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the applications filed under a particular rule shall have to be considered applying the rule available at the relevant time itself.

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2021 (III) ILR-CUT- 177

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

STREV NO. 55 OF 2010

M/s. RAMLAL AGARWAL ..... Petitioner

.V.

STATE OF ORISSA .....Opp.Party

THE ODISHA SALES TAX ACT, 1947 – Sections 2(h) r/w 5(2) (A) (a) (iii) – "Sale Price" & "Taxable turnover" – Sale of crushed ballast – Two separate bill prepared by the seller i.e. one for price per cum/unity and another for transportation and stacking – Petitioner filed tax return as per value of the per cum/unity – But the authority raised demand including the transportation and stacking price on the ground that sale was completed at the stacking point – However Petitioner pleaded that transportation and stacking price purely labour and services done at the behest of the purchaser as separately charged on the body of the bill – Question raised whether the transportation and stacking charges are includible in the sale price or to be treated separately? – Held, transportation and stacking charges are not includible in the sale price.

Case Laws Relied on and Referred to :-

1. (1999) 116 STC 494 (Ori) : P.K.Satpathy v. State of Orissa.
2. (1975) 35 STC 84 (Ori) : Orient Paper Mills Ltd. v. State of Orissa.

For Petitioner : Mr. B.P.Mohanty
For Opp.Party : Mr. Debidutta Behura, A.S.C

O R D E R Date of Order : 17.03.2021

BY THE BENCH

1. Heard Mr. B. P. Mohanty, learned counsel for the Petitioner and Mr. Debidutta Behura, learned Additional Standing Counsel for Opposite Party– Revenue.

2. The present revision petition has been filed with a prayer to set aside the impugned order dated 7th November, 2009 of the Orissa Sales Tax Tribunal, Cuttack ('Tribunal') under Annexure-6.

3. Petitioner M/s. Ramlal Agarwal, pursuant to the tender process, entered into an agreement with South Eastern Railways in 1996 for supply and stacking of machine crushed ballast from Ch. 102600 to Ch.106450 at

Talcher end of SBP-TLHR Rail Link Project. The price offer has been accepted by the Railways @ Rs.533/- per cum., i.e. i) for supply at crusher point @ Rs.150/- per cum. and ii) for transportation and stacking at site @ Rs.383/- per cum.. The Sales Tax Officer, Sambalpur Circle, Ward (E) in an ex-parte assessment order U/s.12(4) of the O.S.T. Act for the year 1998-99 raised extra demand of Rs.14,57,357/- against total payment received by the Petitioner to the tune of Rs.1,31,40567/- by drawing the unit sale price at Rs.533/- per cum. on the ground that the sale was completed at the Railway stacking point.

4. The Petitioner claimed bifurcation of unit price, i.e. Rs.150/- as sale value only, and Rs.383/- as the transportation charge which was purely labour and services done at the behest of the purchaser as separately charged on the body of the bill. Thus, being aggrieved by the order of the Assessing Officer on the extra demand that comprises tax @ 12% and surcharge @ 15% on tax due, the Petitioner preferred 1st appeal before the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur. The 1st appellate authority accepting the claim of the Petitioner, allowed the appeal by reducing a sum of Rs.38,90,220/- towards transportation and stacking charges, Rs.17,783/- being the payments received by the appellant during the year 1999-2000 which included at Dhenkanal circle and Rs.4,89,335/- from the gross turnover towards supply of first point tax paid for cement, and finally held Rs.4,508/- to be refundable to the Petitioner.

5. Against the said order, the Opposite Party preferred a Second appeal in S.A. No.485 of 2000-01 before the Tribunal under Section 23(1) of the Orissa Sales Tax Act, 1994 (‘OST Act’).

6. The Tribunal while deciding the appeal, formulated the following three issues:

> (i) Whether under the facts and circumstances of the case the allowance of labour and services @ 45% is at higher side and therefore needs reduction to 35%.
> (ii) Whether under the facts and circumstances of the case the cement supplied by the respondent to the railways is taxable at the hands of the respondent.
> (iii) Whether under the facts and circumstances the transportation and stacking charges of Rs.38,90.220/- separately charged as per the agreement is includible in the sale price.

7. Issues (i) and (ii) have been answered in favour of the Petitioner. Issue (iii) was answered against the Petitioner. It was held that the transportation cost is includible in the sale price. The matter was then remanded to the S.T.O. for re-computation of the tax due.

8. It is contended on behalf of the Petitioner that the Tribunal has misconstrued the issue in view of the definition of 'sale price' in Section 2(h) and 'taxable turnover' in Section 5(2)(A)(a)(iii) of the OST Act. The Petitioner relies on the decisions of this Court in ***P.K.Satpathy v. State of Orissa, (1999) 116 STC 494 (Ori) and Orient Paper Mills Ltd. v. State of Orissa, (1975) 35 STC 84 (Ori).***

9. The short point falls for consideration is, whether the transportation and stacking charges are includible in the sale price or are to be treated separately?

10. The letter of contract dated 18th October, 1996 under Annexure-1 clearly stipulates two separate prices, one for supply, and the other for transportation and stacking of the ballast. The contention of the Petitioner that the bills were prepared separately and that the payment vouchers were correspondingly separate (Annexure-2) remains undisputed. Annexure-1 clearly stipulates the supply price @ Rs.150/- per unit at crusher point and the transportation and stacking @ Rs.383/- per unit at the site. Therefore it is obvious that the transportation and stacking charges were incurred by the Petitioner at the time of or before its delivery, and the price of materials was determined at the crusher point.

11. Section 5(2)(A)(a)(iii) of the OST Act is clear that outward freight cannot be included in the taxable turnover unless it is a part of the goods sold. In those circumstances the finding of the Tribunal that in the present case, such transportation and stacking charges are includible in the sale price, since the place of sale is the railway stacking point, when it is the crusher point, does not appear to be justified.

12. In ***Orient Paper Mills*** case (supra) it has been observed as follows:

> "When the goods are sold, delivery is normally given by the seller at his own place of business or godown. In order to accommodate the customer's convenience, the seller may also agree to send the goods to the former's place, but on the condition that the former would pay to the latter such cost as the latter may incur in so sending the goods. When the seller's bill or

invoice for sale shows any "cost of freight" charged separately from the price of goods, the presumption is that there have been two contracts, one for the sale of goods and the other for their transportation and it is only the first which earns the "sale price" excluding the latter there from."

13. In the instant case since the sale price and transportation cost have been separately mentioned in the contract itself and correspondingly the bills have been raised separately, the finding of the Tribunal that transportation and stacking charges are includible in the sale price cannot be sustained.

14. The revision is accordingly allowed and the impugned order dated 7th November, 2009 of the Tribunal is set aside.

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2021 (III) ILR-CUT- 180

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

STREV NO. 77 OF 2006

M/S. WHIRLPOOL WASHING MACHINES LTD. ..... Petitioner

.V.

STATE OF ORISSA .....Opp.Party

THE ODISHA SALES TAX ACT, 1947 – Entry 59 – Whether washing machine to be treated as "Electronic Appliance" under the Act – Held, Yes.

Case Laws Relied on and Referred to :-

1. [2001] 121 STC 450 (SC) : BPL Ltd. -V- State of Andhra Pradesh.

For Petitioner : Mr. J. Sahoo, Sr. Adv.
For Opp.Party : Mr. Sunil Mishra, A.S.C

O R D E R Date of Order : 19.04.2021

BY THE BENCH

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

2. A short question arises from the impugned order dated 17th June 2006 of the Orissa Sales Tax Tribunal, Cuttack (Tribunal) partly allowing the Petitioner's S.A. No.317 of 1999-2000, which in turn arose out of the order dated 30th March 1999, passed by the Assistant Commissioner of Sales Tax, Cuttack I Range in the first appeal i.e., Sales Tax Appeal Case No.AA-156/CUIE, 1998-99. The concerned assessment year is 1996-97.

3. While admitting the present revision petition on 14th December 2006, the Court framed the following question of law for determination:

> *"Whether, in the facts and circumstances of the case, the Tribunal is justified to hold the rate of sales tax @ of 16% in respect of sale of washing machines by the petitioner in lieu of 12% as claimed by the petitioner?"*

4. The question whether a washing machine should be treated as an electronic appliance is no longer *res integra.* In its judgment in ***BPL Ltd. v. State of Andhra Pradesh, [2001] 121 STC 450 (SC)***, the Supreme Court answered the question in the affirmative and observed, in the context of the Andhra Pradesh statute that the micro chips control and direct electrical current in a programmed manner so as to enable the washing machine to carry out its functions.

5. Even as far as the State of Odisha is concerned, Entry 59 in the Schedule to the Act now acknowledges that the electronic appliances would include a washing machine.

6. At the relevant point of time, however, on such electronic item the rate of sales tax leviable was 12 % and not 16 % as was sought to be applied by the Tribunal.

7. In that view of the matter, the question framed is answered in negative by holding that the Tribunal was not justified to hold that the rate of sales tax in respect of washing machine manufactured by the Petitioner should be 16 % in lieu of 12%.

8. The revision petition is accordingly disposed of.

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

2021 (III) ILR-CUT-182

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

W.A. NO. 593 OF 2021

DAMODAR DAS .....Appellant

.V.

UNION OF INDIA & ORS. .....Respondents

WRIT APPEAL – Writ appeal filed against a common judgment passed in two writ petition – First writ petition filed with a prayer to stay the departmental proceeding till disposal of the criminal case – Second writ with a prayer to change the enquiry officer because he was conducting the enquiry in a predetermined manner – Single Judge has negative both the prayers with reason and observation – Thus, no ground is made for interference with the impugned order of the learned Single Judge. (Para 17)

Case Laws Relied on and Referred to :-

1. (2012) 1 SCC442 : Divisional Controller, Karnataka, SRTC v. M.G. Vittal Rao.
2. AIR 2014 SC 989 : Stanzen Toyotestsu India P. Ltd. v. Girish V.
3. AIR 2016 SC 351 : State Bank of India v. Neelam.

For Appellant : Ms. Saswati Mohapatra

For Respondents: None

O R D E R Date of Order : 23.09.2021

Dr. S. MURALIDHAR, C.J.

1. The present appeal is directed against the common judgment dated 6th July, 2021 passed by the learned Single Judge in two writ petitions filed by the present Appellant i.e. W.P.(C) Nos. 16373 of 2015 and 22946 of 2015.

2. The prayer in the first writ petition, W.P.(C) Nos. 16373 of 2015, was to quash a letter dated 30th July, 2015 issued by the Asst. Security Commissioner, Railway Protection Force (RPF), East Coast Railway, Waltair Division rejecting the representation of the Appellant/Petitioner that the departmental proceedings against him should be kept in abeyance till disposal of the criminal case filed against him.

3. It may be mentioned that the aforementioned order was passed pursuant to the order passed by this Court on 4th May, 2015 in W.P.(C) No.8282 of 2015.

4. The prayer in the second writ petition i.e. W.P.(C) No.22946 of 2015 was that the Enquiry Officer appointed in the Departmental Enquiry should be changed as according to the Appellant, he was conducting the enquiry in a predetermined manner.

5. By the impugned judgment/order the learned Single Judge has negatived both the prayers. The learned Single Judge concluded that the charges framed in the departmental inquiry against the Appellant were not identical to the accusation against the Appellant in the criminal case. Secondly, it was held that nothing tangible had been placed on record by the Appellant to substantiate his contention that the enquiry officer was conducting the proceedings in a preconceived and predetermined manner.

6. The Court would not like to discuss the facts in great detail as that could cause prejudice to the case of the Appellant both in the departmental enquiry as well as in the criminal proceedings. Suffice it to note that an incident of theft of aluminium power from a stabled rake of a goods train at Ladda Railway Station took place at 10.30 pm on 16th August, 2013. The Appellant was at that time working as a constable in the RPF at Rayagada. Enquiries revealed the involvement not only the Inspector, RPF but also the Appellant. On that basis, apart from registration of the criminal case bearing 2 (C) CC Case No.504 of 2013 arising out of RP (UP) Case No.17 of 2013, departmental proceedings were initiated against the present Appellant. After the bail application in the criminal case was rejected on 24th April, 2014 the Appellant surrendered before the learned S.D.J.M., Rayagada on 14th May, 2014. He was remanded to judicial custody up to 27th May, 2014 on which date he was released on bail.

7. The Appellant was in the departmental proceedings also charged with absconding from duty without authority on 27th August, 2013 and again between 21st September, 2013 and 8th January, 2014. He was placed under suspension on 28th November, 2013.

8. A charge sheet was submitted against the Appellant in the departmental proceedings on 26th March, 2015. As noted by the learned Single Judge, while Articles 1 and 2 of the charge related to the criminal case pending before the S.D.J.M., Rayagada, Charge Nos.3 and 4 dealt with the service conditions of the Appellant regarding his unauthorized absence.

9. After his plea that both the criminal proceedings and the departmental proceedings should not proceed simultaneously was negatived by the order dated 30th July, 2015 of the Asst. Security Commissioner, RPF, the Appellant filed W.P.(C) Nos. 16373 of 2015. Although in the said writ petition no interim order was passed, when the second writ petition i.e. W.P.(C) No.22946 of 2015 was filed asking for change of the enquiry officer, the learned Single Judge appears to have passed an interim order therein on 23rd December, 2015 staying the departmental proceedings. That interim order continued till disposal of the said writ petition. Effectively, therefore, the departmental proceedings remained stayed for nearly six years.

10. Even the criminal case does not appear to have progressed much. Going by the additional affidavit filed by the Appellant on 17th August, 2021 in the present appeal, the order sheets of the criminal court show that the trial is yet to progress even to the stage of examination of witnesses on account of the accused persons remaining absent and partly due the resolution of the local Bar Association not to conduct trial due to COVID-19.

11. The learned Single Judge has negatived the plea of the Appellant that both the criminal trial as well as the departmental proceedings cannot proceed simultaneously, by referring to several decisions of the Supreme Court including ***Divisional Controller, Karnataka, SRTC v. M.G. Vittal Rao (2012) 1 SCC 442***.

12. Ms. Mohapatra, learned counsel for the Appellant relied on two decisions of the Supreme Court in ***Stanzen Toyotestsu India P. Ltd. v. Girish V. AIR 2014 SC 989*** and ***State Bank of India v. Neelam AIR 2016 SC 351.***

13. Both the decisions reiterate the legal position summarized in ***M.G. Vittal Rao*** *(supra)* as under:

> "(i) There is no legal bar for both the proceedings to go on simultaneously.
>
> (ii) The only valid ground for claiming that the disciplinary proceedings may be stated would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts or law.
>
> (iii) Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings.

> (iv) Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common"

14. In ***Stanzen Toyotestsu India P. Ltd.*** *(supra)* the Supreme Court noted that the trial Court had in that case examined only 3 witnesses out of 23 witnesses cited in the charge sheet and the trial was not "anywhere near completion". It was acknowledged that "disciplinary proceedings cannot remain stayed for an indefinite long period". As a result, the Supreme Court directed that the criminal trial should be completed within a period of one year from the date of the order and for some reason if it was not so completed, then "the disciplinary proceedings initiated against the Respondent shall be resumed and concluded by the enquiry officer concerned." In the present case, the criminal trial is yet to take off and the question of any prejudice being caused to the present Appellant as a result thereof does not arise.

15. Again in ***Neelam*** *(supra)* it was noted by the Supreme Court that despite the Division Bench of the High Court in 2010 directing the criminal trial court should proceed with the trial on "day-to-day basis", no effective progress had been made in six years. Only two additional prosecution witnesses had been examined. It was observed that the "pendency of criminal trial for around ten years, by no means, can be said to be a reasonable time frame to withhold the disciplinary proceedings". It was in fact made clear by the Supreme Court that the disciplinary proceedings cannot brook any further delay as they were "pending for more than ten years." Again, a one-year time limit was given to conclude the criminal trial and it was clarified that if the criminal trial was not completed then the disciplinary proceedings shall be resumed.

16. Neither of the above decisions is helpful to the Appellant since on the facts of the present case, with the criminal trial not having commenced yet, no prejudice is going to be caused to the Appellant if the disciplinary proceedings continue.

17. Thus, no ground is made for interference with the impugned order of the learned Single Judge.

18. It may be noted here that learned counsel for the Appellant sought to invite the attention of this Court to the merits of the charge against the

Appellant. However, this Court refrains from expressing any view thereon lest it should prejudice the case of the Appellant in the departmental proceedings or the criminal trial one way or the other.

19. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs.

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2021 (III) ILR-CUT- 186

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

W.P.(C) NO. 24882 OF 2012

JAMBESWAR NAIK & ANR. .....Petitioners

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 21, 39(f) and Article 45 r/w Section 11 of the Right to Education Act – Duty of the State – There is corresponding duty and responsibility of the State on a collective reading of Article 45 & 21 of the Constitution of India to make a necessary arrangements for early childhood care and education for all children till they attain the age of Six Years and to prepare children above Three Years for elementary education. (Para 17)

(B) COMPENSATION – Two innocent young children died in Anganwadi Centre – Liability of the State arises in such cases for payment of compensation – The court directs that a sum of Rs. 10,00,000/- (Rupees Ten Lakh) be paid to each of the petitioners for the death of their two little children, further directs the authorities to ensure strict compliance with "MEASURES" as per the direction of Hon'ble Supreme Court *In Re: Measures for prevention of fatal accidents of small children*. (Paras 24, 25)

Case Laws Relied on and Referred to :-

1. 2013 (I) OLR 154 : Prabir Ku. Das -V- State of Odisha.
2. AIR 1983 SC 1086 : Rudul Sah -V- State of Bihar.
3. AIR 1993 SC 1960 : Smt. Nilabati Behera @Lalita Behera -V- State of Orissa.
4. AIR 1995 SC 922 : Consumer Education & Research Centre -V- Union of India.
5. AIR 1996 SC 2426 : Paschim Banga Khet Mazdoor Samity -V- State of West Bengal.

6. AIR 1997 SC 610 : D.K. Basu -V- Union of India.
7. AIR 1966 SC 1750 : Municipal Corporation of Delhi -V- Subhagwanti.

For the Petitioners : Mr. P.K. Das
For Opp. Parties : Mr. M.S. Sahoo, A.G.A

O R D E R Date of Order : 30.09.2021

Dr. S. MURALIDHAR, C.J.

1. The present writ petition under Article 226 of the Constitution of India has been filed by the fathers of two innocent young children who died in tragic circumstances in an Anganwadi Centre (AWC) operating in the premises of a Government School in Angul District on 7th September, 2012. The prayers in the present petition are as follows:

> (i) For conducting an inquiry, fixing responsibility and ensuring initiation of criminal proceedings against those responsible for the tragic death of the two young children;
> (ii) To pay compensation of Rs.10 lakhs to each Petitioner;
> (iii) To issue a set of guidelines/directions with regard to safety of children while undertaking construction work in the premises of the School.

2. The background facts are that Monalisa Naik, the daughter of Jambeswar Naik (Petitioner No.1) and Priyanka Das, the daughter of Pitabas Das (Petitioner No.2), both the children aged 4 years, went to the AWC operating in the premises of the Tentulihata Project Upper Primary School (hereafter 'the School') under the Banarpal Block in Angul District on 7th September, 2012. When the children failed to return after the AWC closed, the Petitioners tried to search for them. They learnt that the bodies of the two children were found by the students of the School in the waterlogged pits excavated in the premises of the School. The bodies were then recovered and sent to the local nursing home where they were declared brought dead by the doctor. The photographs of the deceased children and the water filled pits have been enclosed with the petition.

3. It is pointed out by the Petitioners that the pits that were excavated within the school premises were left un-barricaded by the school authorities. These pits had been excavated for laying the foundation for new classrooms. On account of the failure to put in place any protective measure, the tragic incident occurred. It is submitted that two precious young lives were lost on

account of the grave negligence of the School authorities in keeping the pits filled with water unguarded. Invoking Article 21 of the Constitution for violation of the right to life of the two little children, their respective parents have filed the present petition seeking the aforementioned reliefs. It is pointed out that apart from a sum of Rs. 20,000/- paid to each of the families by the local District Administration, no other relief has been granted. It is pointed out that both the Petitioners belong to the Scheduled Castes and are among the economically weaker sections.

4. In response to the petition, the District Social Welfare Officer (DSWO), Angul has filed a counter affidavit. The fact that both children died on 7th September 2012 due drowning in the pits excavated inside the School campus is not denied. It is stated that the School Managing Committee (Managing Committee) of the School was undertaking construction of additional classrooms for which the pits had been excavated. It is pointed that the work was halted on account of heavy rain fall. Both pits had been filled with rain water upto a depth of 4.5 feet. Both girls admittedly fell inside the pits and died due to drowning. At around 2.30 pm, the dead bodies were recovered from the water pits and sent to the local nursing home where they were declared brought dead.

5. In a weak attempt at shifting the blame, it is sought to be suggested by the DSWO that the incident occurred beyond the working hours of the AWC i.e. 9 am to 12.30 pm and during that time, the children were in the custody of their respective parents. Further, it is sought to be alleged that there is a footpath to move from the house to the main road, but the family members as well as the deceased girls normally used to move through the school campus to reach the main road. This way the parents are sought to be assigned with contributory negligence.

6. The DSWO states that the Headmaster of the School had been placed under suspension on 11th September, 2012. Instructions are said to have been communicated to all concerned on 7th September 2012 itself for taking appropriate measures to prevent such incidents.

7. Interestingly, the said letter dated 7th September 2012, a copy of which has been enclosed as Annexure-B to the affidavit dated 23rd April 2013 of the District Social Welfare Officer, encloses a copy of a letter dated 27th August 2012 of the Director, Social Welfare, Odisha asking that appropriate steps should be taken for implementing the guidelines of the Supreme Court

and seeking an action taken report to be sent for compliance to the National Commission for Protection of Child Rights (NCPCR) within a week's time. This letter dated 27th August 2012 was addressed to all Collectors and enclosed the order passed by the Supreme Court of India in Writ Petition (C) No.36 of 2009 along with a copy of a letter dated 26th July 2012 of the NCPCR. This letter of the NCPCR enclosed an order dated 11th February 2010 of the Supreme Court of India in Writ Petition (C) No.36 of 2009 (***In Re: Measures for prevention of fatal accidents of small children due to their falling into abandoned bore wells and tube wells v. Union of India & Ors***). The NCPCR reminded the State Governments that the guidelines set out in the order "are to be strictly adhered to by the concerned Departments/Authorities of the State Governments/UT Administrations in the best interest of the children." The NCPCR sought "coherent Action Plan" prepared by the State for implementing the Supreme Court guidelines and also setting up the complaints/grievances redressal mechanism at the State, District, Block and Panchayat levels and to give wide publicity to the same through the print and electronic media.

8. On 8th March 2013, the Superintendent of Police, Angul and the Officer-In-Charge, Banarpal Police Station filed their joint counter affidavit confirming the incident. This affidavit correctly mentions the names of two deceased children as Kumari Monalisha Naik and Kumari Priyanka Naik both aged four years. The inquiry in the U.D. Case No.13 dated 7th September 2012 registered at Banarpal Police Station revealed the cause of death of the two children as "their accidental fall in the excavated pits logged with rain water" in the premises of the School. The postmortem report is stated to have determined the cause of death as "asphyxia and shock (laryngeal spasm)." It is stated that the Assistant Surgeon of the District Headquarters, Angul has in a subsequent report clarified that "death may be due to drowning (dry drowning)." Copy of the postmortem report has been enclosed with the affidavit.

9. The present petition was listed once on 31st January 2013, when notice was issued and next on 15th March 2021 when this Court directed its final hearing to take place on 11th May, 2021. Finally, the hearing concluded and orders were reserved on 9th September, 2021.

10. Mr. P.K. Das, learned counsel appearing for the Petitioners has relied on this Court's decision in ***Prabir Kumar Das v. State of Odisha 2013 (I) OLR 154*** where while dealing with death of seven children below five years

due to the collapse of the wall of an AWC, this Court directed the State to pay Rs.5 lakh to the parents of each of the deceased children and issued a set of directions. Mr. Das has pointed out that the said judgment was delivered on 20th November 2012 around two months after the tragic incident of death of two little children forming the subject matter of the present petition.

11. Mr. Sahoo, learned Additional Government Advocate for the State-Opposite Parties has not disputed the basic facts. However, he has contended that there could be contributory negligence on the part of the parents since the children who had fallen into the pits at a time beyond the normal working hours of the AWC.

12. The Court finds that the basic facts are not in dispute. Importantly, there is no denial of the fact that the three pits had been excavated in the school premises for construction of additional classrooms and that the 4 ½ feet pits were left open without any barricade. The photographs enclosed with the present petition show that the rainwater filled pits were left unguarded. There is no warning sign anywhere. The counter affidavits by the DSWO and the Police do not deny that the excavated pits were fully filled with water on account of the rain and are unbarricaded. What is also not in dispute is that both the young children fell into the pits and drowned to their death.

13. It is not possible for the Court to accept the suggestion of the Opposite Parties that there was an element of contributory negligence of the parents in the death of the two little children. One of the children appears to have been enrolled in the AWC. The fact is that the children did go to the AWC operating in the School premises. The affidavit filed by the Police setting out the above facts is as a result of a detailed inquiry. It does not suggest that the deaths occurred beyond the working hours of the AWC or that there was any contributory negligence of the parents.

14. While it is possible to envision that the School provided a convenient passage to the main road, the fact remains that the two children went to the School only because the AWC was operating there. With there being no barricades, no warning boards or signs, there is no way the two young children would have known that there were water filled pits, of 4 ½ feet which they had to avoid stepping into. The lack of barricading of the pits or any warning sign appears to be the reason why they met with a tragic death. There can be no doubt therefore that there was gross negligence on the part of

The School Management/Administration and for that matter the District Administration in not barricading these pits. The School authorities owed a duty of care to all those who were likely to visit its premises and with the AWC being located therein, it was expected that the School authorties would be conscious that young children were bound to visit it.

15. Turning to the order passed by the Supreme Court on 11th February 2010 in Writ Petition (C) No.36 of 2009 (**In Re: *Measures for prevention of fatal accidents of small children*** (*supra*), it appears to have addressed the problem of the dangers posed to the life and safety of young children by abandoned bore wells and tube wells. However, the order did underscore the duty of care owed by State authorities to unwary wayfarers, of young age, who might unknowingly get trapped in the unguarded drilled well left abandoned. The safety norms that have been put in place and formed part of the order of the Supreme Court read thus:

> "SAFETY NORMS
>
> 1. Construction of Cement/concrete platform measuring 0.50 x 0.50 x 0.6m (0.3 m above ground level and 0.3 m below ground level) around the well casing.
> 2. Capping of well assembly by welding steel plate.
> 3. Erecting a chain link fence of 3 x 3m around the well.
> 4. Filling up the mud pits and channels after completion of drilling operations.
> 5. Filling up of abandoned bore wells by boulders/pebbles.
> 6. Erection of sign-board near the well with detailed address at the time of construction of well."

16. The above norms would obviously apply to any similar pits or holes excavated for the purposes of construction or any allied activity which can attract the children even out of curiosity and who may meet with tragic accidents for no fault of theirs. In the present case, there was a complete absence of any standard of care or even anticipation of the likely danger posed by an unguarded excavated pit 4 ½ feet of depth.

17. As part of the right to education of young children, it is within the ambit of Article 45 of the Constitution, which requirs the State to "endeavour to provide early childhood care and education for all children until they complete the age of six years" that a safe and secure environment is provided even to children attending AWCs. On a conjoint reading of Article 21, 39(f) and Article 45 of the Constitution read with Section 11 of the Right to

Education Act it appears that the right to life and the right to education of children encompasses all elements that comprise the receiving of education in a healthy and safe enviroment. There is a corresponding duty and responsibility of the State on a collective reading of Articles 45 and 21 of the Constittuion of India to make necessary arrangements for early childhood care and education for all children till they attain the age of six years and to prepare children above three years for elementary education.

18. The liability of the State to provide reparation for constitutional torts arising from acts of omission and commission of state entities has been recognised by the Supreme Court of India and the High Courts in a series of decisions beginning with ***Rudul Sah v. State of Bihar AIR 1983 SC 1086*** followed by ***Smt. Nilabati Behera @ Lalita Behera v. State of Orissa AIR 1993 SC 1960; Consumer Education and Research Centre v. Union of India AIR 1995 SC 922*** and ***Paschim Banga Khet Mazdoor Samity v. State of West Bengal AIR 1996 SC 2426***.

19.1 In ***Nilabati Behera v. State of Orissa*** *(supra)*, the Supreme Court explained the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in action on tort. The Court said:

> "It may be mentioned straightway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defense in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings."

19.2 After referring to the decision of the Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2), (1978) 2 All ER 670*, the Supreme Court in ***Nilabati Behera*** held:

> "It follows that a claim in public law for compensation 'for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental rights is distinct from, and in addition to, the remedy in private

> law for damages for the tort' resulting from the contravention of the fundamental right. The defense of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defense being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental rights is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights."

19.3 In the same decision, the Supreme Court explained that public law proceedings serve a different purpose than the private law proceedings. It observed:

> "The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

19.4 Again in ***Nilabati Behera***, the Supreme Court it was explained that the remedy under Article 32 or 226 would be granted once it was established that there has been an infringement of fundamental rights of the citizen and no other form of appropriate redressal by the Court in the facts and circumstances of the case is possible. It was emphasised that "this remedy in public law has to be more readily available when invoked by the have nots who are not possessed of the wherewithal for enforcement of their rights in private law, even though this exercise is to be tempered by judicial restraint to avoid circumvention by private law remedy when more appropriate."

20. The dictum in ***Nilabati Behera*** has been consistently applied in later cases, the prominent among which is ***D.K. Basu v. Union oif India AIR 1997 SC 610***. Therefore, applying these principles, and considering the fact that there is no dispute as to how and in what circumstances the two children died, there is no difficulty in this Court holding the State officials liable for the death of the two helpless little children of the two Petitioners, and requiring the state authorities to pay compensation for violation of the fundamental right to life of the two children.

21. The undisputed facts are that the two children fell into rainwater filled pits of 4 ½ feet depth and drowned. That the deaths were on account of the sheer negligence of the Scholl authorities in leaving the pits unbarricaded and with no warning signs stands established in the police inquiry as well as the post mortem reports that have been placed on record. In the considered view of the Court, this is a case where apart from the principle of strict liability the principle of *res ipsa loquitur* would also apply.

22.1 In ***Municipal Corporation of Delhi v. Subhagwanti AIR 1966 SC 1750***, the facts were that the legal heirs of three persons, viz., Shri Ram Parkash, Shrimati Panni Devi and Sant Gopi Chand who died as a result of the collapse of the Clock Tower situated opposite the Town Hall in the main Bazar of Chandini Chowk, Delhi belonging to the Municipal Corporation of Delhi (MCD) filed three suits for damages. The question that arose was whether the MCD was negligent in looking after and maintaining the Clock Tower and was liable to pay damages for the death of the persons resulting from its fall? The contention of the MCD that the fall of the Clock Tower was due to an inevitable accident which could not have been prevented by the exercise of reasonable care or caution and that there was nothing in the appearance of the Clock Tower which should have put the MCD on notice with regard to the probability of danger was rejected by the Supreme Court. It was observed;

> "It is true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies where the circumstances surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part. The principle has been clearly stated in Halsbury's Laws of England 2nd Edn., Vol. 23, at p. 671 as follows:
>
> An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence tells its own story of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defense, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part.
>
> In our opinion, the doctrine of res ipsa loquitur applies in the circumstances of the present case."

22.2 In the same decision, the Supreme Court further considered whether the MCD as the owner of the Clock Tower abutting the highway was bound to maintain it in proper state of repair so as not to cause any injury to any member of the public using the highway and whether the MCD was liable "whether the defect is patent or latent." It answered the issue thus :

> "The finding of the High Court is that there is no evidence worth the name to show that any such inspections were carried out on behalf of the appellant and, in fact, if any inspections were carried out, they were of casual and perfunctory nature. The legal position is that there is a special obligation on the owner of adjoining premises for the safety of the structures which he keeps besides the highway. If these structures fall into disrepair so as to be of potential danger to the passers-by or to be a nuisance, the owner is liable to anyone using the highway who is injured by reason of the disrepair. In such a case it is no defense for the owner to prove that he neither knew nor ought to have known of the danger. In other words, the owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect."

22.3 In conclusion, it was held by the Supreme Court that the MCD was "guilty of negligence because of the potential danger of the Clock Tower maintained by it having not been subjected to a careful and systematic inspection which it was the duty of the appellant to carry out." This was followed in ***Sham Sundar v. State of Rajasthan AIR 1974 SC 890*** where it was held:

> "The principal function of the maxim is to prevent injustice, which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it even when the facts bearing on these matters are at the outset unknown to him and often within the knowledge of the defendant.
>
> The plaintiff merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine of *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability."

23. In ***Darshan v. Union of India 1999 (79) DLT 432*** the Delhi Court was dealing with a claim by the widow and minor children of a bus driver who had fallen into an open manhole and died of drowning. On the facts of the case, it was held that it was a case of *res ipsa loquitur*, and therefore compensation could be awarded under Article 226 The Court:

> "Compensation had also been awarded by this Court as well as by the Apex Court in writ jurisdiction in several cases of custodial deaths. Coming to instant case, it is one of res ipsa loquitur, where the negligence of the instrumentalities of the State and dereliction of duty is writ large on the record in leaving the manhole uncovered. The dereliction of duty on their part in leaving a death trap on a public road led to the untimely death of Skattar Singh. It deprived him of his fundamental right under Article 21 of the Constitution of India. The scope and ambit of Article 21 is wide and far reaching. It would, undoubtedly, cover a case where the State or its instrumentality failed to discharge its duty of care cast upon it, resulting in deprivation of life or limb of a person. Accordingly, Article 21 of the Constitution is attracted and the petitioners are entitled to invoke Article 226 to claim monetary compensation as such a remedy is available in public law, based on strict liability for breach of fundamental rights."

24. In the present case too, the Court finds that the death of two little children was entirely avoidable and would not have occurred if barricades had been erected around the excavated pits. A clear case is made out for grant

of compensation for violation of the constitutional right to life of the two young children resulting in their needless deaths at a very young age. Keeping in view all of the above circumstances, the Court directs that a sum of Rs.10,00,000/- (ten lakh) be paid to each of the Petitioners for the deaths of their two little children in the capacity as their respective fathers. The amount shall be paid by the District Administration within a period of four weeks from today and compliance affidavits shall be filed in the Court on or before 1st November, 2021. If there is non-compliance with this direction the Registry will list this matter before the Court for appropriate orders. A copy of this order shall be sent to the Collector, Angul to ensure that the compensation amount is disbursed to both the Petitioners forthwith.

25. Additionally, directions are issued to the Collectors of all the thirty districts in Odisha to ensure strict compliance with the directions of the Supreme Court ***In Re: Measures for prevention of fatal accidents of small children*** (*supra*) and extend those MEASURES not just to bore wells or tube wells, but even construction sites and other places where it is likely that young children might meet with fatalities for lack of awareness and adequate safety measures. A copy of this order shall also be sent to the Odisha State Commission for Protection of Child Rights (OSCPCR) and the National Commission for Protection of Child Rights (NCPCR) for information.

26. The writ petition is disposed of in the above terms.

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2021 (III) ILR-CUT- 197

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

W.A. NOs. 401 & 474 OF 2021
AND
CONTC NOs. 1378 OF 2017 & 481 OF 2019

SECRETARY, GOVT. OF ODISHA, DEPT. OF HIGHER EDUCATION ..... Appellant

.V.

SHRI JASHOBANTA BARAL & ORS. .....Respondents

(A) CONTEMPT OF THE COURTS ACT, 1971 – Section 19 – Writ Appeal – Where the High Court, in a contempt proceeding renders a decision on the merit of a dispute between the parties, either by an interlocutory order or final judgment, whether it is appealable under

section 19 of the Contempt of Court Act, 1971 – Held, yes – In the light of the judgment in Midnapore People's Co-op. Bank Ltd -V- Chunilal Nanda (2006) 5 SCC 399, an intra-court appeal is maintainable.

(Paras 35, 42)

(B) DOCTRINE OF NEGATIVE EQUALITY – There is no concept of negative equality under Article 14 of the Constitution of India – It is the law that, the right to equality cannot be claimed in a case where a benefit has been given to a person contrary to law.

Case Laws Relied on and Referred to :-

1. (2019) 19 SCC 626 : State of Odisha v. Anup Kumar Senapati.
2. (2006) 5 SCC 399 : Midnapore Peoples' Co-op. Bank Ltd. v. Chunilal Nanda.
3. (2010) 6 SCR 291 : Secretary, Cannanore District Muslim Educational Association v. State of Kerala.
4. AIR 1990 SC 464 : Noorali Babul Thanewala v. K.M.M. Shetty.
5. (2014) 7 SCC 416 : Bihar State Government Secondary School Teachers' Association v. Ashok Kumar Sinha.
6. AIR 1978 SC 1014 : Purshotam Das Goyal v. Hon'ble Mr. Justice B.S. Dhillon.
7. (2006) 8 SCC 662 : Union of India v. Madras Telephones SC & ST Social Welfare Association.
8. 2018 (II) OLR 932 : State of Odisha v. Lokanath Behera.
9. (2009) 1 SCC 180 : M/s Sethi Auto Service Station v. Delhi Development Authority.
10. AIR 1963 SC 395 : Bachhitar Singh v. State of Punjab.
11. (2003) 5 SCC 413 : Laxminarayan R. Bhattad v. State of Maharashtra.
12. (2020) 15 SCC 546 : Hav (OFC) RWMWI Borgoyary v. Union of India.

For Appellant(s) : Mr. Ashok Ku. Parija, Advocate General
Mr. M.S. Sahoo, A.G.A
Mr. S.N. Das, A.S.C.

For Respondents : Mr. S.C. Tripathy (in WA 401/2021 & CONTC 1378/17)
Mr. Bharat Sangal, Sr. Adv.(in WA 474/2021 & CONTC 481/19)
Mr. S.N. Patnaik (For Intervener)

JUDGMENT Date of Judgment : 29.10.2021

Dr. S. MURALIDHAR, C.J.

1. These are two writ appeals by the State of Odisha in the Department of Higher Education (DHE) challenging the orders dated 16th April, 2015 passed by the learned Single Judge in W.P.(C) Nos.14603 of 2010 and 18488 of 2021 respectively as well as the orders dated 5th February 2021, 16th March 2021, 15th April 2021 and 29th April 2021 in Contempt Case No.1378 of 2017 as well as the order dated 5th February, 2021 in Contempt Case No.481 of 2019.

2. As far as the first writ appeal, W.A. No.401 of 2021 is concerned, while directing notice to issue in the appeal this Court stayed the order dated 29th April, 2021 passed by the learned Singe Judge in Contempt Case No.1378 of 2017. As far as W.A. No.474 of 2021 is concerned, while issuing notice in the said appeal on 18th August, 2021 the impugned order of the learned Single Judge was stayed.

Background facts

3. The background facts are that in 1985-86 the Indrabati Mahavidyalaya, Jaypatna in the district of Kalahandi was established by the Upper Indrabati Project and was being managed by the Department of Energy of Government of Odisha. In the year 1990-91 Indrabati Project College, Khatiguda in the district of Nawarangpur was also established by the Upper Indrabati Project and was managed by the same Department of Energy (DoE), Government of Odisha.

4. On 1st June, 1994 Section 7C was inserted in the Orissa Education Act, 1969 (OE Act) for regulation of grant-in-aid to the private educational institutions. The relevant Sections 7C (1) and 7C (6) of the OE Act read as under:

> "7-C (1) The State Government shall within the limits of its economic capacity, set apart a sum of money annually for being given as grant-in-aid to private educational institution in the State."
>
> "7-C (6) No educational institution imparting any other courses of studies except those provided in sub-section (5) shall be eligible for grant-in-aid from Government. Educational institutions established and/or managed by Urban Local Bodies, Zilla Parishads, Panchayat Samitis and Gram Panchayats, Public Sector Undertakings or Companies or Statutory bodies shall not be eligible for grant-in-aid under this Act."

5. Simultaneously, the grant-in-aid (GIA) Order 1994 was promulgated in terms of new Section 7-C of the OE Act. Under the provisions of the GIA Order 1994, Non-Government educational institutions were entitled *inter alia* to receive full salary cost in the form of aid. 1/3rd of the salary cost shall be paid to persons duly appointed against admissible posts with effect from 1st June, 1994; 2/3rd after three years and full cost two years thereafter i.e. with effect from 1st June, 1998. This was almost at par with the corresponding employees of the State Government educational institutions and it was applicable to both teaching and non-teaching staff.

6. On 1st April, 1996 the Management of the aforesaid two educational institutions was transferred to the Odisha Hydro Power Corporation (OHPC). As far as Indrabati Project College is concerned, the building consisted of 41 rooms. The land belonged to the Irrigation Department under control of the DoE. There were 12 teaching and 13 non-teaching staffs. The recurring monthly expenditure was being borne by the project but it was subsequently frozen by the OHPC. Since the college was being managed by a public sector undertaking it was not eligible for GIA under Section 7C (6) of the OE Act and therefore, was not declared as an aided college.

7. Likewise, the Indrabati Mahavidyalaya was under the control of the OHPC and got government concurrence in 1985-86 in Arts and Science and permanent concurrence from 1992-93 with 128 seats in Arts and 64 seats in Science. The buildings of the college were situated over both government and private land consisting of 15 rooms with library and laboratory. There were 12 teaching and 23 non-teaching staff. Both the institutions were being financed by the OHPC.

8. On 5th February, 2004 the GIA Order 2004 was promulgated thereby repealing the earlier GIA Order, 1994. Under the GIA Order 2004 the concept of payment of full salary cost was done away with. The GIA Order, 2004 provided for Block Grant (i.e., partial grant to employees of private educational institutions) keeping in view the economic capacity of the State. Only a part of the salary was to be granted in the form of aid. Para 4 of the GIA Order, 2004 reads as under:

> **"4.** ***Repeal and saving-*** (1) The Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-aid Order, 1994 is hereby repealed, save for the purposes mentioned in sub-para (1) or para 3.
>
> (2) Notwithstanding the repeal under sub-para(l), the private educational institutions which are in receipt of any grant-in-aid from Government under the Order so repealed immediately before the date of commencement of this Order shall continue to receive such grant-in-aid as if the Grant-in-aid Order, 1994 had not been repealed."

9. It must be mentioned here that subsequently for different types of private educational institutions and for teaching and non-teaching staff of such institutions, the Government of India introduced Block Grant schemes through the GIA Orders 2008 and 2009, the GIA Order 2009 for Sanskrit College, GIA Order 2014 and GIA Order 2017.

10. The Respondents in W.A. No.401 of 2021, i.e. Shri Jashobanta Baral and nine others, working as lecturers in Indrabati Project College, Khatiguda, Nawarangpur filed W.P.(C) No.14603 of 2010 in this Court for a direction to the State Government to extend the benefit of GIA Order 1994 to them. Bishnupriya Mohanty and seventeen others working as teaching and non-teaching staff/ employees in the Indrabati Higher Secondary School, Jaypatna, including some of whom had retired, filed Writ Petition (Civil) No.18488 of 2010 in this Court for a direction to extend the salary benefit of GIA Order 1994 to them. A further direction was sought for the Government to take over the control of the educational institutions.

11. On 14th December, 2012 a High-Powered Committee (HPC) comprising the Minister in the DoE as Chairman along with the ministers of the Department of School and Mass Education (SME), DHE, Department of Science and Technology (DST) took a decision regarding the taking over of the aforementioned two institutions. A Sub-Committee was constituted by the HPC for submission of its report to the Secretary HE. The Sub-Committee in its meeting held on 1st May, 2013 suggested that the OHPC would first hand over the colleges to the District Magistrate to be managed by a private educational agency. The said agency would then apply to the Director, Higher Education for grant-in-aid. The Government in the DHE would take a decision to declare the two colleges aided under the GIA Order 1994 and authorize the Director to undertake verification of the records of the colleges for approval of posts and sanction of GIA.

12. On 23rd May, 2013 the Director, HE submitted a report on the colleges governed by OHPC. He made the following recommendations:

> "In inviting a reference to the proceedings of the meeting held in your office chamber on 1.5.2013 I am to state that Indravati Project College, Khatiguda and Indravati Mahavidyalaya, Jaipatna are private colleges aided by the Upper Indravati Project now O.H.P.C. Ltd., While the college at Jaipatna, Mukhiguda, Kalahandi has a valid Governing Body approved by the Regional Director of Education, Berhampur, the term of the G.B. of the other college has expired. The Regional Director of Education, Berhampur has been requested to appoint the Sub-Collector, Nawarangpur as President of the G.B. of Indravati Project college, Khatiguda. The Governing Bodies of the two colleges would be asked to submit proposal to include the two colleges under GIA fold provided Govt. in principle agree to extend the benefit of G.I.A. available under GIA Order, 1994 to these two colleges."

Further, in his report, the Director, Higher Education submitted:

> "If it is agreed the O.H.P.C. authority are requested to transfer movable and immovable property under the possession of the institutions in the name of said institution with the funds available in the account of the College. Inclusion of these institutions under G.I.A. fold shall be considered for releasing grant to the teaching and non-teaching staff as per the yardstick. Ways and means to sanction Grant and its quantum shall be decided keeping in view fiscal position of the State exchequer and in same footing as the contemporary institutions in the State avail grant from Government.
>
> Govt. will accord their approval to the proposal for inclusion of the two colleges in the G.I.A. fold under GIA Order, 1994 in accordance with the provisions made for left out colleges. GIA equivalent to 1/3rd of salary cost shall be paid to the person duly appointed against admissible posts w.e.f. 1.6.94, 2/3rd after three years and full cost two years hereafter, i.e. w.e.f. 1.6.98."

13. On 8th August, 2013 the Additional Secretary of the DHE submitted a proposal as follows:

> "There was a statutory constraint to extend the benefit of GIA to the colleges managed by public sector undertaking. Hence, it was suggested that OHPC would first handover the colleges to the District Magistrate to be managed by private educational agency as per existing provision. The said agency after taking over the management shall apply to Director, Higher Education for grant of GIA. The Government in H.E. Department will take a decision to declare these two colleges under relevant GIA Order and authorize the Director, Higher Education to undertake verification of records for approval of posts and sanction of GIA.
>
> The file may be endorsed through DC and Chief Secretary for necessary Government orders."

14. 13th August, 2013 the Principal Secretary, DHE granted the approval of the Additional Secretary by noting as under :

> "Notes above may kindly be perused. As mentioned above, the H.E. Dept. does not have any objection to take over these colleges which would come under the Grant in aid fold in the H.E. Dept. For kind perusal and further orders."

15. Sometime in September, 2013 the Principal Secretary, DHE directed that the matter may be placed for a decision after the elections which were to be held at that point in time.

16. The learned Single Judge dealt with not only the aforementioned two writ petitions but an entire batch of writ petitions and disposed of them by a common order dated 16th April, 2015. The order of the learned Single Judge reproduced the minutes of the HPC as well as the Sub-Committee. It noted the letter written on 23rd May, 2013 by the Director, Higher Education containing the aforementioned recommendations as well as the endorsement made by the Secretary, DHE thereon. Thereafter, the learned Single Judge directed as under:

> "As a matter of principle, the Government has taken a decision to take over the institutions under the GIA fold as such no final order has been communicated yet.
>
> In that view of the matter, this Court disposes of these writ petitions directing the Government to take immediate follow up action in compliance with the decision taken on 13.08.2013. The entire exercise shall be completed within a period of four months from the date of communication of this order.
>
> The affidavits filed in Court be kept on record."

17. According to the Appellant (State) since the above order was innocuous as it had been directed only to take a follow up action in compliance with the decision taken on 13th August, 2013, the said order was not considered to be adverse to the State. On 13th May, 2015 a meeting under the Chairmanship of the Minister of Housing and Urban Development (HUD) with the participation of the Minister, HE, ST, Commerce and Transport Energy and IT and the Principal Secretary to the Government in the Energy Department and the Officers of the OHPC being present decided that the two institutions would be notified as aided educational institutions in terms of the OE Act. On 24th October, 2017 a notification was published by the S & ME Department in compliance with the order of the learned Single Judge dated 16th April, 2015 in terms of Section 3(b) of the OE Act read with 3(1) of the GIA Order 2004 declaring the Indrabati Project College, Khatiguda and Indrabati Mahavidyalaya, Jaipatna as aided educational institutions eligible to receive block grant in terms of in terms of para 3 of the GIA Order, 2004. The notification was come into force immediately. It was stated that there will be "no arrear liability on the State" and that the Director, HE will remain responsible for the correctness of the notification and grant-in-aid extended to the eligible persons of these two colleges.

18. As far as the Petitioner in Writ Petition (Civil) No.18488 of 2010 was concerned, he immediately filed CONTC No.562 of 2016 complaining of non-compliance of the order dated 16th April, 2015. The learned Single Judge disposed of the said contempt case by order dated 6th April, 2018 granting the State four months' time to comply with the order dated 16th April, 2015 if not complied with already. As far as the Petitioners in W.P.(C) No.14603 of 2010 are concerned, they filed a contempt case i.e. CONTC No.1378 of 2017 on 15th October, 2017 complaining of non-compliance with the order dated 16th April, 2015 of the learned Single Judge. In the said contempt petition the Appellant (State) filed an affidavit bringing on record the notification dated 27th October, 2017. While the said contempt petition was pending the Petitioners in W.P.(C) No.18488 of 2010 filed another contempt petition being CONTC No.481 of 2019 again complaining of non-compliance with the order dated 16th April, 2015 of the learned Single Judge.

19. On 5th February, 2021 the learned Single Judge passed a detailed order in CONTC No.1378 of 2017 rejecting the compliance affidavit and in particular paras 6 and 7 thereof in which the notification dated 24th October, 2017 was placed on record. The learned Single Judge observed as under:

> "In view of contentions raised in paragraphs-6 and 7 of the compliance affidavit, it is made clear that the order of this Court has not been complied with, rather this Court directed to bring the institution under the fold of Grant-in-aid order, 1994. There is no justification to include the institution under the fold of Grant-in-Aid Order, 2004 and that itself amounts to deliberate and willful violation of the order passed by this Court.
>
> Mr. S.N. Nayak, learned Additional Standing Counsel for the State seeks time to obtain instructions to that extent."

20. On the same day, in CONTC Case No.481 of 2019 filed by Smt. Bishnu Priya Mohanty and others who are Petitioners in W.P.(C) No.18488 of 2010 the learned Single Judge after reproducing the operative portion of the order dated 16th April, 2015 observed as under:

> "In view of the above, there is no iota of doubt that the Government has to extend the benefit of Grant-in-Aid to the institution as per Grant-in-Aid Order, 1994."

21. It was then ordered that the said CONTC No.481 of 2019 should be placed after two weeks along with the CONTC No.1378 of 2017.

22. Aggrieved by the order dated 5th February, 2021 in CONTC No.1378 of 2017 the Appellant (State) filed SLP (C) No.4967 of 2021 in the Supreme Court of India. One of the grounds urged in the said SLP was that they had never been of HPC to bring the subject colleges, teaching staff under the fold of GIA Order 1994 which had already been repealed by GIA Order of 2004. Reliance was placed on the decision of the Supreme Court of India ***in State of Odisha v. Anup Kumar Senapati (2019) 19 SCC 626*** (judgment dated 16th September, 2019) in terms of which benefit under GIA Order 1994 could not be extended after its repeal. It was further contended that file notings would not amount to a final decision of the Department or confer on an educational institution the right to claim under the GIA Order 1994.

23. On 6th April, 2021 the Supreme Court disposed of the aforementioned SLP (C) No.4976 of 2021 after hearing counsel for the Respondents herein i.e. the writ Petitioners by the following order:

> "This Special Leave Petition is disposed of with observation that the personal presence of the alleged contemnors be dispensed with by the High Court until the final order is passed by it in the pending contempt petition, after considering the rival submissions in those proceedings.
>
> If adverse order is passed against the petitioner or the officers of the State, that may not be given effect to for a period of one week from the date of the order to enable the petitioner to take recourse to appropriate remedy, as may be advised.
>
> The Special Leave Petition is disposed of accordingly.
>
> Pending applications, if any, stand disposed of."

24. CONTC No.1378 of 2017 was thereafter listed before the learned Single Judge on 15th April, 2021 and the following order was passed:

> "The matter is taken up through video conferencing mode.
>
> Heard Mr. B. Routray, learned Senior Counsel appearing along with Mr. S.K. Samal, learned counsel for the petitioners and Mr. S.N. Nayak, leaned Additional Standing Counsel for opposite party-contemnor.
>
> It is brought to the notice of this Court that the State had preferred SLP (Civil) No. 4967 of 2021 against the order dated 05.02.2021, wherein this Court found that opposite party-contemnor to have deliberately and willfully violated the order dated 16.04.2015 passed

by this Court in WP(C) No. 14603 of 2010. The apex Court, on consideration of aforesaid SLP, on 06.04.2021 passed the following order:

"This Special Leave Petition is disposed of with observation that the personal presence of the alleged contemnors be dispensed with by the High Court until the final order is passed by it in the pending contempt petition, after considering the rival submission in the those proceedings.

If adverse order is passed against the petitioner or the officers of the State, that may not be given effect to for a period of one week from the date of the order to enable to petitioner to take recourse to appropriate remedy, as may be advised.

The Special Leave Petition is disposed of accordingly. Pending applications, if any, stand disposed of."

After the order was passed on 05.02.2021, the matter was listed before this Court on 10.03.2021, when learned State Counsel sought time to obtain instructions whether the order dated 05.02.2021 has been complied with or not by the opposite party, and the matter was directed to be listed on 16.03.2021. On that date, this Court, taking note of the fact the State had already preferred appeal against the order dated 05.02.2021, also observed that the opposite party has violated the order passed by this Court deliberately and willfully. Subsequently, on 17.03.2021, the Principal Secretary, Higher Education Department appeared in person and undertook to comply with the order dated 16.04.2015 passed by this Court in WP(C) No. 14603 of 2010 and sought time for the said purpose. Accordingly, this Court allowed 10 (ten) days time to comply with the aforesaid order. Again, the matter was listed on 30.03.2021 and on that date, it was found that the Principal Secretary, Higher Education has not complied with the order dated 17.03.2021, as per undertaking given by him. Therefore, this Court also made observation that the opposite party deliberately and willfully violated the order dated 16.04.2015 passed by this Court in WP(C) No. 14603 of 2010.

The factum of non-compliance of the order passed by this Court perhaps has not been placed before the apex Court in proper manner for consideration. In any case, since the Principal Secretary to the Government of Odisha in Higher Education Department has already undertaken before this Court for compliance of the order dated

16.04.2015 passed by this Court in WP(C) No. 14603 of 2010, non-compliance of the same is contemptuous in nature. On 06.04.2021, the Principal Secretary, Higher Education Department appeared in person and filed compliance affidavit stating that he will have an interdepartmental discussion with the Secretary, School and Mass Education Department for compliance of the order dated 16.04.2015 passed by this Court in WP(C) No. 14603 of 2010 and sought time for the said purpose. Accordingly, time was granted till 15.04.2021, but till date, he has not complied with the said order passed by this Court. It is seen that an officer like the Principal Secretary of the Government of Odisha in Higher Education Department holding such a higher rank in the State administration is showing scant regard to the orders of this Court and despite continuous undertaking is flouting the orders passed by this Court deliberately and willfully, which is contemptuous in nature. Therefore, this Court is constrained to call upon the Principal Secretary to the Government of Odisha in Higher Education Department to show cause as to why he shall not be suitably punished under the provisions of Contempt of Courts Act for willful and deliberate violation of orders of this Court dated 16.04.2015 passed in WP(C) No. 14603 of 2010, which shall be filed by 20.04.2021 positively.

Put up this matter on 22.04.2021."

25. Thereafter it was again listed 29th April, 2021 when the following order was passed by the learned Single Judge:

"The matter is taken up by video conferencing mode.

Heard Mr. H.M. Dhal, learned Additional Government Advocate and Mr. B. Routray, leaned Senior Counsel appearing along with Mr. S.D. Routray, learned counsel for the petitioner.

Mr. S. Mishra, Principal Secretary, Higher Education Department, Govt. of Odisha has filed compliance affidavit incorporating the document as Annexure-A stating that the institutions, namely Indrabati Project Higher Secondary School, Khatiguda in the district of Nawarangapur and Indravati Higher Secondary School, Jaipatna in the district of Kalahandi have been re-notified by the State Government to receive Grant-in-Aid in terms of the provisions of the Orissa (Non-Government Colleges, Junior Colleges and Higher

Secondary Schools) Grant-in-Aid Order, 1994 w.e.f. 01.06.1994. It is also stated that the Director, Higher Secondary Education will remain responsible for the entitlement of Grant-in-Aid extended to the eligible persons of the aforesaid Higher Secondary Schools.

In that view of the matter, since the Government has already issued notification for extension of Grant-in-Aid in terms of the Grant-in-Aid Order, 1994 w.e.f. 01.06.1994 in favour of the eligible persons of the aforesaid institutions, let the amount be calculated and disbursed to each eligible person by 06.05.2021. To that effect an affidavit shall be filed by the Secretary, Higher Education Department on the next date.

Put up this matter on 07.05.2021."

26. It was at that stage that on 30th April, 2021 Writ Appeal No.401 of 2021 was filed by the State. At the hearing of the said appeal on 31st May, 2021 the following order was passed by this Court:

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

2. The State of Odisha through the Secretary, Department of Higher Education has preferred this appeal against a series of orders passed by the learned Single Judge on 5th February, 16th March, 15th April and 29th April, 2021 in CONTC No.1378 of 2017.

3. At the outset Mr. A.K. Parija, learned Advocate General appearing for the Appellant states that although in the prayer clause there is also a challenge to an order dated 16th April, 2015 passed by the learned Single Judge in W.P.(C) No.14603 of 2020, he does not press the appeal as far as the said order is concerned since according to the Appellant the said order is not adverse to it. Accordingly the Appellant confines the challenge in this appeal to the aforementioned four orders passed by the learned Single Judge in CONTC No.1378 of 2017.

4. When asked about the maintainability of the present appeal against the orders passed in contempt proceedings by the learned Single Judge, Mr. Parija places reliance on the judgment of the Supreme Court in ***Midnapore Peoples' Cooperative Bank Ltd. v. Chunilal Nanda (2006) 5 SCC 399*** and in particular to the following portion in paragraph-11 of the said judgment which spells out what the remedy is in such situations and reads thus:

"11(V) If the High Court, for whatsoever reason, decides an issue or makes any direction relating to the merits of the dispute between the parties, in a contempt proceeding, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

5. Mr. Parija further points out that against the order dated 5th February, 2021 passed in CONTC No. 1378 of 2017 by the learned Single Judge, the present Appellant had filed SLP (C) No. 4967 of 2021 before the Supreme Court of India, which SLP came to be disposed of by the Supreme Court on 6th April, 2021 by the following order:

"This Special Leave Petition is disposed of with observation that the personal presence of the alleged contemnors be dispensed with by the High Court until the final order is passed by it in the pending contempt petition, after considering the rival submissions in those proceedings.

If adverse order is passed against the Petitioner or the officers of the State, that may not be given effect to for a period of one week from the date of the order to enable the Petitioner to take recourse to appropriate remedy, as may be advised.

The Special Leave Petition is disposed of accordingly.

Pending applications, if any, stand disposed of."

6. Mr. Parija submits that thereafter the learned Single Judge has passed the further three orders. Inasmuch as the order dated 15th April, 2021 of the learned Single Judge holds that the Principal Secretary in the HE Department has flouted the orders passed by the learned Single Judge, "deliberately and willfully which is contemptuous in nature", the said order is adverse to the Appellant. The further order dated 29th April 2021 directs that the monetary benefits as a result of implementation of the order dated 15th April 2021 should be disbursed to the Respondents and that order too, therefore, is adverse to the Appellant. Accordingly, he submits that the present appeal against the said adverse orders, in terms of the order dated 6th April, 2021 by the Supreme Court read with the judgment in ***Midnapore Peoples' Cooperative Bank Ltd.*** *(supra)* is maintainable before this Court.

7. Mr. Suresh Tripathy, learned Senior counsel appearing for the Respondents on advance notice submits that he needs some more time to study the aforementioned judgment and any other decisions as regards the maintainability of the present appeal.

8. While reserving the right the Respondents to argue the issue of maintainability on the next date, the Court issues notice in the present appeal. Mr. Tripathy accepts notice on behalf of all Respondents. He is permitted to file an affidavit in response, which would include the issue regarding maintainability of the present appeal, at least one week before the next date.

9. Considering the fact that the Appellant, as noted by the learned Single Judge in the order dated 29th April, 2021, has issued a notification in purported compliance of the earlier orders of the learned Single Judge, at the pain of contempt, and has now been asked to disburse the amounts calculated to each eligible person by 6th May 2021, the Court is of the view that at this stage the balance of convenience in staying further proceedings in CONTC No.1378 of 2017 is in favour of the Appellant.

10. Accordingly, it is directed that till the next date of hearing, all further proceedings in CONTC No.1378 of 2017 as well as the operation of the order dated 29th April 2021 passed therein shall remain stayed.

11. List on 18th August, 2021."

27. Thereafter on 21st June, 2021 the State filed Writ Appeal No.474 of 2021 in which it challenged the orders passed by the learned Single Judge on 16th April, 2015 in W.P.(C) No.18488 of 2010 and the order dated 5th February, 2021 in CONC Case No.481 of 2019. The said writ appeal was listed along with W.A. No.401 of 2021 on 18th August, 2021 when notice was issued and the impugned order was stayed.

28. On the same date in W.A. No.401 of 2021, I.A. No.1579 of 2021 being an application filed by Smt. Bishnupriya Mohanty and 17 others who were the Petitioners in W.P.(C) No.18488 of 2010 seeking to intervene in W.A. No.401 of 2021 was taken up. Since W.A. No.474 of 2021 was already on board, this Court declined to entertain the said application and disposed it of accordingly.

29. On 15th September, 2021 I.A. No.1732 of 2021 was taken up by this Court in W.A. No.401 of 2021 permitting the Respondents in the appeal to file documents which were not earlier produced before the learned Single Judge. Time was granted to the learned Advocate General appearing for the Appellant (State) to examine the said documents.

30. This Court has examined the additional documents filed by the Respondents in the said writ appeal as well as the documents filed on behalf of the State (Appellant) in response to those documents.

31. This Court has heard the submissions of Mr. Ashok Parija, learned Advocate General; Mr. M.S. Sahoo, learned Additional Government Advocate and Mr. S.N. Das, learned Additional Standing Counsel on behalf of the Appellants (State). The submissions of Mr. Suresh Chandra Tripathy and Mr. Bharat Sangal learned Senior Advocates on behalf of the Respondents in both the writ appeals along with Mr. S.N. Pattnaik, learned counsel have also been heard. The written submissions filed by the parties have also been considered.

Submissions on behalf of the Appellant State

32. On behalf of the Appellant, it was submitted as under:

(i) In terms of Section 7-C (6) of the OE Act, educational institutions established and/or managed by public sector undertakings "shall not be eligible for grant-in-aid". It was for this reason that for many years thereafter the two educational institutions which were managed by OHPC were not extended the benefit under the GIA Order 1994.

(ii) Once the GIA Order 1994 stood repealed by the GIA Order 2004, the question of extending benefit to any institution under GIA, 1994 did not arise. This position was further made clear by the Supreme Court of India in ***Anup Kumar Senapati*** *(supra)*.

(iii) The notings in the files of the government did not constitute a final decision to grant the benefits under the GIA Order 1994 to the two colleges. The learned Single Judge failed to appreciate that the decision taken at the meeting of the HPC held on 14th December, 2012 was not the final decision of the Government. It only proposed the modality to avoid statutory constraints that would come in the way of giving the benefits under the relevant GIA Order. Reference in particular was made to the following passage in the minutes of the meeting of the HPC held on that date:

"The said agency after taking over the management shall apply to director, higher education for grant of grant in aid order. The government in higher education department will take a decision to declare these two colleges, under relevant grant in aid order and authorise director higher education to undertake to verification of records for approval of post and sanctions of grant in aid."

(iv) It was therefore factually wrong to contend that the Government took a decision to bring the two colleges under the fold of the GIA Order 1994. The expression used was "relevant grant-in-aid order". Granting the benefit under the GIA Order 2004 to the two educational institutions could not, therefore, be construed as a wilful disobedience of the order dated 16th April, 2015 of the learned Single Judge.

33. It requires to mentioned that in response to the preliminary objection raised by the Respondents regarding maintainability of the present appeals, Mr. Parija, learned Advocate General, referred to the decision in ***Midnapore People's Coop. Bank Ltd. v. Chunilal Nanda (2006) 5 SCC 399.***

Submissions on behalf of the Respondents

34. Appearing on behalf of the Respondents Mr. Tripathy and Mr. Sangal learned Senior Counsel submitted as under:

(i) In view of the decision in ***Secretary, Cannanore District Muslim Educational Association v. State of Kerala (2010) 6 SCR 291***, the directions of the learned Single Judge in the order dated 16th April 2015 read with the order dated 5th February, 2021 were binding on the Government particularly since the Supreme Court did not interfere with the order dated 5th February 2021 of the learned Single Judge in the SLP filed against it. Unless the State purges itself of the contempt, the present appeal should not be entertained. Reliance is also placed on the decision in ***Noorali Babul Thanewala v. K.M.M. Shetty AIR 1990 SC 464*** stating that the breach of undertaking given to the court would be the breach of an injunction. Therefore, unless the contemnor purges itself of the contempt, no challenge to the orders in the contempt petition or the original order in the writ petition should be entertained.

(ii) Relying on the decision in ***Bihar State Government Secondary School Teachers' Association v. Ashok Kumar Sinha (2014) 7 SCC 416***, it was contended that once the order dated 16th April, 2015 of the learned Single Judge attained finality, it had to be complied with and

no challenge thereto could be entertained at the stage of the contempt proceedings. Further, as pointed out in the said decision it was important to examine whether the steps taken by the State to comply with the directions were in fact "in furtherance of its compliance or they tend to defeat the very purpose for which the directions were issued".

(iii) Reliance is also placed on the decision in ***Purshotam Das Goyal v. Hon'ble Mr. Justice B.S. Dhillon AIR 1978 SC 1014*** to contend that no appeal would lie under Section 19 of the Contempt of the Courts Act, 1971 from the order of the learned Single Judge rejecting the prayer of the contemnor.

(iv) On merits it is submitted that there were several instances of identically placed educational institutions who were granted the benefit of the GIA Order 1994 even after it was repealed by the GIA Order 2004. The documents bearing out such instances were placed on record along with I.A. No.1732 of 2021. It was, therefore, submitted that there would be unfair discrimination against the present respondents if selectively certain institutions identically placed were given the benefit of the GIA Order 1994. Referring to the benefit granted to certain other colleges even after repealed the GIA order 1994, Mr. Tripathy, learned counsel for the Respondents submitted that as a doctrine 'negative equality' cannot be applied selectively.

(v) The authorities were fully conscious of the applicability of GIA 1994 as the notings on the file show. The minutes of the meeting dated 1st May 2013 of the Sub-Committee also reflected this position. The statutory constraint under Section 7-C (6) of the OE Act was noticed and a conscious decision was taken to nevertheless extend the benefit of the GIA Order, 1994 to the two institutions.

(vi) Mr. Tripathy also specifically referred to the note sheet dated 8th August, 2013 signed by Additional Secretary Sri Behera, who was also a signatory to the minutes of the meeting dated 1st May, 2013 where it was decided that the benefit under the GIA Order 1994 had to be extended. Therefore, according to Mr. Tripathy, the prefix "relevant" to the word 'GIA' meant nothing other than GIA Order 1994 and that the paras were to be read as a whole and not in isolation.

(vii) Seeking to withdraw the grant of the benefit under the GIA 1994 eight years after taking such a decision was unfair and unjust. Once the managing control of the OHPC over the colleges ceased and the colleges were handed over to the District Magistrate, the salary of the Respondents (lecturers) was reduced from Rs.30,000/- per month to just Rs. 11,000/- per month and all other statutory benefits were given a go-by. The Respondents had served several years in the backward districts of undivided Koraput and they had a legitimate expectation of receiving better salary. The denial of the benefit of the GIA Order 1994 was based on mere technicalities and should not be allowed to defeat justice

(viii) The Appellants cannot be allowed to wait for eight long years, and for the judgment in ***Anup Kumar Senapati*** *(supra)* which was rendered in 2019, to deny the Respondents the benefits pursuant to the decision take on 13th August, 2013. The rights so determined could not be invalidated on the strength of the subsequent declaration of law. Reliance in this regard is placed on the judgment of the Supreme Court in ***Union of India v. Madras Telephones SC and ST Social Welfare Association (2006) 8 SCC 662*** the recent decision dated 17th August 2021 of the Supreme Court in Civil Appeal No.4840 of 2021 (***Nilima Srivastava v. State of Gujarat***).

(ix) According to Mr. Tripathy, on the very first date of hearing of W.A. No.401 of 2021 as noted in the order dated 31st May, 2021 of this Court, the challenge to the order dated 16th April, 2015 of the learned Single Judge was given up by the State and that order therefore, attained finality. Therefore, what was impermissible to be done directly, was sought to be directly indirectly by only challenging the orders in contempt and this course of action was impermissible in law.

(x) When the same GIA Order 2004 stood repealed with effect from 7th January, 2009 by the GIA order 2008 then even granting the benefit under the GIA Order, 2004 by the order dated 24th October, 2017 would be in defiance of the judgment in ***Anup Kumar Senapati*** *(supra).* Therefore, this was not a tenable argument in law.

Analysis and reasons

35. The above submissions have been considered. As regards the maintainability of the writ appeal, the Court is of the view that in the light of

the judgment in ***Midnapore People's Coop. Bank Ltd.*** *(supra)* the present appeals by the State would be maintainable. One of the questions that arose for consideration in the said decision was:

> "(i) Where the High Court, in a contempt proceeding, renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether it is appealable under section 19 of the Contempt of Courts Act, 1971? If not, what is the remedy of the person aggrieved?"

36. In answer to the above question, the Supreme Court held as under:

> "I. An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.
>
> II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.
>
> III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.
>
> IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of 'jurisdiction to punish for contempt' and therefore, not appealable under section 19 of CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under section 19 of the Act, can also encompass the incidental or inextricably connected directions.
>
> V. *If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceeding, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal*

> *(if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).*" (emphasis supplied)

37. What is immediately relevant for the present case is what is stated in para V above. When one compares the order dated 16th April, 2015 in the main writ petition with the order passed by the learned Single Judge on 5th February, 2021 in the contempt case, it is plain that the learned Single Judge was seeking to interpret the orders passed on 16th April, 2015 and issued a direction regarding the merits of the dispute between the parties. Interestingly, when the said order was challenged in the Supreme Court of India, in its order dated 6th April, 2021 in SLP (C) No.4967 of 2021 the Supreme Court clearly stated that "if adverse order is passed against the Petitioner or the Officers of the State that may not be given effect to for a period of one week from the date of the order to any of the Petitioner to take recourse the appropriate remedy as the case may be". Even thereafter, the learned Single Judge passed orders on 15th April, 2021 and 29th April, 2021 which further explicated the merits of the dispute on the applicability of the GIA Order, 1994.

38. The decisions relied upon by the Respondents to the question of maintainability of the present appeals are distinguishable on facts. In ***Secretary, Cannanore District Muslim Educational Association, Kanpur*** *(supra)* there was a clear commitment by the Government to give the Appellant Institution sanction for holding higher secondary classes. The Government order could not be implemented in view of the Court proceedings. It was accordingly contended that the Appellant "has a right or at least a legitimate expectation to get the permission to hold higher secondary classes". In the present case, however, even on the date of the judgment of the learned Single Judge on 16th April, 2015 the GIA Order 1994 was repealed and there was no question of that being implemented. There was no specific direction by the learned Single Judge to that effect.

39. In ***Bihar State Government Secondary School Teachers' Association v. Ashok Kumar Sinha*** *(supra)* the question was of the interpretation of the orders of the Supreme Court and whether there was a wilful disobedience of those orders. The following observations in the said judgment are relevant:

> "19. At the outset, we may observe that we are conscious of the limits within which we can undertake the scrutiny of the steps taken by the respondents, in these Contempt proceedings. The Court is supposed to adopt cautionary approach which would mean that if there is a substantial compliance of the directions given in the judgment, this Court is not supposed to go into the nitty gritty of the various measures taken by the Respondents. It is also correct that only if there is willful and contumacious disobedience of the orders, that the Court would take cognizance. Even when there are two equally consistent possibilities open to the Court, case of contempt is not made out. At the same time, it is permissible for the Court to examine as to whether the steps taken to purportedly comply with the directions of the judgment are in furtherance of its compliance or they tend to defeat the very purpose for which the directions were issued. We can certainly go into the issue as to whether the Government took certain steps in order to implement the directions of this Court and thereafter withdrew those measures and whether it amounts to non-implementation. Limited inquiry from the aforesaid perspective, into the provisions of 2014 Rules can also be undertaken to find out as to whether those provisions amount to nullifying the effect of the very merger of BSES with BES. As all these aspects have a direct co-relation with the issue as to whether the directions are implemented or not. We are, thus, of the opinion that this Court can indulge in this limited scrutiny as to whether provisions made in 2014 Rules frustrate the effect of the judgment and attempt is to achieve those results which were the arguments raised by the respondents at the time of hearing of C.A. No. 8226-8227 of 2012 but rejected by this Court. To put it otherwise, we can certainly examine as to whether 2014 Rules are made to implement the judgment or these Rules in effect nullify the result of merger of the two cadres."

40. The above observations require the Court to carefully scrutinize the scope and extent of the order of the learned Single Judge and whether, as contended by the Appellants, they expand the scope of the reliefs granted in the first instance in the guise of the contempt proceedings. This judgment in fact helps the case of the Appellant (State) as far as the present case is concerned.

41. The decisions in ***Purshotam Das Goyal*** *(surpa)* and ***Noorali Babul Thanewala v. K.M.M. Shetty*** *(supra)* also turned on their own facts. In the present case, in view of the specific order of the Supreme Court in SLP (C) 4967 of 2021 dated 6th April, 2021 it cannot be said that the Appellant (State) is required to purge itself of the alleged contempt, in order to maintain the present appeal.

42. For all of the aforesaid reasons, the preliminary objections, as of the Respondents to the maintainability of the present appeals, is hereby negatived.

43. Turning to the merits of the case, the Court would like to first discuss at some length the judgment of the Supreme Court in ***Anup Kumar Senapati*** (*supra*) as it has a direct bearing on the issues raised in the present case. The background to the above judgment was that the employees of various educational institutions had approached the Odisha Administrative Tribunal in 2011 and 2012 to claim reliefs of grant-in-aid under the GIA Order 1994. Divergent views had been taken by the High Court and the OAT on the eligibility of such employees to the benefit of the GIA Order 1994. In ***State of Odisha v. Lokanath Behera 2018 (II) OLR 932*** a Division Bench of this Court held that no right is accrued merely because an institution satisfies the eligibility condition under the GIA 1994 and definitely not after its repealed. This was taken note of and approved by the Supreme Court in its decision in ***Anup Kumar Senapati*** *(supra).*

44. In ***Anup Kumar Senapati*** *(supra)* before the Supreme Court of India, it was contended on behalf of the employees that once a right to grant-in-aid had accrued under the GIA 1994, it could not be taken away retrospectively and that ***Lokanath Behera*** *(supra)* had not been correctly decided. This specific contention of the employees was noted in para 21 as under:

> "21…..The employees were entitled to approval of their appointment and payment of grant-in-aid in terms of Order of 1994. The Order of 1994 contains long-lasting commitment towards extending the aid benefits to the educational institutions. The communication of the Higher Education Department, Government of Odisha dated 7.10.2017 indicates that aid can be claimed and there is continuing eligibility notwithstanding the repeal of the provisions of the Order of 1994. There is no dispute concerning the method of selection and qualification of the respondents to occupy the respective posts. Thus, after completion of the qualifying period, the grant-in-aid has been rightly ordered to be released. An office order was passed on 5.7.2011, informing the respondents that they were approved for payment of 40% of Block Grant in terms of Order of 2008. Thereafter, cases were filed before the Tribunal. As some of the colleges are located in educationally backward districts, it would not be appropriate to deny the payment of a benefit under the Order of 1994. Similar benefits have been granted to a large number of colleges by the Tribunal as well as by the High Court. The employees cannot be forced to obtain less favourable treatment under the

> Order of 2008, which provides for 40% of Block Grant where grant-in-aid is available under the Order of 1994 of salary, benefits of annual increments, dearness allowance, etc. which are not included in the Order of 2008".

45. The Supreme Court discussed at length the provisions of not only Section 7-C of the OE Act but also the relevant provisions of GIA Order 1994 as well as GIA Order 2008, considered the effect of the repeal and held as under:

> "28. The next question which we take up for consideration is concerning the effect of the repeal of the Order of 1994, by the Order of 2004. The provisions contained in Paragraph 4 of the Order of 2004 has repealed the Order of 1994 save for the purposes in Paragraph 3(1). Paragraph 3(1) provides every private educational institution being a Non-Government College, Junior College or Higher Secondary School which has become eligible by 1.6.1994 to be notified as aided educational institution under the Order of 1994, shall be notified by the Government as required under Section 3(b) of the Act and shall be entitled to receive grant-in-aid by way of block grant in the manner provided in Paragraph 3(2). The proviso to Paragraph 3 makes it clear that a college to be eligible as an aided educational institution must not have more than two ministerial staff and two peons. There is no other saving of the Order of 1994. However, Paragraph 4(2) of the Order of 2004 provides notwithstanding the repeal of the Order of 1994, the private educational institutions which are in receipt of any grant-in-aid from the Government under the Order so repealed shall continue to receive the grant-in-aid as if the Grant-in-aid Order, 1994 had not been repealed. Thus, it is clear that in case a college is receiving grant-in-aid, with respect to a post, shall continue to receive it under the Order of 1994, however, in case it was not receiving the grant-in-aid as saving of the Order of 1994 is only entitled for block grant under Paragraph 3(1), not eligible for receiving the grant-in-aid under the Order of 1994. The saving of Order of 1994 is for a limited purpose that the institution shall continue to receive grant-in-aid concerning the posts which had been sanctioned before the repeal of the order of 1994."

46. The Supreme Court in ***Anup Kumar Senapati*** *(supra)* considered the effect of Section 6 of the General Clauses Act, 1897 and held as under:

> "30. The provisions contained in Section 6 of the General Clauses Act stipulate that by the repeal of enactment, the benefit given to the person concerned shall not be affected. However, the repeal shall not revive anything not in force or existing at the time at which the repeal takes place. The previous operation of any enactment or anything is duly done or

suffered thereunder shall not be affected or any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. However, the best guide is found in what has been saved is by reference to the repealing provisions in the order of 2004 which are clear and unambiguous."

47. Thereafter it was concluded and held as under:

"34. In the present case, it is apparent that there is no absolute right conferred under the Order of 1994. The investigation was necessary for whether grant-in-aid to be released or not. It was merely hope and expectation to obtain the release of grant in aid which does not survive after the repeal of the provisions of the Order of 1994. Given the clear provisions contained in Paragraph 4 of the Order of 2004, repealing and saving of Order of 1994, it is apparent that no such right is saved in case grant-in-aid was not being received at the time of repeal. The provisions of the Order of 1994 of applying and/or pending applications are not saved nor it is provided that by applying under the repeal of the order of 1994, its benefits can be claimed. Grant was annual based on budgetary provisions. Application to be filed timely. As several factors prevailing at the relevant time were to be seen in no case provisions can be invoked after the repeal of the order of 1994. Only the block grant can be claimed.

35. The High Court in *Loknath Behera* has rightly opined that due to repeal, the provisions of the Order of 1994 cannot be invoked to obtain grant-in-aid. The High Court has rightly referred to the observations of this Court in *State of Uttar Pradesh and Ors. v. Hirendra Pal Singh*, wherein it was observed:

"22. It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under Section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal *(vide Dagi Ram Pindi Lall v. Trilok Chand Jain, (1992) 2 SCC 13; Gajraj Singh v. STAT, (1997) 1 SCC 650; Property Owners' Assn. v. State of Maharashtra, (2001) 4 SCC 455 and Mohan Raj v. Dimbeswari Saikia, (2007) 15 SCC 115).*

24. Thus, there is a clear distinction between repeal and suspension of the statutory provisions and the material difference between both is that repeal removes the law entirely; when suspended, it still exists and has operation in other respects except wherein it has been suspended. Thus, a repeal puts an end to the law. A suspension holds it in abeyance."

36. Reliance has also been placed on the decision of *BCCI v. Kochi Cricket (P) Ltd.,* wherein decision rendered in *State of Punjab v. Mohar Singh* has been relied upon while holding that when the repeal is followed by fresh legislation on the same subject, the provisions of the new Act have to be looked into so as to ascertain whether it manifests an intention to destroy the rights or keep them alive.

37. Considering the various provisions of Section-C of the Act and the Order of 1994, it is apparent that institutions which received grant-in-aid and post with respect of which grant-in-aid was being released, have been saved. The reference of the institution means and includes the posts. They cannot be read in isolation. It cannot be said that right to claim grant-in-aid has been fixed, accrued, settled, absolute or complete at the time of the repeal of the order of 2004. As per the meaning in *Black's Law Dictionary*, vesting has been defined thus:

"vest, vb. (15c) 1. To confer ownership (of property) upon a person.

2. To invest (a person) with the full title to property. 3. To give (a person) an immediate, fixed right of present or future enjoyment. 4. Hist. To put (a person) into possession of land by the ceremony of investiture. – vesting, n."

38. Thus, there was no vested, accrued or absolute right to claim grant-in-aid under the Act or the Order of 1994. Merely fulfilment of the educational criteria and due appointment were not sufficient to claim grant in aid. There are various other relevant aspects fulfilment thereof and investigation into that was necessary. Merely by fulfilment of the one or two conditions, no right can be said to have accrued to obtain the grant-in-aid by the institution concerning the post or individual. No right has been created in favour of colleges/individual to claim the grant-in-aid under the Order of 1994, after its repeal. No claim for investigation of right could have been resorted to after repeal of 1994 Order."

48. In view of the categorical ruling in ***Anup Kumar Senapati*** *(supra)* [which incidentally was not available to be considered by the learned Single Judge since the writ petition was disposed of on 16th April, 2015 itself], it is obvious that no direction could have been issued to implement the GIA Order 1994 that would be contrary to the judgment in ***Anup Kumar Senapati*** *(supra).* Nevertheless, at the time of considering the contempt petition, the effect of the judgment in ***Anup Kumar Senapati*** *(supra)* was required to be considered.

49. A careful reading of the operative portion of the order dated 16th April, 2015 of the learned Single Judge indicates that there was no specific direction that it is the GIA Order 1994 that had to be implemented. It thus turned the interpretation of the notes on file which by themselves can never be considered to constitute the final decision of the Government. The legal position in this regard has been made abundantly clear in ***M/s Sethi Auto Service Station v. Delhi Development Authority (2009) 1 SCC 180***. There the question arose whether the recommendation of the Technical Committee in its minutes dated 17th May, 2002 for relocation of a retail petrol pump outlet would constitute an order or decision binding on the DDA. Then the Supreme Court observed as under:

> "12. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that, internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department; gets his approval and the final order is communicated to the person concerned."

50. The Supreme Court in the aforementioned decision referred to the decisions in ***Bachhitar Singh v. State of Punjab AIR 1963 SC 395*** and ***Laxminarayan R. Bhattad v. State of Maharashtra (2003) 5 SCC 413*** and concluded as under:

> "22. From the afore-extracted notings of the Commissioner and the order of the Vice Chairman, it is manifested that although there were several notings which recommended consideration of the appellants' case for relocation but finally no official communication was addressed to or received by the appellants accepting their claim. After the recommendation of the Technical

> Committee, the entire matter was kept pending; in the meanwhile a new policy was formulated and the matter was considered afresh later in the year 2004, when the proposal was rejected by the Vice Chairman, the final decision making authority in the hierarchy. It is, thus, plain that though the proposals had the recommendations of State Level Co-ordinator (oil industry) and the Technical Committee but these did not ultimately fructify into an order or decision of the DDA, conferring any legal rights upon the appellants. Mere favourable recommendations at some level of the decision making process, in our view, are of no consequence and shall not bind the DDA. We are, therefore, in complete agreement with the High Court that the notings in the file did not confer any right upon the appellants, as long as they remained as such. We do not find any infirmity in the approach adopted by the learned Single Judge and affirmed by the Division Bench, warranting interference."

51. Therefore, the attempt by Mr. Tripathy to closely read the notings on the file and decisions of the HPC as well as the Sub-Committee to somehow infer from them a final decision of the Government to grant the two institutions benefit under the GIA Order 1994 should fail. It is only when the final order was passed in 2017 that the final decision of the Government was made explicit. That alone is relevant for determining whether any vested right accrued in favour of the Respondents. Anything short of the final notification cannot qualify as the final decision of the Government in the matter.

52. In this context, the Court like to observe that any number of orders that may have been passed by the learned Single Judges of this Court in individual cases granting benefit to certain other educational institutions of the GIA Order, 1994 even after its repeal, cannot be considered good law after the decision of the Supreme Court in ***Anup Kumar Senapati*** *(supra).* Interestingly, some of those orders have been challenged in Special Leave Petition (Civil) No.33245 of 2018 ***(State of Odisha v. Ratikanta Tripathy)*** and batch in which the following order was passed on 22nd November, 2019 by the Supreme Court:

> "Mr. Ashok Parija, learned Senior Counsel invited out attention to the judgment and order dated 16.09.2019 passed in Civil Appeal No. 7295 of 2019 and all other connected matters. The issue involved in the matter was set out in para 1 of said judgment as under:
>
> *"1. The question involved in the appeals in whether the employees are entitled to claim grant-in-aid as admissible under the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools)*

grant-in-aid Order, 1994 after its repeal in the year 2004 by virtue of provisions contained in Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-aid Order, 2004 (hereinafter referred to as the 'the order of 2004'). The order of 2004 has also been repealed by Orissa (Aided Colleges, Aided Junior Colleges, and Higher Secondary Schools) Grant-in-aid Order, 2008."

The conclusion drawn by the Court, as set out in para-31, was as under:

"31. It is apparent on consideration of Paragraph 4 of order of 2004 that only saving of the right is to receive the block grant and only in case grant in aid had been received on or before the repeal of the order of 2004, it shall not be affected and the Order of 1994 shall continue only for that purpose and no other rights are saved. Thus, we approve the decision of the High Court in Lok Nath Behera (supra) on the aforesaid aspect for the aforesaid reasons mentioned by us."

Relying on the aforesaid observations, it is submitted that the only right that was saved was to receive the block grant and only in case the grant in aid was to receive the block grant and only in case the grant-in-aid was received on or before the repeal of the Order of 2004. It is further submitted that the decision of the High Court in ***Loknath Behera*** was approved by this Court. Exactly contrary situation has now been accepted by the High Court in the orders presently under appeal.

We must however state that the matters were disposed of by the High Court as the petition in every case was delayed by at least 800 days. In the circumstances, we pass following order:

a) Delay condoned.

Subject to the petitioner-State depositing a sum of Rs.50,000/- (Rupees fifty thousand only) to the account of every petition in the Registry of this Court within four weeks from today, let notices be issued to the respondents, returnable on 13.01.2020.

Dasti service, in addition, is permitted.

b) If the amount is not deposited within the stipulated time, the special leave petitions shall stand dismissed without further reference to the Court.

c) Upon deposit, the amount shall be invested in a fixed deposit receipt with a nationalized bank initially for a period of 90 days with auto renewal facility.

Mr. Subhasish Mohanty, learned Advocate-on-record, who has appeared on behalf of Caveator/Sole respondent in SLP (Civil) Diary No. 31098 of 2019, accepts notice on behalf of sole respondent. He prays for and is granted three weeks' time to put in affidavit in reply.

Rejoinder, if any, be filed within two weeks' thereafter."

53. The concept of negative equality therefore, cannot be said to arise in these kinds of matters. In ***HAV (OFC) RWMWI Borgoyary v. Union of India (2020) 15 SCC 546,*** it was held as under:

> "13…..It is trite law that the right to equality cannot be claimed in a case where a benefit has been given to a person contrary to laws. If a mistake has been committed by the authorities in appointing few persons who were not eligible, a claim cannot be made by other ineligible persons seeking a direction to the authorities to appoint them in violation of the instructions. After referring to several judgments, this Court in *State of Odisha v. Anup Kumar Senapati* held that there is no concept of negative equality under Article 14 of the Constitution of India. The appellants cannot, as a matter of right, claim appointment on the basis of two ineligible persons being given the benefit and no direction can be given to the respondents to perpetuate illegality."

54. In view of the conflicting orders passed by the High Court and the OAT, the legal position regarding the applicability of the benefit under the GIA Order, 1994 even after its repeal was indeed not clear. On the one hand, there was the decision of this Court in ***Loknath Behera*** *(supra)* which supported the contention of the State and then there were views to the contrary by the High Court and the OAT. This conflict came to be resolved only in ***Anup Kumar Senapati*** *(supra)* where the Supreme Court categorically approved the decision of this Court in ***Loknath Behera*** (*supra*). Consequently, the facts of the present case are different from the facts in ***Union of India v. Madras Telephones SC and ST Social Welfare Association*** *(supra)* and even ***Nilima Srivastava v. State of Madhya Pradesh*** *(supra)*. Therefore, those two decisions have no application to the facts of the present case.

55. On the issue that the benefit even under the GIA Order 2004 could not have been granted in 2017 after it was repealed in 2009, it must be noted that in ***Anup Kumar Senapati*** *(supra),* the Supreme Court took note of the fact that in the GIA Order 2008, there is a repeal and saving clause which reads as under:

> "20. Repeal and Saving—(1) The Orissa (NonGovernment Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-aid Order, 2004 hereinafter referred to as the Grant-in-aid order is hereby repealed, save for the purposes of such private educational institution being a non Government College, Junior College or Higher Secondary School which has become

eligible under the said order to be notified as Aided Educational Institution to be entitled to receive Grant-in-aid by way of Block Grant determined in the manner provided in the sub-Para. (2) of Paragraph 3 of the Grant-in-aid Order, 2004.

(2) Notwithstanding the repeal under sub-Para. (1), the private educational institutions which are in receipt of any Grant-in-aid or Block Grant from Government under the orders so repealed immediately before the date of commencement of this Order, shall continue to receive such Grant-in-aid or Block Grant as the case may be as if the Orissa (Non-Government Colleges, Junior Colleges, and Higher Secondary Schools) Grant-in-Aid Order, 1994 and the Grant-in-Aid Order, 2004 had not been repealed."

56. Therefore, the Courts finds no merit in the contentions advanced on behalf of the Respondents that in granting benefit under the GIA Order 2004 to the two institutions, the Appellant State is acting contrary to the decision in ***Anup Kumar Senapati*** *(supra).*

57. Court is unable to view the order dated 16th April, 2015 passed by the learned Single Judge as issuing a positive mandamus to the Government to grant benefits to the Respondents in terms of the GIA Order 1994. Therefore, this Court is of the view that by granting the benefit under the GIA Order 2004 to the two educational institutions the Appellant State did not disobey the order dated 16th April, 2015 of the learned Single Judge. Consequently, none of the orders passed by the learned Single Judge in CONTC 1378 of 2017 and CONTC Case No. 481 of 2019 are sustainable in law. Accordingly, the orders passed by the learned Single Judge on 5th February 2021, 15th April 2021 and 29th April, 2021 in the contempt petitions are hereby set aside.

58. The writ appeals are allowed in the above terms. The contempt proceedings in CONTC Nos.1378 of 2017 and 481 of 2019 are hereby closed and disposed of as such. No orders as to costs.

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2021 (III) ILR-CUT- 226

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

C.R.A. NO. 178 OF 1998

RAMESH SAHU .....Appellant

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – Offence U/s. 302 of the Indian Penal Code, 1860 – Appreciation of evidence – P.W.2 is the sole eye witness – His evidence cannot be wholly reliable in view of the fact that he witnessed the incident from a distance of 165 feet – His evidence is not supported by doctor's evidence – And he being a solitary eye witness whose evidence do not fit to the anvil of objective circumstances of the case as proposed by the prosecution, cannot be relied upon – The prosecution was not established its case beyond all reasonable doubts and benefit of doubt goes to the appellant – Appeal allowed.

(B) INDIAN EVIDENCE ACT, 1872 – Section 134 – Number of witness – A solitary eye witness, who is truthful and reliable in proving the fact asserted by the prosecution may outweigh a number of untruthful witnesses, who are not reliable, can be said to prove the case of the prosecution – The Hon'ble Supreme Court in the case of Vadivelu Thevar -V- State of Madras (AIR 1957 SC 614) classified the witness into three categories, dicussed. (Para 8)

Case Law Relied on and Referred to :-

1. AIR 1957 SC 614 : Vadivelu Thevar v. The State of Madras.

For Appellant : Mr. Satyabrata Panda

For Respondent: Mr. Arupananda Das, A.G.A

JUDGMENT Date of Hearing : 16.12.20/05.10.21 : Date of Judgment : 05.10.2021

S.K. MISHRA, J.

In this appeal, the appellant-Ramesh Sahu has assailed his conviction under Section 302 of the Indian Penal Code, 1861 (hereinafter referred to as "Penal Code") and sentence of imprisonment for life in Sessions Case No.44 of 1997, (arising out of G.R. Case No.139 of 1996 as per the judgment dated 16.05.1998 passed by the learned Sessions Judge, Bolangir-Sonepur, Bolangir.

2. Shorn of unnecessary details, the case of the prosecution is as follows:-

Accused/appellant and deceased belong to the occurrence village Komira. On 28.11.1996 morning, deceased Maguni Pradhan left his house at about 7.00 A.M. While leaving he told his wife (informant)-Mahandri Pradhan (P.W.1) that he was going to the spot land situated near Nuabandha Pond as he apprehended that the accused might be reaping away paddy crops standing thereon. On his way deceased called Gobardhan Badi (P.W.2),

Bidyadhar Pradhan and Hemabanta Tandia to come to the spot land. On his arrival at the spot deceased Maguni found accused Ramesh arranging paddy crops into bundles in the spot land. Deceased asked the accused not to remove paddy. On this, the accused chased him with an axe and dealt several axe blows with its blunt side on the deceased. Deceased sustained injuries and fell down. Being informed by her neighbor, Chera Dip, informant (P.W.1) rushed to the spot. By that time, the deceased with the injuries on him was sitting on the ridge of the spot land. On P.W.1's enquiry he narrated regarding the occurrence to her. P.W.1 with the help others removed the deceased to Subalaya Hospital. However, the deceased succumbed to his injuries as on the way before he could get any medical attention.

On the oral report of the informant (P.W.1) made at Subalaya Police Out Post at 12.00 noon on the same day, A.S.I, Banshidhar Thanapati (P.W.6) prepared written report (Ext.12), sent it for registration to Birmahrajpur Police Station and took up investigation. P.W.6 held inquest over the dead body of the deceased and prepared inquest report (Ext.4) at 1.00 P.M. on that day in presence of witnesses including Shankar Bag (P.W.3). On his requisition contained in the dead body chalan (Ext.13), deceased's dead body was subjected to post mortem examination at D.H.H., Sonepur by Dr.Ansuman Tripathy (P.W.5). Accused Ramesh appeared at Birmaharajpur Police Station before the then O.I.C./S.I. of Police, Khagswar Agasti (P.W.7). P.W.7 apprehended and produced him before P.W.6 at 6.00 P.M on 28.11.1996. P.W.6 seized blood stained lungi (M.O.III) and banion (M.O.IV) of the accused and prepared seizure list (Ext.5) in presence of witnesses including P.W.3. P.W.6 arrested the accused at 7.00 P.M. on that day. At 8.15 P.M. he visited the spot and prepared spot map (Ext.15). From the spot, P.W.6 seized blood stained earth, sample earth and some paddy sheaves and prepared seizure list (Ext.7) in presence of witnesses including Jagannath Jani (P.W.4). While in custody, accused Ramesh gave information regarding concealment of weapon of offence, the axe (M.O.I) in his mother-in-law's house in village Balarampur. P.W.6 recorded accused's disclosure statement (Ext.9). Accused Ramesh led to the recovery of axe (M.O.I) in his mother-in-law's house. P.W.6 seized the axe on production by the accused and prepared seizure list (Ext.8) in presence of witnesses including P.W.4 at 11.00 P.M. on the date of occurrence. On P.W.6's requisition (Ext.16), accused was medically examined and injury report was furnished. P.W.6 also seized and prepared seizure list (Ext.6) in respect of deceased's Gamuchha and blood stained Dhoti (M.O.II). He sent requisition to Revenue Inspector,

Subalaya for demarcation of the spot land on 30.11.1996 and handed over charge of investigation to P.W.7 on 04.12.1996. P.W.7 seized Xerox copy of sale deed (Ext.1) and R.O.R. (Ext.2) on production by the informant (P.W.1) and prepared seizure list (Ext.3/1). He also seized Photostat copy of another sale deed (Ext.18) on production by accused's wife and prepared seizure list (Ext.17) P.W.7 got the spot land demarcated by Revenue Inspector, Subalaya and obtained his reports (Exts. 19 and 22). On prayer of P.W.7, statements of P.W.2 and one Basanta Guru were recorded in Court under Section 164 of the Code. On production of axe (M.O.I) with requisition of P.W.7 for his opinion, P.W.5 Dr. Tripathy submitted his report (Ext.11). On prayer of P.W.7, the seized material objects were sent for chemical examination under the seals and a forwarding report of the Court of S.D.J.M., Birmaharajpur. Result of chemical examination was furnished to the Court from R.F.S.L., Sambalpur under report No.959 dated 06.08.1997 (Ext.21). On completion of investigation, P.W.7 submitted charge sheet against the accused.

3. Defence plea is one complete denial. Accused pleads false implication.

4. In order to prove its case, prosecution has examined seven witnesses. P.W.1-Mahendri Pradhan is the informant, P.W.2-Gobardhan Badi is an eye witness to the occurrence, P.W.3-Sankar Bag and P.W.4-Jagannath Jani are seizure witnesses to a piece of cloth and banion (M.O.IV) and weapon of offence i.e., axe (M.O.I), P.W.5-Dr. Anshuman Tripathy, who conducted the P.M. examination over the dead body of deceased Maguni Pradhan. P.W.6-Banshidhar Thanapati, A.S.I. of Subalaya Police Out Post and P.W.7-Khageswar Agasti, O.I.C./S.I. of police of Katarbaga Police Station are the Investigating Officers.

5. Mr. Satyabrata Panda, learned counsel appearing for the sole appellant argued that in this case vital documents, the R.O.Rs etc. have not been produced by the prosecution to establish that the deceased was in possession of the land in question or that he has title over the same. He further argued that material witness, who has been named in the F.I.R. namely, Chera Dip, who is an eye witness, as per the narration in the F.I.R. has not been examined. The other two eye witnesses, namely Bidyadhar Pradhan and Hemabanta Tandia, who as per the version of the prosecution, accompanied the solitary eye witness namely, Gobardhan Badi have not been examined in this case. No explanation is forthcoming from the side of the prosecution why Hemabanta Tandia and Bidyadhar Pradhan have not been

examined. It is also pointed out by the learned counsel for the appellant that P.W.1 admitted in cross-examination in paragraph-12, Chera Dip learnt about the incident from two female labourers, namely Tarini Sahu and Rambha. No explanation has been forthcoming why the said Tarini Sahu and Rambha have not been examined. Similarly, Dina and Pana Khadal were at the spot prior to arrival of P.W.1 and they have not been examined.

Learned counsel for the appellant further argued that the case of the prosecution is that the appellant assaulted the deceased by means of an axe, whereas the case of the prosecution as revealed from the F.I.R. itself that the appellant assaulted the deceased by using the sharp side of the axe (*tangiare hani deichhi*). But, the evidence led on behalf of the prosecution regarding the death of the deceased i.e., the evidence of P.W.5, Dr. Anshuman Tripathy reveals that the injuries sustained by the deceased were caused by the blunt side of the M.O.I, which is an axe.

Mr. Panda, learned counsel for the appellant further argued that the learned Sessions Judge has found the appellant guilty of the offence of murder basing solely on the solitary eye witness account i.e., the statement of P.W.2 which is fraught with several contradictions. The other circumstance i.e. dying declaration before P.W.1 and the leading to discovery of weapon of offence cannot be relied upon in view of the fact that the deceased allegedly stated before the informant (P.W.1) that the appellant was reaping the paddy crops along with his field servants and that when the deceased stopped him from proceeding with the reaping of the paddy, he assaulted the deceased by means of the sharp side of the axe (*Tangiare Hani Dela*). Admittedly, the field servants have not been examined in this case and the prosecution even do not reveal the names of the said field servants. Hence, it is argued by the learned counsel for the appellant that the appellant should be acquitted of the offence alleged and set at liberty.

6. Learned counsel appearing for the State Mr.Arupananda Das, learned Additional Government Advocate on the other hand argued that this is an appreciation of evidence by the learned Sessions Judge and it should not be interfered lightly by the appellate court.

7. As is evident from the materials available on record and the submissions made by the learned counsel appearing for the parties, the evidence of P.W. 5 has not been assailed. It has not been assailed by the appellant that his opinion that the deceased sustained several injuries, mostly

lacerated and involving fracture of bone were found on the body of the deceased and could have been caused by the blunt side of the axe. So, it is not necessary to examine the evidence so far as the final opinion of the Doctor (P.W.5) is concerned. At this stage, we are more concerned about the complicity of the appellant and the evidences available regarding complicity of the appellant in commission of the crime. In his connection, we have to examine carefully the evidence of P.W.2, Gobadhan Badi to come to a just and proper conclusion.

P.W.2 has stated on oath that on the date of occurrence in the morning the deceased came to their 'pada'. P.W.2 has further stated that on his enquiry, the deceased told him that he had come to the Grama Rakhi for lodging of the report, but the Grama Rakhi was absent in his house. The deceased requested P.W.2 to accompany him as a gentleman to his land near Nuabandha as the appellant was removing paddy from the land. Deceased left the spot first and after some time P.W.2 along with one Bidyadhar Pradhan and one Hemabanta Tandia proceeded towards the spot. P.W.2 further testifies that he saw the appellant, Ramesh chasing the deceased and dealing an axe blow on the deceased from his backside before he fell down. P.W.2 further stated that the accused dealt axe blow on the deceased after he fell down. Seeing this incident P.W.2 returned to village with his companions out of fear. On the way, he narrated regarding the occurrence to Gram Rakhi, Dinabandhu Tandia. In course of cross-examination at paragraph-7 P.W.2 has stated that first he himself, deceased and Hemabanta went to a little distance towards Nuabandha. However, on the way P.W.2 and Hemabanta waited for Bidyadhar Pradhan. In the meantime, P.W.2 also attended to his ailing mother at his home. P.W.2 explained that he along with Hemabanta and Bidyadhar Pradhan proceeded to the spot about half an hour after the deceased left him and Hemabanta on the way.

The evidence of P.W.2 has not been assailed by the defence on the basis of some contradictions which the learned Sessions Judge considered to be minor. His contradictions are with respect to statements made under Sections 161 and 164 of the Code before P.W.6 and Magistrate. It is stipulated in cross-examination that this witness has not stated in his earlier statements that the deceased Maguni came to his house and requested to go to the spot land as a gentleman. He also stated in his earlier statement that the deceased told him that he had come to Grma Rakhi and the Grama Rakhi was not in his house and he expressed his intention regarding lodging of Police

report. It is further clear from the evidence of P.W.2 at paragraph-2 that he admitted that the accused dealt an axe blow on the deceased when he fell down in the manner in which timber logs are cut.

So on the basis of such statement, it is agued by the learned counsel that when a witness states that the appellant gave blows by means of an axe, the natural meaning is that he gave blows in the sharp side of an axe. It is the very prosecution case that the deceased was done to death by giving blows with sharp side of an axe, which is evident from F.I.R. lodged by P.W.1. The learned Sessions Judge has further taken into consideration the evidence that P.W.2 witnessed the occurrence from a distance of 165 feet. Learned trial Judge has further held that since the distance is 165 feet, it is not at all expected that P.W.2 would be able to distinctly notice as to whether axe blows were dealt on its sharp side or blunt side.

P.W.2 has further stated at Paragraph-6 that the land in question was in cultivating possession of the appellant. He admitted the defence suggestion that the appellant had cultivated the paddy in the spot land. P.W.1, the wife of the deceased and the informant has admitted that before mutation of the spot land in the name of her husband's sister's husband Gobinda Pradhan, it was the accused who was cultivating the spot land since long. About one month prior to the date of occurrence her husband claimed the spot land informing the accused that he should leave the same as the same has been recorded in their favour. She admitted the defence suggestion that in the occurrence year, the appellant sown paddy in the spot land and he declined to leave possession of the spot land.

On the basis of this factual aspect, it is apparent that the deceased was the aggressor. When the land in question was in cultivating possession of the appellant and that he had sown paddy there, it was not proper on the part of the deceased to resist the reaping of paddy by the appellant. Coming back to the reliability of the solitary eye witness, P.W.2, it is seen that his evidence suffers from certain contradictions with respect to his statement made earlier under Sections 161 & 164 of the Code. Furthermore, the evidence of P.W.2 is not supported by the evidence of P.W.5 in the sense that the Doctor had found lacerated injury on the person of the deceased which could be caused by the blunt side of the axe and it is not the case of the prosecution that the blunt side of the axe was used, rather it is the case of the prosecution that sharp side of the axe was used. This fact is also gatherable from the evidence of P.W.2.

8. Section 134 of the Indian Evidence Act, 1872, hereinafter referred to as "the Evidence Act" provides as follows:

> "**134. Number of witnesses**.-No particular number of witnesses shall in any case be required for the proof of any fact".

From this provision, it is clear that in order to establish a fact that it is not necessary on the part of the prosecution to prove a number of witnesses. A solitary eye witness, who is truthful and reliable in proving the fact asserted by the prosecution may outweigh a number of untruthful witnesses, who are not reliable, can be said to be proved the case of the prosecution. In the case of **Vadivelu Thevar v. the State of Madras** (AIR 1957 SC 614), the Hon'ble Supreme Court way back in the year 1957 classified the witnesses into three categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. Generally the evidence of a witness, who is wholly reliable, can be accepted and a particular finding can be given without any difficulty. Similarly unreliable witnesses can be discarded and existence of factor non-existing thereof can be recorded by Court. The problem arises whether a witness is neither fully reliable and fully not reliable. In such cases, the evidence of the witnesses is to be carefully examined to find out whether a person can be found guilty of a heinous offence like murder and send to prison for rest of his life.

9. In order to accept the evidence of solitary eye witness the Court has to come to a finding that his evidence is reliable quality without any contradiction or infirmity. Another approach is to test his evidence by testing it with the anvils of the objective circumstances found in the case. It is evident from the discussion of evidence of P.W.2 that there are certain contradictions in his deposition made before the learned Sessions Judge. Further, his evidence cannot be wholly reliable in view of the fact that he witnessed the incident from a distance of 165 feet as has been found by the learned Sessions Judge. His evidence is not supported by the Doctor's evidence as the deceased was found to have sustained injuries on his person which could have been caused by the blunt side of the axe seized in this case. So, we are of the opinion that if the evidence of the solitary eye witness, P.W.2 is tested in the anvils of the objective circumstances then his evidence cannot be said to be reliable so as to come to a conclusion that the accused has committed murder of the deceased.

10. The other materials available on record i.e., alleged dying declaration made before P.W.1 cannot be accepted, as it is an oral dying declaration and runs contrary to the medical opinion.

11. The statement leading to discovery alone itself will not prove the case of the prosecution as it is not established by the prosecution that the axe (M.O.I) was stained with human blood by chemical examination. So, necessary connection between the weapon of offence and the crime cannot be established in this case. Moreover, the axe i.e. produced by the appellant's mother-in-law.

12. Thus, on conspectus of the materials available on record, we are of the opinion that the evidence of P.W.2, Gobardhan Badi is fraught with contradictions and he being a solitary eye witness, whose evidence do not fit to the anvils of objective circumstances of the case as proposed by the prosecution cannot be relied upon. So, there are also materials on record to show that although there are many other eye witnesses to the occurrence, they have not been examined without any plausible explanation. There is material regarding the dispute over the possession of the land which is raised by the deceased and it is admitted by P.Ws.1 and 2 that the appellant was in cultivating possession of the land in question.

13. Keeping in view the materials on record, we are of the opinion that the prosecution has not established its case beyond all reasonable doubts and benefit of doubt goes to the appellant. We, therefore, hold that the learned Sessions Judge committed error on record by holding the appellant guilty of the offence under Section 302 of the Penal Code.

14. Hence, the appeal is allowed. His conviction under Section 302 of the Penal Code and the sentence of imprisonment of life are hereby set aside. The appellant is acquitted of the offence under Section 302 of the Penal Code. He be set at liberty forthwith, if his detention is not necessary in any other case.

15. Accordingly, the CRA is disposed of.

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

17. Urgent certified copy of this judgment be granted on proper application.

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2021 (III) ILR-CUT- 235

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

W.P.(C) NO(s). 36241, 36243, 36245, 36502, 36509, 36514, 36519, 36522, 36526, 36529, 36532, 36537, 36540, 36544, 34744 & 36949 OF 2020

M/S. HI TECH EDIFICE PVT. LTD, KHURDA …. Petitioner

.V.

UNION OF INDIA & ORS. ….Opp.Parties

(In all cases)

CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ Petition filed to declare Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 as ultra vires – Appeal before the Appellate Tribunal – Conditions of pre-deposit/modes of pre deposit by the promoters challenged – Held, such conditions of pre-deposit imposed by legislature in their wisdom cannot be considered to be unconstitutional, not being un-reasonable or onerous. (Para 18)

Case Laws Relied on and Referred to :-

1. CWP No.38144/2018(Dt.16.10.2020 : Experion Developers Pvt. Ltd. v. State of Haryana & Ors.
2. W.P.No. 29933/2019 & W.M.P.No. 29844/2019 :T.Chitty Babu v. Union of India & Anr.
3. (2012) 192 DLT 186 : Gagan Makkar & Anr. Vs. Union of India.
4. 1980 (supp) SCC 574 : Seth Nand Lal and Ors vs. State of Haryana and Ors.
5. (1993) 1 SCC 22 : Shyam Kishore vs. Municipal Corporation of Delhi.
6. AIR 1980 Bom 162 : M/s. Elora Construction Company vs. The Municipal Corporation of Greater Bombay & Ors.
7. AIR 1984 Cal 283 : Chatter Singh Baid & Ors. Vs. Corporation of Calcutta & Ors
8. 2000 1 L.W. 708 : Immanuel vs. The Special Deputy Collector, Tirunelveli
9. C.A.No.7574/2014 (decided on 10.7.2019) : M/s. S.E. Graphites P.Ltd. vs. State of Telangana & Ors.
10. (1999) 4 SCC 468 : Gujarat Agro Industries Co. Ltd., vs. Municipal Corporation of the City of Ahmedabad & Ors.
11. C.A.No.7358/2019 (decided on 18.9.2019) : M/s.Tecnimont Pvt. Ltd. vs. State of Punjab & Ors.
12. (1974) 2 SCC 393 : Ganga Bai vs. Vijay Kumar.
13. (1975) 2 SCC 175 : Anant Mills Co. Ltd. vs. State of Gujarat.
14. (2004) 4 SCC 311 : Mardia Chemicals Ltd. vs. Union of India.
15. AIR 2019 SC 4489 : M/s. Technimont Pvt. Ltd. v. State of Punjab.
16. (2010) 11 SCC 1 : Union of India v. R. Gandhi, President, Madras Bar Association.
17. (2018) 6 SCC 21 : State of Gujarat v. Utility Users Welfare Association.
18. 2018 (1) RCR (Civil) 298 : Realtors Suburban Pvt. Ltd. v. Union of India.

19. AIR 1958, 895 : Venkataramana Devaru v. State of Mysore.
20. AIR 1992 SC 1754 : State of Rajasthan v. Gopi Kishan Sen.
21. (2003) 3 SCC 57 : CIT v. Hindustan Bulk Carriers.
22. (2018) 13 SCC 1 : Securities & Exchange Board of India v. Classic Credit Ltd.
23. (1977)1 SCC593 : K.Kapen Chako v. The Provident Investment Co.(P) Ltd.
24. (2014) 4 SCC 657 : Suhas H. Pophale v. Oriental Insurance Co. Ltd.
25. (2012) 7 SCC 464 : Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board;
26. 2019 AIR (SC) 4489 : M/s.Tecnimont Pvt. Ltd.(Formerly known as Tecnimont ICB Private Limited) Vs. State of Punjab & Ors.
27. 2007 AIR SC 71 : M. Nagaraj and Ors v. Union of India and Ors.
28. 2008 AIR SCW 1826 : Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi.
29. AIR 2011 SC 1913 (relied upon) :Narayana Ch.Ghosh v. UCO Bank & Ors.
30. AIR 2021 SC 1041 : Kotak Mahindra Bank Pvt. Ltd. V. Ambuj A. Kasliwal & Ors.

For Petitioner : Mr. Subhankar Rout
Mr. S.S. Kashyap

For Opp.Parties : Mr. P.K. Parhi, ASGI,
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Mr. Debraj Mohanty
Mr. Sanjib Swain, Sr. Panel Counsel.
Mr. B.P. Pradhan
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Mr. M.K. Badu, CGC
Mr. K.C. Kar, CGC
Mr. D.K.Sahoo-1, CGC
Mr. S. Mohanty, CGC
Mr. A.K. Mohanty, CGC
Mr. Mohit Agarwal
Mr. C.K. Pradhan, CGC
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Mr. D. Swain, Sr. Panel Counsel.
Mr. Gyanaloka Mohanty, Sr. Panel Counsel
Mr. Subha Bikas Panda, CGC
Mr. B.K. Parhi, CGC.

JUDGMENT Date of Hearing : 10.08.21/07.10.21: Date of Judgment : 07.10.2021

S.K. MISHRA, J.

1. In these bunch of Writ Petitions, M/s. Hi Tech Edifice Pvt. Ltd.,Khurda- Petitioner in all these Writ Petitions (hereinafter referred to as "the Petitioner" for brevity) has prayed to declare the proviso to Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016(hereinafter referred to as" the Act, 2016" for brevity) to be ultra vires of the Constitution of India and to quash the orders dated 7.9.2020 passed by the learned Odisha Real Estate Appellate Tribunal in OREAT Appeal Nos.5(T)/2020/09/(RE)/2018, 40(T)/2020/24/2019, 04(T)/2020/8 RE (2018), order dated 14.9.2020 passed in OREAT Appeal No.64(T)/2020/48/2019, order dated 21.9.2020 passed in OREAT Appeal No.14(T)/2020/18 (RE)/2018, order dated 23.9.2020 passed in OREAT Appeal No.85(T)/2020/20/2018, order dated 09.9.2020 passed in OREAT Appeal No.06(T)/2020/10 RE/2018, order dated 28.9.2020 passed in OREAT Appeal No.32(T)/2020/16/2019, order dated 14.9.2020 passed in OREAT Appeal No. 57(T)/2020/41/2019, order dated 28.9.2020 passed in OREAT Appeal No. 30(T)/2020/14/2019, order dated 23.9.2020 passed in OREAT Appeal No.15(T)/2020/19 RE/2018, order dated 28.9.2020 passed in OREAT Appeal No.31(T)/2020/15/2019, order dated 07.9.2020 passed in OREAT Appeal No.38(T)/2020/22/2019, order dated 07.9.2020 passed in OREAT Appeal No.39(T)/2020/23/2019, order dated 09.9.2020 passed in OREAT Appeal No.07(T)/2020/11 (RE) /2018 and order dated 23.9.2020 passed in OREAT Appeal No.93(T)/2020/28/2019.

2. The Petitioner is a Real Estate Developer and a Registered Company. Various Complaint Cases were initiated against the Petitioner before the Odisha Real Estate Regulatory Authority, Bhubaneswar (hereinafter referred to as the "Authority" for brevity), which were allowed. In these cases, the private Opposite Parties have complained about the delayed delivery of the Apartment they have booked with the Petitioner.

The Authority in Complaint Case No.95/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.9,81,750/-(Rupees Nine Lakhs Eighty One Thousand Seven Hundred Fifty) along with interest of 10.35% to the complainant -Mr. Debasis Sen (Opposite Party No.4 in W.P.(C) No.36241/2020).

The Authority in Complaint Case No.227/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.9,42,900/- (Rupees Nine Lakhs Forty Two Thousand Nine Hundred) along with interest of

10.5% to the complainant-Ms. Simadree Pradhan (Opposite Party No.4 in W.P.(C) No.36243/2020).

The Authority in Complaint Case No.82/2018 directed the Respondent-Petitioner to refund payment of Rs.6,68,250/-(Rupees Six Lakhs Sixty Eight Thousand Two Hundred Fifty) along with interest of 10.35% to the complainant-Mr. Tapas Mohapatra (Opposite Party No.4 in W.P.(C) No.36245/2020).

The Authority in Complaint Case No.111/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,25,500/-(Rupees Seven Lakhs Twenty Five Thousand five Hundred) along with interest of 10.5% to the complainants -Mr. Parimal Chandra Samaddar and Mrs. Meera Samaddar (Opposite Party Nos.4 and 5 in W.P.(C) No.36502/2020).

The Authority in Complaint Case No.105/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,98,750/-(Rupees Six Lakhs Ninety Eight Thousand Seven Hundred Fifty) along with interest of 10.35% to the complainant -Mr. Subash Chandra Maiti (Opposite Party No.4 in W.P.(C) No.36509/2020).

The Authority in Complaint Case No.226/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,45,600/-(Rupees Six Lakhs Forty Five Thousand Six Hundred) along with interest of 10.5% to the complainant-Mr. Gyan Ranjan Pradhan (Opposite Party No.4 in W.P.(C) No.36514/2020).

The Authority in Complaint Case No.96/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.5,58,000/-(Rupees Five Lakhs Fifty Eight Thousand) along with interest of 10.35% to the complainant-Mr. Amit Das (Opposite Party No. 4 in W.P.(C) No. 36519/2020).

The Authority in Complaint Case No.109/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,98,500/-(Rupees Five Lakhs Fifty Eight Thousand) along with interest of 10.5% to the Complainant-Mrs. Bijayani Devi (Opposite Party No.4 in W.P.(C) No.36522/2020).

The Authority in Complaint Case No.122/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.5,34,850/-(Rupees Five Lakhs Thirty Four Thousand Eight Hundred Fifty) along with interest of 10.5% to the complainant –Mrs. Namita Sahu (Opposite Party No.4 in W.P.(C) No.36526/2020).

The Authority in Complaint Case No.125/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,42,750/-(Rupees Seven Lakhs Forty Two Thousand Seven Hundred Fifty) along with interest of 10.5% to the complainant –Mr. Banamali Swain (Opposite Party No.4 in W.P.(C) No.36529/2020).

The Authority in Complaint Case No.106/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,54,600/-(Rupees Six Lakhs Fifty Four Thousand Six Hundred along with interest of 10.35% to the complainant –Kintali Sridhar (Opposite Party No.4 in W.P.(C) No.36532/2020).

The Authority in Complaint Case No.124/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,21,500/-(Rupees Six Lakhs Twenty One Thousand Five Hundred) along with interest of 10.5% to the complainant –Mr. Damodar Behera (Opposite Party No.4 in W.P.(C) No.36537/2020).

The Authority in Complaint Case No.224/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.3,97,125/-(Rupees Three Lakhs Ninety Seven Thousand One Hundred Twenty Five) along with interest of 10.5% to the complainant –Mr. Sankar Sebak Dey (Opposite Party No.4 in W.P.(C) No.36540/2020).

The Authority in Complaint Case No.123/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,98,000/-(Rupees Seven Lakhs Ninety Eight Thousand) along with interest of 10.5% to the complainant –Mr. Rabindra Nath Dash (Opposite Party No.4 in W.P.(C) No.36544/2020).

The Authority in Complaint Case No.90/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.10,01,885/-(Rupees Ten Lakhs One Thousand Eight Hundred Eighty Five) along with interest of 10.35% to the complainant –Mr. Devi Prasanna Mohanty (Opposite Party No.4 in W.P.(C) No.34744/2020).

The Authority in Adjudication Case No.5/2018 directed the Respondent-Petitioner to refund payment of Rs.1,00,000/-(Rupees One Lakh) along with interest of 10.35% to the complainant –Mr. Tapas Mohapatra (Opposite Party No.4 in W.P.(C) No.36949/2020).

Such orders were challenged in appeal before the Real Estate Appellate Tribunal (hereinafter referred to as " the Tribunal" for brevity) in different OREAT Appeals and the learned Tribunal has passed orders as mentioned in the first paragraph.

3. Without averting to all the facts because of the limited nature of the challenge to the order impugned on factual aspect, the essential facts of the case may be stated as follows:

It is the case of the Petitioner that it could not complete the project in time due to the default on the part of the allottee to deposit the amount as per the agreement. In fact, it was also specifically directed by the Authority that both the parties shall comply with the terms of the agreement and further that the allottee shall pay the remaining amount for completion of the project. Even though the Petitioner completed the project in due compliance of the order of the Authority, the allottee has not complied with the order. Hence the delay in completion of the project cannot be attributed solely to the default on the part of the Petitioner.

4. The Petitioner asserts that Proviso to Sub-Section (5) of Section 43 of the Act, 2016 is vague and arbitrary inasmuch as it provides for three different, disproportionate and illusory modes of calculation of the amount to be deposited in the Appellate Tribunal by the promoter, as a precondition for the appeal to be entertained by the Tribunal. It is further submitted that the provision leaves an unbridled power in the hands of the Authority in that regard.

5. The Petitioner further asserts that Sub-Section (5) of Section 43 of the Act, 2016 of the Act and the Proviso thereto indicates that even though any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating Officer under the Act, 2016 can prefer an appeal before the Tribunal having jurisdiction over the matter, but only the promoter has been held liable to pre-deposit the amount for his appeal to be entertained. It further transpires that Proviso for three different and disproportionate modes of calculation of the amount to be deposited in the Tribunal by the promoter, as a precondition for the appeal to be entertained by the Tribunal. It is seen that where the order appealed against imposes a penalty, the promoter is required to deposit at least 30% of the penalty amount or such higher amount as may be directed by the Tribunal but where the appeal is against any other order which involves the payment of an amount to the allottee, then the promoter is required to deposit the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be. The promoter is required to deposit the whole amount before the appeal is heard. Therefore, it is prayed on behalf of the Petitioner that the foresaid provision is ultra vires of the Constitution.

6. In this case, the Union of India has not filed any counter affidavit. In course of hearing, it is stated by the learned Counsel appearing for the Union of India that that the matter is covered by the Division Bench judgment of the Punjab and Haryana High Court in the case of ***Experion Developers Pvt. Ltd. v. State of Haryana and others***; CWP No.38144 of 2018 dated 16th October, 2020 and other similar matters and the Division Bench Judgment of the Madras High Court in the case of ***T.Chitty Babu v. Union of India and another***; W.P. No.29933 of 2019 and W.M.P.No.29844 of 2019.

7. The Opposite Party No.3 has filed a counter affidavit with a prayer to remove the name of Respondent No.3 from the Writ Petition with regard to the substantive averments made by the Petitioner. Opposite Party No.3 at Paragraphs- 4 and 5 of the counter affidavit has put forth its case, which are quoted herein below:-

> "4. That the contents of Paras no.13 and 14 elaborate the arbitrary nature of the Provision to Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016. It is most humbly submitted, without prejudice, that the Answering Respondent is a body which voices the concerns of the industry whilst promoting transparency and ethics amongst real estate stakeholders. It is submitted that real estate industry has been in the grip of a slowdown and it facing acute liquidity crunch over the past few years. Across the counter, many projects have been delayed and/or stalled due to lack of liquidity. Subsequently, the sector was also hit by Covid-19 pandemic and is still reeling under legacy issues. It is submitted that the above provision fails to balance the interests of the promoters and the homebuyers. The provision confers an illusory right to appeal to the promoter as it casts an onerous burden as a prerequisite for filing an appeal before the Real Estate Appellate Tribunal.
>
> 5. That without prejudice, in Para No.15 it is submitted that the Provision to Sub-Section (5) of Section 43 of the Act creates an anomaly in as much as the proviso requires the promoter, who is filing an appeal against an order directing payment to the homebuyers, to deposit the whole of the money including interest and compensation without there being any distinction as to whether the allottee wishes to withdraw from the project on account of discontinuance or wishes to take the flat with the entitlement of interest as per the Proviso to Section 18(b) of the Act. It is submitted that the anomaly thus created needs to be addressed by a court of competent jurisdiction in the interest of justice."

8. Now two questions arise in these Writ Petitions;

(1) whether the order passed by the learned Tribunal is factually liable to be set aside, and
(2) whether the provision of Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 is ultra vires.

Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 is quoted below:

> "43(5) – Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.
>
> Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the appeal is heard.
>
> Explanation: For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."

9. It is not disputed by the Parties that in the mean while the judgments of two High Courts have already dealt with the matter. In the case of ***T.Chitty Babu v. Union of India and another***; W.P. No.29933 of 2019 and W.M.P.No.29844 of 2019, the Hon'ble High Court of Madras has referred to various judgments, i.e. in the cases of ***Gagan Makkar and Anr. Vs. Union of India***; (2012) 192 DLT 186, ***Seth Nand Lal and Ors vs. State of Haryana and Ors***., 1980 (supp) SCC 574, ***Shyam Kishore vs. Municipal Corporation of Delhi***, (1993) 1 SCC 22, ***M/s. Elora Construction Company vs. The Municipal Corporation of Greater Bombay and Ors.,*** AIR 1980 Bom 162, ***Chatter Singh Baid and Ors. Vs. Corporation of Calcutta and Ors.***, AIR 1984 Cal 283, ***Immanuel vs. The Special Deputy Collector, Tirunelveli***, 2000 1 L.W. 708, ***M/s. S.E. Graphites Private Limited vs. State of Telangana and Ors***.; Civil Appeal No.7574 of 2014, decided on 10.7.2019, ***Gujarat Agro Industries Co. Ltd., vs. Municipal Corporation of the City of Ahmedabad and Ors***.; (1999) 4 SCC 468, ***M/s.Tecnimont Pvt. Ltd. vs. State of Punjab and Ors***., (Civil Appeal No.7358 of 2019, decided on 18.9.2019, ***Ganga Bai vs. Vijay Kumar***; (1974) 2 SCC 393, ***Anant Mills Co. Ltd. vs. State of Gujarat***; (1975) 2 SCC 175, ***Mardia Chemicals Ltd. vs. Union of India***; (2004) 4 SCC 311 and came to the finding that the words "it shall not be entertained" occurring in the proviso to Sub-

Section (5) of Section 43 of the 2016 Act, is a preliminary injunction. This prevents even the presentation of an appeal. The Clause "before the said appeal is heard" ultimately is a final injunction to the process of appellate exercise of jurisdiction. Conjointly this clearly shuts out even the presentation or physical filing of an appeal before the Appellate Authority, as the total amount to be deposited as against compensation is a sine qua non. The Hon'ble High Court of Madras held that the provision to be intra vires and the appellate forum is not illusory and the condition of pre-deposit cannot be termed as onerous.

10. In the case of ***Experion Developers Pvt. Ltd. v. State of Haryana and others***; CWP No.38144/2018 and other similar cases decided on 16th October, 2020, the Hon'ble High Court of Punjab and Haryana has also referred to various judgments, i.e. in the case of ***M/s. Technimont Pvt. Ltd. v. State of Punjab;*** AIR 2019 SC 4489, in the cases of ***Union of India v. R. Gandhi, President, Madras Bar Association*** (2010) 11 SCC 1 and ***State of Gujarat v. Utility Users Welfare Association***; (2018) 6 SCC 21, in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India***, 2018 (1) RCR (Civil) 298, in the case of ***Venkataramana Devaru v. State of Mysore***; AIR 1958, 895, in the case of ***State of Rajasthan v. Gopi Kishan Sen***; AIR 1992 SC 1754, in the case of ***CIT v. Hindustan Bulk Carriers***; (2003) 3 SCC 57, in the case of ***Securities and Exchange Board of India v. Classic Credit Ltd***.; (2018) 13 SCC 1, in the case of ***K.Kapen Chako v. The Provident Investment Company (P) Ltd***.; (1977) 1 SCC 593, in the cases of ***Suhas H. Pophale v. Oriental Insurance Co. Ltd***.; (2014) 4 SCC 657 and ***Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board***; (2012) 7 SCC 464 and came to the following conclusions:-

> (i) The challenge to the constitutional validity of the proviso to Section 43(5) of the Act is rejected.
>
> (ii) The order of the Appellate Tribunal declining to grant the Petitioners further time to make the pre-deposit beyond the date as stipulated by the Appellate Tribunal or where the appeals have been rejected on account of the Petitioners failure to make the pre-deposit as directed, are hereby affirmed.
>
> (iii) In the facts and circumstances of the individual cases, no grounds have been made out to persuade this Court to exercise its writ jurisdiction under Article 226 of the constitution to grant any relief in respect of waiver of pre-deposit. In none of the cases is the Court satisfied that a case of 'genuine hardship' has been made out.

(iv) On the interpretation of the provisions of the Act, the conclusions in this judgment on the scope of jurisdiction of the Authority and the AO respectively, and given the prayers in the individual complaints from which these writ petitions arise, in none of the cases the Authority can be held to have exercised a jurisdiction that it lacked and its orders cannot be said to be without jurisdiction. No interference under Articles 226 is warranted on that score.

(v) As regards the merits of the order of Authority the remedy of an appeal before the Appellate Tribunal is in any event available. Even where according to the party aggrieved the Authority lacked jurisdiction to decide the complaint, it would be for the Appellate Tribunal to decide that issue in light of the legal position.

(vi) A collective reading of the provisions makes it apparent that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delay delivery of possession, or penalty and interest thereon, it is the Authority which has the power to examine and determine the outcome of a complaint.

11. The Hon'ble High Court of Punjab and Haryana further held that as the Writ Petitions were pending for some time and interim orders had been passed in many of them, where the Petitioner's appeal already stands dismissed by the Appellate Tribunal for a failure to make the pre-deposit as directed, and that order is challenged in the Writ Petition, the Court as a one time measure, permits the Petitioner to make the pre-deposit in terms of proviso to Section 43 (5) of the Act before the Appellate Tribunal within a specified date. Upon making of the pre-deposit within the time granted, the Appellate Tribunal will proceed to hear the appeal and when the appeal has been dismissed will recall its order dismissing the appeal, restore the appeal to file and proceed to dispose of the appeal on merits, which will include examining the validity of the order of the Authority. On failure of the Petitioners to make the pre-deposit within the time as granted by the Court, the order of the Appellate Tribunal dismissing the appeal will stand affirmed without any further recourse to the Court and dismissed all the Writ Petitions.

12. The Petitioner has challenged the proviso to Section 43 (5) of the Act as vague and arbitrary. We are of the opinion that it is misconceived. Section 43 of the Act provides for three modes of calculation of the amount to be deposited in the Appellate Tribunal by the promoter as a precondition for the appeal to be entertained by the Appellate Tribunal. The intention of the legislature behind providing three different modes for calculating the amount

to be deposited in the Appellate Tribunal before entertaining appeal depends on facts of each case. The facts may vary from case to case and hence it is not necessary or advisable to provide a strait jacket formula for every case. The Hon'ble Supreme Court while examining the similar point vide its judgment in the case of ***M/s.Tecnimont Pvt. Ltd.(Formerly known as Tecnimont ICB Private Limited) Vs. State of Punjab and Ors***., 2019 AIR (SC) 4489 in paragraph-9 was pleased to observe that a condition of pre deposit imposed by legislature in their wisdom cannot be considered to be unconstitutional not being un reasonable or onerous.

13. In this case, only the 3rd order of pre deposit condition, which is based on sound principle of law, is challenged. The allottee deposited money which is required to be deposited by pre deposit conditional order. It is quite reasonable. A concessional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate take into account of changing conditions and objectives. In this connection, we rely upon the observations of the Hon'ble Supreme Court in the case of ***M. Nagaraj and Ors v. Union of India and Ors***., 2007 AIR SC 71 at Paragraph-19, which is extracted below:-

> "19. Constitution is not an ephermal legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges."

14. Moreover, the right to appeal is neither an absolute right nor it is an ingredient of natural justice. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. The right to appeal can be conditional or qualified. The pre-deposit provision is based on the basic structure and aims and objectives of the Act. We rely upon the reported case of ***Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi***; 2008 AIR SCW 1826.

15. It is also settled principle of law that when a statute confers a right of appeal, while granting a right the legislature can impose conditions for the exercise of such right, so long as the conditions are not onerous as to amount to unreasonable restrictions rendering the right almost illusory. Bearing in mind the object of the Act the conditions hedged in the said proviso we are of the opinion that the proviso is not onerous ***(Narayana Chandra Ghosh v. UCO Bank and Ors., AIR 2011 SC 1913 relied upon)***.

16. In the case of ***Kotak Mahindra Bank Pvt. Ltd. V. Ambuj A. Kasliwal and Ors***., AIR 2021 SC 1041, the Hon'ble Supreme Court had came to the conclusion that while granting the right of appeal the legislature can impose condition for the exercise of such right. So long as conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. A provision cannot be held to be unconstitutional being unreasonable and arbitrary. The admitted amount received from the allottee should be kept in deposit as condition precedent because the further right of the allottee to get compensation and penalty will be considered at the time of final hearing of the appeal. As such the right of the allottee will be protected and the proceeding will be finalized at an early date.

17. In view of such settled principles of law and in view of the fact that the provision of sub-section (3) provides for deposit of amount which is already calculated by the Authority in a quasi judicial proceeding after taking into consideration all the materials available on record, a condition imposing a pre deposit by the promoter is not unreasonable or onerous. It is also not arbitrary. It is not the case of the Petitioner that the Appellate Tribunal without considering the materials on record directs a pre deposit in fact there has been adjudication of the same which is challenged before the Appellate Tribunal and the Appellate Tribunal shall not entertain the appeal unless at least 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal or the total amount is paid to the allottee including interest or compensation is deposited before the appeal is heard.

18. So in the ultimate analysis, we are of the opinion that Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 is not arbitrary, unreasonable or onerous requiring the same to be declared ultra vires.

19. Coming to the first question we have formulated in this case whether the order passed by the learned Tribunal is factually liable to be set aside, we

are of the opinion that in a proceeding of writ of certiorari, interim orders should not be casually interfered with. Moreover, no substantial ground has been made by the Petitioner to come to a conclusion that the orders passed by the learned Tribunal are factually unwarranted requiring interference in a writ of certiorari.

20. In that view of the matter the Writ Petitions are devoid of any merit and are therefore dismissed.

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2021 (III) ILR-CUT- 247

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

W.P.(C) NO. 3220 OF 2019

SIBA MUDULI .....Petitioner

.V.

DIRECTOR, CONSOLIDATION, ODISHA, CUTTACK & ORS. .....Opp.Parties

CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Reference made to the third bench – Dispute with regard to divergent view on Section 37 of the Orissa Consolidation of Holding & Prevention of Fragmentation of Land Act.1972 (OCH & PFL Act.) – 1st question raised that, whether the Commissioner/Director can entertain a petition at any point of time as there is no period of limitation has been prescribed under the Act? – 2nd question raised that, what is the "reasonable time" to entertain such petition? – Held, the commissioner/director can entertain a petition at any point of time as there is no period of limitation has been prescribed under the Act. And the "reasonable time" means it is question of fact depending on the peculiar facts of each and every case and no strait jacket formula can be provided.

Case Laws Relied on and Referred to :-

1. 2003 (Supp.) OLR-882 : Abhaya Charan Mohanty v. State of Orissa & Ors.
2. 2007 (1) OLR-598 : Bhagaban Jena & Ors. v. State of Orissa & Ors.
3. 1993(II) OLR-194 : Gulzar Khan v. Commissioner of Consolidation & Ors.
4. AIR 1983 SC 1239 : Manasaram v. S.P. Pathak.
5. 1995 Supp (3) SCC 249 : State of Orissa & Ors. v.Bbrundaban Sharma & Anr.
6. (2003) 7 SCC 667 :Ibrahimpatnam Taluk Vyavasaya Coolie Sangham v. K. Suresh Reddy & Ors.

For Petitioner : Mr. H.N.Mohapatra
For Opp.Parties : Mr. M.S.Sahoo, A.G.A
For Interveners : Mr. Samir Mishra.

JUDGMENT Date of Hearing : 08.02.21/07.10.21: Date of Judgment : 07.10.2021

S.K. MISHRA, J.

1. This is a reference to the larger Bench to resolve the conflict between the reported cases of ***Abhaya Charan Mohanty v. State of Orissa and others***; 2003 (Supp.) OLR-882 and ***Bhagaban Jena and others v. State of Orissa and others***; 2007 (1) OLR-598. Apparently, both the aforesaid reported cases were decided by different Single Benches of this Court and there appears to be a conflict of opinion regarding delay in filing the application under Section 37 (1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (in short "OCH & PFL Act").

2. Noting this differences of opinion of learned single Judge in W.P.(C) No.3220/2019 as per order dated 27.2.2019 referred the matter to a larger Bench to decide the following questions :-

> (i) Whether the Commissioner/Director, Consolidation can entertain the petition at any point of time, where no period of limitation has been prescribed for invoking jurisdiction of the Commissioner, Consolidation/ Director, Consolidation under Section 37 of the OCH & PFL Act?
>
> (ii) What is the reasonable time in approaching the court, when no period of limitation has been prescribed?

3. Admittedly Section 37 OCH & PFL Act do not provide for any limitation for filing an application under Section 37 of the OCH & PFL Act. It is also apparent from the provisions itself that the Consolidation Commissioner as well as the Director of Consolidation can suo motu examine the regularity of the proceeding or as to the correctness , legality or propriety of any order passed by such authority in the case or proceedings and may after allowing the parties concerned a reasonable opportunity of being heard make such order as it thinks fit.

4. Thus divergent opinion regarding the scope of Section 37 of the OCH & PFL Act, it was settled by the Full Bench Judgment of this Court in the case of ***Gulzar Khan v. Commissioner of Consolidation and others***; 1993(II) OLR-194. In the case of Gulzar Khan, the question arose whether the

Commissioner or the Director of Consolidation has the jurisdiction to call for records and pass appropriate orders under Section 37 of the OCH & PFL Act even after issuance of notification under Section 41(1) of the said Act. The Full Bench of this Court after taking into consideration various Full Bench Judgments pronounced earlier and also various other judgments at paragr-37 held as follows:-

> "The aforesaid being the position, it is apparent that a forum has to be available to a person who was to be aggrieved, after Section 41 notification has been issued, with any order having been done during the consolidation operations affecting his right, title and interest. As stated in the opening sentence of this judgment, there cannot be a right without any remedy; and, according to us, the remedy can be made available principally by Section 37 of the Act. As to when such a situation may arise need not be spelt out; indeed, it cannot be; the probability of such a situation arising cannot obviously be ruled out. The power being unfettered, we cannot put any fetter; any such action of ours would render some really hard-pressed people without a remedy. May we repeat that we are not at the question as to when power under Section 37 would be or should be exercised. As already pointed out, this power shall be available only under compelling circumstances, but on compelling circumstances existing, we cannot shut out the invocation of the power. May we also observe that though Section 37 has conferred an unfettered power it is settled law that every power, be it administrative or judicial, has as to be exercised in a reasonable manner, and the reasonable exercise of power inheres in its exercise within a reasonable time as stated at pp.1245-6 of ***Manasaram v. S.P. Pathak***: AIR 1983 SC 1239. This apart no power is really unfettered; every power has to be exercised according to rules of reason and justice, not according to private opinion; according to law, and not according to humour. The exercise of discretionary power cannot be arbitrary, vague and fanciful: it has to be legal and regular."

5. Thus, it is clear that Full Bench of this Court has held that the power under Section 37 of the OCH & PFL Act is unfettered and can be exercised to render justice to some really hard-pressed people who are without a remedy. The Full Bench further held that such power has to be exercised in a reasonable manner and reasonable exercise of power inheres in its exercise within a reasonable time as stated in the case of ***Manasram v. S.P.Pathak (supra)***.

6. In another case arising out of Orissa Estates Abolition Act, 1951 read with provision of the Land Acquisition Act, 1994 arising out of an order of this Court, the Hon'ble Supreme Court in the case of ***State of Orissa and***

others v.Bbrundaban Sharma and another; 1995 Supp (3) Supreme Court Cases 249, examined a case where after 27 years of grant of Patta, the Tahasildar has cancelled the same under the provisions of Orissa Estates Abolition Act was upheld by the Hon'ble Supreme Court by setting aside the order of this Court. Such view is taken by the Hon'ble Supreme Court mainly on the ground that when the original order was vitiated by illegality or impropriety committed by officer or authority or was passed due to suppression of the material facts or fraud, it is open to the Tribunal to reopen the same. The Hon'ble Supreme Court further held that limitation would start running from the date of the discovery of the fraud or suppression of material or relevant fact or omission thereof and an order under Section 17 of the Orissa Estates Abolition Act was not a bar to exercise suo motu revisional power.

7. In the case of ***Ibrahimpatnam Taluk Vyavasaya Coolie Sangham v. K. Suresh Reddy and others***; (2003) 7 Supreme Court Cases 667, the Hon'ble Supreme Court had the opportunity of examining the scope and ambit of Section 50–B(4) of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950 and has held as follows:-

> "In the absence of necessary and sufficient particulars pleaded as regards fraud and the date or period of discovery of fraud and more so when the contention that the suo motu power could be exercised within a reasonable period from the date of discovery of fraud was not urged, the Single Judge as well as the Division Bench of the High Court were right in not examining the question of fraud alleged to have been committed by the non-official respondents. The use of the words "at any time" in Section 50-B (4) of the Act only indicates that no specific period of limtation is prescribed within which the suo motu power could be exercise reckoning or staring from a particular date advisedly and contextually. Exercise of suo motu power depended on facts and circumstances of each case. While exercising such power, several factors need to be kept in mind as such effect on the rights of the third parties over the immovable property due to passage of considerable time, change of hands by subsequent bona fide transfers the orders attaining finality under the provisions of other Acts (such as the Land Ceiling Act). Hence, under Section 50-B(4) the suo motu power could be exercised within reasonable period from the date of discovery of fraud depending on facts and circumstances of each case in the context of the statute and nature of rights of the parties. The expression "any time" in Section 50-B(4) cannot be rigidly read letter by letter. It must be read and construed contextually and reasonable and not in an unguided or arbitrary manner.

8. In the OCH & PFL Act, a provision regarding limitation has been provided in Section 57. It reads as follows:-

> "57.Limitation – Subject to the provisions of this Act, the provisions of the Limitation Act, 1963 except Sections 6,7,8,9,18 and 19 shall apply to all applications, appeals revisions and other proceedings under this Act, or the rules made thereunder".

9. Thus, it is apparent from the record that the Orissa Legislative Assembly has made the provisions of the Limitation Act except those provisions mentioned above in the statute itself are applicable to all the applications, appeals, revisions and other proceedings under the Act.

10. However, the provision of Section 37 of the OCH & PFL Act is an enabling Section, which reads follows:

> "37. Power to call for records – (1) The Consolidation Commissioner may call for and examine the records any case decided or proceedings taken up by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness, legality or proprietary of any order passed by such authority in the case or proceedings and may, after allowing the parties concerned a reasonable opportunity of being heard make such order as he things fit.
>
> (2) The power under Sub-Section (1) may be exercised by the Director of Consolidation in respect of authorities subordinate to him."

The power to call for records by the Director or Commissioner Consolidation has been provided to give relief to some persons who are hard-pressed having right but without effective forum of remedy. It is also provided that this power is a suo motu power and which can be exercised by the Commissioner or Director without any application or with an application of an aggrieved party.

11. So having considered all these cases, we are of the opinion that the questions referred to this Bench by the learned Single Judge are answered in the following manner:-

> (1) The Commissioner/Director can entertain a petition at any point of time as there is no period of limitation has been prescribed for the same under Section 37 of the OCH & PFL Act.
>
> (2) What is a reasonable time as it is seen from the reported cases referred to above that in appropriate case even after 27 years the Revisional Authorities have exercised their suo motu power to correct a grave error or injustice perpetuated.

12. We are of the firm opinion that reasonable time may extend even to 20 to 30 years also in cases where the facts of the case involved any of the following factual/legal aspects :-

(i) When the order impugned is passed on the basis of fraud or fraudulent misrepresentation made by a party or based on a fraudulent document;

(ii) When the order was passed is inherently without any jurisdiction or is passed by a person who has no authority to pass such an order;

(iii) When an order is passed adversely effecting the interest of a minor without being represented by legal guardian and it includes the perpetual minor like deity;

(iv) When any Government land or community land has been grabbed by an abuse of process of law; and

(v) When the order impugned before the Revisional authority is passed in complete disregard of the provisions of law guiding the field.

13. We further hasten to add here that this list is not exhaustive but is only illustrative. So, we answer the second point that "what is a reasonable time" in approaching the Court, is in fact a question of fact depending on the peculiar facts of each and every case and no strait jacket formula can be provided.

14. In that view of the matter both questions are answered in the manner narrated above. The matter may be placed before the assigned Bench for further hearing.

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2021 (III) ILR-CUT- 252

BISWAJIT MOHANTY, J.

RPFAM NO. 125 OF 2019

NETAJI BHOI ..... Petitioner

.V.

BIJAYA LAXMI BEHERA@ BHOI ..... Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 125 – Petition for maintenance filed by wife – Despite receipt of notice the husband (petitioner) never cared to appear – The ex-parte order reached its

finality on 12.05.2014 – The order was never challenged – Whether the revision petition filed by the husband should be entertained ? – Held, No – In such background, the petitioner-Husband cannot throw the blame on the lawyer to escape from the rigors of law – This Court is of the opinion that impugned judgment cannot be said to suffer from any illegality or impropriety and accordingly is not inclined to entertain the present revision and the same is dismissed. (Para 7)

For Petitioner : M/s. M. Mishra
For Opp. Party : Mr. D.P. Dhal

JUDGMENT Date of Hearing : 03.09.2021 : Date of Judgment : 07.09.2021

B. MOHANTY, J.

This revision petition has been directed against the exparte judgment dated 30.3.2017 passed by the learned Judge, Family Court, Kendrapara in Criminal Proceeding No. 214 of 2011/CRP No. 373 of 2013, which was initiated under Section 125 of the Criminal Procedure Code by the opposite party-wife.

2. The wife of the petitioner who is the sole opposite party filed a petition under Section 125 of Cr.P.C. against the petitioner with a prayer for grant of maintenance of Rs.5,000/- per month with Rs.10,000/- as litigation expenses. In the said petition, the opposite party has stated that both she and the petitioner are governed under Mitakshar School of Hindu Law and their marriage was solemnized on 12.7.2007 as per Hindu Customs. At the time of marriage the petitioner was given different household articles, gold ornaments as per his demand and the demand of his family members. After six months of the marriage, the opposite party noticed change in behavior of the petitioner and his family members as they were not satisfied with the dowry given. Accordingly the petitioner started demanding Rs.25,000/- to be brought from her father so that he could expand his stationery-cum-betel shop. As her father was not in a position to meet such demand, she was tortured mentally and physically and she was not provided food properly. After the father of the opposite party came to know about this, he gave Rs.6,000/- to the petitioner and requested not to torture her. However in June, 2009, the petitioner left the opposite party for her father's house and made it clear to her that unless she brings the rest amount demanded, she would be harmed. Thereafter the father of the opposite party gave Rs.8,000/- to the petitioner and left the opposite party in the house of the petitioner. Again the opposite party was tortured and after some time the opposite party came to

know about the illicit relationship of the petitioner with his elder sister-in-law and when she protested, she was again assaulted by the petitioner. When the petitioner tried to kill the opposite party, the opposite party was rescued and since then she has been staying at her parent's house in a miserable condition. It is in this background she filed an application under Section 125 of Cr.P.C. praying for maintenance and litigation expenses. Therein she stated that the petitioner earns more than Rs.30,000/- per month from the betel-cum-stationery shop and agriculture. Thus despite having sufficient means he is not maintaining her.

3. It is the case of the petitioner that though in the said case after receipt of summons, the petitioner had engaged his advocate to proceed with the case but the Advocate did not take any steps and the petitioner was set ex parte. In such background the matter proceeded and ultimately same was dismissed on 13.6.2014 by the learned Judge, Family Court, Kendrapara. Challenging the said order the opposite party filed RPFAM No. 74 of 2014 before this Court and this Court vide order dated 24.11.2015 allowed the same and remitted the matter to the trial Court for fresh adjudication and for passing necessary orders. It is in this background the trial Court has passed the impugned judgment directing the petitioner to pay Rs.3,000/- per month from the date of the application subject to adjustment of interim maintenance, if any, paid. It is the further case of the petitioner the impugned order was not within his knowledge. When the petitioner received the information from the local police on 8.1.2019 about issuance of N.B.W. against the petitioner, he approached his Advocate who immediately handed over the file to the petitioner and in order to know the exact status of the case he contacted another Advocate, who intimated the petitioner that the matter has been decided ex-parte due to non-taking of steps by the previous Advocate.

4. Mr. Mishra, learned counsel for the petitioner mainly submitted that though on receipt of summons the petitioner had engaged an advocate to defend him, however the learned lawyer did not take any steps as a result of which, the petitioner was not only set ex-parte but has ultimately suffered an ex-parte judgment and for laches of his advocate the petitioner should not suffer. Mr.Mishra also disputed the income of the petitioner as pointed out by the opposite party in her plaint and evidence and submitted that in the interest of justice the impugned judgment ought to be set aside and the petitioner should be given an opportunity to cross-examine the witnesses examined

from the side of the opposite party and where after the learned court below can pronounce its judgment.

5. Mr. Dhal, learned counsel for the opposite party strongly objected to the prayer of the petitioner and submitted that such a prayer should not be entertained. He submitted that the only intention of the petitioner is to drag the matter. He also submitted that notwithstanding the order dated 12.5.2014 of the Court below directing the petitioner to pay interim maintenance of Rs.2,000/- with effect from the date of filing of application i.e. 5.4.2011 and litigation expenses of Rs.3,000/- but till date the opposite party has received only Rs.30,000/- pursuant to order dated 29.5.2019 passed by this Court in I.A. No. 233 of 2019. According to him by now the outstanding due relating to maintenance stands at Rs.2,63,000/-. In such background he prayed that the present revision be dismissed as the sole opposite party is suffering a lot.

Heard learned counsel for the parties. Perused the L.C.R.

6. A perusal of the L.C.R. shows that in the 125 Cr.P.C. proceeding, the petitioner received the notice to show cause on 4.8.2011 and as per the said notice, date of appearance was fixed to 3.11.2011. Since he took no steps after personal service he was set ex parte on 10.2.2012. The opposite party filed evidence affidavit on 26.9.2012 and again on 3.9.2013 and examined herself on 3.9.2013. On the same date the father of the opposite party was also examined as P.W.2 and matter was posted for further hearing to 27.9.2013. From the order sheet it appears that later on the same date i.e. 3.9.2013, the petitioner appeared through lawyer and his Vakalatnama was accepted subject to limited purposes as per law. He also filed a petition seeking permission to file objection without serving copy of the same either to opposite party or her counsel. This petition was directed to be put up on 27.9.2013 for hearing on its maintainability. Thus it is clear that despite notice, the petitioner never cared to appear on the date fixed. Rather he appeared at a much later stage. In such background, he cannot be permitted to throw blame on the lawyer. On 27.9.2013 the advocate for the petitioner took time. On the same date, an application was filed by the opposite party praying for interim maintenance. On 4.11.2013 the petitioner filed an application with a prayer to recall the ex-parte order dated 3.9.2013 and for allowing him to cross-examine the opposite party. Matter was directed to be put up to 28.11.2013. On 28.11.2013 the matter was adjourned to 6.1.2014. On that date there was no appearance from the side of the petitioner on repeated calls

and the petitioner was set ex-parte for the second time and further prayer of the petitioner to set aside probably the earlier exparte order was rejected. However as no order was passed with regard to the prayer of the petitioner for cross-examining the opposite party; by implication it can be said that such prayer of the petitioner also stood rejected. The matter was directed to be put up on 18.1.2014. The order dated 18.1.2014 reveals that the opposite party was present and her Advocate filed a memo stating about filing of affidavit evidence on 26.9.2012. The memo was directed to be put up on 7.2.2014 along with I.A. No. 33 of 2013 i.e. the petition filed by the opposite party, where she had prayed for interim maintenance. On 3.2.2014 the record was put up on the strength of an advance petition along with a petition to recall the orders dated 6.1.2014 and 18.1.2014. The matter was again directed to be put up on the date fixed i.e. 7.2.2014. On 2.4.2014 the opposite party filed her objection to the petition dated 3.2.2014 filed by the petitioner. The hearing on the petition dated 3.2.2014 was held on 5.5.2014 and ultimately on 12.5.2014 the prayer made in the petition dated 3.2.2014 filed by the petitioner was rejected after referring to the prayer of the petitioner to give him opportunity to cross-examine the witnesses of the opposite party. This order was never challenged by the petitioner. On the same date the prayer of the sole opposite party for interim maintenance was allowed directing the petitioner to pay interim maintenance of Rs.2,000/- per month to the opposite party from the date of filing of application i.e. 5.4.2011 and litigation expenses of Rs.3,000/- till disposal of the original proceeding and the original proceeding was fixed to 11.6.2014 for argument. On 13.6.2014 the petition under Section 125 Cr.P.C. was dismissed by the learned Judge, Family Court, Kendrapara which was set aside by this Court on 24.11.2015 in RPFAM No. 74 of 2014 and ultimately the matter was heard on 18.3.2017 after rejecting the prayer of the petitioner for adjournment.

7. From the above narration of events, it is clear that despite receipt of notice, petitioner never cared to appear on 03.11.2011 i.e. the date fixed. Accordingly, he was set ex parte on 10.02.2012. He entered appearance only on 3.9.2013 by which time examination of witnesses from the side of the opposite party was over. Further as indicated earlier he did not challenge the order passed by the court below on 12.5.2014 dismissing the petition dated 3.2.2014 filed by the petitioner with prayer for recalling the orders dated 6.1.2014 and 18.1.2014. As indicated earlier on 6.1.2014 by implication the prayer of the petitioner for cross-examining the opposite party had stood

rejected. Therefore for all purposes the orders setting the petitioner ex-parte and implied rejection of his prayer to cross-examine the opposite party reached its finality on 12.5.2014. In order dated 12.05.2014 the learned Court below has discussed about the prayer of the petitioner to cross-examine. Also as indicated earlier, the order dated 12.5.2014 was never challenged by the petitioner and it is also nowhere the case of the petitioner that he was never informed about such order by his Advocate. In such background the petitioner cannot throw the blame on the lawyer to escape from the rigors of law. Further direction to pay maintenance of Rs.3,000/- a month cannot be described as a huge amount by any stretch of imagination in these days as the same cannot be even enough to meet the cost of fooding of the opposite party. Further a perusal of order dated 12.5.2014 clearly shows that the learned court below has come to a finding that the petitioner was not interested for disposal of the case and wanted to linger the same. Considering all these things this Court is of the opinion that the impugned judgment cannot be said to suffer from any illegality or impropriety and accordingly is not inclined to entertain the present revision and the same is dismissed. Interim order dated 29.5.2019 staying operation of order dated 26.3.2019 passed by the learned Judge Family Court, Kendrapara in Criminal Execution Proceeding No. 15 of 2011 stands vacated.

Office is directed to send a copy of this order along with the L.C.R forthwith to the Court of Judge Family Court, Kendrapara.

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2021 (III) ILR-CUT- 257

Dr. B. R. SARANGI, J.

W.P(C) NO. 27435 OF 2021

SHIBANI LENKA ..... Petitioner

.V.

D.G, C.I.S.F & ORS. .....Opp.Parties

SERVICE LAW – Transfer – Administrative decision – Interference of the Court / Judicial Review – When warranted – Guidelines indicated.

"In the above view of the matter, this Court is of the considered view that so far as the impugned order of transfer is concerned, it is totally the prerogative of the employer to post its employee where, when and at what point of time, which cannot be interfered with and, as such, the Court has got limited jurisdiction to interfere with the same. More so, the petitioner has not made out a case in her favour alleging mala fide against the person concerned nor she impleaded such authority as a party to this proceeding in person against whom the allegation has been made." (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 1991 SC 532 :1992 (6) SLR (SC) :Shilpi Bose v. State of Bihar.
2. 1989 (2) SLR 684 (SC) :Gujarat Electricity Board v. Atmaram Sungomal Poshani.
3. (1992) 1 SCC 306 : Bank of India v. Jagjit Singh Mehta.
4. AIR 1993 SC 2444 : Union of India & Ors v. S.L. Abas.
5. AIR 1993 SC 2486 : State of Punjab & Ors v. Joginder Singh Dhatt.
6. AIR 2004 SC 2165 : State of U.P. & Ors v. Gobardhan Lal.
7. 2014 (II) OLR 844 : Niranjan Dash v. State of Orissa & Ors.
8. [W.P.(C) No.19816/2014, disposed of on 24.02.2015] : Sudhir Kumar Praharaj v. State Bank of India & Ors.
9. [W.P.(C) No.8398/2014 with batch,disposed of on 26.09.2014] : Narendra Ku. Jena v. Orissa Forest Development Corporation & Anr.

For Petitioner : M/s M.K. Mohanty, M.R. Pradhan & A. Mishra.
For Opp. Parties : Mr. P.K. Parhi, ASGI alongwith Ms. B. Sahu.

JUDGMENT Date of Judgment : 08.09.2021

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 10.05.2021 under Annexure-1, by which she, while working as a Lady HC/GD in Central Industrial Security Force (CISF), has been transferred from Talcher to NALCO, Angul and also directed to submit clearance in the office on or before 31.05.2021. She further seeks to quash the order dated 04.08.2021 under Annexure-3, by which her representation has been considered, enquired into and rejected, being devoid of merit, in pursuance of order dated 02.06.2021 passed in W.P.(C) No.16969 of 2021.

2. The factual matrix of the case, in brief, is that the petitioner was appointed as constable in Central Industrial Security Force (CISF) and after completion of training, she was posted at Jorahat Airport in the State of Assam in the year 2002. Thereafter, she was posted at Bagdora Airport in the State of West Bengal in the year 2006. After three years of service at Bagdora

Airport, in the year 2009, she was transferred and posted in Mumbai Airport. After completion of her 1st tenure of 11 years, the petitioner was posted at Bhubaneswar Airport in the year 2012. After four years, the petitioner was again transferred therefrom to Goa Airport. Subsequently, on 23.04.2018, the petitioner was transferred and posted at Heavy Water Plant (HWP), Talcher and, as such, while working there, she was promoted to the post of Head Constable vide order dated 31.12.2020.

2.1 While continuing as Head Constable at Heavy Water Plant, Talcher, she made an allegation against CT/GD, Anil Kumar Jha for his unwarranted behaviour, i.e., irrelevant comments and gestures, which amounts to sexual harassment at working place. As such, the action of Mr. A.K. Jha was within the knowledge of the Inspector/Executive J.K. Rana. While the petitioner was discharging her duty at Main Gate, instead of giving her protection, Inspector J.K. Rana tried to harass and tarnish her image by maligning her character assassination. As the petitioner made sexual harassment against the above named persons, she was transferred from Heavy Water Plant, Talcher to NALCO, Angul vide office order No. 1312 dated 10.05.2021 under Annexure-1.

2.2 Being aggrieved by the order of transfer under Annexure-1 dated 10.05.2021, the petitioner approached this Court earlier by filing W.P.(C) No.16969 of 2021, which was disposed of, vide order dated 02.06.2021, directing opposite party no.1 to consider the grievance of the petitioner regarding sexual harassment and order of transfer within a period of two months from the date of receipt of the order. It was also observed that if the petitioner is so advised, she may ask for leave till the decision is taken by the authority which will be considered in terms of the service condition. In compliance of the said order, opposite party no.1, vide order dated 04.08.2021 under Annexure-3, disposed of the representation of the petitioner holding that prima facie, allegation of sexual harassment against the Constable/G.D. now HC/GD, Anil Kumar Jha of CISF during HWP, Talcher by the petitioner, does not exist. More so, there was no administrative harassment meted out to her and, therefore, the allegations levelled by the petitioner have not been substantiated. As such, no decision was taken regarding the transfer of the petitioner from Talcher to NALCO, Angul in pursuance of the order dated 02.06.2021 passed in W.P.(C) No.16969 of 2021. Hence this application.

3. Mr. M.K. Mohanty, learned counsel for the petitioner vehemently contended that the petitioner, who is working as a lady HC/GD and having discharged her duty outside the State for more than 17 years, is now posted at Talcher along with her husband, who is working in the same CISF unit, has been transferred from Talcher to NALCO, Angul vide order dated 10.05.2021 under Annexure-1, particularly when she made allegation of sexual harassment. As such, the order of transfer has been passed in gross violation of the circular no.22 of 2017, wherein guidelines for posting/transfer of CISF personnel (NGOs-Constables, HCs, ASIs, SIs and Inspectors) in various sectors of CISF has been prescribed. It is further contended that the transfer order is also in gross violation of clauses-20 and 38 of the policy. Therefore, he seeks for interference of this Court.

4. Mr. P.K. Parhi, learned Asst. Solicitor General of India contended that the order of transfer passed on 10.05.2021 under Annexure-1 has already been implemented by relieving the petitioner from her post w.e.f. 01.06.2021. More so, the petitioner had earlier approached this Court by filing W.P.(C) No.16969 of 2021, which was disposed of, vide order dated 02.06.2021, directing the opposite parties to take a decision with regard to transfer of the petitioner within a period of two months from the date of receipt of the order by giving opportunity of hearing to the parties likely to be affected. In compliance of the said order, the authority has already passed order under Annexure-3 on 04.08.2021, by which the grievance of the petitioner has been rejected. Thereby, no illegality or irregularity has been committed by the authority in passing the order impugned, so as to cause interference of this Court at this stage.

5. This Court heard Mr. M.K. Mohanty, learned counsel for the petitioner and Mr. P.K. Parhi, learned Asst. Solicitor General of India along with Ms. B. Sahu, learned Central Government Counsel by virtual mode, and perused the record. With the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. On critical analysis of the factual matrix, as delineated above, and on careful consideration of rival contentions raised by learned counsel for the parties, this Court finds that the petitioner, who was working as a Lady HC/GD at Talcher, has been transferred to NALCO, Angul, which is at a distance of only 20 k.m. from her present place of posting. The said order of transfer had been challenged before this Court in W.P.(C) No.16969 of 2021,

which was disposed of vide order dated 02.06.2021 with the following directions:-

> *"…… Considering the grievance of the petitioner, this Court is of the opinion that the grievance of the petitioner should be considered by the opposite party no.1. Dependant on the decision of the opposite party no.1, there should be further order involving the petitioner's transfer. The entire exercise be completed within a period of two months from the date of communication of a copy of this order by the petitioner but however involving the party likely to be affect also.*
>
> *Petitioner, if so advised, may ask for leave till a decision is taken by the authority which will be considered in terms of the service condition.*
>
> *The writ petition stands disposed of with the observation made hereinabove."*

7. In compliance of the aforesaid order, the order impugned in Annexure-3 dated 04.08.2021 has been passed rejecting her claim for continuance at Talcher by modifying the order of transfer from Angul to Talcher. So far as the grievance which has been made by the petitioner, that one Anil Kumar Jha who was working at Talcher, had caused harassment to her and, thereby, she requested the Unit Commander not to deploy her under the said constable, is concerned, the same was enquired into and pursuant to JO dated 02.06.2021, instruction was issued to the concerned I.G. and AIG to enquire into the allegations levelled by the petitioner. As such, on the basis of sexual harassment, enquiry was conducted by a complaint committee and after minutely observing and going through all the statements and relevant documents on records, the committee arrived at a conclusion that the petitioner was in habit of changing her own statements and taking undue advantage of being a lady and keep on threatening unit personnel as well as employees, which is not expected from a member of disciplined force, and as such, prima facie allegations of sexual harassment against Anil Kumar Jha of the CISF Unit HWP, Talcher by the petitioner does not exist. With regard to further allegations against the unit administration, enquires were conducted, wherein it was found that the petitioner was causing impediments to the unit administration, which is affecting the atmosphere of the unit and the morale of the force personnel adversely, and that there was no administrative harassment meted out to her. Consequentially, the representation filed by the petitioner has been considered, enquired into and rejected by the authority, being devoid of merit, in pursuance of the order dated 02.06.2021 passed in W.P.(C) No.16969 of 2021. As a result, the petitioner has to comply the order

of transfer under Annexure-1 by joining at Angul. More so, such order of transfer has been passed to facilitate the petitioner to work only at a distance of 20 k.m., so that no prejudice will be caused to her, even though her husband is working at Talcher. Much reliance was placed before this Court, so far as clauses-20 and 38 of the policy are concerned, but, it appears, since her husband is working at Talcher, which is situated at a distance of only 20 k.m. from Angul, the new place of posting of the petitioner, the guidelines, which has been framed, as far as practicable, the same has been implemented by not transferring the petitioner to outside the State, taking into account the fact that she had already rendered more than 17 years of service outside the State.

8. Law is well settled in ***Shilpi Bose v. State of Bihar***, AIR 1991 SC 532:1992 (6) SLR (SC), wherein the apex Court held as under:-

> *"xxxxxx the Courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the 6 other. Transfer orders issued by the competent authority do not violate any of the legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order, instead affected party should approach the higher authorities in the department."*

9. In ***Gujarat Electricity Board v. Atmaram Sungomal Poshani,*** 1989 (2) SLR 684 (SC), it is held that a judicial review of an administrative action is of course permissible, but orders of transfer are interfered when:-

> *a. the transfer is mala fide or arbitrary or perverse;*
> *b. when it adversely alters the service conditions in terms of rank, pay and emoluments;*
> *c. when guidelines laid down by the department are infringed and lastly;*
> *d. when it is frequently done; and*
> *e. if there is a statutory infraction.*

Therefore, whenever a public servant is transferred, he/she must comply with the order but if there be any genuine difficulty in the proceeding of transfer, it is open to him/her to make representation to the competent authority for modification or cancellation of the transfer order.

10. In ***Bank of India v. Jagjit Singh Mehta***, (1992) 1 SCC 306, the apex Court, in paragraph-5, held as under :-

> *"There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs……"*
>
> *"…… No doubt the guideline requires the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible."*

11. In ***Union of India and others v. S.L. Abas,*** AIR 1993 SC 2444, in paragraphs-7 and 8, the apex Court held as under:-

> *"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.*
>
> *8……. The Administrative Tribunal is not an Appellate Authority sitting in the judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer……."*

12. ***State of Punjab and others v. Joginder Singh Dhatt,*** AIR 1993 SC 2486, in paragraph-3, the apex Court held as under:-

> *"3. …… This Court has time and again expressed its disapproval of the courts below interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at point of time a public servant is transferred from his present posting. Ordinarily the courts have no jurisdiction to interfere with the order of transfer."……..*

The above view has been reiterated in ***State of U.P. and others v. Gobardhan Lal,*** AIR 2004 SC 2165, and also by this Court in the cases in ***Niranjan Dash v. State of Orissa and others***, 2014 (II) OLR 844, ***Sudhir Kumar Praharaj v. State Bank of India and others*** (W.P.(C) No. 19816 of 2014, disposed of on 24.02.2015) and ***Narendra Kumar Jena v. Orissa Forest Development Corporation & another*** (W.P.(C) No. 8398 of 2014 and batch of cases, disposed of on 26.09.2014).

13. In the above view of the matter, this Court is of the considered view that so far as the impugned order of transfer is concerned, it is totally the prerogative of the employer to post its employee where, when and at what point of time, which cannot be interfered with and, as such, the Court has got limited jurisdiction to interfere with the same. More so, the petitioner has not made out a case in her favour alleging mala fide against the person concerned nor she impleaded such authority as a party to this proceeding in person against whom the allegation has been made.

14. For all the above reasons, this Court does not find any illegality or irregularity committed by the authority in passing the orders impugned as at Annexure-1 dated 10.05.2021 and Annexure-3 dated 04.08.2021, so as to call for interference by this Court. Accordingly, the writ petition merits no consideration and the same is hereby dismissed. There shall be no order as to costs.

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2021 (III) ILR-CUT- 264

Dr. B.R. SARANGI, J.

W.P.(C) NO. 3964 OF 2020

Dr. BIKASH KUMAR PATTANAYAK ..... Petitioner

.V.

PRINCIPAL SECRETARY, GOVT. OF ODISHA (H&FW DEPT.) & ANR. ..... Opp. Parties

ODISHA MEDICAL & HEALTH SERVICES (METHOD OF RECRUITMENT & CONDITIONS OF SERVICE) RULE, 2017 – Rule 7(b) – Benefit under the Rule – "Age relaxation" – The petitioner is a in-service candidate who was granted study leave – Whether the period of study leave will be counted or comes within the meaning of "serving" – Held, Yes. – The petitioner who was rendering service as a Govt. Servant and was granted study leave, comes well within the meaning of 'serving' and is thus entitled to get benefits of such provision. (Para 12)

Case Laws Relied on and Referred to :-

1. AIR 1970 P&H 351 : Arijit Singh v. State.
2. AIR 1975 SC 1331 : (1975) 1 SCC 421: Sukhdev Singh v. Bhagat Ram.
3. AIR 1987 SC 1073:(1987) 1 SCC 213:Ambica Quarry Works v. State of Gujarat.
4. AIR 1973 SC 855 : Sirsi Municipality v. Cecelia Kom Francis Tellis.
5. (1993)2 SCC 213 : M.A. Haque v. Union of India.
6. (1999)6 SCC 49 :Purushottam v. Chairman, Maharashtra State Electricity Board.
7. (1999) 3 SCC 709:AIR 1999 SC 1412 : Union of India v. No. 664950 IM Havildar/Clerk SC Bagari.

For Petitioner : M/s B.S. Tripathy, M.K. Rath, J.Pati & N.Panda

For Opp. Parties : Mr. J.P. Pattanaik, G.A.
M/s. S. Swain & A. Mishra

JUDGMENT Date of Hearing : 16.09.2021: Date of Judgment : 23.09.2021

Dr. B.R. SARANGI, J.

The petitioner, who is a doctor, has filed this writ petition seeking to quash the notice dated 24.01.2020 under Annexure-10, so far as it relates to rejection of his application bearing Roll No. 100302 and Registration ID No.131920131843 mentioned at Serial 12 on the ground of overage, and to issue direction to the opposite parties to relax his overage for a period of 5 months and 26 days as on 01.01.2020 and consider his application for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department, pursuant to advertisement no. 13 of 2019-20.

2. The factual matrix of the case, in a nutshell, is that the petitioner, having a brilliant academic career in matriculation examination and +2 examination, got himself admitted into MBBS course and passed the same in the year 2011 under the Utkal University. He completed the compulsory Rotating Housemanship for a period of 12 months from 23.10.2011 to 22.10.2012. After acquiring such qualification, the petitioner registered his name in the Orissa Council of Medical Registration, Bhubaneswar on 21.02.2013 and obtained the registration certificate vide Regd. No. 18647 of 2013. The petitioner served as Medical Officer on ad hoc basis vide Govt. Notification dated 15.04.2013 for a period of about three years from 08.05.2013 to 11.05.2016 at Dinger and Gudum PHC of Botalama CHC. Thereafter, the petitioner proceeded on leave from 11.05.2016 to go for higher study of PG in O & G. Consequentially, he joined P.G. course and completed MS (O & G) successfully from 30.05.2016 to 30.05.2019. Accordingly, a provisional certificate in support of passing of the said examination was issued by the Utkal University.

2.1. The Odisha Public Service Commission issued advertisement no. 13 of 2019-20 for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services cadre under Health and Family Welfare Department inviting online applications from the prospective candidates for recruitment to 3278 posts of Medical Officers. Pursuant to such advertisement, the petitioner applied for, but his application was rejected on the ground of "overage". Hence this application.

3. Mr. B.S. Tripathy, learned counsel for the petitioner argued with vehemence and contended that rejection of the application filed by the petitioner for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services cadre on the ground of overage is totally outcome of non-application of mind and, as such, contrary to the advertisement issued. He further contended that as per second proviso to Clause-3 of the advertisement, the petitioner is eligible and entitled for age relaxation as he has served three years under the State Government. It is further contended that on receipt of application form, along with relevant documents, the same was scrutinized and the petitioner was allowed to participate in the written examination where he successfully qualified. In such eventuality, his application should not have been rejected. Therefore, rejection of the petitioner's application on the ground of "overage" after he comes out successful in the written test is not only illegal and

arbitrary but also contrary to the guidelines issued in the advertisement itself. As such, the notice dated 24.01.2020 under Annexure-10 rejecting the application of the petitioner for recruitment to the post of Medical Officer may be quashed and opposite parties may be directed to recommend the name of the petitioner for recruitment to the post of Medical Officer.

4. Mr. J. P. Pattanaik, learned Government Advocate appearing for opposite party no.1 contended that pursuant to Rule-6 of the Odisha Medical and Health Services (Method of Recruitment and Conditions of Service) Rules, 2017 (for short "Rules, 2017"), the Government of Odisha, Health and Family Welfare Department, vide letter dated 28.10.2019, requested the opposite party no.2-OPSC for recruitment of 3278 Asst. Surgeons in the rank of Group-A (Junior Branch) of the Odisha Medical & Health Services cadre during the year 2019-20. Consequentially, opposite party no.2 issued the advertisement under Annexure-5. It is contended that Sub-rules (4) and (7) of Rule -6 of the Rules, 2017 require opposite party no.2 to prepare a list of candidates after adjudging the suitability of candidates in order of merit on the basis of career marking and written test which shall be equal to the number of advertised vacancies. Accordingly, opposite party no.1 received a list of 1403 selected candidates from opposite party no.2, vide OPSC letter dated 28.01.2020, and all selected candidates were given appointments vide Health and Family Welfare Department Notifications dated 04.03.2020 and 21.03.2020. It is contended that the OPSC- opposite party no.2, being the recruiting agency, has evaluated the suitability and eligibility of the petitioner in consonance with the advertisement under Annexure-5. It is further contended that in Rule-7 of the Rules 2017, for the candidates seeking relaxation of upper age limit, it is clearly provided that the upper age limit up to five years shall be given to the doctors serving on ad hoc or contractual basis under State Government/State Government undertaking. In that regard, opposite party no.2-OPSC, being the recruiting agency, is the appropriate authority for considering the applicability of the rules as mentioned in Rule 7 of the Rules, 2017 vis-à-vis the stipulations made in the advertisement under Annexure-5. Thereby, opposite party no.2 is the appropriate authority to mitigate the grievance of the petitioner as claimed in the writ petition.

5. Mr. S. Swain, learned counsel for opposite party no.2 argued with vehemence and contended that the advertisement no. 13 of 2019-20 for recruitment to the post of Medical Officers (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services cadre was issued on receipt of requisition from the Government in Health and Family Welfare

Department, as the requisitioning and appointing authority. The last date of filling up of the online application by the candidates was fixed to 05.12.2019. The objective of keeping the last date is that a candidate shall be declared eligible by 05.12.2019 for filling up of online application. As per Clause-9 (vii) of the said advertisement, only those candidates, who are within the prescribed age limit and fulfill the requisite qualification etc. by the closing date of submission of online application, will be considered eligible. The petitioner, after knowing all the conditions of advertisement, submitted online application for the said post. Accordingly, roll number was assigned to him and prior to scrutiny of documents, all the applicants, who had submitted their applications for the said post through online, were allowed to appear in the written examination provisionally and after written examination, 1582 candidates, including the petitioner, were asked to attend the verification of original documents on 07.01.2020. It was noticed that the petitioner had submitted service experience certificate that he was working as Medical Officer from 08.05.2013 to 11.05.2016 and is continuing his PG from 11.05.2016 and till that date he was on study leave. It is thus contended that since the petitioner was on study leave and continuing his PG from 11.05.2016 till that date, but was not in government service by the last date of submission of his previous service experience certificate as Medical Officer, his case was not taken into consideration for relaxation of age. Thus, he being found as overage, his candidature was rejected on that ground for such recruitment, vide OPSC notice dated 24.01.2020 under Annexure-10. Thereby, the OPSC has not committed any illegality or irregularity in rejecting his application on the ground of overage. It is further contended, by filing an additional counter affidavit, that as per Rule 7(b) of Rules, 2017 relaxation of upper age limit up to 5 years shall be given to the doctors serving on ad hoc or contractual basis under State Government/State Government undertaking. Since the petitioner had undergone study leave and not a doctor serving on ad hoc/contractual basis, thereby relaxation of age is not applicable to him. Therefore, the OPSC on 20.07.2021 examined his case and did not extend him the benefit of condonation of age as the existing rule did not so provide. The same was duly communicated to the petitioner on 20.07.2021. Thereby, the relief sought by the petitioner cannot be granted and the writ petition should be dismissed.

6. This Court heard Mr. B.S. Tripathy- learned counsel for the petitioner; Mr. J. P. Pattanaik- learned Government Advocate appearing for

the State; and Mr. S. Swain, learned counsel appearing for opposite party no.2-OPSC 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.

7. The factual matrix, as delineated above, is not in dispute. Therefore, the only question to be determined in this case is that opposite party no.2, having entertained the application submitted by the petitioner, pursuant to advertisement issued under Annexure-5, and having permitted the petitioner to appear in the written examination, where he was qualified, can subsequently reject his application on the ground of overage.

8. The Government of Odisha in Health and Family Welfare Department issued a notification on 9th August, 2017 that in exercise of powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Medical and Health Services Rules, 2013 except as things done or omitted to be done before such supersession, the Governor of Odisha was pleased to make the rules to regulate the method of recruitment and conditions of service of the persons appointed to the Odisha Medical and Health Services, called, "Odisha Medical and Health Services (Method of Recruitment and Conditions of Service) Rules, 2017". Part-I of the said Rules deals with general, Part-II deals with method of recruitment, Part-III deals with direct recruitment, Part-IV deals with promotion, Part-V deals with other conditions of service, Part-VI deals with miscellaneous. In Part-III, which deals with direct recruitment, Rule- 7 (a) and (b) read as follows:

> *" **7. Eligibility Criteria for direct recruitment-** In order to be eligible for direct recruitment to the service, a candidate must, -*
>
> *(a) be a citizen of India.*
> *(b) have attained the age of 21 years and must not be above the ge of 32 years on the first day of January of the year in which application are invited by the Commission:*
>
> *Provided that the upper age limit in respect of reserved category of candidates referred to in rule 5 shall be relaxed in accordance with the provisions of the Act.*
>
> *Provided further that the upper age limit up to 5 years shall be given to the doctors serving on ad hoc or contractual basis under State Government / State Government undertaking."*

The aforesaid provisions clearly indicate that in order to be eligible for direct recruitment to the service, a candidate must have attained the age of 21 years and must not be above the age of 32 years on the first day of January of the year in which applications are invited by the Commission. The second provision of Sub-rule(b) makes it clear that the upper age limit up to 5 years shall be given to the doctors serving on ad hoc or contractual basis under State Government / State Government undertaking. Thereby, relaxation of five years is applicable to the doctors serving in ad hoc or contractual basis under the State Government or State Government undertaking.

9. On the basis of the requisition received from the State Government in Health and Family Welfare Department as the requisitioning and appointing authority of Medical Officers (Assistant Surgeon), the Odisha Public Service Commission issued advertisement No.13 of 2019-20 for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health & Family Welfare Department in Annexure-5. The last date of submission of online application was fixed to 05.12.2019. The objective behind fixing the last date to 05.12.2019 for filling up of online application was to declare a candidate as eligible by that date. Clause-3 of the advertisement reads as follows:

> *"**3. AGE:***
> *A candidate must have attained the age of 21 (Twenty one) years and must not be above 32 (Thirty two) years as on 1st day of January, 2020 i.e., he/she must have been born not earlier than 2nd January, 1988 and not later than 1st January, 1999.*
>
> *The upper age limit prescribed above shall be relaxable by 5 (five) years for candidates belonging to the categories of Socially & Educationally Backward Classes (S.E.B.C.), Scheduled Castes (S.C.) Scheduled Tribes (S.T.) Woken, Ex-Servicemen and by cumulative 10 (Ten) years for candidates belonging to Physically Handicapped category, whose permanent disability is 40% and more.*
>
> *Provided that, a candidate who comes under more than one category mentioned above, he/she will be eligible for only one age relaxation benefit, which shall be considered most beneficial to him/her.*
>
> *Provided that person with past service as Medical Officers under the State Government to their credit, shall be given preference and in their case, the period of service so rendered by the last date of submission of applications shall be added to the age limit for entry into the service and it is up to maximum period of 05 years."*

On perusal of the above, it is made clear that a candidate must have attained the age of 21 years and must not be above 32 years as on the 1st day of January 2020, i.e., he/she must have been born not earlier than 2nd January, 1988 and not later than 1st January, 1999. The second proviso to clause-3 clearly indicates that the candidates with past s ervice as Medical Officer under the State Government to their credit, shall be given preference and in their case, the period of service so rendered by the last date of submission of applications shall be added to the age limit for entry into the service and it is up to maximum period of 05 years.

10. There is no dispute that the petitioner is overage for a period of 5 months 26 days as on 01.01.2020. Meaning thereby, he has already attained the maximum age of 32 years. Therefore, as on 01.01.2020, he was 32 years 5 months 26 days and there is also no dispute with regard to the fact that the petitioner was rendering service under the Government from 08.05.2013 to 11.05.2016 at Dinger and Gudum PHC of Botalama CHC on ad hoc basis by Government notification dated 15.04.2013 and from 11.05.2016, he was on study leave for P.G. course. Therefore, the petitioner was in government service for a period of three years and three days and thereafter he remained on study leave for acquiring P.G. qualification in O & G. As per the second proviso to clause-3 of the advertisement read with second proviso to Rule 7(b) of Rules, 2017, for the past service rendered by the petitioner under the State Government, he shall be entitled to get the benefit of relaxation of upper age limit for a period of three years and three days. Therefore, if three years and three days will be added to 32 years, the upper age limit for the petitioner will be enhanced to 35 years and three days. Thereby, his application cannot and could not have been rejected on the ground of overage.

11. Considering from other angle, as per the second proviso to Rule 7(b) of Rules, 2017, relaxation of upper age limit up to five years shall be given to the doctors serving on ad hoc or contractual basis under State Government/ State Government undertaking. It is admitted fact that the petitioner has served from 08.05.2013 to 11.05.2016 as a Medical Officer at Dingar and Gudum PHC of Botalama CHC on ad hoc basis vide Govt. Notification dated 15.04.2013, and on 11.05.2016 he was granted study leave to go for higher study of P.G. in O & G. Therefore, the word “serving” used in second proviso of Rule 7(b) of Rules, 2017 means, holding employment, as distinguished from actual performing the duties of service.

12 In ***Arijit Singh v. State,*** AIR 1970 P &H 351, the Full Bench of the Court, while construing Section 9 of the Air Force Act, 1950, held that a member of Air Force on leave is "serving" within the meaning of the section. Therefore, the petitioner, who was rendering service as a Government Servant and was granted study leave, comes well within the meaning of "serving" and is thus entitled to get benefits of such provision.

13. Rule- 179 of the Orissa Service Code, which deals with grant of special study leave, reads as follows:

> *"**Rule-179 : Grant of Special Study Leave** :*
> *(a) Subjects to the conditions hereinafter specified, the State Government may grant special study leave to a Government servant to enable him to study scientific, technical or similar problems or to undergo a special course of instructions, such leave is not debited against the leave account.*
>
> *(b) These rules relate to study leave only. They are not intended to meet the case of Government servant deputed to other countries at the instance of Government, either for; the performance of special duties imposed on them or for the investigation of specific problems connected with their technical duties, such cases will be dealt with on their merits under the provisions of Rule 59. Such leave may be granted to a Government servant in the Public Health, Medical, Civil, Veterinary, Agriculture Education, Public Works or Forest Department or to any other Government servant to whom the State Government is of opinion that such leave should in the public interest, be granted.*
>
> *Note : Save in very exceptional case, study leave will not be granted to a member of subordinate service."*

The aforesaid rule clearly provides that subject to conditions specified, the State Government may grant special study leave to a Government servant to enable him to study scientific, technical or similar problems or to undergo a special course of instructions, such leave is not debited against the leave account. It has also been further clarified under Sub-rule (b) of Rule-179 that such leave may be granted to a Government servant in the Public Health, Medical, Civil, Veterinary, Agriculture Education, Public Works or Forest Department or to any other Government servant to whom the State Government is of opinion that such leave should in the public interest, be granted. Admittedly, the petitioner was serving as a Medical Officer on ad hoc basis and he required a study leave to go for higher study for acquisition of P.G. qualification in O & G, for having been duly selected. That comes within the purview of "medical" as per Sub-rule (b) of Rule-179 and as such,

leave has been granted by the State Government. Therefore, it can be safely construed that the petitioner, as on 1st day of January, 2020, was "serving" as a doctor on ad hoc basis under the State Government. Thus, he was entitled to get the upper age limit relaxation of five years.

14. On conjoint reading of the second proviso to Rule 7(b) of Rules, 2017 and to clause-3 of the advertisement, the petitioner is entitled to get age relaxation up to five years. Admittedly, when the petitioner submitted his application, he was overage by 5 months 26 days only and such overage can be condoned in view of the above mentioned provisions contained in second proviso to clause-3 of the advertisement and second proviso to Rule 7(b) of Rules, 2017. Non-consideration of the same by opposite party no.2 in proper perspective, is in gross violation of the statutory provisions governing the field.

15. In ***Sukhdev Singh v. Bhagat Ram,*** AIR 1975 SC 1331 : (1975) 1 SCC 421, the Constitution Bench of the apex Court observed as under :-

> *"The statutory authorities cannot deviate from the conditions of service.* ***Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations.****"*
>
> *xx xx xx*
>
> *The Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of duty to* ***observe the rule of natural justice and compliance with rule and regulations imposed by statute."***

Similar view has also been taken by the Supreme Court in ***Ambica Quarry Works v. State of Gujarat,*** AIR 1987 SC 1073 : (1987) 1 SCC 213.

16. In ***Sirsi Municipality v. Cecelia Kom Francis Tellis,*** AIR 1973 SC 855, the apex Court observed that *"the ratio is that the rules or the regulations are binding on the authorities."*

17. In ***M.A. Haque v. Union of India,*** (1993) 2 SCC 213, the apex Court observed as under:-

> *"..... We cannot lose sight of the fact that the recruitment rules made under article 309 of the Constitution have to be followed strictly and not in breach."*

18. In ***Purushottam v. Chairman, Maharashtra State Electricity Board,*** (1999) 6 SCC 49, the apex Court held that appointment should be made strictly in accordance with the statutory provisions and a candidate who is

entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstances is not possible.

19. The rules may provide for the granting of study leave to a Government servant with due regard to the exigencies of public service to enable him to undergo, in or out of India, a special course of study consisting of higher studies or specialized training in a professional or technical subject having a direct and close connection with the sphere of his duty.

20. In ***Union of India v. No. 664950 IM Havildar/Clerk SC Bagari,*** (1999) 3 SCC 709: AIR 1999 SC 1412, the apex Court held that the rules for study leave should have nexus with the performance of duties of the class of employees concerned.

21. In view of the factual and legal aspects, as discussed above, this Court is of the considered view that rejection of petitioner's application on the ground of overage, vide notification dated 24.01.2020 under Annexure-10, so far as it relates to the petitioner having Roll No. 100302 and Registration ID No. 131920131843, cannot sustain and the same is accordingly quashed. As the petitioner has already qualified in the written examination, it is incumbent upon the OPSC-Opposite Party No.2 to take further course of action by recommending his name to the Government for giving him appointment against one of the available vacancies, as it was brought to the notice of this Court that as against total posts of 3278, only 1403 selected candidates have been recommended by the OPSC to the State. Ordered accordingly. The above exercise shall be completed within a period of two months from the date of communication of this judgment.

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

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2021 (III) ILR-CUT- 274

Dr. B.R. SARANGI, J.

W.P.C (OAC) NO. 2148 OF 2004

Dr. (Mrs.) SRUTAKIRTI DAS .....Petitioner

.V.

SUPTD. OF POLICE, ROURKELA & ORS. .....Opp. Parties

SERVICE LAW – Retiral benefits – Payment – Delay – No fault of retired employee – Claim of interest due to such delay – Held, the employer is liable to pay interest in case of delay in payment of such benefits granted to the petitioner.

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 1077 : S.K. Dua v. State of Haryana.
2. 1999 (II) OLR 433 : Dhruba Charan Panda v. State of Orissa.
3. [WPC (OAC) No. 2044/2005,disposed of on 22.06.2021] : Gobardhan Naik v. State of Orissa.

For Petitioner : M/s A.Sahoo, A.K. Biswal & S. Ghosh.

For Opp. Parties : Mr. M.K. Balabantaray, Standing Counsel.

JUDGMENT Date of Judgment : 29.10.2021

Dr. B. R. SARANGI, J.

The petitioner, who was working as Lady Assistant Surgeon, Police Hospital, Rourkela in the district of Sundargarh, has filed this writ petition essentially for issuance of a direction to the opposite parties to pay interest @ 12% per annum on the ground of delayed payment of arrear salary for the period from 01.01.1996 to 08.06.1999 amounting Rs.77,716/-, and other consequential benefits incidental thereto, in her favour.

2. The facts of the case, in brief, are that the petitioner joined as Assistant Surgeon under the Govt. of Odisha, Health and Family Welfare Department in January, 1985 and was posted at District Headquarter Hospital, Sambalpur. Thereafter, she worked under such capacity in different Govt. Hospitals till July, 1992, when she was transferred to Police Hospital, Rourkela under the administrative control of the Superintendent of Police, Rourkela. While she was continuing there, she crossed her Efficiency Bar in May, 1995 after reaching the appropriate scale and her Efficiency Bar crossing proposal was to be sent by the Superintendent of Police, Rourkela to the Government through proper channel for timely sanction, but the same was not recommended in due time. Vide Office order No.41460 dated 04.10.1996 of the Government of Odisha, Department of Health and Family Welfare, the service of the petitioner was regularized. As a consequence thereof, the service book of the petitioner containing her service particulars for the period prior to 1995 and for subsequent years, reached opposite party no.1 in December, 1998. But, the proposal in connection with crossing of the Efficiency Bar of the petitioner was not forwarded by the Superintendent of

Police, Rourkela to the Government notwithstanding the specific instruction contained in the Finance Department Memo No.8827/F dated 28.07.1980 and letter No.53977/F dated 24.10.1980.

2.1. For inaction of the authority, the petitioner submitted representation dated 12.07.2000 under Annexure-2 before opposite party no.1. When no action was taken by opposite party no.1, the petitioner approached opposite party no.2 by filing representation dated 31.01.2001 at Annexure-3, but the same was not attended to. After lapse of about two years, the proposal regarding crossing of Efficiency Bar of the petitioner was sent by opposite party no.1 to the Director of Health Services and since the same was sent in a defective manner due to fault of opposite party no.1, it was returned back and sent again. Accordingly, the proposal regarding crossing of Efficiency Bar of the petitioner was sanctioned on 07.08.2002. But, the scale of pay of the petitioner was not fixed in the revised scale as per the Revised Scale of Pay Rules, 1998. Therefore, the petitioner submitted representations dated 09.02.2003 and 12.06.2003 at Annexures-4 & 5 respectively before the Principal Secretary to the Government of Odisha, Home Department. In response thereto, the Government of Odisha, Home Department vide letter dated 11.06.2003 under Annexure-C to the counter affidavit filed by opposite parties no.1 to 3, called upon the Director General and the Inspector General of Police, Odisha to submit a detailed report indicating the reasons for non-fixation of her pay, steps taken for fixation and the persons responsible for the same within a period of 15 days. Since the said instructions were not carried out, the Government of Odisha, Home Department by its letter dated 16.07.2003 under Annexure-D to the counter affidavit, sent a reminder but the same was not responded. But, finally the pay of the petitioner was fixed in January, 2004 and she drew her arrear salary for the period from 01.01.1996 till 08.06.1999 in the revised scale amounting to Rs.73,716/-, whereas the scale of pay of similarly situated persons was fixed in time in January, 1999 and they got their arrear dues by the end of January, 1999.

2.2. For the delay in extension of the benefit of crossing Efficiency Bar and also fixation of arrear salary for no fault on her part, the petitioner has claimed interest @ 12% per annum on her arrear salary for the period from 01.01.1996 to 08.06.1999 amounting to Rs.73, 716/- or in alternative she has sought direction for realization of interest from the erring officer. Hence this application.

3. Mr. A. Sahoo, learned counsel for the petitioner contended that the opposite parties have caused delay in sending the proposal regarding crossing of Efficiency Bar and also payment of arrear dues, as a result of which, the service book of the petitioner was received in the office of opposite party no.1 in December, 1998 for submission of proposal of crossing Efficiency Bar. The proposal was sent to the State Police Headquarters vide letter dated 30.01.2001 i.e. after a period of more than two years from the date of receipt of the service book. After a period of more than 4 years from the date of her regularization, i.e. 04.10.1996, the said proposal was received in the Police Headquarters on 06.02.2001 and the same was forwarded to the Government of Odisha, Department of Health and Family Welfare, pursuant to which the proposal regarding crossing of Efficiency Bar of the petitioner was sanctioned on 07.08.2002. It is further contended that such delay is not attributable to the petitioner, rather to the opposite parties for their callous attitude to move with snail's pace to allow the petitioner to cross the Efficiency Bar, though it was due in 1996, and also for grant of the revised scale of pay in 1998 at a belated stage. As a consequence thereof, the petitioner is entitled to get interest on the amount for the period from 01.01.1996 to 08.06.1999. To substantiate his contentions, he has relied upon ***S.K. Dua v. State of Haryana***, AIR 2008 SC 1077; ***Dhruba Charan Panda v. State of Orissa***, 1999 (II) OLR 433 and ***Gobardhan Naik v. State of Orissa*** (WPC (OAC) No.2044 of 2005 disposed of on 22.06.2021).

4. Mr. M.K. Balabantaray, learned Standing Counsel for the State, referring to counter affidavit, contended that admittedly the petitioner was appointed as Assistant Surgeon on adhoc basis with effect from 23.01.1985 vide notification dated 19.01.1985 issued by the Government of Odisha, Health and Family Welfare Department with one day break between two spells of appointments, pursuant to which she joined in the Police Hospital, Rourkela on 31.07.1992 as per transfer and posting order dated 07.07.1992 of the Director, Health Services, Orissa and subsequent detailed posting order dated 29.07.1992 of CDMO, Sundargarh and was relieved on 08.06.1999 to join Police Hospital, OSAP 2nd Battalion, Jharsuguda. Her services were regularized in the year 1996 vide office order dated 04.10.1996 of Health and Family Welfare Department. Accordingly, the CDMO, Sambalpur was requested by the Superintendent of Police, Rourkela, vide letter dated 28.01.1997, to regularize her services by sanctioning annual increment and pay fixation up to 30.07.1992, i.e. the date of posting under the administrative control of the Superintendent of Police, Rourkela. After fixation of her pay

under ORSP Rules, 1989, her service book was sent to Superintendent of Police, Rourkela on 17.12.1998 by the CDMO, Sambalpur for further necessary action i.e. the verification of services and sanction of increments in the revised scale. Due to regularization of service and fixation of pay under ORSP Rues, 1989, after October, 1996 the arrears could not be drawn in time. As a result, the petitioner filed this application seeking direction to the State opposite parties to pay interest on the arrear dues on fixation of pay under ORSP Rules, 1989 and annual increment. It is further contended that it was not possible to send the proposal for crossing the Efficiency Bar without regularization of service of the petitioner. Therefore, delay has been caused awaiting regularization of service of the petitioner.

So far as grant of Efficiency Bar is concerned, the moment the services of the petitioner were regularized, the service book was handed over to the Superintendent of Police, Rourkela for taking immediate steps for payment of dues admissible to the petitioner. The contentions raised that delay so alleged is not individual laches, rather it is a process which caused delay and due to such reason the petitioner is not entitled to get interest as claimed by her in the writ petition.

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

6. The moot question to be considered by this Court, whether the petitioner is entitled to get any interest for delay in payment of arrear salary for the period from 01.01.1996 to 08.06.1999 or not ?

7. The facts delineated above are not in dispute. So far as grant of increment is concerned, though the petitioner's increment was due in 1996, after regularization of service on 04.10.1996, the proposal regarding crossing of Efficiency Bar was received in the Police Headquarters on 06.02.2001, which was forwarded on 26.02.2001 and vide letter dated 07.08.2002 to the Government of Orissa, Department of Health & Family Welfare for sanction of the same. Thereby, there was a gross delay in sanctioning the Efficiency Bar. As it appears, there are no laches on the part of the petitioner for such delay, rather the same can be attributable to the opposite parties. If there is delay on the part of the authority and for no fault of her the petitioner suffers,

in that case the opposite parties are liable to pay interest for delayed payment of financial benefits as due and admissible to the petitioner.

8. So far as fixation of pay of the petitioner as per ORSP Rules, 1989 is concerned, the opposite parties have not disputed the fact that other similarly situated persons were allowed to draw their arrear salary pursuant to revision of scale of pay, whereas the petitioner received arrear salary for the period from 01.01.1996 to 08.06.1999 after a delay of five years, that ipso facto indicates that the petitioner is entitled to get interest. This fact has been explained at page-5 of the counter affidavit to the following effect:

> *".....In view of this the delay could not be avoided. Further there is no provision to allow interests on the arrear claims of a Government servant for which the claim of the Applicant is not justified.*
>
> *That in reply to para 6(7), it is submitted that as pointed out above, it is natural that some time was taken for drawal of the arrear claims of a pretty long period i.e 1985 to 2002".*

9. In view of such position, it is apparent that there was violation of the instructions contained in the Finance Department Memo No.88270/F dated 28.07.1980 and letter No.53977/F dated 24.10.1980. The opposite parties have refuted the claim of the petitioner for payment of interest on the arrear salary for the period from 01.01.1996 to till 08.06.1999 amounting to Rs.73,716/- on the ground that there is no provision for the same. In absence of any provisions or rules, it can be construed that the interest on delayed payment of arrear salary as a constitutional right can be claimed by an employee.

10. In *S.K. Dua* (supra), the apex Court held as follows:

> *"11. Xxx xxx In the circumstances, prima facie, we are of the view that the grievance voiced by the appellant appears to be well-founded that he would be entitled to interest on such benefits. If there are Statutory Rules occupying the field, the appellant could claim payment of interest relying on such Rules. If there are Administrative Instructions, Guidelines or Norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in absence Statutory Rules, Administrative Instructions or Guidelines, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19 and 21 of the Constitution. xxxx"*

11. Following the judgment as mentioned above, the other High Courts, namely, High Court of Madras, High Court of Bombay (Nagpur Bench) and also the Goa Bench have awarded interest for delayed payment of the dues of the petitioners in the respective cases.

12. In *Dhruba Charan Panda* (supra), this Court also directed in paragraph-18 to the following effect:-

> *"18. We dispose of this application with a direction to the State Government to administratively instruct all the Heads of Departments and the concerned officials to ensure that different steps prescribed to be taken under the Rules are rigidly followed and any non-observance thereof is to be strictly viewed. 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 this interest shall be recovered from the person/persons responsible for the delay. While fixing the rate of interest, we have kept in view the minimum bank rate of interest charged for borrowing from bank. This aspect shall also be notified to all concerned. We are sure, if such stringent steps in addition to those, which the State Government may feel necessary to impose, are taken there shall be strict compliance of the requirement of law and in future the old retired persons shall not be required to move in the corridors of the Courts with tears in their eyes and a faint ray of hope of getting remedy early, and not posthumous. We record our appreciation for the able and fair assistance rendered by all learned counsel who appeared in the case for various parties. No costs."*

13. Similarly, in *Gobardhan Naik* (supra), this Court, after taking into consideration a series of judgments of different courts, held that the employer is liable to pay interest in case of delay in payment of the pensionary benefits granted to the petitioner therein. Accordingly, this Court directed the employer to pay interest to the retired employee at the rate of 18% within a period of four months from the date of communication of the judgment. In paragraph-20 of the said judgment this Court held as follows:

> *"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."*

14. Considering the factual aspect vis-à-vis the law decided by the apex Court as well as this Court, mentioned supra, it can be irresistibly concluded that delay in payment of arrear salary for the period from 01.01.1996 to 08.06.1999 is admitted and the fact, that the other similarly situated employees have already received arrear salary in time, is also not disputed by the opposite parties. Therefore, the opposite parties are liable to pay interest @ 12% per annum, as claimed in the writ petition by the petitioner, as delay

is attributable to the opposite parties, but not to the petitioner. As such, in the meantime, the petitioner has retired from service on attaining the age of superannuation. Consequentially, this Court directs the opposite parties to pay the interest @ 12% per annum on account of delay for the period from 01.01.1996 to 08.06.1999 amounting to Rs.73,716/- and other consequential benefits incidental thereto within a period of four months from the date of communication of this judgment.

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

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2021 (III) ILR-CUT-281

D. DASH, J.

RSA NO. 34 & 35 OF 2021

BASUDEV DAS & ANR. .....Appellants

.V.

GANESWAR MALLIK .....Respondent

PROPERTY LAW – Suit for right, title, interest and possession – Counter claim seeking declaration of their right, title, interest and possession – Defendants father sold the property after taking permission as per section 22 of OLR Act to the plaintiff – Only the year of the case has been erroneously put as 1982 instead of 1980 in the sale deed which is a registered one – The 1st Appellate Court turned down the well-reasoned finding of the Trial Court, based upon the appreciation of oral evidence – Effect of – Held, the First Appellate court on the face of the available documentary evidence was not at all required to look at the oral evidence with regard to such permission when under the circumstance no amount of oral evidence can satisfy the legal requirement and it has to be found out and so ascertained from the documents. (Para 11)

For Appellants : M/s Bhaskar Ch.Panda, S.Mishra, J.N.Panda & K.Rout.
For Respondent: M/s. Ashok Ku Rout, B.N.Behera, H.P.Mohanty, P.K.Sethi & K.K. Dash.

JUDGMENT Date of Hearing : 09.08.2021 : Date of Judgment : 02.09.2021

D. DASH, J.

Since both the Appeals arise out of a common judgment followed by the decrees passed by the learned Addl. District Judge, Salipur in RFA No.08 of 2020 and RFA No. 09 of 2020; those had been heard together for their disposal by common judgment.

The Respondent as the Plaintiff had filed Civil Suit No.731 of 2016 in the Court of learned Senior Civil Judge, Salipur. He has claimed a declaration in respect of his right, title, interest and possession over the suit land with further prayer of injunction. The Defendants entering appearance while filing the written statement had raised counter claim seeking declaration of their right, title, interest and possession over the suit land being the lawful purchasers vide valid sale-deed bearing No.578 dated 28.02.1983. The Trial Court having dismissed the suit; decreed the counter claim.

The unsuccessful Plaintiff being aggrieved filed two Appeals under Section-96 of the Code of Civil Procedure (in short hereinafter called as 'the Code') which stood numbered as RFA No.08 of 2020 and RFA No.09 of 2020. In these two Appeals, the Plaintiff challenged the dismissal of his suit in not granting any relief as prayed for by him as well as the decree passed in the counter claim lodged by the Defendants in declaring their right, title, interest and possession over the suit land and granting other ancillary reliefs.

Learned Additional District Judge, Salipur, by the common judgment and decrees while setting aside the judgment and decrees passed by the Trial Court has reversed the result of the suit and the Counter Claim i.e. the suit has been decreed and the Counter Claim has been dismissed.

The Defendants thus being unsuccessful in the First Appeal have filed the present Appeal under Section-100 of the Code.

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 member of Scheduled Caste Community. The suit land under Khata No.26, Plot No.248, measuring Ac.0.0280 decimals in mouza Kusundaspur is his ancestral property. It stood recorded in the name of his father Adikanda Mallick in the record of right published in the consolidation operation. On the death of Adikanda, the Plaintiff became the owner and possessed the suit land. He was staying at the

place of work which is away from the native village. It is stated that all of a sudden Defendant No.1 started putting up some construction over the suit land and on being asked, he raised his claim over the same as the purchaser from Adikanda, the father of the Plaintiff by registered sale-deed No.578 dated 28.02.1983. The Plaintiff's request to the Defendant No.1 not to go for any construction over the suit land was not paid any heed to. When the Defendant No.1 fast proceeded with the construction work, the Plaintiff initiated a proceeding under Section-144 of the Code of Civil Procedure vide Crl. Misc. Case No.88 of 2016. The Plaintiff then applied and obtained the certified copy of the sale-deed in question which was projected by the Defendants as the source of derivation of the title in respect of the suit land unto themselves. The copy was received by him on 02.07.2016. It finds mention as to permission for such sale under section-22 of the Orissa Land Reforms Act (OLR Act) as to have been obtained from the Competent Authority in Misc. Case No.468 of 1982 and the order to that effect been passed on 25.02.1983. On enquiry, the Plaintiff ascertained that his father had never applied for such permission under Section-22 of the OLR Act and that application giving rise to the Misc. Case No.488 of 1982 had been filed by one Krushna Chandra Sethi and not his father, Adikanda.

It is next stated that sale-deed dated 28.02.1983 has never been acted upon. The Plaintiff claimed to have been the owner in possession of the said land and as such paying land revenue. As for the illegal act of the Defendants, clouds came to be cast upon his title over the suit land; he filed the Suit.

4. The Defendants in the written statement containing the counter-claim have averred that the original owner Adikanda with a view to transfer the land measuring Ac.0.060 decimals out of Ac.0.0280 decimals from the land in Plot No. 248 as required under the law had made the application for grant of permission before the Sub-Collector, Cuttack on 11.12.1980. The Sub-Collector after enquiry as contemplated finally on 31.10.1981 granted permission by passing appropriate order to that effect. Intimation was given to the Registering Officer, Mahanga as well as said Adikanda. This Adikanda is also stated to have obtained permission from the Consolidation Officer, Mahanga in Misc.Case No.794 dated 23.02.1983 to transfer the suit land measuring Ac.0.04 decimals out of Suit Plot No.248 in favour of the Defendants. That permission was also communicated to the Sub-Registrar and Assistant Consolidation Officer, Palli Sahi. Permissions being obtained,

Adikanda transferred the suit land to the Defendants by registered sale-deed No.578 dated 28.02.1983 for consideration of Rs.500/-. Vendor, Adikanda had also delivered the possession of the suit land whereafter the Defendants put up thatched house consisting of three rooms. It is also stated that as the house was damaged, the Defendants were putting up permanent constructions which has progressed up to the lintel level. Explaining the non-indication of their names in respect of the suit land in the record of right published in the Consolidation Operation, they have said that it was for their absence during the period and as such inaction. The Plaintiff's written statement to the counter claim is the reiteration of the facts pleaded in the plaint.

5. The Trial Court on the above rival pleadings, framed in total nine issues. Answering the important issue as to the validity of the Registered Sale-Deed dated 28.02.1983, Ext.A, the Trial Court has touched upon the factum of grant of prior permission, if any, as required in view of the mandatory provision contained in section-22 of the OLR Act with the consequence declared thereunder. Upon discussion of evidence on record on the base of the rival pleadings on that score, keeping in view the settled law that in the absence of the permission, the transaction is void as also the burden of proof in that regard lies on the plaintiff to lead satisfactory evidence so as to shift the onus to the Defendant; the conclusions are as the followings :-

(a) xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

Hence as discussed above, it is found that the father of the Plaintiff had intended to sale the suit land to the Defendants and accordingly necessary permission u/s.22 of the OLR Act and u/s.4(2) of the OCH & PFL Act have been obtained from the concerned authority in furtherance of the same to sale the suit property to the Defendants.

(b) xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

Hence under the circumstances, it is held that the alleged sale deed is properly executed, consideration money was paid at the time of execution and necessary permission u/s.22 of the OLR Act has been obtained from the concerned authority before the sale of the suit land by the vendor i.e. father of the Plaintiff to the Defendants.

Banking upon the above, the Suit having been dismissed; the Trial Court in the factual settings, finding the counter claim as maintainable having the cause of action, has decreed the same.

6. The First Appellate Court being moved by the unsuccessful plaintiff having raised no disagreement with the position that the fate of Suit and Counter Claim solely depend upon the validity of the sale-deed, Ext.A which has also to be decided keeping in view the factum of due grant of permission as mandated under section-22 of the OLR Act, has proceeded to look into the evidence on record in judging the sustainability of the finding of the Trial Court on that score. Relevant portion of the judgment containing the discussions leading to the conclusions arrived at run as under :-

> (a) Be that as it may, here it is only concerned is that whether permission u/s. 22 of the OLR Act was obtained or not. The evidence of Defendant No.1 not at all satisfactory with regard to permission u/s. 22 of the OLR Act as per his statement disposed in court in his cross-examination that at the time of execution and registration of the sale deed in respect of his purchased land his vendor handed over the original permission of the consolidation authority to him but had not supplied the OLR permission u/s. 22 as the said permission was filed before the Sub-Registrar at the time of execution of sale deed. He himself contradicts his own version that he does not have any personal knowledge about the permission as reflected in para-27 of his cross-examination. Therefore, the evidence of possession of suit land after its purchase by complying the mandatory provisions of Sec.22 of OLR Act is not acceptable and rather the evidence led by plaintiff with respect of possession of suit land and not obtaining permission by his father for transfer of suit land is more probable for acceptance. From all these I can come to the conclusion that the validity of the sale deed depends upon the permission u/s. 22 of OLR Act. In view of that matter the onus shifting to Defendant to be discharged as regards the permission was obtained by Adikanda Mallick (father of the Plaintiff) at the time of registration of sale deed in the present case he has utterly failed to do so.
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> (b) From these above propositions of law, it is always the duty of the Court to find out the true intent and purpose of a particular legislation by pressing into use. Therefore, in view of the above, the permission obtained in provisions contained in Sec.4(2) of OCH & PFL Act, 1972 is meaningless when the mandatory provisions of U/s.22 of OLR Act has not been complied.

7. The Appeals have been admitted on the following substantial questions of law:-

> A. Whether the First Appellate Court, in view of the evidence on record, ought to have construed the permission granted for sale of the land under Ext.B to be the permission for the purpose of the sale as made vide Ext.A and accordingly, ought not to have decreed the suit filed by the Respondent as Plaintiff in dismissing the counter claim advanced by the Appellants (Defendants)? and
>
> B. Whether even upon construction of Ext.B in support of the sale made under Ext.A, it can be so held to be valid in the eye of law so as to sustain the transaction carried under Ext.A in conferring title with respect to the land in question in favour of the vendor/s therein?

8. Mr. B.C. Panda, learned counsel for the Appellants submitted that the learned lower Appellate Court has committed grave error in its approach in judging sustainability of the finding of the Trial Court and has unjustifiably turned down the well reasoned finding of the trial Court based upon sound appreciation of evidence that the sale-deed in question had been duly executed by Adikanda on 28.02.1983 which has been duly registered on payment of valuable consideration followed by delivery of possession being backed by a valid and due permission as required under Section-22 of the OLR Act which has been subsequently permitted as required under Section4(2) of the Orissa Consolidation of Holding and Prevention of Fragmentation of laws Act (OCH & PFL Act) by the Competent Authority. He further submitted that the First Appellate Court in disturbing such a finding on the validity of the sale-deed as recorded by the Trial Court has completely thrown the available legal presumption as to due execution, payment of consideration, registration and observance of all such legal formalities thereupon to the winds, perhaps, forgetting for a moment that the sale-deed in question is a registered one. It was submitted that the learned lower Appellate Court has unnecessarily given much emphasis upon the recitals without embarking upon the evidence as to the bilateral mistake in putting the year of the relevant permission case in the sale-deed. According to him, on the face of the document produced and proved in that behalf, such a silly and minor mistake in the recitals which never touches the root of the matter when the fact what is true stands amply proved, ought to be totally ignored. It was submitted that the Trial Court having rightly done so; the lower Appellate Court has committed grave error. He also submitted that the

sale-deed being of the year, 1983 and the vendor under the sale-deed having not questioned the same during his lifetime, the same ought to have been taken as a circumstance as to the acceptance of the said sale-deed on the part of the Plaintiff and his father. It was submitted that overwhelming evidence as to the possession of the suit property by the Plaintiff since the time of his father by putting up construction which have been touched upon by the Trial Court have been completely ignored by the First Appellate Court and that when are taken into account in their proper perspective; the factum of the whole hearted acceptance of the sale-deed in question from every quarter finds strong support. He thus submitted that the judgment and decrees passed by lower Appellate Court are liable to be set aside and the permission under Ext.B ought to have held to be a valid one so also the sale-deed vide Ext.A and accordingly, the substantial questions of law according to him, should find answers against the case of the Plaintiff.

9. Mr. A.K. Rout, learned counsel for the Respondent submitted all in favour of the findings rendered by the learned First Appellate Court. According to him, the sale-deed in question has been rightly held as invalid. It was submitted that the learned lower Appellate Court did commit no mistake in saying that no right, title and interest in respect of the suit land have passed to be hands of the Plaintiff by virtue of that document (Ext.A). According to him, the sale-deed Ext.A being not supported by the permission as mandatorily required under section-22 of the OLR Act in the particular case i.e. Misc. Case No.488 of 1982 as finds mention therein; there stands no second answer but to say the said sale-deed as not even worth the paper written on. According to him, the document (Ex.A) has to be examined as it is and no extraneous evidence is permissible to be taken note of for the purpose. In view of all these above, he argued that the substantial answer to the substantial question of law have to run in favour of the confirmation of the judgment and decrees passed by the learned First Appellate Court.

10. Keeping in view the submissions made, the judgments rendered by the Courts below have been carefully gone through. I have also travelled through the evidence both oral and documentary as placed by the learned counsel for the parties.

11. Admittedly, the Plaintiff belongs to the Scheduled Caste Community and as mandatorily required under Section-22 of the OLR Act, such transactions of sale of immovable property etc. by a member of Scheduled

Caste in favour of a person not belonging to Scheduled Caste are required to be with prior permission of the Competent Authority who under the law is ordained to look into certain relevant aspects so as to safeguard and protect the interest of the vendor and other members of the said Community. Ultimately, the Authority accords the permission in case, it lastly finds that no such member of the said Community is coming forward to purchase the immovable property on payment of the fair and reasonable sum towards consideration.

It is the settled law that any sale-deed in contravention of the said provision of the Section-22 of the OLR Act is void and no Court of law will look into it as a deed of sale so as to construe it in that way without there being a permission for the transaction. The possession of the immovable property pursuant to such sale-deed without permission also remains unlawful where the vendor or his legal representative or even State Authority have the right to restore in accordance with law through appropriate action as provided in the OLR Act.

The controversy in the present case centers round the permission of the Competent Authority for the purpose of sale involving of the suit land under the Registered Sale-deed, Ext.A. The sale deed being executed on 28.02.1983 has been registered on that day and it has been admitted in evidence and marked as Ext.A. The case of the Plaintiff is that prior to such execution and registration of the sale-deed; permission had been granted by the Competent Authority in Misc. Case No. 488 of 1980 and the same was duly communicated to the concerned Sub-Registrar. However, while mentioning said fact; it appears that the permission case number in the sale-deed, the scribe in stand of writing 488 of 1980 has written 488 of 1982 i.e. only the year of the case has been erroneously put as 1982 instead of 1980, when the number as well as the date of order remain the same. The document Ext. B i.e. certified copy of the case record of No. 488 of 1980 proved from the side of the Defendants being gone through, this mentioning of the permission case number in the sale-deed under Ext.A can be termed to be the scribe's devil and that is what the trial court has said. The register of institution of such permission cases indicates that said OLR Case No.488 of 1982 was filed by one Krushna Sethi. However, the certified copy of the relevant record of shows that Misc. Case No.488 of 1980 had been filed by Adikanda Sethi, the father of the Plaintiff. Under the circumstance, the vendor of sale-deed Ext.A does not stand to gain anything by placing the year

of the case as 1982 in place of 1980. Had it been a case that absolutely without any prior permission being granted in any proceeding merely a number had been put/written, the Court even though the sale-deed being a registered one would have no other option but to ignore it, in holding it to be invalid for any purpose whatsoever. But that is not the case here.

The sale-deed here is a registered one and as required under the rules of practice the order of permission being communicated to the Registering Authority; he having made due verification has to register it. It may be mentioned here that law requires such a duty to be performed by the Registering Authority and the failure or even any willful conduct in circumventing the mandatory provision meant to safeguard the rights of the members of such Community over their immovable property invites panel action against all concerned. In the obtained facts and circumstances; legal presumption squarely comes to stand in favour of the validity of the registered sale-deed (Ext.A) that it has been due executed by Adikanda on receipt of due agreed consideration followed by delivery of possession for the property in question and that it was duly registered by the Registering Authority after all required verification and observing the legal formalities; most importantly, with the satisfaction as to grant of permission under the OLR Act also the permission under the OCH & PFL Act as by then in need since the land in question was under the consolidation operation.

With a view to verify the validity of the registering the sale-deed Ext.A that the execution of the sale-deed is in conformity with the said laws or not; the First Appellate Court on the face of the available documentary evidence was not at all required to look at the oral evidence with regard to such permission when under the circumstance no amount of oral evidence can satisfy the legal requirement and it has to be found out and so ascertained from the documents. Thus, the reason culled out by the first Appellate Court that the evidence of Defendant No.1 is not satisfactory with regard to permission as he has no personal knowledge about the same does not stand to acceptance. Furthermore, the First Appellate Court has assigned absolutely no reason as to why the explanation averred by the Defendant and so deposed with regard to the mistake in putting the year of the permission case in the sale-deed executed Ext.A not acceptable. The first Appellate Court appears to have made unnecessary discussion of other evidence in this connection so as to arrive at a conclusion as to the validity of the permission Ext.B in deciding the fate of Ext. A. Having said all these above; this Court is persuaded to

accept the submission of the learned Counsel for the Appellant that the First Appellate Court without any justifiable reason has disturbed the well reasoned finding of the Trial Court found upon sound appreciation of evidence on record on the vital issues. The answers to the substantial questions of law thus are recorded against the case of the Plaintiff (Respondent) running to non-suit him and in favour of the Defendants (Appellants) in decreeing their counter claim.

In the wake of aforesaid, the judgment and decrees passed by the learned First Appellate Court are hereby set aside and those of the Trial Court stand restored.

12. Resultantly, the Appeals stand allowed. No order as to cost.

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2021 (III) ILR-CUT- 290

D. DASH, J.

R.S.A. NO. 264 OF 2011

RAMA CH. BARIK (SINCE DEAD) & ORS. .....Appellants

.V.

PARSURAM BARIK .....Respondent

PROPERTY LAW – Suit for permanent injunction – Counter claim made by defendant with a prayer for partition and separate possession – When there had been disruption of the joint status in the family since long coupled with the fact that the record of right (Ext. 1) has been allowed to stand for more than 20 years in favour of plaintiff, he is entitled to the decree for permanent injunction and defendants are not entitled to the relief of partition in refusing to disturb such long standing respective settled possession by the parties.

For Appellants : M/s. Sashi Bhusan Jena, D.R. Mohapatra, S. Behera, A.Mishra & S. Soren

For Respondent : M/s. Prahallad Kar, A.K. Mohanty & G.D. Kar

JUDGMENT Date of Hearing : 15.09.2021: Date of Judgment : 24.09.2021

D. DASH, J.

The unsuccessful Defendants before the Trail Court as well as the First Appellate Court have filed this Appeal under section 100 of the Code of Civil Procedure (for short 'the Code').

The Respondent as the Plaintiff has filed the suit, i.e, Title Suit No. 27/97 in the Court of the learned Additional Civil Judge (Jr. Division), Nilgiri for permanent injunction in restraining the Appellants (Defendants) from interfering in their possession in so far as the suit land is concerned. The Appellants as the Defendants contesting the suit in filing the written statement have also lodged the counter claim seeking a preliminary decree for partition of the properties. The Trial Court while decreeing the suit, dismissed the counter claim. So the Defendants had carried the First Appeal under section 96 of the Code which was numbered as R.F.A Nos. 23 of 2010/114 of 2003. The same being heard by the learned Civil Judge (Sr. Division), Nilgiri, has also been dismissed.

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

3. Plaintiff's case is that the suit land in schedule "Ka" of the plaint which was his ancestral property stands recorded in his name in the record of right last published two decades before, i.e, in the year 1976. On the death of his parents being the only son and successor, he has been in possession of the suit land by fencing it all around. The Defendants are related to each other and it is said that they have no right, title, interest and possession over the suit land. To the north-east of the suit land, there lies a public road and when the Plaintiff was directed by the Government Officials to remove the fence adjacent to the public road, the Plaintiff made a request for measurement which was under consideration. It is alleged that taking advantage of that situation, the Defendants cut the fence of the Plaintiffs and they also threatened to damage the fence further. So, he filed the suit to restrain them from further doing so.

4. The Defendants in their written statement stated that the schedule land was belonging to the common ancestor of the parties and that land has never been partitioned amongst them. However, the suit land in the settlement record of right standing in favour of the Plaintiff is said to have been

fraudulently obtained behind their back. They claim to have the right, title, interest and possession over the suit land. According to them one Bhagaban is the common ancestor of the Plaintiff and the Defendants. He had two sons, namely, Mani and Hrusi. Hrusi died issueless and Mani had two sons, namely, Bauri and Sanatan. Achyuti is the son of Bauri and Parsuram is the son of Achyuti. Rama Chandra, Jogendra and Narendra are the three sons of Sanatan. Malimani, the widow of Sanatan is alive. It is stated that the suit land in the sabik record of right has been recorded in the name of Mani and others and thus the Plaintiff and the Defendants being the co-sharers are in joint possession. The suit land having not been partitioned, the objected to the prayer for a decree for permanent injunction. Simultaneously, advancing the counter claim, they prayed for passing of a preliminary decree for partition and separate possession respecting the prevailing arrangement as far as possible and practicable.

The plaintiffs filing the written statement to the counter claim denied all said averments as to the factual settings projected in thwarting the suit for permanent injunction and in favour of the prayer for a preliminary decree for partition.

5. The Trial Court on such rival pleadings having framed five issues has answered the issues relating to right, title, interest and possession of the Plaintiff vis-à-vis the claim of the Defendants over the suit land in asserting their shares and seeking partition, in favour of the Plaintiff and against the case of the Defendants. The suit of the Plaintiff thus having been decreed and the counter claim being dismissed; the unsuccessful Defendants had carried the first Appeal.

The Lower Appellate Court upon hearing and discussion of evidence on record by independent appreciation of the same at its level has found no such reason and justification to differ with the ultimate conclusions arrived at by the Trial Court.

6. The present Second Appeal at the instance of the Defendants has been admitted on the following substantial question of law:-

> "Whether the finding of the courts below with regard to prior partition is not based on evidence on record"?

7. The answer to the above substantial question of law would stand upon examination of the evidence on record in arriving at a conclusion as to whether the courts below in recoding that finding has appreciated the

evidence in a perverse manner. Since the courts below have concurrently rendered the finding of fact on the above score against the case of the Defendants and in favour of the Plaintiff in taking up the exercise for answering the same; the evidence on record has to be touched upon to ascertain as to if the courts below have not taken into account certain important material evidence on record or circumstances as those emanate there from in rendering the said finding or that some inadmissible and extraneous evidence as well as circumstances have been emphasized and relied upon for the purpose so as to conclude that had it been done properly, a finding to the contrary would have been the outcome.

8. Mr. D.R. Mohapatra, learned counsel for the Appellants and Mr. P.Kar, learned counsel for the Respondent have been heard at length.

9. Keeping in view the submissions made, this Court has carefully gone through the judgments passed by the courts below.

10. It was submitted by the learned counsel for the Appellants that the courts below having disbelieved the unregistered deed of partition (Ext.3) ought not to have concluded that there is severance of status between the parties since long. He further submitted that the character of property does never undergo change on severance of joint status. According to him keeping in view the presumption of jointness merely on the basis of Record of Right, the Plaintiff's suit ought not to have been decreed and the counter claim ought not to have been dismissed.

11. Learned counsel for the Respondent submitted all in favour of the findings rendered by the courts below. According to him, the concurrent finding of fact is not liable to be disturbed in a Second Appeal unless it is conclusively held that such decision is the outcome of total perverse appreciation of evidence on record and merely because another view is also allowable, it is not so permissible to upset the concurrent finding of fact.

12. Now in the exercise of searching out the answer on the substantial question of law, it becomes necessary to have a look at the evidence on record.

P.W.1 is none other than the Plaintiff. He has deposed that the properties had been partitioned in the year 1942 and he has no direct knowledge as to the same. The suit having been filed in the year 1997 herein the Defendants have come forward with the prayer for partition by advancing the counter claim. The record of right of the land in question had been

published in the year 1976 in the settlement operation. Said record of right has been marked as Ext.1. The land stands recorded in the name of the Plaintiff. He has proved through evidence that he has been paying the rent to the State and obtaining receipts to that effect, which have been admitted in evidence and marked as Ext.2. He also claims to be in possession of the same all through. The Defendants have never challenged the said recording of the land for all these two decades and more and they for the first time are questioning that in this suit upon their appearance. Even though the legal position stands that the Record of Right does not create or extinguish the title yet the same being allowed to stand for quite a long period without being questioned and the conduct of the parties in respect of the dealing of the properties when run in favour of acceptance of the position as such; its value in that light cannot be totally ignored. Thus, Ext.1 and 2 series lead to show that the Plaintiff has been in exclusive possession over the suit land and its enjoyment as such for quite a long period. To add to it, it stands admitted by D.W.1 that they are also in possession of separate parcels of homestead land as well as paddy land for long. This aspect of possession of the land by the Plaintiff has also been stated by the P.W.2 whose house is 200 cubits away from the house of the Plaintiff standing over the land in question. At no points of time save and except that act of the Defendants as alleged, the Defendants have not shown any interest over the suit land when admittedly they are all along in possession of separate land wherein this Plaintiff has no shown any interest. The evidence on record is to the effect that the position as such has been given regard to by the parties.

13. The Lower Appellate Court on scrutiny of evidence, having held that there had been disruption of the joint status in the family since long couples with the fact that Ext. 1 has been allowed to stand for more than 20 years; has held the Plaintiff to be entitled to the decree for permanent injunction and the Defendants as not entitled to the relief of partition in refusing to disturb such long standing respective settled possession by the parties. The whole exercise of appreciation of evidence in arriving at the conclusion as undertaken by the courts below in my considered view does not suffer from the vice of perversity so as to be annulled.

Accordingly, the answer to the substantial question of law stands rendered against the case and the reliefs claimed by the Defendant.

14. In the wake of aforesaid, the Appeal is dismissed. However, in the facts and circumstances, no order as to cost is passed.

2021 (III) ILR-CUT- 295

BISWANATH RATH, J.

W.P(C) NO. 15491 OF 2021

JHUNU CHOUDHURY .....Petitioner

.V.

THE ZONAL MANAGER, BANK OF INDIA & ORS. .....Opp.Parties

INDIAN SUCCESSION ACT, 1925 – Section 370 r/w Banking Mode of Operation (MOP 2018) Clause 3.1.1 and clause 6.4 of MOP 2020 – Death of Saving Account holder without nomination – Release of saving Money in favour of legal heirs beyond the limit of 40 lakhs as prescribed under the MOP 2020 – Petitioner submitted Death certificate of the deceased account holder as well the legal heirs certificate along with the affidavit with regard to no objection of other legal heirs – However bank denied to release the amount without the succession certificate – Necessity of the succession certificate questioned in case of debt and security – Provisions of the section 370 of the succession Act interpreted – Held, Succession certificate is not essential – Hence direction issued to release the amount in favour of the petitioner.

Case Laws Relied on and Referred to :-

1. AIR 1991 (CAL) 128 : Ram Chakravarty Vrs. Manager, Punjab National Bank.
2. AIR 1997 (M.P) 196 : Sharda Chopra & Ors. Vrs. State Bank of India.
3. 1988 (II) OLR 533 : Branch Manager, S.B.I. Vrs. Satyaban Pothal & Ors.
4. AIR 2000 (O) 114 : Kinkar Santananda Sanyasi Vrs. State Bank of India.
5. AIR 1966 (SC) 1370 : Kesoram Industries and Cotton Mills Ltd. Vrs. Commissioner of Wealth Tax (Central) Calcuta.
6. (1997) 6 SCC 564 : Sun Export Corporation, Bombay Vrs. Collector of Customs
7. (2018) 9 SCC 1 : Commissioner of Customs (Imports), Mumbai Vrs. M/s. Dillip Kumar and Company & Ors.
8. 2006(1) ALD 382, 2005 (O) Supreme (AP) 972 : K. Srinivasu Vrs. A.P. Co-Operative Bank Ltd.
9. 1962 (O) AIR (SC) 1764 : Shanti Pr.Jain Vrs. The Director of Enforcement & Anr.
10. AIR 1997 (M.P) 196 : Sharda Chopra & Ors. Vrs. State Bank of India.

For Petitioner : M/s. P.K. Panda

For Opp.Parties : M/s. T. Sahu, S. Mishra (O.P.Nos.1&2)
M/s. S.K.Jethy (O.P.Nos.3 to 5)

JUDGMENT Date of Hearing : 24.08.2021: Date of Judgment : 08.09.2021

BISWANATH RATH, J.

1. This writ petition is filed seeking a direction in the nature of mandamus against the Opposite Party Nos.1 & 2 to settle the claim on behalf of the deceased husband of the Petitioner and release the amount lying in the Account No.515212100005354 in favour of the Petitioner without insisting for production of succession certificate.

2. Factual background involved in the case is that late Rajendra Prasad Choudhury the husband of the Petitioner and the father of the Opposite Party Nos.3 to 5 being two sons and one daughter was serving as a Forest Guard. Deceased joined the post of Forest Guard on 27.06.1972. On attaining the age of superannuation the husband of the Petitioner got superannuated on 31.07.2003. Being a Government employee he was entitled to pension w.e.f. 1.08.2003, which is issued by way of Pension Payment Order vide PPO No.347697 dated 17.12.2004. Pension payment order through clause 12 therein makes the Petitioner entitled to family pension in case of death of the husband. The husband of the Petitioner for smooth running of pension account opened an account under the S.B. Pension Scheme in the Bank of India, Konisi Branch in the District of Ganjam bearing A/c. No.515212100005354. The Petitioner filed relevant portion of pass book to establish her case. Pleadings further reveal that the husband of the Petitioner had some agricultural land under the Mouza-Sihala in the District of Ganjam. During his survival, the Indian Oil Corporation Ltd. acquired some land in the Mouza-Sihala for construction of Petro Chemical Project near Village Sihala. In the process there was acquisition of some agricultural land belonging to the family of the Petitioner and for which compensation being assessed two demand drafts were drawn in favour of the husband of the petitioner during his survival and he had deposited all such amount in the above bank account on 24.07.2020. The husband of the Petitioner passed away leaving behind the present Petitioner, two sons and one daughter as the legal heirs. It is pleaded that in the process the family obtained the death certificate of the deceased on 1.09.2020 and thereafter the Petitioner approached the Branch Manager i.e. Opposite Party No.2 for getting the amount under deposit. It is, on receipt of such request along with death certificate the Branch Manager requested the Tahasildar, Kukudakhandi, Ganjam for submission of a report concerning details of the legal heirs of late Rajendra Prasad Choudhury. Pleadings further disclose that basing on such request of the Bank authority the Tahasildar, Kukudakhandi submitted his report vide Annexure-4 indicating therein that the Petitioner and the Opposite

Party Nos. 3 to 5 are the surviving legal heirs of late Rajendra Prasad Choudhury. After receipt of such report of the Tahasildar and being informed the Petitioner along with Opposite Party Nos.3 to 5 requested the Branch Manager of the Bank of India-Opposite Party No.2 for payment of balance amount lying in the account involved herein in favour of the Petitioner. The Petitioner and the Opposite Party Nos.3 to 5 applied in proper format also enclosing therein the required documents in addition to such claim. The Petitioner also submitted an affidavit being sworn jointly by the Petitioner with the Opposite Party Nos.3 to 5 disclosing therein that the other members of the Family have no objection, in the event the balance amount is settled in favour of the Petitioner. This apart, the Petitioner and the Opposite Party Nos.3 to 5 also executed an indemnity bond undertaking therein that they will indemnify the Bank against all losses that may be caused to it as a result of payment of the amount involved to the legal heirs. The Opposite Party Nos.3 to 5 also filed an affidavit indicating therein that they have no objection whatsoever amount involved herein is released in favour of their mother i.e. the present Petitioner and in addition to such affidavit the Opposite Party Nos.3 to 5 also filed a letter of authority also authorizing the mother to receive such amount. In response to the above approach of the Opposite Party Nos.3 to 5, the Opposite Party No.2 by its letter dtd.7.04.2021 intimated the Petitioner and the Opposite Party Nos.3 to 5 for submission of succession certificate in order to settle the claim involved herein.

3. On the premises that the demand of the Opposite Party No.2 remains contrary to their own policy i.e. Model Operational Procedure (hereinafter in short be reflected as 'MOP'), the Petitioner taking reference to some of the provisions in the MOP, claimed that the Bank Authorities are not justified in asking for succession certificate.

4. To the contrary the Bank authorities filing counter affidavit while not disputing the development taken place in the meantime that on the asking of the Branch Manager there has been an inquiry at the level of the Tahasildar and a report has surfaced accordingly and further there has been an application at the instance of the Petitioner with support of an affidavit, indemnity Bond and letter of undertaking in the matter of release of the amount involved in favour of the Petitioner, but through the counter affidavit attempted to justify the action of the Opposite Party No. 2 in asking succession certificate for release of amount lying in the Bank Account involved herein. The Opposite Party Nos. 1 & 2 taking reliance of the

provision at clause 20.2 of the R.B.I. Master Circular on customer service in the Bank issued on 1.07.2009, contended that for the settlement claim made in respect of the deceased depositor the provision at Section 45-ZA to 45-ZF of the Banking Regulation Act, 1949 and the Banking Companies (Nomination) Rules, 1985 should be adhered to. Taking reference to the Clause 20.2 it is claimed that here the Bank has been authorized to fix minimum threshold limit for the balance in the account of the deceased depositor up to which claim in respect of the deceased depositor could be settled without insisting production of any document other than a letter of indemnity. It is, in the premises, the Opposite Party Nos.1 & 2 claimed that the Bank has come-out with a policy on MOP for settlement of claim in respect of the deceased depositor account and while claiming so the Petitioner did not file the whole MOP and only filed that part of the MOP; which supports her case. Bringing the further disclosures in the MOP more particularly through clause 6.4 the Opposite Party Nos.1 & 2 contended that for the MOP the Bank has introduced requirement of succession certificate for settlement of claim; where the claim is more than rupees forty lakh and further also in the case where there exists dispute between the legal heirs / claimants even if the claim amount is within the threshold amount. It is, for the above conditions in the MOP, the Opposite Party Nos.1 & 2 objected the relief claimed by the Petitioner and thus prayed for rejection of the writ petition.

5. In the above background of the matter Mr. Panda, learned counsel for the Petitioner drawing the attention of this Court to the disclosures through the materials like death certificate, legal heir certificate, format of application, affidavit of Petitioner with Opposite Party Nos.3 to 5, the report of the Tahasildar submitted pursuant to the asking of the Opposite Party No.2, the indemnity bond and lastly the letter of authority, contended that for the existence of all such materials indicated hereinabove there virtually remains no dispute that the Petitioner and the Opposite Party Nos.3 to 5 are the only legal heirs to the estate of the deceased lying in the Bank. Mr. Panda, learned counsel for the Petitioner also while not disputing the allegation of the Bank that the condition at clause 3.1 is not all the condition to consider the case involved herein, taking reference to Clause 6.4. in the MOP and the clause 20.2 of the MOP referred to by the Bank Authorities contended that with the material support involving the claim of the Petitioner there is virtually no dispute that firstly the claimants are the only legal heirs, secondly

the Opposite Party Nos.3 to 5 have no objection in the event of release of proceeds lying in the Bank account in favour of the Petitioner and in the circumstance Mr. Panda, learned counsel submitted that there should not be any insistence of production of succession certificate as claimed by the Opposite Party Nos.1 & 2. On the premises that the pandemic situation for the COVID-19 reason made the Courts of the whole country paralyzed to undertake any final exercise, Mr. Panda, learned counsel also contended that in the given situation it is difficulty on the part of the customers to get a succession certificate, which can only be granted in the finality of such proceedings. To support his stand, Mr. Panda, learned counsel for the Petitioner also relied on some decisions of different Courts i.e. (1) in the case of ***Ram Chakravarty*** *Vrs.* ***Manager, Punjab National Bank*** : AIR 1991 (CAL) 128, (2) in the case of ***Sharda Chopra & Ors.*** *Vrs.* ***State Bank of India*** : AIR 1997 (M.P) 196, (3) in the case of ***Branch Manager, State Bank of India*** *Vrs.* ***Satyaban Pothal & Ors.*** : 1988 (II) OLR 533, (4) in the case of ***Kinkar Santananda Sanyasi*** *Vrs.* ***State Bank of India*** : AIR 2000 (O) 114, (5) in the case of ***Kesoram Industries and Cotton Mills Ltd.*** *Vrs.* ***Commissioner of Wealth Tax (Central) Calcuta*** : AIR 1966 (SC) 1370, (6) in the case of ***Sun Export Corporation, Bombay*** *Vrs.* ***Collector of Customs*** : (1997) 6 SCC 564, (7) in the case of ***Commissioner of Customs (Imports), Mumbai*** *Vrs.* ***M/s. Dillip Kumar and Company and Ors.*** : (2018) 9 SCC 1 (Civil Appeal No.3327 of 2007 decided on 30th July, 2018).

6. Taking this Court to the aforesaid decisions Mr. Panda, learned counsel for the Petitioner also claimed that for the settled position of law there may not be any insistence on production of the succession certificate for release of the amount lying in the account involved. Mr. Panda, learned counsel for the Petitioner also contended that for there is already delay in release of the entitlements in favour of the Petitioner, there is sufficient harassment to the beneficiaries and such amount is illegally retained by the Bank.

7. In his opposition, Mr. T. Sahu, learned counsel for the Opposite Party Nos.1 & 2 taking this Court to the provisions in the Banking Regulation Act, 1949 hereinafter in short be referred to as “the Act, 1949”; more particularly to the provisions at Section 45-Z clause 3.1.1 in the MOP 18 and clause 6.4 in MOP-20 contended that for there is clear restriction in the MOP objecting the claim of the Petitioner, there cannot be release of a huge amount unless

the succession certificate is produced. To support his case Mr. Sahu, learned counsel also relied on two decisions i.e. in the case of ***K. Srinivasu*** *Vrs.* ***A.P. Co-Operative Bank Ltd.*** : 2006(1) ALD 382, 2005 (0) Supreme (AP) 972, in the case of ***Shanti Prasad Jain*** *Vrs.* ***The Director of Enforcement & Anr.*** : 1962 (0) AIR (SC) 1764. It is, in the circumstance, Mr. Sahu, learned counsel prayed for dismissal of the writ petition.

8. Considering the rival contentions of the parties, this Court finds, undisputed facts remain, there is death of the account holder namely Rajendra Prasad Choudhury and the account involved was being maintained by the deceased. Such account is also accommodated with pensionary benefits of the deceased, which disclosed, the Petitioner being the wife of the deceased, is eligible for family pension in case of death of the deceased as also established through the Clause 12 of the Act, 1949. Further there is also filing of appropriate format with necessary documents such as death certificate, legal heir certificate, affidavit of other family members i.e. Opposite Party Nos.3 to 5, for release of the amount lying with the deceased account. Further there is also filing of an independent affidavit by the Opposite Party Nos.3 to 5 indicating their "No objection" for release of such amount in favour of the Petitioner. This apart, there is also existence of indemnity bond as required by the Bank and also a letter of authority duly executed by the Opposite Party Nos.3 to 5. Since both the parties rely on certain provisions of the MOP, this Court here takes note of the provisions dealing with release of amount lying in the deceased account in absence of nomination facilities. This Court here takes note of the provision at clause 3.1.1 of the MOP March, 2018 being relied on by the Petitioner as appearing at page 44 of the brief, which reads as hereunder:

> **"3.1.1. Savings Account/Current Account:**
> **With Nomination:**
> The balance amount will be paid to the nominee on verification of nominee's identity (such as PAN Card, Election ID Card, Aadhaar Card, MANREGA Card, Passport, Driving License, etc.) and proof of death of depositor.
>
> **Without Nomination:**
> The balance amount will be paid to the legal heir(s) (or any one of them as mandated by all of the legal heirs) on verification of the authority of the legal heir(s) and proof of death of depositor."

This provision undoubtedly did not restrict release of amount involved even without nomination.

9. This Court here also takes into account the provision at clause 6.4. of the MOP August, 2020 being relied on by the Opposite Party Nos.1 & 2, which reads as follows:

> "**6.4 <u>Settlement of claims based on legal representation:</u>**
> **a)** Legal representation by way of succession certificate letter of administration Probate. etc is must for settlement of deceased claim where claim amount is more than the threshold limit of Rs.40 lakh and also in cases of dispute between the legal heirs/ claimants even if the claim amount is within the threshold amount.
>
> **b)** Claimants have to submit duly filled application form as per Annexure 4 of the policy along with Death Certificate KYC documents of the claimants and legal representation by way of Court order succession certificate letter of administration, probate etc.
>
> **c)** When legal representation (i.e. Probated Will or a Succession Certificate or a Letter of Administration) or other legal representation is issued by a competent court in India and produced by the claimants, the branch shall make the payment in terms of legal representation after examining and satisfying that
>
> i. Legal representation produced by the claimants should relate to the account(s) of the deceased.
> ii. Particulars of the amounts payable by the Bank to the deceased are correctly mentioned or shown in the legal representation (Succession Certificate / Probate/ Letter of Administration, etc.) on the strength of which payment is desired to be made to the claimants.
> iii. The identity of holder(s) of grant of legal representation should be proved to the satisfaction of the Bank Officials.
> iv. The legal representation (grant) should be produced in Original (usually) or True Certified Copy obtained from the Court. A photocopy, if produced by the holder(s), should not be considered and claimants should be advised to produce Original or True Certified Copy of legal representation issued from court.
>
> **d)** Genuineness of Legal representation must be ascertained through Bank Panel Advocate through a certificate inter alia incorporating that verification of Court order is carried out correctly all necessary legal precautions have been observed and payment towards deceased claim to the holders will have valid discharge of Bank's liability for the deceased depositor account(s).

e) If the deceased claim amount is more than Rupees two crore, vetting of the legal representation should be carried out by one more Bank Panel Advocate.

f) Grant of legal representation issued by any Court outside India should not be entertained and a proper grant from a competent court in India should be insisted fro.

g) Branch Manger /Designated Official of Deposit Administration and Services Department of Branch (in scale IV and above Branches) can settle the claim subject to complying with the guidelines of exhibit at **a to f of Para 6.4** above.

h) Any will without probate should not be acted upon and no payment should be made on the strength of the **will only** to the executor(s) until a probate / letter of administration with will attached has been obtained from Competent Court.

i) In cases whether the deceased account holder has made a will but the executors of the will do not intend to obtain the probate and request the Bank to pay the balance against indemnity letter (upto the threshold limit) all the legal heirs of the deceased (as in case intestacy) and all the legatees / beneficiaries as per will should also give their written consent/ NOC and join the indemnity in addition to the executors."

10. For the reference of Clause 20.2 of the R.B.I. instruction dated 1.07.2009 being referred to by Mr. Tuna Sahoo, learned counsel for the Opposite Party Nos.1 & 2, this Court also takes into account the clause 20.2 which reads as hereunder:

"**20.2. Accounts without the survivor/ nominee clause:**
In case where the deceased depositor had not made any nomination or for the accounts other than those styled as either or survivor (such as single or jointly operated accounts) Banks are required to adopt a simplified procedure for repayment to legal heirs of the depositor keeping in view the imperative need to avoid inconvenience and undue hardship to the common person. In this context, banks may, keeping in view their risk management systems, fix a minimum threshold limit, for the balance in the account of the deceased depositors, up to which claims in respect of the deceased depositors could be settled without insisting production of any documentation other than a letter of indemnity."

11. It is, on reading of the provision at Clause 20.2 of the R.B.I. instruction, this Court finds, while it has prescribed for settlement of claim in respect of the deceased depositor and simplification of procedure, provision of the Banking Regulation Act, 1949, the Bank should adhere to the provisions at Section 45-ZA to 2F of the Banking Regulation Act, 1949 and the Banking Compensation Nomination Rules, 1985. Similarly, looking to the Clause 20.2 as quoted hereinabove, this Court finds, through this provision the Banks have been asked to adopt a simplified procedure for repayment to legal heirs of the depositors therein and also advisory has been issued asking the Banks to keep in view their risk engagement system by fixing a minimum threshold limit for the balance in the account, up to which could be settled without even insisting production of any documentation other than a letter of indemnity. The MOP-18 and MOP-20 are such outcomes. There should not be any doubt that the GODs/MOPs are brought for the request of the Reserve Bank of India to the Banking Institutions to come with prescriptions in the matter of release of the amount involving Bank Accounts. MOP-18 while remaining in operation, MOP-20 has come into force. MOP-18 when prescribed, balance amount will be paid to the legal heirs or any one of them as mandated by all the legal heirs upon simple verification of the authority and filing of proof of death of depositors, there is no difficulty in releasing the balance amount in favour of the Petitioner as there is already available of necessary documents and a mandate of legal heirs authorizing the Petitioner to receive such amount on their behalf.

12. Now coming to the introduction of MOPs, this Court finds, there is clear prescription for releasing upto rupees forty lakh from the deceased depositor account without even insisting for the Court order by way of succession certificate or letter of administration etc. in favour of the legal heirs. Through this MOP there is a cap of detention of the amount over rupees forty lakh and this amount shall be released on production of succession certificate. On reading through the clause 6.4 this Court finds, this clause makes it mandatory for production of a succession certificate and/or letter of administration; where the claim amount is more than the threshold limit of rupees forty lakh. This Court here finds, this MOPs are the outcome of R.B.I. instruction dated 1.07.2009. Thus these instructions at best can be termed as instruction/ guidelines, but cannot be treated to have any statutory force. Statute operated in the field remains the Banking Regulation Act, 1949.

13. Now coming to the MOP through the condition at clause 6.4 insisting for production of succession certificate or letter of administration / probate for release of the amount beyond rupees forty lakhs from the deceased account, this Court here finds, death of the deceased is not being disputed as supported through a death certificate. That came to existence for the legal heir certificate indicating the name of the Petitioner as well as the Opposite Party Nos.3 to 5. Further the report of the Tahasildar since based on a request of the Bank authorities and the Tahasildar concerned being the competent authority under the Miscellaneous Certificate Rules have certified that the Petitioner and the Opposite Party Nos. 3 to 5 are the only legal heirs of the deceased and no other legal heirs are there at Village-Sihala. Details of the deceased family members remains proved. To add to this, there is affidavit of all the remaining four members of the Family certifying therein that they being the only legal heirs, are entitled to succeed to the estate of the deceased and it further appears, an indemnity bond is also produced by the Opposite Party Nos.3 to 5. A letter of authorization filed by the Opposite Party Nos. 3 to 5 clearly discloses that the Opposite Party Nos. 3 to 5 have no objection, if the amount lying in the account of the deceased depositor is released in favour of their mother Smt. Jhunu Choudhury-the Petitioner. This apart, for the affidavit being accompanied with such letter of authority, there remains no issue that the claim involved herein is a composite claim of all the legal heirs authorizing the Petitioner to get the amount lying with the account of the deceased husband of the Petitioner. The Bank not being the disputant, has no authority to retain the amount lying in such account except releasing such amount in favour of the mother of the Opposite Party Nos. 3 to 5. For there is inordinate delay the Petitioner be entitled to interest minimum @6% per annum allthrough.

14. While doing so, this Court also takes into account the decisions relied on by both the parties. First, coming to take a decision on the citations cited by Mr. Sahu, learned counsel for the Opposite Party Nos.1 & 2 vide *1962 AIR SC 1764,* this Court finds, for the factual difference herein, the citations cited at the instance of the Opposite Party Nos.1 & 2 have no application to the case at hand. This Court here looking to the decision vide *2006 (1) ALD 382* also finds, since the claim involved therein was made by the sole legal heir and the Bank was insisting for production of succession certificate for release of the amount, finally the Hon'ble Court through the said decision while observing that asking of such certificate may not be unreasonable and

unwarranted, but however, considering that there is no dispute by the legal heirs, remitted the matter finally to consider the case of the claimant therein on the basis of the legal heir certificate. This decision rather supports the case of the Petitioner as here there is also no dispute that the parties involved are all the legal representatives.

15. Taking into account the decisions cited by the Petitioner, this Court from the decision in the case of ***Branch Manager, State Bank of India*** *Vrs.* ***Satyaban Pothal and other*** : **1988 (II) OLR 533**, finds as follows:

> "….. When the materials on record go to show that the Petitioner has clearly declared that her husband left no other heir and produced certified copy of the judgment to show that the Civil Suit filed against the Petitioner has been dismissed, if any other person has or can have any other claim in respect of the contents of the locker he would have sort it out with the Petitioner. But the Bank is not required to behave like a busy body and develop any headache over the matter. The Bank and its legal advisors ought to have realized that the Bank is expected to adopt an attitude of cooperation and not of a combatant to its customers or their representatives."

Through the above decision considering similarly nature of claim the Court has come to observe that the Bank and its legal advisor ought to have realized that the Bank is expected to adopt an attitude of cooperation and not a combatant to its customers or their representative.

Similarly, looking to the decision in the case of the case of ***Sharda Chopra and Others.*** *Vrs.* ***State Bank of India*** : **AIR 1997 (M.P.) 196** in paragraph no.5 towards last para the High Court of Madhya Pradesh has come to observe as follows:

> "…… It is not necessary to obtain succession certificate and if there is a dispute then the parties can get the matter settled by approaching the Civil Court.
>
> The identity of the heirs of Sri S.L. Chopra is fully established. Under the circumstances, direction is given to the Bank to let the present Petitioner have access to the articles lying in the Bank's locker. They would however, furnish a letter of indemnity which would be equal to the value of the articles."

Through the above judgment the High Court of Madhya Pradesh appears to have observed that there is no necessity of obtaining succession certificate as identity of legal heirs is fully established.

In the case of ***Kinkar Santananda Sanyasi*** *Vrs.* ***State Bank of India*** : AIR 2002 (O) 114, the Court even has come to observe, grant of succession certificate is not even final adjudication of *inter se* right between the parties and parties shall be abided by decision from a competent Court in case either of the parties approaches. This Court, therefore, finds, there is no justified clause in asking the Petitioner to produce Succession Certificate, if it is not conclusively proved the inter se right between the parties.

On the question as to whether there can be grant of succession certificate involving release of the amount lying in a Bank, the Hon'ble Apex Court in ***Keshoram Industries and Cotton Mills Ltd.*** *Vrs.* ***Commissioner of Welth Tax (Central), Calcutta*** : **AIR 1966 SC 1370**, came to hold that since this amount cannot be termed as debt, there cannot be issuance of succession certificate in the provision of Section 570 of the Indian Succession Act. This Court here takes into account the provision at Section 370 of the Act, 1925, which reads as follows:-

> "……. Sec.370 of the Indian Succession Act ('Act' in short), 1925 provides that a succession certificate is granted in respect of **debt or security.**
>
> Though the word 'security' has been defined under Sec.370 (2) of the Act. But neither in the Act, banking Regulation Act, 1949 nor in the Banking Companies (Nomination) Rules, 1985 the word 'debt' has been defined.
>
> Therefore, the dictionary meaning ordinarily understood is to be applied which means 'debt' is a liability owning from one person to another whether in cash or kind, secured or unsecured, whether ascertained or ascertainable arising out of any obligation / express or implied. Keeping in view the above meaning of the debt it can be said that 'debt' is nothing but loan. The amount deposited in the deceased account since is not coming under the definition and meaning of debt, therefore, in view of the provision U/s.370 of the Act, succession certificate cannot be issued by the competent Court."

This Court here finds, the view of this Court here also gets support through the above statutory provision as in the given circumstance there is no scope for applying a succession certificate.

Similarly, in deciding on the applicability of the clause 3.1.1 of the MOP indicated hereinabove to the case at hand, this Court finds, in similar situation the Hon'ble Apex Court in the case of ***Commissioner of Customs (Imports), Mumbai*** *Vrs.* ***M/s. Dilip Kumar and Company and others.*** : ***(2018) 9 SCC 1*** through paragraph nos.18 therein has come to observe as follows:

> "The purpose of interpretation is essentially to know the intention of the legislature. Whether the legislature intended to apply the law in a given case; whether the legislature intended to exclude operation of law in a given case; whether the legislature intended to give discretion to enforcing authority or to adjudicating agency to apply the law, are essentially questions to which answers can be sought only by knowing the intention of the legislation. Apart from the general principles of interpretation of statutes, there are certain internal aids and external aids which are tools for interpreting the statutes.

16. For the reasons assigned hereinabove, the decisions referred to hereinabove have direct application to the case of the Petitioner. This Court while declaring, asking of the Bank for a Succession Certificate becomes unreasonable and remains bad, allowing the writ petition directs the Opposite Party No.2 to release the amount lying in the A/c. No.515212100005354 in favour of the Petitioner in terms of the application of the Petitioner, on the basis of the affidavit, the indemnity bond involving the amount involved herein and the letter of authority. Since there is already delay, the Petitioner will also be entitled to interest at the rate of 6% per annum all through.

17. The writ petition succeeds to the extent indicated hereinabove. But however, there is no order as to costs.

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2021 (III) ILR-CUT-307

BISWANATH RATH, J.

W.P.(C) NO. 27634 OF 2020

BINDUSAGAR SAMANTRAY ..... Petitioner

.V.

STATE OF ODISHA (S&ME DEPT.) & ORS. ..... Opp. Parties

(A) SERVICE LAW – Appointment under the provisions of Rehabilitation Assistance Scheme, 1990 – Fate of old rule on coming into effect of a new rule – What could be the prospect of pending applications – Held, Considering the decision of five judges bench in Indian Bank and Others Vrs. Promila and Another reported in (2020) 2 SCC 729, this Court held that the applications filed under a particular rule shall have to be considered applying the rule available at the relevant time itself.

The case of the petitioner deserved to be considered under the Rule available at the relevant Rule, i.e, 1990 Rule r/w Amendment 2016. (Para 19)

(B) CONSTITUTION OF INDIA, 1950 – Article 14 – If the judgment rendered in a case is judgment in rem or personnam, whether the department justified in claiming that there is no room for negative equality – Held, No – When a particular set of employees are given relief by the Court all other identically situated persons need to be treated alike by extending that benefit and further not doing so, would be meaning to discriminate and would be violative of Article 14 of the Constitution of India.

Case Laws Relied on and Referred to :-

1. 2016(I)ILR 1162 : Ritanjali Giri @ Paul Vrs. State of Odisha (S& ME Dept) &Ors.
2. 2015(I) SCC 347 : State of Uttar Pradesh Vrs. Arvind Ku.Srivastava.
3. (2006) 2 SCC 747 : State of Karnataka & Ors. Vrs. C. Lalitha.
4. 1987(I) OLR 645 : Assistant Personnel Manager (G) Hindustan Steel Ltd. Vrs. Elias Minz & Ors.
5. 66(1988) CLT 293 : Arjun Charan Jena Vrs. Director of Secondary Education, Orissa, Bhubaneswar & Ors.
6. 2011 (I) OLR 524 : Nityananda Lenka and Ors. Vrs. State of Orissa & Ors.
7. (2006) 2 SCC 740 : S.L.Srinivasa Jute Twine Mills P. Ltd Vrs. Union of India (UOI) & Ors.
8. AIR 2008 SC 739 :Sangam Spinners Vrs Regional Provident Fund Commissioner-I.
9. 2015(7) SCC 412 : Canara Bank & Ors. Vrs. M.Mahesh Kumar & Ors.
10. (2020) 2 SCC 729 : Indian Bank & Ors. Vrs. Promila & Ors.
11. AIR 2021 SC 1441 : Neena Aneja & Ors. Vrs. Jai Prakash Associates Ltd.
12. W.P.(C).No.10571/2021(disposed of on 23.3.2021) : Rakesh Ch.Swain Vrs. State of Odisha & Ors.
13. W.P.(C).No.14739 of 2021 : Hari Sankar Mishra Vrs. State of Odisha & Ors.
14. (2019) 19 SCC 626 : State of Orissa & Anr. Vrs. Anup Ku.Senapati & Anr.
15. (1995) 4 SCC 734 : Air India Vrs. Union of India & Ors.
16. (2011) 6 SCC 668 : Union of India (UOI) Vrs. Glaxo India Ltd. & Ors.
17. (1999) 2 SCC 400 : Calcutta Municipal Corporation Vrs. Pawan Ku.Saraf & Anr.
18. (1964) 4 SCC 1284 : State of Orissa & Anr. Vrs. M/s. M.A. Tulloch & Co.
19. 2020 (7) SCC 617 : N.C.Santosh Vrs. State of Karnataka.
20. 63 (1978) CLT 480 : Assistant Personnel Manager (G) Hindustan Steel Ltd. Vrs. Elias Minz & Ors.
21. 66 (1988) CLT 239 : Aarjun C.Jena Vrs. Director of Secondary Education &Ors.
22. (1995) 4 SCC 734 : Air India Vrs. Union of India & Ors.
23. (2011) 6 SCC 668 : Union of India Vrs. Glaxo India Ltd & Anr.
24. (2020) 15 SCC 546 : Hav (OFC) Rwmwi Borgoyary & Ors. Vrs. Union of India & Anr.

25. AIR 2021 SC 1441: Neena Aneja & Anr. Vrs. Jai Prakash Associates Ltd.
26. (2020) 2 SCC 729 : AIR 2021 SC 1441 : Indian Bank & Ors. Vrs. Promila & Anr.

For Petitioner : Mr. K.K. Swain
For Opp.Parties: Mr.Ashok Kumar Parija, Advocate General
Mr. Jyoti Pattnai, A.G.A,
Mr. Sandeep Parida, Sr. Standing Counsel &
Mr. D. Mohapatra, Standing Counsel (S&ME Dept)

JUDGMENT Date of Hearing : 10.08.2021 : Date of Judgment : 13.09.2021

BISWANATH RATH, J.

1. This writ petition involves a challenge to the impugned order dated 9.9.2020 issued by the State Government in School & Mass Education Department under Annexure-7 thereby reviving the order dated 1.08.2019 vide Annexure-6 to the writ petition and further also issuing necessary direction to the Opposite Parties to appoint the Petitioner in Group 'D' Post following the provision of Rehabilitation Assistance Scheme. So far as the contest of the Petitioner in the writ petition to the order dated 9.9.2020 being issued by the State Government in the Department of School and Education vide Annexure-7 thereby taking out the effect of order dated 1.08.2019 under Annexure-6 is concerned, at the threshold of the hearing of the writ petition Mr. Parija, learned Advocate General objected the challenge of the Petitioner to the order vide Annexure-7 on the premises that the rules of business having provided power to the principal department of the State being the General Administration Department and for the involvement of financial implication on the larger issue involved herein, the decision involved herein in Annexure-6 ought to have been taken by the General Administration Department in consultation with the Finance Department. Mr. Parija, learned Advocate General thus submitted that the order dated 1.08.2019 under Annexure-6 having not been approved by the General Administration Department, the same remains invalid. Mr. Parija, learned Advocate General here further submitted that finding an order being issued by an incompetent authority on being asked by issuing order dated 9.09.2020 vide Annexure-7, the effect of incompetent order has been withdrawn by the School & Mass Education Department and claimed in the circumstance, there is no illegality in issuing the order vide Annexure-7, which need not be interfered with. Mr. K.K. Swain, learned counsel has no dispute with regard to the aspect that the decision involving extension of Rehabilitation Assistance Appointment Scheme to the Aided and Block Grant School ought to have come through the General Administration Department and also with necessary financial

concurrence. For the statement of the counsel in the writ petition not disputing the stand of Mr. Parija, learned Advocate General, this Court finds, neither the order dated 1.08.2019 vide Annexure-6 nor the order dated 9.09.2020 vide Annexure-7 to this writ petition have any legal force. Thus while declining to entertain the request of the Petitioner in the above regard, this Court confines the consideration involving the writ petition only to the other prayer involved herein to the extent issuing necessary direction to the Opposite Parties to appoint the Petitioner in Group 'D' post following the provision of Rehabilitation Assistance Appointment Scheme, 1990. It is, in the above premises, this Court proceeds as follows:

2. Short background involved in this case is that the Petitioner's father was appointed as Jr. Clerk in the Govinda Chandra High School, Nuagarh in the district of Jagatsinghpur and he joined the post on 19.11.1993. On 20.02.2004 the School in question where the father of the Petitioner was continuing as a Jr. Clerk, was notified to receive grant in Aid from the State Government in terms of Section 3(b) of the Orissa Education Act, 1969 and as per the grant in Aid order 2004 vide Annexure-12. The Grant-In-Aid order dated 20.02.2004 discloses the name of the School i.e. Govinda Chandra High School, Nuagarh at Sl. No.490 therein. It is after the School in question was notified to receive the Grant-in-Aid from the State Government, the Inspector of Schools, Jagatsinghpur circle, Jagatsinghpur vide his office order No. 8825 dated 4.09.2004 approved the appointment of the members of the teaching and non-teaching staffs including that of the Petitioner‟s father, who has been approved against the post of Jr. Clerk. As a consequence the father of the Petitioner was allowed to avail 40% of the Block Grant in the pre-revised scale under ORSP Rules, 1998 as disclosed from Annexure-10. There is also no dispute that quantum of block grant was further enhanced in favour of the teaching and non-teaching staff of the schools in question including the Petitioner‟s father from 40% to 60% plus D.A. vide order dated 21.11.2009. This order under Annexure-15 includes the name of the Petitioner‟s father at Sl.No.9. It is stated that while the Petitioner‟s father was continuing as Jr. Clerk, he died on 15.11.2016 and in the meantime the mother of the Petitioner also died on 27.07.2017. On 11.10.2017 the Petitioner claimed to have submitted an application in prescribed form for appointment under the Rehabilitation Assistance Scheme involving death of his father. In the application the Petitioner also claimed to have enclosed affidavit of other family members expressing their no objection to such claim of the Petitioner

available at Annexure-4 (series). Pursuant to such request of the Petitioner, it is pleaded that the Headmaster of the School in question, which forwarded the application with supportive documents vide his letter No.52/GCHS/2017 dated 11.10.2017 requested the District Education Officer, Jagatsinghpur for consideration of the application for appointment under the Rehabilitation Assistance Scheme. It is, on the premises that the application at the instance of the Petitioner not being finally decided and further for there being creation of some obstruction in issuing subsequent notification on 9.09.2020 by the Government of Odisha in the Department of School & Mass Education, the Petitioner approached this Court seeking direction indicated hereinabove. It is, in the above factual background Mr. Swain, learned counsel while taking support of applicability of the provisions in the Orissa Civil Services (Rehabilitation Assistance Rules) 1990, together with its amendment made in 2016 read with the General Administration Department resolution dated 14.10.1998, wherein the benefit of Orissa Civil Service (Rehabilitation Assistance) Rules 1990 has been extended to the Family members of the teaching and non-teaching staff of the Aided Educational Institutions, claimed that for the provision in the aforesaid rules and resolutions, it is too late to deprive the Petitioner in getting the benefit of the appointment under Rehabilitation Assistance Scheme. There is, however, no dispute that the General Administration Department is the competent authority to issue required resolutions in terms of Rule 16 of the Orissa Civil Services (Rehabilitation Assistance) Rules 1990. Mr. Swain, learned counsel also contended that for the rules vide Annexure-11 and the resolution dated 14.10.1998 under Annexure-9 having not been modified/altered/ withdrawn, is binding the employees of all the Aided Educational Institutions. Referring to the circular dated 21.06.2011 vide Annexure-10 Mr. Swain, learned counsel appearing for the Petitioner contended that for the School & Mass Education Department having no such power, had no scope for restricting the benefit of 1998 circular only to the family members/ legal heirs of the deceased employees of the fully Aided Educational Institution under the direct control of the Government. It is also contended that such circular remains contrary to the purport of the resolution dated 14.10.1998. Taking this Court to the decision of this Court in ***Ritanjali Giri @ Paul Vrs. State of Odisha (School & M.E. Deptt.) & others***, reported in 2016 (I) ILR 1162 disposed of on 11.05.2016 Mr. Swain, learned counsel for the Petitioner contended that the observation made in paragraph nos.6 to 8 clarifies the position that the Education Act does not make any distinction between the

full Grant-in-Aid School and Block Grant Schools. Mr. Swain, learned counsel thus contended that there is no reason in not considering the application of the Petitioner being forwarded by the Principal of the School in 2017 till now. Mr. Swain, learned counsel also claimed that the judgment in ***Ritanjali Giri @ Paul*** *(supra)* since passed taking into account the Government Resolution dated 14.10.1998, the Government in School & Mass Education Department might be justified in issuing the order dated 1.08.2019 under Annexure-6 and in extending the benefit also to the Aided Schools and all Block Grant Schools. Further considering, it is issued by the incompetent authority, but however the intention in such resolution appears to be justified as it is strictly in terms of the Resolution, 1998 and under the direction of this Court in ***Ritanjali Giri @ Paul*** *(supra),* it was necessary on the part of the General Administration Department to bring such resolution at least to remove any doubt in the mind of public authorities. Mr. Swain, learned counsel also contended that for the decision of this Court in ***Ritanjali Giri @ Paul*** *(supra)* and the principle decided therein, even there may not be any requirement of issuing any further clarification in the said regard, except working out the pending cases in terms of the decision made in the ***Ritanjali Giri @ Paul*** *(supra).* Mr. Swain, learned counsel also contended that the decision in the case of ***Ritanjali Giri @ Paul*** was passed in the year 2016 and in the meantime not only five years have already passed remaining the judgment unchallenged, but in the meantime the judgment in ***Ritanjali Giri @ Paul*** *(supra)* has been implemented in case of the ***Ritanjali Giri @ Paul***, who was also an employee in a Block Grant Institution. Mr. Swain, learned counsel, therefore, contended that the State Authorities are estopped in taking a stand otherwise than the view of this Court in ***Ritanjali Giri @ Paul*** *(supra).* Mr. Swain, learned counsel also taking this Court to the decision in the case ***State of Uttar Pradesh Vrs. Arvind Kumar Srivastava,*** reported in *2015(I) SCC 347* more particularly to the paragraph no.23 therein, contended that for the judgment of the Hon‟ble apex Court, the normal rule is, when a particular set of employees are given relief by the Court, the other identically situated persons need to be treated alike. It is, in the circumstance, Mr.Swain, learned counsel claimed for direct application of the decision in *2015(I) SCC 347* to the case at hand. Similarly taking this Court to a decision of the Hon‟ble apex Court in the case ***State of Karnataka and Ors. Vrs. C. Lalitha****,* reported in *(2006) 2 SCC 747* through paragraph No. 29, Mr. Swain also contended that the above decision has direct application to the case of the Petitioner. On the claim that once a benefit is already granted to a particular

set/class of employees, the same should be extended to all the employees standing in same footing. Taking this Court to the definition of Section 3(b) of the Orissa Education Act, a contention is also raised by Mr. Swain, learned counsel that under the definition of Section 3(b), there cannot be even any distinction between the fully Aided Educational Institution and Block Grant Institution. Mr. Swain, learned counsel also claims such distinction has no place. Also following the decisions in the case of ***Assistant Personnel Manager (G) Hindustan Steel Ltd. Vrs. Elias Minz and Ors.,*** reported in *1987(I) OLR 645,* in the case of ***Arjun Charan Jena Vrs. Director of Secondary Education, Orissa, Bhubaneswar & Ors.***, reported in *66(1988) CLT 293*, taking a view otherwise than *1987 (1) OLR 645* indicated hereinabove and for the ultimate decision of a Full Bench of this Court in the case of ***Nityananda Lenka and Ors. Vrs. State of Orissa and Ors.,*** reported in *2011 (I) OLR 524*. Mr. Swain, learned counsel contended that the aid connotes the Grant-In-Aid and the expression "receiving aid" meaning thereby the Institution which has been admitted by the Government to the Scheme entitling it to receive Grant-in-Aid. Mr.Swain, learned counsel thus contended that Section 3(b) includes all the Aided Educational Institutions including institutions receiving and/or notified to receive Block Grant and thus there cannot be any distinction between the two. Mr.Swain also contended that Annexure-12 abundantly makes it clear that extension of Grant-in-Aid to the High Schools and Upper Primary Schools enlisted in Annexure-12, appears to have been extended in exercise of power conferred in clause (b) of Section 3 of the Orissa Education Act read with paragraph nos.3, 4 & 5 of the Orissa Education (Payment of Grant-in-Aid) to the High Schools, Upper Primary Schools etc. order 2004 to the private educational institutions the term used, there is aided. Mr. Swain thus claimed that there remains no doubt that the benefit of Grant-in-Aid is provided to the Institutions enlisted therein w.e.f. 1.1.2004.

3. Mr.Swain, learned counsel for the petitioner next coming to the applicability of the decision in the case of ***Ritanjali Giri @ Paul*** *(supra)*, taking this Court to paragraphs-7 and 8 read with definition of Section 3(b) of the Orissa Education Act and the decision through ***Nityananda Lenka & Ors. -Vrs- State of Orissa & Ors.,*** reported in ***2011 (I) OLR 524,*** contended that the Single Bench of this Court in deciding the case of ***Ritanjali Giri @ Paul (supra),*** has a direct bearing on the case at hand. Mr. Swain, learned counsel for the petitioner further contended that firstly for there is no challenge to the

judgment in ***Ritanjali Giri @ Paul*** *(supra)* and secondly in implementing the direction in ***Ritanjali Giri @ Paul*** *(supra)* in the case involved herein and also in some other cases involving employees belonging to Block Grant School like that of the institution involved herein, the decision involving ***Ritanjali Giri @ Paul*** *(supra)* has a direct application to the case at hand. It is next taking to the effect of the Orissa Civil Service (Rehabilitation Assistance) Rules, 2020 and the fate of applications already submitted prior to introduction of Rule, 2020, under the premises that application of the petitioner came on 11.10.2017 following the rule existed at the relevant point of time, particularly, Orissa Civil services (Rehabilitation Assistance) Rules, 1990 with its amendment made in 2016 and the resolution of 1998, Mr. Swain, learned counsel contended that for the supersession of Rule, 1990 and the amendment 2016 bringing in Rule 2020 cannot be construed to be repealing of Rule, 1990 and the amended rule 2016 herein. In an attempt to bring a distinction between repeal and supersession, Mr. Swain, learned counsel also taking aid of Section-6 of General Clauses Act, 1987 (Central Act) and Section 5 of the State Act submitted even repeal of a rule shall not affect any right, privilege, obligation or liability accrued or incurred under any enactment brought in supersession of an earlier enactment. Mr.Swain, learned counsel here took support of decision in the case of ***S.L.Srinivasa Jute Twine Mills P. Ltd Vrs. Union of India (UOI) and Ors***, reported in ***(2006) 2 SCC 740*** further decision of the Hon‟ble Apex Court in the cases of ***Sangam Spinners Vrs Regional Provident Fund Commissioner-I***, reported in ***AIR 2008 SC 739, Canara Bank and Ors. Vrs. M.Mahesh Kumar and Ors***. reported in ***2015(7) SCC 412***, ***Indian Bank & Ors. Vrs. Promila and Ors***, reported in ***(2020) 2 SCC 729***, ***Neena Aneja and Ors. Vrs. Jai Prakash Associates Ltd.,*** reported in ***AIR 2021 SC 1441***, and decision taken by this Court in the case of ***Rakesh Chandra Swain Vrs. State of Odisha and Ors***. in *W.P.(C).No.10571 of 2021* disposed of on 23.3.2021 and in the case of ***Hari Sankar Mishra Vrs. State of Odisha & Ors.*** in *W.P.(C).No.14739 of 2021* disposed of on 6.7.2021, Mr. Swain learned counsel for the petitioner contended that position of law on coming into existence of an enactment in supersession of earlier enactment does not take away the effect of pending applications. Mr. Swain, learned counsel therefore claimed for allowing the writ petition and issuing suitable direction in terms of prayer herein.

4. In filing the counter affidavit, the opposite party no. 1 while in demonstrating the issue required to be decided herein, contended that the

father of the petitioner was appointed by the Managing Committee without following any procedure as Junior Clerk on 19.11.1993. The opposite party no.1 however conceded that while the father of the petitioner was continuing as Junior Clerk, State Government in exercise of power conferred under Sub-Section 4 of Section-7(C) of Orissa Education Act introduced Grant-in-Aid order to regulate the payment of Grant-in-Aid in shape of block grant to various eligible private educational institutions consequent upon which a gazette notification was published on 5.2.2004 by virtue of which the appointment of father of the petitioner was approved by the erstwhile Inspector of the School against the post of Clerk vide its office order dated 4.9.2004. It is further contended that while the father of the petitioner was continuing as such he died on 27.7.2017, resulting which petitioner made an application on 11.10.2017 for appointment under Rehabilitation Assistance Scheme in place of his late father. Opposite party however objected to such claim for no copy of such application being filed to the writ petition and contended that it is not known as to whether the application was filed in the prescribed format or within stipulate period? Through its submission in paraaph-10, it has been admitted that there is existence of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 being framed by the General Administration Department by invoking power conferred under Article 309 of the Constitution of India and that since the rule was only applicable to the Government employees, General Administration Department being competent authority under the Rules of Business issued resolution No.29686 dated 14.10.1998 extending benefit of Rehabilitation Assistance Scheme will also applicable to the families of Government Primary School Teachers, teaching and non-teaching staff of Aided Educational Institutions under the Education Department, work charge employees of the State Government and employees of public sector undertaking. Through the averments in paragraph-10, it has been also clarified that for the General Administration resolution dated 14.10.1998, the Orissa Civil Service (Rehabilitation Assistance Rules), 1990 has been made applicable to the family members of the fully Aided Educational Institutions receiving full Grant-in-Aid under direct payment system.

5. Answering on the claim of the petitioner with regard to applicability of the decision of ***Ritanjali Giri @ Paul (supra),*** opposite party no.1 contended that the decision vide ***Ritanjali Giri @ Paul*** is a judgment in personnam and further there being no Principle decided therein it becomes a

decision in personam, it is thus contended that there is no application of such decision to other cases. Bringing to the notice of this Court to the introduction of Orissa Civil service (Rehabilitation Assistance) Rules, 2020 came into force by way of notification dated 17.2.2020, the opposite party no.1 contended that Rule, 1990 is no more available and further since there is no appending of the application form to the writ petition, it is not known as to whether such application is filed within a year of the death taking place. It is also contended that there is also no scope for applying the provision at Rule 2020 since it confined to Govt. employees only, the petitioner is not entitled to be considered under Rule, 2020. Taking to the decision of Hon"ble Apex Court in the case of ***State of Orissa and Another Vrs. Anup Kumar Senapati and Another***, reported in (*2019) 19 SCC 626*, opposite party no.1 claimed that for the decision hereinabove, the case of the petitioner cannot be settled on merit as it is opposed to the above decision. In the counter, it appears the opposite party no.1 answering the allegation of the petitioner that benefit of ***Ritanjali Giri @ Paul (supra)*** has not only been extended to the petitioner involved therein but there has been also application of the judgment in the case of similarly situated persons, in its opposition while not disputing that judgment in ***Ritanjali Giri @ Paul (supra)*** is applied in case of others but for there is mistaken grant of benefit, opposite party no.1 claimed that there is no room for negative equality. It is thus contended that merely because benefit through ***Ritanjali Giri @ Paul*** *(supra)* has been extended to some similarly situated persons illegally and/or bonafidely can not warrant similar benefit also be extended to all other persons and taken support of the decision of the Hon"ble Apex Court in the case of ***State of Orissa and Another Vrs.Anup Kumar Senapati and Another***, reported in **(*2019) 19 SCC 626*** *(supra).*

6. It is in the above background Mr. Ashok Parija, learned Advocate General appearing for the opposite party nos.1, 2 and 3 in adoption of counter of opposite partyno.1 also in respect of opposite party nos.2 and 3 claimed that for the supersession of Rule, 1990 by Rule, 2020, there is no room for applying the provision under Rule, 1990 to the case of the petitioner, Mr.Parija, learned Advocate General referring to the introduction of Rule, 2020 and the indication therein that such rule has come in supersession of Orissa Civil Service (Rehabilitation Assistance), Rules, 1990 as well as the amendment taking place in the meanwhile contended that once a new enactment has come into place, for there is no saving of the earlier rule therein the Rule, 2020 more particularly on deletion of Rule, 1990 through

Rule 2020, Mr.Parija, learned Advocate General contended that there is no scope for considering the case of the petitioner under Rule, 1990 or taking into account the resolution dated 14.10.1998. In support of his case, Mr.Parija, learned Advocate General also relied on a decision of Hon'ble Supreme Court in the case of ***Air India Vrs. Union of India and Others***, reported in ***(1995) 4 SCC 734***. Taking this Court to paragraphs-8 and 9 therein, Mr.Parija, learned Advocate General attempted to justify his above submission. Mr.Parija, further contended that Rule, 2020 since is applicable only to Government servant, same cannot be extended to the employees of the School in the Block Grant fold. Mr.Parija, learned Advocate General also made an attempt to take support of the judgment in the case of ***Union of India (UOI) Vrs Glaxo India Ltd. and Ors***., *reported in (2011) 6 SCC 668* and attempted to define word "supersession". Referring to paragraph-10 of the judgment in the case of ***Calcutta Municipal Corporation Vrs. Pawan Kumar Saraf and Another,*** reported in *(1999) 2 SCC 400*, Mr. Parija, learned Advocate General contended that for the decision, the word "supersession" in law means set aside, obliterate, annul, replace, inefficacious or useless, repeal. Mr.Parija, learned Advocate General further taking this Court to the decision in the case of ***State of Orissa and Another Vrs M/s. M.A. Tulloch and Co***., reported in *(1964) 4 SCC 1284* through paragraph- 20 therein contended that in view of the above legal scenario, Rule, 1990 and amendment therein has lost its force. An attempt is also made to take help of decision of the Hon'ble Apex Court in the case of ***State of Odisha and Another Vrs Anup Kumar Senapati and Another***, reported in *(2019) 19 SCC 626* through paragraphs-29 and 32 and claimed that this decision also supports the case of the department.

7. It is in the above premises Mr. Parija claimed that the writ petition involves disputed question of fact inasmuch as there is no pleading in the writ petition that the application for employment is in proper statutory form and following the required procedure. Mr. Parija taking this Court to Rules 5 to 8 therein contended that it shall also be duty of the School to enter into necessary inquiry before requesting the opposite parties and even then also petitioner was entitled to the benefit within the limit of 10%. Further keeping in view that the School has forwarded an application on the very same day, Mr. Parija claimed it itself establishes that there is no compliance of Rule-8, Mr. Parija thus contended in the circumstance that there involves disputed question which disentitles the entertaining of the writ petition. Mr.Parija also

objected the claim of the petitioner on the premises of delay. Mr. Parija also contended that since petitioner seeks job in the post of Jr. Clerk, the Managing Committee being the employer, the Managing Committee alone is to provide him job and it has nothing to do with the departments involved here. Taking this Court to the core of Rule, 1990 the objective to the claim requiring consideration of such application with intention to save the family from immediate distress, the writ petition having been moved after so much time, Mr.Parija contended that the writ petition also suffers on account of delay. Mr.Parija also raised objection to the entertainability of the claim of the petitioner on the premises that there is apparent non-compliance of the provision of Rule 3, 5, 8 of Rule, 1990. Answering on the claim on consideration of the case also under Rule, 2020, Mr.Parija, learned Advocate General taking this Court to Rule 6 (9) of Rule, 2020 contended that the application of the pettier is also otherwise not sustainable in the eye of law as he is yet to satisfy his case can be considered in terms of Rule, 2020.

8. Coming to answer on the claim of the petitioner on application of ***Ritanjali Giri @ Paul (supra) case*** to the case at hand on the premises that judgment passed in ***Ritanjali Giri @ Paul (supra)*** being passed involving an individual, the judgment becomes judgment in personam and for there is no principle decided therein, cannot be treated to be a judgment in rem and thus claimed such decision ought to be ignored in respect of others. Taking this Court to the decision, an attempt is also made to satisfy the Court that there has been no principle decided requiring to govern the field on similarly situated cases. On the issue of application of the rule prevailing on the date of consideration of the application filed herein, in their opposition, Mr.Parija relied on a decision in the case of ***N.C.Santosh Vrs. State of Karnataka***, reported in *2020 (7) SCC 617* and placed reliance on paragraphs-18 and 19 therein. Mr. Parija, learned Advocate General lastly in his opposition to the claim of Mr.Swain, learned counsel for the petitioner submitted that there is no application of the judgment in ***Ritanjali Giri @ Paul (supra)*** not only to the case herein but also to other similarly situated persons. Mr.Parija, learned Advocate General taking this Court to concept of negative equality under Article 14 of the Constitution of India claimed wrong application or wrong decision somewhere cannot confer a right on the similarly situated persons. Mr.Parija also disputed the claim of petitioner that the institution involved herein is an Aided Institution on the premises that it is yet to receive full grant, thus does not come under the provision of Section 3(b) of Orissa

Education Act. Finally, Mr. Parija, learned Advocate General prayed for rejection of the writ petition.

9. In filing the rejoinder affidavit, this Court here finds not only the petitioner reiterated the factual aspects already narrated in the writ petition but however for the controversy raised in the counter affidavit by the opposite party no.1, petitioner appears to have filed a rejoinder affidavit making therein the pleading on the basis of resolution dated 14.10.1998, the copy of the letter dated 21.6.2011 issued by Additional Secretary to Government, School & Mass Education Department, copy of Rule, 1990, copy of notification dated 20.2.2004, copy of Government circular dated 5.9.1985 and copy of the resolution of the Grant-in-Aid Order, 2017 and Mr. Swain made his submissions in reference to the aforesaid documents to support his case.

10. For the claim and objection to such claim by the respective counsel, this Court finds the case involves the decision on following issues:

> (i) For the objection of entertainability of the writ petition on being filed in 2020 involving a claim of 11.10.2017, if the writ petition suffers on account of delay and latches?
>
> (ii) If the institution involved here is an Aided institution within the meaning of Section 3(b) of Orissa Education Act?
>
> (iii) If the application dated 11.10.2017 can be thrown for not being in terms of Rules 5 to 8 of Rule, 1990?
>
> (iv) After the introduction of Rule, 2020 taking out the effect of pending applications, what will be the position of Rule,1990 involving pending applications came to exist prior to coming into effect of Rule 2020?
>
> (v) What is the meaning of Head Master sending claim of petitioner to D.E.O. and if compliance of Rules 5 to 8 of Rule 1990 is at all necessary?
>
> (vi) If there is application of judgment in ***Ritanjali Giri @ Paul to*** the case at hand and if it is a judgment in personam or judgment in rem?

11. Answering issue no.(i), this Court finds pleading clearly discloses that while the father of the petitioner was working as a Jr. Clerk in an Educational Institution on receipt of 60% Aid plus D.A. vide order dated 21.11.2009, which order indicating father of petitioner‟s position as a staff member of the institution at Serial No.9, he died on 15.11.2016 and in the meantime petitioner's mother also dies on 27.7.2017. It is accordingly on 11.10.2017

the petitioner claimed to have made an application to the institution in appropriate format and claimed appointment under Rehabilitation Assistance Scheme Rule, 1990. It is also pleaded herein that petitioner in the said application also enclosed affidavit of no objection of surviving family members. It also appears the Headmaster of the Institution forwarded said application with supportive documents vide his letter No.52/GCHS/2017 dtd.11.10.2017 requesting the District Education Officer, Jagatsinghpur for consideration of the application for appointment under the Rehabilitation Assistance Scheme. State department on the other hand on the premises that no such application being formed part of the writ petition simply claimed it is not known as to whether the application of the petitioner is within one year time prescribed, further if it satisfied the other required conditions? There is no counter to the claim of the petitioner on the submission of application with enclosures and forwarding of such application by the Head Master of the school on 11.10.2017 vide Annexure-5 to the writ petition. State Department in the counter while disputing the filing of such application in time also pleaded that Head Master on receipt of such application was required to comply certain requirements which he did not do and for the Head Master sending the application of the petitioner on the same date on 11.10.2017 itself established that there is no proper enquiry before sending such application to the D.E.O. State on one hand while claiming for no filing of application claimed to have been submitted it is not known if the application is in time and in terms of Rule, 1990, on the other hand claims Head Master on receipt and before sending it to D.E.O. on same date has not done required examinations. States stand here remain contradicting its own claims. Further there is also no denial to the Head Master sending the petitioner‟s application with necessary documents on 11.10.2017 vide Annexure-5. Even there is no explanation forthcoming if the Head Master‟s recommendation finds any short fall and did not meet the requirements under Rule, 1990. From the above, it becomes clear that when the petitioner‟s father died on 15.11.2016 petitioner submitted the application involved on 11.10.2017 which is undisputedly within one year of death of father of the petitioner. This Court here also taking reference of discussion and answer to Issue No.(v) herein below finds communication of Head Master to the District Education Officer, Jagatsinghpur was though a communication to the D.E.O. but for the post required to be filled up not a State Cadre post, the letter/communication can be maximum construed to be only for information of D.E.O. and at the same time it was the duty of Managing Committee to take a decision on the request

of the petitioner. For no State cadre being maintained involving such post, decision involving such appointment has to be taken in Managing Committee level and it is not known why the Head Master sought for instruction and/or direction from District Education Officer in the matter of appointment involved herein. Both Head Master and the D.E.O. remained under unnecessary dilemma. Thus the case of the petitioner is a pending case. It is in the circumstance, the writ petition does not suffer on account of delay. The Issue No.(i) is answered accordingly.

12. Answering Issue Nos.(iii) & (v) : On considering Rules-5, 7 & 8 of 1990 Rule, this Court here finds the post involving the appointment being Jr. Clerk no doubt a decision for appointment in such post required to be taken by the Managing Committee of school involving, further such post since does not have a State cadre, the Managing Committee is only competent to take a decision. At the same time, this Court finds since appointment is sought for as against an Aided post, the Head Master's letter to District Education Officer shall be construed to get sanction/approval of D.E.A of a posting against an Aided post. This Court here finds there is no requirement to visit through Rules-5 or 7 & 8 of Rule, 1990 involving filling a post of Jr. Clerk in the establishment involved at District Education Officer level. Yes, it is a different case that there will be requirement of compliance of Rules-7 & 8, if it is a teaching post since teaching posts are State cadre post. It is needless to mention here that post of Jr. Clerk involved is already approved since 2004. This court thus answering both the issue nos. (iii) and (v) observes the application of the petitioner need to be considered by the Managing Committee alone.

13. Coming to answer on Issue No. (ii), if the institution involved here is an Aided Institution within the meaning of Section 3(b) of the Orissa Education Act?, this Court proceeds as follows:

Pleading of respective parties discloses that initially the petitioner's father was appointed as a Junior Clerk in Govinda Chandra High School, Nuagarh in the district of Jagatsinghpur on 19.11.1993. This School was notified to receive Grant-in-Aid the State Government in terms of Section 3(b) of the Orissa Education Act, 1060 following Grant-in-Aid order, 2004 vide Annexure-12. Annexure-12 clearly included the name of Govinda Chandra High School, Nuagarh. It further reveals that after the School was notified to receive Grant-in-Aid, the Inspector of Schools, Jagatsinghpur vide

his Office OrderNo.8825 dated 04.09.2004 approved the appointment of the members of teaching and non-teaching staffs including the father of the petitioner against Junior Clerk and was also allowed to avail 40% of Block Grant in the pre-revised scale of pay of ORSP Rules, 1998 again as disclosed in Annexure-10. Undisputedly, 40% of Block Grant already granted in favour of the School concerned was enhanced to 60% + D.A. vide order dated 24.11.2009 at Annexure-15, which also discloses the father of the petitioner name at Sl.No.9 therein and the petitioner‟s father while was continuing as Junior Clerk, died on 15.11.2006. This Court here takes note of definition under Section 3(b) of the Orissa Education Act as relied upon by both the parties which reads as follows:

> "Section- 3 (b) Aided educational institution' means private educational institution which is eligible to, and is receiving‟ grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid;"

14. Looking to the plain language in Section 3(b) of the Orissa Education Act, it becomes clear that an institution became an Aided Educational Institution must be eligible and receiving Grant-in-Aid. Again the definition also includes an institution, which has already been notified to receive Grant-in-Aid. It is at this stage, this Court finds examining the terms "Aided Educational Institution", this issue has been decided by this Court at least in three stages as appearing from the case of ***Assistant Personnel Manager (G) Hindustan Steel Ltd. Vrs. Elias Minz and Ors***, reported in *63 (1978) CLT 480*, in the case of ***Aarjun Charana Jena Vrs. Director of Secondary Education and Ors***., reported in *66 (1988) CLT 239* and the issue became final in a Full Bench decision of this Court in the case of ***Nityanaanda Lenka and Ors. Vrs. State of Orissa and Ors***, reported in *2011 (I) OLR 524*. This Court taking the word "Aided Institution" as interpreted by the Full Bench of this Court vide paragraphs-1 and 11, finds it reads as follows:

> **1.** While these two writ applications were being heard by a Division Bench, having regard to the conflict of the views expressed in some decisions of this Court, it was considered necessary to refer two questions to a larger Bench for opinion. The two questions formulated are as under:
>
> **(a)** Whether the expression 'aid in Section 3(b) of the Orissa Education Act, 1969, means grant-in-aid or any type of aid received from the Government? and

> **(b)** Whether to acquire the status of 'an aided educational institution the institution should have continuously received aid or a decision of the Government to grant aid is sufficient to render the institution an aided educational institution and ancillary if the communication of the order to the institution is necessary?

While taking note of question therein, the Full Bench has come to observe as follows:

> "**11.** I, therefore, answer the question as follows:
>
> **(a)** Expression Aid in Section 3(b) of Orissa Education Act, 1969 before its amendment by Orissa Act 15 of 1989 means any type of aid continuously received from the State Government by an Aided Educational Institution including grant-in-aid of any category.
>
> **(b)** To acquire the status of an Aided Educational Institution, it should continuously receive the aid which includes a decision of the State Government to give the aid continuously even, though actually not paid and educational institution becomes aided after receipt of the communication of the order from the State Government."

Hon'ble K.C. Jagadeb Roy, J. I fully agree with the views expressed by Hon'ble R.C. Patnaik, J. and Hon'ble S.C. Mohapatra, J on both the questions referred to us.

Reading the aforesaid judgment, this Court finds for the Full Bench decision an institution became an Aided Educational Institution which should continuously be receiving aid. It even includes a decision of State Government to give aid continuously even though actually not paid. The Full Bench even made it clear that an institution becomes Aided after receipt of communication from the State Government even. It is in the above circumstance and the decision under Section 3(b) of the Orissa Education Act, it is at this stage, taking into account the undisputed position between the parties that the institution was already in respect of 60% Grant-in-Aid may be by way of Block Grant is an Aided Educational Institution and this Court therefore also observes, there should not be any distinction between an institution declared to receive Grant-in-Aid and an institution is in receipt of Grant-in-Aid by way of Block Grant or in receipt of a notification for being entitled to receive Grant-in-Aid. Accordingly, the Issue No.(ii) is answered holding that the petitioner"s institution is an Aided Educational Institution under the meaning of Section 3(b) of the Orissa Education Act.

15. Coming to the question (vi) hereinabove through the case of ***Ritanjali Giri @ Paul*** (supra), through paragraphs-6, 7, 8 & 9, this Court finds the Court in deciding the case involved therein through paragraphs-6 to 9 has come to observe as follows:

> **"6.** The sole question that hinges for consideration is as to whether the benefit of the Scheme applies to the family members of an aided educational institution, which is receiving Block Grant?
>
> **7.** Section 3(b) of the Orissa Education Act, 1969 defines the Aided Educational Institutions, which is quoted hereunder:
>
> "3(b) Aided Educational Institutions means private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid."
>
> **8.** On a bare perusal of the aforesaid provision, it is abundantly clear that private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid is an aided educational institution. The Act does not make any distinction between the full Grant School or Block Grant School. Moreover, the private educational institution which has been notified by the State Government to receive grant-in-aid is also an aided educational institution.
>
> **9.** The application of the petitioner was rejected by the opposite party no.4 on untenable and unsupportable ground. In view of the above discussion, this Court has no option but to quash the order dated 13.07.2012 passed by the District Education Officer, Balasore, opposite party no.4. The matter is remitted back to the opposite party no.4. The opposite party no.4 is directed to consider the application of the petitioner within a period of three months from the date of production of a certified copy of this order. The writ petition is allowed. No costs."

From the above, this Court observes a coordinate Bench of this Court taking into account the provision of Section 3(b) of the Orissa Education Act, 1990 Rules and the resolution dated 14.10.1998 in clear tone observed that there cannot be a distinction between Fully Aided Schools and the Block Grant Schools. It has further come to observe the employees in both the institutions are to be treated alike and a principle has been decided that there cannot be any distinction between the institution Fully Aided and in receipt of Block Grant and that employees in both the institutions are to be treated alike. For the opinion of this Court, the observation of the coordinate Bench

in the case of ***Ritanjali Giri @ Paul*** *(supra)* appears to be a judgment in rem as it decided a principle and thus has to be applied in respect of persons standing in same footing. It be stated here that this decision not only has not been challenged but while applying the direction therein in the case of petitioner therein, an employee in a Block Grant School as disclosed from the pleadings has also been applied in the case of some other similarly situated persons. This Court here takes into account two decisions of the Hon'ble Apex Court in the case of ***State of U.P. and others Vrs. Arvind Kumar Srivastava and others,*** reported in *(2015) 1 SCC 347* and in the case of ***State of Karnataka and others Vrs. C. Lalitha,*** reported in *(2006) 2 SCC 747***.** In the case of ***State of U.P. and others Vrs. Arvind Kumar Srivastava and others*****,*** reported in *(2015) 1 SCC 347***,** the Hon"ble Apex Court in paragraph-22 observed as follows**:**

> **"22.** The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.
>
> **22.1.** The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.
>
> **22.2.** However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.
>
> **22.3.** However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the

> authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see *K.C. Sharma* v. *Union of India* [*K.C. Sharma* v. *Union of India*, (1997) 6 SCC 721 : 1998 SCC (L&S) 226]). On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

Similarly in the case of ***State of Karnataka and others Vrs. C. Lalitha*** reported in *(2006) 2 SCC 747,* paragraph-29 reads as follows*:*

> **"29.** Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

From the aforesaid decision of Hon'ble Supreme Court and taking into account several other decisions of Hon‟ble Apex Court, it appears, the Hon‟ble Apex Court has come to observe normal rule is that when a particular set of employees are given relief by the Court all other identically situated persons need to be treated alike by extending that benefit and further not doing so, would be meaning to discriminate and would be violative of Article 14 of the Constitution of India. It has also come to further observe that in case of judgment in personam, though it has no application but on such pronouncement it becomes an obligation on the part of the authorities to extend the benefit through it to all such similarly situated persons except the person so approaches shall have to satisfy that their particular request does not suffer from either latches and delays or acquiescence.

In deciding the case in ***State of Karnataka and Others Vrs. C.Lalitha***, reported in *(2006) (2) SCC* 747, Hon"ble Apex Court has come to observe that service jurisprudence evolve of this Court from time to time postulates similar situated employees should be treated similarly. Only because one person approached the Court that would not mean person similarly situated should be treated differently. It is for the above consistent view of the Hon'ble Apex Court, this Court finds the State Department has no escape from applying the principle decided in the case of ***Ritanjali Giri @ Paul*** *(supra)* to all such similarly situated cases.

16. Coming to the stand taken by the opposite party no.1, there cannot be a claim of negative equality, for the aforesaid discussions based on the ruling of Hon'ble Apex Court, this Court here finds there is justified reason on application of the decision in the case of ***Ritanjali Giri @ Paul*** *(supra)* to similarly situated cases and there is no room for availing this decision on application of the principle of negative equality here. This Court thus answers Issue no.(vi) accordingly.

17. Now coming to deal with issue no.(iv) as to after the introduction of Rule, 2020 making provision for considering pending applications filed in term of the provision of Rule, 2020, this Court finds from the pleadings of both the parties, the case of the petitioner is that the application at the instance of the petitioner though submitted on 11.10.2017 and forwarded by the Headmaster to the District Education Officer on 11.10.2017 and while consideration involving the application of the petitioner was pending, Orissa Civil Service (Rehabilitation Assistance) Rules, 2020 came into operation. Petitioner's case rests on the provision of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 together with amendments made in 2016 read with General Administration Department Resolution dated 14.10.1998 wherein the benefit of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 has been extended to the family members of the teaching and non-teaching staff of the Aided Educational Institution and for the application being filed in operation of a rule, the benefit desired to flow from such rule. For the Rule, 2020 brought in supersession of the existing rule remains prospective and the applications already pending by the time coming into effect of Orissa Civil Service (Rehabilitation Assistance) Rules, 2020 has to be considered under the rule prevailing at the time of application and Orissa Civil Service (Rehabilitation Assistance) Rules, 2020 has no role to play to such cases. To

the contrary, the Department case is once the Rule, 2020 has been brought in supersession of the previous rule and the subsequent rule being confined such benefit to only Government Employees that too in Grade-"D" category, further also clearly indicating that all such pending cases shall be considered in terms of Rule, 2020 takes away the effect of previous rule. It is thus contended that the application, if any, under the previous rule remaining undecided has to be automatically taken care of under the provision of new rule. Mr.Parija, learned Advocate General appearing for department hence contended that there is no illegality in the stand of Department to consider the pending application under Rule, 2020. Both sides here relied on several decisions in support of their case.

18. Mr.Swain, learned counsel for the petitioner while relying on the decisions in the case of ***State of Uttar Pradesh and Others Vrs. Arvind Kumar Srivastava and Others***, reported in *(2015) I SCC 347*, in the case of ***State of Karnataka and Others Vrs. C.Lalitha***, reported in *(2006) (2) SCC 747*, whereas relying on the decision in the cases of ***Air India Vrs. Union of India and Others***, reported in (1995) 4 SCC 734, in the case of ***Union of India Vrs. Glaxo India Limited and Another***, reported in *(2011) 6 SCC 668*, in the case of ***Calcutta Municipal Corporation Vrs. Pawan Kumar Saraf and Another***, *(1999) 2 SCC 400*, in the case of ***State of Orissa and another Vrs. M/s M.A. Tulloch and Co.,*** reported in AIR 1964 SC 1284, in the case of ***State of Odisha and Another Vrs. Anup Kumar Senapati and another***, reported in (2019) 19 SCC 626 and in the case of ***N.C.Santhosh Vrs. State of Karnataka and Others***, reported in *(2020) 7 SCC 617*, Mr.A.K.Parija, learned Advocate General attempted to explain the meaning of repealing on introduction of a new rule coming into existence. Mr. Parija, learned Advocate General through the aforesaid decisions contended since 2020 rule clearly indicated to have been brought in supersession of the Rule, 1990, it is thus submitted for the new rule coming to play already and the disclosures through Rules 6 and 9 of the Rules, 2020, the application submitted under previous rule pending consideration has to be considered under the provision of New Rule. Mr.Parija, learned Advocate General also took an alternate plea while objecting the claim of the petitioner on application of the decision in the case of ***Ritanjali Giri @ Paul*** not only the petitioner therein but also similarly situated persons, Mr.Parija, learned Advocate General took the plea that there is no room for negative equality and relied on a decision of the Hon'ble Apex Court in the case of ***HAV (OFC) RWMWI BORGOYARY and***

OTHERS Vrs. UNION OF INDIA AND OTHERS, reported in *(2020) 15 SCC 546* in support of his case.

19. Court in considering the aforesaid issue proceeds to decide the issue in three compartments, i.e.:

> (i) Effect of earlier rule on coming into effect of a new rule, what could be the prospect of pending applications?
> (ii) If the judgment rendered in the case of ***Ritanjali Giri @ Paul*** *is* a judgment in rem or personam and is the Department justified in claiming that there is no room for negative equality ?
> (iii) If the case of ***N.C.Santhosh Vrs. State of Karnataka and Others***, reported in *(2020) 7 SCC 617* supports the case of State Department?
>
> **A)** It is made here clear that component (ii) hereinabove has already been answered through Issue No.(vi) through paragraph-16 of this judgment.
>
> **B)** Dealing with sub-question no.(i) hereinabove, this Court takes into account the following decisions being relied on by both parties together with provisions in the General Clauses Act:
>
> i) ***State of Orissa and another Vrs. M/s M.A. Tulloch and Co. (1964) 4 SCR 461/AIR 1964 SC 1284;*** (a Constitution Bench of five Judges)
> ii) ***Air India Vrs. Union of India and Others***, *(1995) 4 SCC 734*;
> iii) ***Calcutta Municipal Corpn. Vrs. Pawan Kumar Saraf and another,*** *(1999) 2 SCC 400;*
> iv) ***S.L. Srinivasa Jute Twine Mills(P) Ltd Vrs Union of India and Another,*** *(2006) 2 SCC 740;*
> v) ***State of Karnataka and Others Vrs. C.Lalitha***, *(2006) 2 SCC 747;*
> vi) ***Union of India Vrs. Glaxo India Limited and Another****, (2011) 6 SCC 668*
> vii) ***State of U.P.& Ors Vrs. Arvind Kumar Srivastava & Ors,*** *(*2015) 1 SCC 347;
> viii) ***State of Odisha and another Vrs. Anup Kumar Senapati****, (2019) 19 SCC 626;*
> ix) ***Indian Bank and Others Vrs. Promila and Another***, *(2020) 2 SCC 729*;
> x) ***Neena Aneja and Another Vrs. Jai Prakash Associates Ltd.,*** *AIR 2021 SC 1441*
> xi) ***N.C.Santhosh Vrs. State of Karnataka and Others***, *(2020) 7 SCC 617;*

20. Before going to the legal position, this Court here takes into account the provision at Section 6 of the General Clauses Act, 1897 (Central) and Section 5 of the Orissa General Clauses Act, 1937, which are taken note herein as follows:

"Section 6 of the General Clauses Act, 1897 (Central)

6. Effect of repeal.—Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and

any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

"Section 5 in The Odisha General Clauses Act, 1937

5 Effect of repeal. —Where any Orissa Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, bcontinued or enforced, and any such penalty, forfeiture or

> punishment may be imposed as if the repealing Act or Regulation had not been passed."

Both the above provisions remain perimateria.

The provision at Section 6 as well as Section 5 of the respective Act under the provision (c) and (e) in both the Acts no doubt makes it clear that rights already vested and accrued are to exist on coming into effect of a repealing act as investigation involving the claim of petitioner still remain pending. Section 8 of Orissa General Clauses Act has also come into play here, which reads as hereunder:

> "8. **Construction of references to repealed enactments.** Where any Orissa Act repeals and re-enacts, with or without modification, any provision of a former enactment, references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

This Court here thus observes for the prescription through Section 8 of the Orissa Act and for no clear intention appearing in the new rule in protecting the case of persons like petitioner, there remains no doubt that pending cases have to be considered under the rule prevailing at the relevant point of time.

This Court here also finds otherwise also the provision made in the new rule becomes impracticable as when you have confined it to only Government employment then there is absolutely no scope for considering the application involving institutions otherwise than Government establishment. The provision becomes otiose. Further looking to the entire history related to giving development to the Rehabilitation Assistance Scheme, State brought the Rule in 1990, then 1998 resolution expanding its application to employment other than Government establishments, State thus expanded the scope to other establishment then Amendment 2016 taking place. After extending the scope to several establishments including aided institutions, all of a sudden taking away such provision by way of the Rule, 2020 thereby limiting such scope only to Government employees. For the restriction in the new rule, only to consider claim involving Government employees, there is no scope for consideration of applications involving persons seeking job in establishments other than Government establishment like that of petitioner. This is never a role of model employer.

i) It is under the above position, this Court takes note of law of the Land in the case of ***State of Orissa and another Vrs. M/s. M.A.Tulloch and Co.***, reported in *AIR 1964 SC 1284*. Paragraphs-3 and 21 of the said judgment reads as follows:

> "3. The facts giving rise to these petitions were briefly these. There is not any material difference between the facts of the two cases and so it would be sufficient if we refer only to those in Civil Appeal 561 of 1962. The respondent Tulloch and Co. Private Ltd. a company incorporated under the Indian Companies Act, works a manganese mine in the State of Orissa under a lease granted by that State under the provisions of the Mines and Minerals (Development and Regulation) Act, 1948(Central Act 53 of 1948) and the rules made thereunder. While the respondent was thus working these mines, the State legislature of Orissa passed an Act called the Orissa Mining Areas Development Fund Act, 1952(which for shortness we shall refer to as "the Orissa Act)" whereunder certain areas were constituted as "mining areas" and under the powers conferred under that enactment the State Government was empowered to levy a fee on a percentage of the value of the mined ore at the pit's mouth, the collections being intended for the development of the "mining areas" in the State. The necessary steps for bringing these provisions into operation were taken by the State Government who thereafter made demands on the respondent on August 1, 1960 for the payment of the said fees. The present appeal is concerned with the fees which became due for the period July 1957 to March 1958. When a demand was made for the sum the respondent filed petition 142 of 1960 before the High Court impugning the legality of the demand and claimed the reliefs we have set out earlier. The learned Judges allowed the Writ Petition and issued directions to the second appellant in terms of the prayer in the petition. As the grounds on which the said demand of the fees was impugned raised substantial questions touching the interpretation of the Constitution the appellants applied to the court for a certificate of fitness under Article 132(1) and (2) and this having been granted, the appeals are now before us.
>
> 21. We must at the outset point out that there is a difference in principle between the effect of an expiry of a temporary statute and a repeal by a later enactment and the discussion now is confined to cases of the repeal of a statute which until the date of the repeal continues in force. The first question to be considered is the meaning of the expression "repeal" in Section 6 of the General Clauses Act whether it is confined to cases of express repeal or whether the expression is of sufficient amplitude to cover cases, of implied repeals. In this connection there is a passage in Craies on Statute Law, Fifth Edn. at pp. 323 and 324 which appears to suggest that the

provisions of the corresponding Section 38 of the English Interpretation Act were confined to express repeals. On p. 323 occurs the following:

"In Acts passed in or since 1890 certain savings are implied by statute in all cases of express repeal, unless a contrary intention appears in the repealing Act", and on the next page:

"It had been usual before 1889 to insert provisions to the effect above stated in all Acts by which express repeals were effected. The result of this enactment is to make into a general rule what had been a common statutory form, and to substitute a general statutory presumption as to the effect of an express repeal for the canons of construction hitherto adopted."

There is, however, no express decision either in England or, so far as we have been able to ascertain, in the United States on this point. Untrammelled, as we are, by authority, we have to inquire the principle on which the saving clause in Section 6 is based. It is manifest that the principle underlying it is that every later enactment which supersedes an earlier one or puts an end to an earlier state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under the superseded enactment unless there were sufficient indications — express or implied - in the later enactment designed to completely obliterate the earlier state of the law. The next question is whether the application of that principle could or ought to be limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word „repeal" in the later statute. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word „repeal" is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about it appears to us to be both

> logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving found in Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted. If this were the true position about the effect of the Central Act 67 of 1957 as the liability to pay the fee which was the subject of the notices of the demand had accrued prior to June 1, 1958 it would follow that these notices were valid and the amounts due thereunder could be recovered notwithstanding the disappearance of the Orissa Act by virtue of the superior legislation by the Union Parliament.

Through the above decision in spite of repeal of earlier enactment, notices issued under enactment held to be valid. Since this is a Constitution Bench involving five judges judgment not being altered by a higher Bench, law settled therein remains binding.

ii) In the case of ***Air India Vrs. Union of India and others***, reported in (1995) 4 SCC 734, the Hon‟ble apex Court in paragraph- 8 to 10 of the judgment held as follows :

> **"8.** In our view, if subordinate legislation is to survive the repeal of its parent statute, the repealing statute must say so in so many words and by mentioning the title of the subordinate legislation. We do not think that there is room for implying anything in this behalf.
>
> **9.** Section 8 of the 1994 Act does not in express terms save the said Regulations, nor does it mention them. Section 8 only protects the remuneration, terms and conditions and rights and privileges of those who were in Air India's employment when the 1994 Act came into force. Such saving is undoubtedly "to quieten doubts" of those Air India employees who were then in service. What is enacted in Section 8 does not cover those employees who joined Air India's service after the 1994 Act came into force. The limited saving enacted in Section 8 does not, in our opinion, extend to the said Regulations.
>
> **10.** Holding as we do that the said Regulations ceased to be effective on 29-1-1994, the very foundation of Air India's case no longer exists. No consideration of other arguments is, therefore, necessary."

This Court from the above judgment finds, it is a case involving claim of employees joining after new enactment came into place involving their

claim under previous enactment. So this case has no application to the case at hand.

iii) In the case of ***Calcutta Municipal Corpn. Vrs. Pawan Kumar Saraf and another***, reported in (1999) 2 SCC 400, Hon‟ble apex Court through paragraphs-10, 12 and 13 observed as follows:

> **"10.** When the statute says that the certificate shall supersede the report, it means that the report would stand annulled or obliterated. The word "supersede" in law means "obliterate, set aside, annul, replace, make void or inefficacious or useless, repeal". (vide *Black's Law Dictionary*, 5th Edn.) Once the certificate of the Director of the Central Food Laboratory reaches the court, the report of the Public Analyst stands displaced and what may remain is only a fossil of it.
>
> **12.** If a fact is declared by a statute as final and conclusive, its impact is crucial because no party can then give evidence for the purpose of disproving that fact. This is the import of Section 4 of the Evidence Act, 1872 which defines three kinds of presumptions among which the last is "conclusive proof":
>
> "When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."
>
> **13.** Thus the legal impact of a certificate of the Director of the Central Food Laboratory is threefold. It annuls or replaces the report of the Public Analyst, it gains finality regarding the quality and standard of the food article involved in the case and it becomes irrefutable so far as the facts stated therein are concerned."

iv) In the case of ***S.L. Srinivasa Jute Twine Mills Pvt. Ltd. Vrs. Union Of India & Anr.,*** reported in (2006) 2 SCC 740**,** the Hon‟ble Apex Court in paragraph-18 observes as follows:

> **"18.** 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 retrospective operation. (See *Keshvan Madhavan Memon v. State of Bombay*, AIR 1951 SC 128). 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 constitutio futuris formam imponere debet non praeteritis*. In the words of Lord Blanesburg,

> "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment." (see Delhi Cloth & General Mills Co. Ltd. v. CIT, AIR 1927 PC 242).
> "Every statute, it has been said", observed Lopes, L.J.,
> "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect" (*See Amireddi Rajagopala Rao v. Amireddi Sitharamamma,* AIR 1965 SC 1970).
>
> As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. (See *Reid v. Reid*, (1886) 31 Ch D 402). In other words close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament. (*See Union of India v. Raghubir Singh,* AIR 1989 SC 1933). The above position has been highlighted in "Principles of Statutory Interpretation" by Justice G.P. Singh. (Tenth Edition, 2006) at PP. 474 and 475)."

v) In the case of ***State of Karnataka Vrs. C. Lalitha***, reported in (2006)2 SCC 747, the Hon'ble Apex Court in paragraph-29 of the judgment observe as under:

> **"29.** Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

vi) In the case of ***Union of India (UOI) Vrs Glaxo India Ltd. and Ors***., reported in *(2011) 6 SCC 668*, the Hon"ble Apex Court in paragraphs- 28, 29, 30 and 31 held as follows:

"28. It is submitted that the demands made vide letter dated 16-11-1990 is liable to be set aside as the demand was made on the prices based on notional formulation prices worked out by the Bureau of Indian Standards, which were not revealed to the respondent Company, and that these notional formulation prices were in total disregard of the review of the bulk drug prices notified on 2-1-1989, which were in pursuance of the directions of the first judgment, but on the basis of the previously fixed bulk drug prices of 20-11-1986. In conclusion, it is argued that the Central Government should recalculate the amount based on the difference in bulk drug prices as reviewed and notified on 2-1-1989, in compliance with the directions of the High Court.

The First Judgment of the Delhi High Court

29. The submission of the learned Additional Solicitor General is in view of paras 17, 18 and 19 of the judgment in CWP No. 1551 of 1981. It is clear that the order dated 26-11-1986 was not quashed and the Central Government was only asked to consider the review petition filed by the respondent Company. At this stage, it is useful to extract paras 17 to 19 of the judgment to understand the direction issued by the High Court:

"17. We have come to the conclusion that the interests of justice require that the respondents should give the petitioner once more an opportunity of being heard on the price fixation order of 1986. We, however, wish to make it clear that we are not setting aside the order dated 20-11-1986 for this purpose; nor do we, in view of the categorical observations of the Supreme Court, consider it necessary, proper or appropriate to stay further implementation of the said order or to stay any proceedings for fixation of prices of various drug formulations of the petitioner which that respondents might wish to initiate. We would only direct the petitioner to file a formal application for review and the Government to deal with the same (condoning the delay in filing the same due to the pendency of this writ petition) after giving the petitioner a hearing on the lines indicated above and, in the light of such hearing, to affirm or revise the prices fixed by the order dated 20-11-1986 and to make consequent changes, thereafter, in the prices for drug formulations, if fixed in the meanwhile.

18. We would also, as was done by the Supreme Court, indicate a time-bound schedule for the course of action suggested above:

(a) Within ten days from the date of receipt of this order, the applicants may request the department to furnish such specific information as it may need as to the basis on which the figures of net worth of assets, interest on borrowings and rate of return have been taken by them in respect of each of

the drugs and the department should make the same available to the petitioner within ten days thereafter;
(b) Within ten days thereafter the petitioner may file a formal application for review of the order dated 20-11-1986 with an application to condone delay. This application should not content itself with criticising the department's figures but should specifically set out the petitioner's own detailed working out of the price to be fixed on the basis of the annual and cost audit reports of the Company for the period 1981 to 1985;
(c) The respondent should fix a hearing within a period of 15 days from the date of receipt of the application and the petitioner may be heard thereon;

(d) Within two weeks thereafter, the respondents may dispose of the application as they deem fit. In case they allow it in whole or in part they should pass an order notifying the revised prices under Para 3 of the 1979 DPCO.

19. The writ petition is disposed of accordingly with no order as to costs. It is made clear that the interim stay orders are vacated and the department will be free to implement the order dated 20-11-1986 as well as to proceed to fix the prices for the petitioner's drug formulation, subject to the outcome of the procedure indicated in the previous para."

The Impugned Judgment

30. The issue decided by the Division Bench in the impugned judgment is whether the demands made by the Central Government for deposit of Rs. 71.21 crores was on the basis of the prices notified vide order dated 2-1-1989 or order dated 20-11-1986. The High Court, apart from others, has concluded that from a combined reading of paras 15 to 19 of the directions of the Division Bench in the first judgment, it is clear that the High Court has neither upheld the order dated 26-11-1986 nor given any finality to the same; that the Central Government, for the purpose of considering the review petition filed, pursuant to the directions issued in the first judgment, the matter was referred to the Murthy Committee and that the Murthy Committee has conducted the price refixation of bulk drugs in accordance with the directions that were issued by the High Court. The Murthy Committee has taken into consideration the weighted average figures from 1980-1981 to 1984-1985 and refused the request of the respondent Company to consider the cost of production for the later years, which clearly shows that the Committee focused only on the order dated 26-11-1986 and not thereafter; that it was apparent that the prices fixed by the order dated 20-11-1986 were based on the costing of the year 1981 only, whereas the one dated 2-1-1989 was based on the weighted average cost figures from the year 1981 to 1985; that the notings on the file and the statements of the

Hon'ble Minister on the floor of Parliament indicate that the prices that were refixed by the Murthy Committee were accepted.

31. The High Court has also rejected the contention of the Central Government that there was an implied rejection of the review as there was no notification to that effect. It is also noted that there was no communication from the Central Government to the respondent Company expressing that the review had been rejected at any stage. The Court has also observed that there was a letter dated 20-3-1989 by the Central Government to the respondent Company informing them that the revised prices of bulk drugs was with effect from 12-5-1981, and this was enough to show that the respondent Company was notified that the order dated 2-1-1989 held the field in place of the order dated 26-11-1986. It was also noted by the High Court that even though the word "retrospective" was not mentioned in the Notification dated 2-1-1989, if it were not construed retrospectively, the order impugned would be in violation of the directions of the Division Bench in the first judgment. The High Court, after considering the language of Paras 3 to 17 of the 1979 DPCO, has taken the view that the Central Government was not justified in considering the prices of the formulations under Para 7(2)(a) of the 1979 DPCO for determining the excess amount."

This case rather supports the case of the petitioner.

vii) In the case of ***State of U.P. and others Vrs. Arvind Kumar Srivastava and others***, reported in (2015) 1 SCC 347, Hon'ble apex Court through paragraph-22 observed as follows:

"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.

22.1. The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the

same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3. However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see *K.C. Sharma* v. *Union of India* [*K.C. Sharma* v. *Union of India*, (1997) 6 SCC 721 : 1998 SCC (L&S) 226]). On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

viii) In the case of ***State of Odisha and Another Vrs. Anup Kumar Senapati***, reported in (2019) 19 SCC 626, Hon'ble apex Court through paragraphs- 30, 31 & 32 observed as follows:

"30. The provisions contained in Section 6 of the General Clauses Act stipulate that by the repeal of enactment, the benefit given to the person concerned shall not be affected. However, the repeal shall not revive anything not in force or existing at the time at which the repeal takes place. The previous operation of any enactment or anything duly done or suffered thereunder shall not be affected or any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. However, the best guide is found in what has been saved is by reference to the repealing provisions in the 2004 Order which are clear and unambiguous.

31. In Principles of Statutory Interpretation, 14th Edn. by Justice G.P. Singh, the following observation has been made:

"The distinction between what is, and what is not a right preserved by the provisions of Section 6, General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for,

acquiring a right. A distinction is drawn between a legal proceeding for enforcing a right acquired or accrued and a legal proceeding for acquisition of a right. The former is saved whereas the latter is not. In construing identical provisions of Section 10 of the Hong Kong Interpretation Ordinance, Lord Morris speaking for the Privy Council observed:"It may be, therefore, that under some repealed enactment, a right has been given, but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. On a repeal, the former is preserved by the Interpretation Act. The latter is not. The Lord Chancellor's (Lord Herschell's) observations in an earlier Privy Council case, that "mere right to take advantage of an enactment without any act done by an individual towards availing himself of that right cannot property be deemed a right accrued are not to be understood as supporting the view that if steps are taken under a statute for acquiring a right, the right accrues even if the steps taken do not reach the stage when the right is given nor do the said observations support the view that if no steps are taken for enforcement of a right come into existence, the right is not an accrued right. As explained by Sinha, C.J., the observations of Lord Herschell are only authority for the proposition that "the mere right, existing at the date of a repealing statute to take advantage of provisions of the statute repealed is not a right accrued. Inchoate or contingent rights and liabilities i.e. rights and liabilities which have accrued but which are in the process of being enforced or are yet to be enforced are unaffected for clause (c) clearly contemplates that there will be situations when an investigation, legal proceeding or remedy may have to be continued or resorted to before the right or liability can be enforced. Such a right or liability is not merely a "hope" which is destroyed by the repeal.

(Emphasis supplied)

* * *

It is submitted that as pointed out by Simon Brown, L.J., the two expressions are generally used in saving legislations to convey the same idea and are not mutually exclusive. Yet a possible distinction may be made between cases where some step, after the Act comes into force, is needed to be taken by the claimant for getting the right and cases where the Act, without anything being further done by the claimant confers the right. In the former class of cases, it would be a right acquired after the necessary step is taken whereas in the latter class of cases it would be a right accrued by mere force of the Act.

* * *

The right of a tenant, who has the land for a certain number of years and who has personally cultivated the same for that period "to be deemed to be protected tenant" under the provisions of a statute has been held to be an accrued right which will survive the repeal of the statute. Similarly, a right conferred by an Act that every lease shall be deemed to be for a period of ten years is a right acquired and will be unaffected by repeal of the Act. But the so-called right of a statutory tenant to protection against eviction under Control of Eviction Act is mere advantage and not a right in the real sense and does not continue after repeal of the Act. Similarly on the reasoning that the right of a tenant to get standard rent fixed and not to pay contractual rent in excess of standard rent under a Rent Control Act is only a protective right and not a vested right, it has been held that when during the pendency of an application for fixation of standard rent, the Act is amended and it ceases to apply to the premises in question, the application is rendered incompetent and has to be dismissed as infructuous.

* * *

The option given to a grantee to make additional purchases of Crown land on fulfilment of certain conditions under the provisions of the statute was held to be not an accrued right when the statute was repealed before the exercise of the option.

A privilege to get an extension of a licence under an enactment is not an accrued right and no application can be filed after the repeal of the enactment for renewal of the licence.

* * *

The right or privilege to claim benefit of condonation of delay is not an accrued right under a repealed provision when the delay had not occurred before the repeal of the said provision.

The right of pre-emption conferred by an Act it is remedial right or in other words, a right to take advantage of an enactment for acquiring a right to land or other property and cannot be said to have been acquired or accrued until a decree is passed and does not survive if the Act is repealed before passing of the final decree.

The right of a government servant to be considered for promotion in accordance with existing rules is not a vested right and does not survive if the Government takes a policy decision not to fill up the vacancy pending revision of the rules and the revised rules which repeal the existing rules do not make him eligible for promotion.

General savings of rights accrued, and liabilities incurred under a repealed Act by force of Section 6, General Clauses Act, are subject to a contrary

> intention evinced by the repealing Act. In case of a bare repeal, there is hardly any room for a contrary intention; but when the repeal is accompanied by fresh legislation on the same subject, the provisions of the new Act will have to be looked into to determine whether and how far the new Act evinces a contrary intention affecting the operation of Section 6, General Clauses Act .When a saving clause in a new Act is comprehensively worded and is detailed, it may be possible to infer that it is exhaustive and expresses an intention not to call for the application of Section 6, General Clauses Act.
>
> 32. It is apparent from the aforesaid discussion that what is unaffected by the repeal of a statute is a right acquired or accrued and not mere hope or expectation of or liberty to apply for acquiring a right. There is a distinction in making an application for acquiring a right. If under some repealed enactment, a right has been given, but on investigation in respect of a right is necessary whether such right should be or should not be given, no such right is saved. Right to take advantage of a provision is not saved. After repeal, an advantage available under the repealed Act to apply and obtain relief is not a right which is saved when the application was necessary and it was discretionary to grant the relief and investigation was required whether relief should be granted or not. The repeal would not save the right to obtain such a relief. The right of pre-emption is not an accrued right. It is a remedial right to take advantage of an enactment. The right of a government servant to be considered for promotion under repealed rules is not a vested right unless the repeal provision contains some saving and right has been violated earlier."

ix) In the case of ***Indian Bank and others Vrs. Promila and another***, reported in (2020) 2 SCC 729, through paragraphs-4, 18 and 20 of the judgment, Hon˝ble apex Court observed as follows:

> **"4.** It is trite to emphasise, based on numerous judicial pronouncements of this Court, that compassionate appointment is not an alternative to the normal course of appointment, and that there is no inherent right to seek compassionate appointment. The objective is only to provide solace and succor to the family in difficult times and, thus, the relevancy is at that stage of time when the employee passes away.
>
> **18.** The question of applicability of any subsequent Scheme really does not apply in view of the judgment of this Court in *Canara Bank, (2015) 7 SCC 412*. Thus, it would not be appropriate to examine the case of the respondents in the context of subsequent Schemes, but only in the context of the Scheme of 4.4.1979, the terms of which continued to be applicable even as per the new Scheme of 5.11.1985, i.e. the Scheme applicable to the

respondents. There is no provision in this Scheme for any ex gratia payment. The option of compassionate appointment was available only if the full amount of gratuity was not taken, something which was done. Thus, having taken the full amount of gratuity, the option of compassionate appointment really was not available to the respondents.

20. We have to keep in mind the basic principles applicable to the cases of compassionate employment, i.e., succor being provided at the stage of unfortunate demise, coupled with compassionate employment not being an alternate method of public employment. If these factors are kept in mind, it would be noticed that the respondents had the wherewithal at the relevant stage of time, as per the norms, to deal with the unfortunate situation which they were faced with. Thus, looked under any Schemes, the respondents cannot claim benefit, though, as clarified aforesaid, it is only the relevant Scheme prevalent on the date of demise of the employee, which could have been considered to be applicable, in view of the judgment of this Court in *Canara Bank*, (2015) 7 SCC 412. It is not for the courts to substitute a Scheme or add or subtract from the terms thereof in judicial review, as has been recently emphasized by this Court in *State of Himachal Pradesh & Anr. v. Parkash*, (2019) 4 SCC 285."

x) In the case of ***Neena Aneja and Another Vrs. Jai Prakash Associates Ltd.,*** reported in AIR 2021 SC 1441, Hon'ble apex Court though paragraphs-17 and 71 observed as under:

"17. Therefore, this court made a clear distinction between amendments impacting a substantive right of appeal and amendments which merely alter the forum where such an appeal could be urged. The latter could not be construed as having caused a prejudice as it was not substantive in nature."

71. For the above reasons, we have come to the conclusion that proceedings instituted before the commencement of the Act of 2019 on 20 July 2020 would continue before the fora corresponding to those under the Act of 1986 (the National Commission, State Commissions and District Commissions) and not be transferred in terms of the pecuniary jurisdiction set for the fora established under the Act of 2019. While allowing the appeals, we issue the following directions:

(i) The impugned judgment and order of the NCDRC dated 30 July 2020 and the review order dated 5 October 2020, directing a previously instituted consumer case under the Act of 1986 to be filed before the appropriate forum in terms of the pecuniary limits set under the Act of 2019, shall stand set aside;

> (ii) As a consequence of (i) above, the National Commission shall continue hearing the consumer case instituted by the appellants;
> (iii) All proceedings instituted before 20 July 2020 under the Act of 1986 shall continue to be heard by the fora corresponding to those designated under the Act of 1986 as explained above and not be transferred in terms of the new pecuniary limits established under the Act of 2019; and
> (iv) The respondent shall bear the costs of the appellant quantified at Rupees Two lakhs which shall be payable within four weeks."

This is a case involving an amended provision came to be operational with effect from 1.4.1999. An application involved therein applied for compassionate appointment on 29.6.2000, 25.9.2000 and 1.7.2001 respectively. The application for compassionate appointment undisputedly was made after 1.4.1999. Amended provision prescribing to apply in such an appointment within one year of the date whereas un-amended provision had given a relaxation of one year after the applicant attend majority whereas the case at hand involves father-the employee died on 15.11.2016, mother come to die on 27.7.2017, petitioner filed application for Rehabilitation Assistance appointment on 11.10.2017. In the existence of a set up rule called 1990 Rules read with amendment 2016 Rule, this Court finds the decision relied on by the State Department since stand completely on different footing is nothing to do with the case at hand. It is for the settled position of law, right through the decision involving ***State of Orissa and another Vrs M/s M.A. Tulloch and Co.***, reported in *(1964) 4 SCR 461*, a five Judges Bench up to the case involving ***Indian Bank and Others Vrs. Promila and Another*** reported in (2020) 2 SCC 729 even AIR 2021 SC 1441 that the applications filed under a particular rule shall have to be considered applying the rule available at the relevant time itself. Consequently, the issue involved herein is answered observing the case of the petitioner involved herein deserved to be considered under the rule available at the relevant rule i.e. 1990 Rule read with amendment, 2016.

21. It is here taking into account the role of Managing Committee and the District Education Officer as well as the Director, this Court here going through the Rule 5 and 6 of Rule, 1990 finds Rule 5 and 6 therein reads as follows:

> **"5. Authority competent to make compassionate appointment :-** The authority competent to make substantive appointment to the post of an office identified for appointment shall be the competent authority.

6. Mode of Appointment:- (1) Application for appointment under these rules shall be submitted by the eligible family member of the deceased Government employee, in Form A of these rules along with the following documents, to the Appointing Authority, namely:-

(a) 'Legal Heir' certificate issued by the Tahasildar concerned;

(b) 'Medically Unfit' certificate issued by the Medical Board of the district of permanent residence of the deceased Government employee, in Form B of these rules, in case the spouse of the deceased Government employee is medically unfit for appointment under these rules;

(c) Nomination by the spouse or by other family members (where the spouse is not alive) of the deceased Government employee, in Form C of these rules nominating the applicant for compassionate appointment under these rules, if applicable;

(2) On receipt of the application, the Appointing Authority shall verify the details furnished by the applicant (except information contained against SI. No. 6 and 8 of the application form) and determine the eligibility of the applicant by allotting points in the Evaluation Sheet given in Form D to these rules, as given below:-

(a) If the total points allotted to the applicant in Part - I of the evaluation sheet is 60 or more, the applicant shall automatically be eligible for appointment under these rules and in such case, the Part - II of the evaluation sheet need not be filled up or assessed.

(b) If the total points allotted to the applicant in Part- I of the evaluation sheet is 44 or less, the applicant shall automatically be ineligible for appointment under these rules and in such case, the Part - II of the evaluation sheet need not be filled up or assessed.

(c) If the total point allotted to the applicant in Part-I of the evaluation sheet is between 44 and 60 (i.e. 45 to 59), then the Appointing Authority shall allot points provisionally in Part -II of the evaluation sheet on the basis of the details furnished by the applicant in the application form and if the sum total of points thus allotted to the applicant in Part-I and Part-II of the evaluation sheet remains below 60, the applicant shall be ineligible for appointment under rules.

(d) If the total point allotted to the applicant in Part - I of the evaluation sheet is between 44 and 60 (i.e. 45 to 59) and the sum total of points allotted to the applicant in part - I and Part - II of the

evaluation sheet, as mentioned in Para (c), becomes 60 or more, then the Appointing Authority shall forward a copy of the application to the Collector of the district where the deceased Government employee had his permanent residence and seek a report from the Collector in the Form E to these rules and as per the application, if the applicant or any of his or her family members owns immovable property, jointly or individually, in a district other than the district of permanent residence of the deceased Government employee, the Appointing Authority shall also seek a report from the Collector of the other district(s) concerned in the form F of these rules.

(e) On receipt of the report(s) from the district Collector(s) as stated above, the Appointing Authority shall finally allot points to the applicant in Part - II of the evaluation sheet on the basis of the report(s) of the Collector(s) and if the sum total of the points finally allotted to the applicant in Part - I and Part - II of the evaluation sheet becomes 60 or more, the applicant shall be eligible for appointment under these rules.

(3) In the event the applicant meets the standard as per the criteria outlined under rule 6(2), the Appointing Authority shall appoint the applicant in a suitable available base level Group 'D' vacant post under his control, but if a vacancy does not exist under his administrative control, the Appointing Authority shall forward the application to the Head of the Department with request for his suitable appointment against such vacant posts available in his control and the Head of the Department shall locate vacancies in his own office or other offices under his administrative control and direct Head of the Office where there is such vacant posts to appoint the applicant, and also if no vacancy is immediately available, the application shall be considered for the subsequent vacancy arising in the offices of Heads of Departments and the Head of the Department shall appoint the candidate in the office or in the offices subordinate thereto.

(4) In the case of the Departments of Government in the Secretariat or their attached offices, the Appointing Authority, subject to the conditions stipulated in the proviso to rule 4 shall follow the procedure as specified hereunder, namely:-

(a) The concerned Department shall appoint the candidate against any base level Group-D vacant post available under its control in the Department.

(b) In case of non-availability of suitable post, the Department shall direct the Heads of Departments to appoint the candidate against any suitable base level Group-D post under their administrative control.

(5) If the applicant does not join the compassionate appointment offered, he or she shall forfeit his or her claim under these rules for all times to come and no choice will be offered to the applicant to exercise an option to select or reject any compassionate appointment.

(6) While considering the pending applications in any office, the concerned Competent Authority will consider all complete and eligible applications in order of date of death of the deceased employee.

(7) The economic distress condition shall be evaluated, as per the points awarded in the evaluation sheet contained in Form D, on the date of death of Government employee.

(8) The process of evaluation of application and offering compassionate appointment to the eligible applicant shall be completed within a period of one year from the date of receipt of application complete in all respects.

(9) All pending cases as on the date of publication of these rules in the Odisha Gazette shall be dealt in accordance with the provision of these rules.

(10) In all pending cases, the Appointing Authority shall collect the additional information on the present distress condition from the applicant within six months from the date of publication of these rules in the Odisha Gazette and evaluate the applications along with fresh applications received during that period."

22. This Court here records the undisputed statement in Bar that Jr. Clerk post in Aided institution is a ex-cadre post and in absence of Rule to govern such post, the postings of this nature is to be considered institution-wise and there is no scope for intervention of D.E.O. even. From the rule taken note hereinabove, it is the Managing Committee being the Appointing Authority has to discharge its role in lieu of Rules-5 and 6 and make appointment of the petitioner provided he is otherwise eligible and fulfilling in terms of Form-A and in the event of any shortfall, then deficiency, if any, has not been pointed

out to the petitioner as of now, he may be intimated involving any such deficiency and on his meeting all such requirement, the petitioner may be provided with employment in the post of Jr. Clerk by undertaking the entire exercise within a period of two months hence. So far as communication of Head Master vide Annexure-5, it be best construed just an information to the Director and/or D.E.O. as here the petitioner is applying for a post of Jr. Clerk in absence of any cadre either at D.E.O. level or State level and further as the post involved is already an Aided post.

23. It is now considering the case of ***N.C. Santhosh Vrs. State of Karnataka***, reported in *(2020) 7 SCC 617*, this Court here finds Hon"ble apex Court through paragraphs 1, 9 and 10 observed as follows:

> **"1.** Leave granted in SLP (C) No. 34878 of 2013 and SLP (C) No. 24169 of 2015. The appellants here were the beneficiaries of compassionate appointments. But on the discovery that their appointments were made dehors the provisions of the Karnataka Civil Services (Appointment on Compassionate Grounds) Rules, 1996 as amended w.e.f. 1-4-1999, (hereinafter referred to as "the Rules"), those appointments came to be cancelled. The amendment to the proviso to Rule 5 stipulated that in case of a minor dependant of the deceased government employee, he/she must apply within one year from the date of death of the government servant and he must have attained the age of eighteen years on the day of making the application. Before amendment, the minor dependant was entitled to apply till one year of attaining majority.
>
> **9.** While Rule 5, as it originally stood, enabled a minor dependant to apply within one year after attaining majority, the rule-making authority with the amendment effected from 1-4-1999 stipulated an outer limit of one year from the date of death of the government servant for making application for compassionate appointment. The validity of the amended Rules is not challenged in any of the present proceedings. Following the amendment, the norms clearly suggest that the earlier provision which enabled a minor dependant to apply on attaining majority (may be years after the death of the government servant), has been done away with. The object of the amended provision is to ensure that no application is filed beyond one year of the death of the government employee. The consequence of prohibiting application by a minor beyond one year from the date of death of the parent can only mean that the appellants were undeserving beneficiaries of compassionate appointment as they attained majority well beyond one year of the death of their respective parents.

> **10.** In all these cases, when the government employee died, the appellants were minor and they had turned 18, well beyond one year of death of the parent. As can be seen from the details in the chart, the dependants attained majority after a gap of 2-6 years from the respective date of death of their parents and then they applied for appointment. By the time, the dependant children turned 18, the amended provisions became operational w.e.f. 1-4-1999. As such their belated application for compassionate appointment should have been rejected at the threshold as being not in conformity with proviso to Rule 5. The appellants applied for compassionate appointment (after attainment of majority), well beyond the stipulated period of one year from the date of death of the parent, and therefore, those applications should not have been entertained being in contravention of the Rules."

The application here since submitted belatedly, the applicants therein were not to be benefited under the erstwhile rule and this decision does not fit to the case at hand.

24. It is under the above circumstance and for the support of law to the petitioner, this Court allowing the writ petition in part directs the Headmaster and Governing Body of Govinda Chandra High School, Nuagarh to take decision on the application of the petitioner dated 11.10.2017 under the provision of Rule, 1990 read with 2016 amendment. It is made clear that in the event there is any deficiency in the application submitted by the petitioner involved herein, as no deficiency has been pointed out as of now, he may be intimated to overcome such shortfall within a reasonable time. The entire exercise be completed within a period of two months hence.

25. In the result, the writ petition succeeds in part but, however, there is no order as to cost.

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2021 (III) ILR-CUT- 350

S.K. SAHOO, J.

CRLA NO(s). 602 & 667 OF 2014

1. SRI RAJESH K.R. .....Appellants
2. SRI JOBBY SONNY

.V.

SATE OF ODISHA ..... Respondent

AND

SRI GEORGE K.A. ..... Appellant

.V.

STATE OF ODISHA ..... Respondent
(IN CRLA 667/2014)

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Non-compliance of Section 42(2) – Effect of – Held, total non-compliance of Section 42(2) of the NDPS Act is impermissible and same would vitiate the trial – Thus, in the absence of any material to show compliance of the mandatory provision, the impugned judgment and order of conviction of the appellants is not sustainable in the eyes of the law. (Para11)

Case Laws Relied on and Referred to :-

1. (2009) 44 O.C.R. (SC) 183 : Karnail Singh -Vrs.- State of Haryana.
2. 2011 (II) O.L.R.(SC) 735 : Rajender Singh -Vrs.- State of Haryana.
3. (2016) 64 Orissa Criminal Reports (SC) 827 : State of Rajasthan -Vrs.- Jag Raj Singh @Hansa.
4. (2018) 70 O.C.R.340 : Ramakrushna Sahu -Vrs.- State of Orissa.
5. (2018) 71 Orissa Criminal Reports 413 : Ghadua Muduli & Anr. -Vrs.- State of Orissa.
6. (2019) 74 O.C.R. 848 : Sumit Ku.Behera & Anr -Vrs.- State of Odisha.
7. 2001 Criminal Law Journal 4844 : Abdul Rehman Fakir Mohd. Durani -Vrs.- The State of Maharastra.
8. 2017 (Supp.-II) O.L.R. 358 :Sambhulal Tibrewal -Vrs.- State of Orissa.

For Appellants : M/s. Ajaya Ku. Pradhan
M/s. Prasanta Ku. Sahoo (CRLA 667/14)

For Respondent : Mr. J.P. Patra, A.S.C

JUDGMENT Date of Hearing and Judgment : 09.09.2021

S.K. SAHOO, J.

The appellants Rajesh K.R. and Jobby Sonny in CRLA No.602 of 2014 and appellant George K.A. in CRLA No.667 of 2014 faced trial in the Court of learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No.215 of 2011 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 23.06.2011 at about 4.00 p.m., they were found transporting ganja in a private vehicle bearing registration no.KL-07-AA-2097 in front of Parlakhemundi police station in thirty nine big packets and thirty two small packets consisting of 116 kgs. of ganja without any licence.

The learned trial Court vide impugned judgment and order dated 19.09.2014 found the appellants guilty under section 20(b)(ii)(C) of the N.D.P.S. Act and sentenced each of them to undergo rigorous imprisonment for a period of twelve years and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default, to undergo further rigorous imprisonment for period of one year each.

Since both the appeals arise out of one common judgment, with the consent of learned counsel for both the parties, those were heard analogously and are disposed of by this common judgment.

2. The prosecution case, as per the first information report (Ext.16), in short, is that the informant Pradyumna Kishore Behera (P.W.4), S.I. of Police, Parlakhemundi police station on the basis of command certificate no.364743 dated 23.06.2011 along with Dibya Lochan Behera (P.W.8), S.I. of Police and other police officials of Parlakhemundi police station left the police station to verify the information regarding the transportation of ganja in a private vehicle bearing registration no.KL-07-AA-2097 as recorded vide S.D.E. No.513 dated 23.06.2011 and at about 4.00 p.m., they detained the said vehicle in front of Parlakhemundi police station and found two persons sitting in the middle seat and one was in the driver"s seat of the vehicle and smell of ganja was coming out of the vehicle. On being asked, the driver of the vehicle disclosed his name and address as Rajesh K.R. (appellant in CRLA No.602 of 2014) and his address and the two persons, who were sitting in the middle seat of the vehicle disclosed their names as Jobby Sonny (appellant in CRLA No.602 of 2014) and George K.A. (appellant in CRLA No. 667 of 2014). The informant (P.W.4) came to believe from the strong smell of contraband ganja coming out of the vehicle that the appellants were in possession of contraband ganja and accordingly, he intimated the fact to the Inspector in-charge of Parlakhemundi police station over phone. He arranged two local independent witnesses i.e. P.W.6 and P.W.7, out of which P.W.7 was the weighman, who had a grocery shop at Khanja Sahi and he arrived at the spot along with his weighing machine. P.W. 4 explained the three appellants that they have the right to be searched either before a Magistrate or a Gazetted Officer and when the appellants gave their choice to be searched before one Gazetted Officer in writing, P.W.4 contacted Gopinath Manipatra (P.W.9), D.S.P., D.I.B., Gajapati over phone with a request to remain present during search and seizure. P.W.9 arrived at the spot

at 4.15 p.m. and he gave his identity to the appellants and then in presence of P.W.9, the personal search of the police team was taken but nothing incriminating was found except the wearing apparels and pen and when the vehicle was thoroughly searched, it was found that on the concealed roof of the vehicle, thirty nine big packets and thirty two small packets were found from it. Those packets were made into four lots and the polythene paper and synthetic thread from all the packets were removed and it was found to be the flowering and fruiting tops of the cannabis plant locally known as „ganja" and on weighment of the four lots, the total quantity came to 116 kgs. After the ganja was mixed homogenously, 50 grams of sample ganja in two packets from each lot were taken and signatures of the witnesses, appellants and also that of P.W.4 were taken on the envelopes containing the sample of ganja and the samples were kept in cloth cover and stitched and all the exhibits were sealed properly with sealing wax and specimen brass seal. The specimen seal of the brass seal was taken in a plain paper on which the signatures of the witnesses, appellants and P.W.4 were taken and since the three appellants could not produce either any authority or any license in support of such possession of contraband ganja, those were seized and a seizure list was prepared at the spot and the witnesses, appellants and P.W.4 signed the seizure list. The vehicle bearing registration no.KL-07-AA-2097, registration certificate, insurance certificate of the vehicle, driving licence of the driver Rajesh K.R. were also seized under seizure list and it was ascertained that one Krishna Kutty was the owner of the vehicle in question. Since the contraband ganja of commercial quantity were seized from the exclusive and conscious possession of the appellants, they were arrested after explaining grounds of arrest and brought to the police station and from the personal search of the appellants, some cash and mobile sets were also seized and three separate seizure lists were prepared in that respect. After returning to the police station, P.W.4 lodged the first information report before the Inspector in-charge of Parlakhemundi police station.

On the basis of such first information report, Parlakhemundi P.S. Case No.77 dated 23.06.2011 was registered under sections 20(b)(ii)(C), 25 and 29 of the N.D.P.S. Act by the Inspector in-charge of Parlakhemundi police station and he himself took up investigation of the case.

3. During course of investigation, the I.O. (P.W.10) seized the vehicle, registration certificate, insurance certificate, driving licence of appellant Rajesh K.R., R.C. Book, ganja packets, cash and mobile phones etc. as per

seizure list Ext.1. He kept the seized ganja of 116 kgs. in safe custody in the P.S. Malkhana by making Malkhana register entry. He visited the spot which is in front of the police station, examined the seizure witnesses, the informant and other witnesses. On 23.06.2011, he submitted the detailed report to the Superintendent of Police, Gajapati and again seized the same vide Ext.23. On 24.06.2011, he forwarded the appellants to the Court and sent the seized articles to the Court and made prayer to send the samples to R.F.S.L., Berhampur for chemical examination. Chemical examination report (Ext.24) was received which indicated that the exhibits marked as Exts.A-1, B-1, C-1 and D-1 were the fruiting and flowering tops of cannabis plant (ganja). On completion of investigation, he submitted the charge sheet against the appellants under sections 20(b)(ii)(C) and 29 of the N.D.P.S. Act.

4. The appellants were charged under section 20(b)(ii)(C) of the N.D.P.S. Act to which they pleaded not guilty and claimed to be tried.

5. During course of trial, in order to prove its case, the prosecution examined as many as eleven witnesses.

P.W.1 Smt. Jamuna Pradhan was the women constable attached to Parlakhemundi police station and she stated that P.W.4 deposited four packets containing ganja marked as A, B, C and D and some papers such as seizure list, zimanama, command certificate before P.W.10, who seized the same and prepared a seizure list vide Ext.1 and she is a witness to the said seizure.

P.W.2 Madhab Rao, P.W.3 Sanmukha Patnaik, P.W.6 V. Chandra Sekhar Rao and P.W.7 Manoj Kumar Panda did not support the prosecution case for which they were declared hostile.

P.W.4 Pradyumna Kishore Behera, who was the S.I. of Police attached to Parlakhemundi police station and he is also the informant in the case. He stated that on the date of occurrence, the then I.I.C. (P.W.10) got reliable information about illegal transportation of huge quantity of ganja in a car bearing registration no.KL-07-AA-2097 and directed him as well as S.I. of Police D.L. Behera (P.W.8) and Havildar P.Mohapatra (P.W.11) to verify the information and that they left the police station and started conducting patrolling. He further stated that at about 4.00 p.m., they noticed the said car was going towards Berhampur and they detained the car, found the appellants

carrying thirty nine big packets and thirty two small packets containing contraband ganja in the vehicle. He seized the vehicle, its registration certificate, insurance certificate, driving licence of appellant Rajesh K.R., who was in the driver"s seat and cash and mobile phones of the appellants. He also took weighment of the contraband ganja and drew sample packets and seized it. He arrested the appellants, brought the seized articles and the appellants to the police station and lodged the first information report before the Inspector in-charge of Parlakhemundi police station.

P.W.5 Gobind Ch. Behera was the Constable attached to Parlakhemundi police station and he is a witness to the seizure of the Malkhana register, command certificate and weighing machine as per seizure lists Ext.17, Ext.18 and Ext.19 respectively.

P.W.8 Dibya Lochan Behera was the S.I. of Police attached to Parlakhemundi police station and he accompanied P.W.4 to the spot. He stated about the recovery of contraband ganja along with other articles from the possession of the appellants.

P.W.9 Gopinath Manipatra was the Deputy Superintendent of Police, D.I.B. attached to the Office of the Superintendent of Police, Gajapati, who on receipt of information from P.W.10 regarding detection of ganja, proceeded to the spot and in his presence, P.W.4 searched the vehicle and recovered thirty nine big packets and thirty two small packets containing contraband ganja which were concealed in the roof of the vehicle and those packets were made to four lots and it was weighted and the total quantity came to 123 kgs. approximately including the wrappers, which were seized as per seizure list Ext.2.

P.W.10 Tapan Kumar Padhi was the Inspector in-charge attached to Parlakhemundi police station and he stated that on the report of P.W.4, he registered the case, took up investigation and during investigation, P.W.4 produced the vehicle bearing registration no.KL-07-AA-2097, registration certificate, insurance certificate and driving licence of the appellant Rajesh K.R., ganja packets with some cash and mobile phones, which were again seized by him vide Ext.1. He forwarded the appellants to the Court and also produced the seized articles in the Court and made prayer before the Court to send the samples to R.F.S.L., Berhampur for chemical examination and on completion of investigation, he submitted the charge sheet.

P.W.11 Pandab Mohapatra was the Havildar attached to Parlakhemundi police station and he accompanied P.W.4 to the spot. He stated about the recovery of contraband ganja from the possession of the appellants and he is also a witness to the seizure of weighing machine, Malkhana register and command certificate.

The prosecution exhibited twenty four documents. Exts.1, 17, 18, 19, 20/3 and 23 are the seizure lists, Ext.2 is the seizure list of ganja, Ext.3 is the seizure list of seized cash of Rs.26,800/- and a Videocon mobile phone, Ext.4 is the seizure list of seized cash of Rs.26,000/- and a white coloured Nokia Mobile, Ext.5 is the seizure list of seized cash of Rs.24,000/- and a black coloured Nokia mobile set, Ext.6 is the zimanama, Ext.7 is the notice to George K.A. appellant, Ext.8 is the notice to appellant Jobby Sonny, Ext.9 is the notice to appellant Rajesh K.R., Ext.10 is the search memo, Ext.11 is the specimen impression of brass seal on a separate paper, Ext.12 is the R.C. Book, Ext.13 is the D.L. of appellant Rajesh K.R., Ext.14 is the tax receipt, Ext.15 is the insurance certificate of vehicle seized, Ext.16 is the plain paper F.I.R., Exts.21 and 22 are the signatures of P.W.7 in the zimanama and Ext.24 is the chemical examination report.

The prosecution also proved twelve material objects. M.O.I is the Nokia mobile seized from appellant Rejesh K.R., M.O.II is the Videocon mobile seized from appellant Jobby Sonny, M.O.III is the Nokia mobile seized from appellant George K.A., M.O.IV is the sample packet of seized ganja A-2, M.O.V is the sample packet of seized ganja B-2, M.O.VI is the sample packet of seized ganja C-2, M.O.VII is the sample packet of seized ganja D-2, M.O.VIII is the bag-A, M.O.IX is the bag-B, M.O.X is the bag-C, M.O.XI is the bag-D and M.O.XII is the polythene jaris.

6. The defence plea of the appellants was one of denial and it is pleaded that they had come to visit Budha Temple and they have been falsely entangled in the case.

7. The learned trial Court after analysing the oral as well as documentary evidence on record has been pleased to hold that the evidence adduced by P.Ws.4, 5, 8, 9 and 11 inspired confidence with regard to the search and seizure of contraband ganja in packets from the vehicle, which were in the possession of the appellants at the relevant time. It was further held that there was total compliance of section 42 of the N.D.P.S. Act by the I.O. of the

case. The learned trial Court also accepted the evidence of the official witnesses P.Ws.5, 8, 9 and 11 on the ground that they had no axe to grind against the appellants who belonged to the State of Kerala. It was further held that both the authorized officers, i.e., P.W.4 and P.W.10 have complied with the provisions of sections 42, 55 and 57 of the N.D.P.S. Act and accordingly, the prosecution was held to have established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants.

8. Mr. Ajaya Kumar Pradhan, learned counsel appearing for the appellants in CRLA No.602 of 2014 and Mr. Prasanta Kumar Sahoo, learned counsel appearing for the appellant in CRLA No.667 of 2014 raised mainly two contentions to challenge the impugned judgment and order of conviction. It was argued that it is a case of prior information received by the police relating to illegal transportation of ganja in a private vehicle and seizure of contraband ganja of commercial quantity from the vehicle. The learned trial Court also held that since it was a case of prior information received by the I.I.C. of Paralakhemundi Police Station, the search and seizure were to be conducted as per section 42 of the N.D.P.S. Act. It was argued that the provision under section 42 of the N.D.P.S. Act has not been complied with though it has been held to be so by the learned trial Court and therefore, the appellants are entitled to be acquitted. Reliance was placed on the following decisions i.e. **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183**, **Rajender Singh -Vrs.- State of Haryana reported in 2011 (II) Orissa Law Reviews (SC) 735**, **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 64 Orissa Criminal Reports (SC) 827**, **Ramakrushna Sahu -Vrs.- State of Orissa reported in (2018) 70 Orissa Criminal Reports 340**, **Ghadua Muduli and Another -Vrs.- State of Orissa reported in (2018) 71 Orissa Criminal Reports 413**, **Sumit Kumar Behera and Another -Vrs.- State of Odisha reported in (2019) 74 Orissa Criminal Reports 848 and Abdul Rehman Fakir Mohd. Durani -Vrs.- The State of Maharastra reported in 2001 Criminal Law Journal 4844**. Another contention was raised that while imposing substantive sentence of rigorous imprisonment for twelve years for the offence under section 20(b)(ii)(C) of the N.D.P.S. Act to each of the appellants, the learned trial Court has not taken into account the provision under section 32-B of the N.D.P.S. Act. Reliance was placed in the case of **Sambhulal Tibrewal -Vrs.- State of Orissa reported in 2017 (Supp.-II) Orissa Law Reviews 358.**

Mr. J.P. Patra, learned Additional Standing Counsel for the State, on the other hand, supported the impugned judgment and contended that in view of the huge quantity of contraband ganja seized from the possession of the appellants, who were travelling together in a private car, the sentence imposed was quite justified.

9. Before going to deal with the contention advanced by the learned counsel for the appellants as to whether the learned trial Court committed error in holding compliance of the provision under section 42 of the N.D.P.S. Act, let me first deal with the arguments relating to substantive sentence imposed by the learned trial Court on the appellants. In paragraph-13 of the impugned judgment which deals with the hearing on question of sentence, the learned trial Court has held as follows:

> "The legislature has prescribed stringent punishment for offence under the N.D.P.S. Act. In order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on society as a whole, the Parliament in its wisdom, has made effective provisions of by introducing Act 81 of 1985 specifying mandatory minimum imprisonment and fine. The section under section 20(b)(ii)(C) N.D.P.S. Act is penal section prescribes punishment i.e. it shall not be less than ten years and may also extend to twenty years and shall also be liable to fine and the fine amount shall not less than Rs.1,00,000/- (rupees one lakh) and may also extend to Rs.2,00,000/- (rupees two lakhs). *By taking note of the gravity of the offence committed by the convicts and keeping the age in mind*, I am to sentence each of the convicts Sri Rajesh K.R., Sri Jobby Sonny and Sri George K.A. to undergo R.I. for twelve years and to pay a fine of Rs.1,00,000/- (rupees one lakh only) each and in default, to undergo R.I. for one year each for offence under section 20(b)(ii)(C) of the N.D.P.S. Act in the interest of justice."

In the case of **Sambhulal Tibrewal** (supra), I had the occasion to deal with an identical point raised in connection with section 32-B of the N.D.P.S. Act, wherein it is held as follows:

> "11. Coming to the sentence imposed by the learned trial Court, I find that after convicting the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act, the learned trial Court has observed that the appellant

had kept huge quantity of ganja even inside a secret place in Puja Ghar which he utilized for transaction and therefore, the Court was of the view that the appellant is not entitled to be leniently dealt with. It is further observed that dealing such huge quantity of ganja is an offence more heinous than the offence of homicide. With these reasons, the learned trial Court has imposed substantive sentence of R.I. for 15 years and also directed to the appellant to pay a fine of Rs.1,00,000/-, (rupees one lakh only), in default, to undergo further R.I. for six months.

Section 20(b)(ii)(C) of the N.D.P.S. Act prescribes, inter alia, that whoever, in contravention of any provision of the Act or any rule or order made or condition of license granted thereunder possesses cannabis which involves commercial quantity, he shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees. Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 32-B of the N.D.P.S. Act deals with factors to be taken into account for imposing higher than the minimum punishment which reads as follows:-

> "**32-B**. Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the Court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:-
>
> (a) the use or threat of use of violence or arms by the offender;
>
> (b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;
>
> (c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence; and
>
> (d) the fact that the offence is committed in an educational institution or social service facility or in their immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities;

> (e) the fact that the offender belongs to organized international or any other criminal group which is involved in the commission of the offence; and
> (f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."

On a bare reading of this section, it is apparent that ordinarily minimum term of imprisonment or fine has to be imposed where it has been so prescribed but if the case comes under any of the clauses i.e. (a), (b), (c), (d), (e) or (f) of section 32-B or any other factors as it may deem fit then the Court may award more punishment than the minimum. On going through the reasons assigned by the learned trial Court in the impugned judgment, it is clear that none of reasons falls within the category of the clauses (a), (b), (c), (d), (e) or (f). The reasons assigned were not sufficient enough to award more punishment than the minimum. It is clear that while imposing a substantive sentence of R.I. for fifteen years, the learned trial Court has not kept in view the provision under section 32-B of the N.D.P.S. Act which was inserted in the N.D.P.S. Act w.e.f. 02.10.2001. The occurrence in this case took place on 11.06.2002 and therefore, at the time of imposing sentence, it was the duty of the learned trial Court to take into account the provision under section 32-B of the N.D.P.S. Act. It is the well settled principle of law that substantive provision unless specifically provided for otherwise intended by the Parliament should be held to have a prospective operation. One of the facets of rule of law is also that all statutes should be presumed to have a prospective operation only."

In view of the provisions as enumerated under the clauses (a), (b), (c), (d), (e) and (f) of section 32-B of the N.D.P.S. Act and looking at the reasons given by the learned trial Court in imposing a sentence of rigorous imprisonment for twelve years, I am of the humble view that the learned Court has not at all kept such provision in mind and simply taking note of the gravity of the offence committed by the appellants has imposed the sentence and therefore, the punishment higher than the minimum punishment imposed by the learned trial Court cannot be sustained in the eye of law.

10. Adverting to the contentions raised regarding non-compliance of provision under section 42 of the N.D.P.S. Act, let me analyse the ratio of the decisions placed by the learned counsel for the appellants. In the case of

Karnail Singh (supra), a five-Judge Bench of the Hon"ble Supreme Court held as follows:-

> "11.....The material difference between the provisions of sections 42 and 43 of the N.D.P.S. Act is that section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, section 43 does not contain any such provision and as such while acting under section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.
>
> x x x x
>
> 17. In conclusion, what is to be noticed is ***Abdul Rashid*** did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did ***Sajan Abraham*** hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.
>
> (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally

precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period that is after the search, entry and seizure. The question is one of urgency and expediency.

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

In the case of **Rajender Singh** (supra), the Hon'ble Supreme Court held as follows:

"4. A reading of the above said provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith.

x x x x

5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced."

In the case of **Jag Raj Singh @ Hansa** (supra), it is held as follows:

"16. Explanation to Section 43 defines expression 'public place' which includes any public conveyance. The word 'public conveyance' as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers..."

x x x x

17.....In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

In the case of **Ramakrushna Sahu** (supra), it is held as follows:

"12.....The present is not a case where P.W.14 suddenly carried out search at a public place. P.W.14 himself stated that he had received the reliable information while he was at the police station and he has come up with a case of compliance of section 42 of the N.D.P.S. Act. There is no material that the offending vehicles come within public conveyance and when the search was conducted after recording information under section 42(1), therefore, even though the seizure was made in a public place during day time, in my humble view, compliance of the provisions of section 42 of the N.D.P.S. Act is necessary."

In the case of **Ghadua Muduli and another** (supra), this Court held as follows:

> "8.....The present is not a case where P.W.4 suddenly carried out search in the vehicle at a public place. P.W.4 himself stated that he received the reliable information regarding transportation of ganja in a Bolero vehicle and he has come up with a case of compliance of section 42 of the N.D.P.S. Act. There is no material that the offending vehicle comes within public conveyance and when search was conducted after recording information under section 42(1), therefore, even though the detention was made during night and seizure was made in a public place during day time, compliance of the provisions of section 42 of the N.D.P.S. Act is mandatory.
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> x x x x
>
> .....In a case of this nature where the prosecution is required to prove the compliance of the mandatory provision under section 42 of the N.D.P.S. Act, all the relevant documents which are connected with such compliance are required to be proved before the trial Court in accordance with law and similarly all the concerned witnesses should be examined in Court to prove the vital aspect. In absence of proof of the oral as well as documentary evidence relating to compliance of such provision, the prosecution case should be viewed with suspicion."

In the case of **Sumit Kumar Behera** (supra), this Court held as follows:

> "10.....Under section 42(1) of the N.D.P.S. Act, if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or

> authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. Section 42(2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall *send a copy thereof* to his immediate official superior within seventy two hours.
>
> x x x x
>
> .....The salutary provision has a very useful purpose. Not only the superior official is required to be aware about the receipt of the reliable information by the concerned officer and his grounds of belief beforehand but also by sending such documents to the superior official, it would check any kind of tampering by the concerned officer with the nature of information received and reduced to writing. It would also safeguard the interest of an accused against false implication."

In the case of **Abdul Rahman Fakir Mohd. Durani** (supra), a Single Judge of Bombay High Court has held as follows:-

> "10. When we consider Sections 42 and 43 together, it can be seen that the two sections have distinguished region of operation. Section 42 operates when the authorised officer has personal knowledge or prior information given by any person and taken down in writing. As against this Section 43 does not refer either to personal knowledge of the authorised officer or to any information given by any person and taken down in writing by him. Thus Section 43 comes into play when the authorised officer stumbles over objectionable articles or comes across the person indulging into an offence punishable under Chapter IV without prior knowledge or any information. To this extent, there is no region, where the two Sections can be said to have overlapping effect, that is there is no situation when section 42 can operate without personal belief or prior information nor there is any zone when Section 43 may come into play although there is prior knowledge of information."
>
> x x x x
>
> 13. Pursuant to discussion above the zones of operation of Section 42 and Section 43 can be crystallized as follows:

Section 42

(i) Belief on the basis of personal knowledge or information given by any person and taken down in writing.
(ii) Narcotic drug/psychotropic substance or document/other article informed to be kept or concealed in any building, conveyance or enclosed place (private as well as public).
(iii) Materials used in the manufacture thereof and any other article and any animal of conveyance liable to confiscation, document or other article furnishing evidence relating such drug or substance to an offence under Chapter IV, all these materials are such which were not part and parcel of the information received.
(iv) Any person reasonably believed to have committed offence under Chapter IV (irrespective whether his presence was/was not part of information received).

Section 43

(i) No previous information at all.
(ii) Narcotic drug/psychotropic substance, which can be believed to be related to offence under Chapter IV; any animal or conveyance or article liable to confiscation; any document or other article which can be believed to furnish evidence of an offence under Chapter IV; all found in public place or transit. (iii) Person about whom belief can be formed of having committed offence under Chapter IV or having narcotic drug/psychotropic substance in his possession (either found in public place or private place accessible to the public).

14. Considering the zones of operations of two sections as crystallized above, it can be seen that two sections considered together do not leave authorised officer powerless in any situation that can be contemplated but there can be seen zones regarding which the two sections overlap and such zones are as follows:-

> (i) Any building, conveyance or enclosed place may incorporate public building, public conveyance or public enclosed place. Although Section 43 specifically uses the word „in any public place or transit", in Section 42 there is no express indication excluding public building, conveyance or enclosed place. On the contrary public place contemplated under Section 43 is limited to hotels and shops, as far as buildings and enclosed places are concerned.
>
> (ii) All material used in the manufacture and any other article and any animal or conveyance liable for confiscation and document or

other articles which were not subject matter of information but found on the spot.

(iii) Any person on the spot whose presence was not reported in the information.

When there are overlapping zones in two sections, those cannot provide proper guide to determine whether Investigating Officer was required to comply with Section 42(2) of the N.D.P.S. Act, 1985. Whether there was prior information or not is the criteria about which there is no clash between Sections 42 and 43. Therefore, it is felt, prior information or no information should be the sole criteria to determine whether compliance of Section 42(2) of the N.D.P.S. Act, 1985 was imperative or not, isolated reading of Section 42(2) fully justifies such an interpretation. I am fortified in expressing such a view by the decision of the Supreme Court in Mohinder Kumar's case reported in 1995 CriLJ 2074, which lays down that from the stage he (Investigating Officer) had reason to believe that accused persons were in custody of narcotic drugs, he was under an obligation to proceed further in the matter, in accordance with the provisions of N.D.P.S. Act."

11. Coming to the case on hand, in the first information report, it is mentioned that a Station Diary entry vide S.D.E. No.513 dated 23.06.2011 was made on receipt of information regarding transportation of ganja by a private vehicle bearing Regd. No. KL-07-AA 2097. P.W.4, the informant while deposing in Court has stated in his examination in-chief that on 23.06.2011 he was working as S.I. of Police in Parlakhemundi police station and on that day afternoon, the then I.I.C. of Parlakhemundi T.K. Padhi (P.W.10) got reliable information that huge quantity of ganja was being illegally transported in a car bearing registration no.KL-07-AA-2097 through Parlakhemundi and directed him as well as S.I. of Police D.L. Behera (P.W.8), S.I. of Police P. Hembram and Havildar P. Mohapatra (P.W.11) to verify the information. He has not stated about making of any Station Diary entry by P.W.10 in the chief examination. However, in the cross-examination, P.W.4 has stated that they had specific information regarding transportation of ganja and P.W.10 had received the information and then he directed them to go to the place and that he had not reduced the information into writing. He further stated in the cross-examination that he had noted the grounds of belief in S.D. Entry No.513 dated 23.06.2011 but no copy of the

said Station Diary Entry is available on record. He has further stated that he noted in S.D. Entry No.513 about the previous information regarding the transportation and the Investigating Officer had seized the said S.D. Entry. He further stated that P.W.10 received prior information at 3.30 p.m. and told him about the information five minutes later.

P.W.10, the I.I.C. of Parlakhemundi police station, who is also the Investigating Officer has stated that prior to registration of the F.I.R., he received a reliable information with regard to transportation of the contraband ganja in a vehicle, which was coming from R. Udayagiri side and hence, he entered the fact in Station Diary Entry No.513 dated 23.06.2011 and asked P.W.4 and others to verify the matter vide command certificate No.364743 dated 23.06.2011. In the cross-examination, P.W.10 has stated that on 23.06.2011 at 3.30 p.m., he received the reliable information about transportation of ganja and he admits that the copy of the Station Diary entry is not available on record.

The documents seized from the vehicle bearing registration no.KL-07-AA-2097 like R.C. Book (Ext.12), tax receipt (Ext.14) and the insurance certificate (Ext.15) clearly revealed that it is a private vehicle. In the F.I.R., it is also mentioned that the illegal transportation was being made by a private vehicle. In the charge framed against the appellants, it is also mentioned that they were transporting ganja in a private vehicle. There is absolutely no material that after the reliable information and ground of belief were taken down in writing in the form of the Station Diary entry, the copy of the same was ever sent to the immediate official superior much less within a period of seventy two hours as required under sub-section (2) of section 42 of the N.D.P.S. Act. Not a single witness has stated in that respect. Neither the copy of the Station Diary entry was proved during trial nor there is any proof regarding communication of the copy of information taken down in writing to the superior officer.

As per law laid down by the Hon'ble Supreme Court and this Court, it is very clear that even if the seizure has been made in a public place during day time, since it is a private vehicle and earlier information regarding illegal transportation of ganja was received in the police station and it is stated that a Station Diary entry was also made in that connection, the total non-compliance of section 42(2) of the N.D.P.S. Act is impermissible and the same would vitiate the trial. The learned trial Court has committed error in

holding compliance of such provision. Thus, in the absence of any material to show compliance of the mandatory provision, the impugned judgment and order of conviction of the appellants is not sustainable in the eye of law.

12. Accordingly, both the appeals are allowed. The impugned judgment and order dated 19.09.2014 of the learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No.215 of 2011/T.R. No.49 of 2011 is hereby set aside and the appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act.

It is submitted by the learned counsel for the appellants that the appellants are in judicial custody in connection with this case since 23.06.2011 and they were never released on bail either during trial or during pendency of these appeals. Thus, the appellants have undergone substantive sentence more than ten years and two months. The appellants be set at liberty forthwith, if their detention are not required in any other cases.

Trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2021 (III) ILR-CUT-369

S.K. SAHOO, J.

JCRLA NO. 49 OF 2011, CRLA NO. 528 OF 2012
AND CRLA NO. 392 OF 2013

PANIA GADA .....Appellant

.V.

STATE OF ODISHA .....Respondent

BHUTULU GOCHHAYAT & ORS -VS- STATE OF ODISHA .....(IN CRLA NO. 528/2012)
KANHEI NAIK @CHIPA -VS- STATE OF ODISHA .....(IN CRLA NO. 392/2013)

CRIMINAL TRIAL – Offences U/ss. 458, 395 of Indian Penal Code r/w Section 25 of the Arms Act – Test of Identification Parade – Ordinarily, identification of an accused for the first time in Court by a witness should not be relied upon – If a witness identifies the accused on Court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence – Appeal allowed.

Case Laws Relied on and Referred to :-

1. A.I.R. 1981 S.C. 1392 :Wakil Singh & Ors -Vrs.- State of Bihar
2. A.I.R. 2002 S.C. 3325 : Dana Yadav @ Dahu & Ors-Vrs.- State of Bihar

For Appellant : Mr. Jagannath Gochhayat, Amicus Curiae (in all the appeal)

For Respondent : Mr. A.K. Beura, A.S.C.

JUDGMENT Date of Hearing and Judgment : 28.10.2021

S.K. SAHOO, J.

The appellants Pania Gada in JCRLA No.49 of 2011, Bhutulu Gochhayat, Aswini Ghadei and Dhania Sahu in CRLA No.528 of 2012 and Kanhei Naik @ Chipa in CRLA No.392 of 2013 faced trial in the Court of learned Assistant Sessions Judge, Sambalpur in S.T. Case No.177/116 of 2005 for commission of offences punishable under sections 458 and 395 of the Indian Penal Code read with section 25 of the Arms Act.

Learned trial Court passed the impugned judgment and order dated 20.07.2007 acquitting the appellants of the charge under section 25 of the Arms Act but convicted them under sections 458 and 395 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for a period of five years under section 458 of the Indian Penal Code and rigorous imprisonment for a period of ten years under section 395 of the Indian Penal Code and the sentences were directed to run concurrently.

2. The prosecution case, as per the first information report (Ext.1) lodged by the informant Krushna Chandra Seth (P.W.9) before the Inspector in-Charge of Dhama police station on 24.09.2004, is that during the intervening night of 23/24.09.2004 at about 2.45 a.m. some unknown persons entered inside his house and committed robbery. His mother, younger brother Radheshyam Seth (P.W.4) and others were present in the house at the time of commission of robbery. It is stated that the culprits used ‘bhujali’ and pistol while committing the crime and they took away gold and silver ornaments and cash. In the first information report, the informant specifically mentioned that four persons committed the crime and he has given their description in the first information report.

On the basis of such first information report, Dhama P.S. Case No.88 dated 24.09.2004 was registered under sections 458 and 395 of the Indian

Penal Code against the unknown persons. P.W.16 Monaranjan Pradhan, Officer in-Charge of Dhama Police Station after registration of the case, took up investigation. During course of investigation, he examined the informant and other witnesses, visited the spot, prepared spot map Ext.18 on 07.10.2004 and arrested three accused persons, namely, Subharanjan Das, Prabin Sen and Jayalal Behera and seized some cash and toy pistols, 'bhujali' from their possession and forwarded them to Court on 08.10.2004. These five appellants were arrested in connection with Jujumura P.S. Case No.81 of 2004 and some articles were also seized from their possession. The appellants were taken on remand in this case on 10.10.2004. On the prayer of the Investigating Officer (P.W.16), P.W.17, J.M.F.C., Sambalpur conducted the test identification parade of the suspects inside the Circle Jail, Samblapur on 14.10.2004 in which the informant (P.W.9) participated as an identifying witness and he identified all the five appellants. The other accused persons, who were earlier arrested and forwarded to Court, were not placed in the test identification parade on that day and it appears that the case against them has been splitted up. P.W.16 handed over the charge of investigation to Circle Inspector of Police, Subash Chandra Sahu (P.W.15), who on completion of investigation submitted charge sheet against the appellants as well as other co-accused persons.

3. During course of trial, the prosecution examined as many as seventeen witnesses.

P.W.1 Haripriya Seth is the daughter of the informant, who identified the appellant Babulu Gada @ Pania Gada in Court to have entered inside their house. She stated that two other accused persons to whom she could not identify demanded key of the almirah kept in the house at the point of knife and out of fear, her mother handed over the key of the almirah to them and they took away the gold ornaments from the almirah.

P.W.2 Rudrani Seth is the wife of the younger brother of the informant and she stated that she identified the appellants Bhutulu Gochhayat, Dhania Sahu and Ashok Ghadei in Court to have entered into her house and demanded the key of the almirah from her at the point of guns and knife and out of fear, she handed over the keys of the almirah and they took away the gold ornaments and cash of Rs.2,000/- from the almirah.

P.W.3 Kamala Seth, who is the wife of the informant stated that all the accused persons entered into their house and at the point of knives and guns demanded the keys of the almirah and she asked her husband to part with the keys to them and thereafter, the accused persons took gold and silver ornaments and cash of Rs.6,000/- from the almirah.

P.W.4 Radheshyam Seth, who is younger brother of the informant reiterated the same version as that of his wife P.W.2.

P.W.5 Anurudha Samantray was a tenant in the house of the informant and stated that some miscreants entered into the house of the informant and looted away household properties.

P.W.6 Santanu Seth and P.W.7 Sanatan Seth, who are the sons of the informant stated about some unknown persons looting away the properties from their house.

P.W.8 Chhabila Seth is a co-villager of the informant and he did not support the prosecution case.

P.W.9 Krushna Chandra Seth is the informant in the case, who supported the prosecution case. He is an identifying witness who identified the appellants in the test identification parade.

P.W.10 Giri Gobardhan Mangual, P.W.11 Bidyadhar Rana, P.W.12 Dutia Behera, P.W.13 Pramod Seth, P.W.14 Aswini Kumar Jhankar are the witnesses to the seizure but they did not support the prosecution case.

P.W.15 Subash Chandra Sahu is the Circle Inspector of Police, Sambalpur Sadar, who took over the charge of investigation from P.W.16 and submitted charge sheet.

P.W.16 Manoranjan Pradhan, the Officer in-charge of Dhama police station was the initial investigating officer of the case.

P.W.17 Sitikantha Samal was the J.M.F.C., Sambalpur, who conducted the test identification parade in respect of the appellants.

No witness was examined on behalf of the defence.

The prosecution exhibited eighteen numbers of documents. Ext.1 is the F.I.R., Ext.2 is the test identification parade report, Ext.3 is the Zimanama, Exts.4, 5, 6, 7, 8, 9, 10 and 12 are the seizure lists, Ext. 11 is the

confessional statement of the appellant Pania Gada, Ext.13 is the seizure list basing on which the articles were seized at the instance of the appellant Kanehi Naik @ Chipa, Ext.14 is the seizure list basing on which the articles were seized at the instance of the appellant Pania Gada, Ext.15 is the seizure list basing on which the articles were seized at the instance of the appellant Bhutulu Gochhayat, Exts.16 and 17 are the seizure memos and Ext.18 is the spot map.

4. The learned trial Court on analyzing the oral as well as documentary evidence on record, came to hold that the appellants committed dacoity in the relevant night by entering into the house of the informant (P.W.9), however, it was held that there is no cogent and credible evidence with regard to any unlawful possession of fire arms, such as, pistol by the accused persons contravening the provision under section 7 of the Arms Act and accordingly, it was held that the charge under section 25 of the Arms Act has not been established against the appellants. Learned trial Court, however, found that prosecution has successfully proved its case under sections 458 and 395 of the Indian Penal Code against all the appellants beyond all reasonable doubt.

5. When the matter was called, since the learned counsel for appellants, who filed power, were not present, Mr. Jagannath Gochhayat, learned counsel was engaged as Amicus Curiae and he was handed over the paper book and given time to prepare the case. After going through the same, he placed the impugned judgment and the evidence of the witnesses. Learned Amicus Curiae submitted that in the first information report, it is specifically mentioned that four persons participated in the crime and therefore, the case was registered under section 392 of the Indian Penal Code and thus, the case of the prosecution that it is a case of dacoity, should not be accepted. It is his further contention that even though some articles were seized from the possession of the appellants but admittedly neither any test identification parade in respect of such articles were conducted nor those articles were produced in Court for the purpose of identification and for marking those as material objects, in absence of which no importance can be attached to the seizure of the articles from the possession of the appellants and it cannot be said that whatever were seized from the possession of the appellant were the stolen articles. It is further contented that it is a case of identification by a single witness i.e. the informant (P.W.9) and there is absolutely no material on record as to how the appellants were kept after their arrest and produced

before the Court and therefore, the possibility of the informant (P.W.9) noticing them prior to the test identification parade after arrest at the time of production in Court cannot be ruled out. It is further submitted that during the test identification parade, the U.T.Ps. who were mixed up with the suspects were wearing different colour dresses and P.W.9 did not disclose before the Magistrate conducting test identification parade regarding details of specific part played by each of the suspects during the commission of the crime. It is submitted that though some other inmates of the house being examined in the Court identified some of the appellants in Court, but in absence of their participation in the test identification parade, no sanctity can be attached to their identification particularly when they were examined more than two years after the alleged occurrence. It is further contended that it is a case of single identification and in absence of any corroborative evidence or any other attending circumstances, it is a fit case where the benefit of doubt should be extended in favour of the appellants.

6. Mr. A.K. Beura, learned Addl. Standing Counsel, on the other hand, supported the impugned judgment and submitted that nothing has been brought out by way of cross examination of P.W.9 to doubt his veracity and therefore, in view of the evidence of P.W.9 coupled with the test identification parade conducted by the Magistrate (P.W.17), it cannot be said that the learned trial Court has committed any illegality in convicting the appellants and therefore, the appeals should be dismissed.

7. It appears from the evidence of P.W.1 Haripriya Seth, who is the daughter of the informant that she identified the appellant Babulu Gada @ Pania Gada in Court during trial. She however stated that no test identification parade has been conducted in respect of the accused persons, which is factually incorrect. Similarly, P.W.2 Rudrani Seth has stated that the informant is the elder brother of her husband and she identified the appellants Bhutulu Gochhayat, Dhania Sahu and Ashwini Ghadei in Court during her evidence. Since P.W.1 and P.W.2 are the inmates of the house, no explanation has been offered by the prosecution as to why steps were not been taken by the prosecuting agency to make them as identifying witnesses in the test identification parade and therefore, it is very difficult to accept their evidence of identification in Court for the first time without being previously tested in the test identification parade, particularly when they were examined more than two years after the occurrence.

8. Coming to the evidence of the informant (PW.9), who is the star witness on behalf of the prosecution, he stated that five accused persons being armed with pistol and bhujali committed the crime. Though he has stated that three accused persons entered inside his house and other two persons were standing outside the door of his house, but he admitted that he did not mention in the F.I.R. in that respect rather in the F.I.R., he has stated that four persons committed the crime. In the test identification parade, no doubt he identified all the appellants, which was held in the Circle Jail, Sambalpur on 14.10.2004, but the Magistrate (P.W.17), who conducted the test identification parade has stated that the U.T.Ps. were wearing different colour dresses and P.W.9 did not state before him the details of the parts played by the suspects during the commission of the crime. Though in this case, the appellants were taken on remand after being arrested in Jujumura P.S.Case No.81 of 2004, but there is nothing on record as to whether they were kept under face covered so as not to expose their identity to others either during transit to the Court or at the time of production before the Magistrate. It was the duty of the prosecution to bring on record that the appellants were kept under covers at the time of production in Court after their arrest to rule out the possibility of being noticed by others particularly, the identifying witness (P.W.9).

In the case of **Wakil Singh and others -Vrs.- State of Bihar reported in A.I.R. 1981 S.C. 1392**, it has been held as follows :

> "2. In the instant case, we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. For these reasons, therefore, the trial court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial court. The High Court, however has chosen to rely on the evidence of a single witness, completely overlooking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade

> about three months after the dacoity and in view of such a long lapse of time, it is not possible for any human being to remember the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances, unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness.

In case of **Dana Yadav @ Dahu and others -Vrs.- State of Bihar reported in A.I.R. 2002 Supreme Court 3325**, it is held as follows:-

> "6……..Ordinarily, identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence".

9. In my humble view, the learned trial Court should not have placed any reliance on the evidence relating to the identification of some of the appellants by P.W.1 and P.W.2 as the same was not tested earlier by conducting T.I. parade by making them identifying witnesses. When the informant (P.W.9) has failed to state about the specific role played by the appellants at the time of commission of the crime before the Magistrate at the time of holding the test identification parade, when the U.T.Ps. who were mixed up with the suspects were wearing different colour dresses and there is absence of any evidence to rule out the possibility of P.W.9 noticing the appellants after their arrest prior to the holding of test identification parade and when the prosecution has not offered any explanation as to why the other inmates of the house did not take part in the test identification parade and when the articles seized from the possession of the appellants were not put to test identification parade nor produced in Court, it is very difficult to accept that the prosecution has successfully established the charges under sections

458 and 395 of the Indian Penal Code against the appellants basing on the single identification of P.W.9 both in T.I. Parade as well as in Court.

Accordingly, the appeal is allowed. The impugned judgment and order of conviction of the appellants under sections 458 and 395 of the Indian Penal Code is hereby set aside and they are acquitted of all the charges. Since all the appellants are on bail, the bail bonds furnished by them before the learned trial Court stand cancelled.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to the learned Amicus Curiae for rendering his valuable help and assistance in deciding these oldest pending appeals. The hearing fees is assessed to Rs.7,500/- (rupees seven thousand five hundred) in toto which would be paid to the learned Amicus Curiae immediately.

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2021 (III) ILR-CUT-377

K.R. MOHAPATRA, J.

O.J.C. NO. 10903 OF 1999

HAJARU MAHAKUR (SINCE DEAD, HIS LEGAL HEIRS TAPASA MAHAKUR & ORS.) .....Petitioners

.V.

PITAMBAR PRADHAN & ORS. .....Opp. Parties

ODISHA CONSOLIDATION OF HOLDING AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Three objection case was filed U/s. 9(3) of the Act – The Consolidation Officer passed one common order – One Appeal filed against the common order before the Appellate Authority – No objection with regard to maintainability of one appeal – Whether one writ petition is maintainable against the one order of Appellate Authority – Held, Yes. (Para 9)

Case Laws Relied on and Referred to :-

1. 1991 (56) ELT 350 : Ekantika Copiers (P) Ltd. -V- Collector of Central Excise.
2. (1979) 118 ITR 412 : Commissioner of I.T, West Bengal -V- Rupa Traders.
3. AIR 1954 Raj. 17 : Bhajandas -V- Nanuram.
4. AIR 2011 SC 644 : Ghisalal -V- Dhapubai (dead) by LRs.& Ors.
5. 1994 (II) OLR 214 : Nityananda Panigrahi & Ors. -V- Commissioner of Consolidation, Orissa, Sambalpur & Ors.

For Petitioners : Mr. Budhiram Das
For Opp.Parties : Mr. U.C. Panda (O.P. No.1)
Mr. Dillip Ku. Mishra, A.G.A (O.P. Nos.2 to 4)

J U D G M E N T Date of Judgment : 01.09.2021

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioners in this writ petition seek to assail the order dated 15th December, 1998 (Annexure-6) passed by the Joint Commissioner, Settlement and Consolidation, Sambalpur-Opposite Party No.4 in Revision Case No.3 of 1996 filed by the Opposite Party No.1 under Section 36 of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short 'the Consolidation Act'). During pendency of the writ petition, said Hajaru Mahakur died and the Petitioners as his legal heirs are substituted in his place.

3. Briefly stated the case of the Petitioners in the writ petition is that one Manglu Mahakur was the recorded tenant in respect of L.R. Holding No.13 to an extent of Ac.7.527 decimals and L.R. Holding No.14 to an extent of Ac.1.772 decimals in total Ac.9.299 decimals of Mouza-Saharapali in the undivided district of Sambalpur (for short 'the case land'). Said Manglu Mahakur and his wife Pira executed a registered deed of acknowledgement on 5th February, 1963 under Annexure-1 acknowledging adoption of Hajaru Mahakur made by them earlier. Subsequently, said Manglu Mahakur cancelled the said deed of adoption vide Registered Deed No.60 dated 19th February, 1982 under Annexure-2. After cancellation of deed of adoption, said Mangulu along with his wife Pira executed a deed of adoption in favour of Opposite Party No.1, namely, Pitambar Pradhan, on 12th October, 1982. While the matter the stood thus, the consolidation operation started in the village. Since Manglu Mahakud was dead by then, the land register under

Section 6 of the Consolidation Act was prepared in the name of Pira and Pitambar Pradhan. Thus, predecessor of the Petitioners, namely, Hajaru Mahakur filed two objections in Objection Case Nos.122/27 and 123/28 respectively under Section 9(3) of the Consolidation Act to record the case land exclusively in his name on the basis of deed of acknowledgement of adoption (Annexure-1). Likewise, Opposite Party No.1-Pitambar Pradhan also filed one objection in Objection Case No. 64/18 to record the case land in his name exclusively in view of a previous partition between Pira and himself. The Consolidation Officer vide his order dated 19th July, 1995 while allowing the Objection Case No. 64/18 filed by the Opposite Party No.1 directing to record the case land exclusively in his name rejected both the Objection Case Nos. 122/27 and 123/28 filed by Hajaru. Assailing the same, Hajaru filed Consolidation Appeal No. 53 of 1995. The Deputy Director, Consolidation of Holdings, Bolangir vide his order dated 15th November, 1995 (Annexure-4) allowed the consolidation appeal filed by Hajaru accepting his adoption by Manglu Mahakur and his wife Pira. Thus, the Opposite Party No.1 being aggrieved filed Revision Case No.3 of 1996, which came to be disposed of on 15th December, 1998 allowing the said revision holding that Hajaru failed to establish his adoption by proving giving and taking ceremony. Further, the deed of acknowledgement of adoption was subsequently cancelled by Manglu Mahakur and a deed of adoption in favour of Opposite Party No.1 was executed. Thus, the appellate forum committed error in holding Hajaru to be the adopted son of Mangulu. Assailing the said order, this writ petition has been filed.

4. It is submitted by Mr. Das, learned counsel for the Petitioners that three objection cases being disposed of by one order, a single appeal is maintainable. In support of his case, he relied upon the case law in the case of ***Ekantika Copiers (P) Ltd. -v- Collector of Central Excise***, reported in 1991 (56) ELT 350 and ***Commissioner of Income Tax, West Bengal -v- Rupa Traders,*** reported in (1979) 118 ITR 412. It is his contention that when objection cases filed by Hajaru and Opposite Party No.1 were tagged together and a common order was passed, the substance as well as the form of the order being one can be assailed in a solitary appeal. Further, the said issue was neither raised before the appellate court nor before the revisional court by the Opposite Party No.1. Since the Opposite Party No.1 had filed one revision in Revision Case No.3 of 1996, this writ petition is maintainable. It is his submission that since Annexure-1 was executed on 4th February, 1963

acknowledging the adoption of Hajaru and was registered on the next day, i.e. on 5th February, 1963, the same does not need any formal proof as the adoption was an ancient one. He further submits that Section 16 of the Hindu Adoptions and Maintenance Act, 1956 (for short 'the Act') also takes within its ambit the deed of acknowledgement of adoption. That being a registered one, there is a presumption of valid adoption unless it is disproved. Thus, strict proof of adoption of Hajaru by Mangulu and Pira is not required under law as there is recital of giving and taking ceremony in the deed of acknowledgement itself. In support of his case, he relied upon the decision in the case of ***Bhajandas –v- Nanuram,*** reported in AIR 1954 Raj. 17, wherein it has been held at paragraph-4 as follows:

> *"4. The next point, that is urged, is that in view of what we have said in our judgment, dated 18th November, 1952 [Bhajandas v. Nanuram (1953 RLW.92).] the suit may be remanded for giving an opportunity to the appellant to prove that there was no giving and taking in adoption. In this connection, we may refer to a part of our previous judgment which runs as follows:—*
>
> > *"In our opinion, in Marwar, where the deed itself mentions that the boy had been given and received in adoption and nothing is shown whereby it may be inferred that the physical act could not take place as mentioned in the deed, a presumption does arise that the recitals in the deed have been truly made; since when a person goes to the length of sending for a scribe and executing the document and getting it registered, there is nothing to prevent him from performing the actual physical act of giving and taking. But if any party to the litigation can prove circumstances which would show that the physical act of giving and taking could not have been performed as recited in the deed of adoption, then it would be for the party setting up the adoption to prove by positive evidence that the physical act of giving and taking had taken place. In other words, it would be for the party challenging the adoption evidenced by a registered deed to plead specifically that the physical act of giving and taking had not been performed and also to indicate the particular circumstances which would negative the presumption as to recitals being correct and thereafter to lead evidence which would show that the physical act could not have taken place as mentioned in the deed, and then the party relying on adoption is to prove by positive evidence that the physical act of giving and taking did take place."*

In that view of the matter, he prays for setting aside the impugned order under Annexure-6 and to direct the Consolidation Officer to record the case land in the name of the Petitioners exclusively on the basis of the deed of acknowledgement of adoption under Annexure-1.

5. Mr. Panda, learned counsel for Opposite Party No.1 vehemently objected to the same. It is his submission that since the deed of acknowledgement of adoption under Annexure-1 was not signed by the natural parents, the same cannot attract the presumption under Section 16 of the Act. In support of his case, he relied upon the decision of the Hon'ble Supreme Court in the case of ***Ghisalal –v- Dhapubai (dead) by Lrs. and others,*** reported in AIR 2011 SC 644. He further contended that deed of acknowledgement of adoption under Annexure-1 is also hit by Section 10(1)(iv) of the Act as the age of Hajaru was more than 15 years at the time of execution of such deed. He further submits that the question of voidability of the deed can only be adjudicated by a competent civil court and not by the Consolidation Authority having limited jurisdiction. On the other hand, the registered deed of adoption in favour of Opposite Party No.1 is a valid one and the adoption is presumed to be valid in view of Section 16 of the Act. The Consolidation Officer as well as revisional court taking into consideration these material aspects passed the impugned order. As such, the same needs no interference.

6. Mr. Mishra, learned Additional Government Advocate for the State also reiterated the submission of Mr. Panda, learned counsel for the Opposite Party No.1 and contended that since Hajaru has not proved the factum of giving and taking ceremony, his adoption is a questionable one and can only be adjudicated by the competent civil court. He further submits that the plea of ancient adoption taken by Mr. Das, learned counsel for the Petitioners is not sustainable in the eyes of law as the deed of acknowledgement of adoption does not by itself prove the factum of adoption, more particularly when the same had already been cancelled by a registered deed of cancellation under Annexure-2. He, therefore, prays for dismissal of the writ petition.

7. Taking into consideration the rival contentions of learned counsel for the parties and on perusal of record, this Court finds that admittedly there is a registered deed under Annexure-1 executed on 4th February, 1963, which was registered on 5th February, 1963. Although Mr. Das, learned counsel for the

Petitioners describes it to be a 'deed of acknowledgement of adoption', but the deed itself reveals that it is a 'deed of adoption'. Further, the date of adoption is conveniently withheld in the said deed. It, however, reveals from the recitals of the said deed under Annexure-1 that it was executed in acknowledgement of earlier adoption. The said deed under Annexure-1 came to be cancelled by executing registered deed on 19th February, 1982 (Annexure-2). Admittedly, the age of Hajaru was more than 15 years at the time of execution of the deed under Annexure-1. Even if the deed under Annexure-1 is assumed to be a deed of acknowledgement of adoption, it is incumbent on the part of the Petitioners to prove giving and taking ceremony strictly in accordance with law to establish that the father of the Petitioners was validly adopted by Manglu Mahakur and his wife Pira. Recital of observance of giving and taking ceremony cannot waive its formal proof. It further appears that for some reasons or other, Manglu Mahakur cancelled the registered deed under Annexure-1 by executing another registered deed on 19th February, 1982. Thus, the adoption of Hajaru is highly questionable. The case law in ***Bhajandas*** (supra) has no application to the case at hand, because it relates to a deed of adoption and not acknowledgement of adoption. On the other hand, the registered deed of adoption in respect of the Opposite Party No.1 is a registered one. Thus, in view of Section 16 of the Act, a presumption of valid adoption is attached to it unless it is disproved in accordance with law.

8. This Court in the case of ***Nityananda Panigrahi and others –v- Commissioner of Consolidation, Orissa, Sambalpur and others,*** reported in 1994 (II) OLR 214 held at paragraphs-5 and 6 as follows:

> *"5. A similar question came up for consideration before a Bench of this Court in the case of Titagarh Paper Mills Co. Ltd. v. State of Orissa (A.I.R. 1975 Orissa 90) and this Court held that a single writ petition seeking to quash two different orders passed in two different proceedings cannot be maintained. In coming to the aforesaid conclusion the Bench of this Court had relied upon the earlier decision of the Patna High Court in A.I.R. 1958 Patna 653 and Allahabad High Court in A.I.R. 1965 Allahabad 517.*
>
> *6. In the Patna case (A.I.R. 1958 Patna 653 - Biswaranjan Bose v. Honorary Secy., Ram Krishna Mission, Vivekanand Society, Jamshedpur) their Lordships had observed:—*
>
> *"Separate applications must be made for issue of separate writs to quash separate orders; otherwise, on one application, if it succeeds, several separate writs will have to be issued and that will lead to an absurd position."*

9. True it is that Hajaru had filed one appeal before the Deputy Director, Consolidation of Holdings, Bolangir against the common order passed in three objection cases, i.e. two filed by him and one by Opposite Party No.1. But, no objection with regard to maintainability of one appeal against a common order passed in three objection cases was raised by the Opposite Party No.1 before the Deputy Director, Consolidation of Holdings, Bolangir. Assailing the order passed in Consolidation Appeal No.53 of 1995, the Opposite Party No.1 filed Revision Case No.3 of 1996 under Section 36 of the Consolidation Act. Hence, the factual position in this case is slightly different from the aforesaid case law. In view of the above, I am of the considered opinion that this writ petition is maintainable.

10. But, the Petitioners having not proved the giving and taking ceremony of adoption in accordance with law, I am constrained to hold that the registered deed under Annexure-1 is questionable. Again the validity of the registered deed of cancellation can only be gone into by the competent civil court and till it is held to be void, it cannot be ignored. On the other hand, the registered deed of adoption in favour of the Opposite Party No.1 attaches a presumption of valid adoption in view of Section 16 of the Act as the same has not yet been disproved in accordance with law.

11. Accordingly, I find no infirmity in the impugned order under Annexure-6. Thus, the writ petition being devoid of any merit stands dismissed.

12. L.C.R. be sent back to the concerned court immediately.

13. The interim order dated 15th October, 1999 passed in Misc. Case No. 10027 of 1999 stands vacated.

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2021 (III) ILR-CUT-383

S.K. PANIGRAHI, J.

CRLMC NO. 464 OF 2021

RAJESH AMBWANI ..... Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent powers of High Court – Offences alleged are under sections 419, 420, 506 and 34 of the Indian Penal Code, 1860 – Categories of cases where inherent power can and ought to be exercised to quash the proceedings, can be broadly compartmentalized into the following :

> **(i) to make such orders as may be necessary to give effect to any order under this Code,**
> **(ii) to prevent abuse of the process of any Court or the law,**
> **(iii) to secure the ends of justice.**

(Para 12)

Case Laws Relied on and Referred to :-

1 . 1964 AC 1254 : Connelly v. Director of Public Prosecutions.
2. 1977 AC 1 : Director of Public Prosecutions v. Humphrys.
3. (1992) 4 SCC 305 : Janata Dal v. H.S. Chowdhary.
4. (2005) 13 SCC 540 : State of Orissa v. Saroj Kumar Sahoo.
5. (2011) 12 SCC 437 : Padal Venkata Rama Reddy v. Kovvuri Satyanarayana Reddy.
6. (2014) 15 SCC 221 : Teeja Devi v. State of Rajasthan.
7. (1992) 4 SCC 15 : Jayant Vitamins Ltd. v. Chaitanyakumar.
8. (1977) 4 SCC 451 : Kurukshetra University v. State of Haryana.
9. (2002) 1 SCC 234 : M.M.T.C. Ltd. v. Medchl Chemicals & Pharma (P) Ltd.
10. (2008) 16 SCC 763 : Eicher Tractor Ltd. v. Harihar Singh.
11. 1992 Supp (1) SCC 335 : State of Haryana v. Bhajan Lal.

For Petitioner : M/s. Saroj Ku. Padhy, A.K.Pattnaik, M.Bora & B.K.Pradhan

For Opp.Parties: Mr. A.K.Parija, Advocate General
Mr. J. Katikia, A.G.A
Mr. Sidharth Dave, Sr. Adv. alongwith M/s. Amit Pattnaik, S.P. Sarangi, D.K. Das, P.K. Dash, V. Mohapatra & A.Das.

JUDGMENT Date of Hearing : 17.08.2021 : Date of Judgment : 09.09.2021

S.K. PANIGRAHI, J.

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed with a prayer to quash the F.I.R. No.228 of 2020 of Chandrasekharpur Police Station, Bhubaneswar corresponding to C.T. No.2661 of 2020, pending before the learned SDJM, Bhubaneswar for the alleged commission of offences under Sections 419, 420, 506 and 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

2. The facts leading to the present case, bereft of superfluous details, are that the present petitioner and the complainant (Opposite Party No.2) were known to each other through some mutual acquaintances. The complainant avers that the present petitioner deliberately made false assurances and representations to the complainant by craftily inducing him to invest some amount of money for the purpose of purchasing a property in Bhubaneswar where the present petitioner claimed to be setting up a project in the name of his company "New ERA Projects Pvt. Ltd.". The complainant, accordingly falling prey to petitioner's inducement, paid the total sum of Rs.2,09,997/- by issuing cheques of Rs.1,18,997/- and Rs.91,000/- respectively favouring another firm of the petitioner by the name "Hedge Stack" at the behest of thepetitioner in the months of February and March 2018. Thereafter, the petitioner started ignoring the complainant's calls and kept falsely reassuring the complainant with respect to the proposed project in Bhubaneswar, Odisha. Subsequently, once the complainant discerned that the petitioner had never intended to undertake any project in Bhubaneswar, Odisha but an attempt was surreptitiously underway to alter his benign faith and defraud him. The complainant, sensing his observable behaviour of deceit, called for immediate refund of his money. The petitioner dilly-dallied for two years on some pretext or other evaded the complainant, which ultimately forced the hand of the complainant to lodge the present FIR. As the matter stands today, the investigation in the matter is not complete and no charge-sheet has yet been filed.

3. Learned counsel for the petitioner Mr. Saroj Kumar Padhy submitted that the Petitioner was known to the complainant through mutual acquaintances and he also used to tutor the complainant's daughter. When the complainant came to know that the petitioner provided general market consultancy for investments in stocks and securities, the complainant sought the petitioner's help in December, 2017 to lay his hands in such investment related knowledge.

4. The petitioner, further contends that his firm "Hedge Stack" then raised an invoice of Rs.1,18,997.10 on 19.01.2018 and Rs.91,000/- on 26.02.2018 in respect to the consultancy services provided to the complainant. It is submitted that it is the petitioner's case that when the complainant suffered some losses in the market around the end of the year of 2019, the complainant started blaming the petitioner and asked the petitioner

to make up for the losses and return the money lost. The counsel for the petitioner also earnestly contends that FIR is not maintainable as it prima facie fails to disclose any offence. Furthermore, the complainant has not shown any material or document showcasing that the petitioner had indeed entered into any deal with the complainant for providing land/house in Bhubaneswar. It is also urged that FIR narratives suffer from falsehood and none of the ingredients of any of the alleged Sections appease the F.I.R.

5. Per contra, Mr. Ashok Kumar Parija, learned Advocate General for the State vehemently opposed the submissions made by the learned counsel for the petitioner. It was submitted that the investigation has not yet been concluded and there is a *prima facie* case made out against the petitioner as the petitioner has misrepresented himself to be wearing different hats and masqueraded himself as a Professor, IIT at some point of time and pretended to be an estate developer at some other point in time. His misleading and deceptive conduct encompasses objectively creating a false impression, which he is not only to defraud innocent persons in order to lure them in investing in his property schemes. It is, therefore, a fittest case for non-interference by this Court under its inherent power as the investigation is at its nascent stage. It was also contended before this Court that the petitioner is a habitual offender having criminal antecedents and several F.I.Rs under similar provisions of the Indian Penal Code have been registered against him for similar offences in other jurisdictions as has been revealed during investigation necessitating a deeper scrutiny of the matter. In the world we live in where identity theft and financial crimes are rampant, it necessitates to be strictly dealt with. Under our present criminal law regime, it would be unfair to scuttle the trial at this stage before unearthing the truth.

6. Mr. Sidharth Dave, learned Senior Counsel for the complainant (Opposite Party No.2) supports the submissions put forth by the State. Mr. Dave, additionally, submitted that the petitioner has falsely represented himself to be an IIT Professor before this Court. The complainant has become the victim of a 'sophisticated' ruse employed by the Petitioner herein by creating a make-believe aura. When suspicion got flared up about his professional background as IIT Professor, while following the pursuit of truth, it was ascertained from an RTI Application dated 06.07.2021 from IIT, Delhi, the Public Information Officer of the Institute vide reply dated 26.07.2021 informed that *"No person in the name of "Rajesh Ambwani"*

exists or existed in records of the Institute". He, further, brought to this Court's notice that the reply received by the IO from IIT Delhi vide letter No.IITD/IES1/2021/328474 dated 15.06.2021 by the Joint Registrar (Estt.-I), Dr. Kalyan Kr. Bhattacharjee reads as follows *"This is with reference to your notice no. DR No- 1947/CSPPS dt. 08.06.2021 on the above cited subject. On inquiring from Establishment-I Section (dealing with Faculty matters), Establishment-II Section (dealing with Non-Faculty matters) and IRD Unit (dealing with research position) of the Institute, it has been found that no person in the name of "Rajesh Ambwani" exists or existed in their rolls."* These facts amply attest to the deception attempted by the petitioner. His masquerading image as Professor of IIT simply got peddled into the cheating pattern which has been beautifully replicated elsewhere but such fraudulent activities got exposed to the complainant by chance. This case deserves thorough probe and does not deserve to be quashed at this stage.

7. Heard the learned Counsel for the parties and perused the records. It is no longer *res integra* that the inherent powers of the High Court have to be exercised cautiously while quashing an FIR. For a long time, the Courts have been satisfied with broad tests based on "need" or the "justice of the case" to set such limits based on the facts and circumstances of the case.

8. It inheres in the spirit of our constitution that one of the major judicial obligations of the Constitutional courts to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. The same is founded on the legal maxim "*quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest"*. Succinctly put, whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect. In fact, it encapsulates another oft repeated expression, ex *debito justitiae* is inbuilt in such an exercise; the whole idea is to do real, complete and substantial justice for which it exists.

In the celebrated decision in ***Connelly v. Director of Public Prosecutions***[1] , Lord Reid at AC p. 1296 expressed his view that *"there must always be a residual discretion to prevent anything which savours of abuse of process"*, with such view all the members of the House of Lords broadly agreed but differed as to whether this entitled a Court to stay a lawful prosecution.

1. 1964 AC 1254

Similarly, Lord Salmon in ***Director of Public Prosecutions v. Humphrys***[2]: also stressed the importance of the inherent powers when he observed that: (AC p. 46 D)

> *"… It is only if the prosecution amounts to an abuse of process of court and is oppressive and vexatious that the Judge has the power to intervene."*

He further accentuated that the court's power to prevent such abuse is of great constitutional importance and should be jealously preserved.

9. This aforesaid principle has been delved into by the Hon'ble Supreme Court of India in ***Janata Dal v. H.S. Chowdhary***[3] where the Hon'ble Court has been pleased to as follows;

> *"131. Section 482 which corresponds to Section 561-A of the old Code and to Section 151 of the Civil Procedure Code proceeds on the same principle and deals with the inherent powers of the High Court. The rule of inherent powers has its source in the maxim "Quadolex aliquid alicui concedit, concedere videtur id sine quo ipsa, ess uon potest" which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist.*
>
> *132. The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles.*
>
> *133. The Judicial Committee in Emperor v. Khwaja Nazir Ahmad [AIR 1945 PC 18, 22] and (2) Lala Jairam Das v. Emperor [(1945) 47 Bom LR 634] has taken the view that Section 561-A of the old Code gave no new powers but only provided that those with the Court already inherently possessed should be preserved. This view holds the field till date.*
>
> *134. This Court in Dr Raghubir Sharan v. State of Bihar [(1964) 2 SCR 336] had an occasion to examine the extent of inherent power of the High Court and its jurisdiction when to be exercised. Mudholkar, J. speaking for himself and Raghubar Dayal, J. after referring to a series of decisions of the Privy Council and of the various High Courts held thus:*

2. 1977 AC 1 , **3.** (1992) 4 SCC 305

> *"… [E]very High Court as the highest court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice …. Being an extraordinary power it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers …."*
>
> *136. Thus, the inherent power under this section can be exercised by the High Court (1) to give effect to any order passed under the Code; or (2) to prevent abuse of the process of any Court; or (3) otherwise to secure the ends of justice."*

10. An apposite finding has been rendered in ***State of Orissa v. Saroj Kumar Sahoo***[4] wherein the Hon'ble Supreme Court has held that:

> *"8. Exercise of power under Section 482 CrPC in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of CrPC. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under CrPC, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. The courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest (when the law gives a person anything, it gives him that without which it cannot exist). While exercising the powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section, though wide, has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself."*

11. The nature of the power vested by Section 482 Cr.P.C. has also been examined in the case of ***Padal Venkata Rama Reddy v. Kovvuri Satyanarayana Reddy***[5], where the Hon'ble Supreme Court held that:

4. (2005) 13 SCC 540 **5.** (2011) 12 SCC 437

"11. Though the High Court has inherent power and its scope is very wide, it is a rule of practice that it will only be exercised in exceptional cases. Section 482 is a sort of reminder to the High Courts that they are not merely courts of law, but also courts of justice and possess inherent powers to remove injustice. The inherent power of the High Court is an inalienable attribute of the position it holds with respect to the courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. The jurisdiction under Section 482 is discretionary, therefore the High Court may refuse to exercise the discretion if a party has not approached it with clean hands.

12. In a proceeding under Section 482, the High Court will not enter into any finding of facts, particularly, when the matter has been concluded by concurrent finding of facts of the two courts below. Inherent powers under Section 482 include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any court subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case. The Court can always take note of any miscarriage of justice and prevent the same by exercising its powers under Section 482 of the Code. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly, carefully and with caution."

12. It, therefore, flows from the aforesaid discussion that the categories of cases where inherent power can and ought to be exercised to quash the proceedings which can be broadly compartmentalized into the following;

i. to make such orders as may be necessary to give effect to any order under this Code,

ii. to prevent abuse of the process of any Court or the law

iii. to secure the ends of justice.

13. When tasked with the vexed question of exercising the inherent power ordained under Section 482 Cr.P.C. at the stage of preliminary investigation, the Hon'ble Supreme in ***Teeja Devi v. State of Rajasthan***[6], observed that;

6. (2014) 15 SCC 221

> *"5. It has been rightly submitted by the learned counsel for the appellant that ordinarily power under Section 482 CrPC should not be used to quash an FIR because that amounts to interfering with the statutory power of the police to investigate a cognizable offence in accordance with the provisions of CrPC. As per law settled by a catena of judgments, if the allegations made in the FIR prima facie disclose a cognizable offence, interference with the investigation is not proper and it can be done only in the rarest of rare cases where the court is satisfied that the prosecution is malicious and vexatious.*
>
> *xxx xxx xxx*
>
> *9. We have no hesitation in holding that in the facts of the case, the High Court was not justified in interfering with the police investigation and quashing the FIR. This is not at all a rare case. Without a thorough investigation, it is not possible or proper to hold whether the allegations made by the complainant are true or not. Hence the investigation should have been allowed to continue so that on filing of the report under Section 173 CrPC the affected party could pursue its remedy against the report in accordance with law. Keeping in view the fact that the criminal case was at the stage of investigation by the police the High Court was not justified in holding that the investigation of the impugned FIR is totally unwarranted and that the same would amount to gross abuse of the process of the court."*

Furthermore, in ***Jayant Vitamins Ltd. v. Chaitanyakumar***[7], the Hon'ble Supreme Court has cautioned that:

> *"4. … As repeatedly pointed out by various decisions of this Court that the investigation into an offence is a statutory function of the police and the superintendence thereof is vested in the State Government and the court is not justified without any compelling and justifiable reason to interfere with the investigation."*

The Hon'ble Supreme Court in ***Kurukshetra University v. State of Haryana***[8] Chandrachud, J. (as he then was), while disapproving the quashing of a First Information Report at premature stage, has expressed its reservations in the following words:

> *"It surprises us in the extreme that the High Court thought that in the exercise of its inherent powers under Section 482 of the Code of Criminal Procedure, it could quash a first information report. The police had not even commenced investigation into the complaint filed by the Warden of the*

7. (1992) 4 SCC 15 **8.** (1977) 4 SCC 451

University and no proceeding at all was pending in any court in pursuance of the FIR. It ought to be realised that inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases."

14. In ***M.M.T.C. Ltd. v. Medchl Chemicals & Pharma (P) Ltd.***[9] the Hon'ble Apex Court has held that;

"The law is well settled that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

A similar view has echoed forth by the Hon'ble Supreme Court, again, in ***Eicher Tractor Ltd. v. Harihar Singh***[10], where it has held as follows;

"13.'… 8.…When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge.'

In the oft cited and relied upon the case of ***State of Haryana v. Bhajan Lal***[11], the Hon'ble Supreme Court while enunciating the categories of cases where the power ought to be exercised has expressed a word of caution in holding that;

"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."

15. Keeping the profusion of judicial authorities on the *lis* at hand, as discussed hereinabove, adverting to the facts of the present matter, the allegations levelled against the petitioner are those of fraud, cheating,

9. (2002) 1 SCC 234 **10**. (2008) 16 SCC 763 **11**. 1992 Supp (1) SCC 335

criminal intimidation and criminal act done in furtherance of a common intention. A bare perusal of the FIR showcases that there is an allegation of a false representation being made to the complainant. The complainant was induced to issuance of two cheques for the total amount of Rs.2,09,997/- at the petitioner's behest to a firm in which the present petitioner was a partner, when presented with the offer of owning a property in Bhubaneswar. Despite the petitioner's claim that the bills were raised by the firm for the financial services rendered by the petitioner, keeping in mind the submissions of the learned counsel for the State and the complainant renders the same questionable. Another aspect of the matter which weighs before this Court is the fact that the accused petitioner seems to have a chequered past involving similar offences. This Court also notes the impunity with which petitioner has allegedly cheated the complainant being fully cognizant of the fact that the complainant is a senior IPS officer. This Court is also surprised by the fact that the petitioner's sagacious attempt to substantiate subterfuge a senior police officer. The question as to whether the intention of the petitioner was dishonest or fraudulent from the inception of the arrangement can be determined only during trial. At this stage, it is not appropriate to enter into the factual matrix to adjudge the correctness of the allegations. An FIR is as the name suggests, is the first information received by the police with respect to the commission of an offence which sets the criminal law into motion. It cannot be held to a standard which necessitates that it contains every minute detail of the reason why an offence is alleged. The dominant reason as to why an investigation is at all required to be conducted if on the basis of the contents of the FIR, the matter to be quashed. This Court cannot lose sight of the fact that the petitioner has not approached this Court with clean hands and he has the audacity to misrepresent facts in the pleadings before this Court filed under solemn oath. This Court warns the Petitioner not to pull such antiques in future, lest severe consequences will follow.

16. The test at this point is to take the allegations of the complaint as they are, without adding or subtracting anything, if absolutely no offence was made out then only will this Court be justified in quashing the FIR in exercise of its powers under Section 482 of the Code of Criminal Procedure.

17. This Court does not believe that it is correct to adopt a hyper technical approach at this stage and such an endeavour may only be justified during trial. At any rate, it is too premature a stage for this Court to step in to stall

the investigation process especially on the flawed ground that the FIR does not palpably make out a *prima facie* case against the petitioner. Without a thorough investigation, it is not appropriate to hold whether the allegations made by the complainant are made out or not.

18. Resultantly, this case does not call for quashing of the F.I.R. under Section 482 Cr.PC at this stage and as a *sequitur* the present Application stands dismissed along with any pending applications. It is clarified that the trial court shall proceed with a fair trial uninfluenced by any of the observations made hereinabove.

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2021 (III) ILR-CUT-394

S.K. PANIGRAHI, J.

CRLMC NO. 1296 OF 2021

RASHMITA PATRA .....Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of the proceeding U/s. 6 of the OPID Act – FIR lodged against the petitioner under several offences of Penal Code as well as under Section 6 of the OPID Act – Petitioner challenge the proceeding under Section 6 of the Act – It was pleaded that, it was a simple sale transaction between the parties because registered sale deed already been executed in the consideration of price though the dispute with regard to ownership of the property – Merely petitioner being a Real Estate Developer, whether section 06 of the OPID Act shall be attracted ? – Held, No.

Case Laws Relied on and Referred to :-

1. 2020 SCC OnLine Ori 633 : Mahasweta Biswal v. State of Odisha.
2. (2012) 10 SCC 575 : M/s. New Horizon Sugar Mills v. Govt. of Pondicherry.
3. 2015 SCC OnLine Mad 10349 :Viswapriya [India] Limited v. Government of TamilNadu.
4. 2019 SCC OnLine Bom 1648 : 63 Moons Technologies Ltd. v. State of Maharashtra and Ors.
5. 2019SCC OnLine Bom1865 : Ashish Mahendrakar v. State of Maharashtra &Ors.

For Petitioner : Mr. Ashwini Ku. Das & S. Das.
For Opp.Parties: Mr. J.P. Patra, ASC (OPID)

JUDGMENT Date of Hearing : 02.09.2021 : Date of Judgment : 24.09.2021

S.K. PANIGRAHI, J.

1. In the present application, the petitioner seeks to challenge the criminal proceeding vide CT Case No.14/2018 and I.A. No.3/2019 in relation to EOW Bhubaneswar P.S. Case No.17/2018, pending before the court of the learned Presiding Officer, Designated Court, under the O.P.I.D. Act, Cuttack for the offences punishable under Sections 420/406/467/ 468/471/120-B of the I.P.C. read with Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011.

2. The succinct facts of the case as narrated by the informant is that in November 2012, he was apprised about the availability of a 2400 sq.ft. plot in Jatani Tehsil near IIT through an advertisement issued by M/s. Z-Infra Construction Pvt. Ltd. (hereinafter 'Company'). He then contacted Prasan Kumar Patra (hereinafter 'co-accused'), MD of the Company to purchase the aforementioned plot. The co-accused assured the informant of absolute right and title of the land after conversion of the plot in question, and construction of a peripheral wall with an accessible road attached to the said plot. The co-accused also allegedly represented that the land belonged to the Company; the cost of the plot is Rs.3,60,000/- and its conversion and the boundary wall would cost Rs.35,000/- and Rs.60,000/- respectively. Thereafter, the informant booked the plot and paid the amount against the plot, and its conversion and the boundary wall. Although, the plot was registered in his name, the road was not constructed as promised. He then allegedly came to know that the Company doesn't have the right and title over the plots over which the connecting road was supposed to be constructed. He alleges that the Company has intentionally defrauded him and 600 other persons by selling them such disconnected plots over many false promises and fabricated documents to dupe around Rs.12 Crores.

3. On receipt of such information from the informant, the petitioner and the other accused were arrested and on recommendation of the EOW Bhubaneswar, their properties were attached to protect the interest of the investors.

4. Learned Counsel for the Petitioner submitted that the petitioner is the Director of the Company and she is the wife of the co-accused. The co-accused holds 60 percent shares of the Company while the petitioner holds the remaining 40 percent shares. Learned Counsel further contends that notwithstanding the

aforementioned accusations, the petitioner and the co-accused are being erroneously prosecuted under the OPID Act. He clarifies that the petitioner and her 'real estate' business is *ultra vires* in so far as the operational jurisdiction of the OPID Act as the Company doesn't qualify to be a 'Financial Establishment' as per the provisions of the Act. Learned Counsel further submitted that the police wrongfully arrested the petitioner and the co-accused, without perusing the contents of the complaint. The present case should clearly be dealt with under the Real Estate (Regulation and Development) Act, 2016 and Odisha Real Estate (Regulation and Development) Rule, 2017 which specifically deals with the subject of 'real estate'.

5. Per Contra, learned Counsel for the OPID, vehemently opposed the instant application by stating that it was a case of planned cheating and fraud. He relied on the agreements to contend that the accused persons had defaulted in fulfilling their part of the promise to deliver plots with a connecting road as well as to return the amount paid to them. He also submitted that the provision of the OPID will squarely apply to the present case and that the provisions of the Real Estate Regulation and Development Act, 2016 have no application whatsoever to the present case.

6. Heard Mr. Ashwini Kumar Das, learned Counsel appearing for the petitioner and Mr. J.K. Patra, learned Additional Standing Counsel for OPID and perused the case records.

7. I had an opportunity to deal with the ambiguities concerning the object and application of the OPID Act in ***Mahasweta Biswal v. State of Odisha***[1]. Here, I would like to reiterate my stance:

> "*The Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 envisages a situation where multitudes of small depositors are defrauded by dubious corporations by luring them with unscrupulous schemes which promised Utopian returns. The object of the Act is tailored to clear-cut situations where hapless depositors are defrauded by dubious "schemes" floated by such dubious "Financial Establishments" as provided under section 2 (d) of the Act. It is imperative that the background of the Act needs to be understood before dealing with the legislation. In recent times a legion of such dubious corporations have burgeoned in different parts of the country which have been alluring naïve investors by promising them quixotic returns under the schemes floated by them. Such companies are essentially sham or paper companies with no real*

1. 2020 SCC OnLine Ori 633

businesses, which arduously market such devious machinations in the form of lucrative "schemes". Gullible common folk mostly acting out of avarice invest in such schemes which promise them the moon, hoping to make quick bucks Such schemes loosely find their origin in "collective investment schemes" which were monitored by SEBI, the capital market regulator and guidelines framed by it from time to time. However, over the period, such Machiavellian paper companies began to erupt across the country mostly in rural and backward areas having designed the "schemes," with a promise to the depositors with high returns and sometimes even assured some sham services to give it the colour of genuine transactions. This court, on numerous occasions has, unfortunately, come across many such cases where thousands of gullible depositors have lost their hard-earned monies. Cognizant of the shamelessly rampant advertising and marketing that were being carried out (almost on a war footing) by such companies, the legislatures across various states of the country were compelled to bring such enactments to curb the menace that was spreading fast and deep. It is with this backdrop that the legislation in question needs to be viewed with proper perspective."

8. On the same note, the Apex Court while dealing with the constitutionality of *parimateria* legislations of Tamil Nadu, Pondicherry and Maharashtra observed in ***M/s. New Horizon Sugar Mills v. Govt. of Pondicherry***[2] :

"*It has also to be noticed that the objects for which the Tamil Nadu Act, the Maharashtra Act and the Pondicherry Act were enacted, are identical, namely,* ***to protect the interests of small depositors from fraud perpetrated on unsuspecting investors****, who entrusted their life savings to unscrupulous and fraudulent persons and who ultimately betrayed their trust."*

[emphasis supplied]

9. Now, coming to the ambiguities perpetrated from the definition clause of the Act, a conscientious perusal of the said Section of the OPID Act would indicate that the legislature has intentionally kept the ambit of the definition quite wide and pervasive. The same is not hard to fathom, looking at the fact that the State Government wanted to enact a law that would take within its fold the rapidly evolving scams being propagated through these sham Companies or "Financial Establishment" by way of such "schemes". The OPID Act is not focused on the transaction of banking or the acceptance of deposits, but it is focused more on the delinquency of collecting money from a community or collective body of depositors, from amongst the public with a firm eye on public interest.

2. (2012) 10 SCC 575

10. The term deposit is derived from the Latin word "*depositus"*, which essentially means "*to put down*". The Merriam-Webster dictionary defines the term "deposit" as "*to place especially for safekeeping*" and being in the nature of a pledge. In the backdrop of the submissions made to advance the challenge of the petitioner, it is necessary to take a deeper look into the definitions of 'Deposit' and 'Financial Establishment' vide Section 2(b) and 2(d) of the OPID Act respectively:

> *"2. (b) "deposit" includes and shall be deemed always to have included any receipt of money, or acceptance of any valuable commodity, to be returned after a specified period or otherwise, either in cash or in kind or in the form of a specified service, by any Financial Establishment, with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include* :-
>
> *(i) amount raised by way of share capital or by any way of debenture, bond or any other instrument covered under the guidelines given, and regulations made, by the SEBI, established under the Securities and Exchange Board of India Act, 1992 (15 of 1992);*
>
> *(ii) amounts contributed as capital by partners of a firm;*
>
> *(iii) amounts received from a Scheduled Bank or a co-operative bank or any other banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);*
>
> *(iv) any amount received from,*
>
> > *(a) a State Financial Corporation, or*
> > *(b) any public financial institution specified in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013), or*
> > *(c) any other institution that may be specified by the Government in this behalf;*
>
> *(v) amount received in the ordinary course of business by way of,-*
>
> > *(a) security deposit,*
> > *(b) dealership deposit,*
> > *(c) earnest money,*
> > *(d) advance against order for goods or service;*
>
> *(vi) any amount received from an individual or a firm or an association of individuals not being a body corporate, registered under any enactment relating to money lending which is for the time being in force in the State; and*
>
> *(vii) any amount received by way of subscriptions in receipt of a Chit.*
>
> *Explanation I.- "Chit" has the meaning as assigned to it in clause (b) of section 2 of the Chit Funds Act, 1982 (40 of 1982);*
>
> *Explanation II.- Any credit given by a seller to a buyer on the sale of any property (whether movable or immovable) shall not be deemed to be deposit for the purposes of this clause;".*

> *2.(d)"Financial Establishment" means an individual or an association of individuals, a firm or a Company registered under the Companies Act, 1956 carrying on the* ***business of receiving deposits under any scheme or arrangement or in any other manner*** *but does not include a corporation or a co-operative society owned or controlled by any State Government or the Central Government, or a banking company as defined under clause (c) of section 5 of the Banking Regulation Act, 1949;"*

Section 2 (b) of the Act seems to intentionally couch the definition of "deposit" expansively in order to take care of any emergent situations arising in the future. However, it is amply clear that the provisions relate to a Company whose primary business under its Memorandum or Articles of Association would be doing the business of accepting or receiving "deposits". It also further contemplates that the said "deposits" must be made pursuant to any "scheme or arrangement or in any other manner" which by necessary implication must mean that in order to accept such deposits the Company in question must float a scheme or enter into an arrangement with the depositor with the sole objective of accepting such deposits. Moreover, the fact that the "deposit" is supposed to be made for a "specified period" puts mere sale/purchase agreements outside the very ambit of this Section.

11. Section 5 of the OPID Act envisages that every Financial Establishment which carries on its business in the State shall mention the details pertaining to its authority to carry on such business. This provision envisages that financial establishments which carry on "such business" shall be mandatorily required to register under the provisions of the Act. The expression "such business" would necessarily mean such Companies whose the primary business is accepting or receiving "deposits". Section 6 of the Act provides that in case where the "Financial Establishment" defaults in the return of deposits or fails to render service for which deposit has been made every person responsible for the management of the affairs of the financial Establishment shall be punished with imprisonment which may extend up to 10 years. In cases of sale/purchase agreements of real estate, these agreements typically provide for the "consideration" to be paid for the plot/flat/apartment purchased. The question of any return on this deposit(s) or payment of interest on such deposits does not arise. This provision also invariably points to the fact that real estate transactions were not intended to be covered under the provisions of this Act.

12. Another peculiarity regarding the applicability of this Act to real estate transactions is on account of Section 10 of the said Act which provides for attachment of the Financial Establishments in cases where the deposit is not paid back or default in payment to the investors. The operation of the aforesaid provision also covers such situations where the Financial Establishment has

transferred any of the property held by it to any other transferee. Typically, if this provision was to be applied in sale/purchase of real estate, it will precipitate a situation where one buyer claiming default on his deposit with the builder/real estate developer can invoke the provisions of this Act and seek attachment of the assets of the Real Estate Company. Consequently, the operation of Section 10 of the Act would result in a piquant situation where one lone buyer while claiming refund of his deposit would cause attachment of the other properties so constructed, irrespective of the fact as to whether such properties have been transferred to other transferees, i.e., creating third party rights by the Company. It is a situation which invariably arises when the provisions of the Act are invoked in real estate transactions especially where a Company has sold multiple real estate properties. Such an erroneous and chaotic situation could not have been the intention of the legislature considering the practices, problems and complexities involved in the real estate sector.

13. In the case of ***Viswapriya [India] Limited v. Government of Tamil Nadu***[3], the Hon'ble Madras High Court while interpreting their corresponding Depositors' Protection Act has held that the definitions in Penal Law are not intended for semantic debates by trained legal minds, but it is intended for the lay and the laity to understand and Act. If an ordinary person reads the definition of the word "Financial Establishment", he will have no doubt in his mind that if he carries on the business of receiving deposits and fails to repay the amount, he will have to face penal consequences. In contrast, a man who is not into the business of receiving deposits, but into the business of ordinary manufacturing or mercantile sale/purchase for instance, this definition will not and should not instil fear, for that would be deleterious and counterintuitive to the progress of a developing society. If it is viewed from any other angle, an ordinary manufacturing or a trading Company or a Company whose business is not accepting deposits cannot be prosecuted under the TNPID Act for default in paying its depositor, although their liability under the Companies Act or any other penal law applicable would not stand extinguished. It could never have been the intention of the Legislature to give unbridled power to the police to destroy legitimate businesses in this country and reduce our countrymen to penury. The entire efforts of the Crime Branch are to catch the developers and instil a fear psychosis among the builders/developers by wrongly invoking the OPID Act which is neither conducive to the flat buyers nor to the developers/realtors in that process the real estate sector is going to be destroyed.

3. 2015 SCC OnLine Mad 10349

14. At this juncture, I must confess that there cannot be a straight-jacket formula to this dilemma, however, certain factors must weigh with the court while deciding if the Company in question is a "Financial Establishment" within the meaning of the Act. Such factors would be the principal nature of business of the Company; the objects clause in the MoA or AoA; the manner of collection of monies by it; whether the same would amount to "deposits" within the Act; the nature of the transaction entered into by the Company; the nature of the "scheme" under which the deposits are accepted etc and most importantly whether it can be said that the monies so paid were in the nature of any "consideration", such as transfer of immovable property in exchange for a consideration as in the present case. Such factors must be fully considered to understand the true nature of the transaction which will help the Court to ascertain as to whether the transactions are genuine business transactions or a mere con job which were intended to be thwarted by the legislation in issue.

15. As emanates from the aforesaid discussion, it can be concluded that the object of the Act in question was never intended to apply to real estate transactions *simpliciter* and doing so is nothing more than misplaced or misadventurous experimentation with the Act. It is, in essence, a beneficial social protection enactment but its mindless application to real estate transactions, will lead to absurd and unintended consequences. It is thus concluded that it could never have been the intention of the legislature to apply the provisions of the Act to neat real estate transactions and the application of the Act thereto will lead to absurd situations contrary to the legislative intendment.

16. At this juncture, I consider it apposite that in order to determine whether or not a "financial establishment" is in the business of accepting or receiving "deposits", the very nature of the transaction involved has to be examined.

In ***63 Moons Technologies Ltd. v. State of Maharashtra and Ors.***[4]**,** the Hon'ble High Court of Bombay conducted a similar exercise to determine if a transaction involving trading on the platform of NSEL was of the nature of accepting deposits. After an elaborate perusal of the bye laws, rules and regulations governing the transaction, the Hon'ble High Court of Bombay was pleased to hold that the transaction entered on the platform of NSEL was not the one of deposit of the amount or commodity and if it is not so within the meaning of Section 2(c) of the MPID Act, then NSEL cannot be held to be a financial establishment and proceeded against under the provisions of the MPID Act. Similarly, in ***Ashish Mahendrakar v. State of Maharashtra and Ors***.[5], the

4. 2019 SCC OnLine Bom 1648 **5.** 2019 SCC OnLine Bom 1865

Hon'ble High Court of Bombay when posed with the question of whether inter corporate deposits could come within the definition of "deposit" held that the intendment of the MPID Act was not to regulate the business transactions between the two companies, even when the transaction has a mild flavour of deposit, after embarking on a journey to examine the pith and substance of the transaction.

17. The case at hand, it is evident that the alleged "deposit" was made as a part of the consideration for purchase of an immovable property. Subsequently, the plot was registered in the informant's name but it came to light that there was alleged misrepresentation pertaining to whether or not the petitioner and co-accused had the absolute rights over the nearby plots which were essential for constructing a connecting road. These are the issues which is the subject matter of other legislations and not of OPID Act.

18. The instant case is a classic example of a commercial transaction gone awry which has been strenuously given the colour of a criminal offence. It has been submitted that MoA and bye-laws of the Company clearly mention that they deal in real estate and projects relating thereof. The informant has purchased the impugned plot after full payment against its quoted price. It is further highlighted by the learned Counsel for the petitioner that the impugned plot was registered in the name of the informant and ROR was also issued in his favour. Evidently, this transaction doesn't qualify as 'deposit' under OPID Act and Section 6 is not attracted because the land title has been transferred after appropriate consideration. There are no remaining dues in nature of "*interest or for return in any kind or for any service"* as far as the purchase of plot is concerned. It, thus, emerges that the principal nature of the business of the Company was real estate and the "deposits" collected by it were in furtherance of sale of immovable properties primarily in the nature of consideration thereof. The dominant intention of the parties was the transfer of the immovable property and therefore, it cannot be said that the nature of the transaction was more than a simple agreement to sale.

19. The relevant law tailor-made for such situations would be the Real Estate (Regulation and Development) Act, 2016 which categorically caters to such situations. RERA Act was enacted to achieve three main purposes, increase investments in the real estate sector by ensuring security, fairness and transparency; protecting buyers and regulating developers. Specifically, Section 12 of RERA, 2016 clearly stipulates that if a person has sustained any loss or damage by reason of an incorrect or false statement contained in a notice or

advertisement for a plot/building, he shall be compensated in the manner as provided in the RERA Act. Further, Section 18 of the RERA Act casts a clear duty on the promoter to compensate the buyers in case the promoter fails to discharge any obligation/causes loss/fails to complete or give possession of the plot. Section 19(4) of the RERA Act lays down that an allottee is 'entitled' to claim the refund of amount along with interest and compensation. The provisions of the Real Estate (Regulation and Development) Act, 2016, in fact, provide for umpteen fail-safe mechanisms to prevent most of the maladies associated with such cases. A plain reading of the Act illustrates how simplified the process of filing complaints for violation have been made in order to injunct any unnecessary litigations arising out of builder-buyer relations. The entire idea was to prevent the property related disputes which are being perilously brought within the dragnet of criminal proceedings. This Court laments to note that the provisions of the said Act which, despite being a well thought out Code by itself, is not being resorted to. Instead, such circuitous proceedings are being resorted which is neither to the benefit of homebuyers nor to the real estate sector at large.

20. As a side note it may be mentioned that, the real estate sector being a core sector in the economy plays a critical role. It contributes about 6% to the GDP and generates large-scale employment. The health of the real estate sector has many socio-economic implications and a strong bearing on consumers' sentiment. Furthermore, the real estate sector has strong linkages with the other core sectors of the economy, such as steel and cement, etc.

21. Without going into the question of legislative competence, it has to be borne in mind that the source of power for every legislation is derived from one of the three lists present in the Seventh Schedule of the Constitution of India. That being the case, it is pertinent to note that in the case of ***New Horizon Sugar Mills Limited*** (supra), the Hon'ble Supreme Court has, in terms, observed that the power to enact the *pari materia* legislations of Tamil Nadu, Pondicherry and Maharashtra Act, is derived by the State from Entries 1, 30 and 32 of the State List, which involves the business of unincorporated trading and money-lending. In my view, the objective of the State legislature by enacting the OPID Act was aimed at protecting the interest of gullible depositors who were fraudulently conned into participating in a scheme or arrangement with unscrupulous financial establishments involved in the business of receiving such deposits. By no stretch of imagination could the provision of the OPID Act be contemplated to mean that the intendment of the State legislature was to bring simple transactions pertaining to sale/transfer of immovable property within the purview of the Act.

22. In view of the aforesaid discussions, at this stage, this Court does not deem it appropriate to interfere with the proceeding vide CT Case No.14/2018 and I.A. No.3/2019 in relation to EOW Bhubaneswar P.S. Case No.17/2018, pending before the court of the learned Presiding Officer, Designated Court, under the O.P.I.D. Act, Cuttack under Section 482 Cr PC in so far as Sections 420/406/467/468/471/120-B of the I.P.C. are concerned.

However, in so far as the prosecution under Section 6 of the OPID Act is concerned, an offence thereunder is not made out as the OPID Act cannot be allowed to govern the field of Real Estate transactions simpliciter as the consideration paid for transfer of immovable property do not fall under the definition of "deposit" as defined under Section 2(b) of the OPID Act and as a *sequitur* the proceedings under Section 6 of the OPID Act stands quashed.

23. It is clarified that the trial court shall proceed with a fair trial uninfluenced by any of the observations made hereinabove.

24. The CRLMC is accordingly disposed of.

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2021 (III) ILR-CUT- 404

MISS SAVITRI RATHO, J.

CRLMC NO. 453 OF 2021

BIPIN BAHADUR .....Petitioner

.V.

STATE OF ODISHA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Challenged the order passed by Special Judge wherein the prayer of the prosecution to extend the period for completion of investigation and to file charge sheet beyond the period of 180 days has been allowed on two occasion without affording any opportunity of hearing to the petitioner or his counsel and in the absence of any report of the special P.P. – Held, order of Court below is illegal and have caused prejudiced to the petitioner, thereby entitling him to the benefit of default bail under Section 167(2) of the Cr.P.C.

(Para 13)

Case Laws Relied on and Referred to :-

1. (2018) 71 OCR-31 : Lambodar Bag v. State of Orissa.
2. (2020) 80 OCR 289 : Iswar Tiwari v. State of Odisha.

3. CRLMC No. 1358/2020 (decided on 08.02.2021) : Rohiteswar Meher v. State of Orissa.
4. CRLMC 446/2021 (decided on 19.03.2021) : Kishore Pujari vs. State.
5. (2021) 2 SC 485 : M. Ravindran vs. Intelligence Officer.
6. (2020) 79 OCR 861 : Sk. Raju vs. State.

For Petitioner : Mr. Manas Chand
For Opp.Party : Mr.S.S Mohapatra, A.S.C.

O R D E R Date of Order : 21.10.2021

1. Mr. Manas Chand, learned counsel for the petitioner and Mr.S.S.Mohapatra, learned Addl. Standing Counsel for the State have been heard through hybrid mode.

2. In this application under Section 482 of the Code of Criminal Procedure (in short "Crl.P.C"), the petitioner has challenged the orders dated 09.07.2020 and 06.08.2020 passed by the learned Addl. Sessions Judge,-cum-Special Judge, Koraput-Jeypore in T.R. Case No. 03 of 2020 wherein the prayer of the prosecution to extend the period for completion of investigation and to file chargesheet beyond the period of 180 days has been allowed on two occasions without affording any opportunity of hearing to the petitioner or his counsel on either occasion.

3. Learned counsel for the petitioner submits that law is well settled in the case of ***Lambodar Bag v. State of Orissa*** reported in ***(2018)71 OCR-31***, ***Iswar Tiwari v. State of Odisha*** *reported in* ***(2020) 80 OCR 289*****, CRLMC No. 1358 of 2020** ***Rohiteswar Meher v. State of Orissa*** decided on 08.02.2021 and ***CRLMC 446 of 2021 Kishore Pujari vs State*** decided on 19.03.2021, relying on the decisions of the Hon'ble Apex Court that the prosecution is duty bound to serve a copy of a petition filed for extension of time for filling charge sheet beyond the statutory period of 180 day alongwith the report of the Public Prosecutor well in advance on the accused and order for extending time for completing the investigation cannot be passed without hearing the accused. His further submission is that in the present case, extension of time has been allowed on two occasions on the very day the petitions were filed by the investigating officer (in short the "IO") i.e. on 9.7.2020 and 6.8.2020 by the learned trial court after hearing the learned Special P.P. only and without hearing the petitioner or his counsel. He further submits that the learned trial court has not even directed for service of the copy of the petition/memo on the petitioner or his counsel and allowed extension on the very day the petitions were filed. His specific averment in the writ petition is that the chargesheet has been filed after one year and

nineteen days which is not permissible. He finally submits that as the extension of time was illegal, the petitioner is entitled to be released on default bail.

4. Mr. Mohapatra, learned Additional Standing Counsel objects to such prayer stating that after the learned Court below granted extension of time, preliminary chargesheet dated 07.09.2020 has been filed against the petitioner for commission of offences under Section 20 (b) (ii) (C) of the N.D.P.S Act within the extension granted and the case is awaiting appearance of the co-accused against whom supplementary chargesheet dated 30.01.2021 has been filed showing him as an absconder. He also submits the contention of the learned counsel that chargesheet has been filed against the petitioner after one year is therefore factually incorrect. He finally submits that as preliminary chargesheet and final chargesheet have been filed, the petitioner should not be released on bail. He relies on the case of **M. Ravindran vs. Intelligence Officer : (2021) 2 SC 485** in support of his submissions.

5. For the purpose of deciding this application, reference To Section 167 (2) of the Code of Criminal Procedure (in short "Crl.P.C") and Section 36-A (4) of the NDPS Act are necessary and the relevant provisions are quoted below.

> *"Section 167. Procedure when investigation cannot be completed in twenty four hours.— (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:*
> *Provided that*
> *(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,*
>
> *(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;*
> *(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;*

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police. Explanation I. For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail. Explanation II. If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."….

Sec- 36- A (4) Proviso of the N.D.P.S Act, is extracted below :

"…..In respect of persons accused of an offence punishable under section 19 or section 24 or section 27- A or for offences involving commercial quantity, the references in subsection (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days :

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating theprogress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."

From a reading of this proviso , it is apparent in cases where the offences are punishable under Section- 19 or Section 24 or Section 27 A of the NDPS Act or cases where the offences involve commercial quantity , where investigation cannot be completed with 180 days , the Special Court has the power to extend the period upto one year on the report of the Public Prosecutor indicating progress of investigation and the specific reasons for detention of the accused beyond the period of 180 days. (emphasis given)

6. In the case of Lambodar Bag (supra) this Court after referring to a number of decisions of the Hon'ble Supreme Court has interalia held :

"8…. In the case in hand, when the petition was filed by the learned Addl. Special Public Prosecutor on 22.07.2017 for extending the period of investigation, no notice was issued to the petitioners on such petition to have their say in the matter. Even the filing of the petition was not brought to the notice of the counsels representing the petitioners. Since while considering such a petition, principles of natural justice was not followed and the petitioners were not given opportunity to oppose the extension on any legitimate and legal grounds available to them and even the trial Judge has not brought filing of such a petition to the notice of the counsels representing the petitioners, in view of the ratio laid down in case of ***Hitendra Vishnu Thakur*** *(supra), I am of the view that the learned trial Judge has committed illegality in granting extension for a further period of sixty days for completing investigation as per order dated 22.07.2017 which is against fair play in action and in my humble opinion, it has caused serious prejudice to the petitioners. Even though sub-section (4) of section 36-A of the N.D.P.S. Act does not specifically provide for issuance of notice to the accused on the report of the Public Prosecutor before granting extension but it must be read into the provision both in the interest of the accused and the prosecution as well as for doing complete justice between the parties and since there is no prohibition to the issuance of such a notice to the accused, no extension shall be granted by the Special Court without such notice. Moreover, report has to be filed by the Public Prosecutor in advance and not on the last day, so that on being noticed, the accused gets fair opportunity to have his say and oppose the extension sought for by the prosecution."….*

This Court has further held :

"*… Keeping in view that ratio laid down in the aforesaid decisions and coming to the case in hand, I am of the humble view that even though the petitioners have not applied for bail during the default period when prosecution report was not filed even after extended period for completion of investigation as was granted by the learned Trial Judge but since the learned trial Judge has not informed the petitioners of their right being released on bail on account of non-submission of prosecution report, no fault can be found with the petitioners for not making such application for bail during the default period. Had the learned trial Judge informed the petitioners of their right and the petitioners on being so informed, failed to file an application for release on bail on account of the default by the investigating agency in the completion of investigation within the extended period, after the prosecution report is filed, they would have lost their valuable right. In the factual scenario, the petitioners cannot be stated to have voluntarily given up their indefeasible right for default bail.*

9. Even though the petitioners have not applied for bail before the learned Trial Judge on the ground of not being noticed to have their say on the invalid petition filed by the Addl. Public Prosecutor on 22.07.2017 but on some other grounds, they are not debarred from taking such ground before this Court. As held in case of ***Rakesh Kumar Paul****, in the matter of personal liberty, the Court*

should not be too technical and must lean in favour of personal liberty. An application for bail in the High Court is not an application for review of the order of the Court below. Grounds not taken in the Court below can be taken in the bail petition in the higher Court and even nontaking of grounds in the bail petition will not deprive the counsel for the accused in raising such grounds during hearing of the bail application. Even if a ground for grant of bail is not taken in the bail petition and not argued by the counsel for the accused, the Court is not deprived of releasing the accused on bail on such ground if it is legally sustainable. Strict rules of pleadings are not applicable in bail petition.

In view of the foregoing discussions, since the learned trial Judge has committed illegality in granting extension for a further period of sixty days for completing investigation as per order dated 22.07.2017 on the petition filed by the Addl. Public Prosecutor without issuing any notice to the petitioners to have their say and the petition dated 22.07.2017 filed by the learned Addl. Special Public Prosecutor was not in accordance with law and the remand order of the petitioners passed by the learned trial Judge on 22.09.2017 is illegal and unauthorized and the petitioners were not informed of their right being released on bail on account of non-submission of prosecution report so as to enable them to make an application for bail, I am of the view that the petitioners are entitled to be released on bail. The grounds on which I am granting bail to the petitioners, I am of the humble view that it is not necessary to consider the gravity of the offence, the merits of the prosecution case or the bar under section 37 of the N.D.P.S. Act."……

In the case of **Iswar Tiwari (supra)** after referring to a number of decisions of the Hon'ble Supreme Court and various High Courts , this Court framed the modalities for granting extension of time for completing investigation and held that:

…. " In case there is violation of any of the above, an indefeasible right to bail will be accrued to the accused. Applying the aforesaid parameters as laid down hereinabove, it is quite evident that there have been such "defaults" in the instant case, especially non-service of notice on the accused which is violative of the most cardinal principle of natural justice i.e. Audi Alteram Partem which creates an indefeasible entitlement to bail to the Petitioner.

18. Considering the aforesaid discussion, submissions made and taking into account a holistic view of the facts and circumstances of the case at hand, this Court comes to an irresistible conclusion that the Petitioner is entitled to be released on bail."…

In the case of **Rohiteswar Meher (supra)**, this Court set aside the order of the Court below to the extent it granted extension of time for completing the investigation. It held as follows:

"..7. Applying those principles as decided by this Court in the case of Lambodar Bag to the present facts of the case as narrated in the preceding paragraphs, it

is felt that in the present case, the indefeasible right of the petitioner for his release on default bail has been violated. It is evinced from the orders dated 9.1.2020 and 10.2.2020 that the accusedpetitioner has not been given any opportunity of hearing to lead his legitimate objections nor he has been informed his right of default bail before granting extension of 30 days to the prosecution…."

In the case of **Kishore Pujari** (supra), after granting extension of time to the prosecution without affording opportunity of hearing to the petitioner therein, chargesheet had been filed. The petitioner had not prayed for being released on default bail at any time before the Court below . Relying on the decisions in **Lambodar Bag** (supra)**, Hitendra Vishnu Thakur** (supra), this Court directed for release of the petitioner on bail.

7. In the case of **M Ravindran (supra)**, the facts were slightly different as in that case the prosecution had not filed any application for extension of time to complete the investigation but had filed another complaint on the same day the petitioner therein had filed application under Section – 167 (2) of the Crl.P.C after expiry of 180 days to be released on bail. The trial Court had allowed the application of the petitioner to be released on but the order was set aside by the High Court of Madras which was challenged by the petitioner before the Hon'ble Apex Court. The Hon'ble Supreme Court directed for release of the petitioner on bail holding that by filing the application under Section – 167 (2) Crl.P.C , the petitioner had availed his right to default bail even if the application remained pending and a chargesheet or a report seeking extension of time was filed on the same day. The Hon'ble Court has also observed as follows:

….."*We agree with the view expressed in **Rakesh Kumar Paul** (supra) that as a cautionary measure, the counsel for the accused as well as the magistrate ought to inform the accused of the availability of the indefeasible right under Section 167(2) once it accrues to him, without any delay. This is especially where the accused is from an underprivileged section of society and is unlikely to have access to information about his legal rights. Such knowledge sharing by magistrates will thwart any dilatory tactics by the prosecution and also ensure that the obligations spelled out under Article 21 of the Constitution and the Statement of Objects and Reasons of the CrPC are upheld."….*

8. This Court in the case **Sk. Raju vs State** reported in ***(2020) 79 OCR 861***, this Court while considering the right of the accused to be released on default bail under the provisions of section 167 (2) Crl.P.C., after referring to earlier decisions of this Court and that of the Apex Court has reiterated the position of law that provisions of General Clauses Act have no application for computation of the period of detention under Section 167 (2) of the Crl.P.C. and therefore the

plea that the Court was closed on 05.09.2020 and 06.09.2020 was a Sunday does will not result in extension of the last day although there is no embargo on the prosecution to carry on investigation or submit final form/chargesheet at a later date.

9. A perusal of the relevant orders passed by the learned Additional Sessions Judge –cum- Special Judge, Koraput is necessary in order to decide the contentions raised by the learned counsel.

The certified copy annexed to the CRLMC does not contain all the orders passed by the learned Additional Sessions Judge-cum-Special Judge, Koraput. The petitioner for reasons best known to him has not filed the copy of the entire order sheet but has filed the certified copies of orders No.08 dated 27.03.2020, order No. 14 dated 28.05.2020, order No.15 dated 10.06.2020, order No.16 dated 02.07.2020, order No.17 dated 09.07.2020, order No.19 dated 06.08.2020, order No.20 dated 20.08.2020, order No.24 dated 02.11.2020, Order No.27 dated 02.02.2021 and order No.28 dated 08.02.2021 only. The copy of the order dated 07.09.2020 when preliminary chargesheet was submitted has not been filed by the petitioner and averment has been made in the CRLMC application that chargesheet has been filed after one year.

Photocopy of the trial court record in T.R. No.3 of 2020 pending in the court of learned Addl. Sessions Judge-cum-Special Judge, Koraput-Jeypore had been called for by this Court vide order dated 11.06.2021 and has been received. The photocopy of the LCR has been received but without any index. It contains the ordersheet from 12.01.2020 till 04.06.2021, copy of the FIR, case diary, copy of the preliminary chargesheet dated 05.09.2020 and chargesheet dated 30.01.2021, and copy of the one page petition dated 06.08.2020 signed by the IIC Nandapur with prayer to allow further time for submission of chargesheet. The copy of the petition dated 09.07.2020 is not available.

Perusal of the photocopy of the ordersheet reveals that the accused had been arrested and forwarded to the Court of the Additional Sessions Judge-cum-Additional Sessions Judge, Koraput on 12.01.2020. As no counsel appeared for the accused, one Mr. Kishore Kumar Patnaik recommended by the T.L.S.C to the O.S.L.S.A. was appointed as retainer / remand counsel by the Court and he was requested to take steps in the interest of the accused and the accused was remanded till 24.01.2020 awaiting final form.

The case was thereafter posted to 06.02.2020, 20.03.2020, 05.03.2020, 19.03.2020, 27.03.2020, 04.04.2020, 19.03.2020, 04.04.2020, 17.04.2020, 23.04.2020 and 01.05.2020, 14.05.2020, 28.05.2020, 10.06.2020 and 20.06.2020

/02.07.2020 awaiting final form and the petitioner remanded to custody. On 02.07.2020, the case was posted to 09.07.2020 awaiting final form and the petitioner remanded to custody.

Perusal of order dated 9.7.2020 indicates that petitioner had been [produced through video conferencing and final form had not been received .The IIC of Nandapur P.S. had made a prayer through the Special P.P. Koraput to grant one month time to submit the final form on the ground stated in the petition .The learned Addl. Sessions Judge after perusing the materials available on record was of the opinion that it was a fit case where the period of investigation of this case should be extended beyond 180 days and granted one month time for submission of final form. He further directed that the case to be put up on 23.7.2020 awaiting Final Form. There is no mention of any report being filed by the Special P.P and the prayer of the IIC has been perused and referring to reasons stated in the said petition , extension of one month time has been granted . It is apparent that from the order that nether the petitioner nor his counsel were heard before granting extension nor had the Special P.P. filed any report as mandated by Section –36 - A (4) the NDPS Act Order No.17 dated 09.07.2020 is extracted below :

> *"Accused Bipin Bahadur is produced through video conferencing. Final Form is not yet received.*
>
> *The IIC of Nandapur P.S. has made a prayer vide DR No.1081/PS, dated 08.07.2020, through the Special P.P., Koraput, to grant one month time to submit the Final Form on the grounds stated therein. Perused the prayer of the I.I.C., submitted by the Special P.P. under Section 36(A)(4) of the N.D.P.S. Act, wherein it has been stated that due to hectic schedule relating to Corona enforcement and busy in investigation of P.S. Case No.45 dated 18.05.2020 under Sections 147/148/302/324/149 of I.P.C., the investigation of this case could not be completed and prayed to grant one month time for submission of Final Form. So, from the materials available on record, I am of the opinion that this is a fit case where the period of investigation of this case should be extended beyond 180 days. Accordingly, the prayer of the I.O. to grant one month time for submission of Final Form is accepted.*
>
> *Send an extract of this order to the I.I.C. of Nandapur P.S., through Special P.P., Koraput, for information and necessary action.*
>
> *Put up on 23.07.2020 awaiting Final Form. Accused Bipin Bahadur is remanded to jail custody till then."*

The case was thereafter posted to 23.07.2020 and then to 6.8.2020. Final form had not been received on both dates and on 06.08.2020 , the I.I.C., Nandapur P.S. had made a prayer through the Special P.P., Koraput for grant of further two months time to complete the investigation for submission of final

form in the case. Again there is no reference to any report filed by the Special P.P. After perusing the prayer of the I.I.C and the reasons mentioned therein and the case record , the learned Court referred found it to be fit case to extend the period of investigation beyond 180 days by one month and directed that the case to be put up on 20.08.2020 . It is apparent that from the order that nether the petitioner nor his counsel were heard before passing the order of extension , nor had the Special P.P. filed any report as per the mandate of Section 36 –A (4) alongwith the prayer of the I.I.C and extension has been granted on perusal of the prayer of the I.I.C . The order No 19 dated 06.08.2020 is reproduced below:

> *"Accused Bipin Bahadur is produced through video conferencing in view of COVID-19. Final Form is not yet received.*
>
> *The I.I.C. of Nandapur P.S. has made a prayer, through the special P.P., Koraput, for grant of further two months time to complete the investigation and for submission of the Final Form in this case. Perused the petition filed through the Special P.P. u/s 36(A)(4) of N.D.P.S. Act, I also perused the prayer of the I.I.C. It is specifically mentioned that the owner of the vehicle which was used for the transportation of contraband ganja is yet to be arrested. Further, he has stated that the financial investigation is also not completed. Under the above circumstances, the I.I.C. prayed to grant two months time for completion of investigation of the case and for submission of charge sheet.*
>
> *Perused the case record. It reveals that earlier one month's time was granted by this Court on the prayer of the I.I.C. of Nandapur P.S. for completion of investigation of the case and for submission of charge-sheet and now, he has prayed for another two months time for submission of charge-sheet on the grounds as stated hereinabove.*
>
> *From the materials available on record, I am of the opinion that this is a fit case where the period of investigation of this case should be extended beyond 180 days. Accordingly, one month time is allowed for completion of investigation of the case and for submission of charge-sheet.*
>
> *Send an extract of this order to the I.I.C., Nandapur P.S., through Special P.P., Koraput, for information and necessary action.*
>
> *Put up on 20.08.2020 awaiting Final Form. Accused Bipin Bahadur be produced on the date fixed."*

On 20.08.2020, the case directed to be put up on 03.09.2020 /05.09.2020 awaiting Final Form.

The case was neither put up on 03.09.2020 or 05.09.2020.

It was put up on 07.09.2020 . It has been stated in the order that it was put up on 07.09.2020 as the Court remained closed on 05.09.2020 as per order dated 04.09.2020 of the this Court 06.09.2020 was a Sunday and the case was put up that day as the I.I.C Nandapur P.S has submitted chargesheet dated

05.09.2020 under Section 20 (b) (ii) (C) of the N.D.P.S. Act (4 sheets) against the petitioner alongwith case diaries (12 sheets) keeping the investigation open . After perusing the same, the learned Addl. Sessions Judge -cum- Spl. Judge, Koraput took cognisance of the offence under Section 20 (b) (ii) (C) of the N.D.P.S. Act against the petitioner and posted the case to 02.11.2020 for submission of further investigation report.

Perusal of the copy of the preliminary chargesheet bears the endorsement dated 07.09.2021 of the learned Additional Sessions Judge-cum-Special Judge and admittedly it has been put up before him on 07.09.2021.

On 18.09.2020, the petitioner had filed an application for bail for the second time and the prayer was rejected by order dated 25.09.2020 considering the nature of accusation, gravity of offence, the punishment provided and in view of the bar under Section – 37 (1) (b) of the N.D.P.S. Act. (This application has been moved during pendency of BLAPL No. 6032 of 2020 before this Court).

Vide order No.24 dated 02.11.2020, the petitioner was produced through video conferencing from Circle Jail, Koraput in view of COVID-19 but no further investigation report under Section 173(8) of Cr.P.C. had been received. Hence, by order dated 2.11.2020, the learned Addl. Sessions Judge-cum-Special Judge, Koraput directed the case to be put up on 19.12.2020 awaiting further investigation report and for supply of prosecution papers of accused and directed the accused to be produced on that date.

Ultimately on 02.02.2021, Supplementary/Final charge sheet No.1 dated 30.01.2021 under Section 20 (b) (ii) (C) of the N.D.P.S. Act was received against the petitioner-Bipin Bahadur and accused Samrat Mandi showing the latter as absconder along with supporting documents. After perusing the case record, by order dated 02.02.2021, the learned Addl. Sessions Judge observed that charge sheet under Section 20 (b)(ii)(C) of the N.D.P.S. Act had been filed on 07.09.2020 against the petitioner-Bipin Bahadur keeping the investigation open and cognizance of offence had been taken against him. After perusing the Additional papers submitted by the I.O., the learned court below held that prima facie case under Section 20(b)(ii)(C)/25 of the N.D.P.S. Act is well made out against accused-Samrat Mandi and cognizance of offence under Section 20 (b)(ii)(C) of the N.D.P.S. Act was taken. Now cognizance of offence under Section 25 (b)(ii)(C) of the N.D.P.S. Act also taken and N.B.W. of arrest was issued against Samrat Mandi on 20.1.2021 on the prayer of the I.O.

On 08.02.2021, the petitioner was produced through video conferencing from Circle Jail, Koraput. By order No. 28 dated 08.2.2021, the learned Addl.

Sessions Judge-cum-Special Judge, Koraput issued process under Sections 82 and 83 of Cr.P.C. against co-accused, Samrat Mandi and directed the case to be put up on 07.04.2021 for his production and also directed the present petitioner to be produced on that date.

Thereafter the case has been put up on various dates for production of co accused Samrat Mandi against whom Processes under Section 82 and 83 of the Crl.P.C. have been issued by order dated 08.02.2021.

On 04.06.2021, the petitioner had submitted petition for changing his counsel.

10. After careful perusal of the ordersheet in T.R. No 3 of 2020, it is forthcoming that in the absence of any report of the Special Public Prosecutor and only on the basis of the application of the Investigating Officer and without affording the petitioner any opportunity of being heard, the learned Additional Sessions Judge -cum-Special Judge Koraput has allowed extension of time of one month not once but on two occasions to complete the investigation and submit chargesheet. Extension of time of one month has been granted on the same day very day on both occasions on the very day the applications of the I.I.C have been filed after perusing his application/prayer and the reasons mentioned therein and in the absence of any report of the Special P.P. It is also apparent that the petitioner has not been informed of his right to get default bail under the provisions of Section - 167(2) proviso of the Crl.P.C. when chargesheet was not submitted within 180 days or within the extended period.

The contention of the learned counsel that chargesheet has been filed after more than one year is however incorrect as supplementary chargesheet against the absconding accused has been filed after one year and preliminary chargehesheet dated 05.09.2021 has been filed on 07.09.2021 against the petitioner.

11. On a consideration of the submissions of the learned counsels for the petitioner and the State, the law laid down by the Hon'ble Apex Court and the decisions of this Court, I am of the considered view an accused who has not availed (applied for) default bail on account of non filing of chargesheet within the prescribed time, will not be granted the benefit of default bail after filing of the chargesheet.

12. But in the present case, it is apparent that the petitioner could not engage any counsel of his own and a counsel recommended by the T.L.S.C to the O.S.L.S.A. was engaged by the Court on the date of his production , i.e.

12.01.2020 and he has not been informed by the learned Court below about his right to be released on default bail when chargesheet was not filed in time. The Special P.P. has not filed any report as per the mandate of Section -36 – A (4) of the NDPS Act on both occasions, but extension of time has been granted on both occasions by perusing the application of the I.I.C on the very day the applications were filed. The first (preliminary) chargesheet dated 05.09.2020 has admittedly been filed on 07.09.2020 which is beyond the thirty days extension granted for the second time on 06.08.2020 by the learned Court.

13. In view of the aforesaid discussion and keeping in view the observation of the Hon'ble Court in paragraph 18.10 in the case of **M Ravindran (supra)** and the decisions of this Courts is Court in the case of **Lambodar Bag** (supra), **Iswar Tiwari** (supra), **Sk Raju** (supra) and **Kishore Pujari** (supra), the extension of time to complete the investigation granted to the prosecution by the learned Court below not once but twice, without affording any opportunity of hearing to the petitioner or his counsel and in the absence of any report of the Special P.P, is illegal and have caused prejudice to the petitioner, thereby entitling him to the benefit of default bail under Section -167(2) of the Crl.P.C.

14. The petitioner is therefore at liberty to move an application before the trial Court for releasing him bail. On such event, he shall be released on such terms and conditions as may be fixed by the Court including the following conditions:

(i) that he will appear in Court on each date fixed for trial.

(ii) He will not tamper with prosecution evidence or try to influence witnesses.

(iii) He will not indulge in any criminal activity.

(iv) He will appear before the Jeypore Police Station once every alternate Monday between 3.00pm to 6.00pm till commencement of trial.

Violation of any of the conditions will entail in cancellation of bail.

15. Trial of the case be expedited as supplementary chargesheet has been filed since January 2021. The CRLMC is accordingly allowed with the aforesaid observation disposed of.

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