THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

Containing Judgments of the High Court of Orissa.

Mode of Citation
2021 (III) I L R - CUT.

DECEMBER - 2021

Pages : 641 to 816

Edited By

MADHUMITA PANDA, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : 300/-

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NOMINAL INDEX

ACTS & RULE

Acts & No.

1908-05	Civil Procedure Code, 1908
1973-02	Criminal Procedure Code, 1973
1860-45	Indian Penal Code, 1860
1939-04	Motor Vehicle Act, 1939
1965-01	Orissa Gram Panchayat Act, 1964
1993-51	Recovery of Debt due to Banks and Financial Institution Act, 1993
1955-11	Shri Jagannath Temple Act, 1955
1995-43	Wakf Act, 1995

RULE

1. Central Administrative Tribunal (Procedure) Rule, 1987

TOPICAL INDEX

SUBJECT INDEX

PAGE

CRIMINAL PROCEDURE CODE, 1973 – Section 167(2) read with section 36 A of the NDPS Act – Default bail/mandatory bail – Offences under NDPS Act – In the present case, charge sheet could not submitted within the statutory periods – Though such period extended to another 60 days but no opportunity was given to the accused, neither the accused produced before the court nor heard before the extension of the period – Even after expiry of the extended period charge sheet could not be submitted before the trial Court – However the accused person did not release on default bail on the plea that, he had not filed such application – Order of the trial court challenged – Held, the Court below committed gross illegality in allowing detention of the accused persons beyond the statutory periods without informing their indefeasible right even in the absence of charge sheet – Impugned order set-aside – CRLMC allowed.

Siba Bisoi & Ors. -V- State of Odisha.

2021 (III) ILR-Cut…… 813

CRIMINAL PROCEDURE CODE, 1973 – Section 167(2) read with section 36-A (4) of the NDPS Act, 1985 – Statutory bail/Mandatory bail – Offences under sections 20(b)(ii)(C) & 25, 29 of the NDPS Act – Non completion of the investigation within the statutory periods, i.e, within 180 days – In the present case, application for extension of the investigation filed and on the same day application was allowed without serving copy to the accused – Order of the Trial Court challenged – Prayer of the petitioner to grant

default /statutory/ mandatory bail considered and bail granted.

Binayak Kanhar -V- State of Orissa.

2021 (III) ILR-Cut…… 798

CRIMINAL PROCEDURE CODE, 1973 – Section 437(6) – Bail in case non bailable offence – Applicability – Whether this provision apply in case of accused who has not been released due to non fulfilment of bail conditions/non furnishing the bail bond? – Held, No.

Prasanta Manna @ Prasanta Ku.Manna -V- State of Odisha.

2021 (III) ILR-Cut…… 810

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Application under section 3 of the Medical Termination of Pregnancy Act, 1971 – Prayer for the termination of child – Application filed by rape victim (mother) to terminate the child – Period for termination as mandated under the Act – Gestational age of such child is 26 weeks as per the medical report – Opinion of the medical board is that there is no risk upon the mother and child in case continuance of the pregnancy – Termination of pregnancy is not immediately necessary to save the life of petitioner as per section 5 of the Act – Held, termination of pregnancy is not permissible – However direction issued

to the collector to provide all the medical facilities as well as proper diet to the victim for safety delivery of the child and direction also issued to provide compensation to the tune of Rs.10,00,000/-.

'X' -V- State of Odisha & Ors.

2021 (III) ILR-Cut…… 777

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Inherent Jurisdiction – Offences U/ss. 441/442/467/ 486/ 384/387 of the Indian Penal Code, 1860, r/w section 3(1)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Interference of the Court – Held, when the ingredients of the offences prima facie lacking in the case to proceed against the petitioners more so, perusal of the materials on record goes to show that the essential ingredients of the alleged offences both under the Penal Code as well as under the S.C. and S.T (P.A) Act are not made out against the petitioners and no prima-facie cognizable offences are made out, the Court has the jurisdiction to interfere – The CRLMC allowed – Consequently the prosecution against the petitioners in ICC No. 22 of 2019 pending in the Court of the learned Special Judge, Jagatsinghpur stands quashed.

Nalini Acharya @ Naliniprava Acharya & Ors. -V- State of Odisha & Anr.

2021 (III) ILR-Cut…… 788

ORISSA GRAM PANCHAYAT ACT, 1964 – Section 24(2)(C) – Whether the statutory notice period of 15 days as prescribed in the section is directory or mandatory – Held, as per the decision of full bench in Sarat Padhi Vs. State of Orissa (AIR 1988 Ori 116) the requirements in terms of the Section 24 (2)(C) of the Act is directory and not mandatory.

Nirakar Sethi -V- State of Odisha & Ors.

2021 (III) ILR-Cut…… 652

PROPERTY LAW – Adverse Possession – The defendants since 50 years are in possession of the suit land – The possession is open, peaceful, continuous and uninterrupted – The suit land has been recorded in the name of the plaintiff and the ROR has been published in April 1984 and the note of possession of the defendants in respect of the suit land finds noted therein – The noting in the said ROR as to possession of the suit land by the defendants have remained unchallenged till 1997, i.e, up to institution of suit – As the defendants possession has been uninterrupted and within the knowledge of the plaintiff, the defendants have acquired title by way of adverse possession.

Krushna Ch. Mahanta & Ors. -V- Harinath Mahanta & Ors.

2021 (III) ILR-Cut…… 731

SERVICE LAW – Appointment – The petitioner joined in service pursuant to merit list prepared by the authority and his service book was opened – The amount towards GIS has been deducted from his salary and he has also been enrolled in the contributory pension scheme of the Govt. – As a result a right has been accrued in his favour to continue in his post – After lapse of one year four months, the authority redrawn the merit list and call upon the petitioner to show-cause why he shall not be removed from service? – Whether such action of Opp. Party No. 3 is hit by principle of estoppel? – Held, Yes – Case law discussed.

Bikash Mahalik -V- State of Odisha & Ors.

2021 (III) ILR-Cut…… 720

SERVICE LAW – Departmental Guideline – Enforcement – Whether the departmental guideline has any legal sanctity to supersede the statutory Rule? – Held, No.

Harish Chandra Patra -V- State of Orissa & Ors.

2021 (III) ILR-Cut…… 656

SERVICE LAW – Disciplinary Proceeding – Judicial interference with quantum of punishment – Scope and ambit of – Held, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court, then the Court would

appropriately mould the relief either by directing the disciplinary or the appellate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare case, impose appropriate punishment with cognate reasons in support thereof.

Kailash Chandra Mohanty -V- Union of India & Ors.

2021 (III) ILR-Cut…… 648

SERVICE LAW – Seniority – Whether period of service in a non-sanctioned casual post can be considered for seniority and fixation of pay? – Held, No. – Past service in a temporary and non-sanctioned post cannot be considered for the purpose of Seniority.

Mrs. Ashalaxmi Mohanty -V- Central Administrative Tribunal & Ors.

2021 (III) ILR-Cut…… 674

SERVICE LAW – Self same allegation/ facts – Initiation of departmental proceeding as well as criminal proceeding – Exonerated from departmental proceeding – Criminal proceeding pending – Promotion denied in view of pendency of criminal proceeding – Question raised that, whether in view of such pendency promotion should be denied ? – Held, No.

Tribunal as per the decision of Ramesh Govindan (dead) through L.Rs. Vs. Sugra Humayan Mirza Wakf, but in the present case the first appeal has been disposed of on 30.03.2013 followed by a decree dated 11.04.2013. – The Amendment Act No. 27 of 2013 has come into force w.e.f 01.11.2013 and before that present second appeal has been presented – In view of the above factual position as to change of law as introduced in the statute, the Courts are found to have committed no jurisdictional error in entertaining and adjudicating the suit.

Md. Usman Khan & Ors. -V- Paltan Masjid (Mosque) & Anr.

2021 (III) ILR-Cut…… 735

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2021 (III) ILR - CUT-641

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

A.H.O. NO. 60 OF 1994

BASUDEV GURU ……..Appellant

.V.

SMT.BASANTI PANIGRAHI & ORS. ……..Respondents

MOTOR VEHICLE ACT, 1939 – Section 95(2) (b) (i) – Limited Liability – Death of a third party – Liability towards such third party/third party claim – Whether limited or unlimited? – Held, Limited.

Case Laws Relied on and Referred to :

1. 1989(II) OLR 120 : National Insurance Co. Ltd -v- Krushna Ch.Das & Ors.
2. AIR 1988 SC 719: National Insurance Co. Ltd, New Delhi, -v- Jugal Kishore & Ors.
3. AIR. 2002 S.C. 651: New India Assurance Co.Ltd. -v- C.M.Jaya & Ors.

For Appellant : Mr. C.A.Rao, Sr. Advocate

For Respondents: Mr. G.P.Dutta

JUDGMENT Date of Judgment: 13.12.2021

A.K. MOHAPATRA, J

1. Being aggrieved by order dated 3rd May, 1994 passed by the learned Single Judge in M.A.No.386 of 1989 holding that the liability of the insurer is limited to the extent of Rs.50,000/- in view of the provision contained in section 95(2)(b)(i) of the Motor Vehicle Act, 1939 and the balance amount of the awarded amount is payable by the owner insured of the vehicle, the owner of the vehicle has preferred the present appeal.

2. The factual backdrop of the present case, bereft of unnecessary details, is that the present Appellant was the owner of the Bus bearing registration No. ORS 9225 and the said bus was duly insured with the Oriental Insurance Company Ltd. (Respondent No.6). One Daitari Panigrahi, who was working as a Teacher in the Modipara M.E.School under Sambalpur Municipality and was earning a monthly income of Rs.1700/-, is the husband of Respondent No.1 and father of Respondent Nos. 2 to 5. On 3rd April, 1986 at about 4 P.M., the above named Daitary Panigrahi was going by his bicycle

and he was on the left side of the main road, Sambalpur leading from Modipara Chhak to Hospital road. When he took a turn to go to Modipara side, the Bus bearing Registration No.ORS 9225 belonging to the Appellant, being driven in a rash and negligent manner, knocked down the deceased and as a result of which Daitary died on the spot.

3. After the death of late Daitary, his widow-Respondent No.1 and children, Respondent Nos. 2 to5 filed a Claim Case in the Court of the learned 2nd Motor Accident Claims Tribunal, Northern Division, Sambalpur bearing Claim Case No.146 of 1986 claiming a compensation amount of Rs.1, 50,000/- from the opposite parties.

4. The Appellant and the Respondent No.6, Opposite Parties in the claim petition, filed their separate written statements denying the allegations made by the claimants.

5. On the basis of the pleadings of the parties, the learned M.A.C.T.(ND), Sambalpur framed three issues to adjudicate the claim, which are given hereunder:

> i) Whether the accident took place due to rash and negligent driving of the Bus driver bearing ORS 9225 resulting in the death of Daitari Panigrahi on 03.04.1986 ?
>
> ii) Whether the applicants are entitled to any compensation? If so, from whom and to what extent?
>
> iii) To what relief, the parties are entitled?

6. To establish their case, claimant-applicants examined four witnesses, whereas the Opposite Parties did not adduce any evidence, be it oral or documentary.

7. The learned 2nd M.A.C. Tribunal, Sambalpur relying upon the ocular evidence of A.W.No.2 arrived at a finding that there is no escape from the conclusion that the accident resulting in the death of the deceased was due to the rash and negligent driving of the bus in question. Hence the Issue No.1 was answered affirmatively in favour of the claimant applicants. So far as the Issues Nos. 2 and 3 are concerned, those two issues were taken up together and after discussing the evidence, learned 2nd M.A.C. Tribunal, Sambalpur passed the award dtd.12.01.1989 holding that the claimant-applicants are entitled to get a total compensation of Rs.1,49,000/-. In reply to the question as to who shall be liable to pay the compensation amount, learned 2nd M.A.C.

Tribunal, Sambalpur presumed that the liability of the insurer, Opposite Party No.2 being unlimited, the Opposite Party No.2 is liable to indemnify the insured and to pay the entire compensation amount to the claimant applicants. Accordingly directed Opposite Party No.2 to pay the entire compensation amount of Rs.1,49,000/- within a period of two months from the date of his judgment to the claimant-applicants.

8. The Respondent No.6, insurer preferred an appeal bearing M.A.No.386 of 1989 before a learned Single Judge Bench of this Court challenging the award dtd.12.01.1989 passed in Misc. case No.146 of 1986. After hearing the parties, this Court vide order dated 3rd May,1994 disposed of the appeal holding that in view of Section 95(2)(b)(i) of the M.V.Act, 1939, 2nd M.A.C. Tribunal, Sambalpur could not have saddled the entire liability of Rs.1,49,000/- on the insurer alone. Further, the award of the learned 2nd M.A.C. Tribunal, Sambalpur was modified to the extent that the Respondent No.6-Insurance Company's liability is limited to the extent of Rs.50,000/- only and the balance amount of Rs.99,000/- would be paid by the present Appellant and further modified the rate of interest from 12% as granted by the learned 2nd M.A.C. Tribunal, Sambalpur to 6% per annum from the date of application till date of payment is made.

9. As stated earlier, neither the insurer nor the insured filed any evidence before the learned 2nd M.A.C. Tribunal, Sambalpur. Even a copy of the insurance policy/premium receipt was not filed by either of them in the learned Tribunal below. However, during pendency of the M.A.No.386 of 1989 before this Court, the Appellant-Insurance Company had filed a Misc. Case No.89 of 1994 to adduce additional evidence in the appeal. Such additional evidence includes a copy of the insurance policy. It is relevant to mention here that, despite having opportunity, no objection, whatsoever, was raised by anyone of the Parties to the said Misc. Case seeking introduction of additional evidence in M.A. No. 386 of 1989. The learned Single Judge, however, observed that such additional evidence shall be considered at the time of final hearing of M.A. No. 386 of 1989 by order dated 15th July, 1997.

10. Challenging order dated 3rd May, 1994 passed in M.A. No. 386 of 989 passed by the learned Single judge, the present Appellant, the Bus owner, has filed the present A.H.O. questioning the legality and validity of order dated 3rd May, 1994.

11. Heard Mr. C.A.Rao, learned Senior Advocate for the Appellant and Mr. G.P.Dutta, Advocate for the Respondent No.6 and perused the records placed before us.

12. Mr. C.A. Rao, Senior Advocate appearing on behalf of the Appellant (insured) made a valiant attempt to assail order dated 3rd May, 1994 passed by the learned Single Judge in M.A.No.386 of 1989 on the ground that the insurance policy taken by the insured covers unlimited liability arising on account of a claim by a 3rd party and that the Appellant is not liable to pay any amount as directed by the learned Single Judge of this court in the M.A.. It is further stated by him that the Respondent No.6 -insurer has accepted a sum of Rs.240/- under "T.P. Policy" and not "Act only Policy" and that the same covers the public risk. Mr. Rao, learned Senior Advocate, further submitted that the T.P. Policy covers the liability of 3rd party for unlimited amount for which an extra premium of Rs.40/- has been paid to the insurer.

13. The Appellant insured has also filed a petition bearing Misc. case No.88 of 1994 in the present AHO for additional evidence. Since no objection was raised by any party, the same is allowed and taken on record. The present Appellant has filed the schedule of rates of the Insurance Company involved in the present case. The document under the heading "Benefits Under Motor Insurance" provides three categories of insurance policies. Under the second category i.e. Liability to the Public Risk (Third Party Insurance), the following note is given;

> "Indemnity against legal liability for claims by the public in respect of accident, personal injury or damage to property caused by the insured vehicle and W.C. liability to paid driver, cleaner or attendant whilst engaged on the vehicle as per limitations mentioned in the policy."

The insured Appellant had taken a liability to public risk policy by paying extra premium of Rs.240/-.and this fact is evident from the copy of the insurance policy filed before this court. Therefore, under the public risk policy, the liability of the insurer is subject to the conditions/ limitations in the policy. When the Appellant has not paid any extra premium for unlimited third party liability as the said column in the premium receipt had been left blank, the liability of the insurer is subject to the statutory limits prescribed under the Motor Vehicle Act, 1939.

14. In course of his argument, learned counsel appearing for the insured placed a strong reliance on a judgment of this Court in ***National Insurance Co. Ltd-vrs-Krushna Chandra Das and others***, reported in 1989**(II) OLR 120**. Relying on Paragraph-5 of the said judgment, it was submitted by him that the claimants are entitled to get the entire compensation amount as directed by the learned 2nd M.A.C. Tribunal, Sambalpur from the insurer without being affected by the limits provided under section 95(2)(b)(i) of the M.V. Act, 1939.

15. On a careful reading of the judgment relied on by the learned counsel for the Appellant reported in 1989(2) OLR 120, it is seen that the deceased in the said case was a 3rd party pedestrian who died unfortunately in an accident caused by a bus. Learned Single Judge, who was adjudicating the said matter referred to Section 95(2)(b)(i) of M.V.Act, 1939 and has arrived at a conclusion that a Pedestrian is not such a person in respect of whom liability has been limited under section 95(2)(b)(i) of the Act and therefore, the learned Single Judge was inclined to hold that the Claimants in respect of an accident caused by a vehicle in which passengers carried are entitled to get compensation from the insurer without being affected by the limits provided in Section 95(2)(b)(i) of the M.V.Act, 1939.

16. Mr.G.P.Dutta, learned counsel appearing for the insurer Respondent No.6, defended the order passed by the learned Single Judge in M.A.No.386 of 1989. Mr. Dutta further submitted that the insurance policy under which the claim is made does not cover unlimited liability towards 3rd party. Moreover, the attention of the Court was drawn to a copy of the Policy to support his contention that the liability towards 3rd party is not unlimited in this case as the extra premium that was required to be paid by the insured for such coverage has not been paid by the insured in the present case. In fact, a close scrutiny of the insurance policy which has been filed by the insurer before the learned Single Judge along with a Misc.Case reveals that a total sum of Rs.1008/- has been paid by the insured as premium to the insurer. Further, the schedule of premium doesn't reveal whether any amount has been paid under the heading "Add for increased T.P.limits" and the said heading in the premium receipthas been left blank. This clearly shows that no extra amount was paid by the insured to the insurer for unlimited 3rd party policy.

17. Mr.C.A. Rao, learned counsel for the Insured relied upon the judgment of the Hon'ble Supreme Court in the matter of ***National Insurance Co. Ltd., New Delhi, -vrs.- Jugal Kishore and others*** reported in ***AIR 1988 SC 719*** to advance his argument on the issue that in all such cases where the Insurance Company concerned wishes to take a defence, in a claim petition, that its liability is not in excess of statutory liability, it has to file a copy of the insurance policy along with its evidence. He further submitted that the Insurance Company having not filed the copy of the insurance policy before the learned M.A.C. Tribunal, Sambalpur, the insurer is estopped to take the defence as stated hereinabove. It is true that the copy of the insurance policy had not been filed before the learned Tribunal by the Insurance Company at the first instance. However, in the appeal before the learned Single Judge, the Insurance Company sought to include in the evidence a copy of the insurance policy by filing a petition for acceptance of additional evidence. Although the insured was a party before the learned Single Judge, no objection was filed to such an application. Moreover, the learned Single Judge had passed an order indicating that the evidence shall be considered at the time of final hearing of the appeal. Therefore, once the learned Single Judge has accepted the evidence and passed order indicating that the same will be considered at the time of final hearing that too without any objection by the insured, it is no more open to the insurer to take a stand that the insurer is estopped to take a plea that the liability is limited under section 95(2)(b)(i) of the M.V.Act. Moreover, it is the insured who has taken a stand in the present appeal that the liability of the insurer is beyond the statutory limit of Rs.50,000/- and therefore, the insured was under the legal obligation to file a copy of the policy, both as a custodian of the insurance policy as well to support his assertion that the liability of the insurer is beyond Rs.50,000/- as provided under section 95(2)(b)(i) of the M.V.Act, 1939, to support his contentions in this regard.

18. Learned counsel appearing for the Insurer while supporting the impugned order has relied upon two judgments of the Hon'ble Supreme Court. First, i.e. **AIR 1988 S.C. 719 (*Jugal Kishore's Case*)** to establish that the liability of the Insurance Company as against 3rd party claim has been restricted within the statutory limit as provided under Section 95(2)(b)(i) of the MV.Act, 1939. He has also placed his reliance upon a judgment of the constitution bench of the Hon'ble Supreme Court of India in the matter of ***New India Assurance Co. Ltd. -vrs.- C.M. Jaya and others***, reported in ***AIR.***

2002 S.C. 651. In C.M.Jaya's case (supra), a constitution Bench of the Hon'ble Supreme Court was considering the question of Law i.e. "the question involved in this appeal is whether in a case of Insurance policy not taking any higher liability by accepting a higher premium, in case of payment of compensation to a 3rd party, the insured would be liable to the extent limited under Section 95(2) or the insured will be liable to the entire amount and he may ultimately recover from the insurer". After analyzing several judgments by the Hon'ble Supreme Court including *Jugal Kishore's* case (supra), in Paragraph-8 of the said judgment has arrived at the following conclusion;

> "8. In the light of what is stated above, we do not find any conflict on the question raised in the order of reference between the decisions of two Benches of three learned Judges in Shanti Bai and Amrit Lal Sood aforementioned and, on the other hand, there is consistency on the point that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance company is neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Act. In Amrit Lal Sood's case, the decision in Shanti Bai is not noticed. However, both these decisions refer to the case of Jugal Kishore and no contrary view is expressed."

19. In view of the legal position discussed hereinabove, the law laid down by a Single Judge Bench of this Court in **1993 (II) OLR page 11** is no more a good law as the same has been impliedly overruled by a constitution Bench of the Hon'ble Supreme Court in **AIR 2002 SC 651**. In view of the final legal position and the materials available on record, the submissions made by the learned counsel for the Appellant that the Respondent No.6 (insurer) had in the present case undertaken an unlimited liability policy towards 3rd party claims does not have any substance. The liability under the policy in the instant case, was the same as the statutory liability contemplated by Section 95(2)(b)(i) of the M.V.Act, 1939 as it stood at the relevant point of time. Therefore, the learned Single Judge has not committed any illegality under the impugned order by restricting the liability of the insurer to Rs.50,000/- as provided under section 95(2)(b)(i) of the M.V.Act, 1939.

20. The impugned order dated 3rd May, 1994 passed in M.A.No.386 of 1989 by the learned Single Judge does not call for any interference by this Court. Accordingly, the appeal preferred by the Appellant insured is hereby dismissed. However, there shall be no order as to cost.

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2021 (III) ILR - CUT-648

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

W.P.(C) NO. 7078 OF 2014

KAILASH CHANDRA MOHANTY ……..Petitioner

.V.

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

SERVICE LAW – Disciplinary Proceeding – Judicial interference with quantum of punishment – Scope and ambit of – Held, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court, then the Court would appropriately mould the relief either by directing the disciplinary or the appellate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare case, impose appropriate punishment with cognate reasons in support thereof.

(Paras 14,15)

Case Laws Relied on and Referred to :

1. (2003) 8 SCC 9 : Dev Singh v. Punjab Tourism Development Corporation.

For Petitioner : Mr. Sameer Kumar Das

For Opp. Parties: Mr. P.K. Parhi, Assistant Solicitor General of India

ORDER Date of Order: 15.12.2021

Dr. S.MURALIDHAR, C.J

1. The Petitioner, who retired from service as Superintendent, Railway Mail Service, Berhampur-Ganjam Division, Berhampur, has filed this writ petition challenging the order dated 22nd January, 2014 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack (CAT) in O.A. No.282 of 2012.

2. The background facts are that the Petitioner joined as Postal Assistant on 10th April, 1972. Subsequently he was promoted in the ranks and was ultimately to the post of Superintendent in 2001. He superannuated on 31st July, 2010.

3. It is stated that between 18th July, 2005 and 20th December, 2005 the Petitioner was posted as Assistant Manager (Administration) in Postal Printing Press (PPP), Bhubaneswar and thereafter as Deputy Manager then

from May, 2008. On 3rd October, 2006 the Chief Post Master General, Orissa Circle, Bhubaneswar (Opposite Party No.2) issued a memo of charges against the Petitioner under Rule 14 of the Central Civil Services (CCA) Rules, inter alia alleging that the Petitioner, in violation of the guidelines, had allowed his son and three other persons to be appointed as Apprentice (Book Binder) during his incumbency as Assistant Manager, PPP. It was further alleged that, by such action in question, those Apprentices were paid stipend, which had resulted in loss of money for the Government and gain to the Petitioner, as one of those Apprentices happened to be his own son. It was further alleged that the Petitioner endorsed the irregular noting dated 20th September, 2005 of the Dealing Assistant recommending selection of three other persons including the son of the Dealing Assistant.

4. The Petitioner denied the charges and a disciplinary enquiry was conducted. It is stated that, while awaiting the report of the enquiry, the Petitioner superannuated. Accordingly, the Petitioner was paid only provisional pension and the payment of gratuity was withheld as was the commuted value of pension and other benefits.

5. On account of the delay in finalization of the disciplinary proceedings, the Petitioner filed O.A. No.427 of 2011 in the CAT. By the order dated 7th July, 1911 the CAT disposed of the said O.A. by directing Opposite Party No.2 to conclude of the disciplinary proceeding within three months.

6. On 14th July, 2011 the Petitioner was forwarded a copy of the Enquiry Report dated 18th April, 2007 asking him to either make a representation or a submission. Thus, the enquiry report was furnished to the Petitioner more than four years after it was made ready.

7. Thereafter the ADG, Vigilance (Opposite Party No.4) in the name of the President of India and in consultation with the UPSC, on 21st February, 2012 issued the order of punishment by way of imposing penalty of withholding 20% of the monthly pension of the Petitioner for a period of 5 years and further directing the withholding of his entire gratuity amount permanently.

8. Being aggrieved by the said order, the Petitioner again approached the CAT by filing O.A. No.20 of 2012. By the impugned order dated 22nd January, 2014, the CAT dismissed the O.A. for the following reasons:

(i) There was no violation of any rule or procedure in finalizing the disciplinary proceedings.

(ii) The delay in finalizing the enquiry proceeding was not prejudicial to the Petitioner. Further the President has power under Rule 9 of the CCS CCA (Pension) Rules, 1972 to withhold whole or part of the pension or gratuity or both or withdraw a pension or a part thereof by way of punishment.

(iii) The delay of 4 years in furnishing the Petitioner a copy of the enquiry report cannot be said to vitiate the punishment since the punishment had "already taken effect and the respondents have implemented the same order already."

(iv) The CAT was not a court of appeal and cannot re-appreciate the evidence in the disciplinary proceeding. The plea that the Petitioner was not the final approving authority for the appointment of the apprentices would not exonerate the Petitioner from the misconduct.

(v) No interference by the CAT with the quantum of punishment was warranted.

9. This Court has heard the submissions of Mr. S.K. Das, learned counsel for the Petitioner and Mr. P.K. Parhi, learned Assistant Solicitor General appearing for the Opposite Parties – Govt. of India.

10. A careful perusal of the enquiry report reveals that the two charges proved against the Petitioner were:

(i) That he irregularly managed to get his son engaged as an apprentice in the Book-binding trade under the special category at the PPPP, Bhubaneswar;

(ii) That, he endorsed an irregular noting of the Dealing Assistant recommending the selection of the sons of the staff members working in the PPP, Bhubaneswar as Apprentices.

11. The fact remains that, in the organizational hierarchy, the Petitioner was working as Assistant Manager and was not the ultimate decision-making authority when it came to appointment of Apprentices. Secondly, the Petitioner had an unblemished track-record till then.

12. In the rejoinder to the counter affidavit the Petitioner has pointed out that no loss as such was caused to the government, as the appointments were cancelled within 4 to 5 days from the date of issuance of the appointment orders. Therefore, a crucial part of the Articles of Charge regarding loss caused to the government and a corresponding gain to the Petitioner was factually not proved by the Opposite Parties.

13. Be that as it may, even if the misconduct encompassed under Articles I and II in the enquiry can be said to have been proved against the Petitioner, the punishment of withholding of the entire gratuity of the Petitioner on a permanent basis apart from withholding 20% of his monthly pension for five years does appears to be disproportionate.

14. In Dev Singh v. Punjab Tourism Development Corporation (2003) 8 SCC 9, while explaining the general principle that the CAT will not ordinarily interfere with the quantum of punishment, the Supreme Court explained as under:

> "A Court sitting in an appeal against a punishment imposed in disciplinary proceedings will not normally substitute its own conclusion on penalty. However, if the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court, then the Court would appropriately mould the relief either by directing the Disciplinary or the Appellate Authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare case and impose appropriate punishment with cogent reasons in support thereof."

15. The present case appears to fall in the category of a 'rare case' of disproportionate punishment. For a person who has served with an unblemished career over three decades in the Postal Department, a single infraction should not attract such a huge penalty of forfeiture of his entire gratuity. As far as the other part of the punishment is concerned, the withholding of 20% of the monthly pension for five years has already been suffered by the Petitioner. To be fair, learned counsel for the Petitioner did not ask for the said portion to be modified.

16. In the above circumstances the Court directs that the punishment imposed on the Petitioner of withholding of his entire gratuity stands set aside and the other part of the punishment in the order of withholding 20% of his monthly pension for five years is sustained. The impugned penalty order dated 21st February, 2012 of Opposite Party No.4 and the corresponding impugned order of the CAT stands modified accordingly.

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

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2021 (III) ILR - CUT-652

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

W.A. NO. 729 OF 2021

NIRAKAR SETHI ……..Appellant

.V.

STATE OF ODISHA & ORS. ……..Respondents

ORISSA GRAM PANCHAYAT ACT, 1964 – Section 24(2)(C) – Whether the statutory notice period of 15 days as prescribed in the section is directory or mandatory – Held, as per the decision of full bench in Sarat Padhi Vs. State of Orissa (AIR 1988 Ori 116) the requirements in terms of the Section 24 (2)(C) of the Act is directory and not mandatory.

Case Laws Relied on and Referred to :

1. AIR 1988 Ori 116 : Sarat Padhi v. State of Orissa.

For Appellant : Mr. Sidheswar Mohanty

For Respondents: Mr. S.N. Das, A.S.C.(Respondents 1,2 & 3)
Mr. S.K. Nayak-2, (Respondents 4 to 23)

ORDER Date of Order: 15.12.2021

Dr. S.MURALIDHAR, C.J.

1. This writ appeal is directed against the order dated 14th September, 2021 passed by the learned Single Judge dismissing the Writ Petition (Civil) No. 27318 of 2020 filed by the Appellant.

2. By the impugned order the learned Single Judge negatived the plea of the Appellant that the "No Confidence Motion" brought against him by the members of the Katanabania Gram Panchayat under Rajkanika Block of Kendrapara district was bad in law for not adhering to the statutory notice period in terms of Section 24(2)(c) of the Orissa Gram Panchayat Act, 1964 ("the Act").

3. The background facts are that the Appellant was the elected Sarpanch of Katanabania GP since February, 2017. Some of the Ward Members of the said GP convened a meeting on 7th March, 2020 and passed resolution of "No Confidence" against the Appellant. Accordingly they moved the Sub-

Collector, Kendrapara (Opposite Party No.3) with the proposed resolution/requisition to convene meeting for considering the "No Confidence Motion". The Collector, Kendrapara verified the signatures of the Ward Members and issued letter dated 29th September, 2020 fixing the date, time and place of the special meeting for considering the "No Confidence Motion" as 21st October, 2020 at 11 AM in the Rajkanika Panchayat Samiti Office.

4. The case of the Appellant was that, although notice was issued on 29th September, 2020, it was received by post by the Appellant only on 8th October, 2020. According to the Appellant, given that the date of the meeting was 21st October, 2020, there was no clear 15 days' gap between the receipt of the notice by the Appellant and the date for consideration of the "No Confidence Motion". It was accordingly contended that this was violation of Section 24(2)(c) of the Act.

5. Since the above contention was negatived by the learned Single Judge, this Court while hearing the present Appeal required the counsel appearing for the Opposite Party – State to produce the original record.

6. Mr. Das, learned Additional Standing Counsel (ASC) appearing for the Opposite Parties 1 to 3, produced the original record which showed that the Sub-Collector, Kendrapara (Opp. Party No.3) had indeed signed the notice in terms of Section 24(2)(c) of the Act on 29th September, 2020. The notice was dispatched by speed post on 7th October, 2020. There is no dispute that the Appellant and others to whom the notice was issued received it on 8th October, 2020. The gap between the date of receipt of the notice and the date of the meeting was indeed less than 15 days.

7. Mr. Das, learned ASC placed reliance on the judgment of the Full Bench of this Court in ***Sarat Padhi v. State of Orissa AIR 1988 Ori 116***. The facts as set out in para 2 of the said judgment reveal that the Petitioner there was the Sarpanch of Chandpur GP in the district of Dhenkanal in December, 1983. On the resolution passed by the members of the GP expressing want of confidence, the SubDivisional Officer, Kamakshyanagar issued a notice dated 3rd September, 1985. The said notice was sent to the members under Certificate of Posting, as required by Section 24(2)(d) of the Act. The Petitioner received the notice on 12th September, 1985, whereas the meeting was scheduled to 24th September, 1985. There too the plea of the Petitioner

was that there was no clear 15 day period between the date of receipt of the notice and the date of meeting and that, therefore, it was violative of Section 24(2)(c) of the Act.

8. After analyzing Section 24 of the Act in detail, it was observed in the leading judgment for the majority that:

> "…the period of 15 clear days is only intended to apply between the date of the notice and the date of the meeting so fixed and not between the date of the actual service of the notice and the date of the meeting."

9. The conclusion recorded in the leading judgment reads as under –

> "The scheme of the notice contemplated under S.24(2)(c) may be divided into three parts – (1) requirement of giving the notice, (ii) fixing the margin of time between the date of the notice and the date of the meeting, and (iii) service of notice on the members, I am of the view, which is also conceded by the learned Advocate General, that the first two parts, namely, the duty to issue the notice and the margin of clear 15 days between the date of the notice and the date of the meeting, are mandatory. In other words, if there is any breach of these two conditions, then the meeting will be invalid without any question of prejudice. But the third condition, i.e., the mode of service or the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting, will not render the meeting invalid. This requirement is only director. This is also based on a sound public policy as in that event any delinquent Sarpanch or NaibSarpanch can frustrate the consideration of the resolution of non-confidence against him by tactfully dealing or avoiding the service of the notice on him and thus frustrate the holding of the meeting. The legislation has also accordingly taken care to provide in unequivocal terms a provision to obviate such contingencies by incorporating cl.(e) to sub-sec.(2) of S.24."

10. The concurring judgment also observed as under –

> "27. Coming to the instant case, section 24(2) of the Act prescribes the procedure for holding the meeting of the Grama Panchayat specially convened to consider no-confidence motion against the Sarpanch and conduct of business at such meeting. Clause (c) of sub-section (2) of section 24 requires the Sub-divisional Officer, on receipt of the requisition, to fix the date, hour and place of the meeting and give notice of the same to all members holding office on the date of such notice along with a copy of the requisition and of the proposed resolution, at least fifteen clear days before the date so fixed. In clause (d) of subsection (2) it is provided that the aforesaid notice shall be sent by post under certificate of posting and a copy thereof shall be published at least seven days prior to the date fixed for the meeting in the notice board of the Samiti. Clause (e) of sub-section (2) which is important for the present purpose, lays down that the proceedings of the meeting shall not be invalidated merely on the ground that the notice has not been received by any

> member. From these provisions it is manifest that non-receipt of notice by any member shall not invalidate the meeting and the decision taken therein and further that fifteen clear days" notice is not an inflexible requirement. Under clause (d) the notice is required to be published in the notice board of the Samiti leaving at least seven clear days prior to the date fixed. If a member who has not received notice of the meeting at all is not entitled to challenge its validity on that ground it does not appeal to reason that one who has received notice but less than fifteen days before the meeting is entitled to do so. The notice of the meeting is given with a view to enable the members to deliberate about the proposed noconfidence motion and to make necessary arrangements to attend the meeting on the date fixed. Therefore, non-receipt of notice or receipt of notice short of the prescribed period will be a matter of prejudice to be considered on the facts and circumstances of each case. Keeping in view the intent and purpose of the provision as discussed above, it will not be reasonable to say that the legislative intent was that shortage of the prescribed period for notice will automatically render the meeting invalid irrespective of the fact that the member concerned otherwise had knowledge of the date of the meeting and had adequate opportunity to attend the meeting on the date fixed."

11. The concurring judgment expressly held that –

> "…the provisions in section 24(2)(c) of the Act are directory…"
>
> That is not to say that the provisions of the Section 24(2)(c) need not be followed or that a meeting held in contravention of Section 24(2)(c) can never be challenged at all. It only means that the proceeding of the meeting will not stand vitiated automatically for any infringement of the Section. The party challenging the validity of the meeting relying on the provision has to establish that he has been prejudiced."

12. On the facts of that case, therefore, it was held that the noconfidence motion would not stand invalidated.

13. The present case is more or less on the same lines. Here again although the notice was dated 29th September, 2020 it was in fact despatched by Speed Post only on 7th October, 2020. It was thereafter received by the Appellant and others on 8th October, 2020, thus leaving a gap of only 13 days between the date of receipt of the notice and the date of the meeting.

14. Learned counsel for the Appellant sought to highlight the wording of Section 24(2)(d) of the Act, which states that "aforesaid notice shall be sent by post under Certificate of Posting" and that, unless such notice is 'sent' it cannot be said to have been 'given' in terms of Section 24(2)(c) of the Act. He also sought to suggest that, in ***Sarat Padhi***'s case (supra) the Court had held that the date of 'issuance' of notice was in fact the date of its dispatch by post, and not the date on which the notice was signed.

15. The Court is unable to agree with the above submissions. In ***Sarat Padhi'***s case (supra) the date on which the notice was dispatched by Under Certificate of Posting was later than the date on which it was signed by the Sub-divisional Officer, thereby narrowing the time period between the date of the meeting and the date of receipt of the notice to less than 15 clear days. Those facts are identical to the facts of the present case. Therefore, it would be wrong to contend that the 15 days' gap between issuance of the notice and the date of the meeting is a must. That requirement in terms of Section 24(2)(c) of the Act has been held to be 'directory' and not "mandatory" by the Full Bench of this Court. This Court is bound by the Full Bench decision in ***Sarat Padhi***'s case (supra). Even otherwise, this Court is not inclined to doubt the correctness of the said decision.

16. The writ appeal is accordingly dismissed, but with no order as to costs.

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2021 (III) ILR - CUT- 656

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

W.P.(C) NO. 30789 OF 2011

HARISH CHANDRA PATRA ……..Petitioner

.V.

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

SERVICE LAW – Departmental Guideline – Enforcement – Whether the departmental guideline has any legal sanctity to supersede the statutory Rule? – Held, No.

For Petitioner : Mr. C.R.Pattnaik
For Opp.Parties: Mr. M.K.Khuntia, AGA

JUDGMENT Date of Judgment: 20.12.2021

B. P. ROUTRAY, J

1. The present writ petition is directed against the judgment dated 30th August, 2011 passed by the learned Odisha Administrative Tribunal (OAT) in O.A.No.1217(C) of 2008.

2. The Petitioner, being duly selected, appointed as a forest guard and joined as such on 1st March, 1997. He underwent training in Mooney Forest Guards School, Angul for the Session November, 2002 to April, 2003. In the training examination, he secured second position and on the basis of the same, he claims that he should be permitted to undergo foresters training in terms of Rule 9 of the Rules for Foresters Training in Odisha. Since the Opposite Parties did not permit him for forester's training, he approached the learned OAT which was rejected in the impugned judgment.

3. It is submitted that learned Tribunal has failed to consider the prayer of the Petitioner though another similarly situated forest guard was permitted to undergo such training of foresters in the year 2003.

4. Conversely, it is submitted by the learned Additional Government Advocate that the Petitioner is under misconception of such provision under the Foresters Training Rules in Odisha. It is further submitted that those Rules are not statutory Rules but guidelines only, which has no statutory effect after coming into force of the Odisha Subordinate Forest Service (Method of Recruitment and Conditions of Service of Foresters) Rules, 1998 and the Odisha Subordinate Forest Service (Method of Recruitment and Conditions of Service of Forest Guards) Rules, 1998.

5. Perusal of the impugned judgment reveals that the learned OAT has rejected the case of the Petitioner by observing that the Odisha Subordinate Forest Service Rules, 1998 in respect of the foresters and the forest guards having come into force in 1998, which are statutory Rules framed under Article 309 of the Constitution of India, the guidelines issued in respect of training of foresters and forest guards do not have any legal sanctity to supersede the statutory Rules.

6. It is seen that two sets of guidelines titled as "Rules for the Forester Training in Odisha" and "Guidelines for the Forest Guard Training in Odisha" were issued by the Principal Chief Conservator of Forests, Odisha from time to time. Thus, those two sets of guidelines prima facie cannot be considered as statutory Rules. In other words, these are the guidelines issued

by the Head of Department to facilitate smooth training for the foresters and forest guards. Rule-9 (it should be referred as Paragraph-9) of the so-called Rules for training of foresters specifies that, top two students passing from Mooney Forest Guards School may be considered eligible for admission into the foresters course. Again, paragraph-35 of the guidelines for training of forest guards specifies that, the Principal Chief Conservator of Forests shall have the power to grant one advance increment to the top most forest guard trainee, if the total number of trainees in the combined examination does not exceed 50, and if, the combined strength of trainees of all the school exceeds 50, then the second topmost trainees shall be granted advance increment.

7. Admittedly, the Odisha Subordinate Forest Service (Method of Recruitment and Conditions of Service of Foresters) Rules, 1998 and the Odisha Subordinate Forest Service (Method of Recruitment and Conditions of Service of Forest Guards) Rules, 1998 do not provide facility of any such forester training either for the topmost student or top two students to be considered eligible for admission into foresters' course. Those two Rules framed in 1998 prescribe the procedure of recruitment for forester and forest guards and their conditions of service. Foresters are to be recruited by direct recruitment to the extent of 50% through competitive examination and by promotion to the extent of rest 50% from eligible forest guards. In other words, any other process of recruitment except in respect of Village Forest Workers, as one time arrangement, was not recognized for appointment as forester.

8. The effect of the so-called foresters' training Rules has no statutory force. As stated earlier, these are the guidelines issued by the Head of Department i.e., the Principal Chief Conservator of Forests. Therefore anything stated in such guidelines, which is inconsistent to the provisions in the statutory Rules, 1998 has no legal sanctity or overriding effect to grant any benefit in favour of the incumbent forest guard trainee. Therefore, no illegality is found in approach of the learned Tribunal to reject the prayer of the Petitioner.

9. With regard to other contention of the Petitioner that one Rajani Kanta Panda, Forest Guard was granted benefit of forester training in the year 2003, it is seen from the letter dated 26th September, 2003 under Annexure-4 that, said Rajani Kanta Panda was appointed much prior to the Petitioner and

undergone forest guard training course during 62nd batch of 1990-1991. In the said letter under Annexure-4, the Conservator of Forests recommended his case to the Principal Chief Conservator of Forest for consideration. The Petitioner being an appointee of the year 1997 and has undergone training in 2002 after coming into force of 1998 Rules, is thus standing on a different footing than said Rajani Kanta Panda and as such cannot be equated with him to get the same benefit.

10. In the result, the writ petition is dismissed

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2021 (II) ILR - CUT-659

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

CRIMINAL APPEAL NO. 127 OF 2020

MINJA @ROHIT PRADHAN …….. Appellant

.V.

STATE OF ODISHA …….. Respondent

CRIMINAL TRIAL –Offences under sections 302, 364, 201 and 379 of the IPC, 1860 – Conviction – Appeal – Conviction based on circumstantial evidence – All the circumstances proved against the appellant are forming the chain complete, unerringly pointing guilt against accused – Effect of – Held, undoubtedly giving the only inference of guilt against the appellant. (Para 26)

Case Laws Relied on and Referred to :-

1. AIR 1952 SC 343 : Hanuman Govind, Nargundkar and another vs. State of Madhya Pradesh.
2. AIR 2010 SC 2914 : G. Parashwanath vs. State of Karnataka.
3. AIR 1984 SC 1622: Sharad Birdhichand Sarda vs. State of Maharashtra.
4. (2003) 8 SCC 180: State of Rajasthan vs. Raja Ram.
5. (2012) 6 SCC 403: Sahadevan and another vs. State of Tamil Nadu.
6. AIR 1947 PC 67: Pulukuri Kotayya vs.King-Emperor.
7. (2012) 10 SCC 464: Munish Mubar vs. State of Haryana.

For Appellant : Mr. B.K. Ragada
For Respondent: Mrs. Saswata Pattanaik, A.G.A.

JUDGMENT Date of Judgment : 24.12.2021

B. P. ROUTRAY, J.

1. The Appellant is convicted for offences under Sections 364, 302,201 and 379 of the Indian Penal Code (IPC) by the learned Additional Sessions Judge, Bhubaneswar in Criminal Trial No.79 of 2011 and sentenced to undergo imprisonment for life along-with imprisonment for different terms in connection with Balipatna P.S. Case No.93 dated 10th July, 2010 corresponding to G.R. Case No.587 of 2010.

2. The Appellant along with five others were prosecuted for commission of offences under Sections 364/302/379/411/34 read with Section 120-B of the I.P.C. Except the Appellant, other four coaccused persons were acquitted from the charges.

3. The deceased namely Tutu @ Prasant Pradhan and the Appellant were working at Kerala. They were involved in labour contract deals to arrange labourers to work at Kerala. The Appellant was working as the Manager along with P.W.19 under the deceased. He had earlier requested the deceased to make him a partner. But the deceased did not heed to the same. The deceased belong to the village Kanapur under Nimapara P.S. and the Appellant belong to the village Sagada-Deuli under the same P.S.

4. On 6th July, 2010 in the morning when the deceased present in his house and taking food, received a phone call from the Appellant.After taking his food when he came out from his house, his parent viz. P.W.11 and 15 asked him where he was going. The deceased replied that the Appellant (Minza @Rohit Pradhan), who is distantly related to him also, called him over phone and as such he is going with him. The deceased went with the Appellant in a bajaj scooter. The deceased was seen sitting in the rear seat of the scooter driven by the Appellant by different witnesses viz., P.Ws.4, 5, 6, 7 & 8. They went towards village Bhairipur. They took liquor with them and the Appellant had kept a Katuri (the weapon of offence – M.O.-IX) with him. Before reaching the village Bhairpur, the scooter stopped due to mechanical failure. Keeping the scooter there, they went walking to the farm house of the sister of the Appellant, namely, Manorama (one of the co-accused), situated

in a lonely place at some distance. The said farm house is the spot of occurrence. One small room of asbestos roof with verandah was there. Nearby to it, a small pond and a coconut tree also were there in the premises of the said farm house. Both the Appellant and deceased drank liquor in the verandah of the asbestos room. After some time, the Appellant told the deceased to pluck green coconut from the tree standing on the bank of the pond. Reaching near the coconut tree, the Appellant instructed the deceased to climb the tree and pluck coconut. The deceased refused to climb the tree and sat under the tree. Then some hot altercation of words were exchanged between them as the deceased undermined the Appellant telling him as the Manager under him when he himself is the labour contractor. This infuriated the Appellant, who by replying that the deceased though had earlier promised to take him as a partner, but took another person from Jajpur as his partner in the labour contract business, and then dealt blows on the head of the deceased by means of the Katuri he was holding. The deceased died there instantly. The Appellant then washed the Katuri as well as the place under the coconut tree where the deceased sat bringing water from the tube-well situating in the same premises. Then he concealed the Katuri (MO-IX) in the heap of firewood kept on the verandah of asbestos room and leaving the dead body there returned back to the house of his sister at village Bhairipur, and again went inside the village. He called two of his friends from the village, went near the scooter, took the same to nearby garage, repaired it and then left. On the next day, the Appellant brought petrol from P.W.17 (turned hostile) and again came to the spot. He undressed the deceased, took off his gold finger ring, gold chain, mobile phone and wrist watch, and kept the wearing pant, shirt near his face, poured petrol and kindled fire so that his face could not be recognized. Then he put two sacks, one from the head side and the other from foot side to cover the body entirely, tied it and threw into the pond. Thereafter he cleaned himself at the tube-well and went to the house of his sister. He gave the gold chain to his sister saying that he has brought it from Kerala and then went to the village market (Khelar chhak) where he gave the mobile phone of the deceased to the other co-accused, Sadasib Pradhan and brought Rs.3,000/- from him and kept the wrist watch and gold finger ring with him. He threw the wrist watch into the pond at village Sagada-Deuli and concealed the finger ring inside the soil under an Arakha tree near the village Ratilo.

On the other hand, as the deceased did not return to house, his parents searched for him on the next day. P.W.11, father of the deceased came to know from the witnesses that the deceased was seen going with the Appellant in the scooter. P.W.11 lodged a man missing report in Nimapara P.S. regarding his missing son (the deceased) which was registered as Man Missing Report No. 6 dated 9th July, 2010. P.W.11 and other witnesses were searching for the Appellant right from the next day of missing of the deceased, but could not found him. On 9th July, 2010, P.W.11 and P.Ws.4 to 8 met the Appellant on the way and when they asked the whereabouts of the deceased to him, the Appellant replied to them that he after killing the deceased in the farm house of his sister had thrown the dead body into the pond wrapping in two basta (sacks). The witnesses then went to the spot i.e. the farm house and found the dead body of the deceased inside the pond which was partially decomposed. Then P.W.11 went to Balipatna P.S. as the spot farm house was coming under the jurisdiction of the said P.S. and lodged the FIR under Ext.4.

5. The IIC of Balipatna P.S. registered the FIR and directed P.W.20, the then Sub-Inspector to investigate. Accordingly P.W.20 took up investigation, held inquest and requisitioned for the scientific team. P.W.21, the scientific officer visited the spot on the same day, prepared a spot visit report under Ext.19 and collected sample earth, blood stained earth and two bamboo leaves stained with blood with some pieces of hair.

6. P.W.20 also prepared a spot map under Ext.18. He examined the witnesses and arrested the Appellant on 15th July, 2010. The Appellant while in police custody confessed his guilt and also confessed to have kept the gold finger ring under the Arakha tree as well as giving of gold chain to his sister and mobile phone to Sadasib. The Appellant lead P.W.20 and other witnesses viz. P.W.16 and another to the place of concealment of the gold ring and gave recovery of the same. He also gave recovery of the gold chain and mobile phone from co-accused Manorama and Sadasib. All those articles were seized by P.W.20 under different seizure lists. P.W.20 continued investigation till 23rd August, 2010 and upon his transfer handed over the investigation to the IIC. From the IIC, P.W.18, another Sub-Inspector of Police took charge of investigation on 10th September, 2010 who continued investigation till 11th November, 2010 when he submitted the charge-sheet against all the accused persons for the offences aforestated.

7. The Appellant did not plead guilty and claimed false implication.

8. Prosecution examined 22 witnesses and exhibited 31 documents in support of their case. The trial ended in conviction of the Appellant as stated earlier.

9. As the principal offence is under Section 302, I.P.C., it is relevant to mention here that the homicidal nature of death of the deceased is not disputed by the Appellant. Otherwise also as seen from the evidence ofP.W.1, Dr. Sujata Mishra, who conducted the post mortem examination over the dead body on 10th July, 2010 at 11.45 a.m., the deceased sustained obliquely placed linear cut wound on the left parietal region of the scalp measuring 5 c.m. x 1 cm. The margins were clean cut. Another clean cut fracture was there on the left occipital mastoid area of length 5 cm associated with fissure fracture. One more cut wound was there extending from the bridge of the nose along the left maxilla upto left mandible associated with mandible fracture. There were two more injuries noticed on the back of the neck and on the left deltoid area. So keeping in view nature of those injuries, no more doubt remains about homicidal death of the deceased as has been rightly concluded by the learned trial court.

10. Admittedly no direct eye-witness is there. Prosecution depends on circumstantial evidence to bring home the charge against the Appellant. The principles relating to circumstantial evidence have been reiterated by the Supreme Court of India time to time in catena of decisions. In the case of ***Hanuman Govind, Nargundkar and another vs. State of Madhya Pradesh, AIR 1952 SC 343***, the Supreme Court have propounded that;

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

11. The law on circumstantial evidence speaks that there must be a complete chain of evidence leading to conclusion that the accused is the only person who could have committed the offence and none else. To decide sufficiency of circumstantial evidence, the Court has to consider the total

cumulative effect of all the proved facts, each of one which reinforces the conclusion of the guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused for determination of the issue even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of guilt of the accused and should exclude every hypothesis except one sought to be proved. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (***G. Parashwanath vs. State of Karnataka, AIR 2010 SC 2914***).

12. The "Panchsheel" proof of a case based on circumstantial evidence, which is usually called five golden principles, have been stated by the apex Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622***. They read as follows :- (Para 152)

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

Law is further settled that every evidential circumstance is a probative link, strong or weak and must be made with certainty. Link after link tagged firmly by credible testimony may form a chain of sure guilty of the accused.

13. The circumstances stated as proved against the Appellant are that, *first*, he was seen last with the deceased shortly before the death of the deceased, *secondly*, he made extra judicial confession before the witnesses to have killed the deceased, *thirdly*, he gave recovery of the weapon of offence (MO-IX) as well as gold ring, gold chain and mobile phone of the deceased while in police custody, *fourthly*, he had a motive to kill the deceased, and *fifthly*, the dead body was recovered from the farm house of the sister of the Appellant i.e. the spot of occurrence.

14. Coming to examine the first circumstance, i.e. regarding last seen theory, it is important to see the evidence of P.Ws.4 to 8. They are the witnesses who have seen the deceased and the Appellant together. All those witnesses have stated that they saw the deceased going in the scooter of the Appellant sitting in the rear seat on 6th July, 2010 around 10.00 a.m. This is exactly the same time that P.W.11 has deposed in his evidence. P.W.11 has said the deceased came out of the house at about 10.15 a.m. As per the post mortem report which was conducted on 11th July, 2010 at 11.45 a.m., the time of death was prior to 5 to 9 days. This means, the probable time of death is between 11.45 a.m. on 6th July to 2nd July 2010. So the statement of P.Ws.4 to 8 that they saw the deceased and the Appellant together around 10.00 a.m. on 6th July, 2010 matches with the time stated by P.W.11 as well as by the post mortem doctor. It is argued here by the Appellant that the dead body of the deceased was recovered on 9th July, 2010 and as such there is no close proximity between the time last seen and finding of the dead body. But the learned counsel for the Appellant is not found right in his submission to compare the time gap from the time of last seen and the time his dead body was found. The proximity of time relevant to be calculated is between the point of time of last seen alive and the time of death. The time of discovery of the dead body is not always relevant to count the proximity. Because the time when the deceased died is always considered relevant to throw light on probable assailant and the nature of assault. In the present case if the time of death is taken at 11.45 a.m. on 6th July, 2010 and the point of time he was seen alive with the Appellant is around 10.00 a.m., then the time gap is so small that rules out all other possibilities of interference by any other person than the Appellant responsible for death of the deceased. Thus the last seen rule of evidence elicited through the witnesses being so consistent is established on record to point the finger only against the Appellant. This is a strong circumstance against him.

15. It is true that extra judicial confession is a weak piece of evidence and has to be appreciated with great deal of care and caution. The Supreme Court while explaining the dimensions of principles governing admissibility and evidentiary value of extra judicial confession, has stated in the case of ***State of Rajasthan vs. Raja Ram, (2003) 8 SCC 180*** that, an extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been

made. The Supreme Court has further explained that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of the witness who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

16. When confession is found ordinarily admissible in evidence as a relevant fact, the taste is in regard to voluntariness and truthfulness of such confession as well as corroboration from other parts of evidence. The Supreme Court in the case of ***Sahadevan and another vs. State of Tamil Nadu, (2012) 6 SCC 403*** have outlined the principles that;

> "(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
>
> (ii) It should be made voluntarily and should be truthful.
>
> (iii) It should inspire confidence.
>
> (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
>
> (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
>
> (vi) Such statement essentially has to be proved like any other fact and in accordance with law."

17. In the instant case as per prosecution, the Appellant has confessed before P.W.11, P.Ws.4, 5, 7 & 8 that he killed the deceased and threw his dead body inside the pond that belongs to his sister at village Bhairipur. This part of the evidence is found consistent in the statement of all such witnesses. P.W.11, the father of the deceased, has stated in his evidence that on 9th July, 2010 when he met the Appellant on the way while searching for the deceased and asked him about the deceased, the Appellant replied that he took the deceased in the scooter to Khelar market and thereafter to the farm house of his sister i.e. the spot. Thereafter he killed the deceased by means of Katuri (M.O.-IX) and threw it in the pond putting in jari bags. Hearing this from the Appellant when P.W.11 and other witnesses went to the farm house of the sister of the Appellant at village Bharipur, they found the decomposed dead body of the deceased inside the pond kept in bags. It is the consistent case of the prosecution that until then the whereabouts of the deceased was not known to anybody and upon such confession with disclosure made by the

Appellant, the dead body of the deceased was found at the stated location. It is true that P.W.11 is a close relative of the deceased, but the other witnesses, viz., P.Ws. 4, 5, 7 & 8 are not. Perusal of the evidence of P.Ws. 4, 5 & 7 coupled with the statement of the P.W.11 inspires confidence about truthfulness of their version. The conduct of the witnesses on the background of missing of the deceased for last three days shows their natural eagerness to ask about the deceased to Appellant. Because he was the person with whom the deceased was last seen. Such confession of the Appellant before those witnesses appears to be voluntary and natural because he has to explain about the deceased. The inquisitiveness of the witnesses to ask whereabouts of the deceased is also natural in the given circumstances of the case. The reply so made by the Appellant which later was found true on verification suggests that the confession and disclosure of information about the deceased as voluntary and truthful. From the statements of those witnesses nothing adverse is found to disbelieve them.

18. Here it is submitted by the Appellant that there is contradiction in the statement of those witnesses as to when the Appellant made such confession, whether on 8th July or 9th July, 2010. But on perusal of their evidence, viz., P.Ws.4, 5, 7 & 11, it is clear that they met the Appellant on 9th July, 2010 and he stated as such before them on 9th July, 2010. There is some discrepancy in the statement of P.W.11 with regard to the date. But the same is not found to be a material discrepancy upon perusal of his entire statement. Here it is important to mention that P.W.11, the father of the deceased, lodged a missing report in Nimapara P.S. which was registered as Missing Report No.6, dated 9th July, 2010. In this context, no ambiguity remains in the evidence of those witnesses that the Appellant confessed so before the witnesses on 9th July, 2010; where-after the witnesses found the decomposed dead body of the deceased in pursuance to the information given by the Appellant. The narration of facts of those witnesses is thus clear without leaving any ambiguity or doubt in the voluntariness and truthfulness of the confession made by the Appellant. However, this is a weak piece of evidence against the Appellant as extra judicial confession stated earlier.

19. Prosecution states that the Appellant while in police custody gave information leading to discovery of the gold ring, gold chain and mobile phone of the deceased as well as the weapon of offence under M.O.IX. Here it is submitted on behalf of the Appellant that the seized mobile is not established to be of the deceased nor M.O. IX has any established link to the

alleged commission of offence. It is further stated that out of two independent witnesses before whom, besides the Police, the Appellant has allegedly gave the disclosure information, one has not been examined by prosecution and the evidence of the other one, viz, P.W.16 is untrustworthy.

20. It is relevant here to look into the evidence of the identifying witness first. As per prosecution story, the Test Identification Parade (TI Parade) in respect of the gold ring and the gold chain was conducted before the magistrate and the same was correctly identified by P.W.11, the identifying witness. Such identification of gold ring and gold chain has been flawlessly stated by P.W.11 in his evidence. The defense did not choose to challenge his statement in this regard during cross-examination. It is further seen that the identification of those gold ornaments of the deceased by P.W.11 in the TI parade has been supported in the evidence of P.W.22, the Judicial Magistrate and P.W.15, the Investigating Officer. As per the testimony of P.W.15, the gold ring which was recovered at the instance of the Appellant and identified by P.W.11 was engrossed with „TUTU" i.e. the name of the deceased. The chain was recovered from possession of Manorama, the sister of the Appellant and the ring was discovered from under the Arakha tree as per the information given by the Appellant while in Police custody. P.W.16, the independent witness has stated about the disclosure information given by the Appellant in Police custody how he disposed of the belongings of the deceased including the Katuri, the weapon of offence. Said P.W.16 is a witness to the seizure of those seized articles. P.W.20 is the concerned Investigating Officer before whom the Appellant had given the disclosure information. This P.W.20 has elaborately said how the Appellant led him and other witnesses to give discovery of the gold chain, gold ring and the mobile phone. No discrepancy or ambiguity is noticed in the said evidence of P.W.20. In addition to the same, it is further seen from the evidence of P.W.16 as well as P.W.20 that the Appellant had given discovery of the Katuri (M.O.-IX) from the heap of firewood kept in the verandah of the house situated at the spot. M.O.-IX is a weapon having wooden handle of length 5 inches with iron portion of 11 inches. The law with regard to discovery in consequence of the information received from the accused as relevant under Section 27 of the Indian Evidence Act has been settled in catena of decisions. In the case of ***Pulukuri Kotayya vs. King-Emperor, AIR 1947 PC 67*** which is now become a locus classicus, the Privy Council has

approved and settled the principles that the discovery of fact referred to in Section 27 of the Evidence Act is not an object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused has to it, has been reiterated and confirmed in subsequent decisions of the apex Court. It is true that M.O.-IX, the Katuri was found without any stain of blood upon the chemical examination, but the same does not itself wash away its‟ relevance keeping in view the nature of injuries sustained by the deceased and the kind of weapon M.O.IX is. Nonetheless hardly any doubt remains there about the information within the special knowledge of the Appellant regarding the gold ring and the gold chain, which have been correctly identified by P.W.11 without any flaw as the belongings of the deceased. The Appellant has no explanation to offer in this regard. Therefore, the contention of the Appellant to discard the evidence on this aspect is found without merit. Accordingly, the finding of the learned trial court that this is a strong circumstance against the Appellant pointing towards his guilt is confirmed.

21. On scrutiny of the materials brought on record, nothing is found adduced to prove the motive against the Appellant by any of the prosecution witnesses. Neither P.W.11 nor P.W.15 nor any other independent witnesses have stated so in their evidence. However, P.W.20, the Investigating Officer, while speaking about the disclosure statement of the Appellant has hinted at the same, which is not sufficient. So this piece of evidence being found without sufficient material cannot be used against the Appellant as a circumstance.

22. It is true that the spot wherefrom the dead body was recovered is belonging to the sister of the Appellant and her husband. As revealed from the evidence of different witnesses, the acquaintance of the Appellant to that spot is not rebutted in cross-examination. The location of the deceased while seen alive with the Appellant on the date of occurrence is within close proximity to that spot. On scientific examination of the spot as stated by P.W.21, the Scientific Officer, the coconut tree was having a cut mark at a height of 2 ft. from the ground. This supports the prosecution story that the Appellant dealt blow by means of M.O.-IX while the deceased was sitting under that tree. Therefore the spot of commission of offence which otherwise seems to be an easy accessible place for the Appellant and a lonely place, shown in the spot maps under Exts. 14, 18 & 19 and so stated by both the

Investigating Officers can be used as a link in the chain of circumstances against the Appellant.

23. One more fact is noticed that P.W.8, who is one of the witnesses seen the deceased with the Appellant in the scooter has stated in his cross-examination that the registration number of the said scooter is 1176. This is the same scooter that was seized by the Police from the house of the Appellant which belonged to the maternal uncle of the Appellant. This fact is not rebutted in evidence. The seizure witnesses have supported the same. This can be an additional link in the chain of circumstances.

24. It is further submitted on behalf of the Appellant that there is delay in lodging the FIR. Learned counsel for the Appellant strenuously submitted that when the deceased was found missing on 6th July, 2010, the FIR was lodged on 10th July, 2010 despite prosecution story to the effect that the dead body of the deceased was found on 9th July, 2010 and therefore, the prosecution having not explained the inordinate delay in lodging the FIR, concoction in the FIR story is a possibility.

25. Perusal of the FIR revels that the witnesses were searching for the deceased after he went missing from 6th July, 2010 and missing report was lodged in Nimapara P.S. It is the admitted case of prosecution that the witnesses came to know from the Appellant about death of the deceased on 9th July, 2010 and consequent thereof they also found the decomposed dead body on the same day at the spot. The FIR was lodged at 9.30 a.m. on 10th July, 2010. The informant, who is the father of the deceased, is a rustic village old man aged about 60 years. They had no other close relative except the deceased. The recitals of the FIR are found corroborative to the prosecution story and no material discrepancy or contradiction is noticed from the same. Therefore, considering the socio-economic background of the informant, nothing unusual is seen to doubt the prosecution case for lodging the FIR on the next morning. It is not a case where there is inordinate delay in lodging the FIR as contended by the Appellant. At best the FIR could have been lodged on 9th July, 2010 whereas it was lodged on the next morning on 10th July, 2010 at 9.30 a.m. So keeping other angles of prosecution case in view where the recitals of the FIR is found corroborated on material aspects, no benefit can be extended in favour of the Appellant for this small delay in lodging the FIR. Accordingly all such contentions raised on behalf of the Appellant are rejected.

26. In view of the discussions made above, all such circumstances proved against the Appellant are forming the chain complete unerringly pointing the guilt against him excluding all hypothesis of innocence in his favour. As said in the case of ***Munish Mubar vs. State of Haryana, (2012) 10 SCC 464***, the circumstantial evidence is a close companion of factual matrix, creating a fine network through which there can be no escape for the accused, primarily because the said facts, when taken as a whole, do not permit us to arrive at any other inference but one indicating the guilt of the accused. Accordingly, upon examination of the entire evidence in its entirety, the circumstances discussed above are undoubtedly giving the only inference of guilt of the Appellant.

27. In the result the appeal is dismissed being without merit.

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2021 (III) ILR - CUT-671

JASWANT SINGH, J & S. K. PANIGRAHI, J.

WP(C) NO. 20574 OF 2021

MIRA AGRAWALLA & ANR. ……..Petitioners

.V.

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

RECOVERY OF DEBT DUE TO BANKS AND FINANCIAL INSTITUTION ACT, 1993 – Section 19(22) – Father of petitioner was declared highest bidder and had paid the full amount of purchase – Sale was duly confirmed and a sale certificate was issued in his favour – After the death of father, the present petitioners seek direction from Recovery Officer of Debt Recovery Tribunal to modify the sell certificate substituting them as legal heir – Whether maintainable? – Held, No.– Once the sell certificate is issued, there is no other provision in the statue for issuance of fresh modified certificate – As the certificate is itself a document of title, they can establish their right before revenue authorities by adopting the process of law. (Para 5)

Case Law Relied on and Referred to :-
1. 2007 (5) SCC 745 : B. Arvind Kumar Vrs. Government of India.

For Petitioners : M/s. Kishore Kumar Jena , S.N.Das
For Opp.Parties: M/s. Bijaya Ku. Pattanyak

ORDER Date of Order : 07.12.2021

BY THE BENCH

1. This matter is taken up through hybrid mode.

2. The two Petitioners-Mira Agrawalla and Subham Mishra claim to be legal heirs of late Siba Prasad Mishra, who is stated to have died on 21.03.2019. The deceased during his life time participated in a auction sale conducted by the Recovery Officer, DRT on 18.10.2007 under Sub-section 22 of Section 19 of the Recovery of Debts due to Banks and Financial Institution Act, 1993 for recovery of the decreetalamount of `12,62,132.35 and interest @ 15.5% per annum from 02.11.1994. Since late Siba Prasad Mishra was declared highest bidder and had paid the full amount of purchase money of `4,15,00 plus poundage fee on 24.10.2007, and the said sale having been duly confirmed, a sale certificate was issued in his favour on 08.11.2007 (Annexure-1), whereby he became the absolute owner of the immovable property described in the sale certificate.

3. That after the issuance of the sale certificate, the auction purchaser approached the Tahasildar, Khordha for mutation and to handover the actual physical possession of the said property. But one Braja Kishore Sahoo (OP No. 8 herein) claiming himself as cosharer of the said property, filed a Civil Suit bearing CS No. 25 of 2008, wherein the learned Civil Judge (Senior Division), Khordha passed an interim order dated 13.10.2010 directing maintenance of status quo in respect of the said property. The auction purchaser filed WP(C) No. 10727 of 2010 before this Court, which was disposed of vide order dated 01.07.2010 directing the authorities to provide full assistance to the auction purchaser for taking over possession of the property purchased by him in a public auction. To counter that, Braja Kishore Sahoo (OP No.8 herein) also filed writ petition bearing WP(C) No. 20392 of 2010, which was disposed of vide order dated 04.01.2011 with the direction to Braja Kishore Sahoo to initiate appropriate proceedings before the learned

Civil Judge (Senior Division) Khurda in case his possession was disturbed by anybody in the backdrop of status quo order. During pendency of the said Civil Suit, the auction purchaser died and concededly the two Petitioners herein have been impleaded as legal heirs in the said suit.

4. The Petitioners in the aforesaid backdrop of facts have filed present writ petition seeking a direction to the Recovery Officer, DRT, Cuttack-OP No. 3 to modify the sale certificate of 08.11.2007 (Annexure-1) by substituting the Petitioners as legal heirs or in the alternative issue necessary instructions to the Tahasildar, Khurda and Sub-Registrar, Khordha (Opposite Party Nos. 5 and 6) to mutate the schedule property and permit the execution of the sale deed in their favour.

5. After hearing the counsel for the Petitioners at length and perusing the pleadings with his able assistance, we find no grounds to invoke our writ jurisdiction under Section 226 of the Constitution of India and to issue such directions as claimed for.

It is not disputed that an appeal bearing M.A. No. 70 of 2020 filed by the Petitioners seeking the relief of modification of the sale certificate issued in favour of their father late Siba Prasad Mishra stands already filed and is stated to be pending before the DRT, Cuttack. The Petitioners have approached this Court on the ground that the Presiding Officer of the DRT is not available. However, we have been informed by the Assistant Solicitor General, Mr. Parhi that very soon necessary arrangements shall be made to make the DRT, Cuttack functional. That apart, we are of the opinion that once the sale certificate is issued, there is no other provision in the statute for issuance of fresh or modified certificate. The title of the attached/secured asset passes immediately on the issuance of a sale certificate based upon public auction conducted under the Recovery Act, 1993 or SARFAESI Act, 2002, which itself is a document of title. Please refer (***B. Arvind Kumar Vrs. Government of India 2007 (5) SCC 745***). If subsequently the auction purchaser has died, it is for the successor in law to apply to the revenue authorities for consequent transfer after establishing his/her right to inherit the respective estate left by the deceased by adopting the process of law. However, it would not give a cause of action to any legal heirs/such person to apply for reissuance or modification of the title documents i.e. sale certificate, which has already been issued in terms of Recovery Act, 1993 or SARFAESI Act, 2002.

6. In the instant case, no doubt the auction purchaser till his death on 21.03.2019 was unable to secure the actual physical possession and the mutation in his favour in view of the Civil Suit filed by one Braja Kishore Sahoo, wherein an interim order was operating and the Petitioners are already parties to the said suits, but the same would not give a cause of action for the Petitioners to seek any directions from this Court for invoking a process which is wholly unknown to law. It is also not in dispute that the Petitioners are already pursuing the claim before the DRT, Cuttack.

7. In view of the aforesaid established facts, the writ petition is devoid of any merits, and is accordingly dismissed.

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2021 (III) ILR - CUT- 674

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

W.P.(C) NO.14342 OF 2005

MRS. ASHALAXMI MOHANTY …….. Petitioner

.V.

CENTRAL ADMINISTRATIVE TRIBUNAL & ORS. …….. Opp. Parties

SERVICE LAW – Seniority – Whether period of service in a non-sanctioned casual post can be considered for seniority and fixation of pay? – Held, No. – Past service in a temporary and non-sanctioned post cannot be considered for the purpose of Seniority. (Para-6)

For Petitioner : M/s. B.Ch. Mohanty, R.K. Nayak, A.K. Kanungo, G.N. Das

For Opp. Parties: Ms. S. Mohanty, Sr. Panel Counsel (Central Govt)

JUDGMENT Date of Hearing : 23.11.2021 : Date of Judgment: 04.12.2021

BY THE BENCH

1. Even though this writ petition involves a challenge to the order of the Central Administrative Tribunal, Cuttack Bench, Cuttack dated 11.04.2005 passed in O.A. No. 549 and 573 to 575 of 2004, however, the challenge is

only confined to at the instance of Smt. Asha Laxmi Mohanty who appears to be one of the applicants before the Tribunal.

2. Short background involved in the case is that the Military Tele-Exchange, Gopalpur commissioned under the authority of Head Quarters, Central Command, Lucknow for having no Combatant Tele Operators available in 1988, the Statio Commander of Gopalpur Cantonment approached the District Employment Exchange and the Zilla Sainik Board, Ganjam to sponsor the names of the suitable candidates for selection of five Civilian Switch Board Operators, hereinafter in short be reflected as 'CSBO' for the tele-exchange, Gopalpur. A selection board was also constituted for the purpose on 18.03.1988. The selection board conducted written as well as viva-voce and practical tests of the candidates being sponsored by the District Employment Exchange and Zilla Sainik Board, Ganjam. On 19.07.1988 the Opposite Party No.5 intimated the Petitioner that she has been selected by the Board of Officers and accordingly instructed to report to the Station Head Quarters with requisite original documents. It appears, pursuant to the above direction the Petitioner submitted all requisite documents in original which was claimed to be duly verified and received by the Opposite Party No.5. It is pleaded that after the above development the Opposite Party No.5 issued appointment order to the Petitioner on 31.08.1988 appointing her as a Civilian Switch Board Operator for Military tele-exchange, Gopalpur, Golabandha w.e.f. 14.09.1988. It is claimed that the Petitioner served for a period of 327 days within a span of one year and it is, thereafter, her services was terminated along with other four CSBOs w.e.f.23.09.1989. Being aggrieved with the order of termination dated 23.09.1989, the Petitioner along with some other persons also working as CSBO filed O.A. Nos.452 & 501 of 1989 before the Central Administrative Tribunal, Cuttack Bench. Entertaining the above O.As. the Tribunal was pleased to pass an interim order thereby staying the order of termination, which also included the Petitioner. It is claimed that pursuant to the said interim order the Petitioner continued to perform her duties without any break. It appears, on 21.02.1990 the Central Administrative Tribunal was pleased to dispose of the O.A. along with similar O.As. by a common judgment observing therein that the services of the applicants should not be terminated so long as the posts would continue to exist and the applicants do not otherwise disqualify themselves for their continuance in the post. It is consequent upon such development the Petitioner claimed to have joined in service and to have been paid with arrear

salary and allowances and continued to hold the posts. It is, in July, 1990 the services of the Petitioner along with other persons have been terminated. Being aggrieved with such order the Petitioner alongwith others again filed O.A. No.322 of 1990 on 5.09.1990 before the Central Administrative Tribunal. It is claimed that by virtue of the order of the Tribunal the Opposite Party No.5 though called back the Petitioner and others to join their duties, but did not regularize their services compelling the Petitioner to raise a contempt proceeding for their services not being regularized. It is when a seniority list was prepared and circulated, the Petitioner came to know that her past services since 1988 has not been taken into consideration. Being aggrieved with such action the Petitioner immediately submitted her objection to the seniority list. It is claimed that even though the objection of the Petitioner was duly recommended by the Opposite Party No.5, the authorities did not pay any attention to the same and finding her representation not being attended to the Petitioner again filed an Original Application before the Central Administrative Tribunal on the above score requesting therein for a direction to take into account the past ad.hoc services of the Petitioner for the purpose of seniority. The Petitioner and the similarly situated persons also took support of a communication dated 18.09.1989 from the Station Head Quarter Central Command, Lucknow to the Station Commander, Head Quarter, Gopalpur indicating therein that five posts of CSBOs are regular in nature and the sanction is accorded from the competent authority. This original application was registered as O.A. No.549 of 2004 and subsequently re-registered as O.A. Nos.549 & 573 to 575 of 2004. Pursuant to notice the Opposite Party Nos.2 to 5 filed a single counter affidavit thereby resisting all the pleas taken by the Petitioner. It was specifically pleaded in the counter affidavit that as the regular post of CSBO was sanctioned by the Hon'ble President in the year 1994, the services rendered by the Petitioner prior to the sanction accorded in the year 1994 was purely on a local arrangement and the engagement was on stop-gap basis as disclosed from the order vide Annexure-7. The Central Administrative Tribunal even though heard the matter taking help of a decision in the case of ***Selina Anthony*** *Vrs.* ***Union of India*** wherein it has been observed that the period of ad.hoc service of an employee should not be ignored while counting the seniority of the employee after the services of the employee is regularized, however in the common judgment dated 11.04.2005 the Central Administrative Tribunal in rejection of the decision cited at the bar at the

instance of the applicants rejected the claim for counting the period of ad.hoc service towards seniority in the cadre of CSBO, which resulted filing of the present writ petition by one of the applicants therein.

3. Learned counsel for the Petitioner on reiteration of the factual background narrated hereinabove contended that for the settled position of law the period of ad.hoc service of an employee cannot be ignored while counting the seniority more particularly after regularization of a person. It is also contended that since the initial appointment was made in accordance with the rules, the period spent in the process cannot be ignored. Referring to the order of the Central Administrative Tribunal passed taking reliance of a decision of the Administrative Tribunal of the Calcutta Bench and also a decision of the High Court of Calcutta, learned counsel for the Petitioner contended that the case involved in the above citation was on a different footing and was not applicable to the case at hand. Learned counsel for the Petitioner alleges that there has been no proper consideration of the above aspect by the Tribunal. It is also claimed by the learned counsel for the Petitioner that since the aspect of selection of the Petitioner through the regular recruitment process was also the opinion of the Tribunal at some places, such aspect should have been taken care of in the final adjudication of the matter. On the basis of the GPF records and signal records learned counsel for the Petitioner claimed that for these records created in September, 1988 should have also been waked up in mind of the Tribunal. Relying on the paragraph Nos.58 & 59 of the Financial Regulation Part-I an attempt is also made to take support of the same. Drawing the attention of this Court to the observation of the Tribunal learned counsel for the Petitioner contended that the Tribunal has completely misdirected itself as it would be clearly evident from bare perusal of the aforesaid rules that there is nothing to indicate or suggest that the Petitioner is not entitled for any seniority / confirmatory or for any regular appointment. It is, in the above background of the matter, learned counsel for the Petitioner prayed this Court for interfering in the impugned order dated 11.04.2005 vide Annexure-8 and setting aside of the same and also for issuing a direction to the competent authority for computing the ad.hoc services of the Petitioner for the purpose of seniority in the cadre of CSBO.

4. Basing on the notice in the above writ petition the Opposite Party Nos. 2 to 5 entered their appearance and filed counter affidavit seriously objecting the claim of the Petitioner and specifically pleaded that the recruitment

process for the post of CSBO clearly mentioned that the post required to be filled up are purely temporary. It is also contended that since the post involved was filled up temporarily, offer of appointment issued to the Petitioner also at paragraph no.2 indicated that the engagement will be hardly for 89 days and such engagement can be taken away without any notice and in absence of any reason assigned therein. It is further also claimed that on expiry of 89 days period the Petitioner used to be terminated and reemployed again for another period of 89 days and continued likewise, but however, with one or two days gap in between such engagements. For the nature of job it is contended that the applicant / the Petitioner was holding a temporary engagement. Referring to the document at Annexure-B/5 the Opposite Party Nos.2 to 5 claimed that the persons holding such post were only regularized w.e.f. 5.01.1994 and for the first time their services with seniority were included /entered in the general staff Branch, Army Headquarters, Common Roster against regular vacancies as CSBO Grade-II w.e.f. 5.01.1994. The Opposite Parties also claimed that since the Petitioner joined being fully aware of the nature of engagement, there is no scope for the Petitioner to claim for continuity. Referring to the seniority list the Opposite Party Nos.2 to 5 claimed that the position of the persons involved have been rightly maintained and the seniority list was also maintained only after inviting objections from the parties aggrieved, if any. These Opposite Parties also contended that for the similar nature of litigations involved involving multiple applications filed before the Tribunal, these Opposite Parties contested the proceeding before the Tribunal by filing a common counter affidavit on the score of the decision of the Central Administrative Tribunal, Kolkata Bench and also a decision of the High Court of Kolkata. These Opposite Parties also contended that the decision therein have a direct bearing to the case at hand and there is no wrong committed by the Tribunal in taking reliance of such decisions. It is also contended that so far as opening of G.P.F. account e.t.c. is concerned, it has no bearing to the claim of the Petitioner for considering the prior period of service for the purpose of seniority. It is, in the above background of the matter, learned Central Government Counsel claimed for dismissal of the writ petition for there being no merit in the same.

5. Considering the rival contentions of the parties and looking to the pleadings of the parties made in this petition, this Court finds, there may not be any denial to the fact that the original recruitment of this Petitioner along

with several others were made in a duly conducted selection process finding that there was nobody to serve as CSBO in the military tele-exchange at Gopalpur. It also appears, the Petitioner claimed that her selection had taken place through a selection board duly constituted to find-out the merit in the candidates appeared and this selection board ultimately selected the Petitioner along with some others. From Annexure-1 this Court also finds, the communication vide Annexuer-1 was made by the Station Staff Officer on behalf of the Station Commander on 2nd July, 1988 indicating therein that the Petitioner has been selected provisionally by a Board of Officers on 18th March, 1988 against temporary post of CSBO for the Army Exchange at Gopalpur and requesting the Petitioner therein to produce the documents indicated in paragraph no.2 therein by making her physical appearance in the headquarter on 2nd August, 1988. On scrutiny of Annexure-3 this Court finds, one Mr. A.K. Sethi, Colonel, Station Commander through this communication intimated the Petitioner regarding her appointment as a Civilian Switch Board Operator (CSBO) Class-III for the military telephone exchange at Gopalpur, Golabandha w.e.f.14th September, 1988, but however, also indicating therein that the engagement is purely temporary and meant for 89 days only. Pleading of the parties also discloses that the Petitioner thereafter continued to hold such posts on 89 days basis. There is also no dispute that on expiry of 89 days the Petitioner used to be disengaged and reengaged on issuance of fresh engagement orders. Somewhere it is observed that the gap remained one day but at some instance it becomes two days on the re-engagement of the Petitioner. It is, at this stage of the matter, this Court from the document at running page 50 of the brief i.e. a part of Annexure-B/5 filed through the counter affidavit at the instance of the Opposite Party Nos. 2 to 5, finds, the communication issued by the CSO-2, Sign.4(o) for SO-in-O on 27th April, 1995 contains as follows:

> "B/44572/Sigs.4(O),
>
> Signals Records,
> Jabalpur (MP)
>
> REGULARISATION OF CSBOS IN EASTERN COMMAND AND CENTRAL COMMAND
>
> 1. Reference your letter No.3681/1/CA6/PE/50 dated 8 Apr. 95.
>
> 2. Confirmed. Clarifications sought vide para 2 (a) and (b) of your ibid letter are as under :-

(a) As per para 3 (f) of Govt. of India letter No. MOD PU MF 4(3)/89/D (Civ.-II) dated 31 Jan. 91, seniority of employees appointed to regular establishment will be reckoned with only from the date of regular appointment. Since PE of various stn. HQs have been amended w.e.f.05 Jan. 94, these CSBOs have to be taken on GS Branch Common Roster w.e.f. that date only,

(b) As per para 3(g) of above Govt. letter, service rendered on casual basis prior to appointment in regular establishment shall not be counted for the purpose of pay fixation etc.

3. In view of above, you are requested to take these 27 CSBOs on GS Branch Common Roster and issue their posting orders accordingly.

(KL Hana)
CSO
CSO 2 Sign. 4(O)
For SO-in-O"

It need be recorded here that the above order was never challenged. It is, on the other hand, the claim although was only to count the past services for the purpose of seniority.

6. On reading of the above, this Court finds, on a query being made by the Department to calculate the seniority in the particular cadre through this letter, the concerned authority intimated that since the P.E. of various station headquarters have been amended w.e.f.5.01.1994 it was communicated therein that these CSBOs have to be taken on G.S. Branch Commission Roster w.e.f. that date only. Through sub-paragraph 'b' it has been further clarified that the services rendered on casual basis prior to the appointment in regular establishment shall not be counted for the purpose of pay fixation etc. This Court here observes, the persons engaged as CSBO prior to 5.01.1994 are all holder of temporary post and it is only after 5.01.1994 post of CSBOs became a confirmed cadre post on creation of such post being approved by the competent authority. There also clearly appears that existence of such post prior to 05.01.1994 was not only a local arrangement but also purely on temporary basis. For the above and for the clear direction therein that there shall be no counting of the casual continuation prior to creation of regular post shall not be counted for the purpose of pay fixation, the Petitioner is not justified to claim her seniority on the basis of continuing her period of service in a non-sanctioned and casual post. This Court also finds, there is virtually no challenge to either the creation of the CSBO posts w.e.f.5.01.1994, nor there is even any challenge to the communication dated 27.04.1995 as find place at Annexure-B/4. It is, in the circumstance, this Court observes, if the

Petitioner was at all aggrieved by the communication at Annexure-B/5 nothing prevented the Petitioner to challenge the decision of the authority therein and in absence of which the claim of the Petitioner to consider her past service for the purpose of seniority being a holder of temporary and non-sanctioned post is not sustainable in the eye of law.

7. Now coming to the observation and findings of the Central Administrative Tribunal at Annexure-8 this Court finds, the Tribunal was justified in its reason taking into account the aforesaid aspect and relying on a judgment of the Administrative Tribunal Kolkata Bench in O.A. No.1489/98 being confirmed by the High Court of Kolkata in W.P.(C) No.583/01. In the process, this Court finds no infirmity in the impugned order vide Annexure-8 requiring to be interfered with.

This Court here also likes to go through certain decisions cited at Bar, but finds none of the decision has any bearing to the case at hand.

8. The writ petition thus stands dismissed for having no merit. There is, however, no order as to costs.

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2021 (III) ILR - CUT-681

BISWAJIT MOHANTY, J & BISWANATH RATH, J.

W.P.(C) NO. 37432 OF 2021

SARBESWAR DAS …….. Petitioner

.V.

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

CENTRAL ADMINISTRATIVE TRIBUNAL (PROCEDURE) RULE, 1987 – Rule 10 – Plural remedies – Petitioner filed an original application with a prayer to give direction to Opp. Parties to consider the grievances of the applicant enumerated in representation – In the representation the petitioner made multiple prayer before the authority – Whether the Tribunal is justified in rejecting the O.A by referring the various grievances of the petitioner before the authority in the representation referring to Rule 10 of 1987 Rule ? – Held, Not justified – Multiple

grievance raised in the representation are of no consequences as rule 10 does not prohibit an employee from praying for the multiple relief in his representation – Hence, the order of the learned Tribunal is set-aside.

For Petitioner : Mr. S. Mohanty

For Opp. Parties: Mr. P.K. Parhi, Assistant Solicitor General of India,
Mr. J. Nayak, Central Government Counsel for O.P.1

ORDER Date of Order : 06.12.2021

BY THE BENCH

01. In this writ petition the Petitioner has prayed for quashing of the order dated 15.11.2021 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.452 of 2021 with further prayer to declare that the prayer made by the petitioner in the O.A. contains a single relief. He has also prayed to pass any other further order as would be deemed fit and proper.

According to Mr. Mohanty, learned counsel for the Petitioner, the Petitioner approached the learned Tribunal by filing the above noted Original Application with the following reliefs:

> "(i) This Hon'ble Tribunal may kindly be pleased to give a direction to the respondents particularly respondent No.4, to consider the grievances of the applicant enumerated in the representation dated 22.05.2021 made by the applicant vide ANNEXURE-A/1 (Series) and dispose of the same within a time stipulated by this Hon'ble Tribunal.
>
> (ii) This Hon'ble Tribunal may also be pleased to pass any other further order / orders as deemed fit and proper in the facts and circumstances of the case."

Thus according to Mr. Mohanty, a single prayer was made by the Petitioner before the learned Tribunal i.e. for a direction to the Respondent No.4, who according to him is the Opposite Party No.3 here, to dispose of his representation. But the Tribunal by referring to various grievances of the Petitioner made in the representation wrongly took a view that the Petitioner is praying for multiple reliefs in the O.A. and accordingly dismissed the same referring to Rule 10 of the Central Administrative Tribunal (Procedure) Rules, 1987. Accordingly, he prays that the impugned order be set aside and the Director of Postal Services, Bhubaneswar (Opposite Party No.3) be directed to take a decision on his representation under Annexure-1, which

was filed before the learned Tribunal as Annexure-A/1(series), within a specified time period.

Mr. Nayak, learned Central Government Counsel while defending the impugned order under Annexure-3 submitted that the learned Tribunal has committed no error, as it has passed impugned order relying upon Rule 10 of the Central Administrative Tribunal (Procedure) Rules, 1987.

Heard learned counsel for the parties.

Perused the records.

Rule 10 of the Central Administrative Tribunal (Procedure) Rules, 1987, as quoted in the impugned order, reads as follows:

> "Plural remedies.- An application shall be based upon a single cause of action and may seek one or more reliefs provided that they are consequential to one another."

A reading of the said Rule makes it clear that so far as the learned Tribunal is concerned, an aggrieved party may file an application, which shall be based on a single cause of action, but he can seek one or more reliefs provided that those are consequential to one another. On perusal of the quoted portion of the prayer made before the learned Tribunal, it appears that the cause of action for filing of the Original Application was, the grievance of the Petitioner relating to non-disposal of his representation dtd.22.05.2021. Accordingly, the Petitioner simply prayed for a direction to the Director of Postal Services, HQ Region-the present Opposite Party No.3 to dispose of his representation dated 22.05.2021 under Annexure-A/1 (series) therein filed herein as Annexure-1. However learned Tribunal perused the representation and since in the representation several reliefs have been prayed, it came to the conclusion that there existed multiple prayers. In our opinion, the approach of the learned Tribunal is not correct, as factually in the Original Application there were no multiple prayers. The fact that multiple grievances raised in the representation are of no consequence as Rule 10 of the Central Administrative Tribunal (Procedure) Rules, 1987 does not prohibit an employee from praying for multiple reliefs in his / her representation. Thus the learned Tribunal has committed an error by treating the various reliefs prayed for by the Petitioner in his representation to be the reliefs prayed in the O.A. It is reiterated that there exists no legal embargo that in a representation multiple reliefs cannot be prayed for. The Tribunal has read into Rule 10, reliefs prayed by the Petitioner in the representation and failed

to distinguish between the reliefs prayed in the representation and reliefs prayed in O.A. In such background we have no hesitation to set aside the order of the learned Tribunal dated 15.11.2021 under Annexure-3 and accordingly, we do so. Though ordinarily while setting aside Annexure-3, we would have remanded the matter to the learned Tribunal, however considering the nature of prayer made before the Tribunal, we do not think, any purpose would be served in remanding the matter. Therefore, in the interest of justice, this Court directs the Director of Postal Services, Bhubaneswar (Opposite Party No.3) to take a decision on the representation dated 22.05.2021 of Petitioner under Annxure-1, which was sent by way of Registered Post on 24.05.2021, in accordance with law within a period of eight weeks from the date of production of a certified copy of this order and communicate the result of such exercise to the Petitioner.

With the above order the writ petition is disposed of. Issue urgent certified copy of this order as per rules.

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2021 (III) ILR - CUT-684

Dr. B.R. SARANGI, J.

W.P.(C) NOS. 12584 OF 2019 & 24671 OF 2020

SURYA NARAYAN MISHRA ..……..Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

AND

W.P.(C) NO. 24671 OF 2020

RAJASHREE PATTNAIK ..…… Petitioner

.V.

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

SERVICE LAW – Transfer – Legal propositions – Held, So far as transfer in general is concerned, the issue of transfer and posting has been considered time and again by the Apex Court and law has been settled by catena of decisions – It is entirely upon the competent authority to decide when, where and at what point of time a public

servant is to be transferred – Transfer is not only an incident but an essential condition of service – It does not affect the conditions of service in any manner – The employee does not have any vested right to be posted at a particular place – The guiding principles are as follows:

(1) Transfer is a condition of service.

(2) It is does not adversely affect the status or emoluments or seniority of the employee.

(3) The employee has no vested right to get a posting at a particular place or can choose to serve at a particular place for a particular tenure.

(4) It is within the exclusive domain of the employer to determine as to at what place and for how long the services of a particular employee are required.

(5) Transfer order should be passed in public interest or administrative exigency, and not arbitrarily or for extraneous consideration or for victimization of the employee nor it should be passed under political pressure.

(6) There is a very little scope of judicial review by the Court/Tribunal against the transfer order and the same is restricted only if the transfer order is found to be in contravention of the statutory Rules or mala fides is established.

Case Laws Relied on and Referred to :-

1. 2015 (Supp.-II) OLR 819 : Prasanna Kumar Acharya Vs. State of Orissa.
2. AIR 1986 SC 1955 : (1986) 4 SCC 131 3 : B. Varadha Rao Vs. State of Karnataka.
3. AIR 1991 SC 532 : (1991) SCC 659 : Shilpi Bose Vs. State of Bihar.
4. AIR 1993 SC 1605 : Union of India v. N.P. Thomas.
5. AIR 1993 SC 2444 : Union of India Vs. Vs. S.L. Abbas.
6. AIR 2009 SC 1399 : (2009) 2 SCC 592 : Somesh Tiwari Vs. Union of India.
7. AIR 1993 SC 1236 : Rajendra Roy Vs. Union of India.
8. AIR 2001 SC 3309 : National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan.
9. AIR 2001 SC 1748 : State Bank of India v. Anjan Sanyal.
10. (2003) 11 SCC 740 : Sarvesh Kumar Awasthi Vs. U.P. Jal Nigam.
11. AIR 2005 MP 170 : Than Singh Vs. State of Madhya Pradesh.
12. AIR 1962 SC 1621 : Smt. Ujjam Bai Vs. State of U.P.
13. AIR 1969 SC 823 : Official Trustee West Bengal Vs. Sachindranath Chaterjee.
14. AIR 1965 SC 1449 : Raja Soap Factory Vs. S.P. Shantharaj.
15. AIR 1973 SC 2602 : Hari Prasad Mulshanker Trivedi Vs. V.B. Raju.
16. AIR 1988 SC 1531 : A.R. Antulay Vs. R.S. Nayak.
17. (2007) 13 SCC 387 : Harpal Singh Vs. State of Punjab.

For Petitioners : M/s. A.K. Pandey, P.K. Samal, and D.N. Mishra, (in both the cases)

For Opp. Parties : Mr. A. Pradhan, Addl. Standing Counsel (O.Ps. No.1, 3 & 4 in both the cases)

Mr. Pradipta Kumar Mohanty, Sr. Adv.
M/s. P. Mohanty, P.K. Nayak & P.K. Pasayat.
[O.P. No.2 in both the cases]

JUDGMENT Date of Hearing :12.04.2021 : Date of Judgment: 20.04.2021

Dr. B.R. SARANGI, J.

Surya Narayan Mishra, while working as Financial Consultant in the District Project Office (DPO), SS, Kendrapara on contractual basis with a consolidated remuneration of Rs.6,000/- per month, has filed W.P.(C) No.12584 of 2019 seeking to quash the order dated 17.07.2019 under Annexure-2, by which he has been transferred to DPO, SS Bolangir on administrative ground.

Whereas Rajashree Pattanaik, who was working as Coordinator Pedagogy in the DPO, SS Khordha on contractual basis and has been transferred to DPO, SS, Rayagada on administrative ground vide office order dated 17.07.2019 under Annexure-1, has filed W.P.(C) 24671 of 2020 challenging the order dated 23.09.2020 under Annexure-5, by which opposite party no.2 has directed the petitioner to obey the office order dated 17.07.2019 and to join at DPO, SS, Rayagada as per OSEPA office order no. 5036 dated 17.07.2019 positively, failing which action shall be taken against her as per the Service Rules & Regulations, 1996.

2. Essentially, both the writ petitions have been filed by the contractual employees working under the Odisha Primary Education Programme Authority (OPEPA) in different capacities seeking to quash the orders of transfer issued against them. Therefore, they have been heard together and are being disposed of by this common judgment, which will govern in both the cases.

3. The factual matrix which has given rise to filing of W.P.(C) No. 12584 of 2019 is that the petitioner therein was engaged as Financial Consultant in the DPO, SSA/DPEP, Malkangiri on contractual basis vide office order dated 17.08.2004 with remuneration of Rs.6,000/- per month.

While he was so continuing, he was disengaged and again re-engaged vide office order dated 10.11.2005 at DPO, Ganjam, While working as such, again he was re-engaged at DPO, SS, Kendrapara vide office order dated 12.05.2008 and continuing as such till the impugned order of transfer was passed by the authority on 17.07.2019, by which he has been transferred from DPO, SS, Kendrapara to DPO, SS Bolangir.

4. The factual matrix which led to filing of W.P.(C) No. 24671 of 2020 is that the petitioner therein was initially engaged as Coordinator Pedagogy in the DPO, Sambalpur on contractual basis. Thereafter, she was transferred to DPC Office, Angul on 17.06.2010 and subsequently she was placed at DPC Office, Keonjhar on 10.08.2010. Again, the authority deployed her in the Head Office of OPEPA and after cancellation of deputation period, the petitioner was again posted at DPC Office, Keonjhar. Then, she was posted at DPC Office, Khurda, vide office order dated 23.08.2016, and while so continuing she has been transferred, vide office order dated 17.07.2019, to DPO, SS, Rayagada on administrative ground as Financial Consultant. Against the order of transfer dated 17.07.2019 under Annexure-1, she filed W.P.(C) No. 12585 of 2019, wherein as an interim measure this Court stayed operation of the said transfer order. Despite that, opposite party no.2, vide office order dated 23.09.2020, compelled her to carry on the order of transfer dated 17.07.2019 by joining at DPO, SS, Rayagada, failing which action shall be taken against her as per OPEPA Service Rules and Regulations, 1996.

5. Mr. A.K. Pandey, learned counsel appearing for the petitioners in both the writ petitions contended that to regulate the service conditions of the employees of the OPEPA, under Clause-5(n) of the Memorandum of Association of the Orissa Primary Education Programme Authority read with Rule 36 of the Rules and Regulations made thereunder, “The Orissa Primary Education Programme Authority Service Regulations, 1996” were framed. It is contended that in the said OPEPA Service Rules & Regulations, 1996 there is no provision for transfer of OPEPA employees from one place to other, nor has any transfer policy been framed by the OPEPA till 2018. But, for the first time, on 17.12.2018 guidelines for transfer of contractual employees working at State Project Office, District Offices and Block Level Offices under RTE-SSA, Odisha were framed, which also do not contemplate for transfer or deployment of employees working under SPO, DPO & Block Level Offices under SSA. It is further contended that taking into consideration the merger

of OPEPA with RMSA to form one society, namely, "Odisha School Education Programme Authroity" (OSEPA), Government was pleased to accord permission for formulation of the guidelines for inter-district and intra-district transfer/deployment, and rationalization of employees working at SPO, DPOs and Block Level Offices under RTE-SSA. It is further contended that so far as the transfer in respect to contractual employees is concerned, it is not permissible by the said guidelines, and, more so, the said guidelines cannot be given effect to as the same have been formulated by a committee having lack of quorum. Therefore, he seeks for quashing of the impugned orders of transfer passed by the authority concerned.

6. Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P. Mohanty, learned counsel for opposite party no.2 vehemently contended that Rule-24 of the OPEPA Service Rules and Regulations, 1996, which deals with travelling allowance, clearly envisages that the employees in case of their transfer from the State Project Office to any DPO or from one DPO to another DPO shall be entitled to travelling allowance, daily allowance and transfer T.A.. Thereby, the posts held by the petitioners are transferable and, as such, they are entitled to travelling allowances as per Rule 24 read with Appendix-B of the said Rules. It is further contended that Rule-12 under Chapter-V deals with "Cadre", which indicates that directly engaged employees in the State Project Office shall be in a common cadre. The staff in all the district offices shall form a separate cadre. Thereby, the petitioners having been engaged in district offices, they form a separate cadre and as such they are liable for transfer. Consequentially, impugned orders of transfer have been given effect to and, thereby, no illegality or irregularity has been committed by transferring such employees. It is contended that when the transfer has been made on administrative ground, as has been indicated in the impugned orders, even though the petitioners are contractual employees, for smooth administration if the order of transfer has been effected, thereby, no illegality or irregularity has been committed by the authority concerned. It is further contended, by referring to Rule-24, that transfer is applicable to contractual employees from the State Project office to District Project office and also from one District Project office to another District Project office. The petitioners, having been engaged in a project on contractual basis, are not holding any civil post and, therefore, the services of contractual employees are coterminous with the implementation of the project. It is further contended that as per Section-45 of the OPEPA Memorandum of Association,

the Executive Committee of OPEPA headed by the Chief Secretary as the Chairman and the Secretary of S & ME Department as Vice-chairman and State Project Director as the Member Secretary are the competent authorities who have the power to frame and amend the regulations pertaining to service matter of SPO/DPO including creation of post, qualification, selection procedure and emoluments, disciplinary controls as well as classification, control and appeal rules. Accordingly, the transfer policy of contractual employees working under OPEPA/OSEPA has been framed as per the approval of the Chairman, EC, OPEPA in the 36th Executive Committee, OPEPA and in such guideline dated 17.12.2018 the provision for transfer of contractual employees is there. Thereby, pursuant to such guideline, if the orders of transfer have been passed, the same cannot be said to be illegal or subjected to judicial scrutiny in the writ jurisdiction of this Court. Thereby, it is contended that both the writ petitions should be dismissed on the grounds mentioned above. To substantiate his contention, he has relied upon the judgment of this Court in ***Prasanna Kumar Acharya v. State of Orissa*****,** 2015 (Supp.-II) OLR 819.

7. Mr. A. Pradhan, learned Addl. Standing Counsel appearing for the State opposite parties contended that since it is a dispute between the petitioners and opposite party no.2, the State has no role to play and, as such, the State did not choose to file any counter affidavit.

8. This Court heard Mr. A.K. Pandey, learned counsel appearing for the petitioners in both the writ petitions; Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P. Mohanty, learned counsel for opposite party no.2; and Mr. A. Pradhan, learned Addl. Standing Counsel appearing for the State opposite parties through virtual mode. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

9. It is admitted fact that both the petitioners had been engaged as contractual employees under the OPEPA/OSEPA and from the date of their engagement they have been discharging their duty. Even in some places they had been disengaged and re-engaged and in some places with the closure of the project they had been directed to discharge their duty in new places. But, by means of these two writ petitions, they seek to quash the orders of their transfer.

10. So far as transfer in general is concerned, the issue of transfer and posting has been considered time and again by the apex Court and law has been settled by catena of decisions. It is entirely upon the competent authority to decide when, where and at what point of time a public servant is to be transferred from his present posting. Transfer is not only an incident but an essential condition of service. It does not affect the conditions of service in any manner. The employee does not have any vested right to be posted at a particular place. These principles have been decided in ***B. Varadha Rao v. State of Karnataka***, AIR 1986 SC 1955 : (1986) 4 SCC 131; ***Shilpi Bose v. State of Bihar*****,** AIR 1991 SC 532 : (1991) SCC 659; ***Union of India v. N.P. Thomas***, AIR 1993 SC 1605; ***Union of India v. S.L. Abbas***, AIR 1993 SC 2444; and the latest judgment in ***Somesh Tiwari v. Union of India***, AIR 2009 SC 1399 : (2009) 2 SCC 592.

11. So far as scope of judicial review of transfer under Article 226 of the Constitution of India is concerned, it has been settled by the apex Court in ***Rajendra Roy v. Union of India***, AIR 1993 SC 1236; ***National Hydroelectric Power Corporation Ltd. v. Shri Bhagwan***, AIR 2001 SC 3309; and ***State Bank of India v. Anjan Sanyal,*** AIR 2001 SC 1748.

12. In ***Sarvesh Kumar Awasthi v. U.P. Jal Nigam***, (2003) 11 SCC 740, the apex Court held as follows:-

> *"In our view, transfer of officers is required to be effected on the basis of set norms or guidelines. The power of transferring an officer cannot be wielded arbitrarily, mala fide or an exercise against efficient and independent officer or at the instance of politicians whose work is not done by the officer concerned. For better administration, the officers concerned must have freedom from fear of being harassed by repeated transfers or transfers ordered at the instance of someone who has nothing to do with the business of administration."*

13. Taking into consideration the law laid down by the apex Court, as discussed above, the legal proposition of the issue of transfer can be summarized as under:-

> *(1) Transfer is a condition of service.*
>
> *(2) It is does not adversely affect the status or emoluments or seniority of the employee.*
>
> *(3) The employee has no vested right to get a posting at a particular place or can choose to serve at a particular place for a particular tenure.*
>
> *(4) It is within the exclusive domain of the employer to determine as to at what place and for how long the services of a particular employee are required.*

(5) Transfer order should be passed in public interest or administrative exigency, and not arbitrarily or for extraneous consideration or for victimization of the employee nor it should be passed under political pressure.

(6) There is a very little scope of judicial review by the Court/Tribunal against the transfer order and the same is restricted only if the transfer order is found to be in contravention of the statutory Rules or mala fides is established.

(7) In case of mala fides, the employee has to make specific averments and should prove the same by adducing implacable evidence.

(8) The person against whom allegation of mala fide is alleged is to be impleaded as a party by name.

(9) Transfer policy or guidelines issued by the State or employer does not have any statutory force as it merely provides for guidelines for the understanding of the Departmental personnel.

(10) The Court does not have a power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee, his family members and children as consideration of these issues fall within the exclusive domain of the employer.

(11) If the transfer order is made in mid-academic session of the children of the employee, the Court/Tribunal cannot interfere. It is for the employer to consider such a personal grievance."

14. There is no dispute with regard to legal proposition, as discussed above. Such principles have to be considered on the touchstone of the reasonableness. Now, coming to the facts of the case at hand, it is admitted case of the both the petitioners that they are employees of the opposite party no.2 and working under the OPEPA and their service conditions have been regulated by OPEPA Service Rules and Regulations, 1996. So far as transfer is concerned, there is no such provision available under the OPEPA Service Rules and Regulations, 1996. Rule-12, deals with cadre, which means the directly engaged employees in the State Project office shall be in a common cadre. The staff in all the district offices shall form a separate cadre. The seniority in each group and category in a cadre shall be fixed according to their date of joining. As such, on perusal of OPEPA Service Rules, 1996, there is no provision prescribed for "transfer".

15. Mr. P.K. Mohanty, learned Senior Counsel appearing for opposite party no.2 placed reliance on Rule-24 of OPEPA Service Rules & Regulations, 1996, which deals with Travelling Allowance, reads as under:-

"(i) The employees of the Authority shall be entitled to travelling allowance, daily allowance and transfer. T.A. in case of their transfer from the State Project Office to any D.P.O. or from one D.P.O. to another at the rates as incorporated in the Appendix-B.

(ii) The class to which an officer shall be entitled for any journey shall be prescribed in Appendix-B.
(iii) Travelling allowance and daily allowance payable to non-official member attending meetings of any body or committee under authority shall be as per rate prescribed in Appendix-B.
(iv) State Government officers attending meetings/Workshops convened by the authority shall draw their T.A. & D.A. from the Authority or from the Department they work as decided by State Government. The rate in such cases shall decided by State Government. The rate in such cases shall be the rate applicable to them under the State Government.
(v) In a particular case if no specific rule is there in this regulation the relevant rules of State government shall apply mutatis mutandis."

16. On perusal of sub-rule (i) of Rule-24, it is made clear that the employees of the Authority shall be entitled to travelling allowance, daily allowance and transfer T.A. in case of their transfer from the State Project Office to any DPO or from one DPO to another at the rates as incorporated in the Appendix-B. The employees as mentioned in sub-rule (i) of Rule-24, there was no specific definition of "the employee" available under the Rules, save and except Rule-3(f) of OPEPA Service Rules and Regulations, 1996, which deals with officers and staff of the OPEPA, reads as under:-

*"**3. DEFINITIONS**:*

xx xx xx

(f) Officers and Staff means whole time employees of the Authority appointed by the Executive Committee or by any officer or authority delegated with power by the Executive Committee to do so and would also include consultant, fellows, research staff and officers and staff working under the Authority on deputation from the State/Central Government. It also includes State Government Officers authorized to work as coordinators either on payment of salary or any fixed amount of remuneration."

17. On a close reading of the definition prescribed in Rule-3(f) of OPEPA Service Rules and Regulations, 1996, it appears that it does not include the officer and staff engaged on contractual basis. Thereby, neither Rule-24 nor the definition prescribed under Rule-3(f) deals with "contractual employee" working under the OPEPA and OPESA. Under Rule-24(i) reference has been made to Appendix-B, which deals with travelling allowance. Clause-2 of Appendix-B reads as under:-

"2. Classification of officers for the purpose of tour in connection with affairs of the Authority.
(a) The officers of the authority including those working on deputation from State/other Governments shall be classified into following grades on the basis of the basic pay or class to which they belong as mentioned below:-

(i) First Grade- All officers in receipt of basic pay of Rs.2500/- and above.
(ii) Second Grade-Officers getting pay above Rs.1300/- but below Rs.2500/- p.m.
(iii) Third Grade – All employees appointed on lump sum contract and classified as group-C in the service regulation.
(iv) Fourth Grade- All employees classified in the group appointed on lump sum contract.
The grade of the reemployed officer shall be on basis of the pay last drawn before deduction of the pension. The retired officers appointed on contract on lump sum amount of pay shall be classified on the basis of the basic contract amount excluding allowances of compensatory nature. The State Government officers working Ex-officio shall be classed into grade on basis of the pay they draw in their post under the state government."

18. If such classification of the officers for the purpose of tour, as envisaged under clause-2 of the Appendix-B, is taken into consideration, it also does not speak about "the employee engaged on contractual basis", rather sub-clauses-(iii) and (iv) of clause-(a) states about all employees appointed on lump sum contract. That by itself cannot construe that the employees who have been engaged on contractual basis. Clause-3 of Appendix-B deals with entitlement of class of accommodation for travel. Therefore, if a close scrutiny would be made to the provisions contained in Rule-3(f) read with clause-24(i) and Appendix-B, nowhere it has been specified with regard to transfer of contractual employee engaged under OPEPA and OSEPA. The travelling allowance, which is admissible under Rule-24(i), is only applicable to the employees indicated in definition 3(f) and, as such, the same does not include the "contractual employees" engaged under OPEPA and OSEPA. Thereby, OPEPA Service Rules and Regulations, 1996, being silent about the transfer and implementation thereof, any transfer of contractual employees, if made, is in violation of such rules and the same cannot sustain in the eye of law.

19. Mr. P.K. Mohanty, learned Senior Counsel appearing for opposite party no.2 relied upon the judgment of this Court in ***Prasanna Kumar Acharya*** mentioned supra. The said judgment was decided on the principle of transfer, as already discussed, and while deciding the said case this Court also took similar view holding that the opposite party, being the employer, has got every prerogative to transfer its employees. But fact remains, such transfer cannot be done arbitrarily, unreasonably and contrary to the rules governing the field. Emphasis has been laid that due to administrative exigencies, the petitioners have been transferred by the opposite party no.2, but nothing has been placed on record indicating the administrative exigencies. Therefore,

merely writing the words "administrative exigencies" cannot create a field for transfer of contractual employees for whom no service rules and guidelines have been framed. As such, the guidelines, which have been relied upon in the present case, cannot be construed to be a guidelines as the same have been framed with lack of quorum. Thereby, the impugned orders of transfer so passed by the authority concerned are without jurisdiction.

20. It is not disputed that OPEPA authority is a society registered under the Societies Registration Act, 1860. As per clause-(1) of Memorandum of Association, OPEPA is an "Authority" whose affairs shall be administered, subject to the rules, regulations and orders of the Authority by an executive committee which will be constituted as per clause-21 of such Memorandum of Association, which reads as under :-

> *" **21. Executive Committee**.*
>
> *The affairs of the Authority shall be administered, subject to the Rule and Regulations and orders of the Authority by an Executive Committee which shall consist of the following.*
>
> *(i) Secretary to Government, School & Mass Education Department of Orissa Bhubanjeswar. Chairman (Ex-Officio)*
>
> *(ii) Secretary to Government, Finance Department, Government of Orissa. Member*
>
> *(iii) Secretary to Government, Department of Panchayati Raj Government of Orissa. Member*
>
> *(iv) Director, Elementary Education Member*
>
> *(v) Director of Mass Education, Department of School & Mass Education, Government of Orissa. Member*
>
> *(vi) Director of T.E. and S.C.E.R.T., Orissa Member*
>
> *(vii) Director, Women & Child Development, Government of Orissa Member*
>
> *(viii) Director, Tribal Welfare & Director, Harijan Welfare, Government of Orissa Member*
>
> *(ix)Two District Project Coordinators, from amongst selected districts by rotation, to be nominated by the Chairman. Members*
>
> *(x) Two Heads of District Committees from amongst selected Districts by rotation, to be nominated by the Chairman. Members*
>
> *(xi)Three representatives of the Central Government Department of Education, Ministry of Human Resource Development, Govt. of India. Members*
>
> *(xii) Two Directors of State level Academic and Technical Resource Support Agencies. Members*

(xiii) Two Educationists known for their experience and interests in basic education sector, one each to be nominated by the State Government, and Central Government. Members
(xiv) One serving teacher known for his/her meritorious service to the cadre of Basic Education to represent teacher's organization concerned with basic education to be nominated by the State Government. Member
(xv) Two women with experience and interest in women's Development and Education, one each to be nominated by the Central and State Government. Members
(xvi) Two persons from Voluntary Agencies who have distinguished themselves for their work in the area of Mass Education, one each to be nominated by the Central and State Government. Members
(xvii) Principal, Regional Institute of Education, Bhubaneswar Member
(xv) State Project Director, O.P.E.P Member Secretary"

Clause-28, which deals with quorum at the meeting, reads as under:

*"**Quorum at the Meeting**:*
One-third of the members of the Executive Committee present and in person shall constitute a quorum at any meeting of the Executive Committee provided that no quorum shall be necessary in respect of an adjourned meeting."

21. On perusal of clause-28, it is made clear that one-third of the members of the Executive Committee present and in person shall constitute a quorum at any meeting of the Executive Committee provided that no quorum shall be necessary in respect of an adjourned meeting. Clause-21 of the Memorandum of Association, which deals with Executive Committee, stipulates the Executive Committee shall comprise of 30 members, as detailed in sub-clause-(i) to (xviii) thereof. That means, in order to constitute a quorum of the Executive Committee, one-third of the members of the said Executive Committee, which comes to ten, are to remain present in person.Thereby, the decision taken by an Executive Committee will only be valid and implemented, if the said Executive Committee constitutes a quorum.

22. In ***Than Singh v. State of Madhya Pradesh***, AIR 2005 MP 170, while considering Section 6(2) of M.P. Panchayat Avam Gram Swaraj Adhiniyam, the Full Bench of Madhya Pradesh High Court, dealt with the question of "quorum" and in paragraphs-36 to 40 observed as follows:-

*"**36**. In Halsbury's Laws of England, Third Edition, Volume 6, while dealing with the factum of regulation and management of companies 'quorum' has been described as under :*

"630. A quorum. A quorum means the minimum number of directors who are authorised to act as a board (b). Each director of the quorum must be qualified to act, and if by the withdrawal of those directors who are disqualified from voting on the ground of interest or otherwise there would be no quorum, no business can be transacted (c). Where some of the directors are interested in a contract and not by the articles permitted to vote, a reduction in the quorum for the purpose of authorities the contract is invalid (d), and where a transaction is really one transaction, the necessary quorum cannot be obtained by dividing the transaction into two (e). The articles may provide that in the case of certain contracts or arrangements a director may be permitted to vote and be included in the quorum present notwithstanding the fact that otherwise he would have been disqualified on grounds of interest (f). Where no quorum is specified in the articles the number who usually act will constitute a quorum (g). Though one director cannot constitute a "meeting" (h). The articles may permit one director to be a quorum (i). Unless so provide by the articles, there cannot be a quorum competent to act where the number of directors is not filled up to the minimum number (k).

***37**. In Encyclopedia Britannica 'quorum' has been defined as under :*

"Quorum : in its general sense, a term denoting the number of members of any body of persons whose presence is requisite in order that business may be validly transacted by the body or its acts be legal. The term is derived from the wording of the commission appointing justices of the peace which appoints them all, jointly and severally to keep the peace in the country named. It also runs "We have also assigned you, and every two or more of you (of whom (quorum), any one of you the aforesaid A, B, C, D etc. we will shall be one) our justices to inquire the truth more fully", whence the justices so named were usually called justices of the quorum. The term was afterwards applied to all justices, and subsequently, by transference, to the number of members of a body necessary for the transaction of it business."

***38**. In Corpus Juris Secundum, Volume LXXIV 'quorum' has been described as under :*

"'Quorum : The word "quorum", now in common use, is from the Latin, and has come to signify such a number of the officers or members of anybody as is competent by law or constitution to transact business; such a number of an assembly as is competent to transact its business; such a number of the members of any body as is, when duly assembled, legally competent to transact business; such a number of a body as is competent to transact business in the absence of the other member. The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number. The idea of a 'quorum' is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action. Thus, the word "quorum" implies a meeting, and the action must be group action, not merely action of a particular number of members as individuals."

***39**. In the case of the Punjab University, Chandigarh v. Vijay Singh Lamba, AIR 1976 SC 1441 the Apex Court has ruled thus :*

"'Quorum" denotes the minimum number of members of any body of persons whose presence is necessary in order to enable that body to transact its business validly so

that its acts may be lawful. The fixation of quorum for the meetings of a committee does not preclude all the members of the committee from attending the meetings. By the quorum, a minimum number of members of the committee must be present in order that its proceedings may be lawful but that does not mean that more than the minimum are denied an opportunity to participate in the deliberations and the decisions of the committee. Whenever a committee is scheduled to meet, due notice of the meeting has to go to all the members of the committee and it is left to each individual member whether or not to attend a particular meeting. Every member has thus the choice and the opportunity to attend every meeting of the committee. If any member considers the matter which is to be discussed or determined in a particular meeting as of such importance that he must make his voice heard and cast his vote, it is open to him and indeed he is entitled to attend the meeting and make his presence felt."

Thus, the basic and fundamental principle inhered in the term 'quorum' is presence of minimum number of members to transact business with the avowed purpose to make it lawful.

***40**. In the instant case, the quorum has been differently prescribed. The effect and import of such enjoining has to be scrutinised in the backdrop of democracy albeit at the grassroot level. By introduction of such a provision the control from the majority slowly but steadily in a different manner travels to the very small and thin body. The democracy is built on the idea of the majority. All have a right to participate as permissible within the parameters of law. <u>But to conceive of a situation that to empower certain weaker section they would be allowed to have control in entirety the democracy at the grassroot level would itself be an anathema to the basic requirement of democracy. To have an idea that the protection of weaker sections should percolate to the minuscule level in a minutest manner cannot but smack of unreasonableness and irrationality. It can be well imagined if in one of the three categories as provided under Section 6(2) is absent the meeting of Gram Sabha cannot be held. We have been apprised at the Bar, that provision has become workable but it can never be the test in a case of this nature.</u> In the case at hand, we are testing the provision keeping in view the democratic polity, rationality of the provisions, the non-arbitrariness of it, and when tested on the bedrock of the same we are of the opinion, the second part of the provision cannot stand the test of the Article 14 of the Constitution. The percolation to that extent, if we say so, is not permissible in a beyond constitutional tolerance. The learned counsel for the State submitted that unless they are allowed to control 'Gram Sabha' would be controlled by a different kind of majority and the entire Panchayat system would collapse. As has been stated above, number is the basic substratum of a quorum but, a significant and pregnant one, the Legislature has further proceeded to provide how the quorum would be formed or to put it differently, who would constitute the quorum. It is interesting to note that no alternative is provided what would happen in the absence of a quorum. The words used therein cast a mandate. Submission of the learned counsel for the State is that in a democratic polity there has to be participation of the weaker sections of the society, moreso, in a country like India where Scheduled Castes, Scheduled Tribes and women who have suffered*

for centuries. The aforesaid submission has its own significance and import and that has been met with by the Parliament while making provisions for reservation. Once the seats are reserved there can be no trace of doubt that the affirmative steps have been taken for progress and upliftment of the weaker sections of the society. The litmus test that is to be applied to the provision is whether a further controlling tool in the hands of a particular number of a particular caste or tribe as well as woman is affirmative or necessary. An argument has been advanced that unless such a provision is engrafted into the marrows of the Statute the aforesaid three categories would not come to the meetings and the democracy at the grassroot level would remain a myth. The aforesaid argument at a first flush may sound attractive but on a deeper probe, greater scrutiny, subtle analysis and pregnant penetration would make it a submission which has to face the founder but cannot form the foundation."

23. Much reliance has been placed on the office order dated 17.12.2018, which shows about the guidelines of transfer of contractual employees working at State Project Office, District Project Offices and Block Level Offices under RTE-SSA, Odisha. The very opening paragraph of the said office order reads as under:-

"Presently there is no transfer/deployment policy for the employees working at SPO, DPO, Block level under SSA. A large number of representations for transfer received from different categories of contractual employees working at SPO, DPO and Block Level are pending and cannot be disposed of, in absence of a clear cut guideline in this regard. In the 36th meeting of Executive Committee of OPEPA held on 21.03.2018 this issue was discussed at length and decision was taken at item no. 11(2) to formulate a Transfer/Deployment Policy for the contractual employees under SSA."

On perusal of the above mentioned paragraph, it is made clear that no transfer/deployment policy for the employees working at SPO, DPO, Block Level under SSA and a large number of representations for transfer received from different categories of "contractual employees" working at SPO, DPO and Block Level are pending and cannot be disposed of in absence of a clear cut guidelines in that regard. In the proceedings of the 36th meeting of the Executive Committee of the OPEPA held on 21.03.2018, the above issue was discussed at length and the same was taken in clause no.11.2 to formulate transfer/deployment policy of the OPEPA employee. The proceedings of 36th Executive Committee of the OPEPA held on 21.03.2018 has been placed on record as Annexure-4 to W.P.(C) No. 24671 of 2020. Clause-11.2, which deals with transfer policy of OPEPA employees, reads as under:-

> *"**11.2 Transfer policy of OPEPA employees**.*
>
> *As per OPEPA Service Rules & Regulations 1996, Rule-13 the directly engaged employees in the State Project Office shall be in a common cadre. The staff in all the district offices shall form a separate cadre. The seniority in each group and category in a cadre shall be fixed according to their date of joining. It is felt that so many representations/recommendations have been received from different corners regarding transfer of district/block employees engaged under RTE/SSA on personal/Health/Spouse Grounds etc.*
>
> *This matter was discussed and decided to frame a transfer policy of State/Dist/Block level staff by a committee to be formed at State Level under the Chairmanship of SPD, OPEPA, which will be placed before Govt. in S & ME Deptt. for approval."*

24. The guidelines for transfer of contractual employees have been framed vide office order dated 17.12.2018 under Annexure-3 to W.P.(C) No.12584 of 2019. If the very same opening paragraph, as mentioned above, would be read with clause-11.2 of the 36th meeting of Executive Committee held on 21.03.2018, it would be evident that nowhere it has said about the transfer policy of the contractual employees under SSA. Clause-11.2 of the proceedings of 36th Executive Committee of the OPEPA held on 21.03.2018 also does not speak about transfer policy of the contractual employees working under the OPEPA. Thereby, no reliance can be placed on such clause of the proceedings of 36th Executive Committee of the OPEPA held on 21.03.2018, so far as transfer of the contractual employees is concerned.

25. Apart from the above, the 36th Executive Committee meeting of the OPEPA held on 21.03.2018 does not satisfy the requirement of forming a quorum as required under clause-28 of the Memorandum of Association. Further, the list of members present in the 36th Executive Committee meeting held on 21.03.2018, which has been placed as Annexure-A at page-57 of W.P.(C) No.24671 of 2020, shows about presence of ten members. If a close scrutiny would be made, it would be apparent that the Labour Commissioner of Odisha, Director, Panchayatiraj & Drinking Water, Odisha and Dr. B.B. Acharya, Technical Consultant, Labour and ESI Department are not the members, as enumerated under clause-21 of the Memorandum of Association. Otherwise also, out of 30 members, if ten are not present in the Executive Meeting, the same lacks quorum. Thereby, any decision taken in an Executive Meeting, which lacks quorum, cannot be said to be a valid decision so that the same can be given effect to. Consequentially, the reliance placed on the proceedings of 36th Executive Committee meeting of the OPEPA held on 21.03.2018, having lacked the quorum, the decision so taken as per clause-11.2 of the said meeting to formulate transfer/deployment policy for the employees is

hardly of any assistance to opposite party no.2. Thereby, it can be safely stated that in absence of any guidelines for transfer of contractual employees of the OPEPA, the impugned orders of transfer cannot sustain in the eye of law.

26. If the issue involved herein is considered from other angle, in absence of any provision contained in OPEPA Service Rules and Regulations, 1996 for transfer of contractual employees read with so called guidelines issued on 17.12.2018 as well as the proceedings of the 36th Executive Committee meeting of the OPEPA held on 21.03.2018, which lacked quorum, the impugned orders of transfer passed by the authority concerned is without jurisdiction.

27. ***Butterworths Words and Phrases Legally Defined***, Vol.3, at page-113, states succinctly "by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision."

28. In ***Smt. Ujjam Bai v. State of U.P.***, AIR 1962 SC 1621, the apex Court held that "jurisdiction" is the power to hear and determine, it does not depend upon the regularity of the exercise of that power or upon correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly.

29. In ***Official Trustee West Bengal v. Sachindranath Chaterjee***, AIR 1969 SC 823, the apex Court held that "jurisdiction" means the legal authority to administer justice according to the means which the law has provided and subject to the limitations imposed by that law upon the judicial authority.

30. In ***Raja Soap Factory v. S.P. Shantharaj***, AIR 1965 SC 1449, the apex Court held that "Jurisdiction" is meant the extent of the power which is conferred upon the Court by its Constitution to try a proceeding.

31. In ***Hari Prasad Mulshanker Trivedi v. V.B. Raju***, AIR 1973 SC 2602, the apex Court held that the word "jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context. Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control, to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry.

32. In ***A.R. Antulay v. R.S. Nayak***, AIR 1988 SC 1531, the apex Court held that jurisdiction is the authority or power of the Court to deal with a matter and make an order carrying binding force in the facts.

33. In ***Harpal Singh v. State of Punjab***, (2007) 13 SCC 387, the apex Court held that "jurisdiction" means the authority or power to entertain, hear and decide a case and to do justice in the case and determine the controversy. In absence of jurisdiction the Court has no power to hear and decide the matter and the order passed by it would be a nullity.

34. Taking into consideration the above meaning of the jurisdiction and applying the same to the present context, it is made clear that in absence of any provision contained in OPEPA Service Rules and Regulations, 1996 read with the guidelines dated 17.12.2018 and the decision taken in 36th Meeting of the Executive Committee of OPEPA held on 21.03.2018 with regard to formulation of transfer/deployment policy as per clause-11.2 thereof, the impugned orders passed by the authority transferring the petitioners, who are contractual employees, are without jurisdiction. Thereby, the order of transfer dated 17.07.2019 under Annexure-2 to W.P.(C) No.12584 of 2019 and that of dated 17.07.2019 under Annexure-1 to W.P.(C) No. 24671 of 2020, as well as letter dated 23.09.2020 and order dated 21.09.2020 under Annexures-5 and 6 to the W.P.(C) No.24671 of 2020 cannot sustain in the eye of law and are liable to be quashed and hereby quashed.

As opposite party no.2 is the employer, keeping in view the settled proposition of law, as discussed above, it is left open to the said authority to frame suitable policy/guidelines for transfer of contractual employees of OPEPA/OSEPA by following due procedure as provided under law.

35. In the result, the writ petitions are allowed. However, there shall be no order as to costs.

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2021 (III) ILR - CUT-701

Dr. B.R.SARANGI, J.

WPC (OAC) NO. 339 OF 2001

SATYARANJAN DAS & ORS. …….. Petitioners

.V.

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

SCALE OF PAY – Recovery of excess amount – The petitioners were extended with the benefit of trained graduate scale of pay pursuant to the direction of Govt. and implement by the Director – Whether the authority is justified in issuing the direction for refund of excess amount without following due procedure of law? – Held, impugned order of recovery is not sustainable in the eyes of law.

Case Laws Relied on and Referred to :-

1. AIR 2015 SC 696 : Punjab v. Rafiq Masih.
2. 2021 (II) OLR 486: Sanjay Pradhan v. State of Odisha.

For Petitioner : M/s. D.K. Panda, B.B. Acharya, J. Sengupta, P.R.J. Dash, C. Mohanty and G. Sinha

For Opp.Parties: M/s. B. Mohanty,Standing Counsel, S&ME Deptt.

JUDGMENT Date of Judgment : 24.11.2021

Dr. B.R.SARANGI, J.

The petitioners, who are working as Headmasters in various M.E. Schools, have filed this writ petition seeking to quash the order dated 21.11.2000 under Annexure-14, by which direction has been given for refund of excess amount paid to them, by calculating up-to-date amount, through challan for necessary compliance of the A.G. Audit report, and to issue direction to the opposite parties to fix their pay, as per the revised scale of pay rules introduced in 1998, w.e.f. 01.01.1996.

2. The factual matrix of the case, in brief, is that the petitioners are working as Headmasters in various aided educational institutions, prior to taking over of the same, as per the provisions contained under Orissa Aided Educational Institution (Recruitment and Conditions of Service) Rules, 1974, which had come into force w.e.f. 01.04.1975. All the petitioners, being trained graduate teachers, were entitled to get such benefit, as per Rule-9 of Rules, 1974, but the same was not granted in their favour. Therefore, grievance was made by the petitioners before the authority and the same was considered and vide circular dated 08.07.1980, Govt. of Orissa in Education and Youth Services Department communicated that after careful consideration, Government have been pleased to decide that Headmasters of Aided M.E. Schools having trained graduate qualification should be allowed the scale of pay admissible to the Headmasters of Government M.E. schools

Having the trained graduate qualification. The same has been implemented, vide letter dated 13.05.1996 issued by the Deputy Secretary, School and Mass Education Department addressed to the Director, Elementary Education, Orissa, wherein it has been specifically stated that trained graduate Headmasters of aided U.P. (M.E.) School are entitled to trained graduate scale of pay from 01.04.1975 or the date of passing B.Ed., whichever is later and, as such, the same has been communicated to the respective inspector of schools for its implementation. Therefore, the petitioners, those who have acquired B.Ed. qualification after 01.04.1975, from the date of passing of B.Ed. qualification were allowed to receive trained graduate scale of pay admissible to the post, pursuant to letter dated 12.09.1997. When the petitioners are enjoying the trained graduate scale of pay, all on a sudden, on 11.03.1999, the Director Elementary Education, Orissa communicated a letter to all the District Inspector of Schools stating inter alia that the benefit admissible, pursuant to School and Mass Education Department letter dated 13.05.1996, has no general applicability and, as such, the directorate memo dated 27.08.1996 has been withdrawn. Consequentially, Annexure-14 was issued on 21.11.2000 for refund of excess amount, which has been paid to the petitioners, in view memos of directorate and inspector of schools, by calculating the up-to-date amount through challan for compliance of A.G. Audit report. Hence this application.

3. Mr. D.K. Panda, learned counsel for the petitioners contended that the petitioners, having got requisite qualification of trained graduate, have been extended with the benefit of trained graduate scale of pay pursuant to letters dated 08.07.1980 and 13.05.1996 and also the letter dated 27.08.1996 annexed as Annexures-1, 2 and 3 respectively, and, as such, finally the benefit has been extended to the petitioners pursuant to the order dated 12.09.1997 under Annexure-9. But, when the petitioners were enjoying such benefit, all on a sudden, the order in Annexure-11 dated 11.03.199 has been passed to withdraw such benefit and consequentially order dated 12.11.2000 under Annexure-14 has been issued for refund of excess amount, which cannot sustain in the eye of law. It is further contended that the action of the authority is arbitrary and contrary to the provisions of law and, thereby, this Court should interfere with the same.

To substantiate his contention, reliance has been placed on the judgment of the apex Court in the case of ***State of Punjab v. Rafiq Masih***, AIR 2015 SC 696 and of this Court in the case of ***Sanjay Pradhan v. State of Odisha***, 2021 (II) OLR 486.

4. Mr. B. Mohanty, learned Standing Counsel for School and Mass Education Department, per contra, has contended that inadvertently the benefit has been extended to the petitioners and, therefore, when A.G. audit was made and objection was raised, the same has been withdrawn. Thereby, the impugned order has been passed directing for refund of the excess amount paid to the petitioners. Consequentially, no illegality and irregularity has been committed by the authority so as to warrant interference by this Court. It is further contended that the benefit extended to Sri P.C. Mohapatra and Madhusudan Panda in School and Mass Education Department letter dated 13.05.1996 has no general applicability and, therefore, direction has been given for refund of the excess amount paid to the petitioners.

5. This Court heard Mr. D.K. Panda, learned counsel for the petitioners and Mr. B. Mohanty, learned Standing Counsel for School and Mass Education Department by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is disposed of finally at the stage of admission.

6. The facts narrated above are undisputed. The only question revolves round that if the petitioners were extended with the benefit of trained graduate scale of pay, whether the authority is justified in issuing the direction for refund of the excess amount without following due procedure of law.

7. There is no dispute that the petitioners have acquired the qualification of trained graduate, which is the requisite qualification, and pursuant to the direction issued by the Government and implemented by the Director, the benefit of trained graduate scale of pay has already been extended to the petitioners. As such, the benefit has been extended to them consciously taking into account their qualification and more so they have been allowed to receive such benefit in accordance with Rule-9 of Rules, 1974 and keeping in view the doctrine of equality, as envisaged under Part-IV of Constitution of India.

8. The doctrine of equality is a dynamic and evolving concept having many dimensions. Doctrine of equality, can also be found in Articles, 38, 39A, 43 and 46 contained in Part-IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order

providing justice, social economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interest of the weaker sections. In view of the aforestated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount.

9. As it appears, in the present case, applying the doctrine of equality, the benefit of trained graduate scale of pay has been extended to the petitioners and, as such, the petitioners are enjoying such benefit. But merely because some audit objection was made, the authority issued a letter for withdrawal of the circular issued for extension of the benefit and also consequential order was issued for recovery of excess amount paid to them without following due procedure, which cannot sustain in the eye of law. It is apparent from the record that the petitioners have been extended with the benefit of trained graduate scale of pay for a quite long period and, thereby, the authority cannot recover such amount as a matter of course stating that the same has been erroneously paid to them. Rather, rights have been accrued in favour of the petitioners to enjoy such benefit for a considerable length of period and, therefore, any action taken for recovery of the same, should have been done by following due procedure of law. Thereby, the direction issued for recovery of the amount is arbitrary, unreasonable and contrary to the provisions of law and, as such, violative of Article 14 of the Constitution of India, as because it would be impossible for an employee to bear the financial burden, in the shape of refund of payment which is said to have been received wrongfully for a long span of time. Needless to say that an employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be ground for causing any difficulty for the employee to meet the needs of his/her family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements and a variety of sundry expenses. As such, if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the

same by following due procedure of law, mainly in compliance of principles of natural justice. Nothing has been placed on record on behalf of the State-opposite parties to substantiate, that any opportunity of hearing was given to the petitioners before asking for refund of the amount. In absence of any such material to show that principles of natural justice were followed, the direction given for recovery of the amount vide impugned order dated 21.11.2000 under Annexure-14, cannot sustain in the eye of law.

10. In ***Rafiq Masih*** mentioned supra, the apex Court observed that recovery of excess payments made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit before their retirement. By so saying, the apex Court held that it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation. Similar view has also been taken by this Court in ***Sanjay Pradhan*** mentioned supra.

11. Mr. B. Mohanty, learned Standing Counsel for School and Mass Education Department contended that while entertaining this application, the tribunal passed interim order not to recover the excess amount paid to the petitioners and, as such, in compliance of the order of the tribunal, the alleged excess amount paid to the petitioners has not yet been recovered from them.

12. In the above view of the matter, applying principles laid down by the apex Court in the case of ***Rafiq Masih*** (supra), which has been followed by this Court in the case of ***Sanjay Pradhan*** (supra), this Court is of the considered view that the order impugned in Annexure-14 series dated 12.11.2000 for refund of excess amount cannot sustain in the eye of law and is liable to be quashed and is hereby quashed. The opposite parties are directed not to recover the excess amount paid to the petitioners, as they have already been extended with the benefits of trained graduate scale of pay.

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

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2021 (III) ILR - CUT-707

Dr. B.R.SARANGI, J.

W.P(C) No. 10919 of 2021

CHAKRADHAR PRASAD GANTAYAT …….. Petitioner

.V.

COMMISSIONER-CUM-SECRETARY, GOVT. OF ODISHA, WORKS DEPTT. ……..Opp. Party

SERVICE LAW – Self same allegation/ facts – Initiation of departmental proceeding as well as criminal proceeding – Exonerated from departmental proceeding – Criminal proceeding pending – Promotion denied in view of pendency of criminal proceeding – Question raised that, whether in view of such pendency promotion should be denied ? – Held, No.

Case Laws Relied on and Referred to :-

1. 2018 (II) OLR (SC) 483 : Roma Sonkar v.Madhya Pradesh State Public Service Commission.
2. (2020) 9 SCC 636: 2020 (II) OLR 736 : Ashoo Surendranath Tewari V. The Deputy Superintendent of Police, EOW, CBI and others.
3. W.P.(C) No. 19909 of 2015 (Disposed on 05.10.2016) : State of Odisha and others V. Somnath Sahoo.
4. W.P.(C) No. 22393 of 2015 (Disposed on 26.04.2017) : State of Odisha V. Anil Kumar Sethi and others.
5. (1996) 9 SCC 1: P.S. Rajya V. State of Bihar.
6. AIR 1997 SC 13 : State of Rajasthan V. B.K. Meena.
7. (2001) 6 SCC 584 : K.C. Sareen vs. CBI, Chandigarh
8. (2017) 15 SCC 133 : Eera Through Dr. manjula Krippendorf V. State (NCT of Delhi) and another.
9. (2011) 3 SCC 581 : Radheshyam Kejriwal vs. State of West Bengal and another.

For Petitioner : M/s S.K. Dalai and Premananda Swain

For Opp. Party: Mr. J. P. Patnaik, Govt. Advocate

JUDGMENT Date of Hearing: : 24.11.2021 : Date of Judgment: 02.12.2021

Dr. B.R.SARANGI, J.

Against denial of promotion to the rank of Superintending Engineer (Civil), Level-II, the petitioner, who is working as Executive Engineer, R&B in the office of the Engineer-in-Chief (Civil), Nirman Soudha, Unit-V, Bhubaneswar, has approached this Court in the present writ petition.

2. The factual matrix of the case, in a nutshell, is that the petitioner, who has got brilliant academic career, having acquired Post Graduate Degree in Civil Engineering from I.I.T., Madras and also one and half years Post Graduate study in the International and Environment from Institute of Delft, Netherland, Europe, was appointed in the post of Assistant Engineer by following due procedure of selection. He was subsequently promoted to the post of Assistant Executive Engineer on 24.01.2002 and Executive Engineer on 10.11.2006. Accordingly, in the gradation list published for the post of Executive Engineers, he was placed at Sl. No. 118. But, unfortunately, a criminal case was lodged by the vigilance department vide FIR No. 42 dated 20.08.2010, while he was continuing as the Executive Engineer (R&B) Division, Bhubaneswar No.4. The final charge sheet was submitted by the vigilance department on 30.09.2014. Accordingly, T.R. Case No. 50 of 2014 was registered in the court of Special Judge (Vigilance), Bhubaneswar. For the selfsame allegation, a disciplinary proceeding was also initiated, vide office memorandum dated 11.07.2014, against three officers, namely Pitabas Sahoo, Assistant Engineer (R&B) Division No.4, Bhubaneswar, Sri Pramod Kumar Mishra, Junior Engineer (Civil), Bhubaneswar and the petitioner. The Chief Engineer, Building, Odisha, Bhubaneswar was appointed as the inquiry officer by the Government of Odisha, Works Department vide letter dated 19.12.2014. He conducted the inquiry and submitted the report on 26.06.2015, recommending that the delinquent officer, i.e. the present petitioner may be exonerated from all the charges levelled against him. Pursuant to the order dated 15.12.2015, opposite party exonerated all the three officers, i.e. Junior Engineer, Assistant Engineer and the petitioner from the charges levelled against them. As a consequence thereof, Shri Pitabas Sahoo, who was working as Assistant Engineer, was promoted to the rank of Deputy Executive Engineer and thereafter to the rank of Executive Engineer on 17.05.2016, whereas the petitioner was denied the benefit of promotion to the next higher rank, i.e. Superintending Engineer (Civil), Level-II, though his juniors were given promotion to the said post. The petitioner represented the authority for giving him promotion, as all the Executive Engineers from Sl. No. 119 to 152 of the gradation list had been promoted to the post of Superintending Engineer (Civil), Level-II except the petitioner. But no action was taken on the representation filed by the petitioner. Therefore, the petitioner approached this Court by filing W.P.(C) No. 18655 of 2019, which was disposed of vide order dated 14.10.2019 directing the opposite party to consider the representation and take a decision within a period of two months

from the date of production of the certified copy of the order along with copy of the writ petition. On receipt of the copy of the order dated 14.10.2019, the opposite party, vide order dated 29.06.2020, disposed of the representation of the petitioner by holding that the claim of the petitioner for promotion to the rank of Superintending Engineer (Civil), Level-II merits no consideration till disposal of the vigilance case pending against him by taking note of the fact that the case of the petitioner was considered in Review DPC meeting held on 04.09.2018 and the findings of the committee was kept in sealed cover in view of G.A. Department office memorandum dated 18.02.1994 read with G.A. Department Circular dated 28.05.2012. Therefore, the petitioner approached this court in the present writ petition.

3. The present writ petition was disposed of vide order dated 22.03.2021 by the learned Single Judge with an observation that the petitioner cannot suffer for the long pendency of the vigilance proceeding and it is also not known when the vigilance proceeding initiated in the year 2010 will come to an end. Accordingly, the learned Single Judge directed the opposite party to give promotion to the petitioner to the rank of Superintending Engineer (Civil) Level-II by opening the sealed cover. However, the promotion of the petitioner, as per the direction of this Court, was subject to ultimate outcome in the vigilance proceeding. The learned Single Judge clarified that the promotion of the petitioner to the rank of Superintending Engineer (Civil) Level-II would not confer equity, in the event he ultimately lost the vigilance proceeding, and the entire exercise was directed to be completed within three weeks from the date of commutation of the direction. It was also clarified that upon promotion, the petitioner would be entitled to all consequential benefits.

4. The State opposite party preferred writ appeal bearing W.A. No. 519 of 2021 against the order dated 22.03.2021 passed by the learned Single Judge, mainly on the ground that the learned Single Judge passed the order on the very first day without giving any opportunity of hearing to the appellant to file a reply. It was also pleaded in the writ appeal that though the petitioner had earlier filed W.P.(C) No. 18655 of 2019, which was disposed of vide order dated 14.10.2019, but the order dated 29.06.2020 passed by opposite party pursuant to the direction of this Court dated 14.10.2019, was not challenged by the petitioner in the present writ petition. While disposing of the writ appeal vide order dated 19.08.2021, the Division Bench at Paragraphs-5, 6 and 7 observed as follows:-

"5. Looking at the prayer in the said writ petition, the paper book of which is available before this Court, it is seen that there was only one prayer in the writ petition for a mandamus to be issued to the present Appellant to give the Opposite Party Ad Hoc promotion "to the rank of Executive Engineer (Civil) to the Superintend Engineer (Civil) (Level-II) with immediate effect".

6. Apart from disputed facts there was the above factor which required to be brought on record by the Appellant before the learned Single Judge in a counter affidavit. Accordingly, this Court is of the view that the writ petition should not have been disposed of on the very first day without a reply from the State of Odisha. Therefore, without expressing any view on merits, on the above short ground, the impugned order of learned Single Judge is hereby set aside and W.P.(C) No.10919 of 2021 is revived for being heard afresh on merits by the learned Single Judge.

7. The following directions are therefore issued:

(i) The writ petition will be listed before learned Single Judge on 4th October, 2021. By 27th September, 2021 the present Appellant, i.e. State of Odisha should file its para-wise reply to the said writ petition. No further time will be granted for that purpose. By 4th October, 2021, if the reply has been filed by then, the Opposite Party, i.e. the writ petitioner should file his rejoinder before 4th October, 2021. Again no further time shall be allowed for this purpose.

(ii) Irrespective of the above, the learned Single Judge will proceed with the writ petition and endeavour to dispose it of on merits by a fresh order not later than 20th December, 2021. Both parties will cooperate with the learned Single Judge in adhering to the above time schedule and will not seek any unnecessary adjournment."

5. On perusal of the aforesaid order, it appears that the Division Bench while remanding the matter has directed the learned Single Judge to proceed with the writ petition and to make an endeavour to dispose of the same not later than 20th December, 2021. The Division Bench has lost sight of the fact that the order dated 22.03.2021 was passed after giving opportunity of hearing to the counsel for the petitioner, as well as the counsel for the State, who was present in the Court. The Orissa High Court Rules prescribes that before filing of the case, a copy of the same has to be served in the office of learned Advocate General. The purpose of serving advance copy in the office of learned Advocate General is for enabling them to obtain necessary instructions and get themselves ready when the matter is listed for fresh admission. Therefore, the State opposite party is well aware of the filing of the case and the contents thereof. Instead of discharging their obligation to obtain instructions from the competent authority and address the Court at the time of admission, it is observed in many a cases, even though the orders are passed in presence of the learned counsel for the State and/or at times, on

their agreement, the orders are passed, they are preferring writ appeals and the same are being entertained by the Division Bench, on the plea that at the very first day without giving opportunity to the State to file reply, the matters are being disposed of. This is absolutely a misleading contention raised by the State appellant before the Division Bench. As it has now become a day-to-day phenomenon on the part of the State counsels, to turn around and approach the Division Bench taking the plea that no opportunity to reply was given, instead of discharging their duties and obligations in conformity with law, even if orders are passed at the time of admission either for want of receiving instructions or on their agreement, which aspect should have been examined in proper perspective and thereafter the matter should have been adjudicated on merits, instead of remanding it to the learned Single Judge to dispose of the same within a stipulated time, with a specific direction to the parties to file counter and rejoinder within a particular time in view of the law laid down by the apex court in ***Roma Sonkar v. Madhya Pradesh State Public Service Commission, 2018 (II) OLR (SC) 483***. In the said case, the apex Court has categorically ruled that the Division Bench in appeal arising out of order passed under writ jurisdiction exercises same jurisdiction, primarily and mostly to consider the correctness or otherwise of the view taken by the learned Single Judge. Therefore, the learned Single Judge is not sub-ordinate to the Division Bench. In such circumstance, the Division Bench is to consider the writ appeal on merits instead of remitting the matter back to the learned Single Judge. But, in this case, the Division Bench, instead of deciding the writ appeal on merits, has remitted the matter back to the learned Single Judge with certain directions as contained in para-7 of the order itself. Therefore, adhering to the judicial discipline, this Court, in compliance of the order dated 19.08.2021 passed by the Division Bench, heard this matter afresh.

6. Pursuant to the direction given by the Division Bench in paragraph-7 of the writ appeal, the opposite party has filed its counter affidavit and the petitioner has also filed rejoinder affidavit within the time specified and accordingly steps have been taken to dispose of the writ petition within the time specified by the Division Bench.

7. Mr. S.K. Dalai, learned counsel for the petitioner contended that a criminal case was lodged by the Vigilance Department vide FIR No. 42 dated 20.08.2010 against the Junior Engineer and the contractor, while the petitioner was continuing as the Executive Engineer (R&B), Division and, as

such, in the FIR, the name of the petitioner was not available, as he was in no way concerned in such dispute. The work had been allotted by the Junior Engineer under F2 agreement, which was prevailing at the relevant point of time. But due to the defective investigation, in the charge sheet the petitioner and the Assistant Engineer came to picture. The investigation continued for a period of four years from 2010 and charge sheet was submitted in the year 2014. Consequentially, cognizance was taken on 13.11.2014, but trial has not yet commenced. On the self charges, a disciplinary proceeding was drawn up vide Memorandum dated 11.07.2014, which was concluded on 15.12.2014 exonerating the petitioner and others from the disciplinary proceeding. Therefore, it is contended that pendency of the vigilance case cannot stand as a bar to give promotion to the petitioner to the next higher post as he has been exonerated from selfsame charge in the disciplinary proceeding. Though the petitioner filed representation and this Court directed vide order dated 14.10.2019 passed in W.P.(C) No. 18655 of 2019 to consider the same, but the said representation was rejected relying upon G.A. Department office memorandum No. 3928 dated 18.02.1994 read with G.A. Department circular No. 11962 dated 28.05.2012. Since the petitioner was denied the promotion, the petitioner approached this Court by filing the present writ petition, which had been initially disposed of, vide order dated 22.03.2021, taking into consideration the ratio decided by the apex Court in ***Ashoo Surendranath Tewari V. The Deputy Superintendent of Police, EOW, CBI and others***, (2020) 9 SCC 636: 2020 (II) OLR 736. Aggrieved by the order of the learned Single Judge, writ appeal was filed and as a consequence thereof the matter has been placed for re-hearing before this Court. He further contended that if the petitioner has been exonerated in the disciplinary proceeding and his case has been considered for promotion and kept in sealed cover, because of pendency of the vigilance case, he should not have been denied promotion, merely because pendency of the vigilance case.

Though reliance has been placed on various orders/ judgments of this Court as well as apex Court, but learned counsel for the petitioner in course of hearing, drew attention of this Court to the judgment of the apex Court in ***Ashoo Surendranath Tewari (supra); State of Odisha and others V. Somnath Sahoo***, W.P.(C) No. 19909 of 2015 disposed of on 05.10.2016; State of Odisha V. Anil Kumar Sethi and others, W.P.(C) No. 22393 of 2015 disposed of on 26.04.2017 and ***P.S. Rajya V. State of Bihar***, (1996) 9 SCC 1.

8. Mr. J. P. Patnaik, learned Government Advocate appearing for the State opposite party argued with vehemence that Bhubaneswr Vigilance P.S. Case No. 42 of 2010 has been filed under Section 13 (2) read with Section 13 (1)(c)(d) of the Prevention of Corruption Act, 1988 and under Sections 409/420/468/471/120-B of IPC against the petitioner and other co-accused officers and contractors who entered into a criminal conspiracy in order to show undue official favour to the contractor by way of making full and final payment towards execution of the work, i.e. "Construction of Barrier free modification work in Deaf & Dumb School, Unit-9 Bhubaneswar", prior to the actual completion of work. In the criminal case, charge sheet was submitted on 30.09.2014 before the Special Judge, Vigilance, Bhubaneswar. Cognizance was taken by the Vigilance Court on 13.11.2014 and accordingly the petitioner, along with co-accused officials and the contractor, is facing trial for the criminal charges framed by the State Vigilance wing in the said Court. Disciplinary Proceeding under Rule-15 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 was started against the petitioner, vide Works Department memorandum dated 11.07.2014, simultaneously along with the criminal proceeding. It is further contended that list of evidentiary documents and list of witnesses, basing upon which the charge sheet was submitted are not exactly the same as that of the list of documents and witnesses which are relied upon in the disciplinary proceeding to sustain the charges levelled against the delinquent officers, including the petitioner. In the disciplinary proceeding the Chief Engineer (Buildings), Odisha, Bhubaneswar was appointed as the Inquiry Officer and Executive Engineer, Bhubaneswar (R&B) Division-IV, Bhubaneswar was appointed as the Marshalling Officer, vide Works Department Office Order dated 19.12.2014. Accordingly the inquiry was conducted by the Inquiry Officer, who submitted the report exonerating the petitioner from the charges levelled in the disciplinary proceeding. According to him, exoneration of the petitioner in the disciplinary proceeding cannot entitle him to exonerate from the criminal proceeding initiated against him. As a consequence thereof, even though the petitioner's case was considered for promotion, but it has not been given effect to and kept in sealed cover due to pendency of the vigilance case. It is further contended that no discrimination has been made against the petitioner in the matter of giving promotion to the next higher rank. In the DPC meeting held on 18.07.2014 for promotion of Assistant Executive Engineer to the rank of Deputy Executive Engineer, the case of Sri Pitabas Sahoo was kept in sealed cover due to disciplinary proceeding. However, in

compliance to the order of the Tribunal in O.A. No. 2759 of 2015, Sri Pitabas Sahoo was promoted. Therefore, the petitioner's case cannot be equated with that of Sri Sahoo. Authorities are well justified in not giving promotion to the petitioner because of the pendency of the vigilance case against him.

To substantiate his contention, he has relied upon the judgment of the apex Court in ***State of Rajasthan V. B.K. Meena***, AIR 1997 SC 13; ***K.C. Sareen vs. CBI, Chandigarh***, (2001) 6 SCC 584; and ***Eera Through Dr. manjula Krippendorf V. State (NCT of Delhi) and another***, (2017) 15 SCC 133.

9. This Court heard Mr. S.K. Dalei, learned counsel for the petitioner and Mr. J.P. Patnaik, learned Government Advocate appearing for State-opposite party by hybrid mode and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission in compliance of order dated 19.08.2021 passed in W.A. No. 519 of 2021.

10. Indisputably, the petitioner, while working as Executive Engineer, was involved in a vigilance case. Though he was not named in the FIR, but subsequently he was implicated in the charge sheet, basing upon which, cognizance was taken. Simultaneously, a disciplinary proceeding was initiated against the petitioner, along with other co-officers, on the selfsame charges. Upon an inquiry being made, all the three officers, i.e. Junior Engineer, Assistant Engineer and Executive Engineer-petitioner herein, were exonerated from the charges of the disciplinary proceeding. In the meantime, the person, who was rendering the service as Assistant Engineer, has been promoted to the post of Executive Engineer, whereas, even though the petitioner is entitled to get promotion from the post of Executive Engineer to Superintending Engineer (Civil) Level-II, because of the pendency of the vigilance case, he has not been given promotion. Therefore, the moot question to be considered by this Court at this stage is, whether a person can be denied the benefit of promotion on the plea of pendency of the vigilance case, when from the selfsame charges levelled against him in the disciplinary proceeding, he has been exonerated?"

11. In order to answer the above question effectively, it is worthwhile to go through the charges levelled against the petitioner in the charge sheet dated 30.09.2014 submitted by the vigilance authority, which has been placed

on record at page-34 of the brief, and the charges levelled against the petitioner in the disciplinary proceeding vide memo dated 11.07.2014 under Annexure-3 series, which includes the article of charges, statement of imputation and memo of evidence. On careful perusal of the same, it is evident that for the selfsame charges, disciplinary proceeding and the criminal proceeding had been initiated against the petitioner. Both vigilance proceeding and disciplinary proceeding had been initiated on the allegation of misappropriation of government money by the officials of R&B Division No. IV, Bhubaneswar without executing the work "*Construction of Barrier free modification work in Deaf & Dumb School, Unit-9 Bhubaneswar*". Out of the two proceedings, criminal proceeding initiated by the vigilance department is pending, whereas disciplinary proceeding has been ended by exonerating the delinquents from the charges. The delinquent officers having been exonerated and their cases having been taken into consideration for promotion, and the delinquent Assistant Engineer having been promoted to the post of Executive Engineer, there is no valid and justifiable reason to keep the promotion of the petitioner in the sealed cover.

12. Needless to say, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court. The apex Court in number of judgments have held that the standard of proof in a departmental proceeding, being based on preponderance of probability is somewhat lower than the standard of proof in a criminal proceeding where the case has to be proved beyond reasonable doubt, in that case also merely because a criminal case is pending, the petitioner cannot and could not have been denied the benefit of promotion though from the selfsame charges levelled against him in a disciplinary proceeding, he has been exonerated.

13. In ***P.S. Rajya*** (supra), the apex Court, at paragraphs-3, 17 and 23 of the judgment, held as follows:-

> *"3. The short question that arises for our consideration in this appeal is whether the respondent is justified in pursuing the prosecution against the appellant under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in*

the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."

"17. At the outset we may point out that the learned counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it."

23. Even though all these facts including the Report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the Report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued. Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-1996 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs."

14. In ***Radheshyam Kejriwal vs. State of West Bengal and another***, (2011) 3 SCC 581, the apex Court at paragraph-26, 29 and 31 of the judgment held as follows:-

"26. We may observe that the standard of proof in a criminal case is much higher than that of the adjudication proceedings. The Enforcement Directorate has not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceedings cannot be said to be irrelevant in the criminal case. In B.N. Kashyap [AIR 1945 Lah 23] the Full Bench had not considered the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage of the said judgment: (AIR p. 27)

"… I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal cases, it is unnecessary for me to decide in this case. When that question arises for determination, the provisions of Section 41 of the Evidence Act, will have to be carefully examined."

29. We do not have the slightest hesitation in accepting the broad submission of Mr Malhotra that the finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication

proceedings cannot necessarily be held guilty in a criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case the entire burden to prove beyond all reasonable doubt lies on the prosecution.

31. It is trite that the standard of proof required in criminal proceedings is higher than that required before the adjudicating authority and in case the accused is exonerated before the adjudicating authority whether his prosecution on the same set of facts can be allowed or not is the precise question which falls for determination in this case."

15. After referring to various judgments, the apex Court in the said case, i.e. in ***Radheshyam Kejriwal*** (supra) further observed at paragraphs-38 and 39 as follows:-

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."

39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

16. On carefully examining the present factual position with the touchstone of the principle laid down in the above noted decision, particularly in para-38(vi) thereof, it is evident that on the selfsame allegation both the criminal prosecution and the disciplinary proceeding had been initiated against the petitioner. In the disciplinary proceeding, the petitioner has been exonerated on merits, as allegations were found to be not sustainable at all and the petitioner has been held innocent. Therefore, the criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlined principle being the higher standard of proof in criminal cases. Merely because the documents adduced and the witnesses examined in the disciplinary proceeding are not exactly same in the criminal proceeding, that itself cannot be a ground not to extend the benefit of promotion to the petitioner on the allegation of the pendency of the vigilance case against him. If it is considered from other angle, the criminal case was initiated in the year 2010, when the FIR was lodged, and as a consequence thereof charge sheet was filed on 30.09.2014. In the meantime, nearly 11 years have passed and many of the juniors have been marched over the petitioner, because of pendency of the vigilance case, though he has been exonerated from the charges in the disciplinary proceeding. Pendency of vigilance case ipso facto can not deny the benefit of promotion to the petitioner, as because it is not known exactly when the vigilance case would be concluded by following due process of law. On account of the same, the petitioner should not be put to harassment denying the benefit of promotion admissible to him. The persons, who had been appointed along with the petitioner, now occupying the promotional post of Chief Engineer, whereas the petitioner is struggling in the post of Executive Engineer for years together in the name of pendency of vigilance case, though he has been exonerated from the charges leveled against him in the disciplinary proceeding, which had been initiated against him on the selfsame facts and circumstances.

17. In the case of ***B.K. Meena*** (supra), which was relied upon by the State, the apex Court held that the approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceeding, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal

proceedings the question is whether offences registered against him under the Prevention of Corruption Act (and the Indian Penal Code, if any) are established and, if established, what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different. Staying of disciplinary proceedings pending criminal proceedings, to repeat, should not be matter of course but a considered decision. Even if stayed at one stage, the decision may require reconsideration if the criminal case gets unduly delayed.

There is no dispute with regard to the proposition laid down by the apex Court as mentioned in ***B.K. Meena*** (supra). Therefore, applying the same principle to the present case, if the petitioner has been exonerated from the charges in the disciplinary proceeding, merely because pendency of the vigilance case he should not have been deprived of getting his promotion.

18. The reliance was also placed on ***K.C. Sareen*** (supra) on behalf of the State-opposite party. The said case relates to Section 389 (1) of the Cr.P.C. and the apex Court held therein that power to suspend conviction should be exercised by appellate or Revisional court in very exceptional cases having regard to all aspects including ramification of such suspension. Therefore, the said case does not in any way helpful to the State.

19. Similarly, in ***Eera through Dr. Manjula Krippendorf*** (supra), which was relied upon by the State, the apex Court dealt with the case of Protection of Children from Sexual Offences Act, 2012. The said judgment is also not applicable to the present case, and the same is distinguishable from the present one.

20. In view of the factual and legal matrix, as discussed above, this Court is of the considered view that if the petitioner has been exonerated from the charges leveled against him in a disciplinary proceeding, which was initiated on the selfsame facts, merely because the vigilance case is pending, though the standard of proof in both the cases are different and even though the standard of proof in case of disciplinary proceeding is lower than the vigilance case, but that ipso facto cannot deny the petitioner the benefit of promotion, which has been kept in sealed cover. Consequentially, this Court directs the opposite party to open the sealed cover and extend the benefit of

promotion to the petitioner, if he is otherwise entitled to get the same, with all consequential benefits with effect from the date his immediate junior has been given promotion to the next higher post. The above exercise shall be done within a period of three months from the date of communication of this judgment.

21. Resultantly, the writ petition is allowed and, there shall be no order as to costs.

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2021 (III) ILR - CUT-720

Dr. B.R.SARANGI, J.

WPC (OA) NO. 923 OF 2015

BIKASH MAHALIK …….. Petitioner

.V.

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

SERVICE LAW – Appointment – The petitioner joined in service pursuant to merit list prepared by the authority and his service book was opened – The amount towards GIS has been deducted from his salary and he has also been enrolled in the contributory pension scheme of the Govt. – As a result a right has been accrued in his favour to continue in his post – After lapse of one year four months, the authority redrawn the merit list and call upon the petitioner to show-cause why he shall not be removed from service? – Whether such action of Opp. Party No. 3 is hit by principle of estoppel? – Held, Yes – Case law discussed.

Case Laws Relied on and Referred to :-

1. 2021 (I) OLR 174 : Pratima Sahoo v.State of Orissa.
2. (1956) 1 All ER 256 : Central London Property Trust Ltd. v. High Treas House Ltd.
3. (1970) 1 SCC 582 : Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council.
4. (1983) 3 SCC 379 : Gujurat State Financial Corporation v. Lotus Hotels
5. 1988 SCC LSS 592 : Ashok Kumar Maheswari v. State of U.P.
6. AIR 2002 SC 322 : (2002) 2 SCC 188: Sharma Transport v. Govt. of A.P.
7. (2004) 7 SCC 673 : State of Rajasthan v. J.K. Udaipur Udyog Ltd.

8. (2007) 2 SCC 725 : A.P. Steel Re-rolling Mill Ltd. v. State of Kerala
9. (2003) 9 Scale 578 : State of Orissa v. Manglam Timber Products Ltd.
10. (2003)2 SCC 355 (365) : B.L. Sreedhar v. K.M. Munireddy.
11. (2010) 12 SCC 458 : H.R. Basavaraj v. Canara Bank.
12. AIR1968 SC 718 : Union of India v. M/s Anglo, Afghan Agencies etc.
13. AIR 1971 SC 2021 : Chowgule & Company (Hind) Pvt. Ltd. v. Union of India.
14. AIR 1979 SC 621 : M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh.
15. AIR 1986 SC 806 : Union of India v. Godfrey Philips India Ltd.
16. AIR 1987SC 2414 : Delhi Cloth & General Mills Ltd. v. Union of India.
17. AIR 1988 SC 2181 : Bharat Singh v. State of Haryana.
18. 1989(1) OLR 440 : Ambika Prasad Mohanty v. Orissa Engineering College.
19. 2014 (I) OLR 226 : Dr.(Smt.) Pranaya Ballari Mohanty v. Utkal University.
20. 2015 (I) OLR 212 : Rajanikanta Priyadarshy v. Utkal University represented through its Registrar.

For Petitioner : M/s. P.K. Mishra, K.L. Kar & A Ganejdra

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

JUDGMENT Date of Hearing: 25.11.2021 : Date of Judgment: 03.12.2021

Dr. B.R.SARANGI, J.

The petitioner, who belongs to Scheduled Caste category and is serving as Junior Clerk in the establishment of Collectorate, Boudh, has filed this writ petition to quash the show-cause notice dated 31.03.2015 under Annexure-13 issued by opposite party no.3 directing him to give reply within 30 days from the date of its receipt as to why his services shall not be terminated; as well as letter dated 09.02.2015 under Annexure-13/1 issued by opposite party no.2 to opposite party no.1 intimating for deletion of the name of the petitioner from the final list and his removal from service on the ground of violation of G.A. Department Notification; and the letter dated 26.03.2015 under Annexure-13/2 issued by the Joint Secretary to Govt. of Odisha, Revenue & Disaster Management Department to opposite party no.2 recommending for issuance of show-cause notice prior to termination of the petitioner from service. He further seeks direction to the opposite parties to allow him to continue as Junior Clerk as usual with all service and financial benefits, as stipulated in the appointment order under Annexure-7 dated 26.11.2013, as he was validly recruited as per the statute.

2. The facts of the case, in brief, are that opposite party no.3-Collector & District Magistrate, Boudh issued an advertisement dated 8.07.2013,

captioned as "Special Recruitment Drive for ST/SC" to fill up the vacant posts of Jr. Stenographer/Jr. Clerk/ Revenue Inspector/Assistant Revenue Inspector/Amin. So far as the vacancy position of Jr. Clerk is concerned, total vacancies were 16 and the posts were distributed as per post based roster i.e. 8 posts meant for ST, 4 posts meant for ST (W), 3 posts meant for SC and 1 post meant for SC (W). For recruitment to the posts of Jr. Clerk, the candidate shall have to appear written test and practical computer skill test as provided in appendix to Rule-10 of Odisha Ministerial Service Rules, 1985, as amended vide notification dated 12.04.2010. As per appendix, opposite party no.3 had specified in the advertisement, that the competitive examination shall consist of written test and practical skill test. The written test shall consist of paper-1 for 3 hours and paper-II for 3 hours. Each paper consists of two parts. Paper-1 consists of Part-1, Language Test (English and Oriya) and Part-II, Objective General Knowledge, carrying each 100 marks and the duration of examination was three hours. Similarly Paper-II consists of Part-1, Objective Mathematics and Part-II, Basic Computer Skill carrying each 100 marks. Total mark of written test (Paper-1 & Paper-II) was 400. The maximum mark of practical skill test i.e. Basic Computer Skill (Objective) was 50. Therefore, total maximum mark was 450 as provided under the statute. In similar manner, another advertisement dated 08.07.2013 was issued in order to fill up the posts of Junior Clerks and other posts from among the UR and SEBC category.

2.1. When the advertisement was published, the petitioner was serving as Jogan Sahayak on consolidated pay of Rs.3,500/- per month in Mathura G.P. under Panchayat Samiti Charichhak in the district of Boudh. While serving as such, he having requisite qualification, applied for the post of Jr. Clerk with required documents within the prescribed period of time. As his application was in order, opposite party no.3 issued admit card bearing his Roll No.JC-0071 instructing him to attend the written test, which was to be held on 06.10.2013 (Sunday) in Jogindra Dev High School, Boudh. Pursuant thereto, he appeared in the written test on the scheduled date and time and secured 234 marks (113 in Paper-I + 121 in Paper-II), out of total 400 marks. Taking into account the marks secured in the written test, opposite party no.3 vide letter dated 19.11.2013 asked the petitioner to appear in the computer skill test on 16.11.2013 at 10.00 AM in the Collectorate, Boudh. Accordingly, the petitioner appeared computer skill test and secured 31 marks out of total marks 50.

2.2. On the basis of marks secured both in written test and computer skill test, opposite party no. 3 prepared a merit list on 26.11.2013. The petitioner having placed at Sl. No.2 securing 265 marks, opposite party no.3 issued appointment letter on 26.11.2013 in his favour appointing him as Jr. Clerk. As a consequence thereof, he was appointed as Jr. Clerk on regular basis being selected through recruitment test. As a result, he resigned from his previous post, i.e. Jogan Sahayak of Mathura G.P. under Panchayat Samiti, Charichhak on 27.11.2013, which was duly allowed by the Sarapanch of Mathura G.P. vide letter dated 27.11.2013 and he joined in his new post on the very same day under opposite party no.3 as Jr. Clerk and discharged his duty assigned to him.

2.3. After joining of the petitioner, opposite party no.3 sanctioned Rs.7,500/- towards one time refundable G.I.S. advance in favour of the petitioner to enable him to make one time deposit under GIS, pursuant to which said amount was recovered from his salary in 10 equal instalments, and he was also enrolled under defined Contributory Pension Scheme as per Finance Department notification dated 17.07.2009 and 24.10.2005 and accordingly, PRAN kits (Permanent Retirement Account Number) was issued in his favour. After completion of one year service, opposite party no.3 opened the Service Book and his name was placed at Sl. No.38 in the gradation list of Jr. Clerk. He also completed departmental examination to be eligible for consideration of promotion to the next higher rank as per the statute.

2.4. The petitioner, while continuing as Jr. Clerk, having completed about one year and four months of service under opposite party no.3, all on a sudden, pursuant to direction of opposite parties no.1 and 2, opposite party no.3 issued impugned show-cause notice dated 31.03.2015 and vide memo dated 31.03.2015 communicated to the petitioner, along with impugned enclosures such as letter dated 09.02.2015 of RDC, (SD), Berhampur, Ganjam, letter dated 26.03.2015 of Government and letter dated 29.03.2015 of RDC (SD), Berhampur, Ganjam, calling upon him to explain as to why he shall not be terminated from Government Service, for having been appointed vide order dated 26.11.2013 by violating the G.A. Department Notification dated 12.04.2010. Hence this application.

3. Mr. P.K. Mishra, learned counsel for the petitioner contended that in view of provisions contained in appendix to Rule-10 of the Orissa Ministerial Services (Method of Recruitment to the Posts of Junior Clerks in District

Offices) Rules, 1985, a candidate has to appear in the written test for maximum marks of 400 and practical skill test of maximum marks of 50 and on the basis of aggregate marks secured in both tests, the merit list/select list has to be prepared for appointment as Junior Clerk. Accordingly, opposite party no.3 conducted the written test and practical skill test for total maximum marks of 450 and on the basis of total marks secured in both the tests, opposite party no.3 rightly prepared the merit list. The petitioner was selected and his name found place at Sl. No.2, pursuant to which he joined as Junior Clerk. Subsequently, the G.A. Department, vide notification dated 12.04.2010, notified that the practical skill test shall be qualifying in nature and the marks awarded in practical skill test should not be added to the marks secured by the candidates in the written test examination. But such notification of the G.A. Department cannot have any justification, as it cannot supersede the statutory provisions contained in Rules, 1985. It is further contended that opposite party no.2, has arbitrarily directed opposite party no.3 to redraw the merit list by excluding the marks of practical skill test, which is absolutely an outcome of non-application of mind. It is further contended that opposite party no.2, vide letter dated 09.02.2015 at Annexure-13/1 issued with regard to the special recruitment drive for the post of Jr. Clerk, directed that the petitioner need to be deleted from the final merit list and removed from the service, because of the reason that he had been awarded 31 marks in practical skill test and thus 31 marks when added to written test marks 234, he secured 2nd position and as per law, the practical test mark is not to be added with aggregate marks of Paper-I and Paper-II and as a consequence his position does not remain in the final merit list. Such a direction contained in Annexure-13/1, being in violation of G.A. Department notification, cannot sustain in the eye of law, as the same is hit by principle of estoppel. Therefore, the petitioner seeks for quashing of the same.

To substantiate his contentions, he has relied upon the judgment of this Court in ***Pratima Sahoo v. State of Orissa***, 2021 (I) OLR 174.

4. Mr. N.K. Praharaj, learned Standing Counsel for the State argued with vehemence that opposite party no.3 published the common merit list, vide office order dated 26.11.2013, by adding the marks secured in the skill test to the marks secured in the written test. In the said merit list, the petitioner stood second, got appointed and continued in service. Such select list prepared by opposite party no. 3 was declared wrong by opposite party no. 2, vide letter

dated 09.02.2015 stating that the computer skill test is qualifying in nature and the marks awarded therefor should not be added with the marks secured in the written test, otherwise it would be in deviation of the Government guidelines. It is further contended that the petitioner has secured 31 marks in computer skill test and got qualified as the qualifying mark was 15 and his merit list should be placed taking into account 234 marks (Paper-I=113, Paper-II=121) secured in written test only. It is further contended that opposite party no.3 has conducted the written test and the practical skill test for total maximum mark of 400 and 50 respectively. There is stipulation in the G.A. Department notification dated 12.04.2010 in paragraph-3 at foot note that the practical skill test shall be qualifying in nature and the marks awarded for practical skill test should not be added with the mark secured by the candidates in the written test examination, as observed by opposite party no.2. Therefore, inclusion of the name of the petitioner in the final merit list, by adding his marks secured in the computer skill test and placing him at serial no.2 cannot sustain. As a consequence thereof, he should be removed from service.

5. This Court heard Mr. P.K. Mishra, learned counsel for the petitioner and Mr. N. K. Praharaj, 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. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa framed the rules to regulate the method of recruitment to the posts of Junior Clerks in the District Offices and the offices subordinate thereto called the "Orissa Ministerial Services (Method of Recruitment to the Posts of Junior Clerks in the District Offices) Rules, 1985 (hereinafter referred to as "Rules, 1985").

7. For just and proper adjudication of the case, Rule 10 of the Rules, 1985 is extracted below:

> *"10.* ***Standard and syllabus of the Examination*** *- The Scheme and subjects for the examination and the Syllabus shall be as specified in the APPENDIX*.

The said appendix to Rule 10 was amended consequent upon amendment of Rules, 1985 as Orissa Ministerial Services (Method of Recruitment to the post of Junior Clerks in District Offices) Amendment Rules, 2009. Appendix-

III of the amended Rule 10 states about scheme and subjects for examination. The extract of the same reads as follows:

"**Appendix – III**
(See Rule 10)
Scheme and Subjects for Examination

Papers	Subjects	Maximum Marks	Time
Paper - I	Part- I – Language Test (English & Odiya) Part –II – Objective General Knowledge	100 100	3 Hours
Paper – II	Part – I Objective Mathematics	100	3 Hours
	Part – II Basic Computer Skills	100	
	TOTAL	400	6 Hours
	Practice Skill Test	50	1 Hour
	Basic Computer Skills		

Subs vide O.G.E NO. 2161, Dt. 05.11.2013

Note : - (i) The Standard of examination shall be equivalent to that of Secondary School,

(ii) Those who will qualify written test shall be called for the practical Skill test.

(iii) The practical test shall be of qualifying nature."

8. There is no dispute with regard to the fact that the petitioner appeared in the written test and secured 234 marks out of 400 marks and also secured 31 marks in practical skill test out of 50. Opposite party no. 3 prepared a select list taking into account marks secured in the written test as well as practical skill test and placed the petitioner at Sl. No. 2 of the merit list. Subsequently, opposite party no. 2 found out that marks secured in the practical skill test, being qualifying in nature, should not be added to the marks secured in the written test. Consequentially, he directed opposite party no.3 to redraw the final merit list on the basis of marks secured by the petitioner in the written test i.e. 234 marks excluding the marks secured in the practical skill test, in which the petitioner had qualified by securing 31 marks, which is above the qualifying mark of 15, out of 50 marks. But fact remains pursuant to merit list prepared by opposite party no.3, the petitioner has already joined and his service book has been opened. The amount towards

GIS has been deducted from his salary and he has also been enrolled in the contributory pension scheme of the Government. As a result, a right has been accrued in his favour to continue in his post. Now, after lapse of one year 4 months, as per direction given by opposite party no.2, opposite party no.3 has redrawn the merit list and called upon the petitioner to show-cause why he shall not be removed from service. Whether such action of opposite party no.3 is hit by principle of estoppel, is the short question to be decided in the facts and circumstances of this case.

9. Section-115 of the Indian Evidence Act, 1872 deals with Estoppel, which reads as follows:-

> *"115. Estoppel:- When one person has, by this declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*
>
> *To bring the case within the scope of estoppel as defined in Section 115 of the Evidence Act;*
>
> *1. There must be a representation by a person or his authorized agent to another in any form, a declaration, act or omission;*
>
> *2. The representation must have been of the existence of a fact and not of promises be future or intention which might or might not be enforceable in contract;*
>
> *3. The representation must have been meant to be relied upon;*
>
> *4. There must have been belief on the part of the other party in its truth;*
>
> *5. There must have been action on the faith of that declaration, act or omission that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to this prejudice or detriment;*
>
> *6. The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice;*
>
> *7. The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel;*
>
> *8. Only the person to whom representation was made or for whom it was designed can avail himself of it."*

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

11. The ***Law Dictionary*** expresses promissory estoppel to the following effect:-

> *"A promise by which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promise, and which does induct such action or forebearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise."*

12. In ***Halsbury's Laws of England***, Fourth Edition, Vol.16 in Para-1514 at page 1017, the "promissory estoppel" has been defined to the following effect:-

> *"Promissory estoppel: When one party has, by his words or conduct made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."*

13. In ***Central London Property Trust Ltd. v. High Treas House Ltd***., (1956) 1 All ER 256, it has been held that a promise is intended to be binding, intended to be acted upon, and in fact acted upon is binding.

14. In ***Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council***, (1970) 1 SCC 582, it has been held that there is no distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.

15. In ***Gujurat State Financial Corporation v. Lotus Hotels***, (1983) 3 SCC 379, it has been held that the principle of "promissory estoppel" would estop a person from backing out of its obligation arising from a solemn promise made by it to the respondent.

16. In ***Ashok Kumar Maheswari v. State of U.P***., 1988 SCC LSS 592, it has been held that doctrine of "promissory estoppel" has been evolved by the Courts on the principle of equity to avoid injustice.

17. In ***Sharma Transport v. Govt. of A.P***., AIR 2002 SC 322: 2002) 2 SCC 188, it has been held that the Government is equally bound by its promise like a private individual, save where the promise is prohibited by

law, or devoid of authority or power of the officer making the promise. The equitable doctrine of promissory estoppel must yield where the equity so requires in the larger public interest.

18. In ***State of Rajasthan v. J.K. Udaipur Udyog Ltd***., (2004) 7 SCC 673, it has been held that the "promissory estoppel" operates on equity and public interest.

19. In ***A.P. Steel Re-rolling Mill Ltd. v. State of Kerala***, (2007) 2 SCC 725, it has been held that where a beneficent scheme is made by the State, the doctrine of "promissory estoppel" would apply.

20. In ***State of Orissa v. Manglam Timber Products Ltd***., (2003) 9 Scale 578, it has been held that to attract applicability of promissory estoppel a contract in writing is not a necessary requirement. This principle is based on premise that no one can take advantage of its own omission or fault.

21. In ***B.L. Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 (365) it has been held by the apex Court that 'estoppel' is based on the maxim "allegans contrarir non est audiendus" (a party is not to be heard contrary) and is the spicy of presumption "juries et de jure" (absolute, or conclusive or irrebuttable presumption).

22. In ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458, it has been clarified that in general words, 'estopeel' is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be stopped from going back on the word given. The principle of estoppels is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

23. The principle of promissory estoppels has been considered by the apex Court in ***Union of India v. M/s Anglo, Afghan Agencies*** etc., AIR1968 SC 718; ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India***, AIR 1971 SC 2021; ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh***, AIR 1979 SC 621; ***Union of India v. Godfrey Philips India*** Ltd., AIR 1986 SC 806; ***Delhi Cloth & General Mills Ltd. v. Union of India***, AIR 1987SC 2414; and ***Bharat Singh v. State of Haryana***, AIR 1988 SC 2181 and many other subsequent decisions also.

24. In ***Ambika Prasad Mohanty v. Orissa Engineering College***, 1989(1) OLR 440, the Division Bench of this Court has already held that a student admitted after satisfying all qualifications, subsequently his admission is cancelled and he cannot prosecute his studies elsewhere, rule of estoppel is applicable.

25. This Court in ***Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University***, 2014 (I) OLR 226 has come to a finding that the action taken at belated stage by the University after lapse of 20 years of publication of the result is hit by the principle of estoppel.

26. Similar view has also been taken by this Court in ***Rajanikanta Priyadarshy v. Utkal University***, ***represented through its Registrar***, 2015 (I) OLR 212, wherein this Court held that the result of +3 Final Degree (Regular) Examination, 2010 of the petitioner therein having been published and on that basis he has already undergone higher studies and passed in different courses, subsequently his initial result cannot be cancelled on the ground that he has failed in the said examination.

27. In ***Pratima Sahoo*** (supra), this Court held that the order of disengagement of the petitioner from the post of Sikhya Sahayak, pursuant to decision of the district administration, having found qualified in the selection process and appointed after resigning from her erstwhile post of Anganwadi Worker and having worked for six to eight months, amounts to putting the petitioner in prejudical and disadvantageous position and the reason assigned for later finding the petitioner not suitable for securing less marks than other meritorious candidates do holds good, the petitioner cannot be found faulted by the mistake committed by the appointing authority in calculating the percentage. Consequentially, direction was given to absorb the petitioner forthwith applying the doctrine of promissory estoppel in the said case.

28. In view of the law and fact, as discussed above, the irresistible conclusion is that the show-cause notice dated 31.03.2015 under Annexure-13 issued by opposite party no.3, the letter dated 09.02.2015 under Annexure-13/1 issued by opposite party no.2 to opposite party no.1 and letter dated 26.03.2015 under Annexure -13/2 issued by the Government of Odisha,

Revenue and Disaster Management Department to opposite party no.2 cannot sustain. Therefore, the same are liable to be quashed and hereby quashed. Pursuant to interim order passed on 07.04.2019 by the Odisha Administrative Tribunal since the petitioner is still continuing, he shall be allowed to continue with all service and financial benefits as due and admissible to him in accordance with law.

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

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2021 (III) ILR - CUT-731

D. DASH, J.

RSA NO. 29 OF 2012

KRUSHNA CH. MAHANTA & ORS. ..... Appellants

.V.

HARINATH MAHANTA & ORS. ..... Respondents

PROPERTY LAW – Adverse Possession – The defendants since 50 years are in possession of the suit land – The possession is open, peaceful, continuous and uninterrupted – The suit land has been recorded in the name of the plaintiff and the ROR has been published in April 1984 and the note of possession of the defendants in respect of the suit land finds noted therein – The noting in the said ROR as to possession of the suit land by the defendants have remained unchallenged till 1997, i.e, up to institution of suit – As the defendants possession has been uninterrupted and within the knowledge of the plaintiff, the defendants have acquired title by way of adverse possession.

For Appellants : M/s. S.P.Mishra, Sr. Adv.
B.S.Panigrahi, S.Nanda, S.K.Sahoo.
For Respondents: ---

JUDGMENT Date of Hearing & Judgment : 01.12.2021

D. DASH, J.

The Appellants by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as 'the Code') has assailed the judgment and decree passed by the learned District Judge, Keonjhar in RFA No.42 of 2020.

By the said judgment and decree while dismissing the First Appeal filed by the present Appellants under Section-96 of the Code has confirmed the judgment and decree passed by the learned Civil Judge (Sr. Division), Champua in Title Suit No.20 of 1997 instituted by one Bandhua Mahanata as the original Plaintiff, the predecessor-in-interest of these Appellants whom we may call as the Plaintiffs.

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

3. Plaintiffs Case in short is that :-

The suit land under four plots appertaining to Khata No.100 in village Bhanda stands recorded in the name of the Plaintiff and as such he is in peaceful possession of the same and paying land revenue. It is stated that during the current settlement operation, when he was absent for sometime in the village, the Defendants have somehow prevailed upon the settlement authorities in getting notes of their forcible possession over the suit plots recorded though neither they nor their ancestors have ever possessed the said lands. It is stated that on 02.06.1996, when the Plaintiff went over the suit land to sow paddy, he was not allowed go ahead and was threatened with dire consequences. The Plaintiff, therefore, though informed the matter to local Police Station, no action was taken. It is his case that the Defendant Nos. 3 & 4 are illegally claiming the suit land to be their own and the basis of the same is the note of possession that they have created in the ROR in their favour with the help of the settlement authority. The Plaintiff states that the Defendants have no right, title and possession over the suit land. In view of all these above, the suit for permanent injunction to restrain the Defendants from creating any problem over the suit land with further prayer of restoration of possession, if found dispossessed during the suit has came to be filed.

The Defendants have denied the fact that the Plaintiff is in possession of the suit land. It is also stated that the settlement authorities have rightly noted their possession in respect of the suit lands in the record of right as they have been in long and continuous possession of the suit land. It is claimed that the Defendants are the recorded owners of the lands under Hal Khata No.21, Plot No.1002/1375 of Panduaposi Chhak and around 40-50 years back, the grandfather of the Plaintiff occupied Ac.0.96 decimals of land of the Defendants corresponding to said Hal Plot No.1002/1375. So, it is stated that the father of Defendant Nos.4,5 and 6 occupied the suit land and since then they have been in cultivable possession of the same without any disturbance from any quarter which in the hal settlement record has been so found and the possession of Defendants over the suit land has been rightly noted. The Defendants are thus claiming to be in possession of the suit land for last 50 years from the time of their ancestors with the full knowledge of the Plaintiff adverse to their interest and accordingly, they claim to have acquired valid title over the suit by way of adverse possession.

4. The Trial Court on the rival pleadings, in all framed nine issues. On answering Issue no.9 as to the claim of the acquisition of title over the suit land by the Defendants by adverse possession, the Trial Court has held that the Defendants have acquired the title over the suit land by adverse possession.

5. Learned counsel for the Appellants submits that the Courts below are not justified in holding that the Defendants have acquired title over the suit land by adverse possession merely relying upon the recording of possession of the Defendants in the record of right published in the year, 1984. According to him, the finding on that score is not based upon proper construction of the legal principles concerning the acquisition of title by adverse possession. It is submitted that the Courts below have misread the provisions contained in Articles-64, 65 as also Section-27 of the Limitation Act and with an erroneous view point of law have non-suited the Plaintiffs. He, therefore, urges for admission of the Appeal formulating the above as the substantial questions of law.

6. Keeping in view the submissions made, I have carefully read the judgments passed by the Trial Court as well as the First Appellate Court.

The Defendants have pleaded that in the written statement that since 50 years, the land in suit is in their possession since the time of their father and that the possession is open, peaceful, continuous and un-interrupted. The suit land has been recorded in the name of the Plaintiff in the Hal Record of Right which is not disputed by the Defendants. The Record of Right has been published in April, 1984 and there the note of possession of the Defendants in respect of the suit land finds noted therein. The suit has been instituted in the year, 1997. Based on the above documents and on detail discussion of oral evidence let in by the parties, the Courts below have come to a conclusion that the Defendants have been in possession of the suit land at least from 01.04.1984 till the institution of the suit has been proved.

Upon exhaustive discussion of the evidence of P.W.1 and taking into account that the noting in the said Record of Right as to possession of the suit land by the Defendants have remained unchallenged, when the evidence of possession of the suit land by the Plaintiffs at any time during the period has been found to have not been established, the conclusion has been that the Defendants have acquired title by way of adverse possession. No such evidence is forthcoming to show that at any given point of time during the above period, the Defendants possession has been interrupted or that during the period they at any point of time admitted the Plaintiff to be the owner of the suit land in renouncing their possession as that of owner. The Courts below have concurrently found the evidence as regards possession of the suit land to be resting with the Defendants during the above period as sufficient which is seen to be the outcome of perverse appreciation of evidence. When it is said that that the grandfather of the Plaintiffs having occupied a portion of the property of the Defendants, the father of the Defendants in turn had occupied the suit land and as such remained in cultivable possession of the same without any disturbance; the Plaintiff is not specifically denying the said fact that no land belonging to the Defendants is in their possession. Based on the above evidence on record, this Court finds no such infirmity with the findings of the Courts below as also the ultimate result so recorded in dismissing the Plaintiffs suit. Therefore, the submission of the learned Counsel for the Appellants that there arises any substantial question of law for being answered in this Appeal cannot be countenanced with.

7. In the result, the Appeal stands dismissed. No order as to cost.

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2021 (III) ILR - CUT-735

D. DASH, J.

RSA NO. 308 OF 2013

MD. USMAN KHAN & ORS. ..... Appellants

.V.

PALTAN MASJID (MOSQUE) & ANR. ..... Respondents

WAKF ACT, 1995 – Section 85 – Jurisdiction of Civil Court – Whether the Civil Courts have the jurisdiction to entertain the suit in view of bar under section 85 of the 1995 Act? – Held, the suit was filed in the year 2000 by the plaintiff-Mosque – The defendants had not raised any objection before the Courts below – The suit was for eviction and clear up the arrear house rent – Though suit for eviction of the tenant should be filed before the Tribunal as per the decision of Ramesh Govindan (dead) through L.Rs. Vs. Sugra Humayan Mirza Wakf, but in the present case the first appeal has been disposed of on 30.03.2013 followed by a decree dated 11.04.2013. – The Amendment Act No. 27 of 2013 has come into force w.e.f 01.11.2013 and before that present second appeal has been presented – In view of the above factual position as to change of law as introduced in the statute, the Courts are found to have committed no jurisdictional error in entertaining and adjudicating the suit. (Para 12)

Case Laws Relied on and Referred to :-

1. (2010) 8 SCC 726 : Ramesh Gobindram (dead) through LRs. vs. Sugra Humayun Mirza Wakf.
2. (2014) 16 SCC 38 : Faseela M vs. Munnerul Islam Madrasa Committee.

For Appellants : M/s.Sisir Ku. Purohit, A.K. Das, A.K. Nayak and P.K. Swain

For Respondents: M/s. Ramakanta Mohanty, Sr.Adv, Debakanta Mohanty, Sumitra Mohanty,S. Mohanty, A. Mohanty, M/s. Md. Fayaz, Md. Riaz,

JUDGMENT Date of Hearing : 26.11.2021 : Date of Judgment : 07.12.2021

D. DASH, J.

The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by the learned District Judge, Sambalpur in RFA No.22 of 2012.

By the said judgment and decree while dismissing the First Appeal filed by the Appellants (Defendants) under section 96 of the Code, the First Appellate Court has confirmed the judgment and decree passed by the learned Civil Judge (Junior Division), Sambalpur in T.S. No. 42 of 2000.

At this stage, it may be stated that the Respondent No.1 (Plaintiff) hereinabove has filed the suit for ejectment of four Defendants who are in occupation of the suit premises as tenants and for recovery of arrear rent. Original Defendant No. 2 having died, his legal representative has come on record in his place. So also the Defendant No. 4 having died, his three legal representatives are there on record and they have joined the two surviving Defendants as the Appellants in the present Appeal.

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-Mosque, a religious endowment is managed by a committee approved by the Board of Wakfs, Odisha and is represented through its Mutawalli (President). It is stated that the Plaintiff-Mosque is the owner of the suit land in question as also the house standing thereon which had been let out to the Defendants on rent since the time of their ancestors. In the year 1997, The Defendants defaulted in paying rent for which notice was served on them asking them to vacate the suit house and clear up the arrear house rent. In response, the Defendants however denied the ownership of the Plaintiff over the suit land and house and they claim themselves to be the owners in possession. So the suit has come to be filed for the reliefs as already stated.

4. The Defendants, in contesting the suit in their written statement, have averred that in the year 1916, their ancestor namely Mohar Khan finding the suit land to be vacant had trespassed upon the same and having constructed a house over there started residing thereon with his family.

The Defendants have denied their relationship with the Plaintiff as tenant and landlord. They claim to be in possession of the suit land and house as owner thereof exercising all the rights as such expressing with hostile animus all through as against the Plaintiff-Mosque. It is stated that the Plaintiff managed to obtain the record of right in respect of the suit land in their favour behind their back.

5. The Trial Court on the above rival case in all framed six issues. Then having discussed the evidence on record has decreed the suit granting all the reliefs as prayed for by the Plaintiff-Mosque.

The aggrieved Defendants having carried the Appeal i.e. RFA No. 48/51 of 2005, the First Appellate Court directed the suit to be decided afresh by framing specific issue as to whether the Defendants were inducted as tenants in respect of the suit premises by the Plaintiff and if so whether the tenancy has been terminated in accordance with law or not. The Trial Court having been directed to undertake the exercise as aforesaid has again decreed the suit recording the finding that the Defendants are the tenant under the Plaintiff landlord and the tenancy has been duly terminated. The First Appellate Court being again moved by the aggrieved Defendants has concurred with those said important findings and accordingly has confirmed the judgment and decree passed by the Trial Court in favour of the Plaintiff-Mosque.

6. The present Appeal is admitted on the following substantial question of law:-

> "Whether the courts below have the jurisdiction to entertain the suit in view of bar contained under section 85 of the Wakf Act, 1995?"

7. Mr. S.K. Purohit, learned counsel for the Appellant submitted that the Civil Court has no jurisdiction to entertain the suit and to grant the reliefs as prayed for. It is his submission that the provision of section 85 of Wakf Act, 1995 clearly ousts the jurisdiction of the Civil Court for determination of any such dispute, question or other matter relating to a wakf or wakf property etc. which is congnizable by the Wakf Tribunal. He therefore submitted that in view of the provision contained in section 85 of Wakf Act, the judgments and decrees passed by the courts below are wholly without jurisdiction and as such are liable to be set aside.

8. Mrs. Sumitra Mohanty, learned counsel for the Respondents first of all submitted that such a plea as to lack of jurisdiction on the part of the courts below at this stage of this Second Appeal being raised for the first time is not to be entertained. She further submitted that here the suit being one for eviction of the tenant under the Plaintiff-Mosque with other reliefs, the same falls within the jurisdiction of the Civil Court for adjudication.

9. Keeping in view the rival submission, I have carefully gone through the judgments passed by the courts below; the suit had been filed by the Plaintiff-Mosque in the year 2000. The Defendants had not raised any objection as to the jurisdiction of the Civil Court in entertaining the suit in their entire written statement nor such a plea had been raised before the First Appellate Court moved in the first round after disposal of the suit when the First Appellate Court framing an issue had remanded the suit for fresh decision. It is also seen that the Defendants have not raised the said question as to want of jurisdiction of the Civil Court after remand of the suit there before the Trial Court nor before the First Appellate Court where challenge was levied to the said judgment and decree passed by the Trial Court after remand. Be that as it may, since the objection as to jurisdiction of the Civil Court in entertaining the suit goes to the root of the matter, the substantial question of law having been framed, this Court is called upon to answer the same.

10. At the outset, before proceeding to answer the substantial question of law, it may be first stated that the courts below upon discussion of entire evidence and keeping in view the rival pleadings have concurrently found the Defendants to be the tenants under the PlaintiffMosque. Learned counsel for the Appellant (Defendants) during hearing has not been able to place anything from record that such aspect to have been dealt by the courts below in a perverse manner by ignoring certain materials which if would have been rightly done, the finding would have been against the Plaintiff-Mosque. Moreover, the Courts below having taken into account the oral evidence let in by the Plaintiffs especially that of another tenant saying to have seen the payment of rent by Momin Khan son of Mohar Khan as well as the counter foils of rent receipts as also the person receiving the rent and issuing the rent receipt proved from the side of the Plaintiff-Mosque in the absence of any such evidence being tendered from the side of the Defendants are seen to have recorded the finding as to the existence of relationship of landlord and tenant, keeping in view the presumption flowing from the Record of Right, Holding tax and Revenue receipts proved by the Plaintiff Mosque. This Court does not on scrutiny of the evidence finds no such infirmity therein.

11. Now coming to the question of jurisdiction, let us first place the provision of sections 83 and 85 of the Wakf Act, 1995 as it stood till 31.10.2013 before the Wakf (Amendment) Act, 2013 (27 of 2013) come into force. That reads as under:-

> "83. (1) The State Government shall, by notification in the Official Gazette, constitute as many as Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.
>
> (2) xx xx xx
> (3) xx xx xx
> (4) xx xx xx
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> 85. No suit or legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by order under this Act to be determined by a Tribunal."

12. It is thus relevant to mention at this stage that the above said provisions being amended in the year 2013 (Act No.27 of 2013) w.e.f. 1.11.2013 now read as under:-

> "83. Constitution of Tribunals, etc.-(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.
>
> (2) xx xx xx xx
> (3) xx xx xx xx
> (4) xx xx xx xx
> (4-A) xx xx xx xx
>
> 85. Bar of jurisdiction of Civil Court, revenue Court and any other authority.- No suit or other legal proceeding shall lie in any Civil Court, revenue Court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."

A comparative reading being given to the above, it is seen that the words "eviction of tenants and determination of right and obligation of the lesser and the lessee of such property" were inserted in sub-section (1) of section 83 after the words "waqf property" by Amendment Act 27 of 2013 and similarly the words "revenue Court and other Authority" have come to be suffixed after the word "Civil Court". Thus it is seen that Act 27 of 2013 expanded the jurisdiction of the Waqf Tribunal covering the landlord-tenant dispute and the rights and obligation of the lesser and lessee and then it has also enlarged the bar of jurisdiction to cover even the "Revenue Court and other Authority."

13. In case of "Ramesh Gobindram (dead) through LRs. vs. Sugra Humayun Mirza Wakf"; (2010) 8 SCC 726, the Hon'ble Apex Court holding that a suit for eviction of the tenants from what is admittedly wakf property could be only filed before Civil Court and not before Tribunal, had overruled the views of the High Courts of Andhra Pradesh, Rajasthan, Madhya Pradesh and Kerala and Panjab and Haryana and thereby had affirmed the views taken by the High Courts of Allahabad, Kerala, Madras and Bombay.

In case of "Faseela M vs. Munnerul Islam Madrasa Committee"; (2014) 16 SCC 38, in a suit for eviction of the tenant filed by Madrasa Committee the Hon'ble Apex Court took a view that the dispute relating to eviction is squarely covered by the decision of the Court in case of Ramesh Gobindram (supra) and finally restored the order of the Tribunal directing return of the plaint which had been set aside by the High Court.

In the given case, the suit has been filed in the year 2000 and the First Appeal has been disposed of on 30.3.2013 followed by decree dated 11.4.2013. The Amendment Act No. 27 of 2013 has come into force w.e.f 01.11.2013 and before that even this Memorandum of Appeal had been presented. In view of the above factual position as to the change of law as introduced in the statute, the courts below are found to have committed no jurisdictional error in entertaining and adjudicating the suit.

In that view of the matter, the substantial question of law in the given case stands answered that the courts below had the jurisdiction to entertain the suit for the reliefs claimed and the bar contained under section 85 of the Wakf Act, 1995 was not then standing on the way all through during the suit and the first Appeal.

Having thus said that the concurrent findings recorded by the courts below are well in order, this Court holds that said judgment and decrees under challenge are free from any jurisdictional error.

14. In the wake of aforesaid, the ultimate result runs in favour of the Respondent No.1 (Plaintiff) by confirming the judgments and decrees passed by the courts below.

Resultantly, the Appeal stands dismissed. No order as to cost.

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2021 (III) ILR - CUT-741

D. DASH, J.

RSA NO. 102 OF 2015

BIRENDRA KU. SAMARTHA@ BIREN @ UMESH SAMARTHA & ORS. ..... Appellants

.V.

SHRI JAGANNATH MANDIR MANAGING COMMITTEE & ANR. ..... Respondents

SHRI JAGANNATH TEMPLE ACT, 1955 – Section 4(D-1) – Whether performing the sevas inside Koili Baikuntha comes under the definition of "sevak" as contained in section 4(D-1) of Temple Act, 1955? – Held, Yes. – The original plaintiff has been performing the seva in Koili Baikuntha recognised as Kotha Suansia Sevak for quite a long time – Therefore, the status of plaintiff's father as such sevak has to be allowed and so also all these plaintiffs, as his successors – Thus, the plaintiffs are declared as sevak having the right to perform the seva as Kotha Suansia Sevaks as per their entitlement, under complete control, management and supervision of the Temple Administration.

Case Law Relied on and Referred to :-

1. AIR 1974 Orissa 75 : Kedarnath Guru Mohapatra Vrs. State of Orissa.

For Appellants : M/s. Amit Prasad Bose, Mrs. V.Kar, S.S.Routray, D.J. Sahoo, N.Hota.

For Respondents: M/s. P.Panda, S.Satpathy, L.N.Rayatsingh, D.Chatterjee.

JUDGMENT Date of Hearing : 08.10.2021 : Date of Judgment : 07.12.2021

D. DASH, J.

The Appellants by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as 'the Code') have assailed the judgment and decree passed by the learned Addl. District Judge, Puri in RFA No.31 of 2008.

2. By the impugned judgment and decree, the lower Appellate Court having dismissed the First Appeal pursued by the Appellants under Section-96 of the Code, has confirmed the judgment and decree passed by the learned Civil Judge (Junior Division), Puri in Civil Suit No.116 of 2003.

The Appellants are the legal representatives of the original Plaintiff namely, Loknath Samartha. He had filed the Suit (CS No.116 of 2003) claiming the relief of declaration of his right as "Sevak" in the Kotha Suansia Nijog inside Koili Baikuntha in the premises of Shri Jagannath Temple, Puri and permanent injunction, restraining the Respondents(Defendants) from interfering in Plaintiffs exercise of the rights as such. That suit having been dismissed, the First Appeal had been filed by him in questioning the judgment and decree of the Trial Court by which his suit had been dismissed and he had been held as not entitled to the reliefs as prayed for.

During the pendency of that First Appeal, upon death of the Appellant (Plaintiff) therein, these Appellants having come on record pursued said Appeal. The First Appeal having been dismissed; they have carried the present Second Appeal.

3. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to as they have been assigned with the position in the Trial Court. In view of the death of the original Plaintiff, his legal representatives and successors-in-interest pursuing this Appeal are called as "the Plaintiffs".

4. The original Plaintiff has stated that he is a "Sevak" in the Kotha Suansia Nijoga in the "Koili Baikuntha" in the Temple of Lord Shri Jagannath, Puri. It is his case that inside that Koili Baikuntha, there are many types Sevas and one of such is to keep the Koili Baikuntha area clean, to maintain flowering plants in said Koili Baikuntha area and to look after the Temple of Samsana Chandi etc. Besides all these above, one more important Seva that is performed is that during 'Nabakalebara' before the old Idols are given Samadhi (final rest), wells are being dug by these Sevaks and there the Idols etc are put to rest and then those are again filled up by earth.

It is stated that Koili Baikuntha being a lonely place inside the Temple of Lord Shri Jagannath, some miscreants and errant pilgrims were creating nuisance in the area and it was apprehended that the divine sanctity of the place would be at peril in case the said activities are not stopped and prevented in future time by stern hands. So the Raja (King) of Puri, the Chief of the Temple Administration appointed Late Chintamani Samanta, father of the original plaintiff i.e. the grandfather of these Plaintiffs to maintain said Koili Baikuntha and as per King's order, a Sanand to that effect had been

issued on 14.04.1937, which was followed by a notification in the name of Raj Sarkar, intimating the same to the Temple Authority as regards issuance of said Sanand. It is further stated that the Chintamani exercised such rights given under the Sanand peacefully and despite several enactments having come into force, his rights as such had never been tinkered with nor affected and exercise of said Seva as Kotha Suansia Sevak remained unhindered. On death of Chintamani, the original Plaintiff being his son and head of the family continued to exercise the said rights as before and went on performing the Seva. It is only in the year, 1987, when the Temple Authority issued a direction to collect entry fee, dispute arose, since such action was objected to by the original Plaintiff through Kotha Suansia Nijoga. The Temple Administration thereafter issued a notice to show-cause on 11.02.2002 to the original Plaintiff as to why he would not be driven out of the said area of Koili Baikuntha. The original Plaintiff then though produced the Sanand which had been issued in that regard, it was not taken into consideration. So the Suit has come to be filed praying for the following reliefs:-

> (i) declaration of rights as "Sevak" in the Kotha Suansia Nijoga inside Koili Baikuntha in the Shri Jagannath Temple, Puri; and
>
> (ii) permanent injunction, restraining the Defendants not to interfere in exercising the rights of the Plaintiff as "Kotha Suansia Sevayat".

5. The Defendants have questioned the locus-standi of the original Plaintiff stating that he is not the "Sevak". It is further alleged that said Sanand is a fraudulent one. When the name of father of the original Plaintiff or that of the original Plaintiff do not find place in the Record of Right prepared under the Orders in terms of the provisions of Shri Jagannath Temple (Administration) Act, 1952, in the relevant sl. no.72 as one among the Kotha Suansia Sevaks, the claim of the original Plaintiff as such is said to be untenable. It has been mainly said that as per the provision of section-4(d-1) of Shri Jagannath Temple Act, 1955, in order to be a "Sevak" having the rights, the name of the person must find mention in the Record of Right and that being not the case here, the Defendants submit that the suit at the instance of the original Plaintiff is liable to be dismissed.

6. On the above rival case, the Trial Court framed the following issues:-

1) Is the suit maintainable?
2) Is there any cause of action for the suit?
3) Has the Plaintiff locus-standi to file the suit?

4) Is the suit barred for non-service of notice under Sec.80 C.P.C. on the defendants?
5) Had there any genuine urgency to grant leave to the Plaintiff to file the suit without any service of the suit under Sec.80, C.P.C.?
6) Has the Court jurisdiction to try the suit as Sec.9 read with 29 of Sri Jagannath Temple Act in Kotha Suansia Nijoga, a necessary party of the suit?
7) Is the suit barred by limitation?
8) Is the suit property properly identified?
9) Has the Plaintiff any right or interest over the suit property?
10) Has the Plaintiff acquired right of adverse possession?
11) To what relief, if any, the plaintiff is entitled to?

7. The Plaintiff in total examined four witnesses and proved the documents more importantly the order dated 14.04.1937 which has been admitted in evidence as Ext.3. Number of letters issued by the Temple Administration Office to the Office bearer of Koili Baikuntha Nijoga have been admitted in evidence as Ext.4 (series). The plaintiffs have also proved commendation letter dated 01.12.1992 issued by the Gajapati Maharaja, Puri who happens to be the President of the Temple Managing Trustee. Several other letters and correspondences have also been proved from the side of the Plaintiffs in support of the factum of his performance of the above Seva and the continuous recognition of the same.

The Defendants examined two witnesses to counter the case that the original Plaintiff and his father were ever the "Sevak" in Koili Baikuntha. They have further called in question, the acceptability of that Sanand (Ext.3) in stating that it is a manufactured one.

8. The Trial Court on going through the evidence, has most importantly said that though Sanand dated 14.04.1937 had been issued by the Raj Sarkar and P.w.4, the Head Clerk of the Temple Administration has proved several letters of the Temple Administration issued to the original Plaintiff addressing him as the Office bearer of Kotha Suansia Nijoga and as one Kotha Suansia Sevak; those have no value in the eye of law since the name of the father of the original Plaintiff or that of the original Plaintiff are not so mentioned at sl. no.72 of the authenticated Record of Right. Despite holding at paragraph-20 of the judgment that the original Plaintiff was performing the Sevas inside Koili Baikuntha, by referring to the definition of "Sevak" as contained of section 4(d-1) of Shri Jagannath Temple Act, 1955 as the name of father of the original Plaintiff or his name are not indicated at sl. no.72 of

the Record of Right which has the statutory backing, the Trial Court has held that such Sanand or other evidence as let in cannot be taken to have conferred the right as such Sevak as claimed by the original Plaintiff.

The lower Appellate Court having given no credence to the evidence let in by the original Plaintiff has discarded the Sanand dated 14.04.1937 and other letters. The same view has been taken that even though the father of the original Plaintiff and the original Plaintiff had been engaged to do the Sevas as such since name of the father of the original Plaintiff or that of his does not find place in the Record of Right, they cannot be considered as the Sevaks in the Temple of Lord Shri Jagannath, Puri.

9. The Appeal has been admitted on the following substantial questions of law:-

> a) Whether the Courts below have misconstrued the definition of "Sevak" as contained in Section-4(d-1) of Shri Jagannath Temple Act, 1955; and
>
> b) Whether non-recognition of Seva and "Sevak"a for the purpose under the Record of Right prepared under Shri Jagannath Temple (Administration) Act, 1952 closes the chapter for all times to come for recognition of any such Seva and Sevak in performing the said Seva in future?

10. Heard learned Counsels for the parties. I have gone through the judgments passed both the Courts, I have also carefully perused the lower Court records such as the pleadings, evidence both oral and documentary placed by the parties.

11. The answer to both the above substantial questions of law as formulated thus would depend upon the acceptability or the non-acceptability by the claim of the original Plaintiff that he would fall within the sweep and covered by the definition of "Sevak" as defined in Section-4(d-1) of the Shri Jagannath Temple Act, 1955. In undertaking said exercise, thus, it is first required to carefully go through the said relevant provision of law holding the field.

The "Sevak" has been defined in section-4(d-1) of Shri Jagannath Temple Act, 1955:-

> "4(d-1) "Sevak" means any person who is recorded as such in the record of rights or is recognized by a competent authority as a Sevak or his substitute or has acquired the rights of a Sevak by means of any recognized mode of transfer and includes a person appointed to perform any Niti or Seva under Clause (i) of Sub-section (2) of Section-21."

12. It is pertinent to state here that the Orissa Legislature first attempted to control Public Hindu Religious Endowments including the Shri Jagannath Temple at Puri by passing Orissa Hindu Religious Endowment Act, 1939. This Act having been visited with several amendments from time to time, all those provisions contained therein were not felt as sufficient to control the administration and endowments of Shri Jagannath Temple, an ancient Temple which has been an institution of the unique National and International importance having been attached with all those rituals, niti kantis, pujas and varieties of Sevas as well as the concerning Sevaks of various class and category. The first step in the direction was the passing of Shri Jagannath Temple (Administration) Act, 1952. This was inter alia to prevent mis-management of the Temple and its endowments by consolidation of the rights and duties of the Sevaks, Pujakas and such persons connected with the Sevas, Pujas and Management thereof. Section-3 of the Act of 1952 conferred the power on the State Government to appoint a Special officer for the preparation of a Record consolidating the Rights and Duties of the different Sevaks, Pujakas and other persons connected with the Sevas, Pujas and Management of the Temple as also its endowments. Section-5 of the said Act provided for publication of the Records prepared by the Special officer which shall be final and shall not be called in question in any Court of law except in the manner as provided in Section-6 of the said Act. It further provided the remedy was to the aggrieved party to prefer objections before the District Judge or any other Judicial Officer not below the rank of District Judge specially appointed in that behalf who was to hear the objections and communicate the order thereof to the State Government, in turn to cause the modification, if any, in the Record of Right as indicated in the order. Next legislation came in the year, 1955 i.e. Shri Jagannath Temple Act, 1955. This Act is with a view to provide for the better administration and governance of Shri Jagannath Temple and its endowments in supersession of all previous laws, regulations and arrangements, having regard to the ancient custom and usages and the unique and traditional nitis and rituals contained in the Record of Rights prepared under the Shri Jagannath Temple (Administration) Act, 1952. It is important to note here that the Act of 1955 in section-3 provided that The Puri Shri Jagannath (Administration) Act, 1952 shall be deemed to be a part of the Act and all or any of the powers and functions of the State Government under the said Act shall be exercisable by the Committee under the Act from such date or dates as the State Government by notification

direct. The Act of 1955 having received the assent of the President on 15th October, 1955, was published in Orissa Gazette on 04.11.1956 and as provided in sub-section-(2) of section-1 of that Act; the provisions of section-1, 2 and 3 came into force at once.

This Court here is called upon to have an interpretation of the definition of "Sevak" as contained in Section-4(d-1) of Shri Jagannath Temple Act, 1955.

13. It is the elementary rule that construction as to the provision of a section is to be made of the all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section. So, this has to be kept in mind in undertaking the exercise.

14. The Trial Court at paragraph-20 of its judgment has come to a conclusion that the original Plaintiff though was performing some kinds of Seva in the Koili Baikuntha area but the same has not been held so as to bring the original Plaintiff within the definition of section-4(d-1) of the Act, 1955 in conferring any right on him as such. According to the Trial Court, the documents relied upon in support of the status of the original Plaintiff or regarding performance of the said Seva as available are not authenticate. The Trial Court in that exercise and on going through the evidence on record has not placed any reliance on the documents admitted in evidence and marked exhibits on behalf of the original Plaintiff. It is finally stated that, there being no authenticated record of right in the name of the original Plaintiff or his father as at Sl. No.72 of the record of right prepared by virtue of the statutory provision as already stated, the prayers as advanced by the original Plaintiff are not allowable.

The First Appellate Court merely saying that as the name of the father of the original Plaintiff or that of the original Plaintiff do not finds place in the record of right which has the backing of the statutory provision and final, he cannot be considered as "Sevak". The First appellate Court has however noted that the Plaintiff was previously engaged as "Sevak".

15. The Plaintiff here in claiming the reliefs in the suit is not banking upon the record of right, published with the statutory backing as aforestated and that is not said as the basis. Admittedly the name of original Plaintiff or that of his father are not noted therein. It is his case that being conferred with

the Sanand, they have been performing the duties as such as Kotha Suansia Sevak in keeping the Koili Baikuntha area clean, digging the well during the Nabakalebara and filling the same again after completion and discharge of duties assigned to other Sevaks and Pujakas in giving final rest to the old idols as also to maintain the flowering plants inside and keep the area under guard. It is stated that Kotha Suansia Nijog being there as the recognized Nijog of the Temple, the original Plaintiff being a member of the said Nijog has all along been recognized as such continuously stretching over a long period.

16. At this juncture, it would be profitable to first take note of, the definition of the Temple as contained in Section-4(d-1) of Shri Jagannath Temple (Administration) Act, 1955.

> 'Temple' means the temple of Lord Jagannath at Puri, other temples within its premises, all their appurtenant and subordinate shrines, other sacred places and tanks and any additions which may be made thereto after the commencement of this Act."

Now let's come to section-21 of Shri Jagannath Temple Act, 1955, which is also necessary for the purpose :-

> "1. The administrator shall be Secretary of the Committee and its Chief Executive Officer and shall, subject to the control of the Committee, have powers to carry out its decision in accordance with the provisions of this Act.
>
> 2. Notwithstanding anything in Sub-section (1) or in Section-5, the Administrator shall be responsible for the custody of all records and properties of the Temple, and shall arrange for proper collections of offerings made in the Temple and shall have power:-
>
> (a) to appoint all officers and employees of the Temple;
> (b) to lease out for a period not exceeding three years at a time the lands and buildings of the Temple which are ordinarily leased out;
> (c) to call for tenders for works or supplies and accept such tenders when the amount or value thereof does not exceed fifty thousand rupees;
> (d) to order for emergency repairs;
> (e) to specify, the general or special orders, such conditions and safeguards as he deems fit, subject to which any Sevak, office-holder or servant shall have the right to be in possession of jewels or other valuable belongs of the Temple;
> (f) to decide disputes relating to the collection, distribution or apportionment of offerings, fees and other receipts in cash or in kind received from the members of the public;

(g) to decide disputes relating to the rights, privileges, duties and obligations of sevaks, of rice-holders and servants in respect of Seva-puja and Nitis, whether ordinary or special in nature;

(h) to require various sevaks and other persons to do their legitimate duties in time in accordance with the record-of rights; and

(i) in the absence of any Sevak or his substitute or on the failure on the part of any such person to perform his duties, to get the Niti or Seva performed, in accordance with the records-of-rights by any other person;

Provided that the exercise of power under Clauses (a), (b), (c) and (e) shall be subject to the directions if any of the Committee issued-specifically in that behalf."

17. Section -21(A) of Shri Jagannath Temple Act, 1955 confers power and control on the Administrator over all Sevaks and servants attached to the Temple or in receipt of any emolument or perquisites therefrom, whether such service is hereditary or not. In other words, the general power of supervision and management of the Institution in question which previously vested in Raja of Puri has now been entrusted with the statutory authorities created under the Act.

A conjoint reading of all these provisions would show that even though in the Record of Right prepared pursuant to the enactment of the year, 1952, mention names of some name and some names are not there, but the authority having found the person to be performing the Sevas or rendering the service as such "Sevaka" or servant when has been allowed to continue and recognized as such, that person would squarely fall within the definition of section-4(d-1) of the Act, since the Committee under the Act with the powers given to the Administrator had all the powers to exercise as those were being so exercised by the State Government till then by virtue of Shri Jagannath Temple (Administration) Act, 1952. The definition as contained in section-4(d-1) of the Act when is read with clause-(i) of sub-section-2 of section-21 of the Act appears to be wider enough also to include such persons who perform any Niti or Seva for a considerable length of time with the knowledge of the Temple Administration having such dealing and relationship expressing the conduct as such leading to be so deemed under the approval of the Administration. So, in the given case, even though for a moment the Plaintiff's claim upon that Sanand (Ext.3) is not accepted, the fate of his claim would hinge upon a decision on the factual finding as to his continuous performance of the duty as such Kotha Suansia Sevak performing that Sevas as attached thereto in the Shri Jagannath Temple.

The above view of mine finds support to a great extent a decision of this Court in case of *Kedarnath Guru Mohapatra Vrs. State of Orissa*; AIR 1974 Orissa 75. In paragraph 10 of the said judgment, the following has been said:-

> "10. No such infirmity in our opinion is discernible in the definition of the expression Sevak. This definition preserves the rights of the existing Sevaks. It only seeks to bring within its fold (1) a person recognised by a competent authority as the Sevak; (2) his substitute; (3) a person who has acquired the rights of a Sevak by means of any recognised mode of transfer; and (4) a person appointed to perform any Niti or Seva under clause(i) of sub-section (2) of section-21. Under the last mentioned provision, power has been given to the Administrator of the Temple to get the particular Niti and Seva performed by any person in the absence of the Sevak or his substitute or on the failure on the part of such person to perform his duties. It is a matter of common experience that on certain occasions, performance of Niti in Shri Jagannath Temple is held up for a considerable length of time either because a particular Sebait whose turn it is to perform the particular Seva does not turn up or some sort of strike is resorted to. It is only reasonable that in such circumstances, the rituals of the Temple should not held up due to the intransigent attitude of a few Sevaks. *The provision of Section-21(2)(i) is therefore a wholesome one and the substitute who is temporarily appointed to perform the Seva should appropriately come within the definition of Sevak*…."

18. At this stage, it would be profitable to refer to the 1st Edition of "Shri Mandira Seva Karmangi" authored by Dr. Bhaskar Mishra, a Researcher of Shri Jagannath Chetana and Matha Parampara published in the year, 2020, who has also authored a number of such invaluable books such as Matha Parampara, Nabakalebara, Shri Jagannath Gyana Kosa etc. With regard to Kotha Suansia Seva. At page 188 of the Book, it very much finds mention therein that in the Record of Right at Sl. No.72, said Seva finds place. These Sevaks are not Sadhibandha Sevaks. This Sadhibandha is a custom which is prevalent in case of engagement of some Sevaks and they are so engaged after being duly educated and gaining sufficient experience in performing the Seva Puja whereas in respect of performing some Sevas, that Sadhibandha custom is not followed. Sadhibandha is followed in case of Pushpalaka, Puja Panda, Garabadu, Suarabadu, Khuntia, Mekapa etc. whereas other Sevaks for whom that Sadhibandha ritual is not performed are said to be "Asadhibandha Sevaks". These Kotha Suansia Sevaks are Sudras of cultivator class. The duties attached to said Seva are to fix and remove the 'Charamala' in the Chariots during Ratha Yatra, put the tent over the Snanabedi and clean the same during Snana Purnima, carry Changuda and Bhandara Sindhuka to the Chariots, in which Lords proceed to Srigundicha Temple from Shri Jagannath

Temple during Ratha Jatra Festival. It has also been stated that beside the above, other such related works during Nabakalebara in Koili Baikuntha, which they use to do are to prepare Daru Ghara and dig Samadhi and fill it up after all rituals are over. So, this Seva which is the subject matter here and the original Plaintiff claimed to be a "Sevak" of that category is a recognized one and is still being performed. The Seva that the original Plaintiff is stated to have been performing from the time of his father is the Seva assigned to such "Sevak" who are called Kotha Suansia Sevaks.

19. In view of the above and the interpretations as stated in the foregoing para, the evidence on record need be examined.

Besides leading oral evidence, the original Plaintiff has proved certain documents which the Courts below although have not accepted, now need elaboration for the purpose as aforestated. Ext.1 is the letter addressed to Lokanath Samartha (original Plaintiff) and its dated 14.02.2003. The letter finds mention that it had been issued by the order of the Administrator. The contents are concerning that Sanand which had been given by the original Plaintiff stating therein that as no such material in support of the Sanand is available in the office, cause be shown as to why it would not be disregarded. Ext.2 is another letter dated 11.02.2002 addressed to the original Plaintiff. This was given by the Administrator of Shri Jagannath Temple, Puri and the contents concern with the collection but non-deposit of revenue collected from that Koili Baikuntha area, the Samadhi Pitha of the Lords. Ext.4 is a notice from the Administrator of Shri Jagannath Temple, Puri to the Secretary, Koili Baikuntha Nijog, the original has been filed and proved. This was in relation to the allegation/ report as to collection of some amount from the pilgrims without any direction from the Authority. Ext.4/b is letter dated 26.05.2000, addressed to the original Plaintiff to discuss about discharge of Kotha Suansia Seva by said Sevaks and maintenance of discipline during the Snana Yatra and Ratha Yatra. Another important letter proved from the side of the Plaintiff reveals that the original Plaintiff being the Secretary of the Kotha Suansia Nijog had submitted a bill in excess of Rs.816/- as against the direction to spend upto a limit of only Rs.14,000/- for preparation of Charamala which is a type of Seva entrusted to Kotha Suansia Nijog during those festivals for going over the Chariots and coming down during when the Chariots remain stationed before being pulled. Original Plaintiff as the Sevak and as such a member of Kotha Suansia Nijog has been asked to rectify the

bills submitted after the Ratha Yatra in the year, 1993 as relating to preparation of Charamala. The letter is dated 09.05.1994 has been admitted in evidence and marked Ext.4/c. The original Plaintiff being the Secretary of the Kotha Suansia Nijog has received another letter dated 26.07.1997, which has been proved in original pointing out certain improprieties relating to performance of Seva and that has been exhibited as Ext.4/g. Letter dated 04.06.1996 given by the Assistant Administrator, Sri Jagannath Temple to the original Plaintiff as to non-availability of stock certificate regarding purchase of some materials. Ext.4/h is the sanction order of the Administrator relating to payment of Rs.930/- to the Secretary of Nijog. This has been proved in original. The original Plaintiff as the Secretary has received such sanction orders regarding payments relating to the Sevas and those have been marked as Ext.4/j. Also similar such orders are Exts.4/p to 4/z and Exts.4/z-1 to 4/z-9 as well as Ext.4/z-11.

In relation to recovery of the outstanding dues, the letter of the Administrator of Shri Jagannath Temple to the original Plaintiff as the Secretary of the Nijog is Ext. 4/m. Many other correspondences by the Administrator to the original Plaintiff have also been proved. Furthermore, the original Plaintiff has proved the entries in the Peon Book of the Temple Administration showing the dispatch and receipt of some such letters to him.

The Defendants having raised their objections as against all these documents have not shown any specific infirmity or circumstance in particular in connection with any one of such document and their objection is in a general and casual manner that all those are being created by the original Plaintiff for the purpose. Thus, in my considered view, looking at the number of documents proved and on carefully going through the examination of those, such objections do not appear to be sustainable.

The first witness examined from the side of the Defendants appears to have stated that the original Plaintiff was never recognized as the Kotha Suansia Sevak of the Temple. In saying so, he has given the emphasis on the fact that the record of right is silent about it. Whereas, the documents as referred to above run against said evidence. He has also not stated in clear words that the original Plaintiff had never performed such Seva in the Temple as Kotha Suansia Sevak. The evidence of next witness examined from the side of the Defendants also run in the same vein. No document has been proved to outweigh such voluminous documents proved coupled with the oral evidence let in from the side of the original Plaintiff.

Keeping in view the above evidence on record, the First Appellate Court at the end has therefore made a pertinent observation that Defendants are at liberty to utilize the service of the Plaintiffs, if necessary; in view of the previous engagement of the ancestor of the Plaintiffs. The evidence on record, in my considered view lead to the conclusion as to recognition of the original Plaintiff as Kotha Suansia Sevak for quite a long length of time. Therefore, the status of the father of the Plaintiffs as such Sevak as claimed has to be allowed and so also of all these Plaintiffs as his successors. Thus, the Plaintiffs are declared as Sevaks having the right to perform the Seva as Kotha Suansia Sevaks as per their entitlement under complete control, management and supervision of the Temple Administration and they would be performing their Sevas as such Sevaks as would be so assigned to them by the Administration under such terms and conditions as deemed fit and proper.

The aforesaid discussion, thus provide the answer to the substantial questions of law in favour of the Plaintiffs.

The Appeal is accordingly allowed in part to the extent as aforesaid in granting the prayer of the Plaintiffs to the said extent. In the peculiar facts and circumstances, no order as to cost is passed.

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2021 (III) ILR - CUT-753

BISWANATH RATH, J.

WP(C) NO. 23312 OF 2020
WITH
WP(C) NOS.19067 OF 2021 & 25464 OF 2020

PRASANTA KU. MOHAPATRA & ORS. …….. Petitioners
.V.
STATE OF ODISHA & ORS. …….. Opp. Parties

P.ANUPA KUMAR ACHARY (IN W.P.(C) NO.19067/2021} …….. Petitioner
TRIPATI PADHY(IN W.P.(C) NO.25464/2020) …….. Petitioner
.V.
STATE OF ODISHA & ORS. …….. Opp. Parties

SERVICE JURISPRUDENCE – Whether there is any difference between the employee working in the aided institutions and block grant Institutions? – Held, No – All person similarly situated should be treated similarly.

Case Laws Relied on and Referred to :-

1. W.P(C) No.27634 of 2020 (Disposed on 13.9.2021) : Bindusagar Samantray vrs. State of Odisha & Ors.
2. 2016 (I) ILR 1162 : Ritanjali Giri @ Paul vrs. State of Odisha (School & M.E.Deptt.) & Ors.
3. (2015) 1 SCC 347 : State of U.P. & Ors. Vrs.Arvind Kumar Srivastava & Ors.
4. (2006) 2 SCC 747 : State of Karnataka & Ors. Vrs. C. Lalitha.
5. (1993) 1 ATT (HC) 306 : Kumari Sabitri Dash Vrs. State of Orissa & Ors.
6. 78(1994) CLT 967 : Kshitish Chandra Pati & Ors. Vrs. State of Orissa & Ors.
7. 2001(I) OLR 233 : Arabinda Panda vrs. State of Orissa & Ors.
8. 1993(II) OLR 272 : Patras Soreng vrs. State of Orissa & Ors.

For Petitioners : Mr.K.K.Swain, (In W.P.(C) No.23312/20)
Mr. B.Routray, Sr.Adv. (In W.P.(C) No.19067/2021)
Mr. J.K.Rath, Sr. Adv. (In W.P.(C) No.25464/2020)

For Opp. Parties :Mr.S.Parida, Sr.Standing Counsel
Mr.D.Mohapatra, Standing Counsel

JUDGMENT Date of Hearing & Judgment: 28.09.2021

BISWANATH RATH, J.

1. For the clarity sake and on consent of all the Counsel involved, W.P.(C) No.23312/2020 is taken up as a leading case. All the Writ Petitions appear to be at the instance of number of Petitioners being the teaching and non-teaching staff of different Educational Institutions claiming for the benefits under the Orissa Education (Leave of Teachers and other Members of the Staff of Aided Educational Institutions) Rules, 1977, the Orissa Aided Educational Institutions Employees' Retirement Benefit Rules, 1981 and the Orissa Aided Education Institutions' Employees General Provident Fund Rules, 1983 with application of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (in short, "the 1974 Rules". Undisputedly, all these Writ Petitions involve teaching and non-teaching staff of Block Grant Schools under the Grantin-Aid Order, 2004. Further

undisputedly, the Institutions involve herein are already in receipt of full Block Grant. For there is a dispute at the instance of the State Department that there is a clear distinction between the employees in the Block Grant Institutions and the Aided Institutions, this Court in deciding the dispute of this nature in the case of ***Bindusagar Samantray vrs. State of Odisha & Others*** (W.P.(C) No.27634 of 2020 disposed of on 13.9.2021) framed therein Issue No.(ii), particularly touching this core aspect and in answering the core question whether there is any distinction between the employees (teaching and nonteaching) in the Aided Schools under the Grant-in-Aid fold, 1994 and the employees (teaching and non-teaching) under Grant-in-Aid Order, 2004,in elaborate discussion running through Paragraphs-25 to 28 therein taking reliance of the provision at Section 3(b) of the Orissa Education Act, this Court while confirming the view of the coordinate Bench in the case of ***Ritanjali Giri @ Paul vrs. State of Odisha (School & M.E.Deptt.) & Ors.*** : 2016 (I) ILR 1162 has clearly hold that there is in fact no distinction between the employees working in the Aided Institutions and Block Grant Institutions. Further this Court here also finds support of the Petitioners' case through the provision of Section 2(d) of the 1981 Rules. Further reading together with Rule-3 therein First Part, this Court finds support to the claim of the Petitioners through the above. It be noted here that many Institutions involved are already in receipt of full grant.

2. It is at this stage, taking this Court to the impugned order involving W.P.(C) No.23312/2020, as the leading case, Mr.K.K.Swain, learned counsel for the Petitioners drawing the attention of this Court through the discussions in Paragraphs-7 of the order under Annexure-15 contended that the entire endeavor of the District Education Officer involved herein made in the ultimate outcome on the basis of the Resolution of the Government dated 17.3.1979. It is at this stage, Mr.K.K.Swain, learned counsel for the Petitioners taking this Court to the amendment of 1979 Resolution taken place in 1985, vide Annexure-24 to the rejoinder affidavit demonstrated that the 1985 Resolution has been brought in amendment of the 1979 Resolution and taking through both the Resolutions, Mr.Swain, learned counsel, further contended that the impugned order having been strictly based on a non-existing Resolution, there is absolutely non-application of mind by the District Education Officer involved and as such foundation in the decision is wholly defection and such order must go.

3. It is at this stage of the matter, this Court finds, through the counter affidavit filed in response to such allegation in the Writ Petition through Paragraph-9 at Page-77 of the Brief involving W.P.(C) No.23312/2020, there is an attempt by the same District Education Officer through the counter to justify their decision impugned herein, again relying on an obstinate Resolution. This Court here observes, even after the Petitioners bringing through their pleading with the decision impugned has been taken on an unavailable Resolution, it is not known in what application of mind, the District Education Officer again attempted to justify such action and basing on reliance on an unavailable Resolution. It is at this stage of the matter, a statement at Bar is made that the impugned order involved herein is not only an outcome of reliance of an unavailable Resolution but in all the cases listed today even though the impugned orders therein have been passed by the District Education Officers throughout the State have also followed the same suit. In this situation, this Court finds, when the teaching and non-teaching staff are able to find out appropriate application of Resolution, it is surprise to note that the District Education Officers in the State being the protector of Law could not be aware of the change in the Resolution and taking decision referring to obstinate the Rules. This Court observes, this is a bizarre state of affairs by all the District Education Officers herein. Even in some cases the Principal Secretary even followed the same suit.

4. This Court here also finds, taking such decisions the competent authority is also required to take into account the two relevant 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.

5. It is at this stage of the matter, Mr.S.Parida, learned Senior Standing Counsel for the School & Mass Education Department in clear understanding that the impugned order has been passed based on non existing resolution and also decisions of this Court already available by now, sought for withdrawing the impugned orders involved herein and seeking permission of this Court to re-visit on the claim of the Petitioners on application of proper Rules and the judgment already came into operation in between in similar situation and if permissible.

6. This Court here appreciates the submission of Mr.Parida, learned Senior Standing Counsel seeking withdrawal of the impugned orders and to re-visit the issue involved herein.

7. In the circumstances, this Court here observes, the impugned order involving each Writ Petition be treated to have been recalled and not in existence but for there being requirement of further decision in the appropriate application of mind and by appropriate Authority and as this Court has already come to observe, the District Education Officers involved are in habit of passing orders avoiding the prevailing Rules or Resolutions, the first litigation being already disposed of involving College matters in

W.P.(C) No.29322/2020 disposed of on 11.8.2021 on same footing, directs the Commissioner-cum-Secretary, School & Mass Education Department, O.P.1 and the Director of Secondary Education, O.P.2 to consider the case of the Petitioners involved herein and take decision by undertaking the complete exercise within a period of two months from the date of communication of this order. For the discussions made herein above, this Court also directs O.Ps.1 & 2 while considering the case of the Petitioners to keep in view the decision of this Court in ***Bindusagar Samantray vrs. State of Odisha & Others*** (W.P.(C) No.27634 of 2020 disposed of on 13.9.2021), particularly involving Issue Nos.(ii) & (vi) then also keeping in view the decisions in ***Kumari Sabitri Dash vrs. State of Orissa & Ors.*** : (1993) 1 ATT (HC) 306, ***Kshitish Chandra Pati & Ors. Vrs. State of Orissa & Ors.*** : 78(1994) CLT 967, ***Arabinda Panda vrs. State of Orissa & Ors.*** : 2001(I) OLR 233, ***Patras Soreng vrs. State of Orissa & Ors.*** :1993(II) OLR 272, ***State of Karnataka & Others vrs. C.Lalitha*** : (2006)2 SCC 747 and ***State of U.P. & Others vrs. Arvind Kumar Srivastava & Others*** : (2015)1 SCC 347, then other decisions taken note herein above and also the provision at Rule 9(1) of the 1974 Rules further keeping in view the observations of this Court herein above.

8. Keeping in view large number of cases filing numbering some thousands, this Court directs the learned Senior Standing Counsel for the School & Mass Education Department to highlight the issues that are required to be attended by the Commissioner-cum-Secretary, School & Mass Education Department and the Director of Secondary Education along with copies of judgments indicated herein to the concerned at least within seven days of this order along with free copy of this order.

9. Learned counsel for the Petitioners are also directed to cooperate the learned Senior Standing Counsel for the School & Mass Education Department in formulating the issues/subjects that are required to be considered under the direction of this Court. Further the Commissioner-cum-Secretary and Director of the Department are also directed to attempt for a composite action involving all such issues involved herein passing a common order.

10. The Writ Petitions are thus disposed of.

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2021 (III) ILR - CUT-760

S.K. SAHOO, J.

JCRLA NO. 60 OF 2018

PRAFULLA MUNDARI @ PELKA …….. Appellant

.V.

STATE OF ODISHA ……..Respondent

INDIAN PENAL CODE, 1860 – Section 375(c) – Offences under section 376(2)(i) and section 6 of POCSO Act – Manipulates any part of the body of a woman so as to cause penetration – Meaning and extension – Discussed – Conviction sustained.

Case Laws Relied on and Referred to :-

1. A.I.R. 1939 PC 47 : Pakala Narayana Swami -Vrs.- Emperor.
2. A.I.R. 1998 SC 1406 : Central Bureau of Investigation -Vrs.- V.C. Shukla .
3. 2014 Criminal Journal 2107 : Irsad Alam -Vrs.- The State of Bihar.
4. (2020) 4 Gauhati Law Times 411 : Beirangai -Vrs. - State of Mizoram and Ors.
5. 2021 (4) Kerala Law Times 656 : Santhosh -Vrs.- State of Kerala.
6. (2004) 5 SCC 518 : Sakshi -Vrs.- Union of India.

For Appellant : Mr. Arun Kumar Budhia , Amicus Curiae

For Respondent : Mr. Arupananda Das , Addl. Govt. Advocate

JUDGMENT Date of Hearing & Judgment: 02.11.2021

S.K. SAHOO, J.

The appellant Prafulla Mundari @ Pelka faced trial in the Court of learned Addl. Sessions Judge -cum- Special Judge, Sundargarh camp at Rourkela in Special G.R. Case No.417 of 2013/Trial No.29 of 2017 for commission of offences punishable under section 376(2)(i) of the Indian Penal Code and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'POCSO Act') on the accusation that he committed rape on the victim girl, who was aged about eight years at the time of occurrence, in a dilapidated house situated at village Lindra under Bisra police station in the district of Sundargarh.

The learned trial Court vide impugned judgment and order dated 21.03.2018 found the appellant guilty of both the charges and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 5,000/- (five thousand), in default, to undergo rigorous imprisonment for six

months for the offence under section 376(2)(i) of the Indian Penal Code. No separate sentence was awarded for the conviction of the appellant under section 6 of the POCSO Act in view of the provision under section 42 of the said Act.

2. The prosecution case, as per the first information report lodged by one Minaketan Mundari (P.W.10), the father of the victim before the Inspector in-charge of Bisra police station on 24.02.2013 is that on that day in the afternoon at about 03.00 p.m., the appellant called the victim girl who was aged about eight years to a dilapidated house and opened her pant and committed rape on her and after the occurrence, the victim returned home and disclosed about the incident crying before her mother.

On the basis of such first information report, Bisra P.S. Case No. 20 dated 24.02.2013 was registered under section 376(2)(h) of the Indian Penal Code and section 4 of the POCSO Act. P.W.14 Subodha Kumar Mallik, Inspector in-charge of Bisra police station after registration of the case, took up investigation, examined the victim, informant, mother of the victim and other witnesses, seized the wearing apparels of the victim girl, sent the victim girl for her medical examination to Bisra C.H.C., arrested the appellant on 24.02.2013, seized the wearing apparels in presence of witnesses, sent the appellant to Bisra C.H.C. for medical examination, visited the spot and prepared the spot map, seized the biological samples of the victim girl collected by the medical officer, forwarded the appellant to the Court on 25.02.2013 and made a prayer to the Court for dispatch of the exhibits to the R.F.S.L., Sambalpur for chemical examination, received the medical examination reports of the victim as well as the appellant and on completion of investigation, submitted charge sheet on 30.05.2014 under section 376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act against the appellant.

3. The defence plea of the appellant is one of denial and it is pleaded that there was civil dispute between both the families for which a false case has been foisted against him.

4. Initially, the learned trial Court framed charges under section 376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act on 24.03.2015, but subsequently on 19.03.2018 charge was reframed under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act

against the appellant and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. During course of trial, in order to prove its case, the prosecution has examined as many as fourteen witnesses.

P.W.1 Rajgobind Mahali stated that the wearing apparels of a girl were seized in his presence by police and his signatures were taken in two documents.

P.W.2 Mahendra Mahali is a witness to the seizure of wearing apparels of the victim and the appellant such as top, pants, T shirt and gamucha vide seizure lists Exts.1/1 and 2/1 respectively. He further stated that when a gathering of people called the appellant and confronted him about the occurrence, he admitted the fact.

P.W.3 Ghanashyam Naik is an independent witness and also a witness to the seizure of one sealed vial containing vaginal swab of the victim and one vial containing pubic hair of the appellant vide seizure lists Ext.3 and 4 respectively.

P.W.4 Samarai Mundari is a co-villager of the informant and the appellant and he did not support the prosecution case and was declared hostile by the prosecution and cross-examined.

P.W.5 Jamuna Mundari is the aunt of the victim (P.W.9) and sister-in-law of the informant (P.W.10). She stated that when she was returning from work on one evening, she heard from the villagers that the appellant had raped her niece and she went to the house of the informant (P.W.10) and there the mother of the victim (P.W.11) informed her that the appellant had raped the victim.

P.W.6 Bijaya Kumar Mundari is the brother-in-law of P.W.10 and brother of P.W.11. He stated that when he was returning from his work, he heard from P.W.11 that the appellant raped the victim, who is his niece.

P.W.7 Shyamlal Mundari is an independent witness, who stated that on 24.02.2013 in the afternoon, he heard from the villagers that the appellant had raped the minor daughter of the informant (P.W.10), who was aged about five to six years at the time of occurrence.

P.W.8 Ramesh Chandra Sandil, who is a co-villager of the informant and the appellant, is the scribe of the F.I.R. (Ext.5).

P.W.9 is the victim. She supported the prosecution case and stated about the commission of rape on her by the appellant.

P.W.10 Minaketan Mundari is the informant of the case and he is the father of the victim (P.W.9). He stated that on the date of occurrence, when he returned home from work, his wife (P.W.11) informed him about the misdeeds of the appellant in committing rape of the victim (P.W.9) and at that time, he asked the victim who told him about the incident. He stated that on his production, police seized the wearing apparels of the victim and prepared seizure list vide Ext.1/1. He also proved the consent on the medical examination report of the victim vide Ext.6.

P.W.11 Sini Mundari is the mother of the victim (P.W.9), who stated that when her younger daughter informed her about the incident, she asked the victim who narrated the entire incident of rape before her.

P.W.12 Eprem Tirkey was working as the Constable at Bisra police station, who stated that on the basis of command certificate issued by the Investigating Officer, he escorted the victim and the appellant to the hospital for their medical examination and after medical examination, the hospital authority collected vaginal swab of the victim and the pubic hair and semen of the appellant keeping the same in two sealed vials and handed over to him, which produced before the I.O. which were seized as per seizure lists Exts.3 and 4 respectively.

P.W.13 Dr. Gujaram Majandi was the Medical Officer of Bisra C.H.C., who medically examined the appellant and the victim on police requisition and proved the medical examination reports vide Exts.7 and 9 respectively. He also proved his observation on the medical examination report of the appellant vide Ext.8.

P.W.14 Subodha Kumar Mallik was the Inspector in-charge of Bisra police station and he is the Investigating Officer of the case.

The prosecution exhibited twelve numbers of documents. Ext.1/1 is the seizure list of the wearing apparels of the victim, Ext.2/1 is the seizure list of one red and green colour half pant, one black and blue colour T shirt and

red colour gamucha of the appellant, Ext.3 is the seizure list of one sealed vial containing vaginal swab of P.W.9 presented by P.W.3, Ext.4 is the seizure list of two vials containing pubic hair and semen of the appellant, Ext.5 is the F.I.R., Ext.6 is the consent of P.W.10 on the medical examination report of P.W.9, Ext.7 is the injury report of the appellant, Ext.8 is the medical examination report of the appellant, Ext.9 is the medical report of P.W.9, Ext.10 is the spot map, Ext.11 is the prayer for forwarding M.Os. and Ext.12 is the copy of forwarding report.

No witness was examined on behalf of the defence.

6. Learned trial Court after analyzing the evidence on record, came to hold that the victim was eight years of age at the time of incident and that the appellant committed rape on the victim and that the prosecution has been able to prove the charges under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act against the appellant.

7. Mr. Arun Kumar Budhia, learned Amicus Curiae appearing for the appellant contended that the evidence of the victim (P.W.9) that the appellant after removing her pant inserted his penis into her vagina and anus is not corroborated by the medical evidence. The doctor (P.W.13), who examined the victim on the very day of occurrence has stated that he did not find any external or internal injury on her person suggestive of forcible sexual intercourse and the genitals were intact and there was no sign and symptoms of recent sexual intercourse. It is further argued that though the victim stated in her evidence that the appellant inserted his penis in her vagina and anus and that to by making her lie on the ground, but she disclosed before her parents i.e. P.Ws. 10 and 11 that the appellant rubbed his penis on her vagina. Learned counsel further submitted that as per the report submitted by the learned trial Court along with the report of the Jail doctor, the appellant is now aged about eighty years and the Medical Officer, Jail Hospital, Special Jail, Rourkela has reported that the appellant is suffering from different age related ailments and he is unable to take care of his personal hygiene and his routine activities without the assistance of his co-inmates. Learned counsel further submitted that since the appellant has remained in custody for more than eight years and eight months as he was forwarded to Court on 25.02.2013, in view of his alarming health condition, in case the impugned judgment and order of conviction is upheld, the sentence awarded to the appellant deserves to be reduced to the period already undergone by him.

Mr. Arupananda Das, learned Additional Government Advocate, on the other hand, contended that the victim girl appears to be a truthful witness and she stood the test of cross-examination very well and nothing has been elicited in her cross-examination so as to disbelieve her testimony. The evidence of the victim is also getting corroboration from the evidence of her parents and in such a scenario, the evidence of the doctor regarding absence of external and internal injury suggestive of forcible sexual intercourse or absence of any sign or symptoms of recent sexual intercourse cannot be a ground to discard the testimony of the victim. Learned counsel further submitted that complete penetration is not required for establishing the offence charged in view of the definition of 'rape' as per section 375 of the Indian Penal Code, which was substituted by the Act 13 of 2013 and came into force on 03.02.2013. Since the occurrence has taken place on 24.02.2013, the said definition of 'rape' would be applicable in this case and therefore, it can be said that the prosecution has successfully established the charge under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act against the appellant. Learned counsel further submitted that the appellant has admitted his guilt before the villagers which is stated by P.W.2, who is a co-villager. He further argued that since minimum sentence prescribed under section 376(2)(i) of the Indian Penal Code has been imposed on the appellant by the learned trial Court, the question of reducing the sentence does not arise in this case and therefore, the appeal should be dismissed.

8. In this case, the victim (P.W.9) is the star witness on behalf of the prosecution. So far as the age of the victim is concerned, the F.I.R. indicates that the victim was aged about eight years at the time of occurrence. The victim herself while giving her evidence on 02.03.2016 has stated her age to be ten years and that she was a student of Class-IV. Nothing has been elicited in the cross-examination of the victim to disbelieve her age. The doctor (P.W.13) has also stated the age of the victim to be eight to twelve years and the evidence of the doctor has remained unchallenged inasmuch as no cross-examination has been made to the doctor. Of course, the Investigating Officer has stated that he has not seized any documents to show the date of birth of the victim and as per the disclosure of the family members about the age of the victim, the same was mentioned, but since the evidence of the victim as well as the doctor has remained unchallenged, I am of the humble view that the finding of the learned trial Court that the victim was below twelve years

of age at the time of incident is quite justified. Learned counsel for the appellant has also not challenged the age of the victim.

The victim was tested by the learned trial Court by putting some questions and it was found that she was able to give rational answers. Being examined as P.W.9, the victim has stated that on the date of occurrence, she along with her sister was playing on the verandah of their house and their father was not present in the house and their mother was cooking food and at that time the appellant came and gave her money and took her to another house situated nearby and there the appellant by removing her pant, inserted his penis in her vagina and anus (MORA PICHARE AND JUNGHA SANDHIRE THOKLA). On the question put by the Court as to what happened thereafter, the victim replied 'SUAI KARI THOKLA MOTE'. The victim further stated that after the appellant left, she came to her house and narrated the incident before her mother. In the cross-examination, she has also stated that there was no quarrel between her family and the family of the appellant. She further stated that she did not seek any permission from her mother to accompany the appellant. She stated that her parents had never tutored her as to what to say in the Court. She denied the suggestion given by the learned defence counsel that the appellant had not given her any money and not taken her to a house and removed her pant and inserted his penis into her vagina and anus.

The mother of the victim being examined as P.W.11 has stated that when the victim (P.W.9) was asked, she informed that the appellant called her to a nearby dilapidated house while she was playing in the verandah with her sister and there the appellant made her lie on the ground, removed her chadi and rubbed her penis on her vagina. She denied the suggestion given by the learned defence counsel that there was any quarrel between the two families and that they had taken heavy loan from the appellant and that in order to escape from the liability of loan, a false case was foisted against the appellant. Nothing has been elicited in the cross-examination to disbelieve the evidence of P.W.11.

The evidence of the father of the victim, who has been examined as P.W.10 also corroborated the evidence of the victim and he stated that when he asked the victim, she told him that on that day at about 03.00 p.m. to 04.00 p.m. the appellant took her to a dilapidated house, removed her pant and rubbed his penis on her vagina and anus. Therefore, the evidence of the victim is corroborated by the statements of her parents.

It is pertinent to note that the occurrence in question took place on 24.02.2013 and on the very day, the matter was reported to the police and the victim was also medically examined on that date. Therefore, there was no time for concoction of any case and prompt lodging of the first information report is also another factor, which goes in favour of the prosecution.

P.W.2, who is a co-villager of the informant, has stated that he got information from the informant about the offence committed by the appellant and when the gathering called the appellant and confronted him about the fact, he admitted the fact. Then the appellant was kept in the custody of some of the villagers and the matter was reported to the police. In the cross-examination, he has stated that twenty to twenty five persons had gathered. However, in the accused statement, no question has been put to the appellant on such admission. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. (**Ref: Pakala Narayana Swami -Vrs.- Emperor**; **A.I.R. 1939 PC 47**). Only voluntary and direct acknowledgment of guilt is a confession but when a confession falls short of actual admission of guilt, it may nevertheless be used as evidence against the person who made it or his authorized agent as an 'admission' under section 21 of the Evidence Act. (**Ref: Central Bureau of Investigation -Vrs.- V.C. Shukla ; A.I.R. 1998 SC 1406**). When a statement falls short of a plenary acknowledgment of guilt, it would not be a confession, even though the statement is in respect of some incriminating facts, which taken, along with other evidence, tends to prove the guilt of the accused. However, such a statement would, indeed, be admission. (**Ref: Irsad Alam -Vrs.- The State of Bihar, 2014 Criminal Journal 2107**). The surrounding circumstances under which the admission was stated to have been made, absence of any specific material as to what was confronted to the appellant and what was his answer to such confrontation made before twenty to twenty five persons and more particularly when this material circumstance was not put to the appellant in his statement recorded under section 313 of Cr.P.C., the prosecution cannot be permitted to rely on this admission. Thus, the evidence of P.W.2 no way helps the prosecution case.

The victim was medically examined on the date of occurrence and the doctor (P.W.13) has stated that he found no external or internal injury on her

person suggestive of forcible sexual intercourse, the clothes were intact and there was no tear and her pant was stained with semen. The doctor further stated that the genital was intact and there was no sign or symptoms of recent sexual intercourse and the age of the victim was opined to be eight to twelve years. Though the biological samples along with the seized wearing apparels of both the victim and the appellant were sent for chemical analysis, but the reports were not obtained from the R.F.S.L., Sambalpur to be proved by the prosecution during trial. Delay in analysis of the exhibits and delay in communication of its results by the Forensic Science Laboratories to the Courts create hindrance to the early disposal of the criminal trial. It is the solemn duty of the State to engage more number of efficient analysts in different laboratories to see that right to speedy trial which is a fundamental right guarantee under Article 21 of the Constitution of India is not denied to any accused.

In view of the definition of 'rape' as per the amended provision of section 375 of the Indian Penal Code, which came into force from 03.02.2013, it is apparent that complete penetration of the penis either into the vagina, mouth, urethra or anus of a woman is not necessary to make out a case of rape. If there is penetration of penis, to any extent, into any of such part of the body of a woman, that would come within clause (a) of section 375 of the Indian Penal Code and the man committing such act can be stated to have committed rape. Explanation I makes it very clear that for the purpose of section 375 of the Indian Penal Code, 'vagina' shall also include labia majora.

In the case of **Beirangai -Vrs.- State of Mizoram and Ors., reported in (2020) 4 Gauhati Law Times 411**, a Division Bench of Gauhati High Court, Aizawl Bench held as follows:

> "25. Section 6 of the POCSO Act, 2012 is the punishment provided for aggravated penetrative sexual assault, which not only requires that the condition/s provided in Section 5 of the POCSO Act, 2012 are satisfied, but that the conditions provided in Section 3 of the POCSO Act, 2012 are present. Thus, while Section 3(a) requires penetration of the vagina by the penis, the words used by the learned Trial Court, while framing charge under Section 6 of the POCSO Act, 2012, is that the appellant tried to insert his penis into the vagina of the prosecutrix. The use of the word "tried to insert" leads to an inference that an attempt to rape or penetrative sexual assault had been made, but had not led to actual penetration. However, the framing of charge under Section 6 of POCSO Act, 2012, read with facts of this case, implies

penetration by the appellant's penis into the vagina of the prosecutrix, thereby attracting Section 3(a) of the POCSO Act, 2012. In any event, the attempt to insert the penis into the victim's vagina, after rubbing it with soap to oil it would also attract Section 3(c) of the POCSO Act, 2012 as the rubbing of the vagina with soap to oil the same and touching of the vagina by the penis would amount to manipulation of any part of the body of the child so as to cause penetration into the vagina. Penetration of the penis into the vagina is not sine qua non for attracting Section 3(c), as the same is taken care of by Section 3(a). Thus, rubbing of soap or oil the victim's private parts, so as to cause penetration and the meaning of attempt to penetrate the vagina would come within the meaning of the word "manipulation", as provided in Section 3(c). As the prosecutrix is below 12 years of age, Section 5(m) is attracted and thus, we find no infirmity with the framing of charge being made against the appellant under Section 6 POCSO Act, 2012, only because of the use of the words "tried to insert".”

In the case of **Santhosh -Vrs.- State of Kerala reported in 2021 (4) Kerala Law Times 656**, a Division Bench of Kerala High Court held as follows:

“32.....One of the crucial aspects to be noticed in section 375 as it stood prior to the amendment in 2013, is that, it provided for "sexual intercourse" and "penetration" (of any degree). In **Sakshi -Vrs.- Union of India : (2004) 5 SCC 518**, the Honourable Supreme Court, adopted the dictionary meaning of the word "sexual intercourse" as "heterosexual intercourse involving penetration of the vagina by the penis". So, penile-vaginal interaction was one of the necessary ingredients for constituting the offence of rape, prior to the amendment. As noticed above, even at that time, judicial interpretations sounded different notes and often adopted very wide interpretation as to the degree of penetration and even slightest penetration was treated as sufficient to attract the offence of rape. In the amendment proposed in Criminal Law Amendment Bill, 2012, the expression "rape" itself was proposed to be substituted with the expression 'sexual assault', to make the offence of sexual assault gender neutral and also for widening the scope of the offence of sexual assault. One of the objects of the said proposal was that the term "sexual intercourse", which confined it to penile-vaginal intercourse, was to be done away with. However, in the report of Justice J.S. Verma Committee, the proposal was to widen the scope of definition of "rape" by retaining the said expression in the statute, instead of substituting it with ' "sexual assault". The proposal in Justice J.S. Verma Committee report included penetration to other orifices but such penetration was confined to orifices such as vagina, urethra and anus. In the said report section 375(b) proposed was "manipulates any part of the body of a person so as to cause penetration of the vagina or anus or urethra of another person". In all the above stages, the suggestions were made for amendments to widen the scope of definition of offence of rape, though it fell short of including any orifices other than vagina, urethra and anus. Later, presumably by taking into account, the suggestions from other sources, the legislature has further widened the said provision, by including the penetration to any part of the body of woman. As the provision

> stands at present in 375(c) what constitutes rape reads as: (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or". It includes penetration to other parts of the body of woman and it is not confined to vagina, urethra and anus. In the amended provisions, the legislative intention is very evident, and it is also a marked deviation from what is proposed in Justice Verma Committee report, wherein the penetration was confined to vagina, urethra and anus alone. When the amended definition of section 375 is examined in the light of the gradual evolution of definition of rape and the expansion thereof, in our view, the expression "cause penetration into the vagina, urethra, anus or any part of body of such woman" as used therein, requires wider interpretation so as to include any orifices naturally present or any part of the body manipulated to simulate a penetration and have the effect/sensation of an orifice. It is crucial to note that the said provision starts with the words "manipulates any part of the body of a woman so as to cause penetration" The dictionary meaning of "manipulate: includes "control or influence cleverly or unscrupulously.". The word penetration means: "a movement into or through something or someone" The word, 'penetrate', as per 'The Concise Oxford Dictionary', means 'the act or process of making way into or through something'; 'to enter or pass through or force a way into or through'. When the above provision is read with the said definitions in common parlance, we have no doubt in our mind that, when the body of the victim is manipulated to hold the legs together for the purpose of simulating a sensation akin to penetration of an orifice; the offence of rape is attracted. When penetration is thus made in between the thighs so held together, it would certainly amount to "rape" as defined under Section 375. In short, considering the intention of the legislature as revealed from the above proposals, followed by the enactment of Criminal Law Amendment Act, 2013 and gradual evolution of the concept of the offence of "rape" from time to time, the irresistible conclusion is that, the definition of rape as contained in section 375 would take in, all forms of penetrative sexual assault onto vagina, urethra, anus or any other parts of the body so manipulated to get the feeling or sensation of an orifice. The word manipulation by itself includes an artificial creation. The effect of manipulating the thighs to be held tightly together is to cause penetration of the crevice, when the muscles engulf the object which penetrates to create or simulate the same effect as in a normal penile-vaginal intercourse."

In the case in hand, the victim has stated in her evidence that the appellant by removing her pant inserted his penis in her vagina and anus. The learned trial Court mentioned the exact words stated by the victim, such as 'MORA PICHARE AND JUNGHA SANDHIRE THOKLA'. Thus, if properly translated, the victim in fact stated that the appellant inserted his penis in between the buttocks and the thighs. Even though the victim has stated before her parents that the appellant after removing her chadi rubbed his penis in her vagina but not stated about insertion of penis in her vagina

and anus, as stated by her in her deposition (which seems to have not been properly translated by the learned trial Court while recording evidence), but in my humble view such act of rubbing the penis in the vagina of the victim or penetrative sexual act between the buttocks or thighs of the victim by the appellant would amount to an act of manipulation of the body of the victim to obtain sexual gratification which would come under clause (c) of section 375 of the Indian Penal Code which includes "manipulates any part of body of a woman so as to cause penetration into...or any part of body of such woman". Non-noticing of any external or internal injury on the person of the victim suggestive of forcible sexual intercourse as per the evidence of the doctor (P.W.13) in such a scenario, cannot be a ground to discard the prosecution case. The minor variation in the evidence of the teen aged victim and what she stated before her parents about rape is not sufficient to disbelieve the prosecution case. Therefore, the learned trial Court has rightly found the appellant guilty under section 376(2)(i) of the Indian Penal Code and 6 of the POCSO Act.

9. The learned trial Court has imposed minimum sentence prescribed under section 376(2)(i) of the Indian Penal Code and therefore, the contention of the learned counsel for the appellant to reduce the sentence to the period already undergone by the appellant cannot be accepted. However, taking into account the health condition of the appellant and his age as per the report dated 12.08.2021 furnished by the learned trial Court basing on the report of the Medical Officer, Jail Hospital, Special Jail, Rourkela that the appellant is now eighty years of age and suffering from Systemic hypertension, complete blindness of right eye and diminished vision of left eye and that due to old age debility and diminished vision, he is unable to take care of his personal hygiene and his routine activities without assistance of his co-inmates, the appellant is at liberty to move the appropriate Government for remission of the sentence through the Jail Superintendent as per the provision of section 432 of the Code of Criminal Procedure in accordance with law, which is over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules and this Court expresses no opinion on the same.

Though the learned trial Court sent a copy of the judgment to the District Legal Services Authority, Sundargarh to award compensation as per the provision of Victim Compensation Scheme, it is not clear whether the

same has been done or not. A copy of this judgment along with the trial Court record be sent to the concerned Court to take necessary steps in that regard.

The JCRLA being devoid on merits, stands dismissed.

Before parting with the case, I would like to put on record my appreciation to Mr. Arun Kumar Budhia, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

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2021 (III) ILR -CUT-772

K.R. MOHAPATRA, J.

CMP NO. 467 OF 2021

BASANTI PANDA @ MISHRA …….. Petitioner

.V.

KANANABALA PANDA@DASH & ORS. ……..Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 151 – Analogous hearing of the Suits – When warranted? – Principle discussed.

Case Laws Relied on and Referred to :-

1. 1999 (II) OLR 637 : Smt. Puspalata Das alias Moharana Vs. Muralidhar Bhol.
2. 57 (1984) CLT 477: Dr. Guru Prasad Mohanty and others Vs. Bijoy Kumar Das.
3. AIR 1992 Orissa 155: Motilal Chunilal Rathor Vs. Pani Bai and others.

For Petitioner : Mr. Ganesh Prasad Samal
For Opp.Parties : Mr. Ajit KumarTripathy

ORDER Date of Order : 15.12.2021

K.R.MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioner in this CMP seeks to assail the order dated 5th July, 2019 (Annexure-5) passed by learned Civil Judge (Senior Division), Salipur in CS No.722 of 2016 (filed by Opposite Party No.1) directing to hear CS No.377 of 2016 and CS No.560 of 2016 filed by the present Petitioner.

3. Mr. Samal, learned counsel for the Petitioner submits that for analogous hearing, learned trial Court has to satisfy itself that the parties to the suits, issues involved, relief claimed as well as the subject matter of dispute are same in all the suits. If one of the above ingredients is absent, direction for analogous hearing of the suit cannot be made. In the instant case, CS No.377 of 2016 has been filed by the Petitioner against the Opposite Party No.1 and others for the following relief :-

> "16. The Plaintiff, therefore, prays that:
>
> *(i) Let it be declared that the registered sale deed bearing No.369 dated 17.03.2016 is illegal, inoperative and no title passed in favour of the defendant No.2 and not binding on the plaintiff;*
>
> *(ii) Alternatively let a decree be passed directing the defendant No.2 to execute a sale deed in respect of the plant schedule 'B' property in favour of the plaintiff on receipt of the consideration amount shown in the impugned sale deed dt.17.03.2016 and got the same registered within a time limit that may be stipulated in that behalf;*
>
> *(iii) Let a decree of permanent injunction be passed restraining the defendant No.1 from transferring her remaining undivided interest in the plaint Schedule "A" property to any stranger;*
>
> *(iv) Let a decree of permanent injunction be passed restraining the defendant No.2 from coming upon the plaint schedule 'B' property and changing its nature and character in any manner whatsoever;*
>
> *(v) Let cost of the suit be decree in favour of the Plaintiff;*
>
> *(vi) Any other relief to which the plaintiff be found entitled be granted in favour of the Plaintiff;"*

3.1 In CS No.560 of 2016 filed by the present Petitioner against Opposite Party No.1 and one Ashok Jena, the relief prayed for are as follows:-

> *(i) Let it be declared that the registered sale deed bearing No.595 dated 30.03.2016 is illegal, no title passed in favour of the defendant No.2 and inoperative and not binding on the plaintiff;*
>
> *(ii) Alternatively let a decree be passed directing the defendant No.2 to execute a sale deed in respect of the plant schedule 'B' property in favour of the plaintiff on receipt of the consideration amount shown in the impugned sale deed dt.30.03.2016 and got the same registered within a time limit that may be stipulated in that behalf;*

(iii) Let a decree of permanent injunction be passed restraining the defendant No.1 from transferring her remaining undivided interest in the plaint Schedule "A" property to any stranger;

(iv) Let a decree of permanent injunction be passed restraining the defendant No.2 from coming upon the plaint schedule 'B' property and changing its nature and character in any manner whatsoever;

(v) Let cost of the suit be decree in favour of the Plaintiff;

(vi) Any other relief to which the plaintiff be found entitled be granted in favour of the Plaintiff;"

However, the suit filed by Opposite Party No.1 in CS No.722 of 2016 against the Petitioner and others, the reliefs claimed are as follows:-

8. HENCE THE PLAINTIFFS PRAY :-

(a) Let a preliminary decree for partition in respect of plaintiffs' share (excluding her sale) be passed in preliminary decree may be made final through process of the Court and the allegation (sic) made by plaintiff in favour of defendant No.5 and 6 may be adjusted in her share and while making allotment, possession of plaintiff and defendant No.5 and 6 may be taken into consideration;

(b) Let the Sale Deed No.375 dated 23.02.2005 obtained by the defendant No.2, be declared void, illegal, invalid and fraudulent, holding that defendant No.2 derived no interest in the suit schedule properties;

(c) Let a decree for permanent injunction be passed restraining the defendant No.1 and 2 and their men and agents from making any sale/transfer, raising any construction, changing the nature and character of the suit schedule land and dispossessing the plaintiff from the suit land in absence of partition;

(d) Cost of the suit may be decreed in favour of plaintiff;

(e) Any other relief to which plaintiff found entitled be granted in her favour;"

He, therefore, contended that although the properties involved in all the suits are same, but the reliefs claimed in all the suits are different. Although, the Petitioner and Opposite Party No.1 may be common in all the suits, but there are some other Opposite Parties impleaded as defendants in different suits. It is his contention that neither the issues in all the suits as stated above nor the reliefs claimed in the above suits are same. Thus, the learned trial Court has committed error in directing to hear all the suits analogously. It is further submitted that learned trial Court has not made any endeavour to verify as to whether the aforesaid ingredients are satisfied in order to issue a direction for analogous hearing of the suits or not. In that view of the matter, he prayed to set aside the impugned order.

4. Mr. Tripathy, learned counsel for Opposite Party No.1 submits that the requirements for analogous hearing of the suits, as submitted by learned counsel for the Petitioner is not correct. He relied upon the decision in the case of ***Smt. Puspalata Das alias Moharana Vs. Muralidhar Bhol***, reported in 1999 (II) OLR 637, wherein this Court held as follows:-

> *10. Law is well-settled that when a specific provision has been made to cover a particular aspect, there is no scope for invoking the inherent power of a Court Under Section 151, CPC. However, the said principle has no application to the facts of the present case. In the present case, it is apparent that the main questions raised in both the suits are similar. Though all the parties are not common, the contesting parties are same in both the suits. One of the main issues in both the suits would be relating to validity of the sale deed allegedly executed in favour of the present opposite party by Bijayalaxmi Das, who is also a party in the other suit. Since the main parties are common and common questions of fact and law are likely to arise, it cannot be said that the trial Court has committed any illegality in directing that both the suits should be heard analogously instead of directing stay of the subsequent suit. The facts and circumstances arising in the Supreme Court decision reported in AIR 1962 Supreme Court 527 are completely different. The other two decisions of the Orissa High Court cited by the counsel for the petitioners relate to general principle of law and do not lay down anything which can be considered to be throwing any light on the question now involved. It is to be noticed that both the suits were pending in the very same Court and not in different Courts. The order passed by the trial Court directing analogous hearing of both the suits is in the interest of justice and it cannot be said that the order is without jurisdiction……."*

He further relied on a decision of this Court in the case of ***Dr. Guru Prasad Mohanty and others Vs. Bijoy Kumar Das***, reported in 57 (1984) CLT 477, wherein it is held as under:-

> *"….The policy of the law is to obviate the possibility of two contradictory verdicts by one and the same Court in respect of the same relief. The object of consolidation of suits is to avoid multiplicity of proceedings and unnecessary delay and protraction of litigation. These objects are not in conflict with the principles of Section 10 of the Civil P.C., but in the aid of the object of the said Section…."*

In another case law between ***Motilal Chunilal Rathor Vs. Pani Bai and others***, reported in AIR 1992 Orissa 155 relied upon by Mr. Tripathy, learned counsel, this Court has held as under:-

> *"5. …. Where both the suits are in the same Court, public policy of early finality would call for exercise of inherent power under Section 151 C.P.C., to direct analogous hearing. In a case reported in (1984) 57 CLT477 : (AIR 1984 Ori 209) (Dr. Guru Prasad Mohanty v. Bijay Kumar) exercise of inherent power by a Court of higher pecuniary jurisdiction for consolidation of the suit before it with the suit pending in a Court of lesser pecuniary jurisdiction was upheld. It was observed :--*

".....After all, Section 10 Civil Procedure Code merely lays down a procedure and does not vest any substantive right in the parties. The object of the said section is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. The policy of the law is to obviate 'the possibility of two contradictory verdicts by one and the same Court in respect of the same relief. The object of consolidation of suits is to avoid multiplicity of proceedings and unnecessary delay and protraction (sic) of litigation. These objects are not in conflict with the principles of Section 10 of the Civil Procedure Code, but in the aid of the object of the said section." Therefore, I am inclined to hold that both suits should be tried together."

4.1 It is his submission that the subject matter of dispute in all the suits is same. The contesting parties are also the same in all the suits. In the aforesaid suits, sale deeds either executed by the Petitioner or by Opposite Party No.1 with regard to the selfsame property are under challenge. Only an additional prayer for partition has been made in CS No.722 of 2016, which is a consequence of declaration of the sale deeds to be null and void. Thus, in all fairness and to prevent the multiplicity of litigations as well as delay in disposal of the suits, all the suits should be heard analogously. Although learned trial Court has not discussed the matter in detail, but the conclusion cannot be said to be erroneous. Hence, he prays for dismissal of the writ petition.

5. Heard learned counsel for the parties and perused the materials on record including the case laws cited. It is not in dispute that the subject matter of dispute is one and the same in all the suits. The Petitioner filed two suits as stated above for cancellation of two sale deeds executed by Opposite Party No.1. In the suit filed by Opposite party No.1, the sale deed executed by the Petitioner is under challenge. All the sale deeds are in respect of same subject matter of dispute, i.e., the suit property in all the suits. Relief of permanent injunction has been prayed for in all the suits. An additional prayer for partition of the suit property has been made by Opposite Party No.1 in CS No.722 of 2016. Prayer for partition is consequent upon declaration with regard to validity of the sale deeds executed either by the Petitioner or by Opposite Party No.1. All the suits are pending before one Court, i.e., learned Civil Judge (Senior Division), Salipur. Thus, on analysis of the facts, subject matter of dispute involved in the case and relief claimed in all the aforesaid suits in the light of the ratio decided in the case laws cited by Mr. Tripathy,

learned counsel for the Opposite Party No.1 and in all fairness, all the three suits should be consolidated and tried together to avoid multiplicity of litigations, conflict in decisions and to avoid delay in disposal of the suits.

6. In view of the discussions made above, I am of the considered opinion that learned Civil Judge (Senior Division), Salipur has committed no illegality in directing consolidation of all the three suits to be tried together. However, learned Civil Judge ought to have discussed the matter in detail and pass a reasoned order taking into consideration the materials available on record.

7. In view of the above, the CMP merits no consideration and accordingly the same is dismissed.

8. If all the suits are ready for hearing, an endeavour shall be made by the learned trial Court for early disposal of same in accordance with law. Issue urgent certified copy of the order on proper application.

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2021 (III) ILR -CUT-777

S.K. PANIGRAHI, J.

CRLMC NO.1741 OF 2021

'X' …….. Petitioner

.V.

STATE OF ODISHA & ORS. ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Application under section 3 of the Medical Termination of Pregnancy Act, 1971 – Prayer for the termination of child – Application filed by rape victim (mother) to terminate the child – Period for termination as mandated under the Act – Gestational age of such child is 26 weeks as per the medical report – Opinion of the medical board is that there is no risk upon the mother and child in case continuance of the pregnancy – Termination of pregnancy is not immediately necessary to save the life of petitioner as per section 5 of the Act – Held, termination of

pregnancy is not permissible – However direction issued to the collector to provide all the medical facilities as well as proper diet to the victim for safety delivery of the child and direction also issued to provide compensation to the tune of Rs.10,00,000/-.

Case Laws Relied on and Referred to :-

1. Writ Appeal No. 745/2021 (MP High Court) : Prosecutrix vs. The State of Madhya Pradesh
2. (2009) 9 SCC 1 : Suchita Srivastava & Anr. Vs. Chandigarh Administration
3. D.B. Spl. Appl. Writ No. 1344/2019 : State of Rajasthan vs. S
4. (2017)3 SCC 458 : Mrs. X and Ors. vs. Union of India and Ors.
5. (2018) 14 SCC 289 :Mamta Verma vs. Union of India and Ors.
6. (2018) 14 SCC 75 : A vs. Union of India.
7. AIR 2017 SC 461 : Meera Santosh Pal & Ors. vs. Union of India & Ors.
8. Writ Petition No. 10835/2018 : Sudha Sandeep Devgirkr vs Union of India.

For Petitioner : Mr. Sarathi Jyoti Mohanty
For Opp. Parties: Mr. L. Samantaray, AGA

JUDGMENT Date of Hearing: 10.11.2021 : Date of Judgment: 16.11.2021

S.K. PANIGRAHI, J.

1. *"Justice is the sum of all moral duty"* as observed by William Godwin who is considered to be one of the first exponents of utilitarianism, justly articulates the relevance in the present case. The Courts are duty bound to come to the rescue of the victims and alleviate their mental agony and suffering especially in cases where there is a lacuna in the law. Interpreting law in a contemporary legal perspective may be necessary to do complete justice in each case. The present petitioner seeks to assail the order dated 09.07.2021 passed by the Ld. S.D.J.M., Banki in G.R Case No. 137 of 2021 under Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as "the MTP Act" for brevity). Aggrieved by the order, the present petitioner, has approached this Court by way of present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for brevity).

2. Shorn of unnecessary details, the substratum of the matter presented before this Court states that the petitioner is a resident of Vill- Bania, P.S- Baideswar, Dist - Cuttack. On 14.04.2021, the petitioner while returning to her house was gagged in the mouth by a towel and she was forcibly taken

away to the nearby school. Thereafter, the accused persons forcibly committed rape on her and threatened to kill in the event she spoke about the act to her family members or police.

3. The petitioner lost her senses and narrated her ordeal to her father after returning home. The petitioner's father intimated the village gentry about the said incident and consequently, a FIR was lodged in Baideswar Police Station. Pursuant thereto, the IIC of Baideswar Police Station registered the FIR against the present proforma Opp. Party Nos. 4 to 8 for commission of offence u/s 376-D, 506 and 34 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity).

4. Mr. Sarathi Jyoti Mohanty, learned counsel for the petitioner submits that the petitioner, being an unmarried young girl has not just suffered physically and mentally but has also been deprived of maintaining a dignified social life due to commission of the said offence. In fact, rape is understood as humiliation, violation of self-determination and an intimate attack on the woman's personhood. The learned counsel for the petitioner has further submitted that the petitioner has been pregnant for more than 4 months and feels morally insecure to step out of her house due to horrendous social stigma attached to such crime. The social relations between men and women in which violence against women is often taken for granted, especially in cases like these the judge do decide their fate in the decision to abort or not to abort the pregnancy.

5. In the cases of this genre, the medical practice of abortion, legal and illegal, has expanded but the Psycho-physiological and social condition of the rape survivors form the essential aspects of medical judgment especially in therapeutic abortion case. In this context, it is worthwhile to advert to Section 3 of the MTP Act which provides a statutorily protected space as under:

> "*3. When pregnancies may be terminated by registered medical practitioners.-*
>
> *(1) Notwithstanding anything contained in the Indian Penal Code [45 of 1860], a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.*
>
> *(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, —*

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the opinion, formed in good faith, that—

(*i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or*

(ii) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.

Explanation 1. — For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(2B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman."

6. Learned counsel for the petitioner submitted that despite the clear mandate of provisions, learned S.D.J.M., Banki has erroneously rejected the fervent plea of the petitioner on the grounds of lack of jurisdiction. Further the learned S.D.J.M., Banki has also opined that the petition could not be considered on its merit due to the fact that the conviction against the accused persons has not yet been established. He vehemently contended that the

learned S.D.J.M., Banki has awfully failed to appreciate the fact that it is not necessary that the allegation of rape is required to be proved before Section 3 of the MTP Act could be invoked. The said contention can be aptly reflected by the Madhya Pradesh High Court in the case of **Prosecutrix vs The State of Madhya Pradesh**[1]:

> *"(10) Testing the factual matrix attending the instant case on the anvil of provision of Section 3 of the 1971 Act, it is amply clear that the prosecutrix has alleged that she was subjected to rape and the pregnancy arises from the said incident of rape and since the period of pregnancy is below 20 weeks and she admittedly is subjected to grave injury to her physical and mental health due to said rape, this Court cannot stand in the way of the prosecutrix in getting her pregnancy aborted/ terminated.*
>
> *(11) This Court hastens to add that the Scheme of the 1971 Act is such that it allows triggering of Section 3 provision inter alia in cases where rape is alleged. It is not necessary that the allegation is proved before Section 3 can be invoked.*
>
> *(12) Consequently, since the prosecutrix satisfies the requirements of Section 3(2)(b)(i), this Court permits termination of pregnancy subject to prosecutrix consenting for termination in writing"*

7. Coming to the facts of the present case, the learned counsel pointed out that the victim is 20 years old girl of sound mind and the question of consent for termination of pregnancy may not be of relevance. However, the radiological report dated 06.10.2021 conducted by Dr.Sudipta Srichandan states that the gestational age is 26 weeks & 4 days +/- 2 weeks which is well beyond the statutory requirement. Therefore, to say what cannot be done in terms of the MTP Act, can be done if the court so directs, is a contradiction in terms. The Court needs to see what is legally possible. A thing that may be possible medically, may not be possible legally.

8. While examining the instant case, the Court is confronted with a dynamic tension between the Court's power to protect the rights of the victim and the solicitude for the unborn. In fact, the crime like rape affects the lives of victims and associated physical and emotional consequences. Considering the gravity of the issue, in the absence of any report by medical team ascertaining the actual period of pregnancy, this Court considered it appropriate to direct the office of the Advocate General vide order dated 01.11.2021 in order to facilitate the petitioner for testing of the period of pregnancy accurately by a team of doctors as prescribed under the Act.

1. Writ Appeal No. 745/2021 (MP High Court)

Accordingly, the office of the Advocate General arranged for such a test to be conducted on 3rd November, 2021 and the test report submitted by the medical team of S.C.B. Medical College and Hospital, Cuttack suggests it may be unsafe for getting the termination done at this stage. In fact, allowing the termination at this stage could endanger the mother's life or even lead to substantial and irreversible impairment of a major bodily function.

9. The cumulative intent behind the MTP Act which is still a legally sterile subject but with significant safeguards for the victim and the unborn, the provisions of the Act has further been enriched by judicial interpretation. Reproductive choice of a woman has been recognised as a fundamental right by a three Judges Bench of Hon'ble the Supreme Court in the case of **Suchita Srivastava & Anr. vs Chandigarh Administration**[2] wherein, it was observed that:

> *"**11.** A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. **There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India.** It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.Furthermore, women are also free to choose birth- control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a `compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."*

10. Further, the judgment in ***Suchitra Srivastava*** (supra), notes that a perusal of the provisions of the MTP Act makes it clear that ordinarily a

2. (2009) 9 SCC 1

pregnancy can be terminated only when a medical practitioner is satisfied that a 'continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health' [as per Section 3(2)(i)] or when 'there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped' [as per Section 3(2) (ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period. The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth-control methods since both of these eventualities have been equated with a 'grave injury to the mental health' of a woman. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is 'immediately necessary to save the life of the pregnant woman.

11. Similarly, while dealing with a pregnant rape victim's reproductive choice, the learned Division Bench of High Court of Rajasthan in the case of **State of Rajasthan vs S**[3], iterated that the infringement of the fundamental right to life of the victim heavily outweighs the right to life of the child in womb. It was further held as under:

> "*We are of the opinion that while making the above evaluation, the learned Single Judge did not take into account the correct perspective, the fact that the woman's right to make a reproductive choice has been recognized as a dimension of personality liberty by Hon'ble the Supreme Court in the case of Suchita Srivastava (supra). The reproductive choice has been held as covering procreation as well as abstention therefrom. Indisputably, a woman's right to privacy, dignity and bodily integrity is a fundamental right guaranteed by Article 21 of the Constitution of India.*

3. D.B. Spl. Appl. Writ No. 1344/2019

When the prospective child has been conceived as a result of rape, the eventuality has been held as causing grave injury to the mental health of a woman in the case of Suchita Srivastava (supra) and Explanation-1 to Section 3 of the MTP Act. While directing that the rape victim shall deliver the child, the learned Single Bench failed to consider the fact that the personal liberty of the woman was being impinged upon on two counts i.e. on her right to make a reproductive choice as well as posing a grave injury to her mental health and causing her Mental Trauma. In the comparative evaluation, the infringement of the fundamental right to life of the victim heavily outweighs the right to life of the child in womb. Therefore, we may reiterate that the fundamental right of the pregnant woman i.e. the child writ (12 of 20) [SAW-1344/2019] petitioner to get the pregnancy terminated would heavily outweigh the right of the foetus to be born."

12. Further, the Hon'ble the Supreme Court in the cases of **Mrs. X and Ors. vs Union of India and Ors.[4], Mamta Verma vs. Union of India and Ors.[5], A vs. Union of India[6]** and **Meera Santosh Pal & Ors. vs. Union of India & Ors.[7]**, has permitted termination of pregnancy of a foetus with "abnormalities" where duration of pregnancy was up to 24 weeks. In both the cases, there was a substantial risk of the child suffering from such physical or mental abnormalities as to be seriously handicapped upon birth. In the case of ***Mrs. X and Ors. vs Union of India and Ors.*** **(supra),** the Hon'be Court posited that:

*"**9.** Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly."*

13. Many judicial decisions permeates to the instant issue. Hon'ble High Court of Bombay in the case of **Sudha Sandeep Devgirkr vs Union of India[8]** was of the opinion that the conspectus of the decisions of the Hon'ble Supreme Court makes it quite clear that the Supreme Court has construed the provisions of Section 5 of the MTP Act, not narrowly by adopting the principle of literal construction but liberally by adopting the principle of purposive construction. The Hon'ble Court has consistently permitted medical termination of pregnancies which had exceeded the ceiling of 20 weeks where medical opinion established that continuance of pregnancy involved grave injury to the mental health of the pregnant woman or where

4. (2017)3 SCC 458 **5**. (2018) 14 SCC 289 **6**. (2018) 14 SCC 75
7. AIR 2017 SC 461 **8**. WRIT PETITION NO. 10835 OF 2018

there was substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. This was despite the fact that there was no immediate danger to the life of the pregnant mother. In effect therefore, the Hon'ble Supreme Court read into the provisions of Section 5 of the MTP Act the contingencies referred to in clause (i) and (ii) of Section 3 (2)(b) of MTP Act. Needless to state, this was upon satisfaction that the risk involved in the termination of such pregnancies was not greater than the risk involved in spontaneous delivery at the end of the full term.

14. Pertinently, in the present case, there is no opinion of any registered medical practitioner that the continuance of pregnancy of the petitioner would involve a risk to her life or grave injury to her physical or mental health. Further, there is no suggestion that if the child were born, it would suffer from any physical or mental abnormalities as to be seriously handicapped. In any event, as per the provision, an opinion to terminate pregnancy assumes importance in cases the length of the pregnancy does not exceed twenty-four weeks. Unfortunately, in the present case, the pregnancy exceeds 24 weeks and as per the requirement of the statute, the medical opinion of not less than two medical practitioners has also not been obtained. Moreover, there is no medical opinion that termination of pregnancy is immediately necessary to save the life of the petitioner as per Section 5 of MTP Act. Viewed from every angle, the provisions of the MTP Act do not permit the termination of pregnancy of the petitioner.

15. Indisputably, in the case at hand, the victim is being forced to bear and care for the unwanted child is bound to severely impact her personality and womanhood. Considering the present situation, where the victim chose to approach the Court through her guardian as per the MTP Act seeking termination of her undesired pregnancy albeit with some delay, her request should have been acceded to over and above the right to life of the child yet to be born. Though this issue has, time and again, knocks at the judicial threshold it is still crying for a unperplexed solution by way of suitable amendment in the statute governing the field.

16. Proper provisions are required to be made for the welfare, education and upbringing of the child. The child is innocent, just like the victim, his/ her mother. This Court is fully conscious of the hard realities of life and the possible traumas, the victim is undergoing and would face, in future. The

ordeal mental agony and fear of social ostracism can take a toll on the victim and even on the unborn child. As stated hereinabove, there is no other legal option for her but to undergo suffering and deliver the baby since the pregnancy is over twenty-six weeks old.

17. In the present case, the factual matrix suggests that the petitioner and her father initially approached the police station for the purpose of termination of pregnancy, but were directed to approach the concerned court as the charge sheet was filed by then. In this regard, this Court feels that the Police officers could have acted more sensibly and, at the very least, guided them to approach District Legal Service Authority or Legal Services Units at Taluk Level or to any para legal volunteers. This would have, perhaps, helped the victim to get timely legal advice and may have saved her from suffering the forced delivery, imposed on her due to medico-legal compulsions.

18. It is imperative that every police man should be given proper understanding of the working of legal services authority at different levels. The legal services authority could provide training modules to the police stations to sensitise and make the police officers aware of the role and functions of the authority. Upon registering a case, the police officers could then do well to suggest the victims to approach to the nearest legal service authority for legal assistance, if required. **The legal services authority at district level are also required to coordinate with the police department in setting up legal aid booths or providing legal services helpline numbers at each and every police station**. **The helpline numbers could be displayed in each police station to assist the victims**. Time is of the essence in matters involving MTP Act and no victim should suffer due to lack of onerous obligations involved in the process. Therefore, the role of legal services authority at district and taluk level assumes paramount importance to ensure no victim suffers due to lack of timely legal assistance.

19. In the light of the above, although this court is painfully conscious of the possible impact of this decision on the life of the petitioner, it is bound by the legal mandate. The physical, mental, psychological trauma suffered by the petitioner is formidable. Rape is a crime not only against a woman but against humanity at large as it brings out the most brutal, depraved and hideous aspects of human nature. It leaves a scar on the psyche of the victim

and an adverse impact on society. In the present case, the agony experienced by the petitioner has left a more visible impact. Only the sufferer knows the extent of the suffering. It is heart-wrenching to imagine the situation of the petitioner and what lies ahead of her. This Court does feel that her welfare is, therefore, paramount consideration for this court. However, as regards the legal position, the above discussion and the mandate of Section 3 of the MTP Act, in particular, leads only to one conclusion i.e., since the length of the pregnancy of the victim is over twenty-six weeks, this Court cannot permit its termination.

20. Given the peculiar facts and circumstances of this case, this Court believes that it may be necessary to pass certain orders in the interest of the victim and the unborn child. Keeping the welfare of the mother, child and the parents of the victim, this Court considers it appropriate to issue the following directions:

> 1).The District Collector, Cuttack shall ensure that arrangements are made to provide proper diet, medical supervision and medicines as may be necessary, to the victim throughout the remaining part of her journey of pregnancy. When the time for delivery arrives, proper medical facilities be made available for a safe delivery of the child.
>
> 2).The State Legal Services Authority shall ensure that the State Government shall pay an amount of Rs.10,00,000/- (rupees ten lakhs only) as compensation to the victim. This amount shall be over and above the compensation amount, if any, the learned Trial Court may direct to be paid to the victim and/or her child at conclusion of the trial in the underlying proceedings.

21. With the aforesaid orders, the present CRLMC is disposed of.

22. Urgent certified copy of this judgment/order be granted on proper application.

23. A free copy of this Judgment/ order be handed over to the learned Additional Government Advocate for the State for early compliance and another copy to the Secretary, State Legal Services Authority.

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2021 (III) ILR -CUT-788

S.K. PANIGRAHI, J.

CRLMC NO. 35 OF 2021

NALINI ACHARYA @ NALINIPRAVA ACHARYA & ORS. …….. Petitioners

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Jurisdiction – Offences U/ss. 441/442/467/486/384/387 of the Indian Penal Code, 1860, r/w section 3(1)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Interference of the Court – Held, when the ingredients of the offences prima facie lacking in the case to proceed against the petitioners more so, perusal of the materials on record goes to show that the essential ingredients of the alleged offences both under the Penal Code as well as under the S.C. and S.T (P.A) Act are not made out against the petitioners and no prima-facie cognizable offences are made out, the Court has the jurisdiction to interfere – The CRLMC allowed – Consequently the prosecution against the petitioners in ICC No. 22 of 2019 pending in the Court of the learned Special Judge, Jagatsinghpur stands quashed.

Case Laws Relied on and Referred to :-

1. 2020 (2) OJR (SC) 435 : D. Devaraja -vs. Owais Sabeer Hussain.
2. AIR 1992 SC 604 : State of Haryana & Ors. -vs. Bhajanlal & Ors.
3. (2006) 6 SCC 736 : Indian Oil Corporation -vrs.- NEPC India Ltd. & Ors.
4. (2000) 2 SCC 636 : G. Sagar Suri & Anr. -vrs.- State of U.P. & Ors.

For Petitioners : Mr. Devashis Panda
For Opp. Parties: Mr. Karunakar Gaya, ASC (O.P. No.1)
Mr. Pramod Ku. Lenka, ASC (O.P. No.2)

JUDGMENT Date of Hearing : 30.11.2021 : Date of Judgment : 23.12.2021

S.K. PANIGRAHI, J.

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for brevity) has been filed with a prayer to quash the proceedings of 1.C.C. No.22 of 2019 pending before the learned Special Judge, Jagatsinghpur for commission of the alleged offences under Sections 441/ 442/ 467/ 468/ 384/ 387 of the Indian Penal Code, 1860

(hereinafter referred to as "the I.P.C." for brevity) read with Sections 3(1)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the SC and ST (PA) Act" for brevity), and all proceedings consequent thereto.

2. The facts of the present case, in short, are summarized herein below:

(a). One Promod Kumar Lenka, an Advocate in Jagatsinghpur is disposed of towards Petitioner No.3 because of professional rivalry. The Petitioner No.1 is an Assistant Teacher in Galupada Atamal U.P. School, Petitioner No.2 is a Superintendent of Sishu Ashram, Jagatsinghpur, Petitioner No.3 is a Government Counsel, Petitioner No.4 is a retired Government employee. Because of avocation, the Petitioner Nos. 1 to 3 reside at Jayabada and they are visitors to the house of Petitioner No.4, who resides in his house with his other family members. The Petitioner No.3 has been adopted since childhood to the Acharya family who has their separate house in the village. The Petitioner No.2 is a resident fulltime at Sishu Ashram, Jagatsinghpur and he was visiting to his parents on holiday. The house of Petitioner No.4 is near that of the Opposite Party No.2 approachable through a black-topped public road, a part of which is claimed by Opposite Party No.2 as his ancestral land though it is used as public road.

(b). The dispute between Petitioners and Opposite Party No.2 arose when the local self-Government authority decided to construct a cement-concrete road over the existing black-topped road leading to the wife of Opposite Party No.2 to lodge a written report at Jagatsinghpur Police Station against the municipal staff supervising the construction work of the road which had been contracted to one Raghunath Mohanty.

(c). On 19.09.2019, the Opposite Party No.2 lodged a written report at Jagatsinghpur Police Station against the Petitioner No.3 and three others, which was registered as Jagatsinghpur P.S. Case No.311 of 2019. During investigation of the aforesaid case, the Opposite Party No.2 filed 1.C.C. No.22 of 2019 on 07.12.2019 before the court of learned Special Judge, Jagatsinghpur against the Petitioners. Prior thereto, on 20.10.2019, Raghunath Mohanty to whom the road construction had been entrusted had lodged a written report at Jagatsinghpur Police Station against the Opposite Party No.2, his wife and others and the same was registered as Jagatsinghpur P.S. Case No.355 of 2019.

(d). On 26.11.2019, the Opposite Party No.2 blocked the road, thereby the family members of Petitioner No.4 denied to go out of their house leading to a written report being lodged at Jagatsinghpur P.S. by Petitioner No.3 against Opposite Party No.2, his wife and another. The written report was registered as Jagatsinghpur P.S. Case No.427 of 2019. One Sulochana Devi, wife of Petitioner No.4 also lodged FIR on 01.12.2019 against Opposite Party No.2 and three others and the same was registered as Jagatsinghpur P.S. Case No.431 of 2019.

(e). On 29.11.2019, the Opposite Party No.2 filed C.S. No.443 of 2019 and I.A. No.302 of 2019 against the Executive Officer and Junior Engineer of Jagatsinghpur Municipality, Raghunath Mohanty, the Contractor and Petitioner No.3. Thereafter, on 07.12.2019, Petitioner No.3 filed C.S. No.460 of 2019 and I.A. No.314 of 2019 against Opposite Party No.2 and three others.

(f). It is further stated that the land in question where the road exists has been in existence as public road since years together and in lieu of that portion, the father of Opposite Party No.2 has been given Government land of same area adjacent to his plot which the family of Opposite Party No.2 is enjoying. The father of Opposite Party No.2, by letter dated 25.07.2019, has addressed to the Executive Officer, Jagatsinghpur Municipality stating that he permitted that particular portion of land for public use since 60 years. The electricity line as well as water supply pipe have been installed thereon by the Municipality. In lieu thereof, the Government has taken the possession and there is no objection to use the said portion as public road.

(g). In the complaint filed against the Petitioners, the Opposite Party No.2 has alleged that the incident happened on 27.11.2019 when the Petitioner No.1 along with accused persons, namely, Rajanikanta Mishra, IIC, Jagatsinghpur P.S., Bimal Kumar Lenka, Executive Officer, Jagatsinghpur Municipality and Debabrata Mishra, Junior Engineer, Jagatsinghpur Municipality, had removed the fence from his homestead land and his son was taken forcibly by the I.I.C., Jagatsinghpur P.S. from his house and further on 29.11.2019 at 8.00 P.M. in the night when it occurred in his house by all the accused persons named in the complaint wherein he has cited his wife and father along with one Pradeep Kumar Das as witnesses for commission of offences punishable under Sections 115B, 120B, 166, 177, 189, 219, 220, 323, 327, 329, 331, 338, 341, 380, 386, 387, 394, 455, 458, 460, 467, 506(II) and 34 of

the I.P.C. read with Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the SC and ST (PA) Act" for brevity).

(h). In the complaint, it is alleged that an area measuring Ac.22 decimal, Khata No.740, Plot No.3259 is homestead land in Mouza- Chatara stands recorded in the name of Opposite Party No.2. In map, the aforesaid area reflects that there is no Government Road and a road was being made by the Executive Officer and Junior Engineer of Jagatsinghpur Municipality under the Government's 'Unnati Yojana' from 'Mela Ghar' to the house of Petitioner No.4, who is not a voter of the village.

(i). It is further alleged against the Petitioner No.3 that he has been continuing in the panel of Assistant Public Prosecutor in Judicial Department for the last 20 years being identified as a political leader and was creating goonda-raj in the locality and has got recorded several landed properties in his name from the villagers without any sale deed. After termination from the post of Assistant Public Prosecutor by the Director, Public Prosecutions, Orissa without any court order on the basis of forged documents, the Petitioner No.3 and his wife were continuing as teachers on the basis of forged documents. The Opposite Party No.2 has further alleged that some months ago he learnt from public gossip about construction of public road forcibly by the Executive Officer and Junior Engineer of Jagatsinghpur Municipality over his homestead plot having been proposed by Petitioner No.3 for which Opposite Party No.4 has sent a Pleader's notice on 03.12.2018 to the Collector, Jagatsinghpur, with a copy to the I.I.C., Jagatsinghpur P.S. requesting that no concrete road should be made on his homestead land. Thereafter, on 28.07.2019, the Petitioner No.3 abused to Opposite Party No.2 in the public casting aspersions on his caste and threatened him for sending notice to the Municipality which he has reported to the I.I.C., Jagatsinghpur P.S. in a FIR. But as no action was taken, the Opposite Party No.2 has again sent the said allegations in writing on 29.07.2019 to the I.I.C., Jagatsinghpur P.S., but he did not take any action against Petitioner No.3.

(j). It is further alleged that on the directions of Petitioner No.3, the Municipality authorities started construction of concrete road over the homestead plot of Opposite Party No.2 through a contractor and created several problems resulting in a written FIR being lodged by him on 19.09.2019. The said FIR has been registered under Sections 294, 506, 447,

379 and 34 of the IPC read with Sections 25 and 27 of the Arms Act against Petitioner No.3 vide Jagatsinghpur P.S. Case No.311 of 2019, instead of registering under Sections 386, 387, 457 and 380 IPC as well as under Section 3 of the SC and ST (PA) Act to show favour to Petitioner No.3 and the contractor. The Opposite Party No.2 further alleged on 27.11.2019 that the Petitioner No.1 along with the I.I.C., Jagatsinghpur P.S. and the Municipality authority came to his homestead plot in a police van and abused his wife and son, removed the fence and took his son Laxmidhar Samal to the Polie Station. Thereafter, the Opposite Party No.2 went to meet the Superintendent of Police, Jagatsinghpur, who ordered him to go to the I.I.C., Jagatsinghpur. Then, the I.I.C., Jagatsinghpur informed the Opposite Party No.2 that on the basis of a written FIR registered on Memo No.4565 of the Executive Officer, Jagatsinghpur Municipality; complainant's son has been arrested. Further, it is alleged that on 29.11.2019 the police arrived at his house to arrest him and the Executive Officer and Junior Engineer, Jagatsinghpur Municipality made concrete road over complainant's homestead plot being protected by the I.I.C., Jagatsinghpur P.S. and the direction of Petitioner No.3, for which complainant has raised a grievance before the Superintendent of Police, Jagatsinghpur. When the Opposite Party No.2 went to the I.I.C., Jagatsinghpur P.S. being sent by the Superintendent of Police with Grievance No.24505027071900042 dated 29.11.2019 he was abused and threatened by the I.I.C. in filthy language saying that he does not care for the Superintendent of Police's orders and that both he and Petitioner No.3 were Brahmins and casting aspersions on Opposite Party No.2's caste has threatened him not to obstruct road construction, otherwise he and his family would be arrested and asked him to get out from the Police Station. After three days, on the directions of Petitioner No.3, the I.I.C. forwarded the complainant's son to court in bailable offences in Jagatsinghpur P.S. Case No.427 dated 27.11.2019 registered under Sections 341, 283, 506, 384 and 34 of the IPC which was registered on the basis of allegations made by Petitioner No.3, whom complainant had named as an accused in Jagatsinghpur P.S. Case No.311 dated 19.09.2019. Thereafter, at about 5.00 P.M. police arrived at his house and threatened his wife stating that unless her husband reached the Police Station by 7 'o' clock evening he would come in the night hours and arrest both husband and wife again casting aspersions on their caste.

(k). Again, at about 8.00 P.M. on 29.11.2019, the Petitioners came to the house of Opposite Party No.2 and Petitioner No.3 forced the wife of Opposite Party No.2 to sign on four blank non-judicial papers threatening that otherwise he would call the police and arrest the couple and also forcibly taken her signatures on six blank non-judicial papers while Petitioner No.1 took away a gold mangalsutra of 3 gms. weight and Petitioner No.2 took away hard cash of Rs.1,000/- and thereafter all of them left complainant's house threatening his wife in filthy language in the public casting aspersions and calling her by their caste name and threatening with dire consequences, if the road construction was opposed.

(l). The Opposite Party No.2 further alleged on 02.12.2019 that he gave a written FIR to the Superintendent of Police, Jagatsinghpur for being sent to the I.I.C., Jagatsinghpur but it was not registered nor copy thereof was supplied to him. Thereafter, he filed complaint in the court with a prayer to send the same to the I.I.C., Jagatsinghpur P.S. under Section 156(3) of the Cr.P.C. for registration and investigation.

(m). The prayer in the complaint was for a direction to be issued under Section 156(3) of the Cr.P.C. to the I.I.C., Jagatsinghpur P.S. The learned Special Judge, Jagatsinghpur conducted an inquiry under Section 202 of the Cr.P.C. after recording the statement of Opposite Party No.2 under Section 200 of the Cr.P.C. and by order dated 25.02.2020, called a report from the I.I.C., Jagatsinghpur P.S. under Section 210 of the Cr.P.C. in respect of the progress and present position of Jagatsinghpur P.S. Case Nos.311 of 2019 and 427 of 2019. In respect thereto, the I.I.C., Jagatsinghpur P.S. stated that both the cases were investigated into and in Jagatsinghpur P.S. Case No.311 of 2019, which was duly investigated by the S.D.P.O., Jagatsinghpur and supervised by the Addl. Superintendent of Police, Jagatsinghpur together with enquiry conducted jointly by them, it has been returned as false FIR vide final form No.160 dated 29.02.2020 with the facts having been intimated to the informant.

(n). As regards Jagatsinghpur P.S. Case No.427 of 2019, it is stated that the investigation has led to arrest the son of Opposite Party No.2 on 29.11.2019 and that he has been forwarded to court on the same day and investigation is continuing. It is further alleged that Petitioner No.3 and other villagers wanted a village road, but the Opposite Party No.2 was protesting that construction with the support of his lawyer who has professional rivalry with

Petitioner No.3. The report was placed before the learned Special Judge, Jagatsinghpur, who after perusing the police report has quietly passed the impugned order under Annexure-1 holding that the incidents which relate to Jagatsinghpur P.S. Case Nos.311 and 427 of 2019 do not relate to the subject matter of 1.C.C. No.22 of 2019 and that *prima facie* case in respect of offences punishable under Sections 441, 442, 467, 468, 384, 387 of the IPC and Section 3(1)(r)(s) of the SC & ST (PA) Act was made out against the Petitioners. Thereafter, the learned Special Judge has taken cognizance and issued summons for their appearance in court further holding that no sufficient ground was made out for proceeding against the I.I.C. of the aforesaid Police Station as well as the Executive Officer and Junior Engineer of Jagatsinghpur Municipality in respect of any of the penal offences alleged against them besides the fact of want of sanction to prosecute them for incidents that were reasonably connected with discharge of some official duties by them.

3. Being aggrieved by the order dated 24.12.2020 passed in 1.C.C No.22 of 2019 by the learned Special Judge Jagatsinghpur under Annexure-1, the present Petitioners filed this petition under Section 482 of the Cr.P.C. for quashing of the said order and proceedings thereon.

4. Perused the contents of the complaint petition, initial statements of the complainant Bishnu Charan Samal recorded under Section 200 Cr.P.C., the statements of two witnesses i.e. Anjana Bhoi and Pradeep Kumar Das recorded under Section 202 Cr.P.C. and the records of G.R. Case No.1060 of 2019, arising out of Jagatsinghpur P.S. Case No.311 of 2019 and G.R. Case No.1398 of 2019 arising out of Jagatsinghpur P.S. Case No.427 of 2019 and found that the I.C.C. No.22 of 2019 has been filed by the complainant for the occurrence of the alleged incident on 29.11.2019 at about 8 P.M. in his house at village-Chatara.

The FIR of Jagatsinghpur P.S. Case No.311 of 2019 was lodged by the informant Bishnu Charan Samal (who is the complainant in I.C.C. No.22 of 20219) for the alleged incident on 19.09.2019, in which, the Investigating Officer has submitted final report indicating the same as false case.

The FIR of Jagatsinghpur P.S. Case No.427 of 2019 was lodged by the accused, namely, Krushna Chandra Acharya against the complainant of the case i.e. against Bishnu Charan Samal and others for the alleged incident on 27.11.2019, in which, the investigation is going on.

5. As such, the alleged incidents of the above two police cases vide Jagatsinghpur P.S. Case No.311 of 2019 and 427 of 2019 are not the subject matter of inquiry of the complaint vide 1.C.C. No.22/2019.

6. Therefore, an order, whether processes are to be issued or not to be issued against the persons (named as accused persons in the complaint petition vide I.C.C. No.22/2019) is to be passed on satisfaction after perusing the complaint petition of the complainant, initial statement of the complainant recorded under Section 200 of the Cr.P.C. and the statement of the witnesses recorded under Section 202 of the Cr.P.C.

7. On perusal of the aforesaid materials available on record, the learned Special Judge came to the conclusion that there is sufficient ground for proceeding against Krushna Chandra Acharya, Nalini Prava Acharya, Anjaneya Acharya and Banshidhar Das for their implications with the offences under Sections 441, 442, 467, 468, 384 and 387 of the IPC read with Section 3(1)(v)(s) of the SC and ST (PA) Act and took cognizance of the offences under Sections 441, 442, 467, 468, 384 and 387 of the IPC read with Section 3(1)(v)(s) of the SC and ST (PA) Act against the accused persons, namely Krushna Chandra Acharya, Nalini Prava Acharya, Anjaneya Acharya and Bansidhar Das. Thereafter, he issued summons to the aforesaid accused persons under Section 204 of the Cr.P.C. for their implications with the offences under Sections 441, 442, 467, 468, 384 and 387 of the IPC read with Section 3(1)(v)(s) of the SC and ST (PA) Act directing them to appear before the court. However, he further held that the materials available on record do not make out a case against three persons i.e. Rajani Kanta Mishra (IIC, Jagatsinghpur P.S.) Bimal Kumar Lenka (Executive Officer, Jagatsinghpur, Municipality) and Debabrata Mishra (Junior Engineer, Jagatsinghpur, Municipality) in respect of any of the Penal offences. In addition to that, he further held that there is want of sanction from the appropriate Government under Section 197 of the Cr.P.C. for their prosecution in the case in view of the ratio decided by the Hon'ble Apex Court in ***D. Devaraja vs. Owais Sabeer Hussain***[1], 2020 (2) OJR (SC) 435 as the acts alleged against them are reasonably corrected with their discharging official duties. Accordingly, the learned Special Judge dismissed the complaint filed by Bishnu Charan Samal under Section 203 of the Cr.P.C. against the afore-stated accused persons.

1. 2020 (2) OJR (SC) 435

The Bench Clerk was directed to issue processes to the accused persons namely, Krushna Chandra Acharya, Nalini Prava Acharya, Anjaneya Acharya and Bansidhar Das for their appearance before this Court in this case on dated 27.01.2020 for their implications with the offences under Sections under Sections 441, 442, 467, 468, 384 and 387 of the IPC read with Section 3(1)(v)(s) of the SC and ST (PA) Act.

8. Learned counsel for the Petitioners placed reliance on the judgment of the Hon'ble Apex Court passed in the case of ***State of Haryana and others vs. Bhajanlal and others***[2] and contended that where the allegations made in the F.I.R. or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused; where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused; where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused and where a criminal proceeding is manifestly attended with mala fide and/ or where the proceeding is maliciously instituted with an anterior motive for wreaking vengeance on the accused and with a view to spit him due to private and personal grudge as is there in the present complaint, this Court has jurisdiction to exercise power under Section 482 of the Cr.P.C. to quash the aforesaid proceeding. He further contended that averments made in column 8, subparagraph on which reliance has been placed by the learned Special Judge do not establish prima facie case against the preset Petitioners for commission of offences under Sections 441/ 442/ 467/ 468/ 384/ 387 of the I.P.C. In addition, no offence under Section 3(i)(r)(s) of the S.C. and S.T. (PA) Act has been made out against the present Petitioners, since the alleged occurrence has never occurred in a public place, but inside the house of the complainant.

9. Before adverting to the case of the Petitioners, it would be apposite to have a look on the case of ***Indian Oil Corporation -vrs.- NEPC India Ltd. and Others***[3], wherein the Hon'ble Apex Court referring to the judgment passed in ***G. Sagar Suri and Another -vrs.- State of U.P. and Others***[4]:, have held as follows:

2. AIR 1992 SC 604 **3**. (2006) 6 SCC 736 **4**. (2000) 2 SCC 636

> "13……it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/ creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriage/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In **G. Sagar Suri -vrs. State of U.P. and Others** : (2000)2 SCC 636, this Court observed:
>
> "It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."
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> 14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant……"

10. Keeping in mind the aforesaid, when the case in hand is addressed, the ingredients of the offences are as such *prima facie* lacking in this case, to proceed against the petitioners. More so, perusal of the materials on record goes to show that the essential ingredients of the alleged offences both under the Penal Code as well as under the S.C. and S.T (PA) Act are not made out against the Petitioners and no *prima-facie* cognizable offences are made out. Since the alleged incident has never occurred in public place but inside the house of the complainant, it cannot be said that the order of cognizance and issuance of process there under is well founded in law.

11. Hence, this Court is of the view that, the criminal proceeding against the present Petitioners was without any substance and as such this CRLMC stands allowed and the impugned order stands set aside. Consequently, the

prosecution against the Petitioners in I.C.C. No.22 of 2019 pending in the court of the learned Special Judge, Jagatsinghpur stands quashed. The court concerned on receipt/ production of the certified copy of this order shall do well to drop the aforesaid proceeding against the Petitioners.

12. With the aforesaid order, this CRLMC stands disposed of being allowed.

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2021 (III) ILR -CUT-798

MISS SAVITRI RATHO, J.

CRIMINAL REVISION NO. 1 OF 2021

BINAYAK KANHAR ..... Petitioner

.V.

STATE OF ORISSA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167(2) read with section 36-A (4) of the NDPS Act, 1985 – Statutory bail/Mandatory bail – Offences under sections 20(b)(ii)(C) & 25, 29 of the NDPS Act – Non completion of the investigation within the statutory periods, i.e, within 180 days – In the present case, application for extension of the investigation filed and on the same day application was allowed without serving copy to the accused – Order of the Trial Court challenged – Prayer of the petitioner to grant default /statutory/ mandatory bail considered and bail granted.

Case Laws Relied on and Referred to :-

1. (2018) 71 OCR 31: Lambodar Bag vs. State of Orissa.
2. (2020) 80 OCR 289: Iswar Tiwari vs. State of Odisha.
3. CRLMC No.1358 of 2020 (decided on 08.02.2021) : Rohiteswar Meher vs. State of Odisha
4. BLAPL No.11113 of 2019 (decided on 08.02.2021) : Ramina Bewa vs. State of Odisha.
5. BLAPL No.4652 of 2020 (decided on 27.01.2021) : Naresh Digal vs. State of Odisha.
6. (2021) 2 SCC 48 : M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence.

7. 2007 Crl.L.J 2316 : Rasheek V State of Karnataka.
8. 1994 SCC (4) 602: Hitendra Vishnu Thakur Vs. State of Karnataka.

For Petitioner : Mr. Suryakanta Dwibedi
For Opp.Party : Mr. G.N Rout, Addl. Standing Counsel

ORDER Date of Order : 21.10.2021

SAVITRI RATHO, J.

1. Mr. S.K. Dwibedi, learned counsel for the petitioner and Mr. G.N Rout, learned Addl. Standing Counsel for the State have been heard through hybrid mode.

2. This is an application under Section 401 of Cr.P.C. challenging the order dated 17.12.2020 passed by the learned Special Judge -cum- Addl. Sessions Judge, Balliguda in C.T. Case No. 23 of 2020 arising out of Balliguda P.S. Case No.110 of 2020 registered for commission of offence punishable under Sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act, rejecting the application of the petitioner to release him on default bail for non submission of chargesheet within the stipulated period of 180 days.

The application has been rejected holding that the procedure has been rightly followed as the prosecution has filed the application for extension before completion of the stipulated period and notice could not be issued to accused due to absence of his counsel.

The petitioner has filed BLAPL No.5608 of 2021 after his prayer for bail was rejected vide order dated 17.12.2020 by the Special Judge -cum-Addl. Sessions Judge, Balliguda on merit. The BLAPL is still pending.

3. The prosecution allegations in brief are that on 05.06.2020 at about 1.00 P.M., the petitioner was apprehended by the police while transporting 81 Kgs. 900 gms of ganja without valid papers. Two other accused persons who were on a motorcycle and were escorting the auto rickshaw, escaped.

4. Learned counsel for the petitioner has submitted that the petitioner is in judicial custody since 06.06.2020. He further submits that the stipulated period of 180 days for submission of chargesheet was due to expire on 03.12.2020 and before expiry of the said period, on 26.11.2020, the learned Special P.P has prayed for extension of a further period of 180 days as investigation could not be completed. But without service of copy of the said

petition on the petitioner or his counsel and without affording any opportunity of hearing, the time for filing the chargesheet was extended by 30 days. Before filing of the chargesheet on 23.12.2020, the application for default bail was filed on 15.12.2020. But the learned Court below has erroneously rejected the application on the ground that the I.O had prayed for extension of time as the chemical examination report had not been obtained and copy of the petition could not be served on learned counsel Mr. A. Patnaik appearing for the petitioner as he could not be found and notice could not be issued to the petitioner, due to absence of his counsel, hence procedure has been rightly followed.

Mr. Dwibedi, learned counsel for the petitioner further submits that Sub-section 36-A(4) of the N.D.P.S. Act mandates that an opportunity of hearing must be given to the accused before granting extension for completing investigation and the learned court below has erred in proceeding to decide the application moved by the prosecution in terms of Section 36-A (4) of the N.D.P.S. Act without issuing notice to the petitioner or hearing him or his counsel for which the grant of extension is illegal. The period of 180 days being completed on 03.12.2021 and the application under Section – 167 (2) of the Crl.P.C having been filed on 15.12.2020 before the chargesheet was filed on 23.12.2020, the application of the petitioner should have been allowed. In support of his submissions, he relies on the decisions of this Court rendered in the case of :

i) ***Lambodar Bag vs. State of Orissa*** *reported in* ***(2018) 71 OCR 31,***

ii) ***Iswar Tiwari vs. State of Odisha*** *reported in* ***(2020) 80 OCR 289,***

iii) ***CRLMC No.1358 of 2020 : Rohiteswar Meher vs. State of Odisha (decided on 08.02.2021),***

iv) ***BLAPL No.11113 of 2019 : Ramina Bewa vs. State of Odisha (decided on 08.02.2021),***

v) ***BLAPL No.4652 of 2020 : Naresh Digal vs. State of Odisha (decided on 27.01.2021).***

5. Mr. G.N. Rout, learned Addl. Standing Counsel opposes the prayer for bail submitting that the petitioner has been caught red handed with about 87 Kgs. of ganja which is of commercial quantity and copy of the application for extension of time had been served on the learned counsel as would be apparent from a perusal of the order dated 26.11.2020 and hence the

contention that principles of natural justice have been violated, have no merit. He relies on the decision of the Hon'ble Supreme Court rendered in the case of ***M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence reported in (2021) 2 SCC 48***, in support of his submission.

6. It is no longer res integra that though not expressly provided in Section 36-A (4) of the N.D.P.S. Act, while granting extension of time by exercising power under the said provision, as the valuable right of the accused will be affected, he has to be given an opportunity of hearing and this opportunity has to be effective. Mere service of copy of the application on the accused or his counsel without affording reasonable time or opportunity to oppose the prayer for extension, cannot be stated to be a compliance of such right.

7. A careful perusal of the relevant orders passed by the learned Additional Sessions Judge -cum- Special Judge, Balliguda is necessary, in order to decide the contentions raised by the learned counsels.

The petitioner had initially filed the certified copy of the order dated 17.12.2020 (Annexure-1) and certified copy of the orders dated 05.06.2020 and part of the order dated 26.11.2020 passed in C.T. No 23 of 2020 (Annexure-3). He has thereafter alongwith a memo filed the certified copy of the order dated 26.11.2020 passed later on the same day vide which the period to compete investigation has been extended by a period of 30 days.

Photocopy of the trial court record in C.T. No.23 of 2020 pending in the court of learned Special Judge -cum- Addl. District & Sessions Judge, Balliguda had been called for by this Court vide order dated 28.01.2021 and other than the order sheet, the other documents have not been chronologically arranged and page marked.

8. Perusal of the photocopy of the order sheet reveals that the accused had been arrested and forwarded to the Court of the Special Judge, Balliguda on 06.06.2020.

The bail application dated 06.06.2020 of the petitioner was taken up for consideration on 09.06.2020 and rejected. Thereafter the case has been posted on 18.06.2020, 15.07.2020, 17.08.2020, 08.10.2020 and 05.11.2020 awaiting the final form.

On 05.11.2020, the petitioner had been produced from jail custody, the case had been directed to be put up on 03.12.2020 awaiting final form and the petitioner had been remanded till then.

On 26.11.2020 the case was put up on receipt of the prayer of the I.O to issue N.B.W of arrest against the co accused persons .This was allowed and the case was directed to be put up on 03.12.2020 on the date fixed for their production.

Later, on the same day (26.11.2020), the I.O made a prayer to extend the period of 90 days for further investigation and submission of chargesheet. The Court directed it be put up later for order. Thereafter the Special P.P filed a petition under Section 36-A (4) of the N.D.P.S. Act to extend further period of 90 days in view of the prayer of the I.O. Copy of the petition was served on the learned defence counsel.

These orders are extracted below :

"*Later (26.11.2020)*

"The I.O. has made a prayer to extend the period of 90 days for further investigation and for submission of charge sheet. Copy of the petition is served on the learned Addl. P.P. Put up later for order.

Sd/-
Special Judge cum ADJ, Balliguda
26.11.2020 .

Later

Learned Special P.P. cum Addl. P.P. files a petition u/s 36- A(4) of NDPS Act to extend further 90 days to complete the investigation in this case in view of prayer made by I.O. Copy of the petition is served on learned defence counsel. Heard.

The provision to sub-sec. (4) of s-36-A of the NDPS Act makes it clear that, if it is not possible to complete the investigation within the period of 180 days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 180 days. The provision of sub-section (4) of s-36A of the NDPS Act has been enacted for the purpose of declaring a law relating to the narcotic drugs and to make stringent provision for the regulation of operations relating to narcotic drugs and thus NDPS Act being a Special Act it overrides the general provision of s. 167(2) of Cr.P.C. (Rasheek V State of Karnataka 2007 Crl.L.J 2316) (Kant).

In view of the said provision the petition filed by the learned Special P.P. is allowed. The I.O. is directed to complete the investigation and to submit the

charge sheet further in a period of 30 days. Put up on the date fixed awaiting Final Form. Send an extract of this order to the I.O."

Sd/-
Special Judge cum ADJ, Balliguda
26.11.2020.

On 03.12.2020, the accused was produced and the case was posted to 11.01.2021 for production of accused persons and awaiting final form and the petitioner was remanded to jail custody till that date.

On 14.12.2020, the case was put up on strength of an advance petition and vakalatnama filed by counsels Sri K.S. Pradhan and Sri Ajit Ku. Pattanaik on behalf of the petitioner was accepted and the case directed to be put up on 11.01.2020.

Thereafter the case was advanced to 15.12.2020 on basis of a petition filed by Advocate Sri K.S. Pradhan who also filed a petition under Section – 167 (2) Cr.P.C to enlarge the petitioner on default bail alongwith a memo with copy of the judgement passed in BLAPL No. 10152 of 2019 dated 20.08.2020. After hearing both sides, the case was posted to 17.12.2020 for orders.

On 17.12.2020, the petition filed under section – 167 (2) of the Crl.P.C has been rejected.

Thereafter chargesheet dated 23.12.2020 has been submitted on 23.12.2020 and after perusal of the case record and the documents etc, the learned Special Judge, found a prima facie case made out against the petitioner and the two other absconding accused persons and has taken cognisance of the offences punishable under Sections – 20(b)(ii) (C)/25/29 of the N.D.P.S. Act and posted the case to 11.01.2021 for production of the co-accused Radhakanta Digal and Mantu @ Bibek Digal.

9. The cases of ***Lambodar Bag*** (supra) and ***Naresh Digal*** (supra) are applicable to the facts of this case.

In the case of **Lambodar Bag** (supra), this Court relied upon the decision of the Hon'ble Supreme Court in the case of ***Hitendra Vishnu Thakur Vs. State of Maharashtra*** reported in ***1994 SCC (4) 602*** and held as follows:-

"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.*

…….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 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……. 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 ***Naresh Digal*** (supra), this Court has held as follows:-

"An order for release on bail under the proviso (a) of section 167(2) of the Cr.P.C. is an order on default on the part of the prosecution to file charge sheet within the prescribed period. It is a legislative command and not a judicial discretion of the Court. An indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in completing the investigation within the period prescribed. If an accused entitled to be released on bail under the proviso (a) makes an application before the Magistrate, there 11 is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not and whether a challan has been filed or not. The merits of the case are not to be gone into while releasing the accused on bail under proviso (a) to section 167(2) Cr.P.C.

In the case in hand, the period of completion of investigation as per sub-section (4) of section 36-A of the N.D.P.S. Act from the first date of remand of the petitioner to custody was one hundred eighty days which was expiring on 13.12.2020 and the said period of investigation could have been extended as per proviso to the section in the manner it is provided which must be after complying principle of natural justice and after providing fair opportunity to the petitioner to have his say and oppose the extension sought for by the prosecution.

Therefore, when a petition was filed by the investigating officer in advance on 04.12.2020 (which was not the date fixed in the case earlier) through the Special Public Prosecutor to extend the period of completion of investigation for a further period of ninety days and copy of the petition was also served on the learned defence counsel on 04.12.2020, since nine 12 days more period was still there for completion of one hundred eighty days, in all fairness of things, the case should have been posted to some other date by the learned Special Judge to consider the petition on merit by giving opportunity to the learned defence counsel to obtain instruction from the petitioner, who was in jail custody and to file his objection, if any, to such petition. If no objection would have been filed from the side of the petitioner, then the Court after hearing both the sides could have passed the order and similarly, if any objection would have been filed from the side of the petitioner, the Court could have passed the order considering the objection in accordance with law after giving opportunity of hearing to both the sides. In this case, when the order was passed on the very day the extension petition was served on the defence counsel and in the order, there is nothing to show that the defence counsel was aware that the petition would be considered on that day itself and there is also nothing that the defence counsel did not want to file any objection after taking instruction from the petitioner and there is also nothing that the defence counsel was present at the time of hearing of the petition and when it was the duty on the part of the Court to grant some reasonable time to the defence counsel to obtain instruction from the petitioner to file objection, if any, 13 the same

having not being done in this case, it cannot be said that fair opportunity was provided to the petitioner to have his say and oppose the extension sought for by the prosecution. Mere serving a copy of the extension petition by the prosecution on the defence counsel and that to on a date which was not earlier fixed, is not sufficient to assume that fair opportunity was provided to the petitioner.

In that view of the matter, I am constrained to hold that the order of extension to complete the investigation granted by the learned Special Judge as per order dated 04.12.2020, is not in accordance with law and therefore, the petitioner is entitled to be released on bail on that ground itself. Accordingly, the prayer for bail is allowed."

In the case of ***M Ravindran*** (supra), the Hon'ble Supreme Court was considering a case where the prayer for bail of the petitioner for default bail had been allowed by the trial Court but the said order had been set aside by the High court for which the petitioner had approached the Hon'ble Supreme Court. The court after referring to its earlier decisions arrived at these conclusions:

"25. Therefore, in conclusion:

25.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation.

Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

25.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the

accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid."

In **Iswar Tiwari** (supra), as time for completing investigation had been extended without giving an opportunity of hearing to the petitioner, it was held that non-service of notice on the accused was violative of the most cardinal principle of natural justice i.e. Audi Alteram Partem which created an indefeasible entitlement to bail to the petitioner and he was directed to be released on bail.

In the case of ***Rohiteswar Meher*** (supra), the order granting extension to the prosecution for completion of investigation was set and the petitioner directed to be released on bail he had not been given any opportunity of hearing to lead his legitimate objections nor he had been informed about his right of default bail before granting extension of 30 days to the prosecution.

In the case of ***Ramina Bewa*** (supra), on completion of 180 days neither any extension of time was prayed by the prosecution nor the challan / charge-sheet was filed. The final report in terms of Sec.167(2) of the Cr.P.C. was filed beyond the 180 th day. It was held that right of the accused to be released on default bail for non submission of final report / charge-sheet / challan within the period stipulated in Sec.167, Cr.P.C., is an indefeasible one and the oral prayer of the petitioner for being released on default bail made during pendency of her regular bail application was accepted and it was directed to release the petitioner on bail.

10. From a reading of the order dated 26.11.2020 extending the period for investigation by 30 days, it is apparent that it has been passed on the same day the applications of I.O. and Special P.P. for extension were filed. Although it is stated in the order dated 26.11.2020 that copy of the application of the Special P.P. has been served on the learned defence counsel but subsequently, vide order dated 17.12.2020, the learned Special Court has itself observed that that copy of the application could not be served on the learned counsel as he was not present .

Copies of two petitions of the Inspector Balliguda Police Station dated 25.11.2020 are available in the photo copies of the documents sent to this Court. But these documents have not been chronologically arranged or page marked. The two petitions are :

(i) L.No. 3098 /PS dated 25.11.2020 consisting of four pages, Sub: Prayer passing orders to allow another period of three months i.e 90 (ninety) days beyond the stipulated period of 180 days to complete the investigation; and

(ii) L.No. 3097 / PS dt. 25.11.2020 consisting of two pages, Sub: Prayer for issuing NBW against the absconding accused persons namely Mantu @ Bibek Digal (23) S/o Baladeb Digal and Radhakanta Digal (22) S/o Sida Digal, both are of village - **Baligata**, P.S. - Phiringia, District- Kandhamal. The photocopy of the petition stated to have been filed by the Special P.P. under Section – 36-A(4) of the N.D.P.S. Act on 26.11.2020 is not available among the documents sent to the High Court.

11. Be as it may, a perusal of the part of the orders passed on 26.11.2020, reveals that the prayer of the I.O. to extend the period of 90 days for further investigation and submission of chargesheet has been served on the learned Addl. P.P. and the petition of the learned Special P.P. cum Addl. P.P. filed under Section - 36-A (4) of the N.D.P.S. Act is served on the learned defence counsel. The copy of the petition filed by the learned Special P.P. is not available to ascertain if endorsement of the defence counsel is available on it. But non availability of copy of the petition is not of much consequence while deciding this criminal revision for two reasons;

i) The learned Special Judge has himself observed in the impugned order dated 17.12.2020 that copy of the application could not be served on the learned defence counsel due to his unavailability.

ii) Even assuming for moment, that the copy of the petition had been served on the learned defence, as the case was not posted to that day i.e. 26.11.2020 there was no necessity for the defence counsel to be present in Court on that day in the absence of any intimation that the application would be taken up for disposal / hearing on that day. That apart, as the case was taken up and heard on the very day the petition of the I.O. and Special P.P were filed and the learned defence counsel could not be expected to be in a position to obtain instructions from the accused and contest the application on the same day.

12. The fact remains that neither the counsel for the petitioner nor the petitioner himself were heard before the order for extension of time for investigation was passed, for which the order dated 26.11.2020 granting extension of time was illegal and is liable for interference. Another feature of this case is that the petitioner had not been produced from custody nor heard nor was his counsel present on 26.11.2020 as the case was not posted to that

day. It also appears that 180 would have been completed on 03.12.2020 and hence there was ample time for the Court to adjourn the matter to any date before 3.12.2020, and thereby granting opportunity to the petitioner and / or his counsel to have their say on the application filed for extension by the prosecution.

13. It is not disputed that the application under Section 167 (2) Crl.P.C has been filed on 15.12.2020 while chargesheet has been submitted on 23.12.2020 and period of 180 days would have been completed on 3.12.2020.

14. After considering the submissions of the counsel and in view of the provisions of Sec- 36-A (4) of the N.D.P.S. Act, the decision of the Apex court in the case of **Hitendra Vishnu** (supra), the decisions of this Court in the case of **Lambodar Bag** (supra) and **Naresh Digal** (supra) and the discussion made above, I am of the view that the extension of time granted by the learned Special Court without affording of hearing to the petitioner, is illegal, for which the petitioner is entitled to the benefit of default bail under Section - 167 (2) Crl.P.C. While considering an application under Section 167 (2) of the Crl.P.C., the gravity of the offence or the merits of the prosecution case are not required to be considered. Impugned order dated 17.12.2020 rejecting the application for default bail is therefore set aside and the application of the petitioner filed under Section – 167 (2) of the Crl.P.C is allowed.

15. Let the petitioner Binayak Kanhar be released on bail in the aforesaid case on such terms and conditions as deemed fit and proper by the learned Special Judge -cum- Additional Sessions Judge, Balliguda, including the following conditions:

(i) that he will appear in Court on each date fixed for trial;
(ii) he will not try to influence witnesses;
(iii) he will not indulge in any criminal activity ; and
(iv) he will appear in the Phiringia Police Station between 3.00 pm to 5.00 pm on every alternate Tuesday, till commencement of trial.

Violation of any of the conditions will entail in cancellation of bail.

The Criminal Revision is accordingly allowed.

A copy of this order be sent to the I.I.C., Phiringia Police Station and the I.I.C., Balliguda Police Station for their information.

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2021 (III) ILR -CUT-810

SASHIKANTA MISHRA, J.

CRLMC NO. 1648 OF 2021

PRASANTA MANNA@ PRASANTA KUMAR MANNA …….. Petitioner

.V.

STATE OF ODISHA …….. Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 437(6) – Bail in case non bailable offence – Applicability – Whether this provision apply in case of accused who has not been released due to non fulfilment of bail conditions/non furnishing the bail bond? – Held, No.

For Petitioner : Md. Mustaq Ansari & S.Swain

For Opp.Party : Mr. S.K. Mishra, Addl. Standing Counsel

ORDER Date of Hearing : 26.10.2021 : Date of Order : 03.11.2021

SASHIKANTA MISHRA, J.

The Petitioner in this application filed under Section 482 Cr.P.C. seeks to challenge the order dated 01.09.2021 (Annexure-9) passed by learned J.M.F.C, Sambalpur in G.R. Case No. 1441 of 2018, whereby the petition filed by him purportedly under Section 437(6) of Cr.P.C. was rejected.

2. The petitioner is facing trial as an accused in the above mentioned case which has arisen out of Hirakud P.S. Case No. 80 dated 15.05.2018 under Section 408 of I.P.C. He was granted bail by this Court vide order dated 09.07.2019 passed in BLAPL No. 4959 of 2019 (Annexure-), inter alia on the conditions of his executing bond of Rs. 20,000/- (Rupees twenty thousand only) with two sureties each for the like amount fund furnishing cash security of Rs. 10 lakh to the satisfaction of learned trial court. The petitioner again approached this Court seeking modification of the condition imposed by this Court by filing I.A. No. 303 of 20221. However, this Court vide order dated 22.03.2021 found no satisfactory ground to entertain the said application for modification and accordingly, the I.A. was rejected vide Annexure-6. Thereafter, during pendency of the trial, the petitioner filed a

petition purportedly under Section 437(6) of Cr.P.C. (Annexure-8) seeking his release on bail as the trial had not been concluded within the period of sixty days as stipulated under the said provision. By order dated 01.09.2021 (Annexure-9), which is impugned in the present application, the trial court observed that the petitioner was in custody for not furnishing bail bond and hence, the provision under Section 437 (6) of Cr.P.C. does not apply. On such ground, the petition was rejected.

3. Heard Md. Mustaq Ansari learned counsel for the petitioner and Mr. Sangram Keshari Mishra, learned Additional Standing Counsel for the State.

4. Mr. Ansari has referred to the provision under Section 437 (6) of Cr.P.C. to contend that the same squarely applied to the case of the petitioner inasmuch as charge was framed in the case on 16.08.2018 as per order sheet enclosed vide Annexure-7 and despite the fact that the Petitioner is in custody, trial has not been concluded even till date, which is more than three years from the date of framing of charge. Thus, according to Mr. Ansari, the accused-petitioner is entitled to be released on bail. It is also argued by Mr. Ansari that the condition of furnishing cash security of Rs. 10 lakh as imposed by this Court is unable to be complied with by the accused-petitioner in view of his financial inability and therefore, non furnishing of bail bond under such circumstances, cannot be treated as a default on his part, rather such stringent condition should be construed as non-grant of bail.

5. Mr. Mishra, learned Additional Standing Counsel for the State, on the other hand, has contended that the provision under Section 437(6) of Cr.P.C. is applicable to accused persons, who are not on bail. In the instant case, the accused person was granted bail by this Court, but is in custody only because he has not furnished bail bond for whatever reason.

6. Having noted the rival contentions as above, it would be apt to examine the relevant provision which is quoted herein below :

> *"**437 – When bail may be taken in case of non-bailable offence.***
> *xxx xxx xxx*
> *(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, **if he is in custody** during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."* *(emphasis supplied).*

7. The Petitioner in the instant case, claims that the aforesaid provision applied to him because he is in custody. A careful reading of the above provision shows the untenability of the above contention inasmuch as the provision under Section 437 Cr.P.C. relates to grant of bail in case of non-bailable offences. In other words, it pre-supposed cases in which bail has not yet been granted and the accused is in custody. Thus, the expression, "if he is in custody" would refer only to such accused, who has not yet been granted bail. In the case at hand, as has already been stated herein before, the petitioner was granted bail by this Court, but is yet to furnish bail bond. It is stated that he was unable to furnish bail bond because of his inability to comply with the condition of furnishing cash security of Rs. 10 lakh. But then it is also seen that the petitioner had moved this Court seeking modification of the said condition, but, such prayer was rejected. Thus, having failed to obtain the necessary modification and not having moved the higher forum against the order of rejection of his prayer for modification passed by this Court, the petitioner has attempted to invoke the provision under Sub-section (6) of Section 437 of Cr.P.C. In other words, what he could not obtain directly, he seeks to do so indirectly. In the peculiar facts of the case, such a course of action cannot be countenanced in law. It is stated that at the cost of repetition that the provision under Section 437 of Cr.P.C. including sub-Section (6) Cr. P.C. thereof applied to a situation where the accused has not been granted bail and is in custody for such reason, which is not the same thing as being granted bail and being in custody for not furnishing bail bond.

8. Reading of the impugned order reveals that the learned J.M.F.C, Sambalpur has dealt with the matter in the correct perspective to hold that the petition filed by the Petitioner under Section 437 (6) of Cr.P.C. is not maintainable. This Court, for the reasons indicated hereinbefore, finds no reason to interfere with the impugned order.

9. The CRLMC is, therefore dismissed.

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2021 (III) ILR -CUT-813

SASHIKANTA MISHRA, J.

CRLMC NO. 2123 OF 2021

SIBA BISOI & ORS. …….. Petitioners

.V.

STATE OF ODISHA …….. Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167(2) read with section 36 A of the NDPS Act – Default bail/mandatory bail – Offences under NDPS Act – In the present case, charge sheet could not submitted within the statutory periods – Though such period extended to another 60 days but no opportunity was given to the accused, neither the accused produced before the court nor heard before the extension of the period – Even after expiry of the extended period charge sheet could not be submitted before the trial Court – However the accused person did not release on default bail on the plea that, he had not filed such application – Order of the trial court challenged – Held, the Court below committed gross illegality in allowing detention of the accused persons beyond the statutory periods without informing their indefeasible right even in the absence of charge sheet – Impugned order set-aside – CRLMC allowed. (Paras 9,10)

Case Laws Relied on and Referred to :-

1. (2018) 71 OCR 31: Lambodar Bag vs. State of Orissa.
2. 2020 SCC Online SC 867 : M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence.
3. (2017) 15 SCC 67: Rakesh Kumar Paul vs. State of Assam.

For Petitioners : M/s. J.K.Panda, S.S. Dash, B. Karna & A.P. Dash

For Opp. Party : Mr. Sangram Keshari Mishra, Addl. Standing Counsel

ORDER Date of Order : 18.11.2021

SASHIKANTA MISHRA, J.

In the present application filed under Section 482 Cr.P.C., the petitioners challenge the orders dated 06.09.2020/08.09.2020, 02.03.2021 & 03.05.2021 passed by learned Sessions Judge-cum-Special Judge, Malkangiri

in T.R. Case No. 94 of 2020. All the petitioners have been implicated in the above-mentioned case corresponding to Mathili P.S. Case No. 125 of 2020 for the alleged commission of offence under Sections 20(b)(ii)(C)/25/27-A/29 of the N.D.P.S. Act.

2. Briefly stated, the prosecution case is that on 05.09.2020 at about 8.00 p.m. while the police were performing evening patrolling duty and excise raiding duty at Kalapali Colony, they received reliable information that some persons were moving in a group carrying balance sticks on their shoulders with two bags containing suspicious articles towards Mathili P.S. area. When the police officers cordoned the accused persons, they were attacked by the group by means of sticks, axes and other deadly weapons. As a result, one home guard, namely, Banabasi Maharana sustained bleeding injuries and thereafter he was rescued and shifted to hospital. The police detained 36 persons and others ran away taking the advantage of darkness. The persons so detained disclosed that the luggage contained contraband ganja and they were transporting the same from Chitrakonda area to Bargaon. After weighment, 1945 kg and 400 grams of ganja was recovered and seized. On such basis, the case was registered, the accused persons were arrested and forwarded to the court of learned Special Judge, Malkangiri on 06.09.2020. Since then, the accused persons are in custody.

3. The case record was put up on 27.02.2021 as the I.O. though Spl. Public Prosecutor submitted a prayer for extension of the remand period of the accused persons by another 120 days on the ground of further investigation. The said petition was considered on 02.03.2021 and on the same day it was allowed by extending the period of investigation by another 60 days despite the objection of the defence. However, despite expiry of the said extended period of 60 days on 01.05.2021, neither the charge sheet was filed nor the accused persons were produced before the Court to inform them of their right to seek default bail under the provisions of Section 167(2) of Cr.P.C. On 03.05.2021, i.e., the second day of expiry of the extended period the I.O. submitted charge sheet against 46 accused persons including the present petitioners. The said order accepting the charge sheet beyond the stipulated period as well as the orders passed on 06.09.2020, 08.09.2020 and 02.03.2021 are impugned in the present application.

4. Heard Mr. J.K. Panda, learned counsel for the petitioner and Mr. S.K. Mishra, learned Addl. Standing Counsel through hybrid mode.

5. It is submitted by Mr. Panda that the day of first remand being 06.09.2020, 180 days was due to expire on 03.03.2021. The I.O. filed a petition seeking extension of time to complete investigation on 27.02.2021 i.e., within the 180-day period. It is further submitted that the said petition was considered and allowed on 02.03.2021, which is one day before the expiry of 180-day period. But charge sheet was not filed within the extended period of 60 days, i.e., on or before 01.05.2021, but two days thereafter. On such basis, Sri Panda has argued that the indefeasible right of the accused-petitioners to be released on bail for the default of the investigating agency as accrued on 01.05.2021 was completely ignored by the Court below and the charge sheet was accepted but without releasing the petitioners on default bail. To fortify his contention, Sri Panda has cited a decision of this Court rendered in the case of ***Lambodar Bag vs. State of Orissa,*** (2018) 71 OCR 31.

6. Mr. Sangram Keshari Mishra, learned Addl. Standing Counsel, on the other hand, has argued that the petition for extension was filed for justified reason since several relevant aspects were required to be verified. Moreover, the initial investigation had revealed that other persons were also involved in the occurrence. For all the above reasons, it was highly necessary to allow extension of the period of investigation and therefore, the impugned order does not warrant any interference. Moreover, the accused-petitioners had not filed any application for default bail on 01.05.2021 and hence, cannot claim such right after filing of the charge sheet.

7. Certified copies of the relevant orders have been annexed to the CRLMC petition vide Annexure-4 series. A perusal of the same reveals that the accused persons were remanded to judicial custody for the first time on 06.09.2020. As such, the period of 180 days was due to expire on 03.03.2021. Admittedly, the petition for extension of time to complete the investigation was heard and allowed one day before completion of the 180-day period. No illegality is involved thereby and the petitioners also do not have any serious grievance against such order. But what is forcefully challenged by the petitioners is that on the date of expiry of the extended period, i.e., 01.05.2021, neither they were produced before the court nor they were informed of their right of being released on bail since admittedly charge sheet had not yet been filed. Charge sheet was ultimately filed on 03.05.2021, i.e., two days after and still the accused persons were remanded

which is contrary to the law laid down by the Apex Court in the case of ***M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence***, reported in 2020 SCC ONLINE SC 867 as well as by this Court in ***Lambodar Bag*** (supra).

8. It has been time and again emphasized that the right of the accused persons to be released on bail under the provisions of Section 167(2) of Cr.P.C. is indefeasible and akin to a fundamental right flowing from Article 21 of the Constitution of India. Moreover, despite absence of specific provision under Section 36A it is necessary for the court to inform the accused of such entitlement immediately after completion of 180 days or the extended period, as the case may be. These fundamental aspects have been given a complete go bye by the learned Special Judge. Thus, as on 01.05.2021 or even 02.05.2021, the accused persons had acquired an indefeasible right of being released on bail and therefore, their detention beyond such date(s) become illegal and hence, deserves to be interfered with. It is immaterial that the accused persons had not filed any application for bail on that day. Since, as held by the Apex Court in the case of ***Rakesh Kumar Paul vs. State of Assam,*** reported in (2017) 15 SCC 67, as reiterated in the case of ***M. Ravindran*** (supra) and followed by this Court in ***Lombadar Bag*** (supra), in the absence of information to the accused by the Court of their entitlement to default bail, they cannot be deprived of their indefeasible right only because they had not applied for bail. Moreover, they have specifically pleaded in the present application at paragraph-20 that for the aforementioned illegality committed by the Court, they are entitled to be released on bail.

9. For the forgoing reasons, therefore, this Court has no hesitation in holding that the learned court below committed gross illegality in allowing detention of the accused persons beyond 01.05.2021 without informing them of their indefeasible right even though no charge sheet had been filed. Once it is so held, all subsequent orders of remand of the accused persons are also rendered illegal.

10. In the result, the CRLMC is allowed. The impugned order dated 03.05.2021 is hereby set aside. The petitioners are at liberty to move the trial Court for bail and in such event, it is directed that they shall be released on such terms and conditions as may be fixed by the trial court including the condition that they shall personally appear before the trial Court on each date of posting of the case without fail.

11. The CRLMC, is therefore, disposed of.

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