtain photocopies of the said report from the Registry on payment of usual charges.
>
> 3. On the next date this Court will like to take up not only the issue of eviction of 'prawn gheries', but the other issues as highlighted in the order dated 30th October, 2017, viz., pollution, uncontrolled boat operations and oil- spills, siltation, depletion of the mangrove forests of Bhitarkanika and poaching.
>
> 4. List on 8th March, 2021 at 2 pm."

45. On the next date i.e. on 8th Match, 2021, the following order was passed:

> "1. Heard Mr. Mohit Agarwal, learned Amicus Curiae, Mr. M.S.Sahoo, learned Additional Government Advocate for the State Opposite Parties and Mr. S.K. Dalai, learned counsel for Intervener.
>
> 2. An affidavit dated 1st March, 2021 has been filed by the Chief Executive of the Chilika Development Authority addressing the various issues that have arisen in the course of the present petition. It is a matter of some concern that the Committee that

> met on 3rd February,2021 noted that there has been increase of net Gheries of 2193.30 hectares inside Chilika Lake since the affidavit which was earlier filed on 2nd December, 2019 by the Director, Environment. A series of decisions have been taken by the Committee for demolition of the Prawn Gheries in Khurda and Puri districts, demolition of the earthen embankments of the other Gherries/illegal ponds, to find out and stop the sources of the illegal seed supply, to disconnect the Electricity supply to the illegal prawn culture ponds, and to evict the obstructions in Palur canal uncontrolled Boat operations and oil spills and so on. The affidavit sets out the timelines for the various courses of action.
>
> 3. The immediate concern is to implement the decisions taken by the Committee within the timelines set by it. In response to a query by the Court as to how the timelines are expected to be met and what would be the task force involved in that process, Mr. Sahoo, learned Additional Government Advocate says that he will obtain instructions and file a further affidavit on or before 15th March, 2021.
>
> List on 18th March, 2021."

46. On 15th March 2021, an affidavit was filed by the Committee constituted by the Notification dated 7th February, 2020 indicating that the Collectors of Puri, Ganjam and Khurda districts had constituted Task Force Committees (TFCs) at the district level for evicting unauthorized/illegal prawn gheries, ponds and removing the obstructions to the Palur Canal in the Chilika lake. By letter dated 16th March, 2021, the Collector, Kendrapara intimated that three Committees (Tahasil wise) had been constituted in 2018 itself under the CAAA for identification and demolition of the illegal prawn gheries.

47. In an order dated 18th March 2021, this Court noted the statements in para 6 of the affidavit dated 1st March, 2021 of the Committee that the Collector, Kendrapara had undertaken the demolition of 544 gherries involving area of 562.48 acres would be completed by 30th April, 2021. Similar timelines were indicated for eviction of the illegal gherries in Puri, Ganjam and Khurda as 31st December, 31st May and 31st May, 2021 respectively. The learned Amicus Curiae then pointed out that the Collectors could verify the progress of the demolition/eviction drive through satellite imagery for which coordinates are available with the Orissa Remote Sensing Application Centre (ORSAC). The Court then directed as under:

> "6. The Collectors of the Districts of Puri, Khurda, Ganjam and Kendrapara are directed to call for daily reports by e-mail with attached scanned documents from the TFCs set up to effectively monitor the progress of the work. They will

also use the data provided by the ORSAC and ensure that the timelines as set out in the affidavit dated 1st March 2021, of the Committee, are adhered to. In turn, the Collector will submit a report to learned Advocate General every two days to enable the Office of the Advocate General to apprise this Court whether in fact the setting up of the TFCs has fulfilled the desired objective.

7. Additionally, it is pointed out by Mr. S.K. Dalai, learned counsel for Opposite Party No.17 that in many places in Chilika, the violators are resorting to the vannamei culture and this is going unchallenged. It will be the responsibility of the TFCs set up to ensure that there is no such resort to vannamei culture by the violators and that prompt action is taken against such practice.

8. List for further monitoring on 13th April, 2021."

48. On the next date i.e. on 13th April, 2021, the following order was passed by this Court:

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

2. An affidavit has been filed on 1st March, 2021 by the Chief Executive, Chilika Development Authority (CDA) in which inter alia certain timelines were set out for removal of illegal prawn gherries in four districts i.e., Puri, Ganjam, Khurda and Kendrapara. In a tabular column as under:

District	Remaining Total Gherry Area in Ha.	Timeline of completion of the eviction
Puri	10642.57	31.12.2021
Ganjam	266.21	31.05.2021
Khurda	1223.00	31.05.2021
Total	12131.78	
Kendrapara	225.00	30.04.2021

3. This Court had in its order dated 18th March, 2021 taken note of the fact that Task Force Committees have been constituted by the Collectors of Puri, Ganjam and Khurda districts as well as the Collector, Kendrapara. The Court directed that the Collectors should call for daily reports by e-mail to effectively monitor the progress of the work of demolition of the illegal prawn gherries. The Collectors were asked to submit every two days a report to the Office of the Advocate General to enable this Court to be apprised of the progress.

4. Since then affidavits have been filed on 9th April, 2021 by the Tahasildar, Chilika stating that as far as Khurda district is concerned, two gherries over an extent of 7.1 Hecs. in village Hatabaradihi and 4.2. Hecs. in village Nimuna have been removed. It is stated that on 25 March, 2021, the Committee had demolished gherries covering areas 17.047 Hec. Given the total area where gherries exist in Khurda district is 1223 Hectares, clearly the rate of progress is not satisfactory.

5. An affidavit has been filed by the Tahasildar, Ganjam on 9th April, 2021 in which inter alia it is pointed out that three illegal prawn gherries tanks involving 7.03 Hec. have been summarily evicted. So here again given the total area of 266.21 Hec., and with a deadline of 31st May, 202, the rate of progress is not satisfactory.

6. A third affidavit dated 9th April, 2021 has been filed by the Collector & District Magistrate, Puri where inter alia it is stated that on account of the by-election in the Pipili constituency, eviction work could not be taken up. In other words, absolutely no work has undertaken to meet the deadline for eviction of illegal prawn gherries. The Court notes that no affidavit has been filed in regard to the work undertaken in the Kendrapara district.

7. It appears to the Court that the issue is not receiving the kind of urgent attention that it requires and despite the earlier orders of this Court not enough is being done to remove the illegal prawn gherries over such vast areas in the four districts. It may be noted here that the deadline for removal of prawn gherries in Kendrapara was 30th April, 2021 and there is no affidavit of compliance with the deadline.

8. Expressing its deep concern about the poor progress made in removal of illegal prawn gherries, which is essential to revive the drinking water sources for Odisha, the Court directs that the Chief Secretary, Government of Odisha shall convene a meeting whether in physical or virtual mode of the Collectors of Puri, Ganjam, Khurda and Kendrapara along with the Chief Executive of the CDA and the learned Advocate General within the next one week and in any event not later than 21st April, 2021 at a time that is mutually convenient for all of them. The purpose of the meeting is to come up with a detailed plan of action to ensure that the work of removal of the illegal prawn gherries in the four districts aforementioned is taken up on an urgent basis, the efforts redoubled, revised deadlines be fixed and strictly adhered to. The Court requests the Chief Secretary to personally oversee the progress since it deserves urgent attention and has been neglected for too long. The Court would like to see real progress on the ground through the status reports that will be filed by the Collectors of each of the districts of Puri, Khurda, Ganjam and Kendrapara before this Court by the next date.

9. List on 28th April, 2021. Xxx"

49. In its order dated 29th April 2021, this Court took note of the fact of the connected writ petitions and asked them all to be listed so that no conflicting orders passed by different Benches of the Court.

50. The learned AC pointed out that although certain photographs were enclosed with the affidavits filed on behalf of the Assistant Conservator of Forests of the Chilika Wildlife Division to show that illegal prawn gheries have been demolished, within a couple of days of removing, these gheries had re-emerged. He also pointed out the demolished materials were left at the location and there was no effective patrolling. Therefore, the villagers were able to re-erect the gheries overnight. The Court then issued the following directions in its order dated 29th April, 2021:

> "6. The Court notes that in the recent meeting convened by the Chief Secretary, as explained in the affidavit dated 26th April, 2021 of the Chief Executive, Chilika Development Authority, it has been decided that there will be one platoon of dedicated police force of Puri and additional forces as and when required to enable to Collectors to comply with the orders of this Court as per the time lines and remove the encroachments. The Court would like to impress upon the D.G., Police to ensure that the additional forces be deployed immediately so that there is no re-emergence of the illegal prawn gheries after their removal. This can be ensured only by constant patrolling of these areas by the additional forces.
>
> 7. The progress of the work be reported as per the earlier directions of this Court by each of the Collectors of Puri, Ganjam, Kendrapara and Khurda filing fresh status reports at least three days prior to the next date.
>
> 8. The Court notes that the Opposite Parties have asked the learned AC also to be present at the next meeting. Mr. Ashok Parija, learned Advocate General assures the Court that since the litigation is essentially non-adversarial, all the suggestions of learned AC will be attended to with the seriousness that they deserve.
>
> 9. The Court would like to reiterate that the Opposite Parties must, without any unnecessary delay, register criminal *cases against the offenders, as was earlier directed, as otherwise there would be no deterrence against the continued illegal activity. The Court directs each of the Collectors to include in their status reports the progress in this regard as well.
>
> 10. List on 24th May, 2021 before the Vacation Bench."

51. The situation did not improve remarkably as was noted by this Court in its order dated 31st May, 2021. Learned Amicus Curiae pointed out that despite a plethora of statutory provisions, the brazen violation of the law was continuing by those operating the illegal prawn gheries and no complaints had yet been registered against the violators. The Court then issued the following directions:

> "7. The Court further directs the Collectors of four districts (Puri, Ganjan, Kendrapada and Khurda) shall remain present before this Court in virtual mode on the next date to explain what steps they have taken to activate the statutory remedial processes.
>
> 8. The Court further directs the Collector, Kendrapara to arrange for the satellite verification of the entire area/zone in the district for detection and control of the proliferation of the illegal prawn gherries. He will explain to the Court on the next date the steps taken in this regard.
>
> 9. A copy of this of order be communicated immediately to the Collectors of the above four districts by the Registrar (Judicial) of this Court.
>
> 10. List on 22nd June, 2021 at 2 PM."

52. The AC then submitted a detailed note on the statutory provisions that would stand attracted as a result of the operation of the illegal prawn gheries and this included the Prevention of Damage to Public Property Act, 1984 (PDPPA), EPA and the Wetlands (Conservation and Management) Rules, 2019 (WCMR). The Advocate General assured the Court that the additional platoons of police forces had been deployed in the areas where action was being taken against the illegal operation of prawn gheries and that sufficient progress had been made. A separate compilation of FIRs filed had been placed on record by the Collector, Kendrapara. This Court then issued the following directions on 22nd June, 2021:

> "6. This Court would like to once again emphasize the need for prompt corrective action without let or hindrance by all State authorities acting in close co-operation. The Collectors of Puri, Ganjam, Kendrapara and Khurda will by the next date file updated status reports by way of affidavits on the action taken to remove the illegal prawn gheries in their respective districts. The report of the Collector, Khurda district will specifically address the issues raised by the learned Amicus Curiae in the report submitted by him today on the existence of such illegal prawn gheries by way of encroachment both within and on the fringes of the Chilika lake."

53. There was then a flurry of intervention applications filed before the Court i.e. I.A. Nos.7321, 9733 and 8468 of 2021 by various residents of various villages of Kendrapara District claiming to be cultivating prawns in their own land and not causing any pollution whatsoever. In its order dated 27th July 2021, this Court noted that except the Tahasildar, Ganjam, the Collectors of Puri, Kendrapara and Khurda were yet to file affidavit on the status report. The Court noted the submissions of the AC that the photographs enclosed with the affidavit of Tahasildar, Ganjam did not show that the equipments that facilitate the operation of illegal prawn gheries viz. the Diesel Generator sets, Aerators, Water Pipes, Electricity wires and other incriminating materials had in fact been seized. The Court then issued the following directions:

> "14. The Court accepts the above submission of the AC and directs each of the Collectors in the four districts will ensure the seizure of all the above equipments and any other device which facilitate the operation of illegal prawn gheries. They will file further affidavits before the next date to confirm that clear instructions have been issued to the raiding/enforcement teams in this regard.
>
> 15. The AC also points out that the satellite verification in Kendrapara district has still not been undertaken despite the directions issued by this Court on 31st May, 2021.
>
> 16. The Collector, Kendrapara is once again directed to report compliance of the above direction by the next date.
>
> 17. Because of paucity of time in the regular Bench, all the counsel agree that the matter can be listed at a special sitting on any Saturday.
>
> 18. Accordingly, list this matter before this Bench on 14th August, 2021 at 10.30 A.M.
>
> 19. The Collectors of Puri, Kendrapara, Khurda and Ganjam shall remain present in virtual mode on that date."

54. This Court has heard in a hybrid mode all the present petitions including the intervention applications today i.e. on 14th August, 2021. Mr. V. Narasingh, Mr. Monoj Kumar Mohanty, Mr. Sukant Kumar Nayak, Mr. B. P. Pradhan and Mr. S. K. Sarangi, learned counsel appeared for the Intervenors. Mr. S. K. Dalai, learned counsel for the Petitioner in Writ Petition (Civil) No.16974 of 2021. Mr. Mohit Agarwal, learned AC made a submission. Submissions on behalf of the State Government were made by

Mr. M. S. Sahoo, learned Additional Government Advocate and on behalf of the Union of India, by Mr. P. K. Parhi, learned Assistant Solicitor General of India.

55. The Court also heard in virtual mode the submissions of the Collectors of Puri, Khurda, Ganjam and Kendrapara. Mr. Susanta Nanda, Chairperson of the CDA also made submissions in virtual mode.

Discussion of issues

56. The Court would like to first address the issue of the problems encountered thus far in the effective implementation of the various statutory provisions, the decision of the Supreme Court in ***S. Jagannath*** (supra) and ***M. K. Balakrishnan*** (supra) and of this Court in ***Kholamuhana Primary Fishermen Co-operative Society*** (supra) and the numerous other directions issued from time to time. These are evident not only from the reports and applications filed in the lead petition but in each of the writ petitions in this batch. Each of these points to the failures of law enforcement.

57. As is clear from the above narration, there is no dearth of statutory provisions, or authorities constituted thereunder or powers of those authorities to carry out steps to ensure the preservation of the ecology of the Chilika lake and regulate the activities of fishing, coastal aquaculture including shrimp/prawn production. Numerous committees have also been constituted from time to time to examine the issue. There also have been Task Forces constituted at periodical intervals. The Court has also been continuously intervening in the matter for well over two decades now. The question that arises is why is it so difficult for all these efforts to bear fruit and why is the proliferation of the illegal prawn/shrimp farms in and around the Chilika lake and in Kendrapara not able to be controlled?

58. The orders passed by this Court from time to time reflect one stark reality. Even while the eviction/demolition drives are undertaken, those erecting and operating the illegal prawn/shrimp farms are able to revive the activity in the very same area in a very short time. The learned AC has repeatedly stressed that the raiding teams have failed to do the most obvious thing viz., to seize all the materials that facilitate the carrying on of the illegal activity.

59. Indeed, the photographs presented before the Court, including a short video clip presented to it during the course of hearing today by Mr. Dalai, show that to operate an illegal prawn farm/gherry the use of the Diesel Generator set, an Aerator, the Water Pipes, Electricity wires are essential. A Diesel Generator set is not an equipment that can be quickly carted away and hidden. It should be possible for the local administration to track the movement of trucks which would carry such equipment. It is plain from the affidavits filed thus far by the Collectors of the four districts and the FIRs and seizure lists presented that barring a few instances, what is being seized is only basic material like bamboo sticks and nets and not the Diesel Generator sets, the Aerators, the Pipes, the wires etc.

60. The other serious problem is the failure to invoke the statutory provisions that resultant the FIRs being registered only under some relatively benign provisions of the Indian Penal Code (IPC). In a majority of the FIRs registered thus far the provisions of the PDPP Act are not even mentioned. Section 3 of the PDPP Act makes a cognizable and non-bailable one punishable up to imprisonment terms of five years with a fine of Rs.1 lakh.

61. The other problem, as already noted, is the inaction of the Authority under the CAA Act in nominating an officer under Section 15 of the CAA Act to file complaints under Section 14 of the CAA Act. Therefore, for nearly 16 years now, the stringent provisions of Section 14 of the CAA Act have not been able to be invoked.

62. Another major factor hindering the enforcement of the law, is the failure to fill up the vacancy of the posts of Chairperson and Members of the Authority under the CAA Act. The responsibility for this must squarely lie with the administrative Ministry of the Central Government under which the Authority functions. The Court is informed by Mr. Parhi that this is the Ministry of Agriculture.

63. The Court also finds that the plethora of authorities including the CDA have not really taken effective measures. Mr. Nanda, the CEO of the CDA informs the Court that the CDA had no powers to itself carry out any raids or register cases. The Court had to impress upon Mr. Nanda that this should not have prevented the CDA from writing to both the State Government and Central Government about the need to make the provisions of the CAA Act effective by nominating an officer under Section 15 of the

CAA Act for filing complaints and for filling up all the vacancies of the Authority in terms of Section 3 (2) of the CAA Act. The CDA is fully conscious of the extent of the problems and it is tasked to closely monitor the effectiveness of the implementation of the statutory provisions and orders of the Court. The Court would expect the CDA to be proactive in this regard and continuously draw the attention of the authorities concerned to the extent and complexity of the problem.

64. The Court also finds that the raids conducted in the different districts is sporadic and not continuous. This gives enough time to the violators to regroup and revive their activities. Unless the raids to close down/demolish the illegal prawn gherries are conducted in secrecy, with promptitude and on a continuous basis, it will cease to be effective. The efforts would come to nothing if there is too much of a gap between two consecutive raids. In their presentations, each of the Collectors has assured this Court that they would increase the periodicity of the raids by the Special Task Forces (STFs).

Directions on specific issues

65. The Court accordingly directs that each of the STFs will

(i) prepare and operate a check list of what should be seized during the raid;

(ii) ensure that the seized materials are taken away far from the site, properly inventorised and kept under the watch of the authorities till the conclusion of the criminal cases;

(iii) promptly register FIRs invoking all the available statutory provisions and importantly the PDPPA Act.

66. The Court would like to see some real change in the ground in so far as meeting the target set by each of the District Collectors for demolition of the illegal prawn gheries. The demolition should be not only of the illegal prawn gherries but also of illegal prawn hatcheries. The Court directs that each of the demolition actions must be videographed to show that not only have they been effectively demolished but all the equipments used have actually been seized and taken away far from the site and detained in the custody of the authority concerned. The Court directs that each of the status report filed by the four Collectors will enclose pen drives/C.Ds. containing the videographs of all the demolition actions along with their respective status reports to be filed by the next date.

67. The Court also directs each of the Collectors of Puri, Ganjam, Kendrapara and Khurda to immediately apply to the National Centre for Sustainable Coastal Management in Chennai and obtain satellite imagery of the areas in which the illegal shrimp/prawn farms and hatcheries are operating; place those satellite imagery maps before the Court to indicate the exact locations of such illegal farms and hatcheries, indicate the action that has been taken to remove such illegal farms and further to confirm to the Court that all those sites have been re-visited on weekly basis thereafter to ensure the demolished farms and hatcheries have not reemerged. The status reports enclosing the satellite imagery maps and all of the above information will be made available before the next date of hearing with an advance copy to the learned AC to enable him to make his submissions thereon.

68. The status reports will be accompanied by a chart giving the details of the FIRs registered contemporaneous with every demolition action and showing the provisions under which the FIRs have been registered and what action was taken on the FIRs so registered.

69. The Court also directs the concerned Police Stations in each of the four Districts to ensure that the investigation in each of these FIRs is not delayed; the charge-sheets are properly filed; that the cases are taken to the logical end without undue delay. A direction is issued to the Director General of Police, Odisha to ask for monthly reports from the SHOs of the concerns PSs in these four Districts, specific to the demolition/raids undertaken pursuant to the directions of this Court to remove the illegal prawn gheries.

Interpretation of the CAA Act

70. The Court now turns to the issues raised by the Intervenors specific to the interpretation of the various provision of the CAA Act. The provisions themselves have been set out hereinbefore. It does appear that the purport of the provisions of the CAA Act is to ensure that all persons undertaking the activity of coastal aquaculture in a coastal area have to compulsorily get the operation/farms registered. If they do not have any such registration as mandated under Section 13 (1) read with Section 13 (4) (5) and (9), then straightaway they invite action under Section 14 of the CAA Act.

71. The Court is informed that all of the figures of illegal prawn gheries that remain to be demolished, as is evident from the affidavits of the

Collectors of Puri, Ganjam, Kendrapara and Khurda, refer to illegal prawn gheries i.e. those operating in the coastal area without a registration. Therefore, there should be no problem at all in proceeding to demolish all such illegal prawn gheries.

72. In terms of Section 13 (8) that can be no registration of a fresh prawn gherry/farm in the CRZ area. If there is any such farm in a coastal area, which is beyond the prohibited area under Section 13 (8) of the CAA Act and which is not a traditional coastal aquaculture firm, for which the governing provisions are Section 13 (1) read with Section 13 (9) of the CAA Act, then again it cannot continue to operate without registration.

73. It is therefore abundantly clear that in a coastal area that cannot be any coastal aquaculture activity undertaken unless there is registration under the CAA Act.

74. Registration is different from licensing. The Court is told that the license is issued by the Marine Products Export Development Authority (MPEDA) and a license is valid for a period of five years. In other words, if a person operating a coastal aquaculture farm is unable to produce a valid registration as well as the license, such person cannot be allowed to continue to operate. In the check list prepared by the STFs, the two important requisites that required to be verified is whether the person operating the coastal aquaculture farm has a valid registration and has a valid license. The Court directs that the reports submitted by the STFs, should enclose the above checklists vis-a-vis each of the illegal prawn farms/gherries demolished and be placed before the Court by the next date along with the status reports of the District Collectors of the four districts.

75. The Courts directs the Union of India, Ministry of Agriculture to file an affidavit on the timeline within which it proposes to fill up the vacancies in the authority under the CAA Act i.e. the Chairperson as well as the Members. This is essential if indeed the CAA Act is to have any meaningful effect on stopping the menace of illegal shrimp/prawn firming in the coastal areas of the State of Odisha.

Intervention applications

76. Having heard learned counsel for all of the Interveners, it appears to this Court that the refrain is that each of them is supposedly operating beyond

the coastal area. Therefore, each of them claims that they do not require to be registered under the CAA Act and they do not have to get a license issued by the MPEDA. The State Government is yet to respond to these claims.

77. A direction is accordingly issued to the State Government to place before this Court a chart showing, vis-a-vis each of the Intervenors, whether their claim that they are validly operating shrimp/prawn firms on their own lands is correct? Whether, in fact, the land in which they undertake such operation is beyond the coastal area? Whether there is no illegality committed by any of them under the CAA Act, the EPA, the PDPP Act, the WCM Rules or any other law for the time being in force? The State Government shall also indicate the status of the applications pending before the DLCs / SLCs for grant of registration / licenses and within what time such applications will be disposed of.

78. At this juncture accepting the averments in the Intervention Applications at their face value, the Court directs as an interim measure that till the next date of hearing, no coercive steps be taken against the Intervenors unless the State authorities are able to confirm that since they are operating within the coastal area in which case they cannot continue to operate as such.

79. List on 23rd September, 2021 at 2 P.M.

80. Copies of this order be delivered by Special Messenger to the D.G. of Police, the Collectors of Puri, Ganjam, Khurda and Kendrapara forthwith for compliance.

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2021 (III) ILR - CUT- 37

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

STREV NO. 469 OF 2008

M/s.LARSEN & TOUBRO LTD. ……..Petitioner

.V.

STATE OF ORISSA ……..Opp. Party

ORISSA SALES TAX – Whether component parts were brought from different places outside Orissa and assembled in Orissa amounts to intra-State sale? – Held, it is an inter-State sale.

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 1854 : Bharat Heavy Electrical Limited Vs. Union of India.
2. (1958) 9 STC 353 (SC) : State of Madras Vs. Gannon Dunkerley & Co.

For Petitioner : Mr. Sidhartha Ray

For Opp. Party: Mr. Sunil Mishra, A.S.C. (CT & GST)

ORDER Date of Order : 01.09.2021

Dr. S. MURALIDHAR, C.J.

1. The present revision petition arises from an order dated 23rd April, 2008 passed by the Sales Tax Tribunal, Cuttack by which S.A. No.3009 of 1995-96 filed by the present Petitioner was partly allowed. By the said impugned order, the Full Bench of the Tribunal upheld the decision dated 27th November, 1995 of the Assistant Commissioner of Sales Tax (ACST), Sambalpur Range, Sambalpur in Sales Tax Appeal No.AA 76 (SA III) of 94-95. It was held that the three separate contracts for supply, design and erection of 100 TPD Rotary Kiln by the Petitioner to M/s.Tata Refractories Ltd. (TRL) amounts to works contract and an intra-State sale exigible to sales tax at 4% notwithstanding that the Petitioner had paid Central Sales Tax (CST) on the same transaction.

2. While admitting the petition on 29th July, 2009, the following substantial questions of law were framed by this Court:

> "1. Whether in the particular facts and circumstances of the case the Full Bench, Orissa Sales Tax Tribunal has acted in accordance with the statutory provision and the settled position of law while disallowing the claim of sales u/S.6(2) of the CST Act and treat it as intra state sale when the selfsame turn over has been assessed under the CST Act for the selfsame year by the STO, Rourkela II Circle?
>
> 2. The Full Bench, Orissa Sales Tax Tribunal having been satisfied with the fact that conditions do not exist for imposition of penalty u/S.12(5) of the Orissa Sales Tax Act, 1947, whether the Tribunal is legally justified in not deleting the penalty imposed entirely?"

3. The background facts are that the Petitioner and TRL entered into three separate contracts on 25th August, 1992. One was for supply of indigenous equipment including all accessories for the 100 TPD Rotary Kiln. The second was for erection, testing and commissioning of the Rotary Kiln. The third was for the system engineering and design of the 100 TPD Rotary Kiln including all auxiliary equipment. The Rotary Kiln was to be set up in Belpahar in Orissa and the equipment was to be supplied from outside the State of Orissa. Some of the equipments were to be manufactured by the Petitioner at its factory in Maharashtra and some of them were brought from other manufacturers located outside Orissa and despatched to TRL by way of transfer of documents with the title to the goods passing when the goods were in transit.

4. The trigger point for the dispute was an order dated 28th October, 1994 passed by the Sales Tax Officer (STO), Rourkela for the assessment year ending 1993-94. The STO held that the Petitioner had failed to get itself registered under the Orissa Sales Tax Act (OST Act) leading to a notice under Section 12 (5) of the OST Act being issued to it. Before the STO, it was contended by the Petitioner that out of the three contracts, the one for system engineering and design was purely a service contract and did not attract the provisions of either the OST Act or the Central Sales Tax Act (CST Act). The supply of indigenous equipment was in the course of inter-State trade for which the Petitioner was separately registered. The jurisdiction for levying CST on such transaction was, under Section 6(2) of the CST Act, with the STO, Rourkela-II Circle, Rourkela. The agreement for erection and commission was purely a labour and service agreement.

5. It was contended by the Petitioner before the STO that in the year 1992-93, no work was executed and therefore proceedings under Section 12(5) of the OST Act were unwarranted. The Petitioner produced before the STO invoices, which showed that 4% CST had been collected.

6. The STO rejected the above contentions and came to the conclusion that when the component materials and equipments were despatched from outside the State, the property in the complete equipment had not passed yet to the buyer. It was held that the transaction fell "squarely outside the Section 3(a) of the C.S.T. Act". It was further held that the property in the Rotray Kiln passed only after successful its commissioning. It was then concluded as under:

> "The complete 100 TPD Rotary Kiln which is nothing but is an end product, is the subject of contract and is separate from the component materials imported from other States. The movement of the above component materials from different states was with object of making the 100 TPD Rotary Kiln which alone was the subject of the contract. Here the 100 TPD Rotary Kiln took stupe only when all the component and materials of the equipment are brought to the site in Orissa and assembled. It was made over thereafter to the purchaser by appropriation to the contract."

7. On this basis notwithstanding that the Petitioner had paid CST on the above transaction, the STO by the impugned assessment order determined the tax payable under the OST Act at 4% amounting to Rs.51,25,273.56. Further, surcharge and penalty were also levied.

8. The Petitioner's appeal against the above order was dismissed by the ACST by the order dated 27th November, 1995. The conclusions reached by the ACST were as under:

> "(i) The contract for supply and commissioning is a composite one held out to the appellant through two instruments. One is inextricably linked with the other in as much as by supply alone the contractee's entrustment would not be fulfilled. Nor is erection and commissioning possible without supply. After all the contractee was not interested in mere supply of goods but wanted 100 TPD Rotary Kiln installed in their physical and functional entirety.
>
> (ii) The goods envisaged in the contract were not the same goods which made their way from Maharashtra to Orissa in course of inter-state trade. The items received from Maharashtra were reshaped in Orissa and appropriated to the contract.
>
> (iii) The inter-state journey of the goods was breached when the appellant himself took delivery of the same in order to fabricate the items necessary to be appropriated for compliance of contract.
>
> (iv) The goods were not sold qua-goods but were pleased on to the contractee on the theory of accretion."

9. The Petitioner then went before the Full Bench of the Tribunal which initially by an order dated 7th October, 2002 dismissed the appeal, rejecting the contention of the counsel for the Petitioner that the contractee, i.e., TRL had received the materials brought from Maharashtra to the State of Orissa and stored in its own godown and therefore, it was an inter-State sale and not

an intra- State sale. The Tribunal observed that it could not "find out any documentary evidence to show that as goods were received by the contractee."

10. Aggrieved by the above orders, the Petitioner filed ST Revision No.23/2003 in this Court. By order dated 12th March, 2008, this Court remanded the matter to the Tribunal for re- hearing after examining the documents produced by the Petitioner before it. It was directed that the Tribunal should hear the appeal afresh, consider the documents before coming to a finding.

11. Consequent upon the remand, the Tribunal after hearing the appeal and considered the documents passed the impugned order dated 23rd April, 2008 holding inter alia as under:

> "It is clear from the three numbers of Letter of Indent mentioned earlier that what was intended by the parties to the contract was not sale or supply of goods simpliciter but drawing design supply, installation, erection, testing commissioning & demonstration of 100 TDP Rotary Kiln. It is not supply of chattel qua chattel but a works contract involving the aforesaid processes. It is an indivisible works contract which has been made divisible by legal fiction by the constitution (46th) amendment Act. It is not a contract for deemed sale of goods and labour involved in works contract. In the instant case, a colorable device adopted by the parties to make indivisible works contract divisible in order to evade payment of tax under the OST Act. In order that there should be a sale of goods qua goods which is liable to sales tax as a part of the contract for work there must be a contract in which there is not merely transfer of title of goods as an incident of the contract, but there must be a contract, express of implied for sale of very goods. Prior to the constitution (46th) Amendment Act and in view of the decision of the Hon'ble Supreme Court of India in case of *State of Madras Vs. Gannon Dunkerley & Co (1958) 9 STC 353 (SC)* the real question that was to be decided was whether the contract was primarily a contract for supply of materials at the price agreed to between the parties for the materials so supplied and the works and service rendered was incidental to the execution of the contract. If it was so the contract was for sale of materials. If on the other hand the contract was primarily a contract for work and labour and supply of material was incidental to the execution of such contract it could not be said there was a contract for sale of materials. It would be a works contract. But after 46th Amendment of the constitution the position has been altogether different. In a works contract however small is involvement of the material that is to be exigible to Sales Tax as deemed sale of goods in course of execution of such contract. From the facts of the present case it would be seen that the setting

up the 100 TDP Rotary Kilns is a highly sophisticated activity which requires very high degree of skill. Drawing, design, supply, erection testing commissioning is one single indivisible process and the kiln comes into existence when the erection is complete. Erection, installation or commissioning is thus a fundamental and integral part of the contract. It is, therefore, not a sale of equipments simpliciter but works contract involving deemed sale of the equipments and supply of labour and services in course of execution of the work. Moreover the contract entered into by the parties is a contract for design, supply, erection, etc of unascertained/future goods. At the time of execution of contract the goods are not in existence. In case of unascertained or future goods at the time of their appropriations to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation. In case of the present contract the appropriation to the contract has been made after installation/erection of 100 TDP rotary kiln and demonstration. Therefore, the present contract is a works contract involving deemed sale of goods after accretion/erection/commission and demonstration of the working of the kiln."

12. The further finding of the learned Tribunal was under:

"Here the instant case when the contract is for supply, erection etc of 100 TDP Rotary Kiln bringing of the component parts and equipments and assembly of the same at the work site amounts to manufacture and erection of the same and both these manufacture and erection amount to works contract."

xxx xxx xxx

"But in the instant case when the sole purpose is the drawing, design, supply erection etc of 100 TDP Rotary Kiln and assembly of the equipments and component tantamount to manufacture and erection the components can't be sold inter-State by the contractor to the contractee inter-State and if it is so then the contractor's assembly and erection of the same can't amount to works contract but sales of component parts inter-State and the contract is not sale of component parts inter-State but the deemed sale of the Rotary Kiln. Further, most of the goods have been claimed to have been sold inter-State by way be subsequent inter-State sales and exemption of such sales from levy of CST as per the provisions of Sec.6(2) of the CST Act."

13. The Tribunal then proceeded to discuss Section 6(2) of the CST Act and its applicability. Ultimately, the Tribunal concluded as under:

"In the absence of documentary evidence, it is established that M/s.L&T has taken delivery of goods from the common career in Orissa in course of 1st inter-State movement o f goods, thereby bringing such movement to an end and

> thereafter delivered the goods to M/s. TRL who in his turn delivered the goods to M/s. L&T to assemble and erect the 100 Rotary Kiln and such assembly, erection etc of the equipments in a phased manner amounts to works contract and is exigible to sales tax at the rate of 4% the rate of tax applicable for goods deemed to have been sold in course of execution of works contract."

14. This Court heard the submissions of Mr. Sidhartha Ray, learned counsel appearing for the Petitioner and Mr. Sunil Mishra, learned A.S.C. for the Department.

15. The first issue be considered is whether the Tribunal erred in treating the above transactions as an intra-State sale despite the Petitioner having paid CST on the same transaction.

16. The question appears to be no longer res integra. In ***Bharat Heavy Electrical Limited v. Union of India AIR 1996 SC 1854***, the Supreme Court was considering a similar question which arose in the background of Bharat Heavy Electrical Limited (BHEL) being awarded a Letter of Intent (LOI) by the National Aluminium Company Limited (NALCO), Bhubaneswar for setting up of five captive power plants (120 MW each) at its Aluminium smelter complex at Angul, Orissa. Pursuant to the LOI, BHEL instructed its several units in Haridwar, Jhansi, Bhopal, Bangalore, Ramachandrapuram (Andhra Pradesh- near Hyderabad), Ranipet and Tiruchi (Tamil Nadu) and so on to manufacture the requisite machinery and equipment. There was a separate supply and service contract executed between the parties. The execution of the work order involved manufacturing of some of the components and parts in places outside Orissa and then bringing them to the work site at Angul, Orissa to be incorporated into the captive power plant being erected in Orissa. BHEL paid Central Sales Tax on the value of entire boiler systems manufactured by Tiruchi unit in Tamil Nadu which ultimately became part of the captive power plant. When the sales tax authorities in Orissa sought to levy OST BHEL protested stating that simultaneous taxation in different States for the same transactions was causing it an unbearable burden. The Supreme Court examined the question whether the above sales were intra- State sales? It observed as under:

> "22. Whether a particular sale is an inter-State sale or an intra-state sale is essentially a question of fact.Perhaps, it may be more appropriate to say that it is a mixed question of fact and law. Whenever BHEL enters into a supply contract with a party, it designates one of its units as the executing unit. That is treated as

> the main unit executing the work. (Sometimes, this is not done and each unit is entrusted a particular job). But it may happen that the executing unit does not manufacture all the parts and components which are required for completing the job entrusted to it. It, therefore, requests other units of BHEL to manufacture the parts and components required by it and to despatch the same. Some of the parts and components so manufactured by other units are sent directly to the executing unit for being incorporated into the main machinery/system while some parts and components are despatched directly to the work-site. Tiruchi unit was supposed to be the executing unit. But some parts and components required for the boiler system and other equipment (which was the responsibility of the Tiruchi unit to manufacture) were being manufactured at the Hyderabad unit. At the request of the Tiruchi unit-or on the instructions of the Head office, as the case may be – the Hyderabad unit manufactured those parts and components and dispatched some of them to Tiruchi and some of them directly to Angul in Orissa (work-site). The consideration stipulated in the supply contract was payable in the manner provided therein."

17. The Supreme Court disagreed with the view of the Tribunal that the transaction was not an inter-State sale since the goods sent (by rail or road) did not answer the description of the goods mentioned in the annexure to the LOI/supply contract. The Supreme Court observed as under:

> "Obviously, the annexure mentions only the major items of machinery and equipment. These major items cannot be transported as such; transport has to be effected in sections and parts and assembled at the spot. For that reason, it cannot be said that the goods transported are not the goods agreed to be supplied. It is nobody's case that BHEL supplied some other goods than the goods agreed upon. Having thus erroneously excluded Section 3 of the Central Sales Tax Act, the Tribunal went to Section 4 and held that in the circumstances, the sales must be held to have taken place inside the State of Orissa. The discussion about endorsement of goods by NALCO to BHEL in Orissa and so on is rather ambiguous."

18. On the same basis, as far as the present case is concerned, merely because the component parts were brought from different places outside Orissa and assembled in Orissa, it cannot be said that it was an intra-State sale and that a colourable device was deployed to avoid paying sales tax under the OST Act. This is contrary to the facts. The documents placed on record clearly show that components either manufactured in the Petitioner's own facilities outside Orissa or brought from outside Orissa were transported to Orissa for erection, testing and commissioning of the 100 TPD Rotary Kiln.

19. There was no occasion for the Tribunal to have gone into a lengthy discussion whether it amounted to a works contract when the focus ought to have been on whether it was an intra-State sale as contended by the State. The goods were indeed supplied in course of inter-State rate, and received by TRL in Orissa. The movement of the goods originated from outside the State. This was not an intra-Sate sale by any stretch of imagination.

20. Consequently, the Court is unable to agree with the conclusion reached by the authorities at all levels, i.e., STO, ACST and the Tribunal and accordingly all their orders in this regard are hereby set aside. Question No.1 is answered in the negative by holding that the Full Bench of the Tribunal erred in treating the transactions as intra-State sales despite those transactions having been exigible under Section 6(2) of the CST Act. Question No.1 is accordingly answered in favour of the Petitioner-assessee and against the Department.

21. Consequently, Question No.2 is answered in the negative by holding that the Tribunal was not justified in declining to delete the penalty imposed in its entirety.

22. The STREV is accordingly disposed of.

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2021 (III) ILR - CUT- 45

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

WRIT APPEAL NO.172 OF 2019

JAGDEV MAJHI .....Appellant

.V.

STATE OF ODISHA & ORS. .....Respondents

ORISSA GRAM PANCHAYAT ACT, 1964 – Section 26 (2) – Jurisdiction of the Collector – Whether the Collector has jurisdiction under section 26 (2) of the 1964 Act to decide the question of disqualification of a returned candidate for not having the requisite qualification under section 11(a)(i) of the aforesaid Act as not attained the minimum age of

21 years for the post of Sarpanch – Held, Yes – In our considered opinion, an application under section 26 of the Act has within its gamut, the absence of qualification as well as the presence of disqualification.

Case Laws Relied on and Referred to :-

1. 2015 (II) CLR 897: Bilash Majhi Vs. Collector and District Magistrate, Kalahandi and Anr.
2. 2014 (I) CLR 922 : Debaki Jani Vs. The Collector and Anr.
3. 2008 (I) OLR 230 : Raghunath Sahoo Vs. Collector & District Magistrate, Keonjhar and Ors. 2008 (I) OLR 230
4. AIR 1999 SC 1120 : Rabindra Kumar Nayak Vs. Collector, Mayurbhanj, Orissa and Ors.

For Appellant : Mr. Bibhuti Keshari Biswal

For Respondents: Addl. Govt. Adv. (for resp. nos.1 and 2)
Mr. Samvit Mohanty and Saswata Mohapatra
(for Resp. nos. 3)

JUDGMENT Date of Hearing: 31.03.2021 & 16.08.2021: Date of Judgment: 03.09.2021

S.K.MISHRA. J.

> *"Whether Collector of a district has jurisdiction under Section 26 (2) of the Odisha Grama Panchayat Act, 1964 to decide the question of disqualification of a returned candidate for not having the requisite qualification under Section 11(a)(i) of the aforesaid Act for not having attained the minimum age of 21 years for the post of Sarpanch of a Grama Panchayat."*

2. The above question arose in this intra-Court appeal. The appellant, being the petitioner before the Collector, Nuapada assails the correctness of order dated 09.04.2019 passed by the learned Single Judge in W.P.(C) No.2924 of 2019, wherein he set aside the order passed by the learned Collector, Nuapada in exercise of jurisdiction under Section 26, read with Section 11 (a)(i) of the Odisha Grama Panchayat Act, 1964, hereinafter referred to as 'Act' for brevity.

The respondent no.3 was elected as a Sarpanch of Saliha Grama Panchayat of Nuapada block on 27.02.2017. A petition under Section 26 of the Act was filed by the appellant and others on the ground that nomination of the respondent no.3 was accepted illegally as she has not attained the age of 21 years on the date of filing of the nomination and as such, she was not qualified to the post of Sarpanch as per Section 11 (b) of the Act. The

Collector, Nuapada issued notices and after accepting evidences etc came to the conclusion that the respondent no.3, opposite party before him, had not attained the minimum age prescribed in Section 11 (b) of the Act at the time of filing nomination for the post of Sarpanch, as her date of birth is 29.09.1997. Accordingly, he declared the respondent no.3-Manita Sahu to be disqualified for being elected as Sarpanch of Saliha Gram Panchayat of Nuapada Panchayat Samiti and her election for the said post was declared to be void and illegal.

3. The learned Single Judge after taking into consideration the materials placed before him and relying upon a judgment of this Court in W.P.(C) No.3321 of 2018 held that the allegation with regard to not attaining the age of 21 i.e. the age of eligibility is a violation of Section 11 (b) of the Act, and it can only be challenged in a election petition filed under Section 30 of the Act and the allegation made does not come within the purview of Section 25 of the Act. Hence, he held that the Collector should not have exercised the jurisdiction under Section 26 of the Act and therefore, allowed the writ petition and quashed the order passed by the Collector, Nuapada.

4. The appellant filed an application before the Collector, Nuapada that the respondent no.3 was under age at the time of filing of the nomination, which can be known from reliable source. The respondent no.3 suppressed her date of birth and filed a false affidavit. The appellant examined the Head Master, Government UG High School, Magurpani and the information dated 28.12.2016 and 22.12.2017 obtained under the Right to Information Act has been exhibited. It was established before the Collector that the respondent no.3-Manita Sahu was admitted in the School having date of birth 29.09.1997. The respondent no.3-petitioner in W.P.(C) No.2924 of 2019 has not given an alternative date with regard to her date of birth. In other words, the petitioner has not put an alternative case that she was born on a particular date to make her eligible to contest the election of Sarpanch having attained the age of 21 on the date of nomination. She has only relied upon averments and the document filed as Annexure-5 to the writ petition, which happens to be copy of the electoral roll prepared by the State Election Commissioner for Saliha Grama Panchayat, that she was 22 years on 2017. The contentions raised before the learned Single Judge are that the lack of qualification mentioned in Section 11(b) of the Act cannot be adjudicated upon or answered in a proceeding under Section 26 of the Act as the Section 26 of the Act is confined only to the disqualification referred to in Section 25 of the

Act and that the Collector does not have jurisdiction to declare the election void under Section 26 of the Act.

5. Mr. Bibhuti Keshari Biswal, learned counsel for the appellant relied upon the reported case of ***Bilash Majhi v. Collector and District Magistrate, Kalahandi and another, 2015 (II) CLR 897***. In the reported case, the learned Single Judge held that a disqualification appearing in Section 11(a)(i) of the Act can be decided in a proceeding under Section 26(2) of the Act. The learned Single Judge took into account the earlier reported case of ***Raghunath Sahoo v. Collector & District Magistrate***, ***Keonjhar and others***, 2008 (I) OLR 230 and the full Bench judgment of this Court in ***Debaki Jani v. The Collector and another***, 2014 (I) CLR 922.

6. The learned counsel for the respondent no. 3, on the other hand, very emphatically submitted that the order passed by the learned Single Judge does not suffer from any infirmity or illegality. He relied upon the reported cases of ***Rabindra Kumar Nayak v. Collector, Mayurbhanj, Orissa and others***, AIR 1999 SC 1120 and Debaki Jani v. the Collector and another, (supra). While answering the question formulated at the beginning of the judgment, we are of the opinion that the procedure adopted by the learned Single Judge in disposing of the writ petition is improper in view of the fact that a Bench of co-ordinate strength has already decided this matter in ***Bilash Majhi v. Collector and District Magistrate, Kalahandi and another*** (supra). If the learned Single Judge was of the opinion that the judgment and the ratio decided in Bilash Majhi case (supra) is not the correct law, the best course should have been to refer it to a larger Bench. The judgment of the learned Single Judge impugned in this intra-Court appeal is therefore hit by the principles of stare decisis.

7. We are of the opinion that the view taken by C.R. Dash,J. in ***Bilash Majhi vs. Collector & District Magistrate, Kalahandi and another*** (supra) is correct. We give the reasons for the same as follows:

> " In Raghunath Sahoo v. Collector & District Magistrate, Keonjhar and others (supra), this Court held that simultaneous proceedings under Sections 26 and 30 of the Act are maintainable. Section 30 of the Act provides for the election dispute before the Civil Judge (Junior Division) whereas Section 26 provides for an enquiry by the District Magistrate and Collector. For the purpose of convenience, the relevant portions of the provisions applicable to the case are quoted below:

"Section 11. Qualification for membership in the Grama Panchayat – Notwithstanding anything contained in Section 10 no member of a Grama Sasan shall be eligible to stand for election-

xxx xx xx

(b) as a Sarpanch or Naib-Sarpanch, if he has not attained the age of twenty-one years or is unable to read and write Oriya;

xx xx xx

Section 25 of the Act provides for disqualification for membership of Grama Panchayat. The relevant portion is quoted below.

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

xx xx xx

(s) is disqualified by or under any law made by the Legislature of the State; or

xx xx xx"

Section 26 of the Act reads as follows:

"26. **Procedure of giving effect to disqualifications**. - (1) Whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other member is or has become disqualified or whenever any such person is himself in doubt whether or not he is or has become so disqualified such person or any other member may, and the Sarpanch at the request of the Grama Panchayat shall, apply to the Collector for a decision on the allegation of doubt.

(2) The Collector may suo motu or on receipt of an application under Sub-section (1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of being heard, determine whether or not such person is or has become disqualified and make an order in that behalf which shall be final and conclusive.

(3) Where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member is or has become disqualified such decision shall be forthwith published by him on his notice-board and with effect from the date of such publication the Sarpanch, Naib-Sarpanch or such other member, as the case may be, shall be deemed to have vacated office, and till the date of such publication he shall be entitled to act, as if he was not disqualified."

8. Thus, a joint reading of the aforesaid provisions leaves no doubt in the mind of the Court that in a proceeding under Section 26 of the Act, the Collector has the jurisdiction to determine whether or not such person is or has become disqualified and make an order in that behalf, which shall be final and conclusive. As provided under sub-Section (3) of the aforesaid Act, such decision is to be forthwith published by him on his notice board and with effect from the date of such publication, the Sarpanch, Naib-Sarpanch or such other member, as the case may, shall be deemed to have vacated office.

Section 25 of the Act lays down the disqualification for membership of Grama Panchayat or to hold the office of Sarpanch. Clause (s) of Section 25(1) provides that a person shall be disqualified for being elected or nominated as a Sarpanch or other member of the Grama Panchayat constituted under that the Grama Panchayat Act, if he is disqualified by or under any law made by the legislature of the State. In that very Grama Panchayat Act of 1964, Section 11 provides for the qualifications to be a member of the Grama Panchayat or Grama Sasan. Clause (b) of Section 11 very clearly lays down that notwithstanding anything in Section 10 no member of a Grama Sasan shall be eligible to stand for election as a Sarpanch or Naib-Sarpanch, if he has not attained the age of twenty-one years. Thus, a conjoint reading of Section 25 (1) (s) and Section 11 (b) of the Grama Panchayat Act leads to the irresistible conclusion that in order to contest for the post of Sarpanch of a Grama Panchayat, a person should have attained the age of 21. Though there is no mention as about the date on which the candidate should complete 21 years, we are of the opinion that it is on the date of nomination that she/he should have attained the age of 21.

Admittedly, in this case, the factual findings of the Collector, Nuapada that the date of birth of the respondent no.3 is 29.09.1997, hence she had not attained the age of 21 years on the date of nomination, has not been set aside by the learned Single Judge. Therefore, her nomination is illegal and cannot be upheld by the Court.

9. The learned counsel for the respondent no.3 submitted that the Collector-cum-District Magistrate cannot pass an order that the election is void. However, we are of the opinion that the choice of word by the Collector, Nuapada, may not be proper but that does not nullify the findings he has arrived at in a quasi-judicial proceeding. As per sub-Section (3) of Section 26 of the Act, once the Collector comes to the conclusion that a

person is not qualified to hold the office and that he takes a decision to that effect and publish the same in his notice board, from that day onwards, the Sarapanch or Naib-Sarpanch or Member of the Grama Panchayat shall be deemed to have vacated the office. So, merely because the Collector used the word 'void' in his order, it will not make his decision on the petition filed under Section 26 of the Act by the appellant susceptible to interference. The argument of Mr. Samvit Mohanty, learned counsel for the respondent no.3 that in an application under Section 26 of the Act only disqualification appearing under Section 25 of the Act should be considered and not the absence of qualification enumerated under Section 11 of the Act, is of no substance. He argued that absence qualification as enumerated in Section 11 can only be decided in a election petition under Section 30 of the Act is also of no substance. In election petition filed under Section 30 of the Act, questions relating to absence of qualification or presence of disqualification as mentioned in Sections 11 and 25 of the Act can be gone into. In our considered opinion, an application under Section 26 of the Act has within its gamut the absence of qualification as well as the presence of disqualification.

10. Thus, we come to the conclusion that the order passed by the learned Single Judge in W.P.(C) No.2924 of 2019 on dated 09.04.2019 is not sustainable and has to be interfered with.

Accordingly, the Writ Appeal is allowed. The order dated 09.04.2019 passed in W.P.(C) No.2924 of 2019 is hereby set aside. It is directed that the election of the respondent no.3 to the post of Sarpanch is illegal as she did not have the qualification to contest in the election on the date in question. It is further directed that the respondent no.3 shall be deemed to have vacated the office from the date of the decision of the Collector, Nuapada that she was disqualified for being elected as Sarpanch on 27.02.2017.

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2021 (III) ILR - CUT- 51

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

WPCRL NO. 124 OF 2018

HEMKUMAR MAJHI .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of Habeas Corpus – Maintainability – Held, where the person/victim is missing and has not been illegally detained by anybody, a Writ application to the extent of Habeas Corpus not maintainable.

Case Laws Relied on and Referred to :-

1. 2020 (I) ILR CUT 93 : Chaitanya Madhi Vs. State of Orissa.
2. (1973) 2 SCC 674 : Kanu Sanyal Vs. District Magistrate Darjeeling and Ors.

For Petitioner : Mr. S.K. Joshi

For Opp. Parties: Mr. M.S. Sahoo, A.G.A

ORDER Date of Order: 30.09.2021

BY THE BENCH

1. We have heard Mr. S.K. Joshi, learned counsel for the petitioner and Mr. M.S. Sahoo, learned Addl. Govt. Advocate through video conferencing mode earlier because of restrictions on account COVID-19 pandemic and again on hybrid mode on 27.09.2021 when matter was listed for "to be mentioned".

2. In this writ application, the petitioner- Hemkumar Majhi has prayed for the following reliefs:

> *"It is therefore prayed that this Hon'ble Court may graciously be pleased to admit the writ application and issue notice to the opposite parties and after hearing the parties direct the opposite party nos.2 and 3 to make production of the younger brother of the petitioner namely 'Indra Majhi' before this Hon'ble Court, who is in the illegal custody of the opposite party no.4".*

3. In paragraph 9 of the writ application it has been stated as follows:

> *"9. That it is humbly submitted that the petitioner's brother has gone to Chennai by the Opposite Party No.4 along with another person and on query the petitioner came to know that his brother is neither in Chennai nor his where about is known either by opposite party no.4 or the person namely Joseph Pilley thereby the petitioner is suspecting that his brother has either been taken to somewhere else or sold at the hands of their master or he is no more."*

4. The petitioner has further stated in the writ petition that his younger brother Indra Majhi was taken by the opposite party No.4-Jagdish Bhoi to Chennai along with another person namely Joseph Piley of Khariar Road,

Ward No.9 to be engaged in good work. On 25.03.2018, Joseph Pilley asked the petitioner over phone whether his brother namely Indra Majhi has reached his house or not? And as he was not with him, the petitioner immediately asked Jagadish Bhoi, the Opposite Party No.4 but he could not say the whereabouts of his brother. On 25.03.2018 the petitioner with the assistance of his friend tried to find out the whereabouts of his brother but it is not known till date. On 04.04.2018 the petitioner intimated the said fact to the I.I.C., Jonk Police Station, the Opp. Party No.3 who did not register any case and only make Station Diary Entry i.e., Jonk SD No.400 of 2018 dated 04.04.2018 told the petitioner that he cannot do anything. So, the petitioner represented to the Superintendent of Police, Nuapada, Opp. Party No.2 on 12.04.2018 who on receipt of the same only issued the acknowledgment slip in favour of the petitioner. In the meantime, more than four months have elapsed. His brother is neither in Chennai nor his whereabouts is known either by Opposite Party No.4 or the person namely Joseph Pilley, thereby the petitioner is suspecting that his brother has been either taken somewhere else or sold at the hands of their master or he is no more. Neither the I.I.C. of Jonk Police Station nor the S.P., Nuapada are taking any steps to ascertain the whereabouts of the petitioner's brother nor any communication is made till date.

5. That vide order dated 09.04.2019, the Opp. Party No.3 I.I.C., Jonk Police Station had been directed to take appropriate steps to rescue the victim boy including raiding the house of Opp. Party No.4. When it became apparent that the Opp. Party No.3 had not taken any steps to trace/rescue the missing boy as directed by order dated 12.11.2020, the Opp. Party No.2 Superintendent of Police, Kalahandi and Opp. Party No.3, I.I.C., Jonk Police Station had been directed to remain present before this Court us through video conferencing on the next date. On 01.12.2020 when the matter was taken up, the S.P. Nuapada and I.I.C., Jonk Police Station, appeared before us through virtual mode and undertook to file a response within seven days. Thereafter separate affidavits have been filed by Opp. Parties No. 2 and 3 but with identical averments and documents.

6. The affidavits give a detailed account of the steps taken by them to trace the missing person "Indra Kumar Majhi". Apart from entering the information in the Station Diary Entry and Man Missing register on 04.04.2018, VHF messages have been sent to all IICs and OICs of Nuapada District and bordering P.Ss. and to Inspector District Crime Record Bureau,

Nuapada and W.T. message to all S.Ps. of Odisha/DCP BBSR & Cuttack with information to S.P. CID, CB Odisha, Cuttack. The I.I.C. had gone to Chennai for the purpose of enquiry. At different times, different police officers have gone to Mahasamud District, Chhatisgarh as it is the neighbouring District, neighbouring Beltukuri P.S in Nuapada District, Khariar P.S in Nuapada District, Paikamala P.S. of Bargarh District, Arang P.S. in Mahasamud Distirct (State-Chhatisgarh), Bagbehera P.S. in Mahasamud District (State-Chhatisgarh), Paikamal P.S. in Bargarh District, Jharbandh P.S., Bargarh P.S., Junagarh P.S. in Bhawanipatna District. Rabi Pillai of Khariar Road has been contacted and examined to find out the whereabouts of Indra Majhi. Jonk P.S. Case No.51 of 2020 for offences under Sections 370, 420, 294, 506 I.P.C. has also been registered and Opp. Party No.4 Jagdish Bhoi arrested. He and Raj Pillai have been examined during investigation and they have stated that as per earlier information they and Indra Majhi were to be engaged in a cotton mill but when they found that they would be engaged in tube well digging work, they were reluctant and Jagdish Bhoi and Indra Majhi escaped from the car of the owner P.Pandian and ran in different directions and could not be located. Jagdish Bhoi came back home after some days but the whereabouts of Indra Majhi remained unknown. Chargesheet has been filed against Jagdish Boi on 20.08.2020 but investigation has been kept open. A S.I. had gone to Madurai District and examined P.Pandian. He also went to Otthakadai P.S. in Madurai District and to different marble and granite factories, textile, biscuit and chemical and rubber factories in Madurai District and to the State Crime Bureau, Chennai to trace the missing person.

7. After going through the affidavits and the documents, we are satisfied that adequate steps have been taken by the police to trace the missing person Indra Majhi and rescue him from the custody of Opp. Party No.4, but with no success as he is not in the custody of Opp. Party No.4 and his whereabouts still remain unknown for which the police have kept their investigation open.

8. It is also clear from certain averments in the writ petition and the averments in the affidavits of Opp. Parties No.2 and 3, that Indra Majhi brother of the petitioner is missing and that there is no question of his illegal detention by anybody. The petitioner has mentioned in his report dated 04.04.2018 submitted to the IIC Jonk Police Station which is part of Annexure A/3 to the affidavit dated 03.08.2019 of the I.I.C Jonk Police Station that his brother is aged 28 years.

9. That it has been decided in a catena of decisions of the Hon'ble Apex Court, this Court and various other High Courts that in cases where the victim/person is missing and has not been illegally detained by anybody, a writ application for issue of a writ of habeas corpus is not maintainable.

10. This Court in the case of **Chaitanya Madhi Vrs. State of Orissa reported in 2020 (I) ILR CUT 93** has held as follows :

> *"..7. The Hon"ble Apex Court in the case of* ***Kanu Sanyal Vrs. District Magistrate Darjeeling andothers reported in (1973) 2 SCC 674 (Constitution Bench)*** *have enunciated the principle concerning the nature and scope of a writ of habeas corpus as follows:-*
>
> *"17. The writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain". But the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained."*
>
> *8. Illegal confinement is the precondition to issue writ of habeas corpus. Though a writ of right, it is not a writ of course. This extraordinary remedy is not available against a missing person who is not disable by minority. The missing person might have exercised his volition to stay away and such volition is not violation of Article 21 of the Constitution."…*

11. As we are convinced that this is not a case of illegal detention and admittedly the missing person is not a minor, this writ application filed for issue of writ of habeas corpus is not maintainable and is accordingly dismissed.

12. Dismissal of this writ application will however not affect the investigation by the police, who shall proceed with the investigation in accordance with law and intimate the result of the investigation to the petitioner who is the informant in the case.

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2021 (III) ILR - CUT- 56

BISWAJIT MOHANTY, J.

W.P.(C) NO.15994 OF 2014

PARSURAM ROUT …….. Petitioner

.V.

BATAKRUSHNA SAHU & ANR. ……..Opp. Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order-09 Rule 04 – Restoration of case – Application under Section 166 of the M.V Act, 1988 filed claiming compensation there under – Tribunal restored the application to the file with the observation/condition that, petitioner cannot claim the interest till the date of restoration – Observation of Tribunal Challenged – Held, Nowhere rule-4 Order-09 of C.P.C mandates that a dismissal order can be set aside only such terms and conditions as the court may think it fit and proper – Therefore, this court has no hesitation in coming to a conclusion that the impugned observation is not warranted by law.

(B) MOTOR VEHICLE ACT, 1988 – Section 171 – Order of Interest – When to be warranted? – Whether any order with regard to interest can be passed before the order of compensation is passed? – Held, No.

Case Laws Relied on and Referred to :-

1. W.P.(C) No.13416 of 2014 : Pramila Behera Vs. Narayan Pati and another

For Petitioner : M/s. Antaryami Dash, A. Otta & J.Moharana

For Opp. Parties : M/s. G.P. Dutta, S.K. Mohanty,B.K. Sahoo & S. Patra

Date of Hearing: 26.08.2021 Date of Judgment: 01.09.2021

BISWAJIT MOHANTY, J.

This writ petition has been filed challenging the order dated 16.05.2013 passed by the learned 1st M.A.C.T., Cuttack in M.J.C. No.32 of 2005 so far as it observes that the petitioner would not be entitled to any interest on his claim till the date of restoration of his claim petition, i.e., M.A.C. No.783 of 1997, which was dismissed for default on 05.04.2004.

2. Shorn of unnecessary details, the facts of the present case are as follows:

The petitioner being the injured in a motor vehicle accident, filed M.A.C. No.783 of 1997 before the Motor Accident Claims Tribunal, Cuttack for grant of compensation under Section 166 of the Motor Vehicle Act, 1988 and since no steps were taken, the learned Tribunal dismissed the said petition for default on 05.04.2004. In order to restore the aforesaid claim petition, the petitioner filed M.J.C. No.32 of 2005 under Order-9, Rule-4 of the Code of Civil Procedure read with Section 151 of Code of Civil Procedure. After several adjournments, the matter was restored by the learned Tribunal on 16.05.2013 with an observation that the petitioner should not be entitled to any interest on his claim till the date of restoration on the ground of laches on the part of the petitioner's counsel for which, the opposite parties should not be put to hardship.

3. Mr. Otta, learned counsel for the petitioner submitted that M.A.C. NO.783 of 1997 was dismissed for default as per Rule 2 of Order No.9 of Code of Civil Procedure, 1908. He further submitted that observation made by the learned Tribunal as indicated above while restoring M.A.C. No.783 of 1997 is not warranted as this is not permissible as per the language of Rule-4 of Order-9 of the Code of Civil Procedure, 1908. According to him, the above noted rule simply indicates that when a person applies for setting aside a dismissal order passed on account of default, if he satisfies the Court that there was sufficient cause for such default, the Court should set aside the dismissal order and fix a day for proceeding with the suit. It nowhere says that the Court while setting aside the dismissal can do so on such terms and conditions as it thinks fit and proper. Secondly, he submitted that language of Section 171 of the Motor Vehicle Act, 1988 which deals with award of interest makes it clear that a decision on awarding of such interest has to be made while the Tribunal allows a claim for compensation not prior to that.

Accordingly, he submits that the learned Tribunal erred in law by observing that the petitioner is not entitled to any interest till the date of restoration of the case i.e. 16.05.2013. In support of the above two points, he relied upon a decision of this Court rendered in the case of **Pramila Behera Vs. Narayan Pati and another** passed in W.P.(C) No.13416 of 2014 (disposed of on 01.12.2015). Thirdly, he submitted that for laches of the counsel, the petitioner should not suffer.

4. None has appeared for opposite party No.1.

5. Mr. Dutta, learned counsel appearing for opposite party No.2 submitted that though the claim petition was filed in the year 1997 as the petitioner took no steps till 05.04.2004, the learned Tribunal dismissed the same for default on 05.04.2004. Thereafter, after lapse of nine months, the petitioner filed an application for restoration of M.A.C. No.783 of 1997 styled as M.J.C. No.32 of 2005 and without complying the order dated 24.01.2005 took several adjournments and only took steps on 16.05.2013 on which date the case was restored with the impugned observation. Thus according to him, in the facts and circumstances of the case, the impugned observation/order can neither be turned as illegal nor arbitrary. Accordingly, he prays that the writ petition should be dismissed.

6. Heard learned counsel for the parties.

7. Before proceeding further, let us refer to Rule-4 of Order-9 of C.P.C. which reads as follows:

> "4. **Plaintiff may bring fresh suit or Court may restore suit to file** – Where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for [such failure as is referred to in Rule 2], or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.
>
> Provided that in cases where the defendant had entered into contest by filing his defence, no suit shall be resorted without notice."

A perusal of the above provision makes it clear that when a suit is dismissed under Rule-2 of Order-9 as has been done in the present case, the

plaintiff may either bring a fresh suit or he may apply for an order to set aside the dismissal order passed by the Court and for the said purpose, he has to satisfy the Court that he had sufficient cause for non-appearance. If the Court is satisfied with the cause shown, then the Court shall make an order setting aside the dismissal and shall fix a day for proceeding with the suit. Nowhere, Rule-4 of Order-9 Code of Civil Procedure mandates that a dismissal order can be set aside only on such terms and conditions as the Court may think it fit and proper. Therefore, this Court has no hesitation in coming to a conclusion that the impugned observations are not warranted by law.

8. That apart, consideration with regard to the award of interest as per Section 171 of the Motor Vehicle Act is required to be made when the Motor Accident Claims Tribunal allows a claim for compensation not at any stage prior to that. In such background, when the matter is yet to be adjudicated, by making the impugned observations, the learned Tribunal has acted with material irregularity ignoring the language of the statute. The stage for considering the grant of interest is yet to come. In this connection, I am fortified by the views of this Court as expressed at Para-9 of the judgment rendered in the case of **Pramila Behera** (supra)

9. Further, a perusal of the order dated 16.05.2013 clearly shows that in making the impugned observation, the learned Tribunal was influenced by the consideration that the opposite parties should not suffer on account of laches of petitioner's counsel. But while making such observation it has forgotten to take into account the fact that the petitioner, who is a victim of motor accident, should also not suffer for the laches of his counsel and the beneficial nature of compensatory jurisprudence.

10. For all these reasons, this Court is of the opinion that the impugned observation that the petitioner would not be entitled to any interest on his claim till the date of restoration and interest, if any, will be admissible to him not from any back date but only from the date of order i.e. 16.05.2013 restoring M.A.C. No.783 of 1997 is clearly unwarranted in law and legally unsustainable and is accordingly set aside. Since the claim petition is of the year 1997, the learned Tribunal is directed to dispose of the same as expeditiously as possible preferably within a period of six months in accordance with law. It is needless to observe here that in the matter of awarding of interest, the learned Tribunal will be guided by Section 171 of the Motor Vehicle Act, 1988 if it chooses to allow the claim of the petitioner for compensation. Writ petition is accordingly disposed of. No cost.

2021 (III) ILR - CUT- 60

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 2044 OF 2005

GOBARDHAN NAIK …….. Petitioner

.V.

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

SERVICE LAW – Non payment of pension benefits – Claim of arrear amount along with the 18% of interest – Prayer of the petitioner acceded – Held, Petitioner is entitled to receive all the pensionary benefits along with interest amount of 18% thereon.

Case Laws Relied on and Referred to :-

1. 2015 (I) OLR (SC) 81:D.D. Tewari (D) Thr. L.Rs.Vs.Uttar Haryana Bijli Vitran Nigam Ltd.
2. (1983) 1 SCC 322 **:** D.S. Nakara Vs. Union of India.
3. AIR 1985 SC 356 : State of Kerala Vs. Padmanabhan Nair.
4. (1996) 10 SCC 148 : Vasant Gangaramsa Chandan Vs. State of Maharashtra.
5. (1997) 4 SCC 569 : State of Punjab Vs. Justice S.S. Dewan.
6. AIR 1999 SC 1212 : Dr. Uma Agarwal Vs. State of U.P.
7. (2003) 12 SCC 293 : Kerala State Road Transport Corporation Vs.K.O. Varghese.
8. (2006) 9 SCC 630 : U.P. Raghavendra Acharya Vs.State of Karnataka.
9. Vol. 88 (1999) C.L.T. 637 : 1999 (II) OLR 433 :Dhruba Charan Panda etc. Vs. State of Orissa.
10. AIR 1999 SC 1212 : Dr. Uma Agarwal Vs.State of U.P.
11. 2015 (I) OLR (SC) 81 : D.D. Tewari (D) Thr. L. Rs. Vs.Uttar Haryana Bijili Vitran. Nigam Ltd
12. W.P.(C) No. 12024 of 2006: State of Orissa Vs. Jagannath Pattanaik.

For Petitioner : M/s. Upendra Kumar Samal, B.R. Barik , C.D. Sahoo

For Opp. Parties: Mr. M. Balabantaray, Addl. Standing Counsel, [O.P. Nos.1, 2 & 4]
Mr. P.R.J. Dash, [O.P. No.3]

JUDGMENT Date of Judgment: 22.06.2021

Dr. B.R.SARANGI, J.

The petitioner, who is a retired police officer, by means of this writ petition, seeks direction to the opposite parties to pay balance GPF amount with interest and compounded interest @ 18% per annum on all the retrial benefits, such as, pension, gratuity, GPF, commuted value of pension and unutilized leave salary for delayed payment of such dues.

2. The factual matrix of the case, in brief, is that the petitioner was initially appointed as a Lower Division Clerk in the office of Zilla Parishad, Sundargarh in the year 1963. After joining in service, a subscription account was opened in his name in the same year vide A/C No. 21657-G.A. (O) and accordingly account slip was issued to him by the Executive Officer, Zilla Parishad Office, Sundargarh. While he was so continuing, in the year 1964, he appeared an interview for the post of Sub-Inspector of Police and was selected to undergo training. Consequentially, he was relieved from the office of Zilla Parishad, Sundargarh on 10.01.1964 and joined in the Police Training College, Angul on 14.01.1964. During his training period, he was regularly subscribing to the GPF account. After completion of training, he was relieved from the Police Training Centre, Angul in December, 1964 and joined as Sub-Inspector of Police in Sambalpur on 01.01.1965 and there he continued till May, 1974. Though he was paying the GPF dues, but he did not receive any account slip for the years 1964-65 and 1965-66. Therefore, he approached the authority on several occasions, but no action was taken.

2.1 On attaining the age of superannuation, he retired from service on 31.03.1997 and submitted all the relevant documents for the purpose of getting retirement benefits from the opposite parties. In spite of several approaches made by the petitioner, since no action was taken, he filed OA No. 2670 (C) of 1998 before the Odisha Administrative Tribunal seeking direction to the opposite parties to pay the balance GPF amount, gratuity, unutilized leave salary, group insurance deposit and other retirement benefits, which he is entitled to. The tribunal, vide order dated 26.11.1998, disposed of the O.A. with a direction to the opposite parties to give pension with other benefits. On receipt of the order passed by the tribunal, the opposite parties partly paid the retirement dues, i.e. pension on 12.09.1999 at old scale of pay from 01.04.1997 to 01.01.1999 Rs.96,557/-, commuted value of pension of Rs.60,878/-on 12.09.1999 and gratuity of Rs.48,000/- on 18.03.1999, without releasing the balance GPF amount and unutilized leave salary, though he is entitled to get all retirement service benefits on the date of retirement.

2.2 The Superintendent of Police, Sundargarh, vide letter no. 1154 dated 29.03.2000, forwarded the revised calculation sheet of the petitioner in O.C.S. (P) Form-8 in triplicate with revised LPC for onward transmission to the Government for revision of pension, DCRG and commuted value of pension. Though the petitioner approached the opposite parties to pay all retirement benefits, but the same were not paid. Due to non-compliance of

the direction given by the Odisha Administrative Tribunal in O.A. No. 2670 (C) of 1998, he filed C.P. No. 127 (C) of 2000 and upon hearing the tribunal issued notice on 28.11.2001 calling upon the opposite parties to show cause. On receipt of the notice from the tribunal, the Accountant General (A & E), Orissa again on 11.01.2002 released the gratuity amount of Rs. 93,200/- without interest out of Rs.1,48,613/- and commuted value of pension amounting to Rs.1,18,114/-without interest out of Rs.1,78,992/- on 11.01.2002. Thereafter, a balance amount of Rs. 63,944/- with interest towards GPF was although due, an amount of Rs.42,744/- was paid on 20.03.2002 without any interest.

2.3 Upon receipt of the aforesaid amount, even though petitioner made several grievances, but the authorities did not consider the same. Consequentially, the petitioner again approached the Odisha Administrative Tribunal by filing O.A. No. 2044 (C) of 2005 seeking aforesaid relief. On being noticed by the tribunal, the opposite party no.1 filed counter affidavit admitting the fact that the petitioner retired from government service on 31.03.1997 as D.S.P. The DG & IG of Police, Orissa submitted the pension papers on 31.08.1998 and requested to release the pension and commuted value of pension but to withhold gratuity till receipt of final NDC from them. The pension papers were forwarded to the AG (A & E), Orissa on 17.10.1998 for release of pensionary benefits. The final NDC of the petitioner was received from DG (P), Orissa on 23.10.1998 and the same was forwarded to AG (A & E), Orissa on 16.11.1998. Consequentially, the AG (A & E), Orissa released the PPO and CPO on 29.01.1999 and GPO on 05.03.1999. Upon fixation of his pay in the O.R.S.P. Rules, 1998 and inclusion of past service rendered by the petitioner in Zilla Parishad Office, Sundargarh, the D.G (P), Orissa was requested in Department letter dated 05.02.2000 to furnish proposal for revision of pensionary benefits of the petitioner. The D.G (P), Orissa submitted revised proposal on 03.08.2000 with his service book. The service book was forwarded to Finance Department for concurrence of the past service rendered by the petitioner in Zilla Parishad Office, Sundargarh, which was received on 22.06.2001. Accordingly, the revised pensionary documents were forwarded to the AG (A & E), Orissa on 21.07.2001. Consequentially, the AG (A & E), Orissa released revised PPO, CPO and GPO on 28.12.2001. It is stated that there is no absolute administrative delay in communicating the pension papers and grant of pension etc. by the opposite party no.1. As a result, it is not liable to pay interest as claimed by the petitioner.

2.4 Before the tribunal, the opposite party no.3 also filed separate counter affidavit stating inter alia that the petitioner's pension papers were received in the office of opposite party no.3 on 22.10.1998 and necessary orders as to payment of pension and commuted value of pension were issued by opposite party no.3 on 29.01.1999, i.e. just after taking three months time, which was the minimum time required for settlement of a pension case after completing all the paraphernalia/procedure. With regard to release of balance GPF amount, it is contended that the petitioner was allotted two GPF account numbers. On receipt of the petitioner's final payment application from the concerned Drawing and Disbursing Officer, an amount of Rs.1,46,551/- was authorized as available balance in respect of the GPF Account No.22703 P(O) on 10.12.1997. Since there were some irregularities in respect of deposits made for the years 1991-92 and 1992-93 in the GPF account of the petitioner, a CE memo dated 10.12.1997 calling for details of the deposits for the years 1991-92 and 1992-93 was also issued. After receipt of the details from the concerned DDO and verifying the same with his GPF account, an amount of Rs. 42,744/- was worked out as due and admissible and accordingly authorized vide letter dated 06.02.2002 and the same was paid with interest of Rs.2025/-. Consequentially, for delay in payment of GPF interest has already been paid, as a result the petitioner is not entitled to any claim as has been made.

2.5 By way of rejoinder affidavit, the petitioner disputed such facts and categorically stated that despite specific provision in the Odisha Civil Services (Pension) Rules, 1992 as well as the order of the tribunal passed in O.A. No. 2670 (C) of 1998, the opposite parties have paid the following retirement benefits at old scale of pay vide PPO No.300988:-

> *"1. Pension on 12.09.1999 Rs. 96,557/- (01.04.1997-01.01.1999)*
>
> *2. C.V.P on 12.09.1999 Rs.60,878/-*
>
> *3. Gratuity on 18.03.1999 Rs.48,000/-*
>
> *Thereafter the S.P. Sundargarh on 29.03.2000 submitted pension paper with revised L.P.C. before the Respondent No.1 for revision of pension, DCRG & CVP.*
>
> *The A.G. (A & E), Odisha authorized the following revised pension in favour of the Applicant on the following dates :*
>
> *1. Gratuity on 11.02.2002 Rs.93,000/- out of Rs.1,48,613/- without interest.*

2. C.V.P. on 11.02.2002 Rs.1,18,114/- out of Rs.1,78,992/- without interest.

3. G.P.F. on 20.03.2002 Rs.42,744/- out of Rs.63,944/- without interest.

4. Unutilized leave salary on 02.07.2002 Rs.44,478 without any interest.

Further the A.G. (A & E) Odisha authorized the following balance gratuity & C.V.P. in favour of the applicant on the following dates:

1. Gratuity Rs.4,413/- in March 2005 without interest.

2. C.V.P. Rs. 5,648/- in March, 2005 without interest.

Though the Applicant is entitled to get the balance G.P.F. amount Rs.21,200/- but the same has not yet been paid."

The petitioner has further stated that since his retirement dues were not paid on due date of his retirement, the opposite parties are liable to pay interest @ 18% per annum for such delayed payment, in view of the Govt. of Orissa, P.G. & P.A. Department letter dated 30.12.1999, which has been filed as Annexure-10 to the writ petition. It is further stated that there is no delay attributable to the petitioner so as to disentitle him to get the benefit of interest for delayed payment of pensionary benefits to the petitioner, as has been stated by the opposite parties.

3. Although pleadings were completed, on the abolition of the Odisha Administrative Tribunal, Cuttack Bench, Cuttack, the above noted O.A. No. 2044 (C) of 2005 was transferred to this Court, in pursuance of order dated 03.01.2020 passed in W.P.(C) No. 27440 of 2019 by a Division Bench of this Court, and registered as above and taken up for hearing.

4. Mr. B.R. Barik, learned counsel for the petitioner contended that as per the provisions contained in Odisha Civil Services (Pension) Rules, 1992 petitioner's pension papers had been transmitted to the authority concerned and in view of Rules 58(1), 62 and 64(1) of the Rules, 1992, pensionary benefits were to be disbursed to the petitioner well within time specified, but the same has not been complied with. Thereby, the opposite parties are responsible for non-compliance of the statutory provisions and for non-payment of the retiral dues well within time specified they are liable for payment of interest @ 18% for delayed payment of the pensionary benefit to the petitioner. To substantiate his contention, he has relied upon a judgment of the apex Court in ***D.D. Tewari (D) Thr. L.Rs. v. Uttar Haryana Bijli Vitran Nigam Ltd***., 2015 (I) OLR (SC) 81.

5. Mr. M. Balabantaray, learned Standing Counsel appearing for the State, referring to the counter affidavit filed by opposite party no.1, vehemently contended that since the service of the petitioner had been regularized during the period when he was continuing in the office of the Zilla Parishad, the delay has been caused for release of the pensionary benefits and, as such, the delay is not attributable to the authority concerned, rather the delay has been caused by the petitioner himself. Consequentially, the State opposite parties are not liable to pay any interest for so called delayed payment of pensionary benefits to the petitioner.

6. Though Mr. P.R.J. Dash, learned counsel had entered appearance on behalf of opposite party no.3 and has filed a counter affidavit, pleadings of which have been taken note of by this Court in the foregoing paragraphs, but none appeared at the time of hearing.

7. This Court heard Mr. B.R. Barik, learned counsel for the petitioner and Mr. M. Balabantaray, learned Addl. Standing Counsel appearing for the State-opposite parties no.1, 2 and 4 through virtual mode, and perused the record. As pleadings have been exchanged between the parties and it is an old case of the year 2005, with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

8. Undisputedly, the petitioner was a government employee and after his superannuation from service he is entitled to get pensionary benefits as due and admissible to him in accordance with law. For release of pensionary benefits in favour of the petitioner, Orissa Civil Services (Pension) Rules, 1992 are applicable. Elaborate provisions in the context have been prescribed under Rules-57, 58, 59, 60, 61, 62 and 65 appearing in Chapter-VIII of the Rules, 1992. Chapter-IV deals with conditions for grant of pension. Sanctity attached to expeditious payment to a pensioner is revealed from the modalities prescribed; some of them being time bound and even specifying the officials who are to take steps. Adhering to such provisions, the petitioner is entitled to get the pensionary benefits as due and admissible to him in accordance with law within the time stipulated.

9. In ***D.S. Nakara v. Union of India***, (1983) 1 SCC 322, referring to Social Security Law by Prof. Harry Culvert, it is stated as follows:

> " 'Pension' is paid according to rules which can be said to provide social security law by which it is meant those legal mechanism primarily

> concerned to ensure the provision for the individual of a cash income adequate, when taken along with the benefits in kind provided by other social services (such as free medical aid) to ensure for him a culturally acceptable minimum standard of living when the normal means of doing so failed."

10. In ***State of Kerala v. Padmanabhan Nair***, AIR 1985 SC 356, the apex Court observed that pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but are valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

11. In ***Vasant Gangaramsa Chandan v. State of Maharashtra***, (1996) 10 SCC 148, the apex Court held that pension is not bounty of the State. It is earned by the employee for service rendered to fall back, after retirement. It is a right attached to the office and cannot be arbitrarily denied.

12. In ***State of Punjab v. Justice S.S. Dewan***, (1997) 4 SCC 569, the apex Court held that conceptually, pension is a reward for past service. It is determined on the basis of length of service and last pay drawn. Length of service is determinative of eligibility and quantum of pension.

The same view has also been reiterated in ***Dr. Uma Agarwal v. State of U.P., AIR 1999 SC 1212***.

13. In ***Kerala State Road Transport Corporation v. K.O. Varghese***, (2003) 12 SCC 293, referring to corpus juris secundum, it is stated that the title 'pension' includes pecuniary allowances paid periodically by the Government to persons who have rendered services to the public or suffered loss or injury in the public service, or to their representative; who are entitled to such allowances and rate and amount thereof; and proceedings to obtain and payment of such pension.

14. Further, referring to Halsbury's Law of England 4th Edn. Reissue, Vol.16, in the very same judgment in ***Kerala State Road Transport Corporation*** (supra), the apex Court held as follows:

> *"Pension' means a periodical payment or lump sum by way of pension, gratuity or superannuation allowance as respects which the secretary of state is satisfied that it is to be paid in accordance with any scheme of arrangement having for its object or one of its objects to make*

provision in respect of persons serving in particular employments for providing with retirement benefits and, except in the case of such a lump sum which had been paid to the employee."

15. Considering the meaning attached to the word 'pension', as stated above, and on analysis of the same, three things emerge; (i) that the pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is social welfare measure rendering social-economic justice to those who in the 'hey days' of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon additional condition of impeccable behaviour even subsequent to retirement.

16. In ***U.P. Raghavendra Acharya v. State of Karnataka***, (2006) 9 SCC 630, the apex Court held that 'pension' is treated to be a deferred salary. It is not a bounty. It is akin to right of property. It is correlated and has a nexus with the salary payable to the employees as on date of retirement.

17. A Division Bench of this Court in ***Dhruba Charan Panda etc. v. State of Orissa***, Vol. 88 (1999) C.L.T. 637 : 1999 (II) OLR 433 applying the ratio in ***Dr. Uma Agarwal v. State of U.P***., AIR 1999 SC 1212 held that if there is any delay in payment of pension the pensioner shall be entitled to 18% interest per annum for the period of delay and such interest shall be recovered from the person/persons responsible for the delay. While fixing the rate of interest, the Court kept in view the minimum bank rate of interest charged for borrowing from bank.

18. In ***D.D. Tewari (D) Thr. L. Rs. V. Uttar Haryana Bijili Vitran Nigam Ltd***., 2015 (I) OLR (SC) 81, the apex Court, relying upon their judgment in ***State of Kerala. V. M. Padmanabhan Nair*** mentioned supra held that for delayed payment of pension and gratuity, interest has to be granted for the period from the date of entitlement up to the date of actual payment.

19. In ***State of Orissa v. Jagannath Pattanaik*** [W.P.(C) No. 12024 of 2006, disposed of on 14.12.2017], while upholding the judgment of the Orissa Administrative Tribunal dated 14.03.2000 passed in O.A. No. 419 (C) of 2000, a Division Bench of this Court, of which Dr. B.R. Sarangi,J. is a member, came to a definite finding that there is no illegality or irregularity committed by the tribunal in awarding interest for delay in payment of pensionary and other benefits admissible to the government employee, opposite party therein, in accordance with the 1992 Rules. Thereby, the Division Bench of this Court did not interfere with the findings of the tribunal and upheld the same.

20. In view of the factual matrix and propositions of law, as discussed above, and applying the same to the present context, there is no iota of doubt with regard to entitlement of the petitioner for claim of interest for delayed payment of pensionary benefits granted to him. Therefore, this Court unequivocally holds that the petitioner is entitled to get interest @ 18% per annum for delayed payment of pensioanry dues, including GPF amount admissible to him. Such amount should be calculated and paid to the petitioner as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment.

21. The writ petition is thus allowed. No order to costs.

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

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2021 (III) ILR - CUT- 69

Dr. B.R.SARANGI, J.

WPC(OAC) NO. 1629 OF 2015

PRASANTA KUMAR NAYAK …….. Petitioner

.V.

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

(A) SERVICE LAW – Qualification in a particular post – Fixed by the competent authority/expert – Whether it can be altered/substituted by the Court? – Held, No.

(B) WORDS & PHRASES – "And" – Meaning of and its use – Discussed.

(C) ADMINISTRATIVE ORDER – Whether it can be passed without any "Reason" – Held, No.

(D) ADMINISTRATIVE ORDER – Ground/reason of such order – Whether such reason or ground can be supplemented/ Supplanted by way of affidavit – Held, No.

Case Laws Relied on and Referred to :-

1. 2019 (17) SCALE 718 : Dr. (Major) Meta Sahai Vs. State of Bihar and Ors.
2. (WPC(OAC) No. 1975 of 2015 : Babita Manjari Pratihari Vs. State of Odisha & Ors.
3. AIR 1986 SC 1043 : Om Prakash Vs. Akhilesh Kumar.
4. AIR 1995 SC 1088 : Madan Lal Vs. State of Jammu and Kashnir.
5. 2006 SC 2339 : K.H. Siraj Vs. High Court of Kerala.
6. AIR 2008 SC 5 : Union of India Vs. S. Vinod Kumar.
7. AIR 1951 SC 301 : S. Krishnan Vs. State of Madras.
8. (1997) 8 SCC 42 : Calcutta Iron Merchant's Association Vs. Commissioner of Comm Taxes.
9. AIR 2006 SC 2751 : Union of India Vs. Millennium Mumbai, Broadcast Pvt. Ltd
10. AIR 1956 SC 520 : Banarsidas Vs. State of U.P.
11. (1997) 1 SCC 253 : Commissioner, Corpn. Of Madras Vs. .Madras Corpn. Teachers' Mandram.
12. (2008) 3 SCC 432 : Basic Education Board U.P. Vs. Upendra Rai
13. (1998) 9 SCC 471 : Mangej Singh Vs. Union of India.
14. (2001) 3 SCC 110 : O.P. Lather Vs. Satish Kumar Kakkar.
15. 1988 (Supp) SCC 355 : AIR 1988 SC 1348:The Post Graduate Institute Vs. Dr. J.B. Dilawari.
16. AIR 1978 SC 851 : Mohinder Singh Gill Vs. The chief Election Commissioner, New Delhi.

17. AIR 1974 SC 87 : Union of India Vs. Mohan Lal Capoor.
18. AIR 1981 SC 1915 : Uma Charan Vs. State of Madhya Pradesh.
19. 2017 (I) OLR 5 : Patitapaban Pala Vs. Orissa Forest Development Corporation Ltd. & Anr.
20. 2017 (I) OLR 625 : Banambar Parida Vs. Orissa Forest Development Corporation Limited.

For Petitioner : Mr. Saswat Das

For Opp. Parties: Mr. S. Jena, Standing Counsel for S&ME Department.

JUDGMENT Date of Hearing:12.08.2021: Date of Judgment: 17.08.2021

Dr. B.R.SARANGI, J.

The petitioner, who belonged to SEBC category and a Graduate in Arts in Rastrabhasa Ratna from Rastrabhasa Prachar Samiti, Wardha and passed B.Ed. with Hindi as one of the subjects and medium of examination was Hindi, had applied for the post of contractual Hindi Teacher pursuant to resolution issued by the Government of Orissa, School and Mass Education Department dated 27.10.2014 in Annexure-1. His candidature having been rejected vide Annexure-10, he has filed this writ petition seeking following relief:

"(a) Admit the writ application:

(b) Call for the records.

(c) (i) Issue appropriate writ/writs, order/orders to quash the rejection of the petitioner's candidature to the post of Contractual Hindi Teacher as per Annexure-10.

(i-a) Issue appropriate writ/writs, order/orders, direction/directions quashing the condition of having B.Ed. in Hindi/Parangat from 3 particular institutions, i.e., under Sub-Clause (d) to Clause (2) of the Advt. dated 27.10.2014, i.e.; ***Hindi Sikshyan Parangat from Kendriya Hindi Sansthan, Agra/ B.H.Ed. (a course prescribed by NCTE) from an institution recognized by NCTE and affiliated to a recognized University/ B.Ed in Hindi (Course prescribed by NCTE) from Dakhin Bharat Hindi Prachar Sabha, Madras, an institution recognized by NCTE and affiliated to a recognized University*** *under Annexure-1.*

(ii) Issue appropriate writ/writs, order/orders, direction/directions to declare that the B.Ed. from Jammu University with Hindi as one of the subject and medium of examination in Hindi as the requisite qualification for Hindi teacher as require by the State Government and the petitioner be made eligible to remain in draft select list.

(iii) any other order/orders, direction/directions be issued as would be deemed fit and proper to give complete."

2. The factual matrix of the case, in hand, is that in exercise of power conferred under clause (d)(i) of Sub-section (2) of Section 32 read with Section 12 (d) of the National Council for Teacher Education Act, 1993, the Council framed a regulation called, "National Council for Teacher Education (Determination of Minimum Qualification for Recruitment of Teachers in Schools) Regulations, 2001", which came into force from the date of its publication in the official gazette no. 238 dated 04.09.2001 in Annexure-11. On 31.05.2007, in Annexure-15 to the writ petition, a clarification was issued by the NCTE to all the Education Secretaries/ All States Govts./U.Ts as per list that the degrees obtained by the persons from the institutions recognized by the Govt. of J & K/UGC would be eligible for employment in Central Govt. and other State Governments. Consequentially, Utkal University of Odisha vide Annexure-16 dated 15.12.2011 declared the B.Ed and M.Ed course imparted by as many as 61 institutions equivalent to the B.Ed/B.Ed Special Education/M.Ed of Utkal University. The name of Jammu University finds place at serial no.19.

2.1 The petitioner passed B.Ed. examination in the year 2013 from University of Jammu in 2nd division in theory and 1st division in practice of teaching, the medium of teaching and examination was Hindi and the result was declared on 15.03.2014 vide Annexures-6 and 7 to the writ petition. When the matter stood thus, the Government of Odisha, Department of School and Mass Education, vide resolution dated 27.10.2014 in Annexure-1, prescribed recruitment procedure of teaching staff in Govt. Secondary Schools. It includes the criteria to fill up the post of Contract Teacher Hindi/Hindi Teacher. The said resolution was treated as an advertisement for recruitment to the post of contract teachers. Subsequent to the advertisement, a district- wise contract teacher vacancy in respect of 5634 posts was published by the authorities in their official website. As per the advertisement, the last date for receiving the application forms from the intending candidates was fixed to 20.11.2014. The petitioner, having fulfilled the eligibility criteria, applied for the post of Contract Teacher Hindi in respect of five districts, before expiry of the last date, in the following preferences, (i) Jajpur, (ii) Jagatsinghpur, (iii) Ganjam, (iv) Balasore and (v) Angul, vide Annexure-21.

2.2. In exercise of power conferred under clause (dd) of Sub-section (2) of Section- 32 read with Section -12(a) of National Council for Teacher Education Act, 1993 and in supersession of National Council for Teacher Education (Determination of Minimum Qualification for Recruitment of Teachers in Schools) Regulations, 2001, the National Council framed a regulation called, "National Council for Teacher Education (Determination of Minimum Qualification for Persons to be Recruited as Education Teachers and Physical Education Teacher in Pre-Primary, Primary, Upper Primary, Secondary, Senior Secondary or Intermediate Schools or Colleges (Regulation), 2014". The above Regulation was notified in the Gazette of India on 16.12.2014. A corrigendum was issued to the resolution/advertisement in Annexure-1 extending the last date of receipt of application to 28.01.2015, as per Annexure-J to the affidavit dated 16.03.2021. After due verification of documents, a check list was issued by the verifying officer on 16.03.2015 vide Annexure-8. The provisional tabulation sheet of applicants for the post of contractual teacher, in response to the advertisement dated 28.10.2014 to 21.11.2014 and 13.01.2015 to 28.01.2015, was published by opposite party no.2, vide Annexure-9, where the name of the petitioner finds place at serial no. 203. A list of candidates, whose candidature was rejected by the opposite parties for the post of Hindi Teacher, was published in the official website of opposite party no.2. The name of the petitioner finds place at serial no. 535 with the remark "NOT HAVING REQUISITE QUALIFICATION" in the remarks column. Being aggrieved by rejection of his application, for not having requisite qualification, the petitioner approached the Odisha Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No. 1629(C) of 2015. On abolition of the tribunal, the matter has been transferred to this Court and re-numbered as WPC (OAC) No. 1629 of 2015.

3. Mr. Saswat Das, learned counsel for the petitioner vehemently contended that educational qualification prescribed for Hindi Teacher, as per advertisement dated 27.10.2014 under Annexure-1, only lays emphasis on having training qualification from Hindi Sikshyan Parangat from Kendriya Hindi Sansthan, Agra/B.H.Ed. (a course prescribed by NCTE) from an institution recognized by NCTE and afflicted to a recognized university/B.Ed. in Hindi (a course prescribed by NCTE) from Dakhin Bharat Hindi Prachar Sabha, Madras, a institution recognized by NCTE and affiliated to a recognized university. As the petitioner acquired B.Ed. qualification from Jammu University, that has not been prescribed in the

education qualification for Hindi Teacher. Consequently, the petitioner's application has been rejected by the authority, though such reason for rejection has not been indicated in Annexure-10. But, subsequently, by way of filing counter affidavit, the same has been clarified, which the authority could not have. As such, the reason for rejection of application of the petitioner should have been indicated and in absence of any reason thereof and subsequent clarification issued by the authority in counter affidavit cannot sustain in the eye of law and the same is liable to be quashed. It is further contended that the Educational Qualification for Hindi Teacher also indicates that the untrained candidates shall have to undergo required training within a time line as prescribed by the Government. If an untrained candidate can be considered for giving appointment as Hindi Teacher, the petitioner, having stood in better footing than those persons, as a trained B.Ed. from Jammu University, and having passed the same by Hindi medium recognized by NCTE and affiliated to Utkal University, his application could not have been rejected on the ground that qualification has not been prescribed in the resolution itself. It is further contended that the stipulation fixed for Hindi Teacher for educational training qualification only confined to two institutions, which is arbitrary, unreasonable and contrary to the provisions of law, and thus seeks for quashing of that portion of fixation of qualification by the authority, on the ground that qualification acquired from an institution recognized by the NCTE and affiliated by a recognized University should have been given the benefits and exclusion thereof, amounts to discrimination and violative of Articles 14 and 16 of the Constitution of India.

To substantiate his contentions, he has relied upon the judgments in Dr. (Major) Meta Sahai vrs. State of Bihar and Others, ***2019 (17) SCALE 718 and Babita Manjari Pratihari vs. State of Odisha & Ors***. (WPC(OAC) No. 1975 of 2015, disposed of on 23.07.2021).

4. Per contra Mr. S. Jena, learned Standing Counsel for School and Mass Education Department contended that the petitioner is not entitled to get relief sought in the application itself, in view of the fact that having participated in the process of selection and not come out successful, he cannot turn around and challenge the same by way of filing this application. He further contended that the educational qualification prescribed for Hindi Teacher in the advertisement may not be modified or interfered with by the Court, when the process of selection has already been concluded and the recruitment has already been made pursuant to such qualification. As such,

the petitioner initially had not prayed for interfering with the condition stipulated in the advertisement, but, subsequently, pursuant to order dated 04.03.2020 passed in I.A. No. 47 of 2020, by way of amendment the prayer (i-a), for quashing sub-clause (d) of Clause-2 of the advertisement (which is not correct rather sub-clause (f) of Clause-3 is the correct provision) has been incorporated, which is not permissible in law. It is further contended that with eyes wide open, the petitioner submitted his application as per the prevailing educational qualification applicable to the Hindi Teacher knowing very well that the persons having acquired training qualification from those two institutions are only eligible and the institution, wherefrom the petitioner acquired training qualification, having not been included in the advertisement itself, the application made by him cannot sustain and on that ground his application having been reject, he cannot say that the condition so stipulated is arbitrary, unreasonable and contrary to the provisions of law. Therefore, the writ petition has to be dismissed. To substantiate his contention, he has relied upon the judgments of the apex Court in ***Om Prakash v. Akhilesh Kumar, AIR 1986 SC 1043; Madan Lal v. State of Jammu and Kashnir, AIR 1995 SC 1088; K.H. Siraj v. High Court of Kerala; 2006 SC 2339; Union of India v. S. Vinod Kumar, AIR 2008 SC 5.***

5. This Court heard Mr. Saswat Das, learned counsel for the petitioner and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department 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. For just and proper adjudication of the case, Clause-3 of the resolution/advertisement, which prescribes the educational qualification for the post of Hindi Teacher, is extracted hereunder:-

> *"3.* ***Educational Qualification***
>
> *xx xxx xxx*
>
> *(f)* ***Hindi Teacher****-Bachelor's degree from a recognized University with Hindi as one of the elective subject with minimum 50% marks in aggregate (45% for SC/ST/PH/OBC/SEBC candidates)*
>
> *or with Rastrabhasa Ratna from Rastrabhasa Prachar Samiti, Wardha*
>
> *or with Sastri from Orissa Rastrabhasa Parisaca, Puri*

or with Snataks (Acquired by June-2005, the date up to which the temporary recognition has been granted) from Hindi Sikshaya Samiti, Orissa, Cuttack

or an equivalent degree from a recognized institution with at least 50% marks in aggregate (45% for SC/ST/PH/OBC/SEBC candidates) and Hindi Sikshyan Parangat from Kendriya Hindi Sansthan, Agra/B.H.Ed. (a course prescribed by NCTE) from a Institution recognized by NCTE and affiliated to a recognized university/B.Ed. in Hindi (a course prescribed by NCTE) from Dakhin Bharat Hindi Prachar Sabha, Madras, a institution recognized by NCTE and affiliated to a recognized university.

Or

Bachelor's degree with Hindi as one of the optioral/Hons. subject with minimum 50% of marks in aggregate (45% for SC/ST/PH/OBC/SEBC candidates)

and M.A. in Hindi with minimum 50% marks in aggregate from a recognized University.

(The untrained candidates shall have to undergo required training within the timeline as prescribed by Govt.)"

On perusal of the above mentioned educational qualification prescribed in the resolution, which has been considered as advertisement for recruitment to the post of Hindi Teacher, it is evident that a candidate must have different qualifications as prescribed therein along with training qualification acquired from two institutions, namely, (1) Hindi Sikshyan Parangat from Kendriya Hindi Sansthan, Agra/B.H.Ed. (a course prescribed by NCTE) from an institution recognized by NCTE and affiliated to a recognized university, and (2) B.Ed. in Hindi (a course prescribed by NCTE) from Dakhin Bharat Hindi Prachar Sabha, Madras, a institution recognized by NCTE and affiliated to a recognized university.

7. Admittedly, the petitioner has acquired B.Ed. training qualification in Hindi from Jammu University as per the certificate produced by him and enclosed as annexures to the writ petition. But, as the training qualification acquired from Jammu University has not been included in the advertisement itself, his application has been rejected vide Annexure-10, though it only reflects "not having requisite qualification" in the remarks column. What requisite qualification, the petitioner does not possess, has not been indicated therein. It is admitted that the petitioner has acquired Bachelor Degree in Arts from recognized university with Rastrabhasa Prachar Samiti, Wardha. That means, he has got initial requisite qualification as per the advertisement, but he does not possess training qualification, as has been prescribed in the

advertisement, which was subsequently clarified in the counter affidavit filed by the opposite parties. The very use of the word 'and' in the advertisement has disjoined the initial qualification acquired by the petitioner, which is in accordance with the advertisement. Therefore, one may have got initial qualification, but he is bound to acquire the training qualification from the two institutions as prescribed in the advertisement itself. It is therefore clear that by using the word "and", the essential qualification has been disjoined from the training qualification.

8. The apex Court, while considering Article 22(7) of the Constitution of India in ***S. Krishnan v. State of Madras***, AIR 1951 SC 301, held that the word 'and' should be understood in a disjunctive sense.

9. Similarly, while considering Section 5(2)(a) of the Bengal Finance (Sales Tax) Act, 1941, the apex Court in ***Calcutta Iron Merchant's Association v. Commissioner of Commercial Taxes***, (1997) 8 SCC 42, held that the word 'and' occurring in Section 5(2)(a) of the Act cannot be read as 'or' it shall render the rest of the provision superfluous.

10. In ***Union of India v. Millennium Mumbai, Broadcast Pvt. Ltd***, AIR 2006 SC 2751, the apex Court, while considering Section 4 of Telegraph Act (13 of 1885), held that the word 'and' occurring in between the words 'right to revoke the licence' and 'encash and forfeit the bank guarantee' must be read as two separate clauses and it cannot be read as conjunctive.

11. If the construction of the use of word 'and' will be taken into consideration in the present context, in that case this Court is of the considered view that 'and' mentioned in the advertisement has been used as a disjunctive manner. Thereby, a candidate may have different initial qualifications, but he has to possess training qualification acquired from the place mentioned in the advertisement. Consequentially the word 'and' used in the advertisement cannot be considered to be 'or', thereby no liberal construction can be given to such meaning rather the meaning is very clear in its grammatical form which is to be given effect to instead of read into same.

12. In ***Banarsidas v. State of U.P.***, AIR 1956 SC 520, the apex Court held that it is open to the appointing authority to lay down requisite qualifications for recruitment to Government Service.

13. In ***Commissioner, Corpn. Of Madras v. Madras Corpn. Teachers' Mandram***, (1997) 1 SCC 253, the apex Court held that it is open to the appointing authority to lay down requisite qualifications for recruitment to Government Service as this pertains to the domain of policy.

14. As regards the power of the Court to interfere with the qualification prescribed, the apex Court in ***Basic Education Board U.P. v. Upendra Rai***, (2008) 3 SCC 432 held that the change in eligibility conditions/educational qualifications for the purpose of recruitment has been held to be a policy decision which cannot be interfered with by the courts.

15. In ***Mangej Singh v. Union of India***, (1998) 9 SCC 471, the apex Court held that normally, it is for the State to decide the qualification required and the courts cannot substitute the requirements on their assessment of what the requirements should be.

16. In ***O.P. Lather v. Satish Kumar Kakkar***, (2001) 3 SCC 110, the apex Court held that when expert qualification is fixed by a competent authority, ordinarily courts will not interfere.

17. In ***The Post Graduate Institute v. Dr. J.B. Dilawari***, 1988 (Supp) SCC 355 : AIR 1988 SC 1348, the apex Court, while considering that what should be the qualification for a post is a matter for the administration to decide, held as follows:

> *"Though the Court, it is stated, is the expert of experts, it is proper to take note of its limitations. Realisation of this situation has led to a series of pronouncements where this Court has reiterated the position that matters involving expertise should be left to be handled by expert bodies."*

18. In view of settled position of law, as indicated above, this Court is not competent to interfere with the qualification prescribed by the authority when the same has already been acted upon. Thereby, the relief sought in Clause-(i-a) cannot be granted to the petitioner.

19. An endeavour is made by Mr. Das, learned counsel for the petitioner to pursued this Court stating, inter alia, Jammu University, being an institution recognized by NCTE and affiliated by recognized university, namely, Utkal University, the training qualification acquired by the petitioner

from the said institution should have been taken into consideration for upholding the application filed by him instead of rejecting the same. As such training qualification was not indicated in the advertisement, his application has been rejected.

20. While entertaining O.A. No.1629 (C) of 2015, the tribunal, vide order dated 13.05.2015, passed the following order:-

> *"Heard Mr. S.R. Mahapatra, learned counsel for the applicant and Mr. S.K. Jee, learned standing counsel, S & M.E.*
>
> *The application of the applicant has been rejected as per annexure-10 at serial No.535 for not having requisite qualification.*
>
> *Learned counsel for the applicant submitted that his qualification besides graduation and Ratna from Rastrabhasa Prachar Samiti, Wardha is B.Ed. in Hindi (a course prescribed by N.C.T.E.) from Jammu University.*
>
> *Learned counsel for the applicant stoutly argued that that B.Ed. from Jammu University with Hindi as subject is recognized as a course prescribed by N.C.T.E. and recognized by Utkal University.*
>
> *Issue notice on admission.*
>
> *Counter be filed within a period of four weeks. Rejoinder, if any, be filed within a period of two weeks thereafter.*
>
> *So far as prayer for ionterim relief is concerned application of the applicant may be considered for further processing by respondent Nos.2 & 3 but his candidature shall abide by the result of the O.A.*
>
> *List this matter after six weeks.*
> *Send copies at the cost of the applicant."*

21. On being noticed, the opposite parties filed their counter affidavit and in paragraph-8 stated that the petitioner does not possess alternative training qualifications prescribed and published in the advertisement, for which his candidature of was rejected. The tribunal, vide order dated 30.01.2018, in O.A. No.1629 (C) of 2015 passed order to the following effect:

> *"Heard learned counsel for the applicant and learned standing counsel, S & M.E.*
>
> *Learned standing counsel, S & M.E. basing on the counter in para-8 submitted that the applicant does not possess alternative training qualifications prescribed and*

published in the advertisement for which the candidature of the applicant was rejected.

Learned counsel for the applicant, on the other hand submitted that as per the resolution no such stipulation is available in the advertisement for which the applicant's candidature cannot be rejected.

Considering the submissions, let the District Education Officer, Jajpur to appear in person and show on which ground the application of the applicant has been rejected.

List this matter in the next available bench.

Send copies."

22. A perusal of the counter affidavit would show that opposite party no.2, in paragraphs-7 & 8 thereof, has stated as follows:

"7. That, the training qualifications prescribed in the advertisement are crystal clear & unambiguous thus leaving no scope for confusion. Only the training qualification such as:

i) Hindi Sikshyan Parangat from Kendriya Hindi Sansthan, Agra/

ii) B.H.Ed. (a course prescribed by NCTE) from an Institution recognized by NCTE and affiliated to a recognized university/

iii) B.E. in Hindi (a course prescribed by NCTE) from Dakhin Bharat Hindi Prachar Sabha, Madras, an institution recognized by NCTE and affiliated to recognized university.

Have been prescribed and candidates with any of the above said training qualifications shall be considered as per the advertisement. There is no scope in this advertisement to accept any other training qualification for the post of Hindi Teacher.

8. In view of the above eligibility criteria prescribed by Govt. and published in the advertisement the applicant was not eligible for the post. He did not possess any of the alternative training qualifications prescribed and published in the advertisement. So the District Education Officer has rightly rejected his candidature for the post of Hindi Teacher."

23. As the list of rejected candidates (Hindi Teacher) in Annexure-10 does not indicate the reasons, the same cannot be supp lemented or supplanted by way of affidavit filed on behalf of the opposite parties clarifying the position that the petitioner had no training qualification, for

which his candidature has been rejected. The Constitution Bench of the apex Court in ***Mohinder Singh Gill v. The chief Election Commissioner***, New Delhi, AIR 1978 SC 851 in paragraph-8 ruled as follows:

> *"……when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."*

On perusal of Annexure-10, it appears that the petitioner's name finds place as against Sl. No.535 and in remarks column, it has been indicated as "not having requisite qualification". But what type of requisite qualification the petitioner does not possess, the same has not been indicated. In absence of any reasons for rejection of petitioner's application, mere bald statement "not having requisite qualification" cannot sustain in the eye of law. It is well settled principle of law laid down by the apex Court that the administrative authority, while dealing with this type of cases, must give reasons.

24. Reasons being a necessary concomitant to passing an order, the authority can thus discharge its duty in a meaningful manner by furnishing the same expressly.

In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

Similar view has also been taken by this Court in ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and in ***Banambar Parida v. Orissa Forest Development Corporation Limited***, 2017 (I) OLR 625.

25. Admittedly, the petitioner knowing the qualification prescribed by the authority in the advertisement, applied for the post of contractual Hindi Teacher. On the basis of documents filed, a check list was prepared, but no shortfall thereof was pointed to the petitioner. At that stage, his name was found placed at serial no.203 in Annexure-9, but, subsequently his application was rejected vide Annexure-10 bearing serial no. 535 as "not having requisite qualification". Consequentially, it is contended that the petitioner, having participated in the process of selection and not come out successful, cannot turn around and challenge the same. Reliance has been placed by learned Standing Counsel for School and Mass Education on the judgments of the apex Court in Om Prakash, Madan Lal, K.H. Siraj (supra), as well as the order dated 23.03.2021 passed by this Court in W.P.(C) No.82 of 2013.

26. There is no dispute with regard to position of law settled in the above judgments, but the apex Court in Dr. (Major) Meta Sahai (supra) has made a departure in paragraphs- 17 and 18 to the following effect.

> "*17. It is well settled that the principle of estoppel prevents a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgements including Manish Kumar Shahi v. State of Bihar, (2010) 12 SCC 576 observing as follows:*
>
> *"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The appellant invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission.*
>
> *This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."*
>
> *The underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the hope of getting a second chance.*
>
> *18. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges*

misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process."

27. In the above judgment, their Lordships have differentiated the principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The prescribed qualification is a prescribed procedure, which the petitioner accepted. There is no doubt about it. As Jammu University, from which the petitioner acquired the training qualification, is duly recognized by NCTE and affiliated to Utkal University, therefore, he approached the Odisha Administrative Tribunal.

28. As per the advertisement, the untrained candidate shall have to undergo required training within the time line as prescribed by the Government. This clearly indicates that the candidates having no training qualification can also be considered for selection as Hindi Teacher, as per qualification prescribed under Clause-3(f) of the advertisement. Since the petitioner has got the basic qualification and training qualification along with B.Ed. from Jammu University, his application should not have been rejected on the ground of want of requisite qualification. More so, the University from which the petitioner acquired the training qualification is duly recognized by NCTE and affiliated by Utkal University, as is evident from the materials available on record. Therefore, rejection of his application mentioning "not having requisite qualification" cannot sustain in the eye of law. As such, the petitioner has received information under the Right to Information Act, 2005, on 21.12.2016, from the choice list, namely, Angul District, 19.04.2018 there are 24 no. of posts of teachers and out of which 2 belongs to SEBC category and on the basis of R.T.I. information dated 24.02.2018 so far as Jajpur district is concerned, total 42 numbers of posts of contract teacher Hindi are lying vacant, out of which 2 belonged to SEBC category, and on 04.06.2018, the Director of Secondary Education also provided information indicating that out of total 799 contract teachers in Hindi, 388 posts are still lying vacant. Therefore, if the petitioner's application is considered for selection and engagement as contractual teacher in Hindi, it will not cause prejudice to anyone.

29. In view of the aforesaid facts and circumstances, this Court is of the considered view that the relief sought by the petitioner, so far as prayer no.(c)(i-a) is concerned, the same cannot be acceded to, but, so far as relief sought in prayer no.(c)(i) is concerned, as the vacancies are available, the petitioner's application should be considered for engagement as contract teacher in Hindi as per his choice exercised by him, as expeditiously as possible, preferably within a period of 3 months from the date of communication of this judgment.

30. The writ petition is allowed to the extent indicated above. There shall be no order as to costs.

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2021 (III) ILR - CUT- 83

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 3077 OF 2014

MAMATA MANJARI MOHANTY …….. Petitioner

.V.

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

INDUSTRIAL DISPUTE ACT, 1947 – Section 25-F and 25-G – Provisions under – Compliance thereof at the time of retrenchment – Principles to be followed – Discussed.

> "A bare perusal of the aforementioned provisions would go to show that no workman employed in any establishment, who has been in continuous service for not less than one year under an employer, shall be retrenched by that employer until the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice, and that the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. For such retrenchment a procedure has been envisaged that where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the

employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman. The above mentioned provisions are very clear and should be scrupulously followed while retrenching a workman from an establishment. The impugned order of retrenchment in Annexure-10 dated 29.04.2011, on the face of it, reveals that the petitioner has been retrenched from service with immediate effect, as her service was no more required under the organization due to reduction of work load and her retrenchment was expedient, and she would be paid one month pay in lieu of one month notice and other entitlements if any as per the provisions under Section 25-F of the Industrial Disputes Act, 1947. According to Section 25-F of the Industrial Disputes Act, 1947, as has been referred to above, a workman employed in any industry should not be retrenched until he/she been given one month's notice in writing indicating the reasons for retrenchment and the period of notice had expired, or the workman had been paid in lieu of such notice. The notice in this case bears the date "29th April, 2011" and the same was served on the petitioner on the very same day. Therefore, she was supposed to be paid one month's wages in lieu of notice of termination of her service on the very same day, i.e, "29th April, 2011". Admittedly, on 30.04.2011, the petitioner was offered one month's wages, in lieu of one month's notice, by way of cheque bearing no.875312, which she did not accept. Thereby, the provision of Section 25-F, which was incumbent on the part of the employer to comply by paying the workman wages in lieu of the notice period, has not been complied. That is to say, if she was asked to go forthwith, she had to be paid the wages at the time when she was asked to go and should not be paid on the subsequent date, i.e., 30.04.2011, rather it should be simultaneously paid."

(Para-9 & 10)

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 1206: National Iron and Steel Co. Ltd Vs. State of West Bengal.
2. AIR 1995 SC 1352: Syed Azam Hussaini Vs. Andhra Bank.
3. (2003) 9 SCC 163 : Incharge Government Hide Flaying Centre Vs. Rama Ram and Anr.
4. (2015) 13 SCC 754: Gouri Shanker Vs. State of Rajasthan.
5. AIR 1964 SC 1617 : Bombay Union of Journalists Vs. State of Bombay.

For Petitioner : Mr. M.K. Mohanty

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

JUDGMENT Date of Hearing: 11.08.2021 : Date of Judgment: 17.08.2021

Dr. B.R.SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order of retrenchment dated 29.04.2011 in Annexure-10, and to issue direction to

the opposite parties to regularize her service under the work charged establishment, by reinstating her in service and fixing her seniority, and to pay all the consequential financial and service benefits as due and admissible to her in accordance with law.

2. The factual matrix of the case, in precise, is that the petitioner was engaged as NMR Mate (Typist) under the Executive Engineer, Mahanadi Barrage Division, Cuttack on 21.03.1985. While she was discharging her duty continuously, her service was terminated by the Executive Engineer, Mahanadi Barrage Division-opposite party no.4 on 01.03.1989 violating the provisions contained under Section 25-F and 25-G of the Industrial Disputes Act, 1947. Consequentially, the petitioner raised industrial dispute before the appropriate Government and accordingly the Government of Odisha in Labour and Employment Department, vide order dated 15.10.2001, referred the dispute for adjudication by the Presiding Officer, Labour Court, Bhubaneswar, which was subsequently transferred to be adjudicated by the Presiding Officer, Industrial Tribunal, Bhubaneswar, vide order dated 04.04.2008, with following reference:-

> *"Whether the termination of services of Smt. Mamata Manjari Mohanty, NMR Mate (Typist) by the Executive Engineer, Mahanadi Barrage Division, Cuttack is legal and/or justified, if not what relief Smt. Mohanty is entitled to?"*

2.1 When the matter was pending before the Industrial Tribunal, Bhubaneswar for adjudication, Government of Odisha, vide notification no.7323 dated 28.02.2009, took a decision to bring the NMRs, who were recruited prior to 12.04.1993, to the work charged establishment w.e.f. 01.03.2009. Thereafter, Government of Odisha in Water Resources Department, vide order no.17229 dated 19.06.2009, directed the Engineer-in-Chief, Water Resources to bring the NMR employees recruited prior to 12.04.1993 to the work charged establishment. Consequentially, the Engineer-in-Chief, Water Resources, vide order no.8968 dated 20.07.2009, directed the Superintending Engineer, Drainage Circle, Cuttack to implement the order of the Government by bringing the NMR employees, who were engaged prior to 12.04.1993, to the work charged establishment with effect from 01.03.2009. Thereafter, the Superintending Engineer, Drainage Circle, Cuttack, vide order no.3826 dated 25.08.2009, brought the NMR employees recruited prior to 12.04.1993 to the work charged establishment with effect from 01.03.2009. Thereafter, the Presiding Officer, Industrial Tribunal,

Bhubaneswar, vide award dated 24.02.2010, answered the reference in I.D. Case No.256 of 2008, paragraphs-8 and 9 of which read thus:-

> *"8. It may be stated here at the cost of repetition that the management has not complied with the mandatory requirement of Section 25-F of the Act while terminating the employment of the workman nor did it prove that the termination of employment of the workman was due to her misconduct. Hence, the action of the management is held to be neither legal nor justified.*
>
> *9. In view of the discussions made in the foregoing paragraphs, the workman is held entitled to reinstatement in service with 50% back wages. The management is directed to implement the Award within a period of two months hence."*

2.2 In terms of the above award, Government of Odisha in Water Resources Department, vide order no.19021 dated 29.07.2010, directed the Engineer-in- Chief, Water Resources to reinstate the petitioner in service with 50% back wages and thereafter to retrench her by following mandatory provisions of statute. Consequentially, vide order dated 21.08.2010, the petitioner was reinstated in service and allowed to work in the office of the Executive Engineer, Mahanadi Barrage Division, Cuttack until further orders and also paid the back wages from 01.03.1989 to 26.08.2010. Pursuant to such order, the petitioner joined in service in the office of the Executive Engineer, Mahanadi Barrage Division on 27.08.2010. Thereafter, the Superintending Engineer, vide order no.4823 dated 30.09.2010, intimated the Engineer-in-Chief that the NMRs, who are junior to the petitioner, are continuing in service and they have been brought to the work charged establishment and some of them have also been brought over to the regular establishment. But the Government, vide order no.28219 dated 10.11.2010, directed the Engineer in Chief to retrench the petitioner by following due procedure and mandatory requirement of the statute. Thereafter, the Engineer in Chief, vide order dated 01.01.2011, directed the Superintending Engineer to retrench the petitioner from service. As a consequence thereof, the Superintending Engineer, vide office order dated 29.01.2011, retrenched the petitioner with immediate effect, but, however, without complying the mandatory provisions under Section 25-F of the Industrial Disputes Act, 1947, and consequentially on 30.04.2011 a cheque amounting to Rs.4326/- was offered to the petitioner, which she did not accept.

Aggrieved by the above action of the authority, the petitioner filed O.A. No. 3077 (C) of 2014 before the Odisha Administrative Tribunal,

Cuttack Bench, Cuttack and on abolition of the tribunal, the same has been transferred to this Court and renumbered as WPC (OAC) No.3077 of 2014.

3. Mr. M.K. Mohanty, learned counsel for the petitioner contended that the order of retrenchment dated 29.04.2011 under Annexure-10, having been passed without following the provisions contained under Sections 25-F and 25-G of the Industrial Disputes Act, 1947, cannot sustain in the eye of law. It is further contended that the petitioner, who was engaged on 21.03.1985 as an NMR Mate (Typist), was retrenched from service on 01.03.1989, and such order of retrenchment, having been passed without following the provisions contained under Section 25-F of the Industrial Disputes Act, 1947, was held to be neither legal nor justified by award dated 24.02.2010 passed by the Industrial Tribunal in I.D Case No.256 of 2008 and the petitioner was directed to be reinstated in service with 50% back wages, pursuant to which she joined in service on 27.08.2010 and continued to discharge her duty. In such circumstance, since the NMR employees, who were engaged prior to 12.04.1993, were brought to the work charged establishment with effect from 01.03.2009, the petitioner should have been brought over the work charged establishment, as she had been engaged prior to 12.04.1993. Besides, since the Superintending Engineer, vide letter dated 30.09.2010, intimated the Engineer-in-Chief that the NMRs who are junior to the petitioner are continuing in service, the petitioner should have been brought over to the work charged establishment and allowed to continue in service. It is further contended that some of the juniors to the petitioner, having been brought over to the regular establishment, she should have been brought over to the regular establishment.

His further contention is that according to the provisions contained in Section 25-F(b) at the time of retrenchment the workman should be paid compensation, which shall be equivalent to 15 days average pay for every completed year or continuous service. Though the petitioner has worked for near about 16 years, only Rs.1545/- has been paid towards the compensation. So far as retrenchment due is concerned, a cheque bearing no.875312 amounting to Rs.4326/- was offered on 30.04.2011, but petitioner did not accept the same. As per the provisions contained under Sections 25-G of the Industrial Disputes Act, 1947 the employer shall ordinarily retrench the workman who was the last person to be employed in the category, unless for reasons to be recorded the employer retrenches any other workman. It is contended that a number of junior workmen are working in the establishment,

so the last come first go principle is very much applicable in the present case. Thereby, the order of retrenchment passed by the authority is in gross violation of the provisions contained under Section 25-G of the Industrial Disputes Act. At last but not the least, it is contended that though the order of retrenchment was passed on 29.04.2011, but one month's wages in lieu of notice, as contemplated under Section 25-F, was offered to the petitioner on 30.04.2011 and, as such, the same being not simultaneous one, the impugned order of retrenchment cannot sustain in the eye of law.

To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***National Iron and Steel Co. Ltd v. State of West Bengal*****, AIR 1967 SC 1206**; ***Syed Azam Hussaini v. Andhra Bank***, AIR 1995 SC 1352; ***Incharge Government Hide Flaying Centre v. Rama Ram and another***, (2003) 9 SCC 163; and ***Gouri Shanker v. State of Rajasthan***, (2015) 13 SCC 754.

4. Mr. H.K. Panigrahi, learned Addl. Standing Counsel appearing for the State, supporting the order of retrenchment passed by the authority in Annexure-10, contended that since the petitioner alleged violation of Industrial Disputes Act, 1947, this petition is not maintainable. It is further contended that when the order of retrenchment dated 29.04.2011 in Annexure-10 was passed as per the provisions contained in Section 25-F of the Industrial Disputes Act, 1947, the petitioner was offered on 30.04.2011 one month's pay, in lieu of one month notice, amounting to Rs.4326/-, which the petitioner refused. Thereby, the contention raised, that Section 25-F has not been complied with, cannot sustain. As regards the claim of the petitioner that she had joined as NMR Mate (Typist) on 21.03.1985 and, in view of the Government notification dated 28.02.2009, she should have been brought over to the work charged establishment, as she had been employed on or before 12.04.1993, and, in view of the letter dated 30.09.2010 of the Superintending Engineer, since her juniors have been allowed to continue in service, she should have been allowed to continue, it is further contended that vide order dated 10.11.2010 Government directed the Engineer-in-Chief to retrench the petitioner by following due procedure and mandatory requirement of the statute and, as such, in compliance of the same, the order impugned having been passed, no illegality or irregularity has been committed by the authority so as to warrant interference by this Court. Consequentially, he seeks for dismissal of the writ petition.

5. This Court heard Mr. M.K. Mohanty, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State by hybrid mode and perused the records. Since pleadings have been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. On the basis of factual matrix, as delineated above, and rival submissions made by learned counsel for the parties, the moot question that falls for consideration by this Court is, whether the order impugned in Annexure-10 dated 29.04.2011 has been passed in due compliance of the provisions contained under Sections 25-F and 25-G of the Industrial Disputes Act, 1947.

7. Admittedly, the petitioner was engaged as NMR Mate (Typist) under the Executive Engineer, Mahanadi Barrage Division, Cuttack on 21.03.1985, but her service was terminated on 01.03.1989 without complying the provisions contained under Section 25-F of the Industrial Disputes Act, 1947, as a result of which she raised industrial disputes which was registered as I.D. Case No.256 of 2008 and, after due adjudication, the Industrial Tribunal, Bhubaneswar directed the management to reinstate the petitioner with 50% back wages, as there was non-compliance of the provisions contained under Section 25-F of the Industrial Disputes Act, 1947. In compliance thereof, the petitioner was reinstated in service along with the back wages, as directed by the Industrial Tribunal. But subsequently, she was again terminated from service, vide impugned order dated 29.04.2011 under Annexure-10, on the basis of the direction issued by the Government to the Engineer-in-Chief, Water Resource, vide Annexure-8 dated 10.11.2010, by which it was directed to retrench the petitioner by following due procedure and mandatory requirement of the statute.

8. For just and proper adjudication of the case, Sections 25-F and 25-G of the Industrial Disputes Act, 1947, being relevant, are extracted hereunder:-

> "25-F. Conditions precedent to retrenchment of workmen- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-
>
> (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette].

xxx *xxx* *xxx*

"25-G. Procedure for retrenchment – Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

9. A bare perusal of the aforementioned provisions would go to show that no workman employed in any establishment, who has been in continuous service for not less than one year under an employer, shall be retrenched by that employer until the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice, and that the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. For such retrenchment a procedure has been envisaged that where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman. The above mentioned provisions are very clear and should be scrupulously followed while retrenching a workman from an establishment.

10. The impugned order of retrenchment in Annexure-10 dated 29.04.2011, on the face of it, reveals that the petitioner has been retrenched from service with immediate effect, as her service was no more required under the organization due to reduction of work load and her retrenchment was expedient, and she would be paid one month pay in lieu of one month

notice and other entitlements if any as per the provisions under Section 25-F of the Industrial Disputes Act, 1947. According to Section 25-F of the Industrial Disputes Act, 1947, as has been referred to above, a workman employed in any industry should not be retrenched until he/she been given one month's notice in writing indicating the reasons for retrenchment and the period of notice had expired, or the workman had been paid in lieu of such notice. The notice in this case bears the date "29th April, 2011" and the same was served on the petitioner on the very same day. Therefore, she was supposed to be paid one month's wages in lieu of notice of termination of her service on the very same day, i.e, "29th April, 2011". Admittedly, on 30.04.2011, the petitioner was offered one month's wages, in lieu of one month's notice, by way of cheque bearing no.875312, which she did not accept. Thereby, the provision of Section 25-F, which was incumbent on the part of the employer to comply by paying the workman wages in lieu of the notice period, has not been complied. That is to say, if she was asked to go forthwith, she had to be paid the wages at the time when she was asked to go and should not be paid on the subsequent date, i.e., 30.04.2011, rather it should be simultaneously paid. This view has been taken in ***M/s National Iron and Steel Co. Ltd.***, mentioned supra, which received supports from the observation made by the apex Court in ***Bombay Union of Journalists v. State of Bombay***, AIR 1964 SC 1617.

11. In ***Syed Azam Hussaini,*** mentioned supra, the apex Court held that retrenchment under Section 2(00) of the Industrial Disputes Act, 1947, could be done only in accordance with the provisions contained in Section 25-F of the Industrial Disputes Act, 1947 and since one month's wages in lieu of notice has not been paid at the time of such retrenchment and was paid subsequently, it amounts to non-compliance of Section 25-F of the Act and, as such, the termination is not legal.

12. In view of such position, the contention raised by Mr. M.K. Mohanty, learned counsel for the petitioner, that the order of retrenchment dated 29.04.2011 under Annexure-10 and payment of wages in lieu of one month notice of retrenchment, which was offered on 30.04.2011 under Annexure-11, being not simultaneously one, cannot be construed as full compliance of Section 25-F of the Act, get ample corroboration from the materials available on record, and as such, has sufficient force. Thereby, in view of the proposition of law laid down by the apex Court, as discussed above, this Court holds that the impugned order of retrenchment cannot be allowed to

stand, since there was sheer violation of the provisions contained under Section 25-F of the Act.

13. So far as non-compliance of the provisions contained in Section 25-G of the Act is concerned, admittedly the petitioner was engaged on 21.03.1985 as NMR Mate (Typist) under the Executive Engineer, Mahanadi Barrage Division, Cuttack. Though she was retrenched from service on 01.03.1989, by virtue of the award dated 24.02.2010 passed by the industrial tribunal in I.D. Case No. 256 of 2008, she was reinstated in service with 50% back wages. In the meantime, in terms of the resolution passed by the Government, some of the juniors to the petitioner were brought to the work charged establishment, discriminating the petitioner though she was continuing. Thereafter, though the Superintending Engineer, vide letter dated 30.09.2010 intimated the Engineer-in-Chief that the juniors to the petitioner were continuing in service, without considering the same, the order of retrenchment was passed in Annexure-10 dated 29.04.2011 on the basis of instructions issued by the Government, on the ground that due to reduction of work load her retrenchment was expedient. In that case, the provisions contained under Section 25-G were to be followed scrupulously. Meaning thereby, the junior most person had to go allowing the senior to continue. Though the petitioner had been appointed prior to 12.04.1993 and she was a senior most NMR, she was to be brought over to the work charged establishment and subsequently to the regular establishment, instead of directing her to face retrenchment due to reduction of work load. Thereby, the provisions contained under Section 25-G have not been complied with. Consequentially, on that count also the order of retrenchment under Annexure-10 dated 29.04.2011 is also contrary to the provisions of the Industrial Disputes Act, 1947. This view gets ample support from the judgments of the apex Court in ***Incharge Government Hide Flaying Centre*** and ***Gauri Shanker***, mentioned supra.

14. In view of the factual matrix and propositions of law, as discussed above, this Court is of the considered view that the order dated 29.04.2011 in Annnexure-10 retrenching the petitioner from service with immediate effect cannot sustain in the eye of law, as the same has been passed without complying the provisions contained under Sections 25-F and 25-G of the Industrial Disputes Act, 1947. Consequentially, the order dated 29.04.2011 in Annexure-10 is liable to be quashed and hereby quashed. The opposite parties are directed to reinstate the petitioner in service and to bring over her

to the work charged establishment forthwith, from the date her juniors have been brought over to the work charged establishment, in pursuance of the notifications dated 28.02.2009 and 19.06.2009 issued by the Government, and then bring over her to the regular establishment forthwith, if her juniors have been brought over to the regular establishment. Further, keeping in view the fact that the petitioner has been retrenched without following the prescribed procedure and, as such, the fault lies with the employer for such illegal retrenchment, and also being aware of the fact that the petitioner has not discharged her duty since 29.04.2011, this Court directs the opposite parties to pay 50% wages to the petitioner w.e.f. 29.04.2011 till she is reinstated in service. The above exercise shall be completed within a period of four months from the date of passing of this judgment.

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

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2021 (III) ILR - CUT- 93

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 2701 OF 2014

HIMANSHU SEKHAR DAS **……..** Petitioner

.V.

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

SERVICE LAW – Petitioner appointed as 4th peon in the School initially managed by the Managing Committee – Subsequently that school was taken over by the Govt. – After Government taken over of that school the authority cancel/did not approve the appointment of the petitioner – Action of the authority challenged – That school having roll strength more than 100 – Held, the order passed by the authority cancelling approval post held by the petitioner, cannot sustain in the eye of law – Thereby, the said order is liable to be quashed and accordingly quashed.

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 1009 : (2003) 10 SCC 411 :State of Odisha Vs. Rajendra Kumar Das.

2. 1999 (II) OLR 176 : Dipak Kumar Sahoo Vs. State of Odisha rep. by its Secretary in School and Mass Education Department and Ors.
3. WP (C) No. 3472 of 2014 : Prasanna Kumar Rout Vs. State of Odisha and Ors.

For Petitioner : Mr. K.K. Swain, P.N. Mohanty S.C.D. Dash, U. Chhotray and P.K. Mohapatra.

For Opp. Parties: Mr. S. Jena, Standing Counsel for S& ME Department

JUDGMENT Date of Judgment: 08.09.2021

Dr. B.R.SARANGI, J.

The petitioner, who was appointed on 14.12.1991 against the post of 4th peon in Putineswar High School, Putina in the district of Balasore, by the erstwhile Managing Committee, has filed this writ petition seeking to quash the order dated 11.03.2013 under Annexure-8, whereby approval of appointment of the petitioner made vide orders dated 07.09.1998 and 16.07.1999 has been withdrawn on the ground that he was continuing against a non-existent post and beyond yardstick and to issue direction to the opposite parties to continue him in his former post with all consequential service and financial benefits.

2. The factual matrix of the case, in brief, is that the petitioner was appointed against the post of 4th peon in Putineswar High School, Putina in the district of Balasore on 14.12.1991 by the erstwhile Managing Committee. Pursuant thereto, he joined in the said post on 16.12.1991. His post was duly approved as per the roll strength of the school on 27.05.1995. But, in the meantime, the school was taken over by the State Government on 07.06.1994 by virtue of the Government resolution dated 16.12.1994. The petitioner was adjusted in H.C. Academy, Bhograi vide order dated 07.09.1998 against the 2nd post of peon. As his post was duly approved in the said School, he was allowed monthly salary w.e.f. 09.09.1998, but the said order of approval was cancelled vide order dated 25.06.2001 on the ground that his appointment was void/invalid. Challenging the said order dated 25.06.2001, the petitioner approached the Odisha Administrative Tribunal by filing O.A. No. 2693 (C) of 2001. The tribunal, vide judgment dated 04.11.2010, quashed the order dated 25.06.2001 and observed that the petitioner shall not be entitled to any salary or other related benefits other than seniority on the principles of "no work no pay" and also observed that the opposite parties are at liberty to rectify such error in procedure and issue appropriate order observing principles of natural justice. Since the order of the tribunal was not complied

with, the petitioner filed C.P. No. 382 (C) of 2011. In response to the notice issued therein, the Inspector of Schools, Balasore Circle, Balasore filed show cause taking a stand that he has already moved the Government/Director, Secondary Education, Odisha giving details of service particulars of the petitioner and sought for necessary order/approval for his adjustment pursuant to the order passed by the tribunal in O.A. No. 2963 (C) of 2001. When the tribunal insisted for compliance of its order, the opposite parties no. 1 and 2 filed an affidavit annexing the impugned order dated 11.03.2013 that the approval, already accorded in favour of the petitioner, has been withdrawn. Hence this writ petition.

3. Mr. K.K. Swain, learned counsel for the petitioner contended that the petitioner's case is squarely covered by the judgment of the apex Court in ***State of Odisha v. Rajendra Kumar Das***, AIR 2004 SC 1009 : (2003) 10 SCC 411 and ***Dipak Kumar Sahoo v. State of Odisha rep. by its Secretary in School and Mass Education Department and others***, 1999 (II) OLR 176. He further contended that as the petitioner was appointed against the post of 4th peon and his post was approved by the competent authority, a right accrued in his favour, which cannot be taken away after long lapse of time and as such, the order impugned, having been passed without application of mind and without application of settled position of law on the point of appointment and approval of 4th peon, cannot sustain in the eye of law.

4. Mr. S. Jena, learned Standing Counsel for School and Mass Education Department vehemently contended that since the petitioner was appointed against the 4th post of Peon and his post was approved because of the adjustment made against the 2nd post in a nearby school which itself is void and invalid. Thereby, the authority is well justified in withdrawing such approval, for which no illegality or irregularity can be attributed so as to cause interference by this Court at this stage.

5. This Court heard Mr. K.K. Swain, learned counsel for the petitioner and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department appearing for State-opposite parties by hybrid mode. 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. In the instant case, admitted fact is that the petitioner was appointed by the managing committee against the 4th post of peon in Putineswar High School on 14.12.1991 and from that date he had been discharging his duty. His post was also duly approved by the competent authority. But after the school was taken over, the difficulty arose with regard to adjustment of the petitioner against the 4th post. Thereby, he was adjusted against the 2nd post of peon in H.C. Academy, Bhograi. The Inspector of Schools, Balasore, having found that the petitioner was adjusted there illegally, came to a conclusion that his appointment was void/invalid, and accordingly passed an order on 25.06.2001 cancelling the approval accorded to the petitioner. The said order was challenged by the petitioner before the Odisha Administrative Tribunal by filing O.A. No. 2963 (C) of 2001. The tribunal, having found that the order of cancellation was passed without following the principle of natural justice, quashed the same and directed the opposite parties to allow the petitioner to continue in service but denied to pay the back wages on the principle of "no work no pay". Be that as it may, there is no dispute with regard to the fact that the petitioner was appointed against the 4^{th} post of peon.

7. In ***Rajendra Kumar Das***, mentioned supra, the apex Court held that the post of Daftary, carries higher scale of pay, is to be filled up by way of promotion amongst Class-IV employee of the same institution. In paragraphs-9 and 10 of the said judgment it has been held that if a school is entitled to have a "Daftary" as per the yardstick dated 08.07.1981 or as per the yardstick dated 27.03.1992 certainly the appointment has to be made by promoting one of the three peons, i.e. Office Peon, Office Attendant and Night Watcher-cum- Sweeper. In the said case it has been further held that the Management of the concerned institution shall move the concerned authorities for approval of the promotional appointment of a Class-IV employee as "Daftary" and simultaneously, it can also recommend for appointment to Class-IV post. The decision on both motions shall be taken within three months from the date of submission of the recommendation in accordance with law keeping in view the operative yardstick in force at the time appointments were made. The apex Court further held that even if there has been refusal earlier, the matter shall be considered in the light of the said judgment.

8. In ***Deepak Kumar Sahoo*** (Supra), this Court held that if anybody has been appointed against 4^{th} post of peon prior to 13.11.1996 and prior to

01.01.1992 having roll strength of more than 100, his appointment as 4th peon cannot be said to be invalid as his post is admissible. The petitioner's appointment in this case was made prior to cut off date, when roll strength of School was more than 100. Consequentially, his appointment to the 4th post of peon cannot be said to be invalid in any manner.

9. In the light of the judgment in ***Rajendra Kumar Das***, mentioned supra, after lapse of five years of implementation of the said judgment of the apex Court, an office order dated 07.05.2008 was issued providing the modalities for promotion to the post of "Daftary" and consequential approval of 4th peon in that School as per the prevalent yardstick, which is evident from Annexure-10 to the rejoinder affidavit filed by the petitioner. Thereby, as per the law laid down by the apex Court read with the modalities provided by the State Government, vide order dated 07.05.2008, large number of 4th Peons have been approved in those Schools. This fact is elucidated in Annexure-10 to the rejoinder affidavit filed by the petitioner. As such, there is no denial of such document by filing any reply by the opposite parties. After approval of 4th peon in consequential vacancy, this Court directed for payment of their salary in the interregnum period as per the judgment of this Court in Prasanna Kumar Rout vs. State of Odisha and others (WP (C) No. 3472 of 2014 disposed of on 30.10.2017).

10. So far as the case in hand is concerned, instead of approving the post of the petitioner as a 4th peon in the consequential vacancy, his appointment was cancelled in gross violation of principle laid down by the apex Court in ***Rajendra Kumar Das*** and ***Deepak Kumar Sahoo***, mentioned supra, which cannot sustain in the eye of law.

11. In view of the law laid down by the apex Court, as well as this Court and as per the resolution passed by the Government, on the point in issue, the order dated 11.03.2013 passed by the District Education Officer in Annexure-8 cancelling approval of the post held by the petitioner, cannot sustain in the eye of law. Thereby, the said order is liable to be quashed and is accordingly, quashed. The matter is remitted back to the District Education Officer, Balasore with a direction to approve the appointment of the petitioner against the post of 4th peon as per the yardstick laid down in order dated 08.07.1981, which was in force, and since the roll strength of the school was more than 100, the post of 4th peon, against which the petitioner was appointed, was justified as per the yardstick. The entire action shall be taken as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment.

12. The writ petition is allowed. No order to costs.

2021 (III) ILR - CUT- 98

DEBABRATA DASH, J.

R.F.A. NO. 48 OF 2007

THE WESTERN ELECTRICITY SUPPLY COMPANY & ANR. ……..Appellants

.V.

MOHAN PADHAN ……..Respondent

WORDS AND PHRASES – The Doctrine of Strict liability – Meaning there of – Held, principle of law has been settled that a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings – The basis of such liability is the foreseeable risk inherent in the very nature of such activity – The liability cast on such person is known in Law, as "Strict Liability" (Para-10)

The determination of compensation as made by the Court below is also seen to be based upon just and proper application of evidence on record and as such the same is not liable to be tinkered with in this appeal – Appeal dismissed. (Para-12)

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1480 : Charan Lal Sahu Vs. Union of India.
2. AIR 1987 SC 1690 : Gujarat State Road Transport Corpn. Vs. Ramanbhai Prabhatbhai.
3. AIR 2001 SC 485 : Kaushnuma Begum Vs. New India Assurance Co. Ltd.
4. AIR 2002 SC 551 : M.P. Electricity Board Vs. Shail Kumar & Ors.

For Appellants : Mr. Banoja Ku. Pattnaik

For Respondent : Mr.Trilochan Nanda

JUDGMENT Date of Hearing: 13.09.2021: Date of Judgment: 16.09.2021

DEBABRATA DASH, J.

The Appellants by filing this Appeal under Section-96 of the Code of Civil Procedure (hereinafter called as 'the Code') have assailed the judgment and decree dated 21.11.2006 and 08.12.2006 respectively passed by the learned Civil Judge (Senior Division), Bolangir in Civil Suit No.24 of 2005.

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

3. Plaintiff's case is that on 21.06.2003 around 2/3 P.M., when he was going to attend the call of nature, on his way, he suddenly came in contact with the snapped live overhead electric wire. For that, he was partially electrocuted and being immediately taken to hospital, although to his good fortune, his life was saved yet he lost his right arm for ever and become permanently disabled thereby. It is stated that said incident and the result thereof is on account of gross negligence on the part of the Defendants who are in-charge of supply of electricity and maintenance of the supply lines, accessories etc. For the unfortunate incident, the Plaintiff became permanently disabled and thereby suffered in all fronts. It is the further case of the Plaintiffs that he lost his income for properly maintaining himself as also in providing assistance to the members of the family in their day today living. In view of the above, the Plaintiff filed the suit claiming the compensation of Rs.5.00 lakh with the interest and cost from the defendants.

The Defendants in their written statement have stated that the Plaintiff has not suffered the permanent disability by losing his right arm on account of electrocution. The defendants thus denied their liability to pay compensation in pleading that no such incident had taken place due to negligence on their part in maintaining the overhead electric lines in supplying the electricity in the area and maintaining the same with other assessories.

4. On above rival pleadings, the Trial Court has framed as many six issues. Coming to answer Issue Nos.3 & 4 together concerning the negligence on the part of the Defendants and the permanent disability incurred by the plaintiff thereby, in the backdrop of the pleadings upon analysis of evidence and further keeping in view the settled position of law in such factual settings, as established, answers have been rendered against the Defendants in attributing negligence to them for the said incident and consequently, holding that they are held liable to pay the compensation for the permanent physical disability incurred by the Plaintiff and the loss in all fronts as so suffered.

5. Taking up the other issue relating to determination of just and proper compensation, going through the evidence and upon assessment of the age and income of the deceased as also the consequential loss suffered by the plaintiff in his earning for the present and future and the additional financial burden that he has to carry for such permanent disability, the Defendants have been directed to pay compensation of Rs.1,08,200/- to the Plaintiff with interest @ 6% per annum from the said order till payment.

6. The Defendants, being aggrieved by the judgment and decree passed by the Trial Court, are thus on appeal under Section-96 of the Code before this Court.

7. Learned counsel for the Appellants (Defendants) submitted that the court below having rendered the finding on issue nos. 3 and 4 has committed grave error both on facts and law. He submitted that the said findings suffer from the vice of perversity as because in arriving at the same, the Courts below have ignored certain material evidence on record and rather leaned more upon mere conjunctures and surmises. He thus submitted that said findings being the outcome of perverse appreciation of evidence are untenable. He also submitted that the quantum of compensation as determined by the Trial Court is against the weight of evidence on record especially as to the age and income of the deceased as also the loss sustained for the physical disability.

8. Learned counsel for the Respondents (Plaintiffs) submitted all in favour of the findings rendered by the Trial Court. According to him, the findings under challenge are the outcome of just and proper appreciation of evidence in the touchstone of the legal position holding the field.

9. Keeping in view the submission as above, I have carefully gone through the judgments of the courts below.

In the case at hand, Issue Nos.3 & 4 seem to be vital when it appears that the amputation of right arm of the Plaintiff due to electrocution as to have taken place on 02.04.1997 has been amply proved.

10. Principle of law has been settled that a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective

of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability".

> "The doctrine of strict liability has its origin in English Common Law when it was propounded in the celebrated case of *Rylands v. Fletcher*, 1868 Law Reports (3) HL 330, Justice Blackburn had observed thus:
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> "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does so he is prima facie answerable for all the damage which is the natural consequence of its escape."
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> There are seven exceptions formulated by means of case law to the said doctrine. One of the exceptions is that "Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply". (Winfield on Tort, 15th Edn. Page 535).
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> The rule of strict liability has been approved and followed in many subsequent decisions in England and decisions of the apex Court are a legion to that effect. A Constitution Bench of the apex Court in *Charan Lal Sahu v. Union of India*; AIR 1990 SC 1480 and a Division Bench in *Gujarat State Road Transport Corpn. V. Ramanbhai Prabhatbhai*; AIR 1987 SC 1690 had followed with approval the principle in Rylands (supra). The same principle was reiterated in Kaushnuma Begum v. New India Assurance Co. Ltd.; AIR 2001 SC 485.
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> In *M.P. Electricity Board v. Shail Kumar and others*; AIR 2002 SC 551, one Jogendra Singh, a workman in a factory, was returning from his factory on the night of 23.8.1997 riding on a bicycle. There was rain and hence the road was partially inundated with water. The cyclist did not notice the live wire on the road and hence he rode the vehicle over the wire which twitched and snatched him and he was instantaneously electrocuted. He fell down and died within minutes. When the action was brought by his widow and minor son, a plea was taken by the Board that one Hari Gaikwad had taken a wire from the main supply line in order to siphon the energy for his own use and the said act of pilferage was done clandestinely without even the notice of the Board and that the line got unfastened from the hook and it fell on the road over which the cycle ridden by the deceased slided resulting in the instantaneous electrocution. In paragraph 7, the apex Court held as follows:
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> "It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human, being, who gets unknowingly

trapped into if the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps."

(emphasis laid)

The principle of res ipsa loquitur is well known. It is explained in a very illustrative passage in Clerk & Lindsell on Torts, 16th Edn., pp. 568-569, which reads as follows:

"Doctrine of res ipsa loquitur. The onus of proof, which lies on a party alleging negligence is, as pointed out, that he should establish his case by a pre-ponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording prima facie evidence of want of due care on the other's part: 'res ipsa loquitur is a principle which helps him to do so'. In effect, therefore, reliance on it is a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by Erle, C.J.:

'There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.' It is no more than a rule of evidence and states no principle of law. "This convenient and succinct formula", said Morris, L.J., "possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin". It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The court hears only the plaintiff's side of the story, and if this makes it more probable than not that the

> occurrence was caused by the negligence of the defendant, the doctrine res ipsa loquitur is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. It is not necessary for res ipsa loquitur to be specifically pleaded."
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> As held above, a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps. The opposite parties cannot shirk their responsibility on trivial grounds. For the lackadaisical attitude exhibited by the opposite parties, a valuable life was lost.

11. In order to address the rival submission, the evidence on record now be touched upon so as to judge the sustainability of the findings of the trial Court under challenge.

It is the evidence of Plaintiff (P.W.1) that on 21.06.2003 around 3.00 pm, he had been to attend the call of nature when on the way he came in contact with the snapped live electric wire and being electrocuted, he fell senseless and removed to the hospital, where his right arm was finally amputed to save his life. Father of P.W. 1 has been examined as P.W.3 who has deposed about the fact that Plaintiff-P.W.1 was taken to the hospital for treatment due to electrocution from that spot and finally in course of treatment his right arm was amputed. It has been the evidence of P.W.4 that the right hand of P.W.1 on the relevant date and time came in contact with snapped live electric wire and being electrocuted, he fell down. He has deposed that as he was taking bath nearby, he had seen P.W.1 coming to attend the call of nature has also the incident to have so happened. It is his evidence that he with others had taken P.W.1 to the hospital. The documents such as Ext.1 to 18 have been proved to show that the P.W.1 was under treatment. The bed-head ticket Ext.37 reveals that the Plaintiff was under treatment for the injury received due to electrocution, when Ext.13, the discharge ticket shows Plaintiff's admission in the hospital taken from the first hospital on 27.06.2003 and his discharge of 12.07.2003. It also finds mention that the right arm of the P.W. 1 was amputed on 29.06.2003 being badly affected by the injuries received by P.W.1 by coming in contact with the live electric wire.

The oral evidence of P.Ws.1 to 4 have practically remained unshaken and despite scathing cross-examination, no such material has come to surface in so as to discredit their testimonies. Ext. 16 is the certificate showing the permanent physical disability of the Plaintiff to the extent of seventy percentum (70%).

12. For the aforesaid discussion as above, backed by the pleading, this Court does not find any such reason or justification to hold that the finding rendered by the Trial Court that the Plaintiff lost his right arm and incurred permanent physical disability to the extent of seventy percentum (70%) by coming in contact with the snapped live electric wire on his way to the place to attend call of nature as unsustainable being not the outcome of unjust or improper and proper appreciation of evidence.

Applying the principles law as find mention at paragraph-10 to the facts and circumstances obtained in the evidence as discussed, this Court is also not in a position to hold that the finding rendered by the Trial Court that the Plaintiff incurred permanent physical disability to the tune of seventy percentum (70%) on account of electrocution due to negligence of the Defendants in maintaining overhead live electric wire for supply of electricity in the area as untenable and as such liable to be set aside.

In so far as the determination of compensation is concerned, the approach in the matter of appreciation of evidence is found to be sound and the determination of compensation as made by the Court below is also seen to be based upon just and proper appreciation of evidence on record and as such the same is not liable to be tinkered with in this Appeal.

13. Accordingly, the Appeal is dismissed and in the facts and circumstances without cost.

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2021 (III) ILR - CUT- 105

DEBABRATA DASH, J.

RSA NO. 485 OF 2017

NABA KISHORE SAHOO ……Appellant

.V.

BASANTA KUMAR PRADHAN ……...Respondent

PROPERTY LAW – Suit for eviction – Establishment of ownership – In a suit for eviction based on the relationship of Landlord and tenant – Whether establishment of ownership is of significance? – Held, No – Once the relationship is proved, the decree for eviction has to follow – The Appeal is dismissed. (Para-9)

For Appellant : Mr. S.K. Sarangi, S.K. Sarangi,A.K. Nayak, L.K. Sahoo, S. Jain.

For Respondent: M/s. Amit Prasad Bose, V. Kar, A.K. Mohanty, S.S. Dash, N. Hota, D.J. Sahoo.

JUDGMENT Date of Hearing & Judgment: 17.09.2021

DEBABRATA DASH, J.

The Appellant, by filing this Appeal, under section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by the learned District Judge, Khurda in RFA No.37 of 2017.

By the said judgment and decree the Appellant court in that Appeal under Section-96 of the Code has confirmed the judgment and decree passed by the learned Senior Civil Judge, Bhubaneswar in C.S. No.1595 of 2016 in decreeing the suit filed by the Respondent as the Plaintiff for recovery of possession of the suit shop from the Appellant (Defendant) followed by the award of damage @ Rs. 200/- per diem with effect from 01.12 2013 till vacation to be paid by the Appellant (Defendant) to the Respondent (Plaintiff).

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

3. The Plaintiff's case is that he is the owner of the plot of land over which the building having three rooms at its ground floor stands. It is

stated that he had inducted the defendants as the tenant in respect of suit shop consisting of three rooms in the year, 1997 and agreement to that effect had been entered into between them from time to time. It is the case of the Plaintiff by the last agreement, the tenancy commenscing from 01.01.2013 was created for a period of 11 month on the condition as to payment of rent of Rs.4,800/- per month excluding electricity charges of Rs.5,00/- every month. It is his case that after expiry of the period of tenancy i.e. 30.11.2013 he for his own requirement and need requested the defendant to vacate the possession of shop. Then defendant is said to have dragged on with the matter on different pretexts. The Defendant however went on paying monthly rent of Rs.6,500/- excluding electricity charges. When the matter stood thus, the Plaintiff came to know about the institution of a suit bearing C.S. Case No.724 of 2016 by the Defendant as the plaintiff there in against him for permanent injunction. The suit has been filed to restrained the present Plaintiff from evicting him by force and without following due process of law. The Defendant within having not vacated the suit shop, as so wanted by him the present Plaintiff served a notice dated 18.04.2016 which stood retuned by the postal authority without any specific endorsement. So, the Plaintiff again dispatched the notice dated 25.04.2016 requesting the Defendant that in terms of earlier notice, let him vacate the suit shop. When no development in that direction took place, this suit for recovery of possession in respect of the suit shop, from the Defendant has been filed by nthe Plaintiff, in further claiming the damage for such occupation after the termination of tenancy.

4. The Defendant in the written statement questioned the maintainability of the suit on the ground of improper description of the subject matter of the suit i.e. suit shop. The Defendant also questioned the ownership of the Plaintiff in so far as the suit shop is concerned and as claimed by him. He denied his relationship with the Plaintiff as tenant and landlord. It is specifically pleaded that the Defendant has been inducted as a tenant in respect of the suit shop in the year, 1997 vide agreement dated 25.11.1997 by execution of the same by one Hemanta Kumar Pradhan, the Plaintiff who happens to be his brother as landlords. It is his case that when the Plaintiff without any right whatsoever threatened to dispossess him from the suits shop and so evict him therefrom; he had filed the suit i.e. C.S. No.724 of 2016. It is his specific case that the Plaintiff has no right to seeking the decree of eviction from the suit shop.

5. On the above rival pleadings, the Trial Court framed as many as eight issues. Parties are having laid oral and documentary evidence. The Trial Court appears to have rightly taken up the issues relating to maintainability of the suit for improper description of the subject matter and the entitlement of the Plaintiff to the decree of eviction of the Defendant together for decision.

Upon consideration of evidence on record and their detail discussion in the backdrop of the settled position of law holding the field,the Trial Court having held the suit at the behest of the Plaintiff to be competent has finally answererd those issues in fovour of the Plaintiff and has found the Pliantiff as entitled to the decree for eviction of the defendant and award of damage to be paid by the Defendant.

6. The Defendant being aggrieved by the aforesaid judgment and decree passed by the Trial Court having carried the appeal under Section-96 of the Code has been unsuccessful in getting any relief therein. Hence, the present Second Appeal under Section- 100 of the Code.

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

> 1) Whether the learned Courts below in view of non-joinder of party i.e. the State in the Department of General Administration have erred in law in holding the suit as for the reliefs claimed therein and have committed error in passing the decree of eviction and damage ro the surfferance of the Department?

8. Heard Mr. S.K. Sarangi, learned counsel for the Appellant and Mr. A.P. Bose, learned Counsel for the Respondent at length. Perused the judgment passed by the Courts below. I have also carefully gone through the rival pleadings and the evidence both oral and documentary, let in by the parties.

9. In the exercise of arriving at an answer on the substantial question of law formulated while admitting the Appeal, this Court at first feels it proper to have a look at the evidence piloted by the parties. The last agreement pleaded by the Plaintiff to have been executed by him is dated 11.11.2013 and that has been admitted in evidence and marked as Ext.5/B, the Plaintiff and the Defendant are the parties to the same. It appears therefrom that the Plaintiff being the landlord as executed the said agreement; wherein the

Defendant stands as his tenant and the period of agreement as per that was to end on 30.11.2013. From the side of the Plaintiff, the plaint filed by the Defendant in instituting the suit i.e. C.S. No.742 of 2016 has been proved and marked as Ext.1. The Defendant being the Plaintiff in the said suit stands pleaded that the Plaintiff herein the present suit and his brother Hemanta Pradhan are the owners of the suit premises and that he is occupying the suit shop on payment of monthly rent to them. It has also been specifically stated therein that in an amicable partition between the present Plaintiff and his brother Hemanta, the suit shop had fallen to the share of present Plaintiff for which he executed the agreement with the Defendant from time to time and the last one was the 01.01.2013 wherein the period of tenancy was coming to an end on expiry of 30.11.2013.The defendnat has also proved Ext.A showing the payment of rent for the suit shop to the plaintiff.

This being the evidence on record, it stands established that the Plaintiff is the landlord of the Defendant in respect of the suit shop. In the Present suit, the Defendant has asserted that the Plaintiff is not having the ownership over the said shop situated on the ground floor of the building. Such a stand is just opposite to the one that the defendant has taken in the very suit filed by him as Plaintiff to protect his possession of the suit shop from the hands of this plaintiff who according to him was then attempting to forcibly oust him despite his status as a tenant therein and without taking resource to law. Thus when the Defendant has filed the suit i.e. C.S No 724 of 2016 seeking protection as regards the occupation of his suit shop from being taken away by the present Plaintiff by not following the due process of law asserting himself as the tenant under the Plaintiff Landlord he is stopped from the saying otherwise in the present suit and such a plea is barred in law which IS also provided in Section -116 of the Evidence Act. Moreover in a suit for eviction based on the relationship of the landlord and tenant, the question of ownership is of no significance once the relation is proved and it is held that the tenancy has been terminated as required in law, the decree for eviction has to follow. as per the settled position of law the decree for being passed in favour of the landlord for the eviction of the tenant under him is consequent upon finding as to existence of such relationship between them and due termination of the tenancy prior to the suit. Such a decree does in no way affect the right, title and interest of the actual owner/title holder of the property in question.

In view of all the aforesaid discussion that even if for a moment it is said that ownership of the land over which the building consisting said shop does not rest with plaintiff; the Courts below did commit no error in decreeing the suit filed by the Plaintiff granting him the relief of eviction of the Defendant and damage for his occupation after termination of tenancy till the vacation. The substantial question of law formulated while admitting the Appeal is accordingly answered against the case of the Defendant

10. In the wake of aforesaid; the judgements and decrees under challenge are hereby confirmed.

Accordingly the Appeal is dismissed and in the facts and circumstances no order as to cost is passed

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2021 (III) ILR - CUT- 109

BISWANATH RATH, J.

WPC NO. 3973 OF 2021

NESCO ULTILITY & ANR. …….. Petitioners

.V.

THE SECY., ODISHA HUMAN RIGHTS COMMISSION & ORS. ……Opp. Parties

PROTECTION OF HUMAN RIGHT ACT, 1993 – Whether the commission has power in terms of the provisions of the Act to decide the question of compensation? – Held, Yes. – The State Human Right Commission has considered and reached at its view on compensation in strict compliance of provision of the Act taken note here in above in the involvement of the petitioner and there is no infirmity in the impugned order requiring interferes with the same.

For Petitioners : Mr.P.K.Tripathy
For Opp. Parties : None

JUDGMENT Date of Judgment : 05.07.2021

BISWANATH RATH, J.

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

2. Sole ground of challenge to the impugned order is that when the Odisha Human Rights Commission is only authorised to recommend for enquiry or any action against the public authority, it has no authority to direct for payment of compensation.

3. Though there is allegation that there should have been enquiry before coming to such ascertainment, learned counsel for the Petitioners admitted that there has been involvement of an enquiry however it is urged by Sri Tripathy that the enquiry involved cannot facilitate determination of compensation. Sri Tripathy also submitted that since use of electricity by manipulation and/or theft the user of such electricity should have been made liable and shifting liability on the head of petitioner remain improper. It is in the premises, a request is made for interfering with the impugned order and setting aside the same for the Commission exceeding powers under the provision of the Protection of Human Rights Act, 1993.

4. Considering such submission particularly at the stage of admission, this Court finds, the provision of Section 12 of the Protection of Human Rights Act, 1993 while discussing the functioning of the Commission including enquiry into complain on violation of Human Rights or abatement thereof. Vide Section 13, it provides power relating to enquiry. Similarly, though Section 16 gives power of the Commission to give hearing opportunity to persons likely to be affected and through Section 18, it provides power of the Commission to recommend the concerned govt. authority to make payment of compensation or damages to the complainant or to the victim members of the family as the Commission may consider necessary. It appears though sub-section (C) of Section 19, the Commission has even the power to recommend to the concerned govt. authority at any stage of the enquiry for grant of such immediate interim relief to the victim or the family members of his family. For relevancy of Sections 12, 13, 16 and 17 of the Protection of Human Rights Act, 1993 is taken into consideration which reads as follows:

"12. Functions of the Commission- The Commission shall perform all or any of the following functions, namely:-

(a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf [or on a direction or order of any court]1, into complaint of –

(i) violation of human rights or abetment thereof; or

(ii) negligence in the prevention of such violation, by a public servant;

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a Court with the approval of such Court;

(c) visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the protection of human rights.

13. Powers relating to inquiries-

(1) The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil Court trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), and in particular in respect of the following matters, namely :

(a) summoning and enforcing the attendance of witnesses and examining them on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

(2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code (45 of 1860).

(3) The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973 (2 of 1974), in so far as it may be applicable.

(4) The Commission shall be deemed to be a civil Court and when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973 (2 of 1974) forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973.

(5) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) Where the Commission considers it necessary or expedient so to do, it may, by order, transfer any complaint filed or pending before it to the State Commission of the State from which the complaint arises, for disposal in accordance with the provisions of this Act; Provided that no such complaint shall be transferred unless the same is one respecting which the State Commission has jurisdiction to entertain the same.

(7) Every complaint transferred under sub-section (6) shall be dealt with and disposed of by the State Commission as if it were a complaint initially filed before it.

16. Persons likely to be prejudicially affected to be heard- If, at any stage of the inquiry, the Commission:-

(a) considers it necessary to inquire into the conduct of any person; or

(b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry;

it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

17. Inquiry into complaints The Commission while inquiring into the complaints of violations of human rights may–

(i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it:-

Provided that–

(a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;

(b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;

(ii) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry."

5. Taking into consideration the grounds of challenge indicated in the writ petition and as submitted during course of argument on admission, this

Court on close scrutinize of the provision of Law reflected hereinabove and the discussions made in para-4 hereinabove finds the question required to be determined here is "if the Commission here exercised powers strictly in terms of provisions in coming to decide on the question of compensation?"

6. Reading the judgment/order of the State Human Rights Commission impugned herein, this Court finds upon receipt of complaint involved, the Commission as a 1st step sent the copy of application to the Chief Executive Officer of NESCO, Balasore and Executive Engineer, Bhadrak, Electrical Division NESCO, Bhadrak to enquire into the matter. In the 2nd step, upon receipt of report send copy of report both to Sri Radhakanta Tripathy and Sri Babula Sethi parties involved therein and likely to be affected to submit their response. Commission also took note in its order that there is already registration of case vide P.S. No.700, dated 27.11.2015, U/s.304(A)/34 of I.P.C. against the accused Kalandi Mallick on written report Babula Sethi, son of deceased. In the 3rd step the Commission gave opportunity of hearing to both the Executive Engineers and the party likely to be affected. Based on submission of the Executive Engineer and after coming to observe that the deceased suffered death after coming in contact with either short circuit or un-insulated wire and came to further hold that there remains no doubt involving vicarious liability of NESCO as it was ultimately the owner and custodian of the live wire. Commission's finding is also based on further material disclosing that said Mallick drawn power supply from a small transformer which has been set up near the LT line and there involved a report of the Executive Engineer clearly disclosing that power supply at the spot was taken dishonestly by process of hooking from a substation belongs to NESCO. The Commission in the above circumstance applying the principle of vicarious liability and clear case of neglect in their duty and responsibility of the NESCO has rightly directed for payment of compensation to the next kin of the deceased. This apart, this Court also finds there is heavy in flow of compensation on account of electrocution death in several forms including this High Court every now and then and the electricity company can no more showing its responsibility in guarding its property and power being stolen resulting death of innocents.

7. For the observation of this Court hereinabove, the State Human Rights Commission has considered and reached at its view on compensation in strict compliance of provisions of the Act taken note hereinabove in the involvement of the petitioner and there is no infirmity in the impugned order

requiring to interfere with the same. For there is already delay in payment of compensation in the guise of moving the writ petition causing serious hardship with the kin of deceased, this Court while dismissing the writ petition for having no substance directs release of compensation of Rs.4,00,000/- (Rupees Four lakhs) within a period of ten days and filing of compliance report before the Commission within three days thereafter.

8. Writ petition thus stands dismissed.

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

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2021 (III) ILR - CUT- 115

BISWANATH RATH, J.

WPC(OAC) NO.1889 OF 2017

DURGA MADHAB DAKUA & ANR. ……..Petitioners

.V.

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

SERVICE LAW – Appointment – Odisha Nursing Service (Method of Recruitment And Conditions of Service) Rules, 2015 – Minimum qualification for direct recruitment – Whether candidates having acquired higher qualification can be kept away from the zone of consideration? – Held, No – The Department has already brought amendment to the relevant rules in the year 2019 taking out the restrictions in the matter of prescription of minimum qualification in the erstwhile Rules – This Court here observes, finding complications in the matter, considering the candidature of this nature, State taking a

positive note on its own has come forward with amendment in 2019 thereby no further restriction for considering the candidatures having higher qualification – Writ Petition Succeeds.

(Para-7)

Case Laws Relied on and Referred to :-

1. AIR 2021 SC 2221 : Puneet Sharma & Ors. Vs. Himachal Pradesh State Electricity Board Ltd. & Ors.

For Petitioners : Ms.S.Mohapatra
For Opp. Parties : Mr.H.K.Panigrahi, ASC

JUDGMENT Date of Hearing & Judgment: 27.09.2021

BISWANATH RATH, J.

1. Original Application No.1889(C) of 2017 was filed before the Orissa Administrative Tribunal, Cuttack Bench is taken up for hearing being transferred under the situation of closure of the State Administrative Tribunal. This Court finds, the factual background involved herein, Applicant No.1, Durga Madhab Dakua after passing +2 Science in the year 2004, passed B.Sc. Nursing conducted by the Sikhya 'O' Anusandhan University, Bhubaneswar on 9.9.2015 in a four years course duration. Similarly Applicant No.2, Soubhagyalaxmi Mohanty after +2 Science, passed B.Sc. Nursing, a four yours degree course, from Utkal University in October, 2015. While persecuting their studies in Post Basic Diploma in Psychiatric Nursing Course during the academic session, 2016-17 and continuing the said Course, an advertisement dated 11.5.2017 was issued by the S.C.B. Medical College & Hospital, Cuttack seeking applications for the post of Staff Nurse, vide Annexure-5. Both the Applicants applied for the said post. For the Applicants not being allowed to appear the interview, both of them filed the Original Application and sought for interim protection. On entertainment of the Original Application by way of interim protection, it appears, the Tribunal by order dated 18.7.2017 permitted the present Petitioners to appear in the interview but however their result was restricted to be declared and was directed to be kept in sealed cover. There is a development that during pendency of the case, this Court on perusal of the performance of the Petitioners by opening the sealed cover has already taken note that both Petitioner nos.1 & 2 have already been placed in the merit list at Serial Nos.6 & 2 respectively as finds place in the order of this Court dated 18.8.2021.

2. Ms. S.Mohapatra, learned counsel for the Petitioners in the above background taking to the pleadings attempted to satisfy through the advertisement at Annexure-5 on the aspect of eligibility for the purpose of making application.Taking this Court to the eligibility criteria, Ms.Mohapatra attempted to satisfy that for the disclosure of the educational qualification of the Petitioners, both of them clearly met the eligibility criteria prescribed therein. Taking this Court to the eligibility criteria specifically meant for the post Staff Nurses on contractual for the Mental Health Institute (Centre of Excellence in Mental Health) SCBMCH, Cuttack and reading through the eligibility criteria keeping in view the qualification obtained by the Petitioners, Ms. Mohapatra, learned counsel for the Petitioners attempted to demonstrate through the eligibility criteria and submitted that both the Petitioners already met required eligibility criteria. Taking to the provision from the Indian Nursing Council Act, 1947, particularly Section 10 and Clause-13 of Section 17 Part I, Ms.Mohapatra, learned counsel for the Petitioners attempted to satisfy that both the Petitioners have met the eligibility criteria required under the advertisement. It is in the above background of the matter, Ms.Mohapatra, learned counsel contended that there was no scope for keeping both the Petitioners away from the selection process and for they have already been found to be in the final select list keeping in view the interim direction of the Court authorizing both the Petitioners to appear in the interview. Ms.Mohapatra, learned counsel for the Petitioners, prayed this Court for issuing Mandamus for appointment of the Petitioners and passing appropriate orders.

To substantiate her submission, Ms.Mohapatra, learned counsel for the Petitioners took this Court to a recent decision of the Hon'ble Supreme Court in ***Puneet Sharma & others vrs. Himachal Pradesh State Electricity Board Ltd. & others : AIR 2021 SC 2221***. Taking this Court to Paragraph-2 of the said decision involving the issue framed by the Hon'ble Supreme Court and further taking this Court to the disclosures in Paragraphs-3, 32 & 33 thereof claiming this decision para material appliesto the case at hand, Ms.Mohapatra, learned counsel made an attempt to also have the legal support to the claim of the Petitioners.

3. Mr.H.K.Panigrahi, learned Additional Standing Counsel appearing for the Opposite Parties in his opposition without disputing to the claim of the Petitioners involving the recruitment process, the eligibility criteria prescribed therein for the post of Staff Nurse on contractual under Annexure-

5, but however, disputing on the aspect of the eligibility criteria prescribed for the post in the Mental Health Institute involved therein, however in furtherance of the stand taken by Opposite Parties 1 & 2 took this Court to the Rule available for the purpose, vide Annexure-A/2 to the counter affidavit, i.e., Odisha Nursing Service (Methods of Recruitment and Conditions of Service) Rules, 2015 (in short, "the 2015 Rules") through Appendix at Page-79 of the Brief and reading through Column-4 of the same, dealing with minimum qualification for direct recruitment, contended that there being a minimum qualification prescribed in the 2015 Rules, the Petitioners having acquired higher qualification are rightly kept away from the zone of consideration. Then taking to have a legal support also through the decision in Puneet Sharma (supra) through Paragraphs-37 & 38 thereof, Mr.Panigrahi, learned Additional Standing Counsel for the State contended that this decision has no application to the case at hand. Mr.Panigrahi, learned Additional Standing Counsel however did not dispute to the prescription on the recognition of qualification through Section 10 of the Act, 1947 and also the provision at Section 17 therein taken support by the Petitioners. There is also no dispute to the contention of the Petitioners that in the meantime, the Authority has brought the amended Rule in 2019 accommodating the candidates having higher qualification for the selfsame recruitment but in future years. Mr.Panigrahi, learned Additional Standing Counsel for the Opposite Parties however in this context, opposed the contention of the learned counsel for the Petitioners on the premises that the amended Rule being brought in 2019 was not available to be applied involving the advertisement of the year 2017.

4. Considering the rival contentions of the Parties, for the undisputed facts, such as the Indian Nursing Council Act, 1947 through Section 10 prescribing recognised qualification and higher qualification, further input through Section 17 of the Act, 1947, the qualification of the Petitioners being recognised by the Orissa Medical Examination Board as appearing at Clause-13 of Section 17 therein, this Court observes, there remains no dispute that the qualification obtained by both the Petitioners is the recognised qualification. It is at this stage, taking into consideration the Odisha Nursing Service (Methods of Recruitment and conditions of Service) Rules, 2015 in vogue at the relevant point of time through the Appendix, vide Annexure-A/2, this Court finds the Rules prescribe minimum qualification required for direct recruitment for the post of Staff Nurse as follows :-

> "Must have passed +2 Science Examination under Council of Higher Secondary Education, Odisha/equivalent and Diploma in General Nursing & Midwife Course from any of the 3(three) Medical College and Hospitals of the State/any other recognized private institutions duly approved by Indian Nursing Council and examination conducted by the Odisha Nursing Council."

It is taking into account the qualification criteria prescribed for Staff Nurse on contractual basis at Annexure-5, this Court finds, the eligibility criteria prescribed therein reads as follows :-

> "Must have passed HSC/equivalent examination and +2 Science examination under Council of Higher Secondary Education, Odisha/Equivalent and Diploma in General Nursing & Midwife Course from any of the three (3) Medical College and Hospitals of the State/any other recognised private institutions duly approved by Indian Nursing Council and examination conducted by the Odisha Nursing Council. One percent extra mark of the total marks for each completed year of continuous service (from any govt. institution) subject to a maximum of fifteen percent which will be added to the marks secured by them for deciding the merit position."

At the same time, this Court also takes into consideration the eligibility criteria prescribed specifically involving the post of Staff Nurse for Mental Health Institute (SCB MCH, Cuttack), which reads as follows :-

> "Must have passed HSC/equivalent examination and +2 Science examination under Council of Higher Secondary Education, Odisha/Equivalent and Diploma in General Nursing & Midwife Course from any of the three (3) Medical College and Hospitals of the State/any other recognized private instiutions duly approved by Indian Nursing Council and examination conducted by the Odisha Nursing Council. One per cent extra mark of the total marks of the total marks for each completed year of continuous service (from any Govt. institution) subject to a maximum of fifteen percent which will be added to the marks secured by them for deciding the merit position. Preference will be given to the Candidates those who have completed and continuing the Post Basic Diploma in Psychiatric Nursing Course."

5. Reading all these together, this Court here finds, for applying against the advertisement not only the candidates so involved required to have the minimum qualification but even there appears, there is preference declared to be given to the candidates those who have completed and continuing in the post of Basic Diploma in Psychiatric Nursing Course. This Court from the plea of the Parties remaining undisputed, finds, both the Petitioners very much meeting the eligibility criteria prescribed at both the places and even for their acquiring higher qualification, they were also deserved to be given preference. Taking into consideration the submission of Mr.Panigrahi,

learned Additional Standing Counsel that for there is prescription of minimum qualification, candidates having the higher qualification have been rightly excluded, this Court observes, prescribing minimum qualification in absence of clear exclusion of candidature of the persons having higher qualification cannot stand on the way of the candidates like that of the Petitioners from applying against the advertisement. It is keeping this in view and the interim protection granted to the Petitioners, this Court finds, there has been a justified interim direction to permit the Petitioners to apply through the advertisement pending consideration of the dispute involved therein. It is looking to the observations of this Court and the claim and response of the Opposite Parties, entering into legal force behind it, this Court takes into account the claim of both the Parties through the decision in Puneet Sharma (supra). This Court here takes into consideration the factual aspects involved in the said decision finds, the Hon'ble Supreme Court framed the following question :-

> "Whether a degree in Electrical Engineering/Electrical and Electronics Engineering is technically a higher qualification than a diploma in that discipline and, whether degree holders are eligible for appointment to the post of Junior Engineer (Electrical) under the relevant recruitment rules, is the issue that falls for decision in these appeals arising out of a common judgment of the Himachal Pradesh High Court. As is evident, this issue is not novel and has an almost endemic tendency requiring judicial attention, albeit in myriad and diverse contexts ?"

6. Then coming to the factual aspect therein, this Court finds, in Paragraph-3 of the said decision, the Hon'ble Supreme Court recorded the factual aspect involved therein. It is for the above framing of issues and factual background also involving in the case at hand, ultimately in Paragraphs-32, 33 & 36, the Hon'ble Supreme Court came to observe as follows :-

> "32. The latter (2) conclusively establishes that what the rule making authority undoubtedly had in mind was that degree holders too could compete for the position of JEs as individuals holding equivalent or higher qualifications. If such interpretation were not given, there would be no meaning in the 5% sub-quota set apart for those who were degree holders before joining as Junior Engineers - in terms of the recruitment rules as existing.
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> 33. The court's opinion is fortified by the latest amendment brought about on 03.06.2020. This clarifies beyond doubt that even for the post of Junior

Engineers, those individuals holding higher qualifications are eligible to compete. In the opinion of this Court, though the amending rules were brought into force prospectively, nevertheless, being clarificatory, they apply to the recruitment that is the subject matter of the present controversy. Such a position (i.e. clarificatory amendments operative retroactively, despite their enforcement prospectively) has been held in several previous judgments of this court. In Zile Singh v. State of Haryana15 this Court examined the various authorities on statutory interpretation and concluded: (SCC pp. 8-9, paras 13-14)

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the Rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only--'nova constitution futuris formam imponere debet non praeteritis'--a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at page 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., page 440).

14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69)."

36. It would also be relevant to notice that in the appeal, it has been specifically averred that the HPSEB has been making contractual appointments from amongst degree holders in the cadre of Junior Engineers, and that an order was issued upon the recommendation of the Screening Committee, which through its meeting held on 11.04.2018 had cleared the regularization of 28 such candidates. These degree holders are equivalent to Junior Engineers, and had been working for periods ranging between 4 to 6 years. A copy ofthat order has been produced as Annexure P-10 in the Special Leave Petition."

Above decision supports the case of the Petitioners here not only in the matter of possibility of consideration of persons having higher qualification for the post involved but also in consideration of the subsequent development by way of amendment of the Rules, as involved in the case at hand. It is here taking into consideration the stand of the State-Opposite Parties through Paragraphs-37 & 38, this Court finds, for the factual differences involving the cases referred to therein by the Hon'ble Supreme Court, the observation through Paragraphs-37 & 38 have no application to the case at hand. It is for the factual support to the case of the Petitioners through the observations of this Court herein above, the legal support running through the decision of the Hon'ble Supreme Court in Puneet Sharma (supra), this Court finds, the Writ Petition must succeed.

7. It is at this stage of the matter, this Court also takes cognizance of the plea of both sides that pending consideration, the Department has already brought amendment to the Rules taken note herein above in the year 2019 taking out the restrictions in the matter of prescription of minimum qualification in the erstwhile Rules. This Court here observes, finding complications in the matter of consideration of the candidature of this nature, State taking a positive note on its own has come forward with amendment in 2019 thereby no further restricting to consider the candidatures of persons having higher qualification.

8. Thus while allowing the Writ Petition, keeping in view both the Petitioners having been allowed to participate in the interview by virtue of the interim direction, further having been selected, their names having been already panelled in the select list, further keeping in view the sealed cover already opened and the development therein recorded in favour of the Petitioners, this Court directs the Superintendent, S.C.B. Medical College & Hospital, Cuttack, O.P.2, to treat both the Petitioners in order of their merit position in the select list along with other selected candidates and place them accordingly. This Court makes it clear that for illegally keeping the Petitioners away from the selection purview for no reason of the Petitioners and appointment as well, both the Petitioners will be deemed to be continuing as against the Posts of Staff Nurse on contractual basis from the date other candidates involving very same advertisement got selected and placed, further for both the Petitioners having not worked all through, this Court while declaring the benefit so far it relates to wage to be treated notionally, clarifies that the period spent in the meantime shall however be taken into

account for any other service benefit granted to similarly situated candidates from time to time. Opposite Party No.2 is also directed to work out the direction herein above by completing the entire exercise within a period of two weeks from the date of receipt of this judgment.

9. Writ Petition succeeds but however no cost.

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2021 (III) ILR - CUT- 123

S.K. SAHOO, J.

I.A. NO. 1538 OF 2019

(ARISING OUT OF CRLA NO.688 OF 2019)

JOINT DIRECTOR, DIRECTORATE OF ENFORCEMENT, BHUBANESWAR …….Appellant

.V.

M/s. SERAJUDDIN & CO ……..Respondent

PREVENTION OF MONEY LAUNDERING ACT, 2002 – Section 42 r/w Section 5 of limitation Act – Whether section 5 of the limitation Act can be invoked for entertaining an appeal filed under section 42 of the PML Act, beyond the period specified under the said section – Held, No – The specified time limit prescribed under the special law of PML Act shall prevail and to that extent the provision of the Limitation Act shall stand excluded. (Para-11)

Case Laws Relied on and Referred to :-

1. (2009) 5 SCC 791 : Commissioner of Customs and Central excise Vs. Hongo India Private Ltd. & Ors.
2. (2008) 7 SCC 169 : M/s. Consolidated Engineering Enterprises .Vs. Principal Secretary (Irrigation Department) & Ors.
3. (2010) 5 SCC 23 : Chhattisgarh Electricity State Board Vs. Central Electricity Regulatory Commission
4. A.I.R. 1981 SC 116 : Thammanna Vs. K. Veera Reddy and Ors.

For Petitioner : Mr. Gopal Agarwal

For Opp. Party: Dr. Shamsuddin, Mr. S. Mishra, R. Mishra, D. Sahoo, D. Swain, A.R. Sethi, B. Pani.

ORDER Date of Hearing:26.08.2021: Date of Order: 06.09.2021

S.K. SAHOO, J.

The appellant/petitioner Joint Director, Directorate of Enforcement, Bhubaneswar has filed this interim application under section 5 of the Limitation Act, 1963 for condoning the delay of seventy five days in preferring the Criminal Appeal under section 42 of the Prevention of Money-laundering Act, 2002 (hereinafter referred to as 'PML Act') challenging the order dated 06.05.2019 passed by the Chairman, Appellate Tribunal, PML Act, New Delhi whereby the Appellate Tribunal set aside the order dated 01.12.2015 passed by the Adjudicating Authority under the PML Act, New Delhi in O.A. 29 of 2015.

2. This interim application for condonation of delay has been filed basically on the ground that after receiving the copy of the impugned order dated 06.05.2019 of the Appellate Tribunal on 31.05.2019, decision to prefer an appeal before this Court was taken by the competent authority of the petitioner and in that respect, permission was sought for from the Headquarters of the Enforcement Director, New Delhi and due to procedural formalities, there has been delay in presenting the appeal beyond the prescribed period of limitation of sixty days as provided under section 42 of the PML Act. The delay caused is neither intentional nor wilful for which a lenient view should be taken in condoning the delay in preferring the appeal.

3. The respondent/opposite party M/s. Serajuddin & Co. has filed reply to the interim application for condonation of delay stating, inter alia, that the Appellate Tribunal passed the order on 06.05.2019, which was communicated to both the parties on the same day and the present appeal was filed on 18.09.2019, which was after 135 days and thus, it is barred by law of limitation as provided under section 42 of PML Act. The interim application under section 5 of the Limitation Act, 1963 for condonation of delay is barred by section 71 of the PML Act as the latter overrides the inconsistent provisions in other laws for the time being in force. It is further stated that the averments made by the petitioner are not supported by any evidence qua the date of communication of the order dated 06.05.2019 passed by the Appellate

Tribunal and mere mention of the term 'procedural delay' cannot be considered as sufficient cause to the satisfaction of the Court in terms of the proviso to section 42 of the PML Act and therefore, the interim application for condonation of delay is not maintainable and it also suffers from manifest illegality as envisaged under sections 42, 46, 65 and 71 of the 2002 Act.

4. An additional affidavit has been filed by the appellant/petitioner stating, inter alia, that though the learned Appellate Tribunal has ordered to communicate the impugned order dated 06.05.2019 by 'Dasti' to both the parties, but the Registrar of the Appellate Tribunal by its letter served the copy of the order to the respondent/opposite party, it's counsel and to the Director, Directorate of Enforcement, New Delhi even though the Joint Director, Directorate Enforcement, Bhubaneswar was the sole respondent before the Appellate Tribunal. It is further stated that the Registrar of the Appellate Tribunal has never served a copy of the impugned order upon the Joint Director, Directorate Enforcement, Bhubaneswar Zonal Office. It is further stated that the impugned order dated 06.05.2019 was forwarded by the office of the Director, Enforcement Directorate, New Delhi to the Regional Special Director, Directorate of Enforcement, Eastern Region, Kolkota and Joint Director, Directorate Enforcement, Bhubaneswar Zonal Office vide letter dated 24.05.2019, which was received by the Directorate of Enforcement, Bhubaneswar Zonal Office on 07.06.2019 and that apart the scanned copy of the letter dated 09.05.2019 of the Registrar, Appellate Tribunal along with the copy of the impugned order has also been received from the Assistant Director, Link Cell, Office of the Regional Special Director, Directorate of Enforcement, Regional Office, Kolkata by the Joint Director, Directorate Enforcement, Bhubaneswar vide e-mail dated 31.05.2019. It is further stated that though under the law, the Appellate Tribunal was suppose to communicate its orderdated 06.05.2019 to the Joint Director, Directorate of Enforcement, Bhubaneswar Zonal Office who was the sole respondent before the learned Appellate Tribunal, but the learned Appellate Tribunal forwarded the impugned order to the Head Office of the appellant at New Delhi. The appellant/petitioner first came to know about the impugned order of the learned Appellate Tribunal only from the e-mail dated 31.05.2019 as aforesaid and thereafter, steps were taken to prefer the appeal and accordingly, appeal was filed before this Court on 18.09.2019 and thus, the delay in filing the appeal is neither intentional nor willful but due to the delay in receiving the impugned order as well as the time spent in obtaining

legal opinion and necessary permission/ approval from the competent authority to file the appeal.

5. The respondent/opposite party has filed the counter affidavit to the additional affidavit filed by the appellant/ petitioner stating, inter alia, that the interim application for condonation of delay under section 5 of the Limitation Act, 1963 is not maintainable in terms of section 71 read with section 42 of the PML Act. It is further stated that the Joint Director cannot be considered as 'person aggrieved' under section 42 of the PML Act as the Enforcement Directorate is headed by the Director of Enforcement and not by the Joint Director and therefore, it is wrong to state that Joint Director is the 'person aggrieved' in terms of section 42 of the PML Act. It is further stated that when the impugned order has been communicated and served upon the Director, Enforcement Directorate, it is deemed to have been served upon the Enforcement Directorate and once an order is served upon the Director, the Joint Director at Bhubaneswar Zonal Office of Enforcement Directorate needs no separate service of the said order at Bhubaneswar. It is further stated that Joint Director, Directorate Enforcement, Bhubaneswar Zonal Office being under the administrative control of the Enforcement Directorate Headquarters at New Delhi, the Joint Director has no locus to take a plea of non-service of the impugned order. Referring to the notification bearing No. G.S.R. 441(E) dated 01.07.2005 published in the Gazette of India, Extraordinary, Part II, it is argued that the Director of Enforcement has been conferred with exclusive power to exercise under section 42 of the PML Act and not the Joint Director.

6. Mr. Gopal Agarwal, learned counsel for the appellant/petitioner submitted that the impugned order dated 06.05.2019 under Annexure-3 came to the knowledge of the appellant/petitioner from the e-mail dated 31.05.2019 and on receiving the copy of the impugned order on 31.05.2019, the appellant/petitioner sought permission from the Headquarters of the Enforcement Directorate, New Delhi and after maintaining due procedural formalities, the appeal was filed on 18.09.2019 and therefore, the delay of seventy five days in preferring the appeal as pointed out by the Stamp Reporter is neither intentional nor willful. He further submitted that the Enforcement Directorate is being a statutory authority under the Government of India and the appellant/petitioner being a subordinate authority of the Directorate, it has to obtain necessary approval/permission and by such

process, the delay has been caused. He urged that the delay be condoned and appeal be admitted.

7. Dr. Shamsuddin, learned counsel appearing for the respondent/opposite party while refuting the averments made in the application for condonation of delay as well as the additional affidavit filed by the appellant/petitioner submitted that such an application is totally misconceived and not maintainable in the eye of law and moreover the appellant/petitioner has not explained each day's delay in filing the appeal. To buttress his submission, he placed reliance on the decisions of the Hon'ble Supreme Court in the cases of **Commissioner of Customs andCentral Excise -Vrs.- Hongo India Private Ltd. & Others reported in (2009) 5 Supreme Court Cases Supreme Court Cases 791, M/s. Consolidated Engineering Enterprises -Vrs.- Principal Secretary (Irrigation Department) & others reported in (2008) 7 Supreme Court Cases 169 and Chhattisgarh Electricity State Board -Vrs.- Central Electricity Regulatory Commission reported in (2010) 5 Supreme Court Cases 23.**

8. In the case of **Hongo India** (supra), where the question for consideration was whether the High Court has power to condone the delay in presentation of the reference application under unamended section 35-H(1) of the Central Excise Act, 1944 beyond the prescribed period by applying section 5 of the Limitation Act, 1963, it is held as follows :

> "36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35H(1) to make a reference to the High Court is absolute and unextendable by a court under Section 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act.
>
> 37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation."

In the case of **Consolidated Engineering Enterprises** (supra), where the question was posed for consideration is whether the provision of section 14 of the Limitation Act would be applicable to an application submitted

under section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award made by the arbitrator, it is held as follows:

> "20.....When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub- section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act."

In the case of **Chhattisgarh State Electricity Board** (supra), where the question came up for consideration is whether section 5 of the Limitation Act, 1963 can be invoked by the Court for allowing the aggrieved person to file an appeal under section 125 of the Electricity Act, 2003 after more than 120 days from the date of communication of the decision or order of the Appellate Tribunal for Electricity, it is held as follows:

> "25. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression "within a further period of not exceeding 60 days" in the proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days.
>
> 26. The object underlying establishment of a special adjudicatory forum i.e. the Tribunal to deal with the grievance of any person who may be aggrieved by an order of an adjudicating officer or by an appropriate Commission with a provision for further appeal to this Court and prescription of special limitation for filing appeals under Sections 111 and 125 is to ensure that disputes emanating from the operation and implementation of different provisions of the Electricity Act are expeditiously decided by an expert body and no court,

except this Court, may entertain challenge to the decision or order of the Tribunal. The exclusion of the jurisdiction of the civil courts (Section 145) qua an order made by an adjudicating officer is also a pointer in that direction.

27. It is thus evident that the Electricity Act is a special legislation within the meaning of Section 29(2) of the Limitation Act, which lays down that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the one prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and provisions contained in Sections 4 to 24 (inclusive) shall apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application unless they are not expressly excluded by the special or local law."

xx xx xx xx

32. In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract the applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."

9. Keeping in view the ratio laid down by the Hon'ble Supreme Court, let me analyse some of the relevant provisions of the PML Act to decide the issues raised which are as follows:

(i) Whether the date of communication of the order of the Appellate Tribunal as per section 42 of the PML Act is to be calculated from the date the order was communicated to the appellant/petitioner or to the Director, Directorate of Enforcement, New Delhi?

(ii) Whether section 5 of the Limitation Act can be invoked for entertaining an appeal filed under section 42 of the PML Act beyond the period specified under the said section?

(iii) Whether 'sufficient cause' as mentioned in the proviso to section 42 of the PML Act is to be considered liberally by this Court while entertaining an appeal filed beyond the period of sixty days?

Discussion on issue No.(i) :

10. Section 42 of the PML Act reads as follows:

> "42. Appeal to High Court.- Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order:
>
> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
>
> Explanation-For the purposes of this section, "High Court" means—
>
> (i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
>
> (ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business of personally work for gain."
>
> Section 71 of the PML Act reads as follows:
>
> "71. Act to have overriding effect.- The Provisions of this Act shall have effect not withstanding anything inconsistent t herewith contained in any other law for the time being in force."

In view of section 42 of the PML Act, the period of limitation commences from the date of communication of the decision or order of the Appellate Tribunal to the person aggrieved. Rule 5 of the Prevention of Money-laundering (Appeal) Rules, 2005 (hereafter referred to as '2005 Rules'), which deals with service of notice, requisitions or orders, states, inter alia, that an order issued under this Rules shall be served on any person by delivering or tendering the order to that person or the person duly authorized by him, or by sending the order to him by registered post with acknowledgement due to the address of his place of residence or his last known place of residence or the place where he carried on, or last carried on, business or personally works or last worked for gain; or by affixing it on the outer door or some other conspicuous part of the premises in which the person resides or is known to have last resided or carried on business or personally works or has worked for gain and that written report thereof should be witnessed by two persons; or if the order cannot be served under

any of these means, then by publishing in a leading newspaper (both in vernacular and in English) having wide circulation in the area or jurisdiction in which the person resides or is known to have last resided or carried on business or personally works or last worked for gain. On a conjoint reading of section 42 of the PML Act which states about date of communication of the decision or order to the 'person aggrieved' and the words 'that person' used in Rule 5 of the 2005 Rules makes it clear that the decision or order has to be communicated to the person aggrieved by the modes enumerated in Rule 5.

'Person aggrieved' has not been defined in PML Act. 'Person aggrieved' means a person who is injured or one who is adversely affected in a legal sense. In case of **Thammanna –Vrs.- K. Veera Reddy and others reported in A.I.R. 1981 Supreme Court 116**, it is held that the 'person aggrieved' may vary according to the context of the statute and the facts of the case, nevertheless, normally a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived of something or wrongfully refused him something or wrongfully affected his title to something.

In the case in hand, Himansu Kumar Lal, Joint Director, Directorate of Enforcement, Government of India, Bhubaneswar was the applicant before the Adjudicating Authority in O.A. 29 of 2015 in which the respondent/opposite party M/s. Serajuddin & Co. was defendant no.7. The cause of action arose within the territorial jurisdiction of learned Chief Judicial Magistrate, Balasore and the Special Judge (Vigilance), Balasore and charge sheets submitted after investigation made on the basis of two first information reports dated 18.11.2009 and 30.03.2012 indicate that various persons including Government officials and mine owners have committed Schedule Offences under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 and under sections 120-B and 420 of the Indian Penal Code and the materials and documents revealed that various Government Officials connived with M/s. Serajuddin & Co. and their stake holders in conducting mining operations beyond the specified area and thereby obtained pecuniary benefit amounting to Rs.1323,35,66,781/- which preliminary appeared to be the proceeds of the crime. The Original Application filed vide O.A. 29 of 2015 by the Joint Director was allowed and some consequential orders were passed. The respondent/opposite party who was the defendant no.1 and three other defendants preferred four separate

appeals before the Appellate Tribunal, PML Act, New Delhi under section 26 of the PML Act and in all the appeals, the Joint Director, Directorate of Enforcement, Bhubaneswar was the sole respondent and accordingly, the impugned order dated 06.05.2019 was passed and the appeals were allowed by setting aside the impugned order dated 01.12.2015 passed by the Adjudicating Authority in O.A. 29 of 2015 and it was specifically observed that copy of the order be given 'dasti' to both the parties. In view of the factual scenario and the order passed by the Chairman, Appellate Tribunal, PML Act, New Delhi, I am of the humble view that the Joint Director, Directorate of Enforcement, Bhubaneswar who was the respondent can be said to be the 'person aggrieved' as mentioned in section 42 of the PML Act and therefore, when it is not disputed that date of first communication of the impugned order of the Appellate Tribunal to the Joint Director, Directorate of Enforcement, Bhubaneswar was made on 31st May 2019 by e- mail, the period of limitation of sixty days as per section 42 of the PML Act has to be counted taking into account that date and not from any previous date on which the impugned order of the Appellate Tribunal was served on the Director, Directorate of Enforcement, New Delhi or Regional Special Director, Directorate of Enforcement, Eastern Region, Kolkota. Though the Director, Enforcement Directorate, New Delhi forwarded the order dated 06.05.2019 of the Appellate Tribunal to the Joint Director, Directorate Enforcement, Bhubaneswar vide letter dated 24.05.2019 and it was received at Bhubaneswar Zonal Office on 07.06.2019 but since the said order was earlier received vide e- mail dated 31.05.2019 by the Joint Director, Directorate of Enforcement, Bhubaneswar from Regional Special Director, Directorate of Enforcement, Eastern Region, Kolkota, the said date has to be taken as the date of communication for the purpose of calculating the period of limitation under section 42 of the PML Act.

In view of the foregoing discussions, so far as issue no.(i) is concerned, I find substantial force in the argument advanced by Mr. Gopal Agarwal, learned counsel for the appellant/petitioner that the date of communication of the impugned order of the Appellate Tribunal as per section 42 of the PML Act is to be calculated from the date when such order was communicated to the appellant/petitioner i.e. on 31.05.2019 and not from the date when it was communicated to the Director, Directorate of Enforcement, New Delhi.

Discussion on issue No. (ii):

11. Coming to issue no.(ii), I am of the humble view that the time limit prescribed under section 42 of the PML Act is absolute and it cannot be extended by this Court under section 5 of the Limitation Act. In other words, by giving liberal interpretation, limitation cannot be extended by invoking the provision of section 5 of the Limitation Act. If any appeal is filed before the High Court beyond the period of sixty days from the date of communication of the order of the Appellate Tribunal to the 'person aggrieved', then the High Court has to consider the reasons assigned for not filing the appeal within sixty days and on being satisfied that there is sufficient cause which prevented the appellant from filing the appeal within sixty days, the delay can be condoned but the extended period cannot be more than sixty days. Therefore, any appeal filed beyond the period of one hundred twenty days by any person aggrieved to the High Court from the date of communication of the order of the Appellate Tribunal is to be dismissed on the ground of limitation. The specified time limit prescribed under the special law of PML Act shall prevail and to that extent the provision of the Limitation Act shall stand excluded. Section 71 of the PML Act also makes it very clear that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, I am of the humble view that section 5 of the Limitation Act has got no application to condone the delay beyond the outer limit for filing an appeal to this Court which is one hundred twenty days and any appeal filed thereafter cannot be entertained.

Discussion on issue no. (iii):

12. Coming to issue no.(iii), the proviso to section 42 of the PML Act empowers the High Court to entertain an appeal not filed within sixty days from the date of communication of the decision or order of the Appellate Tribunal to the person aggrieved only if it is satisfied that there was sufficient cause in that respect. The satisfaction must be based on the materials available on record and reasons must be given for such satisfaction. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserve the ends of justice. Law is well settled that each day's delay must be explained does not mean that a pedantic approach should be made. The doctrine must be applied in rational common sense pragmatic manner. There

is no presumption that the delay is occasioned deliberately or on account of culpable negligence or on account of malafide. The doctrine of equality before law demands that all litigants including the State as a litigant, are accorded the same treatment and law is administered in an even handed manner. There is no warrant for according a step motherly treatment when the State is the applicant praying for condonation of delay. The condonation of delay is a matter of discretion of the Court. The State which represents collective cause of the community does not deserve a litigant-non-grata status. The Courts, therefore, have to be informed with the spirit and philosophy of the provision in the course of interpretation of the expression 'sufficient cause'. Merit is preferred to scuttle a decision on merits in turning down the case on technicalities of delay in presenting the appeal. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bonafide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bonafide, then it may condone the delay. If on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

In the case in hand, since I have already held that the date of communication of the impugned order of the Appellate Tribunal to the appellant/petitioner is 31.05.2019, I have to see what 'sufficient cause' has been shown by the appellant/petitioner in not filing the appeal within sixty days of the date of communication of such order. In the delay condonation application, it has been mentioned that it is an application under section 5 of the Limitation Act, which I have already held to be not applicable to condone the delay to an appeal filed under section 42 of the PML Act. However, even if it is held that the application has been made under a wrong provision of law, but if this Court is shown to be within its power under any other provision, non-mention or wrong nomenclature of the provision cannot disentitle a party to get his benefit. In paragraphs 3 and 4 of the interim application, it has been mentioned that after receiving the copy of the order on 31.05.2019, the decision to prefer an appeal before this Court was taken by the competent authority of the petitioner and permission was sought for from the Headquarters of the Enforcement Directorate, New Delhi to prefer the appeal and thus on account of procedural act only, there has been delay in presenting the appeal beyond the prescribed period of limitation which is neither intentional nor wilful but only for the aforesaid reasons. In the

additional affidavit filed by the appellant/petitioner, it is mentioned in paragraph 6 that the impugned order dated 06.05.2019 has came to the knowledge of the appellant/petitioner on 31.05.2019 and thereafter legal opinion and steps were taken to file the appeal and in paragraph 7, it is mentioned that due to delay in receiving the impugned order and time spent for legal opinion and necessary permission/approval from the competent authority to file the appeal, the delay has been caused in filing the appeal. It is not clear as to after receipt of the impugned order on 31.05.2019, when the decision was taken by the competent authority of the petitioner to prefer the appeal and on what date permission was sought for from the Headquarters of Enforcement Directorate, NewDelhi to prefer the appeal and on what date,such permission was accorded and when it was communicated to the appellant/petitioner. In absence of any such specific particulars being mentioned either in the interim application or in the additional affidavit filed on behalf of the appellant/petitioner and no document being filed in that respect, the vague averments made about the procedural delay and seeking for legal opinion cannot be a ground to hold that there was 'sufficient cause' on the part of the appellant/petitioner which prevented him from filing the appeal within the period of sixty days as per section 42 of PML Act. On the basis of such averments, in my humble view, the appeal cannot be entertained within a further period of not exceeding sixty days. The issue no. (iii) is answered accordingly.

In view of the foregoing discussions, I find no sufficient force in the submission made by the learned counsel for the appellant/petitioner to condone the delay of seventy five days in filing the criminal appeal. Accordingly, the application for condonation of delay being sans merit, stands dismissed.

I.A. stands dismissed.

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2021 (III) ILR - CUT- 136

S.K. SAHOO, J.

JCRLA NO. 12 OF 2018

RABI MUNDA …….. Appellant

.V.

STATE OF ODISHA ……..Respondent

INDIAN PENAL CODE, 1860 – Section 376 (2)(1) r/w Protection of Children from Sexual Offence Act, 2012 – Section 4 – When the prosecution has not proved that the victim was a child at the time of occurrence and specifically she was under the age of sixteen years – Effect of – Held, when the oral evidence of the victim relating to the commission of rape on her by the appellant is not getting corroboration from the medical evidence even though she was examined on the very next day of the occurrence, the impugned judgment and order for conviction cannot be sustained in the eye of law and accordingly hereby set aside – The appeal is allowed.

(Para-13)

Case Laws Relied on and Referred to :-

1. (2015) 7 SCC 773 : State of Madhya Pradesh Vs. Anoop Singh.
2. (2015) 9 SCC 588 : V.K. Mishra Vs. State of Uttarkhand.
3. (2018) 72 OCR (SC) 221: Sham Singh Vs. The State of Haryana.

For Appellant : Mr. Chittaranjan Sahu.

For Respondent : Mr. D.K. Pani, Addl. Standing Counsel.

JUDGMENT Date of Hearing: 02.09.2021 : Date of Judgment: 13.09.2021

S.K. SAHOO, J.

The appellant Rabi Munda faced trial in the Court of learned Additional Sessions Judge-cum-Special Judge, Keonjhar in Special Case No.185/61 of 2016-14 for commission of offences punishable under section 376(2)(i) of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO Act') on the accusation that he committed rape on the victim, a girl aged about twelve years on 02.08.2014 at about 12 noon in Chiragunidhoda forest at village Uchumadihi under Nayakote police station in the district of Keonjhar.

The learned trial Court vide impugned judgment and order dated 10.11.2017 found the appellant guilty of the offences charged and sentenced

him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further rigorous imprisonment for one year for the offence under section 376(2)(i) of the Indian Penal Code and he was further sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.3,000/- (rupees three thousand), in default, to undergo further rigorous imprisonment for one year for the offence under section 4 of the POCSO Act and both the sentences were directed to run concurrently.

2. The prosecution case, as per the first information report lodged by the father of the victim, namely, Shyama Sundar Majhi (P.W.6), in short, is that on 02.08.2014 at about 12 noon, while the victim (P.W.4), who was a minor girl aged about twelve years had been to nearby Chiragunidhoda forest for grazing goats and she was grazing goats, at that time, the appellant suddenly came near the victim finding her alone, made her lie on the ground, torn her frock and undergarments and forcibly committed rape on her. The victim (P.W.4) raised hullah and on hearing her hullah, when one Sabita Barik (P.W.2) and others who were working in the nearby cultivable fields rushed to the spot, on seeing them, the appellant fled away. The victim was feeling pain on her private parts.

The victim (P.W.4) narrated about the occurrence before her brother Ganesh, who in turn intimated the same to his father (P.W.6) and his mother (P.W.7) over phone. After the parents of the victim returned, they came to know about the occurrence from the victim. Since it was late night, on the next day i.e. on 03.08.2014 P.W.6 came to Nayakote police station in the district of Keonjhar and lodged the written report which was scribed by one Mangulu Palei (P.W.1) of village Dudhapasi as per his instruction, who read over and explained the report to P.W.6 and after he found it to be correct, he signed on the report.

3. P.W.10 Rashmi Ranjan Dash, who was the Sub-Inspector of police of Nayakote police station and also in-charge of I.I.C. in his absence, on receipt of the written report from P.W.6, registered the same as F.I.R. (Ext.1) in Nayakote P.S. Case No.34 dated 03.08.2014 under section 376 of the Indian Penal Code and section 4 of the POCSO Act against the appellant. He took up investigation of the case and during course of investigation, he examined the informant (P.W.6), the victim (P.W.4) and others. He proceeded to the spot and prepared the spot map (Ext.7). The victim was sent to District

Headquarters Hospital, Keonjhar for medical examination along with her wearing apparels for examination. On 04.08.2014, he seized the wearing apparels of the victim and prepared the seizure list vide Ext.8. On the same day, he made prayer for recording of statement of the victim under section 164 Cr.P.C. and accordingly, the same was recorded by the Magistrate on 05.08.2014. The appellant was arrested on 04.08.2014 and on the next day i.e. on 05.08.2014, he was sent for medical examination to C.H.C., Banspal and then forwarded to the Court on the same day. On 08.08.2014, the I.O. (P.W.10) received the medical examination report of the appellant and on 13.08.2014 he received the medical examination report of the victim. He seized three numbers of sealed vials containing biological sample of the appellant, wearing apparels of the appellant and the command certificate as per seizure list vide Ext.9. The Investigating Officer visited the school where the victim had taken her admission in Standard-I and seized the school admission register from the Headmaster as per seizure list vide Ext.11, which reflected the date of birth of the victim to be 15.04.2005. The school admission register was handed over to the Headmaster of the school on executing zimanama vide Ext.3. The Investigating Officer sent the material objects to the Director, State Forensic Science Laboratory, Rasulgarh, Bhubaneswar for chemical examination through Court. On 02.09.2014, as per the order of his superior, P.W.10 handed over the charge of investigation of the case to Mr. B.K. Bihari (P.W.8), Inspector in-charge of Nayakote police station, who re-examined the victim, her parents and other witnesses. On 29.09.2014, on completion of investigation, P.W.10 submitted charge sheet against the appellant under section 376(2)(i) of the Indian Penal Code read with section 4 of the POCSO Act.

4. After submission of charge sheet, the leaned Special Judge, Keonjhr framed the charges against the appellant on 25.09.2015 as already stated and since the appellant 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 has examined as many as ten witnesses.

P.W.1 Mangulu Palei was the scribe of the F.I.R. (Ext.1).

P.W.2 Sabita Barik is a post-occurrence witness and she has stated that while she was working in a nearby field, on hearing the cries of a girl, she along with others came there and found the victim was present there. She further stated that she had not seen anything else for which she was declared hostile by the prosecution.

P.W.3 Dr. Nibedita Nayak, who was working as Medical Officer, District Headquarters Hospital, Keonjhar examined the victim (P.W.4) on police requisition and proved the medical examination report vide Ext.2.

P.W.4 is the victim, who supported the prosecution case and stated about the commission of rape on her by the appellant.

P.W.5 Kartikeswar Mahanta was the Headmaster of the school, where the victim was prosecuting her studies and he is a witness to the seizure of school admission register vide seizure list Ext.4 and he took zima of that register vide zimanama (Ext.3).

P.W.6 Shyam Sundar Majhi is the father of the victim, who is the informant of the case.

P.W.7 Basanti Majhi is the mother of the victim, who stated that after enquiring about the matter from the victim, she informed the matter to her husband (P.W.6).

P.W.8 Bijay Kumar Bihari was the Investigating Officer of the case, who submitted charge sheet.

P.W.9 Dr. Rati Ranjan Mohanta was working as the Medical Officer, Banspal C.H.C., who medically examined the appellant on police requisition and noticed one injury on the ring finger of left hand of the appellant and proved the medical examination report vide Ext.6.

P.W.10 Rashmi Ranjan Dash, the S.I. of Police of Nayakote Police Station, was the initial Investigating Officer of the case.

The prosecution exhibited thirteen numbers of documents. Ext.1 is the F.I.R., Ext.2 is the medical examination report of the victim, Ext.3 is the zimanama, Ext.4 is the entry in the school admission register in Folio no.3 and sl. no.3/2058 dated 12.04.2011, Ext.5 is the 164 Cr.P.C. statement of the victim, Ext.6 is the medical examination report of the appellant, Ext.7 is the spot map, Exts.8, 9 and 11 are the seizure lists, Ext.10 is the 164 Cr.P.C. statement of the victim, Ext.12 is the forwarding report for chemical examination and Ext.13 is the command certificate.

No witness was examined on behalf of the defence.

7. The learned trial Court on analyzing the oral as well as documentary evidence on record, particularly the entry relating to the date of birth of the victim in the school admission register and in view of Rule 12(3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereafter referred to as '2007 Rules') and the ratio laid down by the Hon'ble Supreme Court in the case of **State of Madhya Pradesh -Vrs.- Anoop Singh reported in (2015) 7 Supreme Court Cases 773** has been pleased to hold that the age of the victim was below twelve years at the time of occurrence. The learned trial Court accepted the evidence of the prosecutrix that she was ravished by the appellant and that her evidence has remained unchallenged. It was further held that the evidence of the father (P.W.6) and mother (P.W.7) of the victim corroborated the evidence of the victim relating to the occurrence. It is further held taking into account the evidence of the Medical Officer (P.W.9) who examined the appellant and opined that the appellant was found capable of having sexual intercourse and that there was an injury found on the ring finger on his left hand, that the prosecution has successfully established the charges under section 376(2)(i) and section 4 of the POCSO Act against the appellant.

8. Mr. Chittaranjan Sahu, learned counsel for the appellant submitted that the prosecution has not adduced any clinching evidence to show that the victim was aged about twelve years at the time of occurrence and the conclusion arrived at by the learned trial Court in that respect is faulty. The evidence of the victim relating to commission of rape on her is not getting corroboration from the evidence of the doctor (P.W.3), who examined her on the next day of the occurrence. Highlighting that the imposition of sentence by the learned trial Court both for the offence under section 376(2)(i) of the Indian Penal Code as well as section 4 of the POCSO Act is impermissible in

view of section 42 of the POCSO Act, he urged that benefit of doubt should be extended in favour of the appellant.

Mr. D.K. Pani, learned Additional Standing Counsel for the State, on the other hand, supported the impugned judgment and contended that on the basis of the entry made in the school admission register, it is apparent that the victim was below twelve years of age at the time of occurrence, which has been rightly held by the learned trial Court. He argued that even if no birth certificate has been proved, but the entry in the school admission register cannot be overlooked and when not only the victim but her parents have consistently stated that at the time of occurrence the age of the victim was below twelve years and nothing substantial has been brought out in the cross-examination to disbelieve such evidence, no fault can be found with the conclusions arrived at by the learned trial Court. He further argued that the victim has categorically stated about the commission of rape on her by the appellant while she had been to graze goats in the forest area and after the occurrence, she immediately disclosed about the same before her brother as well as her mother and there has been prompt lodging of the first information report and in such a scenario, even though the medical examination report indicated that there was no sign and symptoms of recent sexual intercourse found on her genitalia, it cannot be a ground to discard the prosecution case as the medical evidence is merely an opinion of the expert. The learned counsel further argued that even though the learned trial Court should not have sentenced the appellant both for the offence under section 376(2)(i) of the Indian Penal Code and section 4 of POCSO Act in view of the provision under section 42 of the POCSO Act, but the higher punishment prescribed for the offence under section 376(2)(i) of the Indian Penal Code is to be taken into account, which prescribes the minimum punishment for ten years and therefore, the appeal should be dismissed.

9. Let me first discuss the evidence on record relating to the age of the victim at the time of occurrence and whether the prosecution has been able to prove that the prosecutrix was a child as per section 2(d) of the POCSO Act and more particularly she was below sixteen years of age at the time of incident.

In the case of **Anoop Singh** (supra), the Hon'ble Supreme Court considering Rule 12(3) of 2007 Rules held that the birth certificate and the middle school certificate can be used for determining the age of the

prosecutrix as per Rule 12(3)(b). It was further held that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in its absence, the medical opinion should have been sought for.

The learned trial Court has followed Rule 12(3)(b) of 2007 Rules and relied upon the admission register of the victim to hold that the age of the victim was below twelve years at the time of occurrence.

Rule 12 of 2007 Rules deals with the procedure to be followed in the determination of age. Rule 12(3)(a) gives topmost preference to the matriculation or equivalent certificate in that respect and in its absence, the date of birth certificate from the school first attended other than a play school and if the same is also not available, the birth certificate given by a corporation or a municipal authority or a panchayat can be taken into account.

Rule 12(3)(b) of the 2007 Rules states, inter alia, that only in absence of either (i), (ii) or (iii) of clause (a), the medical opinion will be sought for from a duly constituted Medical Board, which would declare the age of the juvenile or child. In case, the exact assessment of age cannot be done, the Court for the reasons to be recorded, if consider necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

In the case in hand, when the learned trial Court has not sought for the medical opinion from a duly constituted Medical Board to determine the age of the victim, it should not have mentioned that following Rule 12(3)(b) of 2007, he came to determine the age. On the other hand, the learned trial Court has relied upon the entry made in the school admission register which comes within clause (a)(ii)of Rule 12(3). Thus, the finding is quite confusing.

The victim being examined as P.W.4 has stated her age to be twelve years as on the date of deposition, which was recorded on 02.12.2015. The occurrence in question stated to have taken place on 02.08.2014. However, in the cross-examination, the victim stated that she could not state her date of birth or her exact age. However, she stated that she was admitted in the school and was reading for some days.

The father of the victim being examined as P.W.6 has also stated that at the time of occurrence, her daughter was twelve years of age but in the cross-examination, he stated that at the time of admission of the victim, he had not given the birth certificate, but stated about her date of birth on guess work. He denied the suggestion that the victim was aged about twenty two to twenty three years.

The mother of the victim being examined as P.W.7 has also stated that the age of the victim was twelve years at the time of occurrence. In the cross-examination, she however stated that she had not prepared the birth certificate or horoscope of her children and she was telling the age of her children on assumption, but it is almost correct. She stated that at the time of admission of the victim in the school, they stated about her age on assumption.

The Headmaster of the school where the victim had taken admission was examined as P.W.5 and he proved the entry made in the school admission register relating to the date of birth of the victim, which was 15.04.2005. He also stated that no horoscope or birth certificate of the student was filed at the time of admission. However, he stated that the victim studied in the school for one year and thereafter, she did not attend the school and on 08.04.2014, T.C. was issued in her favour and that he could not say whether the date of birth of the victim which was recorded as 15.04.2005 in the school admission register on the basis of the statement of her father was correct or not.

The doctor (P.W.3), who examined the victim has stated that she advised for ossification test to ascertain the age of the victim. However, there is no material on record to show that any ossification test was conducted to determine the age of the victim.

The Investigating Officer (P.W.10) has stated that his investigation did not reveal that basing on which document, the date of birth of the victim was entered in the School Admission Register. He admitted that he had not seized birth certificate or horoscope of the victim as those documents were not available.

From the aforesaid evidence adduced by the prosecution, it is apparent that no horoscope of the victim was prepared and she was also

having no birth certificate. The entry of the school admission register relating to her date of birth was made as per the version of her father (P.W.6), who himself stated that he stated about the date of birth of the victim by guesswork. The mother of the victim has also stated in the similar manner. When no documentary evidence like horoscope and birth certificate is available and the entry in the school admission register has been made on the basis of guesswork or assumption, in such a scenario, it is very difficult to give due importance to such entry made in the school admission register to determine the age of the victim. When the doctor (P.W.3) advised for the ossification test to be conducted to ascertain the age of the victim, it is quite strange that the Investigating Officer took no step in that regard, which raises a question mark on the fairness of investigation. It is the duty of the prosecution in a case of this nature to prove the age of the victim and the Court can take recourse to Rule 12(3) of 2007 Rules to determine the age, as once the victim is found be a child or her age is found to be below sixteen years at the time of occurrence, the punishment prescribed for the offence is on a higher side. The parents of the victim have given contradictory statements relating to the age of their children. The mother of the victim, who has been examined as P.W.7 has stated that the age her elder son Ganesh would be twenty to twenty two years whereas the father of the victim, who has been examined as P.W.6 has stated that the age of the elder son Ganesh would be about seventeen to eighteen years. Both of them have stated that the victim was their third child and there is no evidence what was the gap between the first child and the second child or the second child and third child, who is the victim. The offence under section 376(2)(i) of the Indian Penal Code, which was omitted by Act 22 of 2018 with effect from 21.04.2018 prescribed punishment for the commission of rape on a woman when she is under sixteen years of age. Since no clinching evidence is brought on record by the prosecution relating to the age of the victim and her age has been stated by the relevant witnesses as per their guesswork and even the school admission register entry was made on assumption and the medical evidence is lacking, I am of the humble view that it cannot be said that the prosecution has successfully established that the victim was a child as per the definition of the 'child' under section 2(b) of the POCSO Act and that she was under the age of sixteen years at the time of occurrence. The finding of the learned trial Court on that score is found to be faulty.

10. Law is well settled that in a case of rape, onus is always on the prosecution to prove affirmatively each ingredients of the offence like other

criminal cases. The prosecution must discharge this burden of proof to bring home the guilt of the accused and this onus never shifts. Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. Conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination etc., if the same is found to be natural and trustworthy and there is a ring of truth in it. There is no legal compulsion to look for corroboration to the testimony of prosecutrix unless the evidence of the victim suffers from serious infirmities. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. On the anvil of the above principles, let me now test the version of the prosecutrix as depicted in the prosecution case.

The victim stated in her evidence that while she was grazing goats in the forest near her village, during noon hours, the appellant came from her backside, pressed her mouth, forcibly made her lie on the ground and pressed her for which she could not escape from his clutches and then the appellant disrobed her and also put off his own dress and then forcibly committed rape on her, for which she felt pain and raised cries and on hearing her cries, the persons engaged in the nearby cultivable land came near her and on seeing them, the appellant escaped.

P.W.2, who was examined by the prosecution to corroborate the version of the victim, has stated that while she was working in the cultivable land, on hearing cries of a girl from the nearby field, she came there and found the victim present there and that she had not seen anything else. The witness was declared hostile by the prosecution. In the cross-examination by the defence, she stated that it was a rainy day and it was raining and some sheep were grazing near the place where the victim was present and that place was visible from the land where they were working. She further stated that she had no direct knowledge about the occurrence and the victim had also not disclosed anything before her.

The victim has stated that there are houses at a little distance from the spot and those houses are visible from the spot and the cultivable lands are situated adjoining to the ditch where she was grazing the goats. She further stated that the occurrence took place on a rainy day and the road was muddy. She further stated that on earlier occasion, the father of the appellant had raised some dispute with her father regarding the landed properties. She further stated that the appellant had caught hold of her when he put off his dress and that the appellant had penetrated his penis in her vagina and she had bleeding for such act of the appellant. The defence counsel suggested to the victim in her cross-examination that she had not stated before the Investigating Officer that during the noon hours, the appellant came from her backside, pressed her mouth and that he forcibly made her lie on the ground and pressed her for which she could not escape from his clutches and thereafter the appellant forcibly committed rape on her, but most peculiarly, no such confrontation has been proved through the Investigating Officer as required under section 145 of the Evidence Act. Under section 145 of Evidence Act, when it is intended to contradict the witness by his previous statement reduced into writing by the Investigating Officer, the attention of the witness is drawn to that part, which must be reflected in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need for further proof of contradiction and it will be read while appreciating the evidence. If however the witness denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process, the contradiction is merely bright on record, but it is yet to be proved. Thereafter, when the Investigating Officer is examined in the Court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the Investigating Officer, who, again by referring to the police statement, will depose about the witness having made that statement. The Court cannot suo motu make use of statements made to police not proved in compliance with section 145 of Evidence Act. **(Ref:-(2015) 9 Supreme Court Cases 588, V.K. Mishra - Vrs.- State of Uttarkhand).** On verification of the statement of the victim (P.W.4) recorded by the police just to see whether there is in fact any such omission made by the victim, it is found that most part of the confronted statement is available in her statement before police. When such type of confrontation was made to the victim by the defence counsel at the time of cross-examination that she had not stated about a particular aspect of the occurrence before police as she has stated in the examination-in-chief, it was

nonetheless the duty of the Public Prosecutor as well as the learned trial Court to verify the statement recorded under section 161 Cr.P.C. immediately and the Public Prosecutor has a duty to object, if there is no such contradiction as pointed out by the defence. The learned trial Court also cannot act as a silent spectator or a mute observer when it presides over a trial, otherwise the sanctity of the proceeding would be lost.

The evidence of the victim relating to her commission of rape is no doubt getting corroboration from the statements of her parents. The mother of the victim being examined as P.W.7 has stated that she enquired about the matter from her daughter, who stated that while she was grazing the goats at Chirigunidhoda forest, the appellant committed rape on her and she informed the matter to her husband (P.W.6) and on the next day, the matter was reported to the police. P.W.6 has also stated that P.W.7 discussed the matter with the victim, who narrated about the incident before her, which she conveyed to him and since it was late evening, on the next day, he reported the matter before the police, which was scribed by Manguli Palei (P.W.1). P.W.1 has stated that he scribed the F.I.R. as per the instruction of P.W.6 and read over and explained the same to him, who admitted the same to be correct and then he signed thereon. The F.I.R. has been marked as Ext.1. In view of the timing of lodging of the F.I.R., it can be said that there is absolutely no delay in the lodging of the F.I.R.

The doctor (P.W.3), who examined the victim on 03.08.2014 found no bodily injury on her person suggestive of forcible sexual intercourse and there was no sign or symptoms of recent sexual intercourse on her genitalia and she further observed that the *hymen of the victim did not even admit tip of little finger* for which it was not practicable to collect the vaginal swab. P.W.3 further stated in the cross-examination that when a girl aged about twelve years is forcibly ravished by a boy of twenty two years, there is possibility of sustaining injury on her private parts.

At this juncture, it is to be seen whether the evidence of the victim relating to the commission of rape on her by the appellant, which is also getting corroboration from the version of her parents, is to be discarded in toto merely because there is no corroboration from the medical evidence. In the case of **Sham Singh -Vrs.- The State of Haryana, reported in (2018) 72 Orissa Criminal Reports (SC) 221**, where the medical examination of the victim indicated that she had sustained an injury on the left side of her

forehead and the doctor opined that the possibility of sexual assault on the victim cannot be ruled out though it was not specified whether the sexual assault was in the recent past, the Hon'ble Supreme Court held that the trial Court and the High Court convicted the appellant merely on conjectures and surmises and not on legally acceptable evidence and such assumptions are not corroborated by any reliable evidence and the medical evidence did not support the case of the prosecution relating to the commission of rape and accordingly, the appellant was acquitted.

In the case in hand, the victim has stated that the appellant had penetrated his penis in her vagina and that she had bleeding for such act of the appellant. The evidence of the doctor, who examined the victim on the very next day of occurrence, is that there was no sign or symptom of recent sexual intercourse on her genitalia and that the hymen of the victim did not even admit tip of the little finger for which it was not practicable to collect the vaginal swab. According to the victim, it was a rainy day and the place was muddy and the appellant disrobed her and laid her on the ground and then forcibly committed rape on her. Had that been the state of affairs, the medical examination report of the victim would have been otherwise. Therefore, I am of the humble view that when the medical evidence completely negatives the accusation of rape on the victim, it is very difficult to accept her version as truthful and reliable.

11. The doctor (P.W.9) who has examined the appellant on 05.08.2014 though stated that the appellant was capable of committing sexual intercourse and there was no sign or symptoms of recent sexual intercourse, but most peculiarly he stated that he found an injury on the ring finger of the left hand of the appellant and opined that it suggested forcible sexual intercourse, though in the cross-examination, he admitted that the injury found on the finger of the appellant was possible to be caused during assault or any kind of force being applied thereto. Therefore, the statement of the doctor that the injury on the ring finger of the left hand of the appellant is suggestive of forcible sexual intercourse is very difficult to be accepted.

12. The Investigating Officer (P.W.10) visited the spot on 03.08.2014 and prepared the spot map (Ext.7) which was the next day of occurrence and he stated that he had not noticed any mark of violence at the spot during his spot visit and that the paddy field is about twenty five meters away from the

occurrence spot. He has not mentioned any mud was sticking on the wearing apparels of the victim at the time of its seizure.

Even though the wearing apparels of the victim and the appellant along with sealed glass bottles containing the semen and pubic hair of the appellant were sent for chemical examination, but for reasons best known to the prosecution, no chemical examination report has been proved during trial.

13. In view of the foregoing discussions, when the prosecution has not proved that the victim was a child at the time of occurrence and specifically she was under the age of sixteen years, when the oral evidence of the victim relating to the commission of rape on her by the appellant is not getting corroboration from the medical evidence even though she was examined on the very next day of the occurrence and in view of the other doubtful features and infirmities in the prosecution evidence which have already been discussed, I am of the humble view that the impugned judgment and order of conviction cannot be sustained in the eye of law and accordingly, the same is hereby set aside.

The appellant is acquitted of the charges under section 376(2)(i) of the Indian Penal Code and section 4 of POCSO Act.

14. Before parting with the case, I would like to put emphasis on the sentencing part of the impugned judgment. In view of the special provision under section 42 of the POCSO Act, though the Special Judge can prosecute and convict an accused, both under section 376(2)(i) of the Indian Penal Code as well as section 4 of the POCSO Act, but so far as the punishment part is concerned, in view of section 42 of the POCSO Act, the Court has to choose from the two which would obviously carry punishment of greater degree and therefore, the imposition of punishment for both the offences i.e. under section 376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act by the learned trial Court, is nothing but a legal error.

15. In the result, the appeal is allowed. The appellant be set at liberty forthwith, if his detention is not required in any other case.

16. It is made clear that while convicting the appellant, the learned trial Court has passed an order that the victim should be compensated under the Odisha Victim Compensation Scheme, 2012 which was enacted in pursuance

to section 357-A of Cr.P.C. and recommended the case to the District Legal Services Authority, Keonjhar to provide financial assistance to the victim. Even though an order of acquittal has been passed in this Criminal Appeal, if the victim has already received compensation, the District Legal Services Authority shall not take any step to recover such compensation amount merely because of this acquittal order.

Let the trial Court record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action.

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2021 (III) ILR - CUT- 150

K.R. MOHAPATRA, J.

CMP NO.1360 OF 2019

LINGARAJ TRIPATHY …….. Petitioner

.V.

AGADEHI @ TARAMANI TRIPATHY & ORS. ……..Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XXI Rule 35 – Duty of Court – Held, the Court while dealing with suits and execution proceeding should keep in mind the mandatory guidelines issued by the Hon'ble Supreme Court (In case of Rahul Saha Vs Jitendra Kumar Gandhi and others). (Para-3,8)

Case Laws Relied on and Referred to :-

1. AIR 2019 ALL 132 : Gopal and Ors. Vs. Amar Jeet Singh & Ors.
2. 2021 SCC Online SC 341: Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors.

For Petitioner : Mr. Digambara Mishra.

For Opp. Parties : Mr. Bijoya Ku Tripathy, Manmath Ku Tripathy, Rabindra Ku Senapati.

ORDER Date of Order: 03.09.2021

K.R.MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioner in this CMP seeks to assail the order dated 11th February, 2019 (Annexure-3) passed by learned Civil Judge (Junior Division), Nayagarh in Execution Case No.2 of 2013 (arising out of T.S. No.67 of 1994), whereby he refused to recall the order dated 11th September, 2017 directing the Petitioner-Decree Holder (D.Hr.) to deposit the cost of deployment of Police force for execution of the decree.

3. It is submitted by Mr. Mishra, learned counsel for the Petitioner that vide order dated 11th September, 2017, learned executing court while entertaining an application under Order XXI Rule 35 C.P.C. filed by the Petitioner-DHr. directed that '…….*Further as there is an apprehension by the DHR that JDR shall cause breach peace at the time of delivery of possession of the suit land, the S.P. Nayagarh be informed to intimate this court the total one day cost of ¼ APR force who shall be deputed to be remained present at the spot on the date of delivery of possession of the suit land. After receiving information from S.P. Nayagarh regarding one day cost of ¼ APR force, the DHR shall be required to deposit the same to get police help for execution of the decree. Hence, this petition is allowed and issue letter to the S.P. Nayagarh for the above purpose. Put up on 16.10.17 for awaiting intimation S.P. Nayagarh."* The Petitioner being aggrieved filed an application to recall the order dated 11th September, 2017, which was rejected holding that since the order has already been passed upon hearing learned counsel for the parties, the same does not require any re-consideration. He further submits that such a direction is against the rule of law. It is the duty of the State to uphold the majesty of the court. If the order passed by the learned executing court is accepted, then the poor litigants like the Petitioner will not be in a position to enjoy the fruit of the decree, if the Judgment Debtor (J.Dr.) obstructs execution thereof. In support of his case, he relied upon the decision of Allahabad High Court in the case of ***Gopal and others –v- Amar Jeet Singh*** and others, reported in ***AIR 2019 ALL 132***, wherein it has been held at paragraph-14 as follows:

> *"14. In the view of the Court, maintenance of law and order in the society is a paramount duty of the State. The court has power to seek police help for*

enforcement of its decree or order. Therefore, in absence of any specific legal provision enabling the police to raise a Bill on the Court for supply of police help to enforce court's decree or order, requiring the decree holder to sustain the expenses for police help would not be appropriate because if, for helping the Court to enforce its decree or order, money is demanded by the police then a situation may arrive where no poor person would ever be able to have the fruits of a decree or order passed in his favour. Such a situation may result in failure of judicial system."

He also relied upon a decision of the Hon'ble Supreme Court in the case of ***Rahul S. Shah-v-Jinendra Kumar Gandhi and others***, reported in ***2021 SCC Online SC 341*** in which the Hon'ble Supreme Court at pagraph-42 issued guidelines to be mandatorily followed by the Courts in dealing with suits and execution proceedings. It reads as follows:

42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below- mentioned directions:

1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order X in relation to third

2. party interest and further exercise the power under Order XI Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.

3. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.

4. After examination of parties under Order X or production of documents under Order XI or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

5. Under Order XL Rule 1 of CPC, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.

6. The Court must, before passing the decree, pertaining to

7. delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

8. In a money suit, the Court must invariably resort to Order XXI Rule 11, ensuring immediate execution of decree for payment of money on oral application.

9. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

10. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

11. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

12. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.

13. Under section 60 of CPC the term "…in name of the judgment- debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

14. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

15. The Executing Court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

16. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the Court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts." (*emphasis supplied*)

4. He, therefore, submits that the executing court while taking Police assistance for execution of the decree must not saddle the cost of deployment of the Police personnel on the parties to the execution proceeding and prays for setting aside the impugned order and to remit the matter back to learned executing court with a direction to execute the decree by deploying APR force without saddling the cost of such deployment on the D.Hr.

5. The case law cited by learned counsel for the Petitioner makes it obligatory on the executing Court to seek for Police assistance, whenever it feels appropriate and expedient for hassle free execution of decree. The parties to the execution proceeding should not be burdened with the cost of deployment, if in the facts and circumstances of any given case it is not so required.

6. Upon hearing learned counsel for the Petitioner and on perusal of the record, it appears that the suit is of the year, 1994 and the CMP is pending before this Court since 2019. Further, if this Court awaits response from the Opposite Parties by keeping this matter pending, there will be further delay in the execution proceeding. It further appears that the case law cited by Mr. Mishra, learned counsel for the Petitioner were not placed before learned executing court while adjudicating the petition for recall of the order dated 11th September, 2017. In the meantime, the Hon'ble Supreme Court has formulated the guidelines to be followed by the Court while dealing with the civil suits and execution proceedings.

7. In that view of the matter, this Court feels that these developments should be brought to the notice of learned executing court to reconsider the submission made by Mr. Mishra, learned counsel for the Petitioner-D.Hr. to recall the order dated 11th September, 2017.

8. Accordingly, this CMP is disposed of with a direction that in the event the Petitioner files an application to reconsider the Petition for recall of the order dated 11th September, 2017 passed by learned Civil Judge (Junior Division), Nayagarh in Execution Case No.2 of 2013 (arising out of T.S. No.67 of 1994) before learned executing court within a period of two weeks hence along with certified copy of this order, he shall do well to consider the same keeping in mind the decision in the case of **Gopal and Rahul S. Shah** (supra).

9. Till a decision is taken in the said petition, as aforesaid, if filed within the stipulated time, order dated 11th February, 2019 passed by learned Civil Judge (Junior Division), Nayagarh shall be kept in abeyance till disposal of such petition, which shall be subject to result of the order to be passed in the said petition.

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2021 (III) ILR - CUT- 155

K.R. MOHAPATRA, J.

FAO NOS.262, 264, 265, 267,
275, 359, 363 & 570 OF 2020

KABI PRADHAN AND ANR. …….. Appellants
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R ……..Respondent

IN FAO NO. 264 OF 2020
DURGA CHARAN GOUDA @ DURGA GOUDA …….. Appellant
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

IN FAO NO. 265 OF 2020
PABITRA MAJHI AND ANR. …….. Appellants
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

IN FAO NO. 267 OF 2020
BUDA SISHA AND ANR. …….. Appellants
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

IN FAO NO. 275 OF 2020
SMT. KOMAL KARAD @ KAMALA KARAD & ORS. …….. Appellants
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

IN FAO NO. 359 OF 2020
JAGANNATH BISWAL & ANR. …….. Appellants
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

IN FAO NO. 363 OF 2020
MADHU MANDA …….. Appellant
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

IN FAO NO. 570 OF 2020
SMT. JAILA BISOYI & ORS. …….. Appellants
.V.
UNION OF INDIA, G.M, E.CO. RLY., B.B.S.R …….. Respondent

RAILWAY ACCIDENT AND UNTOWARD INCIDENTS (COMPENSATION) AMENDMENT RULES, 2020 – Rule 5.1 – Object and intent – Law is well settled that when a Court/ Tribunal as conferred with the discretionary power, it is not required to exercise the same in all cases in a routine manner – The discretionary power conferred on the Court or the Tribunal, should be exercised judiciously in an appropriate case assigning good reason for the same – Discretion should not be exercised in a blanket form which may otherwise lead to improper exercise of such power and will frustrate the object of granting the compensation. (Para-15)

Case Laws Relied on and Referred to :-
1. FAO No. 22 of 2015 : CMA No.4501 of 2015: Geeta Devi Vs. Union of India.
2. 2002 (6) SCC 52:H.S. : Ahammed Hussain & Anr Vs. Irfan Ahammed & Anr.

For Appellants : Miss Deepali Mahapatra
For Respondents : Mr. Dhanoj Kumar Sahoo

JUDGMENT Date of Judgment: 09.09.2021

K.R.MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. These appeals are filed by the claimants under Section 23 of the Railway Claims Tribunal Act, 1987 (for short 'the Act, 1987') being aggrieved by the judgments and awards passed by the Railway Claims Tribunal, Bhubaneswar Bench, Bhubaneswar (for short 'Tribunal') assailing the mode of payment of compensation amount to the respective claimants therein.

3. FAO No. 262 of 2020 has been filed by the parents of the deceased, namely, Kailash Pradhan, assailing the judgment and award dated 7th November, 2019 passed by learned Tribunal in O.A. No. 203 of 2015.

3.1 FAO No. 264 of 2020 has been filed by the husband of the deceased, namely, Mamini @ Mamina Gouda, assailing the judgment and award dated 11th February, 2020 passed by learned Tribunal in O.A. No. 76 of 2017.

3.2 FAO No. 265 of 2020 has been filed by the parents of the deceased, namely, Debananda Majhi, assailing the judgment and award dated 9th January, 2020 passed by learned Tribunal in O.A. No. 59 of 2017.

3.3 FAO No. 267 of 2020 has been filed by the parents of the deceased, namely, Krushna Sisha, assailing the judgment and award dated 21st January, 2020 passed by learned Tribunal in O.A. No. 83 of 2017.

3.4 FAO No. 275 of 2020 has been filed by the widow, minor son and parents of the deceased, namely, Narendra Karad, assailing the judgment and award dated 17th February, 2020 passed by learned Tribunal in O.A. No. 214 of 2013.

3.5 FAO No. 359 of 2020 has been filed by the parents of the deceased, namely, Prakash Biswal, assailing the judgment and award dated 29th January, 2020 passed by learned Tribunal in O.A. No. 41 of 2017.

3.6 FAO No. 363 of 2020 has been filed by the injured assailing the judgment and award dated 6th January, 2020 passed by learned Tribunal in O.A. No. 18 of 2016.

3.7 FAO No. 570 of 2020 has been filed by the widow and parents of the deceased assailing the judgment and award dated 20th February, 2020 passed by learned Tribunal in O.A. No. 145 of 2017.

4. The legal issue involved in all these appeals being similar in nature, the same are taken up for hearing & final disposal and are disposed of by this common judgment.

5. Miss Mahapatra, learned counsel for the Appellants contended that Railway Accidents and Untoward Incidents (Compensation) Amendment

Rules, 2020 (for short 'Amendment Rules') being a subordinate legislation cannot be made applicable retrospectively and thus, mode of payment provided in Rule 5 of the said Rules is not applicable to the cases at hand. She further submitted that even for the sake of argument, it is assumed that the rule has a retrospective application in view of sub-rule (2) of Rule 1 of the Amendment Rules, the applicability of Rule 5 being directory in nature, learned Tribunal should not have directed to deposit a major portion of the compensation amount in term deposits instead of releasing it in favour of the Claimants without recording reasons in support thereof. It is her submission that Amendment Rules have no application to the award passed in FAO No. 262 of 2020 as the award was passed much prior to the date when the said Amendment Rules came into force. She further submitted that Rules have been promulgated keeping in mind the illiteracy and other disabling factors of the claimants impairing the judicious use of compensation. In all these appeals, the Claimants Appellants are able bodied adults and have no disability which would attract the provisions of Rules 5.1 and 5.2 of the Amendment Rules. None of the Claimants are also minor or persons of unsound mind. Thus, learned Tribunal has committed an error of law in directing to deposit a major portion of the awarded amount to be kept in fixed deposit. In support of her case, she relied upon the orders passed in ***W.P.(C) No. 8867 of 2020*** disposed of on ***7th December, 2020*** by the ***Delhi High Court, Civil Revision No. 3730 of 2019*** disposed of on ***8th April, 2021 by Punjab and Haryana High Court, FAO No. 183 of 2020*** (I.A. No. 549 of 2020) disposed of on ***4th November, 2020*** by this Court and also the case law reported in ***2021(I) TAC 543 (Jharkhand High Court).*** Hence, she prayed for disbursal of the awarded amount in favour of the Claimants by releasing it from the term deposits.

6. Mr. Sahoo, learned counsel for the Railways-Respondent, on the other hand, contended that Amendment Rules have been framed in compliance of the order dated 22nd February, 2019 passed by the Delhi High Court in the case of ***Geeta Devi –v- Union of India*** (FAO No. 22 of 2015 and CMA No.4501 of 2015). Accordingly, the Central Government in exercise of power under Section 129 of the Railways Act, 1989 amended the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 and framed the Amendment Rules. The Principal Bench of Railway Claims Tribunal, Delhi also formulated the Railway Claims Tribunal Annuity Deposit (RCTAD) Scheme in the matter of release of compensation amount in conformity with Rules 5.1 and 5.2 of the Amendment Rules. Although the

Amendment Rules was published by the Government of India in the official gazette on 4th June, 2020, but Rule 1(2) of the Amendment Rules stipulates that said Rules deemed to have come into force with effect from 1st January, 2020. As such, the Amendment Rules has application to the awards passed on or after 1st January, 2020. Nothing in the said Rules limits the power of learned Tribunal to make modification of the mode of disbursal of the awarded amount for the reasons to be recorded in writing. Thus, the Claimants-Appellants are at liberty to move learned Tribunal for modification of the mode of disbursing of the awarded amount. The orders and case laws relied upon by learned counsel for the Appellants do not deal with the provisions of the Amended Rules. As such, the same have no application to the present batch of appeals. He, therefore, prayed for dismissal of the appeals.

7. The issue raised by Miss Mahapatra, learned counsel for the Appellants with regard to retrospective application of the Amendment Rules cannot be decided by this Court while exercising power under Section 23 of the Act. The same can be decided in a properly constituted application as and when cause of action for the same arises.

8. Upon hearing learned counsel for the parties and on perusal of the records, it is apparent that the Amendment Rules have no application to the award passed by learned Tribunal impugned in FAO No. 262 of 2020 as the award therein was passed on 7th November, 2019, i.e. much before the Amendment Rules came into force. It also appears that the Appellants in the said appeal are adults and there is no material on record to show that either they are illiterate or of unsound mind or they have any disability both mental and physical. As held by Hon'ble Supreme Court in the case of ***H.S. Ahammed Hussain and another v. Irfan Ahammed and another***, reported in 2002 (6) SCC 52, the amount of compensation awarded to an adult cannot be ordered to be deposited in fixed deposit in a nationalized bank. The relevant paragraph of the aforesaid judgment is as under:

> *"8. Learned counsel for the appellant lastly submitted that the amount of compensation payable to the mothers of the victims should not have been directed to be kept in fixed deposit in a nationalised bank. In the facts and circumstances of the present case, we are of the view that the amount of compensation awarded in favour of the mothers should not be kept in fixed deposit in a nationalised bank. In case the amounts have not been already invested, the same shall be paid to the mothers, but if, however, invested by*

depositing the same in fixed deposit in a nationalised bank, there may be its premature withdrawal in case the parties so intend."

9. Learned counsel for the Railways-Respondent could not justify the direction of learned Tribunal to deposit a major portion of compensation awarded in fixed deposits in O.A. No. 203 of 2015 out of which FAO No. 262 of 2020 arises. Thus, I am of the considered view that the Appellants in FAO No. 262 of 2020 being adults and there being no material on record to show that they have any disability or incapability to utilize the compensation amount in a judicious manner, I direct that the entire compensation amount be released in favour of the Claimants on proper identification.

10. So far as rest of the appeals are concerned, the awards impugned in those cases are passed after 1st January, 2020 when the Amendment Rules had already come into force. Hence, it is to be examined whether the Appellants are entitled to the relief claimed in these appeals by directing the Tribunal to release the compensation amount in favour of the respective Claimants, which are deposited in fixed deposits.

11. In the case of ***Geeta Devi*** (supra), Delhi High Court held as follows:

"5. As Regards Amendment to the Railway Accidents andUntoward Incidents (Compensation) Rules, 1990.

5.1. Many of the claimants are drawn from rural areas with low levels of literacy and lower levels of making appropriate decision for the use of amounts guaranteed under the awards. There are several instances of their exploitation by middlemen and touts operating in the field. The scope for such exploitation is itself one of the incentives for fomenting bogus claims, fabricated documents and duplicate claims in different Benches of the Tribunal for the same cause of action. The availability of bulk funds in the name of an ill-informed claimant is also a cause for exploitation. A scheme for protection of the amount due to such a claimant is the need of the hour. Earlier, this Court has involved 21 Nationalized Banks in dialogue to evolve a scheme of annuities for disbursement of claims. They have been ordered already to be implemented in this case, vide directions passed on 22nd February, 2019. This scheme as applied to motor accident claims has been approved by the Supreme Court in its order dated 05th March, 2019 in Krishnamurthi –v- New India Insurance Company, SLP (C) No. 31521-31522 of 2017. A statutory rule backing will therefore best serve the interest of the litigant in the manner set out below:

5.2. Insert following Rule 5 after Rule 4:-

Rule 5: Mode of payment- (1) The Tribunal may, in order to protect the sum awarded to the claimant, having due regard to the illiteracy or other disabling factors impairing the judicious use of such sum, issue directions for disbursing the award in terms of annuities, fixed deposits or other suitable mode as shall subserve justice.

(2) If any of the claimants is a minor or person of unsound mind, the Tribunal may give liberty to the guardian ad litem to use the interest accruals on the deposit that shall be made during the minority for maintenance.

(3) Nothing in this Rule shall limit the power of the Tribunal to make modifications of the mode of disbursal for reasons to be stated in wiring depending on the exigencies requiring liquidation of any corpus created for annuity or premature closure of fixed deposit, for the benefit of the claimant."

12. On the basis of the recommendation made by Delhi High Court, the Government of India in Ministry of Railways in exercise of power under Section 129 of the Railways Act, 1989 issued a notification on 3rd June, 2020 amending the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990. The said Rule is called as Railway Accidents and Untoward Incidents (Compensation) Amendment Rules, 2020. Rule 1(2) of the Amendment Rules makes it effective from 1st January, 2020. By virtue of Rule 2, Rule 5 has been inserted by way of amendment, which runs thus:

"5. MODE OF PAYMENT5.1 THE TRIBUNAL MAY, IN ORDER TO PROTECT THE SUM AWARDED TO THE CLAIMANT, HAVING DUE REGARD TO THE ILLITERACY OR OTHER DISABLING FACTORS IMPAIRING THE JUDICIOUS USE OF SUCH SUM, ISSUE DIRECTIONS FOR DISBURSING THE AWARD IN TERMS OF ANNUITIES, FIXED DEPOSITS OR OTHER SUITABLE MODE AS SHALL SUBSERVE JUSTICE.

5.2 If any of the claimants is a minor or person of unsound mind, the Tribunal may give liberty to the guardian ad litem to use the interest accruals on the deposit that shall be made during the minority for maintenance.

5.3 Nothing in this rule shall limit the power of the Tribunal to make modifications of the mode of disbursal for reasons to be stated in writing depending on the exigencies requiring liquidation of any corpus created for annuity or premature closure of fixed deposit, for the benefit of the claimant.

5.4 The orders dated 21st April, 2017, 24th May, 2019 and 06th November, 2019 of Hon'ble High Court of Delhi in FAO No. 22/2015 and CM Application

No.4501/2015 in Geeta Devi Vs Union of India, relating to disbursement of compensation shall be read as part of this rule."

13. Conspectus of Rule 5.1 and Rule 5.2 of the Amendment Rules makes it clear that learned Tribunal having regard to the illiteracy or other disabling factors impairing judicious use of sum awarded by it may order to protect the said sum by issuing directions for disbursing of the award in terms of annuities, fixed deposits or other suitable mode so as to subserve the justice. Further, Rule 5.2 makes it clear that if the claimant is a minor or a person of unsound mind, the Tribunal may give liberty to the guardian ad *litem* to use the interest accruals on the deposit that shall be made during the minority for his/her maintenance. Thus, it is clear from the aforesaid Rules that the Tribunal has the discretion to pass suitable orders for disbursal of the awarded amount either in terms of the annuities, fixed deposits or other suitable mode in order to subserve judicious utilization of the awarded amount. When the discretion is conferred on the learned Tribunal to determine the mode of payment of the awarded amount as per Rule 5.1 of the Amendment Rules, learned Tribunal has to exercise the same judiciously and see that withholding disbursal of any amount does not cause any injustice to the claimant. Thus, learned Tribunal has to pass a speaking order specifying the reasons for disbursal of the awarded amount in terms of annuities, fixed deposits or by any other mode to subserve the justice. Likewise, when the claimant is a minor or a person of unsound mind, learned Tribunal has the discretion to give liberty to the guardian ad *litem* to use the interest accruals on such deposits made in terms of Rule 5.1 during the minority of the claimant for his/her maintenance. The orders/case law relied upon by learned counsel for the Appellants have no application to the awards passed subsequent to 1st January, 2020 impugned in the aforesaid appeals as the said decisions/case law have not taken into consideration the effect of Amendment Rules, more particularly Rule 5.1 and Rule 5.2 of the said Amendment Rules.

14. In the instant appeals, all the Appellants are admittedly adults and are not of unsound mind. Thus, learned Tribunal, while directing for deposit of a major portion of the awarded amount in fixed deposits, ought to have taken into consideration the object and intent of Rule 5.1 of the Amendment Rules and the order passed in ***Geeta Devi (supra***). There is no material on record to show that the Appellants in the aforesaid appeals are illiterate or there is any disabling factors, which may impair judicious use of such sum.

15. Law is well settled that when a Court/Tribunal is conferred with the discretionary power, it is not required to exercise the same in all cases in a routine manner. The discretionary power conferred on the Court or the Tribunal, should be exercised judiciously in appropriate cases assigning good reason for the same. Discretion should not be exercised in a blanket form which may otherwise lead to improper exercise of such power and will frustrate the object of grant of compensation. In the cases at hand, there being no material on record to come to a conclusion that requirements of Rule 5.1, Rule 5.2 or Rule 5.4 are satisfied, I am of the considered view that learned Tribunal has committed an error of law in directing for deposit of a major portion of the awarded amount to be kept in fixed deposits.

16. Rule 5.3 of the Amendment Rules prescribes that learned Tribunal has power to modify the mode of disbursal of the awarded amount for the reasons to be stated in writing depending upon the exigencies requiring liquidation of any purpose created for annuity or premature closure of fixed deposit for the benefit of the claimant.

17. Rule 5.3 of the Amendment Rules will come into play when the discretion conferred on the learned Tribunal is exercised judiciously by assigning good reason thereto for issuance of a direction for disbursal of the awarded amount in terms of annuities or fixed deposits etc. This Court could have remitted the appeals back to the Tribunal granting liberty to the Claimants to file application for modification of the mode of disbursal under Rule 5.3 of the Amendment Rules. Since it is already held that the direction of the Tribunal to deposit major portion of the awarded amount is not proper, the occasion for remitting the matter to the Tribunal does not arise.

18. In that view of the matter, all the appeals are allowed and learned Tribunal is directed to disburse the awarded amount by liquidating the fixed deposits, if any, to the claimants on proper identification, as expeditiously as possible preferably within a period of one month from the date of filing of an application along with certified copy of this order following due procedure of law. In the circumstances, there shall be no order as to cost.

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2021 (III) ILR - CUT-164

S.K. PANIGRAHI, J.

CRLMC NO. 687 OF 2021

E. SANKAR RAO …….. Petitioner

.V.

STATE OF ODISHA (VIGILANCE) ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of the proceeding – Offences under section 13 (2)r/w section 13 (i) (e) of the Prevention of Corruption Act, 1988 – Allegation of raising the disproportionate assets – The assets possessed by the petitioner assessed – Such assets stands to less than 10% of the total income for the period in question – Held, this Court is prima facie of the opinion that permission to continue with this prosecution would be an abuse of the process of the court – Hence the proceeding is quashed.

Case Laws Relied on and Referred to :-

1. 1992 Supp (1) SCC 335: State of Haryana Vs. Bhajan Lal.
2. (1988) 1 SCC 692: Madhavrao Jiwajirao Scindia Vs. Sambhajirao Chandrojirao Angre.
3. (1992) 4 SCC 45: M. Krishna Reddy Vs. State Dy. Supdt. of Police
4. (1977) 1 SCC 816: Krishnanand Vs. State of M.P.
5. (1995) 6 SCC 749 : B.C. Chaturvedi Vs. Union of India.
6. (2005) 1 SCC 122 : Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque.

For Petitioner : M/s. V. Narasingh, T. K. Acharya,B. Pasayat & P.K. Behera.

For Opp. Parties: Mr. Niranjan Moharana, Addl. Standing Counsel (Vig.).

JUDGMENT Date of Hearing: 04.08.2021:Date of Judgment: 01.09.2021

S.K. PANIGRAHI, J.

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed with a prayer to quash the proceedings emanating from FIR No.45 dated 11.08.2016 leading to Berhampur Vigilance P.S. Case No.45 of 2016 corresponding to GR (V) Case No.33/2016(v) for alleged commission of offences u/s.13(2), r/w Section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'PCA') and u/s.109 of the Indian Penal Code 1860 (hereinafter referred to as 'IPC') which is pending in the Court of learned Special Judge Vigilance, Berhampur.

2. The facts leading to the present matter, in nutshell, is that upon receiving information regarding the petitioner's assets, searches were conducted at the petitioner's residence and at those of his relatives, after which his movable and immovable assets were assessed to be valued at Rs.74,54,526/-. His income for the check period between 01.01.2005 to 11.05.2016 was assessed to be Rs.31,70,057/- and the approximate expenditure was assessed to be Rs.13,60,521/-. Based on the above figures, the value of the disproportionate assets possessed by the present petitioner was estimated to be at Rs.56,44,990/-. On the basis of the aforementioned information, Vigilance GR Case No.33/2016(v) was registered and investigation commenced. However, till date the investigation has not been completed and no final form has been filed.

3. Challenging the long-drawn investigation, the petitioner had approached this Court in CRLMC No.1843/2019, whereby vide its order dated 06.01.2020, this Court was pleased to direct that the Vigilance authorities shall conclude the investigation expeditiously within a period of three months from the date of the order. The relevant portion of this Court's order dated 06.01.2020 in CRLMC No.1843/2019 is reproduced below:

> *"Learned counsel for the Vigilance Department would submit that the disproportionate assets, if any, of the petitioner is going to be assessed in the light of the affidavit as stated above to which the counsel for the petitioner has no objection but submits to conclude the investigation expeditiously.*
>
> *In view of the aforesaid affidavit of the Vigilance department, it is directed that the Vigilance shall do the needful to file the final form basing on the evidence collected and in the light of the affidavit filed within three months from today but adhering to the Department Circular as stated in the affidavit.*
>
> *With the aforesaid order, this criminal Misc. Case stands disposed of."*

4. Furthermore, the father of the petitioner also approached this Court in CRLMP No.1594 of 2020, praying that the household property listed at Sl. No.1 of the FIR, valued at Rs. 51,33,629/- , Plot No. 386 vide Patta No.102 in Rikapallimouza, Chatrapur listed at Sl. No.3 of the FIR, valued at Rs.2,20,412/- and Plot No.387 vide Patta No.229/837 in Rikapalli mouza, Chatrapur listed at Sl. No.4 of the FIR, valued at Rs.1,10,206/- be struck off from the FIR registered against the petitioner as these three properties belonged to him and not the petitioner and therefore the same could not be included in calculating the alleged disproportionate assets of his son. This

Court vide its order dated 01.02.2021 in CRLMP No.1594 of 2020, was pleased to allow the prayer of the father of the petitioner and directed the vigilance authorities to proceed with the investigation excluding the aforementioned three properties. The relevant portion of this Court's order dated 01.02.2021 in CRLMP No.1594 of 2020 is reproduced below:

> *"Heard Mr. J. Samantaray, learned counsel on behalf of Mr. T.K.Acharya, Learned Counsel representing the petitioner and Mr. N.Moharana, Learned Additional Standing Counsel Vigilance through Video Conferencing Mode.*
>
> *According to Mr. Samantray, the grievance of the petitioner in the present case relates to inclusion of this household property at Sl.No.1 and his Plot bearing No.386 & 387 at Sl.No.3 &4 under the heading " Immoveable and Moveable assets" in the FIR under Annexure-1 for calculating the alleged disproportionate assets of his son, namely E.Shankar Rao. Accordingly to the petitioner, the double started building as reflected at SL No.1 stands only over Plot No.385, 386 and 387 and 384 is a vacant plot, which stands in the name of his daughter in law, who happens to be the wife of the accused. Further he contends that neither far constructing the said building at Sl. No.3 and 4 under the heading " Immoveable and moveable assets" in the FIR, the accused has ever made any contribution financially, therefore, inclusion of his double started building at Sl.No.1 and his plots at Sl.Nos 3 and 4 have been made without application of mind. Accordingly he prays that such inclusion of his properties at Sl. Nos 1,3 and 4 be deleted from the FIR.*
>
> *Mr. Moharana relying on the objection affidavit dated 19.01.2021 filed by the Opposite party does not dispute the above noted submission of the learned counsel for the petitioner.*
>
> *Considering such submissions this Court is of the opinion that the above mentioned properties of the petitioner should not have been included in the FIR and accordingly directs the Opp.Party to proceed with investigation excluding the double storied building and Plot No.386 and 387 of the petitioner as reflected respectively against Sl.No.1, 3 and 4 under the heading "Immoveable and Moveable assets" of the FIR.*
>
> *This writ application is accordingly disposed of."*

5. The learned counsel appearing for the petitioner earnestly contends that after this Court's order dated 01.02.2021 in CRLMP No.1594 of 2020, the value of the alleged disproportionate assets of the petitioner is reduced to less than 10% of his total income and a circular of the Vigilance Department bearing No.4/2015 clearly stipulates that criminal cases or open enquiries shall not be registered against Group C/Group D employees, unless where

the rate of disproportion is very high (100% or more). After the exclusion of his father's properties as indicated above, this proceeding against the petitioner, therefore, is not maintainable and is liable to be quashed. The learned counsel for the petitioner also submits that the proceedings have been constituted against the petitioner with mala fide intention and there is intentional noncompliance of the order of this Court in CRLMC No.1843/2019 to conclude the investigation within three months only to harass the petitioner due to mala fide reasons best known to them.

6. In fact, due to the pendency of the proceedings initiated against the petitioner since 2016, he has been put through immense mental and financial harassment as it has led to the petitioner being deprived of any promotions even though his juniors have since been promoted.

7. *Per contra*, learned counsel for the State opposes the present petition and made multi-pronged submissions as to why the present petition ought not to be allowed although most of them were rather generic in nature.

8. Heard learned Counsel for both parties. For appreciating the rival submissions, this Court finds it appropriate to refer first to the scope of the inherent powers of this Court as postulated under S.482 of the Code of Criminal Procedure. The Hon'ble Supreme Court in ***State of Haryana v. Bhajan Lal***[1], has succinctly held that;

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an*

1. 1992 Supp (1) SCC 335

investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

9. Further, the Apex Court in ***Madhavrao Jiwajirao Scindia v. ambhajirao Chandrojirao Angre***[2], held that-

"7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to

2. (1988) 1 SCC 692

permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

10. At this juncture, it would also be prudent to visit S.13 of the Prevention of Corruption Act, 1988, which reads as follows:

"13. Criminal misconduct by a public servant.—(1) A public servant is said to commit the offence of criminal misconduct,—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he,—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

Explanation.—For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than [four year] but which may extend to [ten years] and shall also be liable to fine."

11. The Hon'ble Supreme Court in ***M. Krishna Reddy v. State Dy. Supdt. of Police***[3], laid down the ingredients which must be made out in order to establish a charge as postulated under Section 5(1)(e) of the erstwhile PC Act, which corresponds to Section 13(1)(e) of the present PC Act and has held that:

"7. To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession (3) it must be proved as to what were his known sources of income, i.e. known to the prosecution and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once the above ingredients are satisfactorily established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able to account for such resources or property. …"

12. Furthermore, the position of law governing the issue as to when a presumption under Section 13(1)(e) of the PC Act arises, was laid down by the Hon'ble Apex Court in ***Krishnanand v. State of M.P***[4] wherein it was held that when the excess of the total assets possessed is less than 10% of the total income, it is not right to hold that the assets found in the possession of the person are disproportionate to his known sources of income. As opined by the Hon'ble Supreme Court in ***B.C. Chaturvedi v. Union of India***[5], the 10% principle was evolved by the Court to give a benefit of doubt, due to the inflationary trend in the appreciation of the value of the assets. This benefit thereof is deemed to be the maximum benefit that can be accorded. The Hon'ble Supreme Court has, therefore, relied on and upheld this principle on numerous occasions, when the percentage of alleged disproportionate assets was low, the proceedings under the PC Act initiated against the petitioner were held to be liable to be quashed.

3. (1992) 4 SCC 45, **4**. (1977) 1 SCC 816, **5**. (1995) 6 SCC 749

13. Section 482 of the Criminal Procedure Code envisages three main circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice, as also held by the Hon'ble Supreme Court in ***Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque***[6]**.**

14. Given that pursuant to the order of this Court vide order dated 01.02.2021 in CRLMP No.1594 of 2020, the revised alleged disproportionate assets possessed by the present petitioner stands at Rs.1,80,473/- which is less than 10% of his total income of Rs.31,70,057/- (for the period in question), this Court is prima facie of the opinion that permission to continue with this prosecution would be an abuse of the process of the Court. The instant case squarely falls within the scope of illustration (3) as laid down by the Hon'ble Supreme Court in ***State of Haryana v. Bhajan Lal*** (supra), whereby the allegations made in the FIR and the evidence collected in support of the same do not make out a case against the accused, especially in view of the position of law as discussed hereinabove. It is also to be noted that no facts or circumstances with respect to abetment attracting the applicability of Section 109 IPC have also been brought to the notice of the Court. Therefore, in the given factual background, Section 109 IPC also has no application.

15. Considering the aforesaid discussion, submissions made and keeping in view the facts and circumstances of the case at hand, this Court is inclined to entertain the instant petition. Accordingly, this Court exercising its inherent power under Section 482 of Cr.P.C. allows this petition and quashes the proceeding in GR (V) Case No.33/2016(v) arising out of Berhampur Vigilance P.S. Case No.45 of 2016 pending in the Court of the learned Special Judge Vigilance, Berhampur and all proceedings emanating therefrom.

16. The CRLMC is accordingly disposed of.

6. (2005) 1 SCC 122

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S.K. PANIGRAHI, J.

CRLA NO. 487 OF 2020

SIDHESWAR BINDHANI @ PETU …….. Appellant

.V.

STATE OF ODISHA AND ANR. ……..Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 374 (2) – Prayer for grant of Bail – Offences punishable under sections 363/ 376(D)/ 328/506 of IPC r/w section 3(1)(w)(i)/3(2) (va) of the S.C and S.T (PA) Act – Whether deviation or inconsistence in the victims testimony could jeopardize the case of the prosecution? – Held, No – It is the prima-facie, evident that there are serious charges of gang rape against the appellant and another – Victim in her statement recorded under section 164 Cr.P.C. has specifically mentioned the name of the appellant to be the second assailant, as mentioned in the FIR – Therefore, there is, prima facie, direct allegation against the appellant under section 376(D) IPC – Also, it appears that other offences under the Indian Penal Code are, prima facie made out, which needs to be determined in further prosecution – Be that as it may, credibility and reliability of statement of witnesses cannot be looked deeply into, at this stage – Therefore, in totality of above discussion, the learned special judge has rightly dismissed the application for grant of regular bail to the appellant – No substantial case is made out for grant of bail. (Para-11)

Case Laws Relied on and Referred to :-

1. (1996) 2 SCC 384 : State of Punjab Vs. Gurmit Singh and others.
2. (2010) 13 SCC 657: Sunil Kumar Sambhudayal Gupta and others Vs. State of Maharashtra
3. 2017 All HC 497 : Guddoo Vs. State of U.P
4. (1992) 3 SCC 204 : Madan Gopal Kakkad Vs. Naval Dubey.

For Appellant : Mr. Bishnu Prasad Pradhan
For Respondents: Mr. P.K. Maharaj, Additional Standing Counsel

M/s.M.K. Mohapatro, S. Khan and P.K. Behera

JUDGMENT Date of Hearing: 16.08.2021:Date of Judgment: 08.09.2021

S.K. PANIGRAHI, J.

1. The appellant in the instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C') seeks to challenge the order dated

24.10.2019 passed by the learned Special Judge, Mayurbhanj, Baripada in G.R. Case No.33 of 2019 arising out of Kuliana P.S. Case No.60 of 2019 for commission of offence punishable under Sections 363/376(D)/ 328/506 of IPC read with Section 3(1)(w)(i)/3(2)(va) of the S.C. & S.T. (PA) Act.

2. The prosecution story reveals that on 07.07.2019, at about 7:00 AM, the informant's wife (hereinafter'victim') had been to the village Patharaghera Bandha to attend the call of nature when two persons forcibly carried her to the nearby forest and gang raped her. When she shouted for help, the appellant tried to administer a liquid substance on her body which smelled like kerosene. Hearing such holler, two girls of the nearby village came to the spot while the accused fled. The police implicated the appellant along with the co-accused on the confessional statement of the victim.

3. Learned counsel for the appellant submitted that the appellant is innocent and in no way connected to the occurrence. He highlighted the fact that the FIR was initially lodged against unknown persons and the victim disclosed the name of the appellant at much later stage of investigation. He also contended that the concurrent statements of the victim are contradictory to each other and do no proffer a consistent story. In closing, he submitted that the medical report did not reveal any sign or symptom of recent sexual intercourse and/or bodily injury to the victim which goes to contradict the narrative of any forceful sexual assault against her. The charge-sheet has already been submitted. Yet, the appellant is languishing in custody since 24.07.2019.

4. Learned counsel for the State vehemently opposed the prayer of the appellant. He submitted that it is a case of gang rape after abduction of the victim and hence, the appellant does not deserve to be enlarged on bail. Also, the material on record reveals that the appellant had attempted to administer poisonous substance to the victim at the time of occurrence. If he is released on bail, there is a strong apprehension of threat to the life of the victim and the witnesses in the case.

5. Heard Mr. Bishnu Prasad Pradhan, learned Counsel for the appellant, Mr. P.K. Maharaj, learned Additional Standing Counsel appearing for the State and Mr. S. Khan, learned counsel appearing for the Respondent No.2 and perused the case records.

6. The first question, which comes up for consideration in this case, is whether deviation or inconsistencies in the victim's testimony could jeopardize the case of the prosecution. This issue came up for consideration before the Supreme Court in ***State of Punjab v. Gurmit Singh***[1] and others[1] where it was held that:

> *"9. …The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not,* ***unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case****. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook.* ***The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable****. [emphasis supplied]*

7. In ***Sunil Kumar Sambhudayal Gupta and others v. State of Maharashtra***[2] while dealing with the issue of material contradictions, the Court held:

> *"14. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons."*

8. In the appeal, learned counsel for the appellant sought to bring out that, in the absence of corroboration of statement of the prosecutrix by the aforementioned medical report, the detention of the appellant was bad. This contention has been totally rejected by Indian Courts and it was also reiterated that there is no need for corroboration.

1. (1996) 2 SCC 384, **2**. (2010) 13 SCC 657

9. In ***Guddoo vs State of U.P***[3] Hon'ble Allahabad High Court shed light upon the value of medical evidence in cases of rape:

> "66. *Value of Medical Evidence: Appreciating Sociological and Psychological Aspect of Rape:*
>
> *Courts used to take the position that if there was no proof of physical assault there would be no rape. The presumption that if no physical injury is evident on the victim, no sexual intercourse has taken place or rape has not been committed, ignores the fact that rape is not only an offence involving physical violence, but also psychological violence. This too when existing laws recognize mental agony and psychological violence as offences against the body. The victim of rape besides being physically ravished is psychologically wounded. It is the feeling of having been exploited and violated more that anything else which leaves lifelong scars on the mind of the victim. Perhaps this trauma has been recognized in a case where it was held that the absence of injuries on private parts of the prosecutrix would not rule out her being subjected to rape. Krishna Iyer. J. who is famous for his humanistic approach towards law, observed in* ***Rafiq Vs. State of U.P. (1980) 4 SCC 262****: "when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. In this case, the testimony has commanded acceptance from two courts. When a woman is ravished what is inflicted is not merely physical injury but the deep sense of some deathless shame". Judicial response to human rights cannot be blunted by legal bigotry."*

10. In similar spirit, **Madan Gopal Kakkad vs. Naval Dubey**[4] where the question as to what constitutes sexual intercourse and rape was discussed, the Apex Court has put the matter in perspective: -

> *"37.* ***To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law.*** *It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a*

3. 2017 All HC 497, **4**. (1992) 3 SCC 204

legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

38. In Parikh's Book of Medical Jurisprudence and Toxicology, the following passage is found:

Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains." [emphasis supplied]

11. In the backdrop of above mentioned legal and factual aspects, it is prima facie, evident that there are serious charges of gang rape against the appellant and another. Victim in her statement recorded under Section 164 Cr.P.C. has specifically mentioned the name of the appellant to be the second assailant, as mentioned in the FIR, therefore, there is, prima facie, direct allegation against the appellant under Section 376D IPC. Also, it appears that other offences under the Indian Penal Code are, prima facie made out, which needs to be determined in further prosecution. Be that as it may, credibility and reliability of statement of witnesses cannot be looked deeply into, at this stage. Therefore, in totality of above discussion, the learned Special Judge has rightly dismissed the application for grant of regular bail to the appellant. No substantial case is made out for grant of bail.

12. Accordingly, the appeal is dismissed with liberty to the appellant to revive the prayer for grant of bail before the trial Court after examination of prosecutrix in Court. The trial Court may decide the subsequent application on merits at that stage without getting influenced by the order of this Court.

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