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In the present case the petitioner joined in district cadre altogether and brought over the directorate only on 03.10.2007, it cannot be construed that he has completed 10 years of continuous service by 2007, so as to entitled him to get promotion to the post of Junior Assistant. Writ petition dismissed.

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2022 (I) ILR - CUT- 689

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

W.P.(C) NO.15076 OF 2008

BACHANA KUMARI DEI ……..Petitioner

.V.

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

(A) ORISSA ESTATE ABOLITION ACT, 1951 – Section 38 (B) – Revision – Whether the initiation of the case under section 38(b) by the member board of revenue, Odisha at the instance of private opposite parties is maintainable? – Held, Yes – The power conferred upon the authority under the act to enquire into the matter suo-moto cannot be cabined, cribbed or confined and the power is wide enough.

(Para-21)

Applying the law laid down by the full bench of this court in Debaki Jani case with regard to exercise of suo-moto power by an authority, this court is of the considered view that under the first contingency, the private parties can always bring the illegalities, irregularities to the notice of the member, Board of Revenue.

(Para-22)

(B) ORISSA ESTATE ABOLITION ACT, 1951 – Section 38 (B) – Revision – Limitation – Held, the issue of limitation will not stand in the way to exercise the revisional power u/s 38-(b) of the OEA Act. Whenever the member, Board of revenue comes to a conclusion that an order has been obtained by practicing fraud or by suppressing material fact, he could always exercise revision conferred on him by the statute to rectify the mistake and unearth the fraud.

(Para-36)

(C) ORISSA TENANCY ACT, 1913 – Section 22 – Claim of occupancy right as well as adverse possession – Maintainability – Held, No – It is the settled position of law that one could not have claimed both occupancy right as well as claimed to have perfected his right, title and interest over the case land by way of adverse possession – An occupancy right over the suit land cannot be acquired by adverse possession. (Para-45)

Case Laws Relied on and Referred to :-

1. 2014(I) OLR(FB)-867 : Debaki Jani Vs. The Collector & Anr.
2. (2009) 12 SCC 378 : State of Orissa & Ors. Vs. Harapriya Bisoi.

3. (2015) 1 SCC 466 : State of Orissa & Anr. Vs. Fakir Charan Sethi
4. (1995) Supp.(3) SCC 249 : State of Orissa & Ors Vs. Brundaban Sharma & Anr.
5. (1995) Supp. (3) SCC 249 : State of Orissa & Ors Vs. Brundaban Sharma & Anr.
6. (2020) 14 SCC 345 : The Inspector General of Registration, Tamil Nadu and Ors. Vs. K. Baskaran.
7. Vol. 33 (1991) O.J.D. 154 (Civil) : Champa Bati Bewa @ Kabi & Ors. Vs. Kanhu Mallik & Ors.
8. 2021(I) OLR 1005 : Dasharath Sharma Vs. State of Odisha.
9. (1995) Supp.(3) SCC 249 : State of Orissa & Ors. Vs. Burndaban Sharma & Anr.

For Petitioner : Mr. Bibekananda Bhuyan, B.N Das, A.K. Rout, B.N.Mishra & Smt. P. Mohapatra.

For Opp. Parties : Mr. D.K. Mohanty, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 03.03.2022 : Date of Judgment: 25.03.2022

A.K. MOHAPATRA, J.

1. The present writ petition has been filed questioning the legality, validity and propriety of order dated 26th April, 2008 passed in O.E.A. Revision No.52 of 1999 (Annexure-7) by the learned Member, Board of Revenue, Odisha, Cuttack where under order dated 14th November, 1979 (Annexure-1) passed by the O.E.A. Collector-cum-Tahasildar, Kujanga in O.E.A. Misc. Case No.15 of 1979 has been set aside by the learned Member, Board of Revenue, Odisha, Cuttack.

2. Upon a careful examination of the impugner order dated 26th April, 2008 passed by the Member, Board of Revenue, Odisha, Cuttack, it is seen that the revision petition was initially dismissed for default on 24th August, 2002 and thereafter the same was restored by order dated 15th September, 2006. The said order further reveals that after the OEA Revision Case was dismissed for default, the original case record of OEA Misc. Case No.15 of 1979 was returned to the office of the Tahasildar, Kujang vide Memo No.1344 dated 9th October, 2002 and the same was received on 21st October 2002 by the Nazir of Kujang Tahasil.

3. However, after restoration of the O.E.A. Misc. Case No.15 of 1979, the original record was again called for from the office of Tahasil, Kujang. The Tahasildar, Kujang vide letter dated 14th November, 2007, reported that the original case record of the above noted case is not traceable in his office. When reminders were given to send the original record of the above noted

O.E.A. Misc. Case, the Tahasildar, Kujang reiterated the previous reply and took a stand that the original records are not traceable in his office.

4. Considering the nature of allegation, this Court is of the considered view that the learned Member, Board of Revenue, Odisha, Cuttack should have taken stern action against the official due to whose negligence the record was misplaced and later on could not be traced out. However, the order-sheet does not reveal as to what action was taken by the learned Member, Board of Revenue, Odisha, Cuttack being the highest revenue authority of the State in the matter of misplacement of record in the office of the Tahasildar, Kujang. In the aforesaid facts and circumstances, this Court now proceeds to adjudicate the writ petition filed by the Petitioner challenging the impugned order passed by the leaned Member, Board of Revenue, Odisha, Cuttack.

5. The factual background of the case, in brief, is that the RoR of villageBijayachandrapur (now coming under Paradeep Town) under Kujang Tahasil was published in the year 1929-30, Khata No.59 of the said village consisting of area measuring Ac.159.58 of land recorded as 'Anabadi' in favour of the Ex-estate known as Burdhaman Estate. The aforesaid Khata No.59 consists of large number of plots. The said Exestate, namely Burdhaman Estate had vested in the State of Odisha in the year 1951.

6. After the Orissa Estate Abolition Act came into force in the year 1951, no "Ekpadia" was submitted by ex-Intermediary in respect of the case land which is a part of Khata No.59 of village Bijayachandapur. Therefore, it is presumed that the ex-Intermediary had not settled, leased out or transferred any portion of the land under Khata No.59 of village Bijayachandraur. Further, the Sabik RoR published in the year 1929-30, is the last published RoR in respect of the aforesaid village. The above noted Khata No.59 of village Bijayachandrapur also includes Plot No.426 measuring an area Ac.8.85 decimals as borne out from the record. The said land has been classified as "Jhada Jungle".

7. The predecessor in interest of the proforma-opposite parties, namely one Hadibandhu Singh claimed that he was possessing an area Ac.0.30 decimals of land as a tenant since 1942 under Khata No.59 of Mouza Bijayachandrapur and that the ex-Proprietor had recognized said Hadibandhu Singh as a tenant by accepting "salami and "khesare" and rent in respect of

the case land. Hadibandhu Singh filed a petition in the year 1979 for settlement of Ac.0.30 decimals of land out Plot No.426 in his favour under Section 8(1) of the Orissa Estate Abolition Act, 1951.

8. On filing of such petition for settlement of the land, the Tahasildar, Kujang-cum-OEA Collector, issued notice to the petitioner (Hadibandhu Singh) to appear in the matter before him along with documentary evidences for verification of the same. Simultaneously a public notice was ordered to be issued inviting objections to the proposed settlement. And further field enquiry report was also called for from the concerned Revenue Inspector.

9. The petition, which was filed by late Hadibandhu Singh for settlementof the land, was allowed by the OEA Collector-cum-Tahasildar vide his order dated 14th November, 1979 passed in O.E.A. Misc. Case No.15 of 1979 on the ground that the said petitioner (late Hadibandhu Singh) was a tenant under the ex-Proprietor and as such, he continued to be the tenant as provided under Section 8(1) of the O.E.A. Act. Further after examination of the land receipt produced by late Hadibandhu singh before the then O.E.A Collector-cum-Tahasildar, Kujang, the said authority had concluded that late Hadibandhu Singh had paid "salami", "Khesare" and the rent to the ex-Proprietor and that he was in possession over the land for more than 30 years and as such, the O.E.A. Collector had come to a conclusion that late Hadibandhu Singh had acquired the right, title and interest over the property in question by way of adverse possession and accordingly it was held that he can be considered as an occupancy tenant in respect of the land. Thereafter, the O.E.A. Collectorcum-Tahasildar, Kujang went on to fix the rent @ Rs.6/- and cess of Rs.3/- and accordingly directed for collection of the rent and cess from late Hadibandhu Singh. The record further reveals that the rent and cess were received from late Hadibandhu Singh in the year 1983.

10. The order dated 14th November, 1979 passed by the O.E.A. Collector-cum-Tahasildar, Kujang settling the case land in favour of late Hadibandhu Singh holding that he had acquired occupancy right in the case land by adverse possession was challenged before the Sub-collector, Jagatsinghpur by filing O.E.A. Appeal Case No.8 of 1998. The said appeal remained pending before Sub-collector, Jagatsinghur from 26th October, 1998 to 18th October, 2005. On 18th October, 2005, the Subcollector, Jagatsinghpur realized that he had no appellate jurisdiction in the matter and therefore, passed necessary orders for transmission of the case record to the

court of Additional District Magistrate, Jagatsinghpur. Upon transmission of the record, the same was renumbered as O.E.A. Appeal No.19 of 2005, which was acknowledged by Additional District Magistrate, Jagatsinghpur vide his order dated 24th November, 2005. Thereafter, the case record was summoned by the Member, Board of Revenue, Odisha, Cuttack and the same had reached the office of theMember, Board of Revenue, Odisha, Cuttack on 22nd October, 2007.

11. Heard learned counsel for the Petitioner as well as learned Additional Government Advocate for the State. Perused the case record, impugned order passed by the leaned Member, Board of Revenue, Odisha, Cuttack as well as written note of submissions filed on behalf of the Petitioner on 04.03.2022.

12. Leaned counsel for the Petitioner contends that the impugned order passed by the learned Member, Board of Revenue, Odisha, Cuttack is being assailed on the following grounds:-

> a) The case was initiated in the year 1999 i.e. almost 20 years after the order was passed by the Tahasildar, without recording any reason for the condonation of delay. The initiation of the case under Section 38(B) by the Member BOR, Odisha at the instance of Private Opposite Parties is not maintainable being barred by law of limitation.
>
> b) Hadibandhu Singh being an agricultural tenant, such tenancy can be created by mere induction and acceptance of rent and he having held the said property for more than the statutory period has acquired occupancy right under Section 22 of the Orissa Tenancy Act.
>
> c) It was further challenged that the order of the Tahasildar under Section 8(1) being an administrative order, Board of Revenue has got no jurisdiction to annul the same in exercising the power under Section 38(B) of the O.E.A. Act.

13. It is further submitted by learned counsel for the Petitioner that upon a bare perusal of Section 38(B), it would be crystal clear that the Member, BOR, Odisha either on his own motion or on being approached by the Collector can exercise the power to call for records of any case decided by any authority subordinate to it. In other words, he submits that the aforesaid provision, the Member, BOR, Odisha, Cuttack can either act on his own motion (suo motu) or being moved by the Collector and not otherwise. Therefore, he submits that initiation of the case under Annexure-7 at the instance of the private parties is something unknown to Section 38(B) of the O.E.A. Act.

14. Learned counsel for the Petitioner further relies upon well settled principles of law i.e. "if a statute requires a particular thing is to be done in a specified manner, the same has to be done in the manner/way provided in the statute or not at all." Accordingly, he submits that the said proposition of law squarely applies to the facts of the present case inasmuch as the present revision have been entertained by the Member, BOR, Odisha, Cuttack at the instance of some private parties which is contrary to section 38(B) of the OEA Act.

15. It is further submitted by leaned counsel for the Petitioner that Section 38(B) of the O.E.A. Act does not prescribe any limitation within which the learned Member, BOR, Odisha, Cuttack, can exercise his Revisional power under Section 38(B) of the Act. However, he further submits that by no stretch of imagination, such period of limitation would extend up to 20 years.

16. It is further submitted by learned counsel for the Petitioner that the Revisional power under Section 38(B) of the O.E.A. Act should be exercised by the learned Member, BOR, Odisha, Cuttack within a reasonable period of time and such reasonable period would be determined by taking into consideration provisions contained in Article 137 of the Limitation Act, which provides that where no period of limitation is prescribed in the Act itself, then in view of the Article 137 of the Limitation Act, the period of limitation shall be construed to be three years.

17. In the said context, leaned counsel for the Petitioner relies upon the judgment of the Hon'ble Supreme Court rendered in the matter of ***S.B. Gurbaksh Singh vrs. Union of India :*** reported in (1976) 2 SCC 181 and in the matter of ***Rajeswar Baburrao Bone vrs. State of Maharashtra and another*** : reported in (2015) 14 SCC 4497. By referring to the aforesaid two judgments of the Hon'ble Supreme Court of India, the learned counsel for the Petitioner tried to impress upon this Court that reasonable time has to be construed in such a manner that the same shall come under the Article 137 of the Limitation Act and accordingly, the period of limitation in the present case should have been three years from the date of the order. Therefore, the exercise of Revisional power by the learned Member, BOR, Odisha, Cuttack after expiry of a period of 20 years from the date of order is hopelessly barred by limitation.

18. The last ground of attack of the learned counsel for the Petitioner is that the order passed by the O.E.A. Collector-cum-Tahasildar under Annexure-1 is an administrative order and as such the same is not amenable to the Revision jurisdiction of the learned Member, BOR, Odisha, Cuttack under Section 38(B). In the said context, the learned counsel for the Petitioner had relied upon a judgment of this Court reported in **Volume 100 (2005) CLT 329** to support his contention that the order passed by the Tahasildar accepting somebody as deemed tenant under Section 8(1) of the O.E.A. Act and acquired occupancy right under the Odidha Tenancy Act is an administrative order and hence, the Member BOR, Odisha has got no jurisdiction under Section 38(B) of the O.E.A. Act to interfere with the order of settlement passed by the O.E.A. Collector-cum-Tahasildar, Kujang.

19. The most important ground of attack to the impugned order by learned counsel for the Petitioner is that the learned Member, BOR, Odisha has committed a gross error of law by entertaining an application under Section 38(B) of the O.E.A. Act. It is submitted by learned counsel for the Petitioner that the Revisional power conferred under Section 38(B) of the O.E.A. Act could be exercised by the learned Member, BOR, Odisha under two contingencies (i) On its own motion, (ii) On a report from the Collector. Therefore, it is submitted that the exercise of power as has been done in the present case by the learned Member, Board of Revenue, Odisha at the instance of a private party is beyond the scope and authority conferred under Section 38(B) of the O.E.A. Act upon learned Member, BOR, Odisha, Cuttack. For easy reference, the provision contained under Section 38(B) of the O.E.A. Act is quoted herein below :-

> **"38B. Revision**. - (1) The [Board of Revenue] may, on its own motion or on a report from the Collector, call for and examine the record of any proceeding in which any authority subordinate to the [Board of Revenue] has made any decision or passed an order under this Act (not being a decision against which an appeal has been preferred to the High Court or the District Judge under Section 22) for the purpose of satisfying itself as to the regularity of such proceeding or the correctness, legality or propriety of such decision or order and if in any case it appears to the [Board of Revenue] that any such decision or order ought to be modified, annulled, reversed or remitted, it may pass order accordingly."
>
> [(i) x x xx]
>
> (ii) revise any decision or order under this Section without giving the parties concerned an opportunity of being heard in the matter."

20. A plain reading of Section 38(B) of the OEA Act gives an impression that the Revisional power conferred upon learned Member, Board of Revenue, Odisha could be exercised under the aforesaid two contingencies. However, there is no power in law to draw the attention of the learned Member, Board of Revenue, Odisha to the irregularities committed by the authorities sub-ordinate to him at the instance of the private parties. In such eventuality, the learned Member, Board of Revenue, Odisha after conducting an enquiry from time to time and subject to his satisfaction can initiate a suo motu proceeding to rectify the illegalities/irregularities committed by his sub-ordinate authorities. Therefore, it would not be appropriate on the part of this Court to give a restrictive interpretation to the provisions contained under Section 38(B) of the O.E.A. Act.

21. A similar view has been taken by the Full Bench of this Court in the matter of ***Debaki Jani vrs. The Collector and another : reported in 2014(I) OLR(FB)-867. In Dabaki Jani*** (supra) a full bench of this Court was dealing with an issue under Section 26 of the Orissa Grama Panchayats Act, 1964 wherein a similar ground was raised that suo motu power conferred under Section 26(2) of the Grama Panchayat Act (in short 'the O.G.P. Act'), could not have been invoked at the instance of a private party. The Full Bench of this Court while resolving the said issue in paragraph-9 of the judgment has observed that the power conferred upon the Collector under Section 26(2) of the O.G.P. Act to enquire into the matter suo motu cannot be cabined, cribbed or confined and that the power is wide enough. The observation of the Full Bench of this Court in paragraph-9 of the judgment in ***Debaki Jani's*** case (supra) has been quoted herein below:

> "9. While under Sub-section (1) of Section 26 of the Act, the categories of persons enumerated therein apply to the Collector for a decision on the allegation or doubt whether or not he is or has become so disqualified; under Sub-section(2) the Collector may suo motu or on receipt of an application under Sub-section(1), make an enquiry as he considers necessary. The power of the Collector to enquire into the matter suo motu cannot be cabined, cribbed or confined. The power is wide enough. But then the same cannot be exercised in a routine manner. The power has to be exercised with great care and circumspection. In the elegant words Bengamin N. Cardozo in the legal classic"."The Nature of the Judicial Process"
>
> "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knighterrant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized any analogy, disciplined

> by system, and subordinated to"the primordial necessity of order in the social life".Wide enough in all conscience is the field of discretion that remains."
>
> The collector has to prima facie satisfy himself and apply his mind before issuing any notice to the person whose disqualification is in question. The only rider is to observe principles of natural justice. The legislature in its wisdom thought it proper to grant ample power to the Collector to see that purity and sanctity in the election process is maintained and no unqualified person holds the post. The same also does not exclude any other person to bring the notice of the Collector about the disqualification incurred by any Sarpanch or NaibSarpanch or any other member of the Grama Panchayat. The Collector exercising the suo motu power is not debarred from obtaining information and materials from various sources."

22. Applying the law laid down by a Full Bench of this Court in ***Debaki Jani's*** case (supra) with regard to exercise of suo motu power by an authority, this Court is of the considered view that under the first contingency as narrated hereinabove, the private parties can always bring the illegalities/irregularities to the notice of the learned Member, Board of Revenue, Odisha. The highest revenue authority of the State, is duty bound to examine the illegalities / irregularities committed by Subordinate authorities. Thereafter, the learned Member, Board of Revenue, Odisha, upon preliminary enquiry and subject to the satisfaction may call for records from the Sub-ordinate authorities and he may exercise the Revisional Power as conferred upon him under Section 38(B) of the Orissa Estate Abolition Act (in short 'the O.E.A. Act'). Therefore, this Court is of the considered view that the learned Member, Board of Revenue, Odisha has not committed any illegality while exercising his suo motu power of revision under Section 38(B) of the O.E.A. Act while passing the impugned order and as such, the first ground of attack of the learned counsel for the Petitioner is bound to fail.

23. The 2nd ground of attack by learned counsel for the Petitioner is based on a judgment of this Court in ***Daitary Rout vrs. State of Orissa and others*** ; reported in Vol.***100(2005) CLT 329***. Relying upon the said judgment, learned counsel for the Petitioner submitted that the order under Section 8(1) of the O.E.A. Act being an administrative order, the same is not revisable under Section 38(B) of the O.E.A. Act.

24. Upon detailed analysis, this Court found that the ratio in ***Daitary Rout vrs. State of Orissa and others*** (supra) is based on a Full Bench Judgment of this Court in ***Smt. Basanti Kumari Sahu vrs. State of Orissa and others*** : reported in Vol.-73 (1992) CLT 868(FB). There is no quarrel with regard to

the proposition laid down by the Full Bench of this Court in the case of ***Smt. Basanti Kumari Sahu*** (supra).

25. The law laid down by the Full Bench in the said judgment has also been followed by this Court in subsequent judgment. However, so far as the present case is concerned, it is to be seen as to whether the ratio laid down in the above noted two judgments applies to the facts of the present case or not? The case relied upon by learned counsel for the Petitioner i.e. reported in ***Vol.100(2005) CLT 329***, in paragraph-2 of which it has been observed that after vesting of the Ex-intermediary interest in the State, the Ex-intermediary submitted 'Ekpadia' in which the name of the Petitioner in the above noted case had been shown as a tenant in respect of the case land involved in that case.

26. Further after vesting of the land, the Petitioner established that he is in possession over the case land as a tenant, therefore, the only issue that was left to be adjudicated in ***Daitary Rout vrs. State of Orissa and others*** (supra) is as to whether the Petitioner in that case is to be recognized as a tenant under the State after vesting of property in view of deeming provision under Section 8(1) of the O.E.A. Act.

27. Therefore, this Court applying the law laid down by the Full Bench of this Court in ***Smt. Basanti Kumari Sahu*** (supra) accepted the contention of the Petitioner in that case, and held that the order under Section 8(1) of the Act passed by the O.E.A. Collector cannot be construed to be an order creating any right in favour of the Petitioner for the first time and therefore, cannot be subjected to the Revisional jurisdiction of the learned Member, Board of Revenue, Odisha under Section 38(B) of the O.E.A. Act and accordingly, quashed the impugned order.

28. The ratio laid down in ***Smt. Basanti Kumari Sahu*** (supra) which was followed in the case of ***Daitary Rout vrs. State of Orissa and others*** (supra) is not applicable to the facts of the present case. In the case at hand, from the materials available on record, it appears that the land in question was recorded as "Jhada Jungle" and further no "Ekpadia/Tenant Ledger" was submitted by the Ex-intermediary at the time of vesting indicating the name of the predecessors in the interest of the claimants. Although vesting took place in the year 1951, after a gap of almost 28 years an application was filed

by one Hadibandhu Singh before the Tahasildar-cum-O.E.A. Collector for settlement of land in his favour.

29. Further, the predecessor of interest of the claimants had also taken a ground that he had perfected his title by way of adverse possession over the case land by the time when he had filed an application for settlement of case land before the O.E.A. Collector-cum-Tahasildar. Therefore, it cannot be said that the order of settlement in favour of the predecessor of the claimant was strictly under Section 8(1) of the O.E.A. Act. In such view of the matter, this Court is of the considered view that the judgments relied upon by the Petitioner in the present case rendered by this Court in the case of ***Smt. Basanti Kumari Sahu*** (supra) ***and Daitary Rout vrs. State of Orissa and others*** (supra) are not applicable to the facts of the present case since the decision of this Court in those two reported cases are distinguishable on facts and as such, the 2nd ground of attack by learned counsel for the Petitioner is also bound to fail.

30. The 3rd major ground of attack to the exercise of power under Section 38(B) of the OEA Act by the learned Member, Board of Revenue, Odisha and the consequential passing of the impugned order is on the ground that the order of settlement was challenged first time in the year 1999 i.e. after a gap of almost 20 years. It is true that no period of limitation has been provided under Section 38(B) of the O.E.A. Act for exercising the Revisional Power conferred upon the learned Member, Board of Revenue, Odisha, the same has to be exercised within a reasonable time. Such a proposition of law cannot be disputed by anybody.

31. However, the exercise of Revisional Power depends on the facts and circumstances of each case. In this context, learned counsel for the State submits that the predecessors of the Petitioner had no right, title and interest over the case land and moreover, settlement order which was passed by the O.E.A. Collector-cum-Tahasildar in favour of Hadibandhu Singh has been passed in collusive manner basing upon a fake and false report submitted by the concerned Revenue Inspector. Therefore, he further submits that the order of settlement passed by the O.E.A. Collector is an outcome of forgery and mis-representation of fact and no sanctity is to be attached to such order of settlement.

32. Learned Additional Government Advocate further submits that submission of "Ekpadia/Tenant Ledger" as provided under Section 5(j) of the O.E.A. Act by the Ex-intermediary to the State is mandatory procedure before applying the provisions under Section 8(1) of the O.E.A. Act. In the present case, since "Ekpadia/Tenant Ledger" has not been submitted by the Ex-intermediary at the time of vesting, the order of settlement is based on a tainted report of the Revenue Inspector, therefore, the order of settlement is a vague and fraudulent one.

33. Further it is made very clear that the right of the tenant/raiyat under the Ex-intermediary, who continued to remained in exclusive possession over the case land even after vesting of the Ex-intermediary Estate, a right would be crystallized under Section 8(1) of the O.E.A. Act by virtue of deeming provision provided the Ex-intermediary submits the "Ekpadia/Tenant Ledger" to the state, which is prescribed under Section 5(j) of the O.E.A. Act. On failure to comply with the mandatory provision of Section 5(j) O.E.A. Act by the Ex-intermediary, no vested right is conferred upon the Tenant/Raiyat, who claims to be in possession as indicated by the Ex-intermediary and after vesting continued to remain in exclusive possession over the case land.

34. Likewise, some similarly situated persons who were claiming right of a Raiyat/tenant on the basis of 'Hata patta' issued by the Ex- intermediary with the production of "Ekpadia/Tenant Ledger" came up for adjudication before this Court as well as before the Hon'ble Supreme Court of India in the matter of ***State of Orissa and others vrs. Harapriya Bisoi : reported in (2009) 12 SCC 378 and State of Orissa and another vrs. Fakir Charan Sethi : reported in (2015) 1 SCC 466*** Hon'bleSupreme Court of India has taken note of the illegalities or irregularities committed in settlement of vast patches of Ex-intermediary land by taking resort to fraudulent means and mis-representing facts before the Court.

35. So far the delay in preferring the revision petition before the Member, Board of Revenue, Odisha is concerned, learned counsel for the State referring to the judgment of the Hon'ble Supreme Court in Civil Appeal Nos.827 and 828 of 1994 (in the matter ***State of Orissa & Ors vrs. Brundaban Sharma & another*** : reported in ***(1995) Supp.(3) SCC 249*** submitted that under the O.E.A. Act, revisional Power was conferred upon the Member, Board of Revenue, Odisha for effective adjudication of disputes.

The revisional power so conferred has to be exercised carefully and cautiously and within a reasonable time.

36. Moreover, the absence of any limitation for exercise of such revisional power makes it abundantly clear that by incorporating such a provision in the O.E.A. Act, the legislatures had intended to confer a revisional power on the Member, Board of Revenue for preventing miscarriage of justice or violation of any of the provisions of the Act by the sub-ordinate authorities and to prevent fraud and suppression. Such power has to be exercised with a lot of caution and circumspection. Notwithstanding any delay in assailing any order by the sub-ordinate authority, further reasonable time should be granted within which the revision has to be preferred and which depends on the facts and circumstances of each case. Moreover, the issue of limitation will not stand in the way to exercise the revisional power under Section 38-B of the O.E.A. Act. Whenever the Member, Board of Revenue comes to a conclusion that an order has been obtained by practicing fraud or by suppressing material fact, he could always exercise the Revisional power conferred on him by the statute to rectify the mistake and unearth the fraud.

37. The Supreme Court of India in Civil Appeal Nos.827 and 828 of 1994 (***State of Orissa & Ors vrs. Brundaban Sharma & another*** : reported in (***1995) Supp. (3) SCC 249*** while dealing with the issue of delay in preferring Revision Petition before the Member, Board of Revenue u/s 38~B of the OEA Act, the court has observed as follows;

> "16. It is, therefore, settled law that when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends on the factual scenario in a given case. Take a case that patta was obtained fraudulently in collusion with the officers and it comes to the notice of the authorities after a long lapse of time. Does it lie in the mouth of the party to the fraud to plead limitation to get away with the order? Does lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right? The answers would be No."

Further in paragraph 19 and 20, the Hon'ble Supreme Court of India went on to observe as follows;

> "19. Under these circumstances, it cannot be said that the Board of Revenue exercised the power Under Section 38-B after an unreasonable lapse of time, though from the date of the grant of patta by the Tehsildar is of 27 years. It is true that from the date of the alleged grant of patta 27 years did pass. But its authenticity and correctness was shrouded with suspicious features. The records of the Tehsildar were destroyed. Who is to get the benefit that was responsible for it? The reasons are not far to seek. They are self-evident. So we hold that the exercise of revisional power Under Section 38-B by the Board of Revenue was legal and valid and it brooked no delay, after it had come to the Board's knowledge. That apart as held by the Board of Revenue, the order passed by the Tehsildar without confirmation by the Board is non est. A non est order is a void order and it confers no title and its validity can be questioned or invalidity be set up in any proceeding or at any stage.
>
> 20. So, we hold that the High Court is not right or justified in opining that the exercise of the power Under Section 38-B is not warranted. It committed illegality in quashing the order of the Board of Revenue. The order of the High Court is set aside. The order of the Board of Revenue is restored. Consequently we hold that the Government, being the owner, need not acquire its own land and need not pay compensation to an illegal or wrongful occupant of the Government land. The direction or mandamus to acquire the land and to pay the compensation to the Respondent is set aside."

The above noted observation has been quoted with approval by the Hon'ble Supreme Court of India in a subsequent judgment in the matter of ***The Inspector General of Registration, Tamil Nadu and Ors. vs. K. Baskaran reported in (2020) 14 SCC 345.***

38. In the above case of ***State of Orissa and others vrs. Brundaban Sharma and another*** (supra), the Hon'ble Supreme Court of India while deciding a similar issue has observed that the length of time depends on factual scenario in a given case where patta was obtained fraudulently in collusion with the officers, and once it comes to the notice of the authorities after long lapse of time; Can a party who is a direct beneficiary of fraud or suppression of fact take the ground of limitation to get away with the order? Is lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right? The answer to the aforesaid questions would be no.

39. Referring to Section 5(j) of the O.E.A. Act, leaned State Counsel submits that upon vesting of the Ex-Intermediary land in the State, the necessary records for administration and the management of the State be either handed over to the O.E.A. Collector or same may be seized in the manner as prescribed under Section 5(j) of the O.E.A. Act. The legislative

intention behind such a provision is that the Raiyats under the Ex-Intermediary were also continuing as Raiyat after the vesting and as such, they would continue in possession of the land in their Khas possession and to pay the rent as would be fixed by the State.

40. The records as referred to hereinabove would also contain the names of the tenants, who were also the tenants of the Ex-Intermediary. Such a provision has been incorporated in the statute, as in the absence of such records particularly tenants ledger, it would be impossible on the part of the State to administer / manage the properties after vesting. Therefore, the failure on the part of the Ex-Intermediary to submit 'Ekpadia' / tenant ledger clearly indicates that there was no such register in existence at the time of vesting and that the Petitioner was not a tenant/raiyat under the Ex-Intermediary and the existence of a 'Hata patta' as claimed by the Petitioner is a false and frivolous one. Once a 'Hata patta' is issued by the Ex-Intermediary, the same is recorded either in the 'Ekpadia' or tenant ledger maintained by the Ex-Intermediary. In such view of the matter, no provision has been made in the O.E.A. Act to call for any application from the tenants to recognize their tenancy or to adjudicate their right under Section 8(1) of the O.E.A. Act.

41. Therefore, the settlement as provided under Section 8(1) of the O.E.A. Act, is automatic and without any application of mind at the instance of the tenants. Therefore, the pre-vesting rights of the genuine tenants would find place in the record of rights prepared by the Tahasildar after receiving the records like Ekpadia / Tenant Ledger once those were transferred by the Ex-Intermediary to the concerned Tahasildar soon after the vesting of the case land.

42. Having heard learned counsels for the parties, this Court is of the considered view that Member, Board of Revenue, i.e. the revisional authority, has not committed any illegality in dismissing the revision petition of the Petitioner. The learned Member, Board of Revenue, Odisha while dismissing the revision petition has observed that so far as the case land is concerned, the rent was not assessed prior to vesting. Accordingly, the Petitioner was not paying the rent, Ex-Intermediary had not submitted 'Ekpadia' or tenant ledger to the State at the time of vesting or after vesting of the case land to the State.

43. In view of the above Tahasildar had no authority to assess the rent afresh in respect of the tenants of the ex-estate. However, the Tahasildarcum-OEA Collector, Sukinda had assessed rent in respect of the case land illegally without authority and further the same goes a long way to prove the fact that rent has not been assessed earlier. Moreover, the fact of such non-assessment of rent prior to vesting of Ex-Intermediary land is supported by the fact that no 'Ekpadia' or tenant ledger in respect of the case land had been submitted by the Ex-Intermediary. Such ground realities bring the 'Hata patta' produced by the Petitioner under a cloud of doubt/suspicion. In other words, in the absence of 'Ekpadia' or tenant ledger prepared and submitted by the Ex-Intermediary, 'Hata patta' produced at the instance of the Petitioner is a false and frivolous one. Therefore, no legal sanctity is attached to such a document.

44. The learned Member, Board of Revenue has rightly come to a conclusion that the finding of the O.E.A. Collector-cum-Tahasildar, Sukinda to the effect that the rent was paid and that the Opposite Party was in possession of the case land are collusive and mala fide. Moreover, if any tenant is aggrieved by non-acceptance of rent from him, then he should have made a representation or approached the authority immediately after vesting of Ex-Intermediary land and should have immediately after vesting sought for correction of record of right. In the case in hand, the Petitioner having not done that, it can be safely presumed that he did not have any tenancy right nor he was in occupation of the case land on the date of vesting.

45. Another major plank of argument of the learned counsel for the petitioner is that Late Hadibandhu Singh being an agricultural tenant, such tenancy can be created by mere induction and acceptance of rent and he having held the said property for more than the statutory period has acquired occupancy right under Section 22 of the Orissa Tenancy Act. Such a proposition of law is not legally acceptable and tenable in view of the settled position of law that Late Hadibandhu could not have claimed both occupancy right as well as claimed to have perfected his right, title and interest over the case land by way of adverse possession. An occupancy right over the suit land cannot be acquired by adverse possession as held by this Court in the case of ***Champa Bati Bewa @ Kabi and others Vs. Kanhu Mallik and others, reported in Vol. 33 (1991) O.J.D. 154 (Civil***). In paragraph 9 of the said judgment this court has observed as follows;

> "9. The learned lower appellate court has held that defendant No. 1 acquired occupancy right by adverse possession. The finding is against law because occupancy right cannot be acquired by adverse possession. It was alternatively held that defendant No. 1 being settled raiyat of the village acquired occupancy right under Sections 24 and 25 read with Section 23 of the Orissa Tenancy Act by being in possession for more than 25 years. There is no pleading to that effect. Hence, the finding of the lower appellate court that defendant No. 1 acquired occupancy right cannot be sustained. In Lachmllal and Ganesh Chamar : AIR 1932 Patna 259, it has been held that status of a tenant on notice to quit is that of a trespasser."

In view of the aforesaid position of law, the finding of the Tahasildar cum OEA Collector, Kujanga that the claimant had acquired occupancy right over the case land by remaining in possession over the case land and that he has perfected his right, title and interest by remaining in adverse possession over the case land is contrary to the law laid down by this court in the above referred judgment in Champa Bati Bewa's Case (Supra). Moreover, there is no pleading and no material to establish the possession/ adverse possession of the claimant over the case land.

46. The decision of this court in **Champa Bati Bewa's** case (supra) has been followed by this court in a recent judgment in the matter of ***Dasharath Sharma Vs. State of Odisha reported in 2021(I) OLR 1005***. In paragraph 17 of the judgment it has been held as follows;

> "17. It is held by this Court in the case of Champa Bati Bewa (supra), an occupancy right cannot be claimed by adverse possession. It necessarily infers that the requirements for claim of title as an occupancy rayat and that of adverse possession are not one and the same and in fact are mutually opposite. Thus, in view of the ratio in the case of Praful Manohar Rele (supra), the claim of title by adverse possession cannot be raised as an alternative plea of occupancy rayat."

47. In such view of the matter, this Court found no illegality with the order passed by the Revisional authority, which is impugned in the present writ petition. Moreover, the views of the Hon'ble Supreme Court in the matter ***State of Orissa and others vrs. Burndaban Sharma and another : reported in (1995) Supp.(3) SCC 249*** fully supports the view taken by this Court on the plea of limitation raised by the Petitioner in the present writ petition.

48. Resultantly, the order dated 14th November, 1979 passed in O.E.A. Misc. Case No.15 of 1979 by the O.E.A. Collector-cum-Tahasildar, Kujang is non-est in the eye of law and accordingly, the same is liable to be set aside

and is hereby set aside. Therefore, the present writ petition challenging the impugned order dated 26th April, 2008 passed by the Member, Board of Revenue in O.E.A. Revision Case No.529 of 1999 is devoid of any merit and as such the same is hereby dismissed. However, there shall be no order as to cost.

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2022 (I) ILR - CUT- 706

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

JCRLA NO. 72 OF 2005

GOVINDA CHANDRA TRIPATHY ……..Appellant

.V.

STATE OF ODISHA ……..Respondent

CRIMINAL TRIAL – Injured witness – Value – Held, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant in order to falsely implicate someone – Convincing evidence is required to discredit an injured witness.

Case Laws Relied on and Referred to :-

1. (2010) 10 SCC 259 : Abdul Sayeed Vs. State of Madhya Pradesh.
2. 2021 SCC OnLine SC 1046 : Sadakat Kotwar Vs. State of Jharkhand.
3. (2016) 16 SCC : Ramvilas Vs. State of Madhya Pradesh.

For Appellant : Mr. B.K. Ragada
For Respondent : Mr. J. Katikia, AGA.

JUDGMENT Date of Judgment: 31.03.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against a judgment and order of conviction dated 14th February 2005 passed by the learned Additional Sessions Judge (FTC), Bolangir in Sessions Case No.92-B/8 of 2003 convicting the Appellant for the offences under Sections 302 and 307 IPC and sentencing him to undergo rigorous imprisonment (RI) for life for the offence under

Section 302 IPC and to RI for five years and to pay a fine of Rs.3000/- and in default to undergo further RI for six months for the offence under Section 307 IPC. The sentences were to run concurrently.

2. The case of the prosecution is that the deceased Rajeswari Mishra was the wife of the Appellant. Soon after the marriage with the Appellant was subjected to cruelty on account of demand of dowry by the Appellant and other members of his family. Consequently, the deceased went to live with her mother Smt. Kuni Mishra (P.W.19).

3. On 8th April 2003 at around 12.30PM, the Appellant entered to the house of P.W.19 while P.W.19 and the deceased were arranging for Mangala Puja. The Appellant entered the house armed with a Tabli (axe) and threatened to kill P.W.19 and the deceased. He first dealt a Tabli blow on P.W.19. As a result of which she sustained bleeding injury. The deceased then came and protested. The Appellant then dealt a blow on the left hand of the deceased by means of the Tabli causing a bleeding injury. He dealt another blow to the head and to the face of the deceased. The deceased fell down on the ground. The Appellant then dealt two other blows on the head of P.W.19 who fell down and became senseless.

4. Panchanan Mishra (P.W.1), the father of the deceased who was running a cycle repairing shop at around 12.30PM had gone to collect leaves for his goats. On the way, Dibya Sahu and Siba Tripathy informed him that the accused had killed his daughter. When he reached home he found his daughter and wife lying on the ground with bleeding injuries. He gave a complaint to the Police on the basis of which the FIR was registered. By the time his daughter was taken to the Bolangir hospital, she was dead. P.W.19 was taken to the Burla hospital where she underwent treatment.

5. Narendra Kumar Sarangi (P.W.22) was the Officer-in-Charge of Loisingha Police Station (PS). He took up the investigation, examined the Complainant, visited the spot where he found P.W.19 lying unconscious and the deceased also lying there in bleeding condition. After arranging to remove them to the Bolangir hospital, he searched for the accused and found him at the Jagannath Temple of village Jogisarda. He arrested the accused on 8th April 2003 at 2.30 pm. On 8th April 2003, he also seized the wearing apparels of the deceased. Pursuant to the statement made by the accused under Section 27 of the Evidence Act, the weapon of offence which was kept

concealed by him was recovered from the roof of Surubabu Tripathy. At around 3 pm, P.W.22 he received information that the deceased had succumbed to her injuries at the District Headquarters Hospital, Bolangir. On the next date, he conducted an inquest.

6. The postmortem of the deceased was conducted on 9th April 2003 by Dr. Ananantaram Meher (P.W.18). The injuries found by him on her person were as under:

(i) One incised wound of size 3" x ½" x bone depth over medial aspect of left Forearm

(ii) One incised wound of size 4" x 1"x bone depth over medial aspect of left wrist Joint

(iii) One incised wound of size 5" x 3" x bone depth over occipital region of left side of skull

(iv) One incised wound of size 5" x ¾ " x bone depth over left side of face with compound fracture of mandible and left maxilla

(v) One incised would of size 6" x 1" x bone depth over occipital region of right side of skull with compound fracture of the skull bone of the underlying would with effusion of blood of exdural and subdural spaces and the brain under lying would was bruised

(vi) One incised wound of size 1" x ½" x muscle depth over left deltoid area of arm

(vii) One incised wound of size 2" x ½" x muscle depth just below medial 2/3rd of left cavity

7. He opined that the injuries (i) to (v) were grievous and ante mortem in nature. Injuries (vi) and (vii) were simple. All injuries were possible by a sharp cutting weapon. The injuries to the brain were opined to him to be sufficient to cause death in the ordinary course. Later, on 7th July 2003, when the Tabli was examined by him, he opined that the injuries on the body were possible by the said Tabli (MO I). In his cross-examination, P.W.18 stated that Injury (iii) by itself was enough to cause death.

8. As far as P.W.19 is concerned, she was examined by Dr. Manorama Satpathy (P.W.21) who noticed the following injuries on her:

(1) One incised wound 4" x 2" x brain depth fracturing left frontal region present longitudinally on frontal region.

> (2) Incised wound of size 5" x 2" x brain depth fracturing the left frontal region present parallel to inj. 1 extending to frontal region to occipital region.
>
> (3) Compound comminuted fracture present over occipital region. Brain matter bulging from the wound."

9. P.W.21 too confirmed that the above injuries were grievous in nature and might have been caused by the sharp cutting weapon and was sufficient in the ordinary course to cause death.

10. On completion of the investigation a charge sheet was laid against the accused, who denied his guilt and claimed trial. Twenty-two witnesses were examined for the prosecution. There was no witness for the defence.

11. The star witness from the prosecution was P.W.19 who was an injured eye witness. The trial court found her evidence to be cogent, clear and reliable. The trial court found her eye witness testimony to be fully corroborated by the medical evidence. The scientific evidence in the form of the chemical examination report Exts.16 and 17 also corroborated it. The pant of the Appellant contained human blood of Group B which tallied with the blood group of the stained earth as well as the blood extensively smeared by four strands of hair collected from sharp edge of Tabli. The hairs collected from the sharp edge of the Tabli tallied with the sample hair of the deceased with respect to their morphological and microscopic characteristics.

12. The trial court also discussed the evidence of other PWs many of whom were residents of the village who had seen the accused entered the house of P.W.19 and emerged thereafter with the Tabli in his hand. The trial court on analyzing the entire evidence found that the guilt of the accused for the offences under Sections 302 and 307 IPC had been proved beyond reasonable doubt by the prosecution. The trial court accordingly proceeded to convict the accused and sentenced him in the manner indicated hereinbefore.

13 This Court has heard the submissions of Mr. Ragada, learned counsel appearing for the Appellant and Mr. Katikia, learned Additional Government Advocate for the prosecution.

14. Mr. Ragada tried to project the case as an assault on the deceased by the accused due to sudden and grave provocation. According to him, while the accused was assaulting his motherin-law, his wife intervened and she was really not the intended target. He submits that the motive for the offence was

not established. He urges the Court since the Appellant has already served over seven years of imprisonment, the offences should be converted to one under Section 304 Part-2 IPC and the Appellant should be sentenced to the period already undergone by him.

15. Mr. Katikia, learned A.G.A. on the other hand submits that this is a case of direct evidence where proof of motive is not crucial. The occurrence had taken place in broad day light with no doubt about the assailant. Although P.W.19 was a related witness, she was an injured witness and had spoken clearly and cogently about the crime. Relying on the decisions in 316 ***Abdul Sayeed v. State of Madhya Pradesh (2010) 10 SCC 259; Sadakat Kotwar v. State of Jharkhand 2021 SCC OnLine SC 1046 and Ramvilas v. State of Madhya Pradesh (2016) 16 SCC***, he submitted that there was no ground made out for interference with the impugned judgment of the trial court.

16. It is settled position in law that even the evidence given one injured eye witness amply corroborated by the medical evidence is more than sufficient to base a finding of guilt. It is not the number of witnesses examined but the quality of the evidence that matters. As pointed out in Ramvilas v. State of Madhya Pradesh (supra), "evidence of the injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard the evidence of the injured witness."

17. The Court has carefully perused the evidence of P.W.19, the mother of the deceased who was severely injured in the incident. In fact, the injuries suffered by her were also capable of causing death as they were all on the brain and she also suffered compound comminuted fracture over occipital region. In her cross-examination, nothing much was able to be elicited by the defence. What emerged is that at the time of incident there was already a case under Section 498-A IPC instituted by the deceased against her husband the Appellant. It is a fact that mother was examined 10 days after the incident but that was because she was undergoing treatment. Although Mr. Ragada seeks to project that there was a delayed examination of P.W.19 even after her return from the hospital, her narration of events has been clear, consistent and she remained unshaken during the extensive cross-examination. There was no basis to disbelieve P.W.19.

18. In ***Abdul Sayeed v. State of Madhya Pradesh*** (supra), the Supreme Court discussed the issue regarding the evidentiary mstatus of an injured witness and in that process observed as under:

> "Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."
>
> xxx xxx xxx
>
> 30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

19. In the present case, the medical evidence as well as the forensic evidence fully corroborates the ocular evidence of the injured eye witness thus strengthening the case of the prosecution.

20. The Court finds no grounds whatsoever made out for interference with the impugned judgment of the trial court and affirms the conviction of the Appellant for the offences under Sections 302 and 307 IPC. There is no occasion therefore to interfere with the sentences awarded either for the aforementioned offences by the trial court.

21. The appeal is accordingly dismissed, but with no orders as to costs. The bail bonds of the Appellant shall stand discharged and it is directed to take him to custody forthwith if he does not surrender within two weeks from today.

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2022 (I) ILR - CUT- 712

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

W.P.(C) NO.15223 OF 2016

ASHOK KUMAR SHAW ……..Petitioner

.V.

PRINCIPAL CHIEF COMMISSIONER, INCOME TAX, BHUBANESWAR & ORS. ……..Opp. Parties

INCOME TAX APPEAL – Whether the commissioner can dispose of the appeal without the appearance of the assesse? – Held, No.

Case Law Relied on and Referred to :-

1. (2016) 69 taxmann.com 407 (Bom) : Commissioner of Income-tax (Central), Nagpur V. Premkumar Arjundas Luthra (HUF).

For Petitioner : Mr. R.P. Kar
For Opp. Parties : Mr. S.S. Mohapatra, Sr. Standing Counsel.

ORDER Date of Order: 31.03.2022

Dr. S. MURALIDHAR, C.J.

1. The challenge in the present petition is to an order dated 22nd March, 2016 passed by the Commissioner of Income Tax (Appeal), Cuttack dismissing the Petitioner's Appeal No.0061/ 2014-15 for non-prosecution on account of non-appearance of the Petitioner.

2. On 30th October, 2017 while issuing notice to the Opposite Parties in the present petition, this Court passed the following order:

> "Heard.
>
> Issue notice.
>
> Extra copies of the brief of the writ petition shall be served on learned counsel for the Income Tax Department.
>
> Mr. D. Pati, learned counsel for the petitioner raises an issue as to whether petitioner's statutory appeal before the CIT (Appeals) could have been disposed of on the ground of default without entering into and/or adjudicating merit of the case of the assessee/appellant in the body of the appeal.
>
> In this respect, reliance is placed on the decision of the Hon'ble Supreme Court in the case of *Bajali Steel ReRolling Mills Vs. C.C.E. and Customs*, reported in 2014 (310) ELT 209 (SC) as well as the judgment of Madras High Court in the case of *Southern Steel Industries Vs. Appellate Assistant Commissioner (CT), Kancheepuram & another*, reported in 1996(101) STC 273.

Counter, if any, be filed within two weeks. List this matter thereafter."

3. The Court heard the submissions of Mr. R.P. Kar, learned counsel for the Petitioner and Mr. S.S. Mohapatra, learned Senior Standing Counsel for the Department.

4. In ***Commissioner of Income-tax (Central), Nagpur V. Premkumar Arjundas Luthra (HUF) (2016) 69 taxmann.com 407 (Bom),*** the Bombay High Court answered a similar question in favour of the assessee and against the Department by holding that on a collective reading of Section 250(6) of the Income Tax Act, 1961 (Act) read with Section 251 (1)(a) and (b) thereof, the CIT(A) is not empowered to dismiss an appeal for non-prosecution. The Explanation to Section 251(2) was held to make it clear that the CIT(A) would be entitled to consider and decide any issue arising in the proceedings before him in the appeal filed, even if the issue is not raised by the Appellant.

5. Mr. Kar, learned counsel for the Petitioner draws the attention of the Court to Rule 24 of the Income Tax Appellate Tribunal Rules, 1963 which does not permit even the ITAT to dismiss an appeal for default. While the main portion of Rule 24 requires the ITAT, even in the absence of the appellant, to hear and decide the appeal on merits after hearing the respondent, the proviso thereto permits the appellant subsequently file an application before the ITAT explaining the reason for non appearance and for the ITAT to again hear the appeal on merits after hearing such party.

6. Be that as it may, in view of aforementioned decision of the Bombay High Court in (*supra*), with which this Court concurs, the CIT(A) could not have by the impugned order proceeded to dismiss the appeal in default for non-appearance of the Petitioner. The CIT (A) was thus obliged to have heard the appeal on merit.

7. For the aforementioned reasons, the impugned order dated 22nd March, 2016 of the CIT(A) is hereby set aside and the ITAT Appeal No.0061/2014-15 filed by the present Petitioner for the Assessment Year 2011-12 is restored to file of CIT(A) for hearing and disposal on merits. For the above purpose, the appeal will be listed before the CIT(A) on 12th May, 2022 on which date the present Petitioner will appear along with a downloaded copy of this order. The CIT (A) will, after hearing the Petitioner and the Department, pass a fresh order on merits.

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

2022 (I) ILR - CUT-714

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

W.P.(C) NO.14469 OF 2005

ALLABOX ALI AND ORS. ……..Petitioners

.V.

ALLABOX KHAN AND ORS. ……..Opp. Parties

WAKF ACT, 1995 – Section 83(9) – Order of the Appillate tribunal – Power of the High Court reviewing the decision of the Wakf Tribunal – Scope – Limited – Interference when justified? – Held, the jurisdiction of the High Court is restricted to only examine the correctness, legality or propriety of the findings recorded by the Wakf Tribunal – Hence, finding of Wakf Tribunal did not warrant interference.

(Para-40)

Case Laws Relied on and Referred to :-

1 AIR 1998 SC 972 : Sayyed Ali Vs. Andhra Pradesh Wakf Board.
2. AIR 1954 Orissa 15 : Imdad Ali Khan Vs. Sardar Khan.
3. 66 (1988) CLT 432 : Pramod Kumar Sahu Vs. Baidyanath Mishra.
4. 2021 SCC Online 280 : Kiran Devi Vs. Bihar State Sunni Wakf Board.

For Petitioners : Mr. P.K. Rath-1

For Opp. Parties : Mr. Md. Fayaz

JUDGMENT Date of Judgment: 04.04.2022

Dr. S. MURALIDHAR, C.J.

1. This writ petition challenges the judgment dated 20th October 2005 passed by the State Wakf Tribunal, Orissa, Cuttack ('Tribunal') in Case No. W.T.(O)/O.A.-02/2004. By the impugned judgment, the Tribunal dismissed the Petitioners' aforementioned suit and held that it was not maintainable.

2. One of the main reliefs sought in the said suit by the Petitioners, who were the Plaintiffs 1 to 5, was for a declaration that they were the Mutawallis of the Pir Saha Hyder Ali Bije Rambhadeipur (Plaintiff No.2 and Petitioner No.3 herein) in respect of the suit property on hereditary basis and Defendant Nos.1 to 5 were not the Mutawallis and had no right, title, interest and possession over the suit property. The Tribunal negatived the above prayer and the further prayer of the Plaintiffs to permanently injunct Defendant Nos.1 to 5 (Opposite Parties 1 to 5 herein) from alienating or coming into the suit property or interfering with the possession of the Plaintiffs (Petitioners

and Proforma Opposite Parties 7 to 10 herein) over the suit property. Hereafter in this judgment the reference to the parties will as far as possible be to their description in the suit before the Tribunal i.e. as Plaintiffs and Defendants 1 to 5. The Wakf Board is referred to as such or as Defendant No.6.

Background facts

3. The background facts are that Plaintiff No.2 before the Tribunal was a deity Peer shown to be represented by its Marfatdar Syed Abbas Ali (Plaintiff), the father of the present Petitioner Nos.1 and 2 and roforma Opposite Parties 8 to 10 and husband of Proforma Opposite Party No.7). The Orissa Board of Wakf was arrayed as Defendant No.6 before the Tribunal and Opposite Party No.6 in the present writ petition. It has been constituted to administer, manage and superintend Wakf properties in the State of Odisha. The Plaintiff who died during the pendency of the proceedings before the Tribunal was substituted by his sons (the present Petitioners 1 and 2) and his wife and daughters (Proforma Opposite Parties 7 to 10 herein) as Plaintiffs 1 (a) to (f). The Plaintiffs and the Defendants 1 to 5 are Sunni Muslims governed by the Hanafi School of Mohammedan Law.

Case of the Petitioners

4. The case of Petitioner Nos.1 and 2 is that their great great randfather Pir Saha Hyder Ali was a pious, religious and noble Muslim person who had dedicated his life for religious charitable purposes for all the Muslim general public of the locality. He is said to have dedicated the suit property along with other properties in the name of the Almighty for religious purposes as well as for the Muslim public for their use.

5. It is stated that Pir Saha Hyder Ali appointed his son Rasuli Saha as the Muttawalli and divested himself from the ownership of the suit property. After the death of Pir Hyder Ali, his tomb was treated as spiritual and pious and the public started worshiping and offering prayer there. As a result, Pir Hyder Ali Saha became a 'Pir' and the properties were utilized for uplifting the spiritual and other aspects of the Muslim public in Odisha.

6. On the death of the son of Pir Hyder Ali, Asak Ali Saha became the Muttawalli and during the settlement operation of 1930, his name was noted in the settlement record of rights (ROR) of 1930. The suit property was in the

'Nijdakhal' of the institution i.e. Pir Saha Hyder Ali through its Marfatdar Asak Ali Saha, the father of Sayed Abas Ali in terms of the notification dated 18th March 1974 of the State Government. Pir Saha Hyder Ali Bije Rambhadeipur was recorded as a tenant under the State having absolute right, title, interest and possession in the suit property.

7. The case of the Petitioners 1 and 2 is that after the death of Asak Ali Saha, the recorded Marfatdar of the 1930 settlement, his son Syed Abbas Ali and after his death, Petitioner Nos.1 and 2 together with Proforma Opposite Party Nos.7 to 10 had been administering the suit property as Muttawalli of the Pir [Petitioner No.3/Plaintiff No.2] and are in possession thereof. The expenses of the institution for offering daily Seva Puja and observing festivals and ceremonies as per Muslim religious customs and charitable purposes prevalent in the locality, maintaining the family expenses as per the customs and directions of the Wakf are stated to be met from the land in question and its usufructs.

8. The case of the Petitioners 1 and 2 is that the descendant of the Muttawalli has to hold that office hereditarily and continuously without any break. It is stated that Asak Ali Saha died in 1975 leaving behind his only son Syed Abbas Ali and three daughters. It is contended that Asak Ali Saha appointed Syed Abbas Ali as Muttawalli Marfatdar of the Peer as per the customs and that the daughters had no right to the office of Muttawalli; that the suit properties have been treated as Wakf properties since the time immemorial as per the custom and last Will of the dedicator.

9. It is claimed that during his lifetime, Syed Abbas Ali appointed his two sons i.e. Petitioner Nos.1 and 2 herein as Marfatdar Muttawallis of the Pir Saha Hyder Ali and that they were discharging and performing duties as directed by the Wakf and their ancestors and continuing as such without a break.

10. The Petitioners 1 and 2 averred in the plaint that Syed Abbas Ali was "an illiterate rustic villager" and he was unable to properly “attend the settlement and consolidation authorities during their operations in the suit Mouza for recording his name as Marfatdar of the Pir in question in respect of the suit land.” The Petitioners claimed that Syed Abbas Ali remained "with the hope and belief that the Wakf Board …. might have properly recorded the suit property in the name of Pir Saha Hyder Ali Marfat Syed Abbas Ali son

of Asak Ali Saha of Rambhadeipur" thereby attesting to the fact that Syed Abbas Ali was performing his duties as Muttawalli of the Pir and enjoying the suit land without disturbance.

11. It is then stated that the dispute arose when after the super cyclone, in March 2000, when Opposite Party Nos.1 and 2 (Defendant Nos.1 and 2 in the suit) tried to interfere with the possession of Petitioner Nos.1 and 2 in the suit land and threaten to dispossess them with an intention to sell the suit property by negotiating with outsiders and projecting as if they were the Marfatdars. It is claimed that after their father Syed Abbas Ali made enquiries with the Office of Revenue Inspector, Tarikunda and obtained a copy of the ROR, it transpired in September 2000 that Opposite Party Nos.1 to 5 (Defendant Nos.1 to 5) had been illegally recorded as the Marfatdars of the Pir in the Hal Settlement Authority and in Consolidation Authority in contravention of a circular dated 8 th November 1977 of the Revenue authorities. It is claimed that this was done without notice to the "real persons" and was in ignorance of the entries in 1930 settlement ROR. According to Plaintiff Nos.1 and 2, Defendant Nos.1 to 5 and the others whose names are recorded in the ROR were not descendants of the ancestor of Plaintiff Nos.1 and 2 and were not the Marfatdars of the Peer. It is claimed that they were the complete strangers to the family of Plaintiffs as well as the suit property and not related either to the dedicator or the Plaintiffs' ancestor.

12. It was stated that by impersonation, a fraud had been practiced on the Settlement and Consolidation Authority by the Opposite Parties projecting themselves as successors of the Plaintiffs' ancestors. It was contended that the entries recording them as Marfatdars had been done in a casual manner without examining their status in relation to the suit land and such entries did not take away or extinguish the right, title, interest and possession of the Plaintiffs or create any corresponding title and interest in favour of Defendant Nos.1 to 5 in the suit property. It is further contended that irrespective of such wrong entries in the ROR, the Plaintiffs had been possessing the suit property peacefully and were in cultivating possession thereof.

13. In the plaint, it was stated that in the current consolidation ROR Khata No.86, an area of Ac.1.87 decimals had been recorded and from the note of possession in the remarks column, it transpired that certain Wakf properties had been alienated in favour of the strangers contrary to law. It was sought to be explained in the plaint that the Plaintiffs were filing the suit in respect of

the properties under Consolidation Khata No.86 and reserved their right to amend or to file a separate suit for other properties.

14. On 26th October 2000, when Defendant Nos.1 to 5 sought to allegedly alienate the suit properties to outsiders, Syed Abbas Ali filed T.S. No.266 of 2000 in the Court of Civil Judge (Senior Division), Jagatsinghpur. The said suit was subsequently transferred to the file of the learned Civil Judge (Junior Division), Jagatsinghpur and was renumbered as T.S. No.231 of 2001.

15. On 11th August 2001, Syed Abbas Ali died and Petitioner Nos.1 and 2 herein, Plaintiff Nos.1 (a) to 1(f) being his children were ubstituted in his place. During the pendency of the above suit, the Tribunal was constituted. The substituted Plaintiffs moved this Court in TRP(C) No.48 of 2003. During the pendency of the civil suit, the Tribunal was established under the provisions of the Wakf Act, 1995. By an order dated 7th February 2004, the Civil Judge (Junior Division), agatsinghpur returned the plaint in T.S. No.231 of 2001 to be presented before the Tribunal.

16. After carrying out corrections by way of amendments to the plaint, the prayer of Petitioner Nos.1 to 3 and Proforma Opposite Party Nos.7 to 10 was for declaration that they were the Muttawallis of Plaintiff No.2 in respect of the suit property on hereditary basis and that Opposite Party Nos.1 to 5 were not the Muttawalli of Petitioner No.3 (Plaintiff No.2) and had no right, title or interest over the suit property.

The case of Defendants 1 to 5

17. While traversing amended plaint, Defendant Nos.1 to 5 contended in their written statement that the suit was not maintainable; the Plaintiffs had no cause of action of filing a suit; the Tribunal had no jurisdiction to take cognizance of the proceedings; the Tribunal had no territorial jurisdiction to try the suit; that the suit was bad as per the provisions of the Orissa Estate Abolition Act (OEA Act) since the suit lands were already settled in favour of Defendant Nos.1 to 5; the suit was hit by the law of estoppel, principles of res-judicata and bad for non-joinder of the necessary parties; it is bad for want of a statutory notice under Section 56 of the Wakf Act, 1954.

18. The further plea of the Defendants 1 to 5 was that the Pir i.e. Plaintiff No.2 was a religious and pious person who came from Kabul for preaching Islam. It was claimed that Asak Ali Saha was not the ancestor of the present

Plaintiffs and that the averments that the family of Plaintiff Nos.1 and 2 were appointed as Muttawalli on hereditary basis was a false and preposterous claim. Specifically, it was contended by the Defendants that "there is no local custom in favour of the present Plaintiffs to bestow them any right to claim Muttawalliship of Plaintiff No.2 in respect of the suit property on hereditary basis."

19. Defendants 1 to 5 also claimed that in terms of a notification dated 18th March 1974 of Government of Orissa issued under the OEA Act, suit property had a 'be-bandobasti' status and that the land in question had vested with the Government of Odisha free from all encumbrances. The ancestor of the Defendants 1 to 5 had filed OEA Case No.917 of 1985. In terms of the orders passed by the OEA Collector, the suit lands were settled in favour of the Defendants 1 to 5 who were paying Salami and annual rent. Subsequently, the consolidation ROR was also published in favour of the Defendants 1 to 5. It was further averred by the Defendants/Opposite Party Nos.1 to 5 "The common ancestor of the Plaintiffs along with other coancestor has executed permanent lease deeds as well as Seva Samarpana Patras in favour of the ancestors of these defendants in respect of the entire suit properties vide registered instruments dt.14.11.35, 2.8.37, dt.14.12.1936, dt.2.12.40, dt.9.12.42 and 29.12.42 and delivered possession in favour of ancestors of these Defendants and as such the ancestors of these Defendants and thereafter the present defendants are the lessees of deity Peer in respect of the suit property." They also claimed that in terms of the orders passed in OEA Case No.917 of 1985, the rent had been fixed in favour of Defendant Nos.1 to 5 and a new vesting Patta had been issued in their favour under Khata No.719/3. The suit property had been recorded in favour of the Defendants 1 to 5 also in Consolidation Khata No.86 in the ROR published in 1996. Defendant Nos.1 to 5 claimed to be in possession of the suit land as tenants under the Government of Odisha.

20. The contention of Defendants 1 to 5 further was that after the Plaintiffs withdrew their suit from the Court of the Civil Judge (Junior Division), Jagatsinghpur and without an order of the High Court for transfer of such case, the application before the Tribunal was like a fresh suit with a fresh cause of action which was therefore liable to be dismissed.

21. On the other hand, in their reply to the written statement, the Plaintiffs 1 (a) to (f) maintained that the alienations relied upon by Defendant Nos.1 to

5 was void ab initio "since the suit lands are surveyed and registered as Wakf properties and are duly notified as such in the Orissa Gazettee notification of the year 1978. Such Gazette notification dated 19th May 1978 having not been challenged before any competent authority within the statutory period has become final and conclusive which is binding on all concerned". It was claimed that the revenue Courts or the OEA authorities have no right to adjudicate on the character of the Wakf property. That had to be decided under the provisions of Wakf Act. A finding which was contrary to law could not operate as res *judicata* in a subsequent suit filed before the competent authority, including the Tribunal.

Issues framed by the Tribunal

22. On completion of pleadings, the Tribunal framed the following issues for consideration:

"(1) Is the suit maintainable in the eye of law?

(2) Have the Plaintiffs any cause of action to bring the suit?

(3) Has this Tribunal jurisdiction to adjudicate this suit?

(4) Is this suit hit under the provision of OEA Act?

(5) Is the suit hit by law of estoppel and resjudicata?

(6) Is the suit bad for non-joinder of necessary parties?

(7) Is the Plaintiff No.1 the lineal successor of Peer Saha Hyder Ali?

(8) Whether the Plaintiff No.1 or the Defendant Nos.1 to 5 are Mutawallis of the suit property?

(9) Whether the Plaintiff No.1 or the Defendant Nos.1 to 5have any manner of right, title, interest or possession over the suit land?

(10) Whether the ancestor of Plaintiff No.1 along with others had legally alienated the suit property in favour of the ancestors of Defendant Nos.1 to 5 with the strength of permanent registered lease deeds in between the year 1936-1942?

(11) Whether the defendants have perfected their title in respect of the suit land by way of adverse possession?

(12) Are the Plaintiffs entitled for a decree of permanent injunction against the Defendant Nos.1 to 5 as prayed for?

(13) To what other relief, if any, the Plaintiffs are entitled?

Additional Issues Dated 28.10.2004

(14) Is the suit barred by law of limitation?

(15) Is the suit bad for want of statutory notice to Defendant No.6 as per provision of the Wakf Act, 1995?

(16) Is the suit bad for want of any Wakf deed or any other document creating the Wakf institution as is being claimed by the Plaintiffs?"

Findings of the Tribunal

23. Taking up the Issues 4 to 12 and 16, the Tribunal concluded that the suit properties are Wakf properties belonging to Plaintiff No.2. Referring to the decision of Supreme Court of India reported in ***Sayyed Ali v. Andhra Pradesh Wakf Board AIR 1998 SC 972,*** it was held "once a Wakf always a Wakf". Further relying on the decision of this Court in ***Imdad Ali Khan v. Sardar Khan AIR 1954 Orissa 15***, it was observed that once a Wakf was validly created, the properties vest in the Almighty. Extensive reference in this regard was made by the Tribunal to the commentary titled *Mulla's Principles of Mohammedan Law* (19th edition) and to Section 202 therein. The further conclusions drawn by the Tribunal were that "the suit properties are agricultural lands and that Defendant Nos.1 to 5 are not the members of the Plaintiffs family and that no Wakf deed is executed in relation to the suit properties and that there is no document disclosing any modality for appointment of Muttawalli of Plaintiff No.2." The Tribunal observed that Section 206 of *Mulla's Mohammedan Law* does not recognize any right of inheritance to the office of the Muttawalli. However, the office could become hereditary by custom, in which case the custom must be followed. The fact that such custom was opposed to general law must be supported by strict proof.

24. The Tribunal proceeded to examine whether the Plaintiffs 1 (a) to (f) had proved that by custom they had the right to be recognized as Muttawalli of Plaintiff No.2 on hereditary basis. PW-1 admitted in his cross examination that the original Plaintiff Syed Abbas Ali was his father-in-law; he testified that he had not seen any document whereby Defendant Nos.1 to 5 were appointed as Muttawalli of Plaintiff No.2 including any ROR. He admitted being present when the plaint was prepared. The Tribunal therefore discarded his evidence as being that of an interested witness and "not beyond reproach".

25. PW-2, a neighbour of Plaintiff Nos.1 (a) to (f) stated that the suit properties were originally dedicated by Asak Ali Saha in favour of Plaintiff No.2 as Wakf. This was inconsistent with the case of the Plaintiffs. Further, he could not state anything about the Hal settlement ROR or consolidation ROR. PW-3 failed to deny the suggestion on behalf of Defendant Nos.1 to 5 that they were Marfatdars in respect of the suit property. PW-5 did not have any personal knowledge regarding the Defendants having obtained the RORs through impersonation. PW-6 admitted in cross-examination that Sayed Abas Ali was his maternal uncle and that the Plaintiffs 1 (a) to (f) were his relations. His evidence regarding the appointment of Marfatdars of the Peerstan on hereditary basis was also not convincing according to the Tribunal. PW-7 was unclear about the exact location of Plaintiff No.2. PW-6 claimed that it was situated over suit Khata No.8 at Mouza Jaisol whereas PW-10 claimed that there was no Peerstali at Rambhadeipur, but at Fakirtakia. PW-12 was also unconvincing as he had written the names of Pir on his left palm while adducing evidence before the Tribunal. The evidence of PWs 6 and 13 were also inconsistent as regards the exact location.

26. The Tribunal then discussed the evidence of PW-8 who was a 'summoned witness'. He was a Muttawalli of Pir Dargha Hazrat Gaus-Pak of Mouza-Praharajpur under Kishannagar Police Station in Cuttack District. In the cross-examination, he admitted to not having seen the suit land or any document relating to Plaintiff No.2. Although, he claimed to be Muttawalli of Gaus-Pak Pir by succession as per custom, in his cross-examination he testified that he had not given any statement or return to the Wakf Board. PW-8 also claimed that the general custom was that Muttawalli would be appointed by way of succession whereas the case of the Plaintiffs 1 (a) to (f) was that they were appointed by their predecessor. Accordingly, the Tribunal rejected the testimony of PW-8 as being inconsistent with the case of the Plaintiffs.

27. PW-11 was a teacher in a Madrasa who in his cross-examination admitted not to have seen any document. He also testified that Asak Ali was the first Muttawalli when in fact he was not. PW-12 was a retired Assistant Engineer, but appeared to have noted the names of the Pir in his palm while he was adducing evidence looking at the palm. PW-13 deposed in his cross-examination that the term Muttawalli means owner whereas under Section 202 of *Mulla's Mohammedan Law* the expression Muttawalli essentially means a manager who has no right to the Wakf property. It also envisaged

that a Muttawalli cannot appoint his successor if the Office went by hereditary right. Thus, it was concluded by the Tribunal that the case of Plaintiff Nos.1 and 2 regarding their appointment as Muttawalli by the predecessor was contrary to Section 205 of Mulla's Mohammedan Law. Reference was made to the decision of this Court in ***Hajee Sheikh Ali v. Mohemmed Yusuf AIR 1962 Orissa 111*** that a Muttawalli cannot appoint his successor while he is in health as distinguished from death illness.

28. The Plaintiffs sought to project Defendant Nos.1 to 5 as belonging to the Wahabi sect and therefore incompetent to perform the duties of Muttawalli of any Pir since according to them Wahabi Muslims, belong to the Deobandi group who believe in Allah directly and do not pray or worship any Pir. However, PW-11 deposed that the word 'Sunni' or 'Wahabi' does not find place in the Koran or Hadis; there was no difference between a Wahabi and a Sunni in the Koran or the Hadis, and that such factions had been initiated to effect groupism amongst the Muslims. The Hal ROR relating to the suit property stood recorded in favour of 'Ali and Khan Muslims'. Further, DW-1 deposed that Marfatdar Asak Ali Saha, the predecessor of the Plaintiffs, along with other Marfatdars alienated the suit property in favour of the predecessors of Defendant Nos. 1 to 5 by way of permanent Chasa Pattas (Exhibits- A, C and E) as well as the Seva Samarpan Patras (Exhibits-B and D) which were all executed between 1936 and 1942. DW-1 also proved the proper custody of the documents in terms of the Section 90 of the Indian Evidence Act. The Tribunal then concluded that if indeed the Defendant Nos. 1 to 5 were incompetent to work as Mutawalli, the Plaintiff could not have executed Exhibits-B and D.

29. PW-13 in his cross-examination admitted that in the plaint the fact of difference between Deobandi and Barelvi was not pleaded. PW-13 in his cross-examination debunked the 1930 settlement ROR as a fabricated document and that the recorded owners therein were not the owners or the Marfatdars of the suit property. The entries in the remarks column of the ROR under Exhibit-2 disclosed the number of illegal purchases. The Plaintiffs 1 (a) to (f) had no explanation how such alienations could be effected if their family was the only Mutawalli of Plaintiff No.2. As per Exhibit-1, the suit property was recorded under Be-bandobasti Khata. The Plaintiffs were unable to explain if any of their family members had taken steps to record the suit land in favour of Plaintiff No.2 or to pay rent in respect of such suit lands.

30. Relying on the decision in ***Pramod Kumar Sahu v. Baidyanath Mishra 66 (1988) CLT 432,*** the Tribunal concluded that when proper custody of a 30-year old document is proved, the presumption under Section 90 of the Evidence Act extends to the execution of the documents i.e. signature, attestation etc., but not the truth of its contents. Further, recitals in such documents were admissible under Section 32(2) of the Evidence Act. On this basis, the Tribunal concluded that the execution of Exhibits A to E had been proved in favour of Defendant Nos.1 to 5. The parties to such documents were all dead and therefore, all those documents were held admissible under Section 32 of the Evidence Act.

31. As regards Exhibits 1 and 2, the Tribunal was not prepared to examine the allegations of the illegality since neither the concerned authorities were examined as witnesses nor the Government of Orissa had been impleaded as parties. As regards Exhibits-A to E, although the Tribunal concluded that a transfer thereunder was without the permission of the Court or the Wakf Board and therefore are void and invalid as per Section 207 of *Mulla's Mohammedan Law.* They could not be brushed aside in limine till they were avoided by any competent authority subject to limitation. The attempt by the Plaintiffs to have the plaint amended to declare Exhibits-A to E to be void had been rejected by the Civil Judge (Junior Division), Jagatsinghpur by an order dated 20th August 2003 on the ground of limitation. That order had not been challenged.

32. The Plaintiffs tried to prove that the consolidation ROR was not conclusive since a restoration application had been filed in Consolidation Revision case which is still pending. The Tribunal concluded that if the consolidation ROR in Ext-3 was reversed, it could not be ignored. The Tribunal further found that the Ext-F, the vesting Patta, had been issued in favour of the Plaintiff No.2 and not Defendant Nos. 1 to 5 with any exclusive interest. Thus, Plaintiff No.2 had been accepted as a tenant under the Government. As regards Exhibit-28, relied upon the Plaintiffs, this was the Xerox copy of an entry relating to survey of the suit property granted by the Survey Commissioner, Wakf Board. This referred to Asak Ali Saha as the Marfatdar. The Tribunal questioned how the name of Abbas Ali could be incorporated therein if Asak Ali was alive when it was prepared i.e. in 1974 that this document was held not to help the case of the Plaintiffs. It was held that the Plaintiffs having failed to prove their case, could not rely on the weakness in the Defendant's evidence to prove their case. The evidence laid

regarding the customary practices through PW-4 was found to be unconvincing. Even as regards the possession, both PWs-2 and 3 could not deny the suggestion that the Defendants were in possession of the suit lands. On the other hand, both DWs-1 and 2 supported the stand of the Defendant Nos.1 to 5. The Defendants had proved the rent receipts under Exhibit-G series and the vesting Patta under Exhibit-F. Exhibits-2 and 3 being the Hal settlement and consolidation documents had also not been set aside. Thus, it was concluded that the Exhibits-2, 3, F and G series established that the Defendant Nos. 1 to 5 were looking after the suit property and could be safely concluded to be in possession thereof.

33. Accordingly, the Tribunal concluded that the oral testimonies relied upon by the Plaintiffs were "prevaricating and inconsistent with each other" and have failed to establish the case of the Plaintiffs of having become Mutawallis on hereditary basis by way of custom. The Defendants not having filed any document regarding Wakf or any donation, the Tribunal concluded that the suit property was a Sunni Wakf by user. Further, the Tribunal held that the Plaintiffs had failed to prove their possession over the suit properties and were therefore not entitled to any order of permanent injunction. Issues 7, 8 and 12 were answered against the Plaintiffs and Issues 11 and 16 against Defendant Nos.1 to 5. Issue No.9 was answered in favour of Defendant Nos.1 to 5 to the extent that they were found to be in possession of the suit lands as Mutawalli of Plaintiff No.2. Issue No.10 was answered to the extent that the alienations under ExhibitA to E were made without sanction of the competent authority but they were not avoided till date. Further since Defendant Nos.1 to 5 failed to establish any exclusive right, title and interest over the suit property which were Wakf property, the suit could not be said to be bad under any provision of the OEA Act. Issue No.4 was accordingly answered against Defendant Nos.1 to 5. The contention that the suit was bad for non-joinder of the family members was not acceptable. The Tribunal refrained from returning a finding on the validity of Exhibits-2 and 3. Issue No.8 was answered in favour of Defendant Nos.1 to 5.

34. Issue No.3 was also answered against Defendant Nos.1 to 5 by holding that the Tribunal had jurisdiction to entertain the matter. Issue No.15 regarding compliance to the requirement of Section 56 of the Wakf Act, 1954 was also answered against Defendant Nos.1 to 5. As was Issue No.14 under which it was held that the suit was not barred by limitation. It was held on Issue Nos. 1, 2 and 13 that the Plaintiffs had no cause of action to file the suit

and therefore, the suit was not aintainable in the eye of law. The suit was accordingly dismissed.

35. This Court has heard the submissions of Mr.P.K. Rath-1, learned counsel appearing for the Petitioners and Mr. Md. Fayaz, learned counsel appearing for the Opposite Parties.

Submissions of counsel

36. Learned counsel for the Petitioners submitted that Defendant Nos.1 to 5 had not filed any order passed by any authority under the Orissa Survey Settlement Act, 1958 (OSS Act) or the Orissa Consolidation of Prevention of Fragmentation Act, 1972 (OCPF Act) to substantiate entries in Exhbits.2 and 3. On the other hand, he relied on the Survey Register and Gazette Notification which had been proved by the Official Witness PW-14 the Wakf Inspector of Wakf Board. Reliance was placed on the Exhibits-27, 28 and 29 and the Gazette Notification published under Section 6 of the Wakf Act, 1956. The entries therein had not been set aside or challenged by the Defendants or their ancestors. Therefore, the entries in the Gazette Notification and the Survey register maintained by the Wakf Board were binding and admissible under Section 74 of the Evidence Act and this should be presumed to be correct as regards proof of custom, right of inheritance of succession of Mutawalli and several generations of the Plaintiffs.

37. According to learned counsel for the Petitioners, the Tahasildar had no power or jurisdiction to record the name of the Defendants 1 to 5 as Marfatdars in the vesting Patta (Exhibit-F) in proceedings under the OEA Act. According to him, the question of the documents being eclared void does not arise as the issue had to be adjudicated in the light of Sections 36 and 56 of the Wakf Act. According to him, no Mutawalli could have given permanent Chasa Patta or any Seva Samarpan Patra without the leave of the Court or the Wakf Board.According to him, there were no documents of conveyance in favour of the Defendant Nos. 1 to 5. He pleaded that the defendants were in the same footing as the Plaintiff. The difference being that the Defendants were successors and the illegal purchasers whereas the Plaintiffs 1 (a) to (f) were the successors of the Sabik Marfatdar. The Tribunal ought not to have presumed that the Defendants 1 to 5 were the Marfatdars without their making a specific averment to that extent.

38. Learned counsel for the Petitioners then argued that the ribunal did not consider the oral evidence adduced by the Plaintiffs and all the documents exhibited by it and that it had opted a pick and choose method. The Tribunal had taking note of the materials evidence and came to an erroneous conclusion of facts. The decisions relied upon by the Tribunal are alleged to have been misapplied.

39. On the other hand, Mr. Md. Fayaz, learned counsel for the Opposite Party Nos.1 to 5 defended the impugned order of the Tribunal by submitting that it was based on a thorough analysis of the evidence on record and suffered from no legal error. He relied on Ex. A to E produced by Defendants 1 to 5 which had been proved to the satisfaction of the Tribunal and which showed their possession over the suit property. He again referred to the decision in ***Pramod Kumar Sahu v. Baidyanath Mishra*** (supra) and submitted that when the proper custody of a 30-year old document is proved, the presumption under Section 90 of the Evidence Act extends to the execution of the document i.e. signature, attestation etc.

Analysis and reasons

40. The above submissions have been considered. At the outset it must be noted that in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution of India, this Court is, while reviewing the decision of the Wakf Tribunal, not acting as a first appellate Court. In ***Kiran Devi v. Bihar State Sunni Wakf Board 2021 SCC Online 280***, the Supreme Court explained:

> "20. Therefore, when a petition is filed against an order of the Wakf Tribunal before the High Court, the High Court exercises the jurisdiction under Article 227 of the Constitution of India. Therefore, it is wholly immaterial that the petition was titled as a writ petition. It may be noticed that in certain High Courts, petition under Article 227 is titled as writ petition, in certain other High Courts as revision petition and in certain others as a miscellaneous petition. However, keeping in view the nature of the order passed, more particularly in the light of proviso to sub-section (9) of Section 83 of the Act, the High Court exercised jurisdiction only under the Act. The jurisdiction of the High Court is restricted to only examine the correctness, legality or propriety of the findings recorded by the Wakf Tribunal. The High Court in exercise of the jurisdiction conferred under proviso to ubsection (9) of Section 83 of the Act does not act as the appellate court."

41. It is the Plaintiffs that came to before the Tribunal with a case that they were the Marfatdars of Plaintiff No.2 by way of custom. The case was that

they had inherited the Mutawalliship from the predecessor and father Syed Abbas Ali. They examined a large number of witnesses who did not support their case. Although, before this Court, learned counsel for the Petitioners sought to build up a different case based on Exhibits-27, 28 and 29 which according to him were proved by PW-14, the Wakf Inspector, the approach before the Tribunal was entirely different. An attempt was made to have them speak about the custom in terms of which the Mutawalliship became hereditary. None of the Plaintiffs witnesses could support that case. They were either related and interested witnesses or they spoke inconsistently or were easily contradicted in their cross-examination thus rendering them unreliable.

42. The Tribunal has undertaken a thorough analysis of the deposition of each of the witnesses carefully and has arrived at an objective conclusion regarding their trustworthiness and veracity. Even the evidence of the PW-14 has been discussed in great detail in paragraph-19 of the impugned judgment as under:

> "19. The Plaintiffs have proved the certified Xerox copy of the entry relating to survey of the suit property granted by Survey Commissioner, Wakf Board as Ext.27 which is the same document as Ext.28 and the Gazette notification as Ext.29 by calling for the same from the Office of the Defendant No.6 and proving the same through their witness PW-14. PW-14 is an official witness who has admitted in his cross-examination that the entries in Exhibit-28 are not made in his presence. PW 14 has also deposed in chief-evidence that in Exhibit-28 there is reference that Asak Ali Saha is the marfatdar of the present suit property and that there has been some illegal alienations in favour of one Sovan Khan who is admittedly the predecessor of Defendant Nos.1 and 2."

43. Thus, apart from the fact that it is incorrect on behalf of the Petitioners to urge that the Tribunal has ignored the evidence of PW- 14, the Tribunal has drawn conclusions from the complications brought to light by such evidence. In the first place the person making the entries was not himself examined. These entries per se did not make Exhibits-A to E illegal. As far as Exhibit-28 is concerned, again the following conclusions of the Tribunal in relation thereto appear to be unassailable:

> "So far as the entry in relation to the name of Abas Ali in Exhibit-28 is concerned, it is the case of the Plaintiffs that the Mutawallis are appointed on hereditary basis and at paragraph 5 of the plaint they have pleaded that Asak Ali died in the year 1975. There is no explanation from the Plaintiffs as to how the name of Abas Ali could be

> incorporated in Exhibit 28 if Asak Ali the then Marfatdar was alive till 1974. Accordingly such circumstance does not reinforce the case of the applicants in any manner."

44. Acknowledging the weakness of the evidence of the Plaintiffs, a consorted attempt was sought to be made by learned counsel for the Petitioners before this Court to confine the submissions to a small set of documents which was sought to be proved by PW-14. However, there appears to be no answer to the fact that a large number of Plaintiffs' witnesses were found to be untrustworthy and did not establish the main plank of the Plaintiff's case namely that they had inherited the Mutawalliship of Plaintiff No.2 on hereditary basis through succession. The attempt to project this as customary, miserably failed.

45. The Tribunal appears to have adopted a balanced approach. It disagreed with the Defendant Nos. 1 to 5 on many of the preliminary and technical objections regarding jurisdiction of the Tribunal, but on merits it found that the Plaintiffs had failed to establish their case. An elaborate exercise had been undertaken by the Tribunal to analyze the evidence. The conclusions reached by it flow from the evidence itself and are not shown to be perverse or illogical.

46. The Court is not satisfied, therefore, that the Petitioners have made out a case for interference with the impugned judgment of the Tribunal. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs.

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2022 (I) ILR - CUT- 729

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

W.P.(C) NO. 21073 OF 2021

M/s. NAGEN CATERER, SANTA SAHI, BUXIBUZAR, CUTTACK. ……..Petitioner

.V.

CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of certiorari – Prayer to quash demand-Cum-Show cause notice issued by additional commissioner GST and central Excise, whether entertainable? – Held, No. – It may be worthwhile to state that writ petition is not entertainable against the show cause notice in view of parameters laid down by the Apex Court in series of decision. (Para-14)

The present case seems neither to be a case of lack of jurisdiction nor any allegation with regard to violation of principles of natural justice by the authority – Therefore this Court feels entertainment of the writ petition at the stage of notice would be premature – Writ petition dismissed with liberty to the petitioner to file reply/objection to show cause notice dated 22.04.2021 and also participate in the proceeding before the adjudicating authority.

(Para-28)

Case Laws Relied on and Referred to :-

1. AIR 1961 SC 372 : Calcutta Discount Co. Ltd. Vs. Income Tax Officer.
2. AIR 1962 SC 1893 : East India Commercial Co. Ltd. Vs. Collector of Customs.
3. (2011) 4 SCC 435 : Commissioner of Central Excise, Vishakhapatnam Vs. Mehta & Co.
4. (1988) 3 SCC 348 : Union of India Vs. Madhumilan Syntex Pvt. Ltd.
5. (1987) 2 SCC 93 : Golak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum.
6. (2006) 5 SCC 638 : Ramesh B Desai Vs. Bipin Vadilal Mehta.
7. (2006) 10 SCC 201 : 2006 SCC OnLine SC 979 : Star Paper Mills Ltd. Vs. State of U.P.
8. (2019) 20 SCC 446 : Union of India Vs. Coastal Container Transporters Association.
9. (2008) 23 VST 8 (SC) : South India Tanners & Dealers Association Vs. Deputy Commissioner of Commercial Taxes.
10. (2010) 11 SCC 593 : Supreme Paper Mills Limited Vs. Assistant Commissioner of Commercial Taxes.
11. 2015 SCC OnLine Ori 53 : Bhubaneswar Development Authority Vs. Commissioner of Central Excise.
12. 2012 SCC OnLine Ori 90 : National Aluminium Company Ltd. Vs. Employees State Insurance Corporation.
13. (2014) 1 SCC 603 : 2013 SCC OnLine SC 717 : CIT Vs. Chhabil Dass Agarwal.
14. (2008) 7 SCC 748 : 2008 SCC OnLine SC 1047 :Deepak Agro Foods Vs. State of Rajasthan.
15. (1963) 1 SCR 166 : AIR 1966 SC 932 : (1962) 13 STC 472 : Central Potteries Ltd. Vs. State of Maharashtra.
16. (2019) 20 SCC 446 : Union of India Vs. Coastal Container Transporters Association.

For Petitioner : Mr. Tushar Kanti Satapathy.

For Opp. Parties: Mr. Choudhury Satyajit Mishra, Sr. Standing Counsel.

ORDER ORDER: 15.03.2022

BY THE BENCH

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

2. Beseeching to issue writ of *certiorari* invoking Article 226of the Constitution of India, the Petitioner has prayed to quash the Demand-*cum*-Show Cause Notice bearing No. C. No. IV(04)48/ S.Tax-Adjn/BBSR/2021/7207A, dated 22.04.2021 issued by the Additional Commissioner GST & Central Excise, Bhubaneswar Commissionerate (hereinafter be referred to as "Adjudicating Authority") under Sections 73, 75, 76 and 78 of the Finance Act, 1994 pertaining to the periods 2015-16 and 2016-17 by asserting that the same is barred by limitation.

3. The Petitioner, M/s. Nagen Caterer, claiming it to be a partnership firm, provides outdoor catering services and got registered under the Finance Act, 1994. It is alleged by the opposite party-Adjudicating Authority that from the data obtained from the Income Tax Department it is revealed that the Petitioner having received considerable amount from different service recipients has made neither full disclosure of the amount in the returns in Form ST-3 nor has it filed the returns in Form ST-3 for certain period; thereby, it has evaded payment of service tax. The Adjudicating Authority proposed to proceed with determination of tax, interest and penalty for the periods 2015-16 and 2016-17 and therefore, he issued Demand-cum-Show Cause Notice dated 22.04.2021 calling upon the Petitioner to produce evidence to rebut the following:-

"*** *** *** *** ***

6.0 Now, therefore the noticee, i.e. M/s. Nagen Caterer, at Samanta Sahi, P.O.: Buxibazar, Cuttack753001, bearing Service Tax Registration No. AAAAN1310KSD002 is called upon to Show Cause to the Additional Commissioner, CGST & CX, Bhubaneswar Commissionerate, C.R. Buildings, Rajaswa Vihar, Bhubaneswar – 751 007 within 30 (thirty days) of receipt of this notice as to why—

i) Service Tax including S.B. Cess & K.K. Cess amounting to Rs.1,72,28,439/- (Rupees One crore Seventytwo lakh Twenty-eight thousand Four hundred and Thirtynine) only should not be recovered from them under Section 73(1) of the Finance Act, 1994.

ii) Interest as applicable should not be recovered from them under Section 75 of the Act on the above demanded amount.

iii) Penalty should not be imposed on them under Section 76 of the Act for non-payment of Service Tax in contravention of Section 68(1) of the Act read with Rule 6 of the Rules with intent to evade payment of Service Tax.

iv) Penalty should not be imposed upon them under Section 78 of the Act for deliberate suppression of taxable value with intent to evade payment of Service Tax.

7.0 M/s. Nagen Caterer, at Samanta Sahi P.O. Buxibazar, Cuttack-753001 while showing cause should produce all the evidences upon which they intend to rely in support of their defense. They should also indicate in their written explanation as to whether they wish to be heard in person before the adjudicating authority when the case will be posted for hearing.

8.0 If no cause is shown against the action proposed to be taken within the above stipulated time and/or they fail to appear before the Adjudicating Authority when the case is posted for hearing, the case will be decided ex parte on the basis of the evidences available on records without any further reference to them.

*** *** *** *** ***"

4. Referring to *Calcutta Discount Co. Ltd. Vrs. Income Tax Officer, AIR 1961 SC 372; East India Commercial Co. Ltd. Vrs. Collector of Customs, AIR 1962 SC 1893,* the counsel for the Petitioner submitted that the Adjudicating Authority had no jurisdiction to issue the Demand-*cum*-Show Cause Notice vide Annexure-1 inasmuch as Section 73(1) of the Finance Act, 1994 envisages action for non-payment of service tax or short payment of service tax by the authorities within eighteen months from the relevant date, and since the case does not fall within the ingredients mentioned under proviso thereto, the extended period of limitation does not get attracted in the present context.

5. It is the further case of the Petitioner that there is illegality in issuance of Demand-cum-Show Cause Notice dated 22.04.2021 as the authority concerned has not considered the effect of Order dated 06.04.2021 of this Court in the case of the Petitioner's own case being Nagen Caterer Vrs. Central Board of Indirect Taxes & Customs & others, W.P.(C) No.24377 of 2020. Mr.Tushar Kanti Satapathy, counsel for the Petitioner placing reliance on the following paragraphs of the said order submitted that the assessing authority is precluded from raising demand which stood concluded by virtue of direction to issue SVLDRS-4 under Sabka Viswas Legacy Dispute Resolution Scheme, 2019 (SVLDRS):-

"*17. As far as the second writ petition filed by NC is concerned, in the counter affidavit again there is no explanation why the Designated Committee issued SVLDRS-2 and SVLDRS-2A without issuing SVLDRS-3. It is also not in dispute that the predeposit amount indicated therein is Rs.33,86,126/- whereas it should be Rs.39,41,880/- as indicated by NC in SVLDRS-1. The only defence put forth is that this was accepted by NC. This is incorrect since NC did write to the authorities on 29th June 2020 which fact is not disputed by the Opposite Parties in the counter affidavit.*

18. Consequently, both the writ petitions are disposed of by issuing the following directions:

(i) *** *** *** ***

(ii) As far as W.P.(C) No.24377 of 2020 is concerned, the Designated Committee (Opposite Party No.2) will issue to NC by 3rd May 2021 the corrected SVLDRS-3 showing the corrected pre-deposit figure as Rs.39,41,880/-. Since NC has already paid the admitted tax liability as indicated therein, the Opposite Parties will also issue in favour of NC by the same date the SVLDRS-4. The SVLDRS-2 and SVLDRS-2A already issued stands quashed. It will be open to NC to seek disposal of the pending appeal thereafter in accordance with law."

6. Sri Choudhury Satyajit Mishra, Senior Standing Counsel for the Revenue pointed out that the Demand-cum-Show Cause Notice relates to the periods 2015-16 and 2016-17 whereas the SVLDRS, 2019 related to the years 2011-12 to 2015-16. Furthermore, the Adjudicating Authority has issued said impugned notice invoking proviso to sub-section (1) of Section 73 of the Finance Act, 1994. Whereas by virtue of amendment vide Finance Act, 2012 (Act 28 of 2016), the normal period of "eighteen months" has been substituted by "thirty months". Said amendment would also cover the periods 2015-16 and 2016-17. Be that be, since the Adjudicating Authority has called upon the Petitioner to furnish evidence(s) to justify its claim vis-à-vis non-disclosure of complete particulars in the returns as also non-filing of the returns during the periods 2015-17 (two years), it is open for the Petitioner to avail the opportunity and he is at liberty to explain with objection and reconcile. It is with vehemence the learned Senior Standing Counsel submitted that the extended period of limitation of "five years" is attracted per proviso to sub-section (1) of Section 73 of the Finance Act, 1994. At the stage of Show Cause Notice this Court need not exercise extraordinary jurisdiction under Article 226 of the Constitution of India. It is stated that inasmuch as the decisions cited and relied upon by the counsel for the Petitioner are in the connection with different setting of language in the

statute compared to the Finance Act, 1994, they have no material bearing on the present facts and circumstances of the matter.

7. Heard Sri Tushar Kanti Satapathy, learned Advocate for the Petitioner and Sri. Choudhury Satyajit Mishra, Senior Standing Counsel.

8. Provisions for levy and imposition of service tax were introduced vide Chapter V in the Finance Act, 1994 and have been amended from time to time. Service tax does not have a separate enactment like the Central Excise Act, 1944, the Customs Act, 1962 or the Income Tax Act 1961. Section 65B of the Finance Act which deals with interpretation vide clause (55) states as follows:

> *"(55)words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (Act 1 of 1944) or the rules made thereunder, shall apply, so far as may be, in relation of service tax as they apply in relation to a duty of excise."*

Explanation clarifies for removal of doubts that provisions of Section 66 of Chapter V of the Finance Act for the purpose of levy and collection of service tax and shall be construed as references to the provisions of Section 66B of the Finance Act. Section 66B creates a charge of service tax on or after the Finance Act, 2012.

9. Section 73 of the Finance Act as amended with effect from 14th May, 2016 reads as under:

> *"73. Recovery of service tax not levied or paid or shortlevied or short-paid or erroneously refunded.—*
>
> *(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*
>
> *Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—*
>
> *(a) fraud; or*

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax;

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.

Explanation.—

Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of thirty months or five years, as the case may be.

(1A) Notwithstanding anything contained in sub-section (1) except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under subsection (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1).

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined :

(2A) Where any appellate authority or tribunal or court concludes that the notice issued under the proviso to sub-section (1) is not sustainable for the reason that the charge of,—

(a) fraud; or

(b) collusion; or

(c) wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax;

has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies under sub-section (1).

(3) Where any service tax has not been levied or paid or has been short-levied or hort-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under subsection (1) in respect of the amount so paid :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

Explanation.1—

For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer, but for this sub-section.

Explanation 2.—

For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

(a) fraud; or

(b) collusion; or

(c) wilfulmis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of thisChapter or of the rules made thereunder withintent to evade payment of service tax.

(4A) * * * *** *** ***

(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A).

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means—

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund."

It is apparent from the bare reading of aforesaid provisions contained in Section 73 (1) that the competent authority may within thirty months from the relevant date serve a notice on the assesse where service tax has not been levied or paid or short levied or short paid or is erroneously refunded. The expression "relevant date" has been defined in sub-section (6) of Section 73.

By virtue of sub-section (3), the assessee is given scope to voluntarily disclose on its own assessment or on the basis of ascertainment of tax by the Officer before issue of show cause notice under sub-section (1) of section 73 of the Finance Act. If such payment is made, notice under Sub-Section (1) is not warranted in respect of the amount paid. This payment is required to be made voluntarily. Nonetheless, if the Officer is of the view that the amount is not paid, he is empowered to proceed to recover the short payment in the manner provided in sub-section (1) to Section 73. Explanation 2 declares that where the assessee makes payment in terms of sub-section (3) of Section73, no penalty under the provisions of the Fin Act or the Rules shall be imposed. However, interest as stipulated has to be paid. As per Section 73(4) nothing in sub-section (3) shall apply to cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of Chapter V of the Finance Act or Rules framed thereunder with the intent to evade payment of tax.

Thus, as per Section 73, unless payment is made in terms of sub-sections (3) and (4) thereof, the proceedings for assessment would commence by issue of the show cause notice under sub-section (1) of Section 73 of the Finance Act. This is the procedure prescribed by the statute for recovery of service tax in cases of nonlevy, non-payment, short levy, short payment and erroneous refund.

Section 83 Chapter V of the Finance Act, 1994 empowers the Authority to invoke Section 14 of the Central Excise Act, 1944 which empowers the Officer to issue summons to any person to give evidence and produce documents. The summons can be issued to any person whose attendance the officer considers necessary. The power can be exercised to collect evidence or a document or any other thing in any inquiry which the officer is making for any purposes under the Act.

Perusal of the impugned notice vide Annexure-1 to the writ petition shows that it contains reasons for issue of notice and it specifies the amount for which recovery proceedings have been initiated. The Show Cause Notice contains particulars with factual and legal assertions why recovery of the amount quantified should not be made on account of short levy, short payment or erroneous refund. These details and particulars are ascertained and found mentioned in the Show Cause Notice itself, as they would constitute the basis and foundation of the notice under Section 73(1) of the

Finance Act. Proviso to sub-section (1) of Section 73 extends recovery for a period up to five years in cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of the provisions of the Finance Act or the Rules with an intent to evade payment of service tax.

10. The statutory scheme requires issue of show cause notice by the Adjudicating Authority, response by the person served with the show cause notice and final determination by the order in original. Issue of show cause notice is a condition precedent to raising an enforceable demand. Reference may be had *to Commissioner of Central Excise, Vishakhapatnam Vrs. Mehta & Co., (2011) 4 SCC 435; Union of India Vrs. Madhumilan Syntex Pvt. Ltd., (1988) 3 SCC 348; Golak Patel Volkart Limited Vrs. Collector of Central Excise, Belgaum (1987) 2 SCC 93.*

11. In the present writ petition, the Petitioner has challenged Demand-*cum*-Show Cause Notice whereby the Adjudicating Authority has asked the assessee to produce evidence which may be relevant to rely in support of its defense. The said Authority also in order to afford opportunity called for explanation/objection and has disclosed proposed actions by specifying components of tax, interest and penalty. Such a Show Cause Notice having clearly spelt out reasons, no prejudice possibly be caused to the Petitioner in the event it is relegated to avail such opportunity by placing relevant material fact including its stance of limitation and the period and transactions covered under the SVLDRS, 2019. This Court, therefore, wishes to leave it to the Adjudicating Authority to proceed and decide. While deciding, the Authority would be obligated to take into consideration any representation or submission made by the Petitioner-assessee.

12. If the Demand-cum-Show Cause Notice (Annexure-1) is read in its entirety it is ex-facie clear that facts are required to be reconciled, settled and adjudicated by the Adjudicating Authority. There seems to be disputed questions of fact inter alia as to:

> i. Whether the transactions under impugned Show Cause Notice were disclosed in the returns with complete material particulars and/or transactions remained undisclosed as returns being not filed?
>
> ii. Whether total period of 2015-16 and 2016-17 would fall within the scope of normal period of limitation under Section 73(1) or would be embraced within the fold of proviso thereto?

> iii. Whether the amounts received and shown in the income-tax returns do relate to service tax vis-à-vis records that would be produced and/or evidence adduced by the Petitioner?
>
> iv. Whether the transactions (partly or wholly) which were considered under the SVLDRS, 2019 as reflected in the Order dated 06.04.2021 of this Court in the case of present Petitioner in W.P.(C) No.24377 of 2020 are covered in the subject-matter of impugned Show Cause Notice relating to 2015-17 (two financial years)?

These are illustrations of questions of fact which may crop up along with any other factual aspects during the process of adjudication under Section 73 of the Finance Act. Furthermore, it has been held in *Ramesh B Desai Vrs. Bipin Vadilal Mehta, (2006) 5 SCC 638* that a plea of limitation is a mixed question of law and fact. In the instant case the Adjudicating Authority is competent to decide whether service tax proposed to be levied for the periods 2015-16 and 2016-17 would be comprehended within the ingredients specified under proviso to sub-section (1) of Section 73 of the Finance Act. Conclusion is required to be arrived at by the Adjudicating Authority including the Appellate Fora provided under the statute that on the facts and materials available on the records the initiation of the proceeding is time-barred. Such a finding is yet to be rendered by the Authority who issued the show cause notice for proceeding under Section 73. Needless to state that factual disputes need not be adjudicated in writ jurisdiction.

13. Self-imposed restriction for entertainment of writ jurisdiction has been succinctly enunciated by the Hon'ble Supreme Court in *Star Paper Mills Ltd. Vrs. State of U.P., (2006) 10 SCC 201 : 2006 SCC OnLine SC 979* which is to the following effect:

> *"4. In response, learned counsel for the respondents submitted that on factual adjudication it was to be established by the appellant that its case is covered by the ratio of this Court's decision in Krishi Utpadan Mandi Samiti case [1995 Supp (3) SCC 433].*
>
> *"10. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in State of H.P. v. Gujarat Ambuja Cement Ltd. [(2005) 6 SCC 499].*
>
> *11. Except for a period when Article 226 was amended by the Constitution (Forty-second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an*

alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

12. Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission [1954 SCR 738 : AIR 1954 SC 207] , Sangram Singh v. Election Tribunal, Kotah [(1955) 2 SCR 1 : AIR 1955 SC 425], Union of India v. T.R. Varma [1958 SCR 499 : AIR 1957 SC 882] , State of U.P. v. Mohd. Nooh [1958 SCR 595 : AIR 1958 SC 86] and Venkataraman and Co. v. State of Madras [(1966) 2 SCR 229 : AIR 1966 SC 1089] held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

13. Another Constitution Bench of this Court in State of M.P. v. Bhailal Bhai [(1964) 6 SCR 261 : AIR 1964 SC 1006] held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in N.T. Veluswami Thevar v. G. Raja Nainar [1959 Supp (1) SCR 623 : AIR 1959 SC 422] , Municipal Council, Khurai v. Kamal Kumar [(1965) 2 SCR 653 : AIR 1965 SC 1321] , Siliguri Municipality v. Amalendu Das [(1984) 2 SCC 436 : 1984 SCC (Tax) 133 : AIR 1984 SC 653] , S.T. Muthusami v. K. Natarajan [(1988) 1SCC 572 : AIR 1998 SC 616] , Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110 : AIR 1995 SC 1715] , Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293 : AIR 2000 SC 2573] , A. Venkatasubbiah Naidu v. S. Chellappan [(2000) 7 SCC 695] , L.L. Sudhakar Reddy v. State of A.P. [(2001) 6 SCC 634] , Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra [(2001) 8 SCC 509] , Pratap Singh v. State of Haryana [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. v. ITO [(2003) 1 SCC 72] .

14. In Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107] this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the Petitioner seeks enforcement of any of the fundamental rights;

where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

15. In Veerappa Pillai v. Raman & Raman Ltd. [1952 SCR 583 : AIR 1952 SC 192] , CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75 : AIR 1985 SC 330] , Ramendra Kishore Biswas v. State of Tripura [(1999) 1 SCC 472 : 1999 SCC (L&S) 295 : AIR 1999 SC 294] , Shivgonda Anna Patil v. State of Maharashtra [(1999) 3 SCC 5 : AIR 1999 SC 2281] , C.A Abraham v. ITO [(1961) 2 SCR 765 : AIR 1961 SC 609] , Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : AIR 1983 SC 603] , H.B. Gandhi v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1 : AIR 1999 SC 22] , Tin Plate Co. of India Ltd. v. State of Bihar [(1998) 8 SCC 272 : AIR 1999 SC 74] , Sheela Devi v. Jaspal Singh [(1999) 1 SCC 209] and Punjab National Bank v. O.C. Krishnan [(2001) 6 SCC 569] this Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

16. If, as was noted in Ram and Shyam Co. v. State of Haryana [(1985) 3 SCC 267 : AIR 1985 SC 1147] the appeal is from 'Caesar to Caesar's wife' the existence of alternative remedy would be a mirage and an exercise in futility. … There are two wellrecognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

The above position was recently highlighted in U.P. State Spg. Co. Ltd. v. R.S. Pandey [(2005) 8 SCC 264 : 2005 SCC (L&S) 78] , SCC pp. 270-72, paras 10-16."

14. It may be worthwhile to state that writ petition is not entertainable against the Show Cause Notice in view of parameters laid down in *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446; South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC); Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593; Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53; National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90.*

15. In a case where assessment order was challenged before the High Court and the High Court quashed the same invoking writ jurisdiction, the Hon'ble Supreme Court in the matter of *CIT Vrs. Chhabil Dass Agarwal, (2014) 1 SCC 603 : 2013 SCC OnLine SC 717* reiterated the scope and purport of exercise of power under Article 226 of the Constitution of India and re-stated the selfimposed restrictions qua entertainment of writ petition:

> *"12. The Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission [AIR 1954 SC 207] , Sangram Singh v. Election Tribunal [AIR 1955 SC 425] , Union of India v. T.R. Varma [AIR 1957 SC 882] , State of U.P. v. Mohd. Nooh [AIR 1958 SC 86] and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras [AIR 1966 SC 1089] have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it canrefuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See N.T. Veluswami Thevar v. G. Raja Nainar [AIR 1959 SC 422] , MunicipalCouncil, Khurai v. Kamal Kumar [AIR 1965 SC 1321 : (1965) 2 SCR 653] , Siliguri Municipality v. Amalendu Das [(1984) 2 SCC 436 : 1984 SCC (Tax) 133] , S.T. Muthusami v. K. Natarajan [(1988) 1 SCC 572] , Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110] , Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] , A. Venkatasubbiah Naidu v. S. Chellappan [(2000) 7 SCC 695] , L.L. Sudhakar Reddy v. State of A.P. [(2001) 6 SCC 634] , Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra [(2001) 8 SCC 509] , Pratap Singh v. State of Haryana [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. v. ITO [(2003) 1 SCC 72] .]*
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> *15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute underwhich the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*

16. As a prelude this Court may hasten to quote from *Deepak Agro Foods v. State of Rajasthan, (2008) 7 SCC 748 : 2008 SCC OnLine SC 1047* with regard to illegal vis-à-vis irregular jurisdiction:

> *"18. Proceedings for assessment under a fiscal statute are not in the nature of judicial proceedings, like proceedings in a suit inasmuch as the assessing officer does not adjudicate on a lis between an assessee and the State and, therefore, the law on the issue laid down under the civil law may not stricto sensu apply to assessment proceedings. Nevertheless, in order to appreciate the distinction between a null and void order and an illegal or irregular order, it would be profitable to notice a few decisions of this Court on the point.*
>
> *19. In Rafique Bibi v. Sayed Waliuddin [(2004) 1 SCC 287] explaining the distinction between null and void decree and illegal decree, this Court has said that a decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction. The Court further held that a distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordancewith the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable."*

17. The Constitution Bench of the Hon'ble Supreme Court of India in the case of *Central Potteries Ltd. v. State of Maharashtra, (1963) 1 SCR 166 : AIR 1966 SC 932 : (1962) 13 STC 472* held as follows:

> *"7. In this connection it should be remembered that there is a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction, and that whereas an order passed by an authority with respect to a matter over which it has no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise than in the mode prescribed by law, is not a nullity. It may be liable to be questioned in those very proceedings, but subject to that it is good, and not open to collateral attack. Therefore even if the proceedings for assessment were taken against a non-registered dealer without the issue of a notice under Section 10(1) that would be a mere irregularity in the assumption of jurisdiction and the orders of assessment passed in those proceedings cannot be held to be without jurisdiction and no suit will lie for impeaching them on the ground that Section 10(1) had not been followed. This must a fortiori be so when the appellant has itself submitted to jurisdiction and made a return. We accordingly agree with the learned Judges that even if the registration of the appellant as a dealer under Section 8 is bad that has*

no effect on the validity of the proceedings taken against it under the Act and the assessment of tax made thereunder."

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

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

19. Bearing in mind the above, we may venture to examine the scope of alternative remedy vis-à-vis entertainment of writ petition by exercising extraordinary jurisdiction under Article 226 of the Constitution of India qua the Show Cause Notice (Annexure1) issued by the Additional Commissioner, GST & Central Excise, Bhubaneswar Commissionerate.

20. In *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446* the Hon'ble Supreme Court has laid down as follows:

> *"30. On the other hand, we find force in the contention of the learned senior counsel, Sri Radhakrishnan, appearing for the appellants that the High Court has committed error in entertaining the writ petition under Article 226 of Constitution of India at the stage of show cause notices. Though there is no bar as such for entertaining the writ petitions at the stage of show cause notice, but it is settled by number of decisions of this Court, where writ petitions can be entertained at the show cause notice stage. Neither it is a case of lackof jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice. High Court ought not to have entertained the writ petition, more so, when against the final orders appeal lies to this Court. The judgment of this Court in the case of Union of India v. Guwahati Carbon Ltd., (2012) 11 SCC 651 : 2012 SCC OnLine SC 210 relied on by the learned senior counsel for the appellants also supports their case. In the aforesaid judgment, arising out of Central Excise Act, 1944, this Court has held that excise law is a complete code in order to seek redress in excise matters and held that entertaining writ petition is not proper where alternative remedy under statute is available. When there is a serious dispute with regard to classification of service, the respondents ought to have responded to the show cause notices by placing material in support of their stand but at the same time, there is no reason to approach the High Court questioning the very show cause notices. Further, as held by the High Court, it cannot be said that even from*

the contents of show cause notices there are no factual disputes. Further, the judgment of this Court in the case of Malladi Drugs & Pharma Ltd. v. Union of India, (2020) 12 SCC 808 : 2004 SCC OnLine SC 358, relied on by the learned senior counsel for the appellants also supports their case where this Court has upheld the judgment of the High Court which refused to interfere at show cause notice stage."

21. The Supreme Court of India in South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC) expressed displeasure in entertainment of writ petition against the Show Cause Notice. The Hon'ble Supreme Court in the said case laid down the modality for the Authority in the following terms:

"2. We have repeatedly stated that as far as possible the High Courts should not interfere in matters at show cause notice stage.

3. Without reply to the show cause notice the appellants herein preferred Original Petitions before the Tamil Nadu Taxation Special Tribunal which decided the matters against the assessees. The assessees filed writ petitions against the order passed by the Special Tribunal in the High Court of Madras in which impugned judgments have been delivered, against which these Civil Appeals have been filed. We find that the assessees have never replied to the show cause notices till date.

4. We are of the view that in such circumstances the Special Tribunal/High Court ought not to have interfered and they ought to have directed the assesse to reply to the show cause notice and exhaust the statutory remedy under the Act, which they have not done till date.

5. In the circumstances, to put an end to this controversy we, first of all, grant liberty to the Department to amend the show cause notices and take up additional grounds, if so advised, within a period of eight weeks from today. They will accordingly give an opportunity to the assessees to reply to the amended show cause notice as well as the original show cause notice within a period of six weeks from the date of the assesses receiving the amended show cause notice.

6. On receiving replies from the assessees the Assessing Authority shall hear and dispose of the matters as expeditiously as possible in accordance with law and in accordance with the directions given hereinabove.

7. We make it clear that the Assessing Authority will decide the matters uninfluenced by any observations made by the High Court/Tribunal in the earlier round of litigation.

8. All contentions on both sides are expressly kept open. At this stage we do not wish to express any opinion on the merits of the case."

22. In an identical case relating to writ petition questioning the show cause notice relating to service tax under the ***Finance Act, 1994, viz. Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53*** this Court observed as follows:

> *"5. After hearing the learned counsel for the respective parties, it would be relevant herein to take note that the judgment of the Hon'ble Supreme Court in the case of Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127 and in particular, Para-9 thereof is quoted as hereunder:*
>
> *"9. *** In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."*
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> *6. Hon'ble Single Judge of Calcutta High Court in the case of Infinity Infotech Parks Ltd., (2015) 85 VST 465 (Cal) appears to have placed reliance on the judgment of Hon'ble Supreme Court as noted hereinabove in Para-66 which admittedly, is a leading judgment on the issue raised in the present case. In the said case, the Hon'ble Supreme Court came to conclude that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. But most importantly, the Hon'ble Supreme Court has noted thereafter that 'Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.*
>
> *7. On perusal of the aforesaid judgment of the Hon'ble Supreme Court, it is clear therefrom that Hon'ble Supreme Court in the said case was dealing with an appeal filed by the Collector of Central Excise, Hyderabad against an order passed by the Tribunal. In the facts and circumstances of the said case, Hon'ble Supreme Court came to hold that this finding of fact having been ultimately held against the revenue by the Tribunal which is the final fact forum and dismissed the appeal filed*

by the revenue on the basis that it did not want to interfere the facts determined by the Tribunal in the said case.

*8. In the present set of circumstances of the case, any finding by the Court at this stage is likely to be prejudicial, either the Petitioner-BDA or the Service Tax Authority. ***"*

23. In *Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593*, the Hon'ble Supreme Court after taking note of earlier case being *Sales Tax Officer, Ganjam Vrs. Uttareswari Rice Mills, (1973) 3 SCC 171 : 1973 SCC (Tax) 123*, wherein challenge was made to Show Cause Notice, has been pleased to make the following observation:

"14. In our considered opinion, the ratio of the aforesaid decision in Uttareswari Rice Mills case [(1973) 3 SCC 171 : 1973 SCC (Tax) 123] of this Court is squarely applicable to the facts of the present case. The expression used in Section 11-E of the Act is that the Commissioner must be satisfied on information or otherwise that the registered dealer has furnished incorrect statement of his turnover or furnished incorrect particulars of his sale in the return. A showcause notice is issued to the dealer with the purpose of informing him that the Department proposes to reopen the assessment because the Commissioner himself is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show-cause notice as to why the said power vested in the Commissioner should not be exercised.

15. A notice was issued in order to provide an opportunity of natural justice to the dealer. There is nothing in the language of the aforesaid provision which either expressly or impliedly mandates the recording of any reasons. The provision of the Act nowhere postulates that the reasons which led to the issue of the said notice should be incorporated in the notice itself, and that in case of failure to do so, the same would invalidate the notice.

16. The aforesaid provision is clear and explicit and there is no ambiguity in it. If the legislature had intended to give any other meaning as suggested by the counsel appearing for the appellant it would have made specific provision laying down such conditions explicitly and in clear words. It is a well-settled principle in law that the court cannot add anything into a statutory provision, which is plain and unambiguous. Language employed in a statute itself determines and indicates the legislative intent. If the language is clear and unambiguous it would not be proper for the court to add any words thereto and evolve some legislative intent not found in the statute."

24. It may be apt to refer to yet another Judgment rendered by the Hon'ble Supreme Court in the context of challenge as to Show Cause Notice in the

case of *CCE Vrs. Krishna Wax (P) Ltd., (2020) 12 SCC 572 : 2019 SCC OnLine SC 1470*. Paragraphs 7 and 10 of said Judgment reads thus:

> *"7. Section 11-A thus deals with various facets including non-levy and non-payment of excise duty and contemplates issuance of a show-cause notice by the Central Excise Officer requiring the "person chargeable with duty" to show cause why "he should not pay the amount specified in the notice". In terms of sub-section (10) of said Section 11-A, the person concerned has to be afforded opportunity of being heard and after considering his representation, if any, the amount of duty of excise due from such person has to be determined by the Central Excise Officer.*
>
> *Without going into other details regarding the period of limitations and the circumstances under which show-cause notice can be issued, the crux of the matter is that such determination is after the issuance of show-cause notice followed by affording of opportunity and consideration of representation, if any, made by the person concerned.*
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> ***
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> *10. The issuance of show-cause notice under Section 11-A also has some significance in the eye of the law. The day the show-cause notice is issued, becomes the reckoning date for various issues including the issue of limitation. If we accept the submission of the respondent that a prima facie view entertained by the department whether the matter requires to be proceeded with or not is to be taken as a decision or determination, it will create an imbalance in the working of various provisions of Section 11-A of the Act including periods of limitation. It will be difficult to reckon as to from which date the limitation has to be counted."*

25. In aforesaid Judgment being CCE Vrs. Krishna Wax (P) Ltd., (2020) 12 SCC 572 : 2019 SCC OnLine SC 1470 the Hon'ble Supreme Court in clear voice assigned reason as follows:

> "13.It must be noted that while issuing a show-cause notice under Section 11-A of the Act, what is entertained by the Department is only a prima facie view, on the basisof which the show-cause notice is issued. The determination comes only after a response or representation is preferred by the person to whom the show-cause notice is addressed. As a part of his response, the person concerned may present his view point on all possible issues and only thereafter the determination or decision is arrived at. In the present case even before the response could be made by the respondent and the determination could be arrived at, the matter was carried in appeal against the said internal order. The appellant was therefore, justified in submitting that the appeal itself was premature."

26. At this stage where Demand-cum-show cause notice has been issued to the Petitioner-Nagen Caterer, various aspects are found mentioned in the impugned Show Cause Notice as to why the Adjudicating Authority has

sought to invoke the extended period of limitation in terms of proviso to sub-section (1) of Section 73 of the Finance Act which essentially relates to the facts and circumstances of the case. Of course, the Petitioner has the fullest opportunity to counter the same during the course of proceeding. It is possible for the Petitioner to seek for further time, if according to him the time given by the authority for filing the reply was required to be extended in order to enable him to collect some record. It cannot therefore be said that if detailed reasons for issuance of notice being absent in the Show Cause Notice, the same would be rendered invalid.

27. We may fruitfully refer to *GKN Driveshafts (India) Ltd. v. ITO, (2003) 1 SCC 72 : 2002 SCC OnLine SC 1116* as the guiding rule for the Adjudicating Authorities as enunciated by the Hon'ble Apex Court. Paragraph 5 of said Judgment speaks as follows:

> *5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."*

28. The present case seems neither to be a case of lack of jurisdiction nor is there any allegation of violation of principles of natural justice. Even though point of limitation is raised as a matter of jurisdictional fact, the same being mixed question of fact and law, the Petitioner has ample opportunity to agitate such an issue before the Adjudicating Authority. Therefore, this Court feels entertainment of the writ petition at the stage of notice would be premature. Doing so would frustrate the tax administration and adjudication process. This Court is live to the fact that the statute under consideration, viz., Chapter-V of the Finance Act, 1994 and rules framed thereunder has provided sufficient safeguard for the assessee-Petitioner, more so, when against the final orders, appeal lay.

29. In fine, without expressing any opinion on the issues raised in the writ petition, we dismiss the writ petition, but allow the Petitioner a further period

of four weeks from availability of the instant order to file reply/objection to the Show Cause Notice dated 22.04.2021 and also to participate in the proceeding. The Petitioner is at liberty to raise all such contentions and the Adjudicating Authority shall deal with the matter strictly in accordance with law without in any manner being influenced by any observation made hereinabove and reach in an independent conclusion both on fact and legal issues raised.

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2022 (I) ILR - CUT- 751

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

I.A. NO. 4359 OF 2022
W.P.(C) NO. 15878 OF 2018

M/s. JINDAL STEEL & POWER LTD. ……..Petitioner
.V.
COMMISSIONER CENTRAL TAX,
GST & CENTRAL EXCISE COMMISSIONERATE ……..Opp. Party

CENTRAL EXCISE ACT, 1944 – Section 35(F) – Conditions of pre-deposit before filling appeal – Whether mandatory? – Held, Yes – It is an undisputed position that a right to file an appeal is not an absolute right but a right bestowed by the statute – Thus, such a statutory right of appeal can be made subject to conditions – If a condition of pre – Deposit is imposed by a statute, party while filing the appeal is bound to meet the requirement of the pre-deposit condition. (Para-18)

Case Laws Relied on and Referred to :-

1. (2014) 13 SCC 651 = 2015 (318) ELT 368 (SC) : Super Industries and Ors. Vs. Commissioner of Central Excise and Customs, Vadodara.
2. 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355 : Indian Oil Corporation Vs. Odisha Sales Tax Tribunal, Cuttack.
3. 2019 SCC OnLine SC 1228 : Tecnimont Pvt. Ltd. Vs. State of Punjab.
4. 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355 : Indian Oil Corporation Vs. Odisha Sales Tax Tribunal, Cuttack.
5. 2022 SCC OnLine SC 184 : ECGC Limited Vs. Mukul Shriram EPC JV.

6. (2012) 54 VST 1 (Ori) : Jindal Stainless Ltd. Vs. State of Odisha.
7. 2016 SCC OnLine Jhar 2323 = (2017) 2 AIR Jhar R 619 = (2016) 4 JBCJ 392 : (HC) Satya Nand Jha Vs. Union of India.
8. 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355 : Indian Oil Corporation Vs. Odisha Sales Tax Tribunal, Cuttack.
9. 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355 : Odisha Sales Tax Tribunal, Cuttack.
10. 2016 SCC OnLine Jhar 2323 = (2017) 2 AIR Jhar R 619 = (2016) 4 JBCJ 392 (HC) : Satya Nand Jha Vs. Union of India.

For Petitioner : Mr. Rudra Prasad Kar & Ms. Neha Gulati.

For Opp. Party : Mr. Choudhury Satyajit Mishra, Sr. Standing Counsel (GST, Central Excise & Customs)

ORDER Date of Order: 19.04.2022

BY THE BENCH

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

2. The Petitioner has filed the present writ petition bearing W.P.(C) No. 15878 of 2018 assailing the order dated 19th March, 2018 passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Eastern Regional Bench, Kolkata (for short referred to as 'the CESTAT'), whereby the demand of differential excise duty of Rs.333,22,45,002/- along with interest and penalty raised in the Order-inOriginal dated 29th November, 2017 raised by the Commissioner of Central Tax, GST & CX commissionerate, Rourkela has been affirmed for non-fulfillment of the condition of pre-deposit of 7.5% of the duty subject to the amount specified in the first proviso to Section 35(F) of the Central Excise Act, 1944 (as amended vide the Finance (No. 2) Act, 2014 (No. 25 of 2014), published in Gazette of India, Extraordinary No.29, dated 06.08.2014).

3. The petitioner has taken a stand that the valuation of iron ore pellets cleared from its unit should have been in terms of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 inasmuch as the clearance of said iron ore pellets were made to its own units which cannot be comprehended within the meaning of "related units", rather than modalities prescribed under Rule 4 of said Rules as claimed by the Revenue. Therefore, the differential amount sought to be raised by way of demand is arbitrary and contrary to already settled cases by the courts/CESTAT. It is further stated by the petitioner that acute hardship faced

by the Petitioner-Company coupled with strong prima facie case would entitle it to claim waiver of pre-deposit under Section 35F of the Central Excise Act, 1944.

4. This Court vide order dated 17th April, 2018 had directed the Opposite Party to take no coercive action pursuant to the demand under Order-in-Original till the next date, which has concededly been continued all this while.

5. Now the aforesaid I.A. No. 4359 of 2022 has been instituted with the prayer to permit the deposit of the amounts towards the condition of pre-deposit so as to get hearing of appeal on merits before the First Appellate Authority i.e. CESTAT. In fact at the time of hearing, reference has been made to the Memo dated 19th April, 2022 filed by the counsel for the Petitioner along with appended documents trying to establish that a sum of Rs.10.00 crores as pre-deposit under proviso to Section 35-F of the Central Excise Act, 1944 in respect of Appeal No. E/75563/18-DB filed before the CESTAT, Kolkata stands deposited so as to seek setting aside the order dated 19th March, 2018 passed by the CESTAT and further direction for hearing of the aforesaid appeal on merits by the First Appellate Authority. It is urged that the delay in deposit towards the condition of predeposit is liable to be condoned for hearing on merits in view of the settled law permitting such a recourse. In support of such contention the Judgment of the Hon'ble Supreme Court in case of *Super Industries and Ors. Vrs. Commissioner of Central Excise and Customs, Vadodara, (2014) 13 SCC 651 = 2015 (318) ELT 368 (SC)* has been cited. The memo dated 19th April, 2022 along with appended documents is taken on record.

6. Upon notice of the aforesaid application, Mr. Choudhury Satyajit Mishra, Senior Standing Counsel appears for the Revenue and has no objection for taking up the main writ petition for hearing today itself and disposing of the same in terms of what is prayed the aforesaid application.

7. The exposition of law with regard to applicable statutory provision on the date of entertainment of appeal has been propounded by this Court in the case of *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355*. This Court succinctly laid down as follows:

> "22.In view of the above, law can be summarised that if a condition of pre-deposit is imposed, a party while filing the appeal is bound to meet the requirement of the redeposit condition. However, it will depend upon the language of statutory provisions and particularly the words used therein as to whether the memo of appeal can be presented/filed or instituted without meeting the pre-deposit condition. In case 'entertaining' the appeal is not permissible, the appeal can be filed, but may not be heard on merit unless the pre-deposit condition is met. The pre-deposit condition is imposed to regulate the procedure of appeal. Therefore, in such an eventuality, where there is no prohibition for filing the memorandum of appeal without meeting the predeposit condition, the appeal can be heard only after meeting it."

8. As is revealed from the record, it is admitted fact that the petitioner had not deposited as statutorily required to do under Section 35F of the Central Excise Act. However, enclosing copy of e-receipt to the Memo dated 19.04.2022 the counsel for the petitioner submitted that the petitioner company has made a payment of Rs.10,00,00,000/- (rupees ten crores) which is the maximum amount specified under the first proviso to Section 35F of the Central Excise Act for compliance of mandatory requirement for entertainment of appeal.

9. Section 35F of the Central Excise Act, 1944 has been amended by way of substitution vide the Finance (No. 2) Act, 2014 (No. 25 of 2014), published in Gazette of India, Extraordinary No.29, dated 06.08.2014, upon receipt of assent of the President of India on 6th of August, 2014. For convenience, position prior to amendment and post amendment is given hereunder:

Pre-amendment position of Section 35F **[prior to 06.08.2014]**	Post amendment position of Section 35F **[after 06.08.2014]**
35F.Deposit, pending appeal of duty demanded or penalty levied.— Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with adjudicating authority the duty demanded or the penalty levied:	35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.— **The Tribunal** or the Commissioner (Appeals), as the case may be, **shall not entertain any appeal.—** (i) under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of **opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:** Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decides such application within thirty days from the date of its filing. Explanation:— For the purposes of this section duty demanded shall include,— (i) amount determined under Section 11D; (ii) amount of erroneous CENVAT credit taken; (iii) amount payable under Rule 57CC of Central Excise Rules, 1944; (iv) amount payable under Rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004; (v) interest payable under the provisions of this Act or the rules made thereunder.	by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise; (ii) against the decision or order referred to in clause (a) of subsection (1) of Section 35B, unless the appellant has **deposited seven and a half per cent of the duty**, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against; (iii) against the decision or order referred to in clause (b) of subsection (1) of Section 35B, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against; **Provided that the amount required to be deposited under this section shall not exceed rupees ten crores;** **Provided** further that the provisions of this section **shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act 2014.** Explanation.— For the purposes of this section "duty demanded" shall include,— (i) amount determined under Section 11D; (ii) amount of erroneous CENVAT credit taken; (iii) amount payable under Rule 6 of the CENVAT Credit Rules, 2001 or the CENVAT Credit Rules, 2002 or the CENVAT Credit Rules, 2004.

10. Intention of amendment can be culled out from bare reading of the provisions as they stood prior to amendment and post-amendment in uxtaposition. Under the provisions prior to amendment an appellant was required to deposit the duty demanded or the penalty levied with the Appellate Authority or the Tribunal; and the application for waiving the deposit also could be preferred. Weighing balance, considering the undue hardship on the part of the assesseeappellant on the one hand and safeguard of the interests of the revenue on the other, the amount of deposit could be waived by the Tribunal or the Appellate Authority by exercising judicial discretion. However such discretion has been curtailed after amendment of Section 35F with effect from 06.08.2014. Substituted Section 35F of the Central Excise Act, 1944 as a matter of rule provided that, 7.5% or 10%, as the case may be, of the duty demanded or penalty levied shall have to be deposited pending the appeal subject to deposit of maximum amount of Rs.10,00,00,000/-. Thus,by virtue of the substituted Section 35F of the Act, 1944, invariably 92.5% or 90% of tax demanded or duty levied is waived during the pendency of the appeal.

11. The Hon'ble Supreme Court in the case of *Tecnimont Pvt. Ltd. Vrs. State of Punjab, 2019 SCC OnLine SC 1228* examined the issue that even though *Mohammed Kunhi, (1969) 2 SCR 65 = AIR 1969 SC 430 = (1969) 71 ITR 815 (SC)* laid down that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make grant effective, can such incidental or implied power be drawn and invoked to grant relief against requirement of pre-deposit when the statute in clear mandate says— no appeal be entertained unless 25% of the amount in question is deposited? Would not any such exercise make the mandate of the provision of pre-deposit nugatory and meaningless? The Hon'ble Court held as follows:

> *"In any case the principle laid down in Matajog Dubey Vrs. H.C. Bhari Dobey, 1955 (2) SCR 925 states with clarity that so long as there is no express inhibition, the implied power can extend to doing all such acts or employing such means as are reasonably necessary for such execution. The reliance on the principle laid down in Mohammed Kunhi, (1969) 2 SCR 65 cannot go to the extent, as concluded by the High Court, of enabling the Appellate Authority to override the limitation prescribed by the statute and go against the requirement of pre-deposit."*

The Hon'ble Supreme Court in the said case being Tecnimont Pvt. Ltd. Vrs. State of Punjab, 2019 SCC OnLine SC 1228 further observed as follows:

"30. As stated in P. Laxmi Devi, (2008) 4 SCC 720 and Har Devi Asnani, (2011) 14 SCC 160, in genuine cases of hardship, recourse would still be open to the concerned person. However, it would be completely a different thing to say that the Appellate Authority itself can grant such relief. As stated in Shyam Kishore, (1993) 1 SCC 22 any such exercise would make the provision itself unworkable and render the tatutory intendment nugatory."

12. This Court in *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355*, made the following observations with regard to right of appeal:

"*7. Further, there can be no quarrel to the settled legal proposition that right of appeal may not be absolute. The Legislature can put conditions for maintaining the same. In Vijay Prakash D. Mehta & Jawahar D. Mehta Vrs. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010, the Hon'ble Apex Court held as under:*

"Right of appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant... If the statute gives a right to appeal upon certain conditions, it is upon fulfilment of these conditions that the right becomes vested and exercisable to the appellant... The purpose of the section is to act in terrorem to make the people comply with the provisions of law."

8. Similar view has been reiterated by the Hon'ble Apex Court in Anant Mills Co. Ltd. Vrs. State of Gujarat, AIR 1975 SC 1234; and Shyam Kishore & Ors. Vrs. Municipal Corportation of Delhi & Anr., AIR 1992 SC 2279; Gujarat Agro Industries Co. Ltd. Vrs. Municipal Corporation of the City of Ahmedabad & Ors., AIR 1999 SC 1818. In Shyam Kishore (supra) the Hon'ble Supreme Court placed reliance upon its earlier Judgment in Nandlal Vrs. State of Haryana, AIR 1980 SC 2097, wherein it has been held that "right of appeal is a creature of statute and there is no reason why the Legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as amount to unreasonable restrictions rendering the right almost illusory", the Court cannot interfere.

9. In Bengal Immunity Company Vrs. State of Bihar, AIR 1955 SC 661, the Hon'ble Supreme Court has observed that if there is any hardship, it is for the Parliament to amend the law, but the Court cannot be called upon to discard the cardinal rule of interpretation for mitigating a hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. As is said, 'dura lex sed lex' which means 'the law is hard but it is the law'. Even if the statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense as that is the first principle of interpretation.

10. In Martin Burn Ltd. Vrs. The Corporation of Calcutta, AIR 1966 SC 529, the Hon'ble Supreme Court while dealing with the same issue observed as under:

"A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not."

11. Similar view has been reiterated by the Hon'ble Supreme Court in The commissioner of Income-tax, West Bengal-I, Calcutta Vrs. M/s. Vegetables Products Ltd., AIR 1973 SC 927.

12. It is the settled legal position that taxing statute must be construed strictly. (vide Manish Maheshwari Vrs. Assistant Commissioner of Income-tax & ors., AIR 2007 SC 1696; Southern Petrochemical Industries Co. Ltd. Vrs. Electricity Inspector & ETIO & ors., AIR 2007 SC 1984; and Bhavya Apparels (P) Ltd. & anr. Vrs. Union of India & anr., (2007) 10 SCC 129.

13. In view of the above, it becomes evident that the appeal is a statutory right, which can be created only by the Legislature and it does not lie by acquiescence/consent of the parties or even the writ Court is not competent to create the appellate forum if not provided under the statute. If Legislature in its wisdom has imposed certain conditions, like pre-deposit for the purpose of filing or hearing of the appeal, the Courts are supposed to give strict adherence to the statutory provisions. The purpose of imposing the pre-deposit condition is that right of appeal may not be abused by any recalcitrant party and there may not be any difficulty in enforcing the order appealed against if ultimately it is dismissed. There must be speedy recovery of the amount of tax due to the authority."

13. Reference also may be had to recent Judgment being *ECGC Limited Vrs. Mukul Shriram EPC JV, 2022 SCC OnLine SC 184* wherein the following observation has been made:

"32. The Division Bench of the Madras High Court in Dream Castle v. Union of India, W.P. No. 13431 of 2015 etc. decided on 18.04.2016 dealing with amended Section 35 of the Central Excise Act by Finance Act No. 2 of 2014 held that when the unamended condition gave only a chance or hope for an assessee to get a total waiver at the discretion of the Appellate Authority, the same cannot be equated to a vested right or stated to be retrospective, unless it is definitely shown that the amended condition is more onerous than the unamended condition. It was held as under:

"54. Therefore, it is well settled that the right of appeal is a creature of statute and the legislature is well within its competence to impose conditions for the exercise of such a right subject only to the restriction that the conditions so imposed are not so onerous as to amount to unreasonable restrictions endering the right almost illusory.

***

59. Therefore, if one condition that was already available in the statute for the exercise of a right of appeal, is merely replaced by another condition, the same cannot be said to be retrospective, unless it is definitely shown that the amended condition is more onerous than the unamended condition. When the unamended condition gave only a chance or hope for an assessee to get a total waiver at the discretion of the Appellate Authority, the same cannot be equated to a vested right. A mere chance of convincing the Appellate Authority to exercise the discretion for the grant of a total waiver is no vested right. The amendment, in our considered view, did not take away a right vested, but merely made a chance divested. What has now gone, is not the right, but the chance or hope. Therefore, the first contention of the learned Senior counsel for the petitioner is liable to be rejected."

33. There is another line of judgments taking a view that right of appeal is a creation of statute and the legislature is competent to determine the conditions on which an appeal would lie. These are not the cases of amending or repeal of a statute, therefore, such judgments are not applicable to the questions arising in the present application."

14. This Court, in *Jindal Stainless Ltd. Vrs. State of Odisha reported in (2012) 54 VST 1 (Ori)* delved into the question as to whether the condition precedent for pre-deposit of tax or interest or both in dispute in addition to payment of admitted tax for entertaining an appeal as provided under Section 77(4) of the Odisha Value Added Tax Act, 2004 read with proviso to Rule 87 of the OVAT Rules, 2005 was unreasonable, oppressive, violative and ultra vires of Article 14 of the Constitution of India and answered as follows:

"25. Therefore, it becomes crystal clear that appeal is a statutory remedy and the same is maintainable provided that the Statute enacted by a competent Legislature provides for it. Further, there can be no quarrel that the right of appeal cannot be absolute and the Legislature can put conditions for maintaining the same.

26. For the reasons stated above, the decisions relied upon by the petitioner are of no help to the petitioner as those decisions are rendered in respect of particular facts of that case.

27. In view of the above, we are of the considered view that the provisions of Section 77(4) of the OVAT Act requiring deposit of 20% of the tax or interest or both in dispute as a precondition for entertaining an appeal against the order enumerated under Section 77(1) of the OVAT Act does not make the right of appeal illusory and such a condition is within the legislative power of the State Legislature and cannot be held to be unreasonable and violative of Article 14 of the Constitution."

15. The Hon'ble Jharkhand High Court at Ranchi has analysed the position in *Satya Nand Jha Vrs. Union of India, 2016 SCC OnLine Jhar 2323 = (2017) 2 AIR Jhar R 619 = (2016) 4 JBCJ 392 (HC)* in the following lines:

> *"17. By virtue of substituted Section 35F of the Central Excise Act, 1944 the following objects are going to be achieved:—*
>
> *(a) There shall be safeguard of the revenue;*
>
> *(b) Multifariousness of petitions in one or other forum relating to waiver of deposits will completely come to an end;*
>
> *(c) It reduces the discretion of Commissioner (Appeals) or the Tribunal;*
>
> *(d) It balances "undue hardship" and "safeguard of the revenue";*
>
> *(e) It is beneficial to the assessee-appellants as the Statute itself waives 92.5% or 90% of the duty demanded or penalty levied, as the case may be, whereas under the unamended Section 35F, the whole amount was to be deposited and as an exception, application for waiver of deposit was to be preferred;*
>
> *(f) Conditional right to prefer an appeal abolishes unnecessary and frivolous appeals. "Chance taking" assessees-appellants will not file appeals, due to this condition of depositing 7.5% or 10% of the duty demanded or penalty imposed;*
>
> *(g) Cap of Rs.10 Crores (1st proviso to Section 35F) makes the provision of new Section 35F more balanced;*
>
> *(h) Change in the provision of unamended Section 35F and the newly substituted Section 35F is mere procedural;*
>
> *(i) By virtue of substituted Section 35F the collection of revenue in case appeals are being preferred, will be in a systematic manner;*
>
> *Thus, the classification has reasonable nexus with the aforesaid object, sought to be achieved by the Act. No legislation relating to tax can be declared to be illegal, much less unconstitutional, on the ground of being harsh, on the anvil of Article 14 of the Constitution of India otherwise, every tax payer will feel every legislation relating to taxation to be a harsh one. The broader classification is to be seen and not the micro classification."*

Against such lucid analysis of amended provisions in Section 35F vis-à-vis provisions as they stood prior to amendment being challenged before the Hon'ble Supreme Court in S.L.P.(C) No. 31297 of 2016 [Satya Nand Jha Vrs. Union of India], the same came to be dismissed vide Order dated 07.11.2016.

16. In the case of Santani Sales Organisation Vrs. Central Excise, customs and Service Tax Appellate Tribunal, Delhi and others, Writ Petition (Civil) No. 4551 of 2017, vide Judgment dated 31st May, 2018 it is said that:

> *"12. It is clear from the aforesaid provisions that a graded scale of pre-deposit has been provided. In case of first appeal, whether before the Tribunal or before the Commissioner (Appeals), 7.5% of the duty and penalty in dispute must be deposited. In case of second appeal before the Tribunal, the amount gets enhanced from 7.5% to 10%."*

17. The position as of now stands can be summarized as: prior to 06.08.2014, the pre-deposit of percentage of duty confirmed or penalty imposed for filing appeal before the Commissioner (Appeals) or the CESTAT was not mandatory and decision in this regard was to be taken by the Commissioner (Appeals) and/or the CESTAT on the merit of the case. The Appellate Authority was vested with discretion to decide the amount of pre-deposit required to be made by the appellant after taking into consideration the merits of the case and/or considering financial hardship caused to the assessee. This apart, safeguard of the interest of revenue was also one of the factors. The Appellate Authority was even competent to order for partial predeposit or to waive the pre-deposit altogether. However, with effect from 06.08.2014, such discretion of the Commissioner (Appeals) and/or CESTAT has been dispensed with. If the prescribed pre-deposit is not made by the time of entertainment of the appeal, the appeal is liable for rejection.

18. It is an undisputed position that a right to file an appeal is not an absolute right but a right bestowed by the statute. Thus, such a statutory right of appeal can be made subject to conditions. However, though the right of appeal has been made conditional by Section 35F of the Central Excise Act, 1944 it is unambiguously suggested that a party who desires to challenge the Order-in-Original in appeal shall have to deposit in terms of provisions contained in Section 35F of the Central Excise Act. The requirement to make such deposit is to be fulfilled for the purpose of "entertainment of appeal" and not "filing of the appeal". This can only be reasonable interpretation to the above provision which is inconsonance with law laid down by this Court in *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355*; otherwise it would require adding the words "filing of" to the above provisions. Section 35F of the Central Excise Act did not bar a party from filing an appeal unless the amounts of tax

and penalty demanded by the adjudicating authority are deposited. Upon cumulative reading of legal position as settled in *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355 and Satya Nand Jha Vrs. Union of India, 2016 SCC OnLine Jhar 2323 = (2017) 2 AIR Jhar R 619 = (2016) 4 JBCJ 392 (HC),* this Court does not see any reason to interfere with the view expressed by the Commissioner (Appeals), Bhubaneswar. Since the Order-in-Original itself is dated 29th November, 2017, i.e., much after Section 35F has been amended with effect from 6th August, 2014, the Petitioner cannot avail a benefit of second proviso to Section 35F Act (post amendment).

19. For the reason that by the date of entertainment of appeal no evidence was placed on record by the petitioner-appellant to show that it had complied with the condition hedged for "entertainment of appeal". However, in view of the undisputed contents of the Memo dated 19.04.2022 and the application accompanied by the affidavit and no objection being raised by the counsel for the Revenue to take up the main writ petition for hearing and setting aside the order dated 19th March, 2018 passed by the CESTAT. We inclined to set aside the order dated 19th March, 2018 subject to the petitioner depositing cost of Rs.1,00,000/- (rupees one lakh only), for the delay in predeposit, with the Orissa High Court Bar Association, Cuttack within three weeks from today. We direct the CESTAT to restore the appeal bearing No. Ex.Appeal No. 75563 of 2018 to file, upon furnishing proof of payment of cost, the CESTAT is directed to proceed with the appeal and decide the same on its merit. We direct the parties to appear before the learned CESTAT on any working day in the 2nd week of May, 2022.Considering the fact that the Petitioner has deposited Rs.10,00,00,000/- (rupees ten crores) as condition for entertainment of appeal as required under Section 35F of the Central Excise Act, 1944 in consonance with the amended provision, this Court directs for no coercive measure for recovery of the rest of the demand raised pursuant to Orderin-Original dated 29th November, 2011 by the Commissioner of Central Tax, GST & CX Commissionerate, Rourkela be taken till disposal of the appeal by the CESTAT.

20. In the above terms, the writ petition as also the I.A. stand disposed of.

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2022 (I) ILR - CUT- 763

C.R. DASH, J & M.S. SAHOO, J.

CRIMINAL APPEAL NO.187 OF 2021

SATYA PRAKASH DIXIT & ANR. .....Appellants

.V.

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Offences under section 498-A/ 304-B/302/201/ 34 IPC and section 4 of D.P. Act – Conviction based on circumstantial evidence – Chain of circumstances not completed – Effect thereof – Held, cannot be convicted – Only on the basis of the post-mortem report and the opinion of the doctor when other circumstances are held to be disproved the appellants cannot be convicted for the offence punishable under section 302/ 34 IPC – Appeal allowed. (Para-20)

Case Laws Relied on and Referred to :-

1. Criminal Appeal No.152 of 2015 : Subhash @ Suraj Ramnaresh Bind Vs. State of Maharashtra.
2. AIR 1992 SC 2186 : Mafabhai N. Raval Vs. State of Gujurat.
3. AIR (1999) SC 2416 : (1999) 6 SCC 120 : Mohd. Zahid Vs. State of Tamil Nadu.
4. AIR 2004 SC 2174 : State of Madhya Pradesh Vs. Sanjaya Rai.
5. (1984) 4 SCC 116 : Sharad Birdhichand Sarda Vs. State of Maharashtra.
6. (2021) 10 SCC 725: Nagendra Sah Vs. State of Bihar.
7. (1956) SCR 199 : Shambu Nath Mehra Vs. The State of Ajmer.
8. (2012) 11 SCC 685: AIR (2013) SC 264): Balaji Gunthu Dhule Vs. State of Maharashtra.

For Appellants : Mr. B.N. Mohapatra

For Respondent : Mr. Sk. Zafrulla, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 29.03.2022 : Date of Judgment: 27.04.2022

C.R. DASH, J.

In S.T. Case No.19 of 2017, learned Additional Sessions Judge, Rairangpur in the district of Mayurbhanj found the present Appellants Satya Prakash Dixit and Ganesh Chandra Dixit guilty of offence under Sections 302/34 of I.P.C. He sentenced both the aforesaid convicts to suffer R.I. for life and to pay a fine of Rs.20,000/- (Rupees twenty thousand) each in default, to suffer further R.I. for six months each.

Appellant No.1-Satya Prakash Dixit is the son of Appellant No.2-Ganesh Chandra Dixit.

2. Prosecution case, stated succinctly runs as follows:

Sarat Chandra Padhi (P.W.12), who is the father of the deceased lodged the F.I.R. alleging that his daughter was done to death by Appellant No.1 and her parents in the night of 24.08.2016 (Janmastami Day). Marriage between deceased Rupali and Appellant No.1-Satya Prakash Dixit was solemnized as per their caste custom, rites and tradition. After marriage, for one year Rupali led a happy conjugal life in her matrimonial house. Thereafter, members of the family of her in-laws started tormenting her mentally. Even the parents-in-law of deceased Rupali asked her and her husband to live in separate mess. In the meantime, Satya Prakash Dixit-Appellant No.1 fathered a son. Obviously, the family expenditure increased and Appellant No.1-Satya Prakash Dixit could not give much money to his parents for their expenditure. The parents-in-law of the deceased for such a situation blamed her. On 21.08.2016, deceased Rupali and her husband Satya Prakash Dixit visited the house of the informant where Rupali told her father that, her father-in-law and mother-in-law are planning to separate her and her husband from their house and on the same day Satya Prakash Dixit husband of the Rupali told the informant that, they will drive Rupali out, if she does not bring extra dowry. Even he threatened to murder Rupali, if Rs.5,00,000/- (Rupees five lakhs) do not reach their house before Janmastami. On 24.08.2016 (Janmastami Day), at about 1.30 A.M. night the informant received information from one Rajanikanta Padhi that Rupali has committed suicide in her in-laws house. The informant along with his family members rushed to the house of the Appellants and saw the dead body of Rupali lying on the floor of her room and there was a saree knotted around her neck. It is alleged that owing to demand of dowry, the Appellants and Rupali's mother-in-law have killed the deceased and they have tried to show case it as a case of suicide.

On the basis of F.I.R. lodged by the informant (P.W.12) IIC, Rairangpur P.S. (P.W.13) registered case under Section 498-A/304-B/302/201/34 IPC read with Section 4 of the D.P. Act against the accused persons.

On completion of investigation, charge sheet was filed against the present Appellants. Keeping the investigation open as mother-in-law of the deceased had not yet been apprehended.

Learned Trial Court on the basis of materials available on record framed charge against the accused persons sent for trial under Sections 498-A/304-B/302/201/34 IPC and Section 4 of the D.P. Act.

3. Prosecution has examined 13 witnesses to prove the charge. P.W.12 is the informant, who happens to be the father of the deceased. P.W.11 is the mother of the deceased. P.W.10 is the younger sister of the informant and happens to be the aunt of the deceased. P.W.1 is the scribe of the F.I.R. and informant P.W.12 happens to be his maternal uncle. P.W.2 is an independent witness and a co-villager of the Appellants. P.W.3 is a witness like P.W.2. P.W.4 is the brother of P.W.1. P.W.5 is the friend of P.W.4. P.Ws.5, 6, 8 and 9 are witnesses to seizure out of whom, P.Ws.5 and 6 are also witnesses to confessional statement of Appellant No.1-Satya Prakash Dixit before the police recorded under Section 27 of the Evidence Act and recovery of a bamboo stick at his instance. Similarly, P.Ws.10 and 12 are witnesses to inquest over the dead body of the deceased. P.W.7 is the Medical Officer, who conducted post-mortem over the dead body of the deceased. P.W.13 is the Investigating Officer.

4. The defence plea is one of complete denial and suicidal death of the deceased during their absence in their house.

Defence has examined two witnesses. D.W.1 Ganesh Chandra Dixit, Appellant No.2 himself and D.W.2 is a co-villager of the Appellants.

5. During trial P.Ws.1, 2, 3, 4, 5, 10, 11 and 12 did not support the prosecution case and each of them were cross-examined by the Additional Public Prosecutor under Section 154 of the Evidence Act. In view of such development during trial, learned Additional Sessions Judge held that the principal prosecution witnesses having not supported the prosecution case, the entire case rests squarely on circumstantial evidence. Having held thus, he discussed in great detail, the different circumstances that inculpate the Appellants.

6. From the reading of the impugned judgment it is found that, learned Trial Court has relied on the following circumstances:

(i) Homicidal death of the deceased within the privacy of her matrimonial home.

(ii) Discovery of a bamboo stick at the instance of Appellant No.1-Satya Prakash Dixit on the basis of his statement before the police recorded under Section 27 of the Evidence Act.

(iii)Photographs taken (not exhibited) by the D.F.S.L. Authority at the time of their crime scene visit and their report (not exhibited) about the existence of furniture in the spot room during their visit discredited the defence plea that there was one stool in the room and another stool Appellant No.1-Satya rakash Dixit had used to bring the dead body of the deceased hanging from the ceiling fan down.

(iv) Silence of the Appellants regarding cause of the alleged suicide or alleged death of the deceased when there was no marital discord and she (deceased) was to take care of a 3 years old son.

(v) Falsity of the defence plea of alibi.

7. Mr. B.N. Mohapatra, learned counsel for the Appellants at the outset impugned the Trial Court judgment on the ground that, the finding of the learned Trial Court regarding the fact that death of the deceased was a homicidal death is wrong and misconceived. He submits that from the post-mortem report and the surrounding circumstances it is clearly proved that the death of the deceased was a suicidal death. He relies on different passages of the medical jurisprudence by Modi and an unreported decision of Hon'ble Bombay High Court in Criminal Appeal No.152 of 2015 (***Subhash @ Suraj Ramnaresh Bind vs. State of Maharashtra***) decided on 10.01.2017.

Mr. Zafrulla, learned Additional Standing Counsel, on the other hand, supports the impugned judgment so far as the aforesaid finding is concerned and submits that the opinion of the Medical Officer cannot be lightly brushed aside.

8. We shall prefer to discuss the law on the point. In the Case of ***Mafabhai N. Raval v. State of Gujurat, AIR 1992 SC 2186*** Hon'ble the Supreme Court has held that, in respect of nature of injuries and causes of death, most competent witness is the doctor examining the deceased and conducting post-mortem. Unless there is something inherently defective, the Court cannot substitute its opinion in place of the doctor.

In the case of ***Mohd. Zahid vs. State of Tamil Nadu AIR 1999 SC 2416: (1999) 6 SCC 120*** It has been held that, sufficient weightage should be

given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory.

In the case of ***State of Madhya Pradesh vs. Sanjaya Rai AIR 2004 SC 2174*** Hon'ble the Supreme Court held that, though opinions expressed in textbooks by specialist authors may be of considerable assistance and importance for the court in arriving at the truth, cannot always be treated or viewed to be either conclusive or final as to what such author says to deprive even a court of law to come to an appropriate conclusion of its own on the peculiar facts proved in a given case. Such opinions cannot be elevated to or placed on a higher pedestal than the opinion of an expert examined in court and the weight ordinarily to which it may be entitled to or deserves to be given.

9. From the evidence of the Medical Officer (P.W.7) it is found that, on the date of examination in chief defence declined to crossexamine him which shows that the opinion expressed by him was acceptable to the defence. However, P.W.7 was further cross-examinedon recall.

A thorough perusal of the evidence of the Medical Officer (P.W.7) in his examination in chief and in his cross-examination shows that, there exists no contradictory statement in his evidence and he has stood by his conclusion that, the cause of death of the deceased was owing to asphyxia as a result of ligature strangulation. We therefore, hesitate to take an opinion otherwise and reach a different conclusion on the basis of submission advanced by learned counsel for the Appellants. We are constrained to hold that, death of the deceased was a homicidal death.

10. Coming to the second circumstance it is submitted by Mr. B.N. Mohapatra, learned counsel for the Appellants that, the seizure of the bamboo stick at the instance of the Appellant No.1 cannot be believed in as much as the bamboo stick has not been used for the fatal assault and it was found in the kitchen of the house, which was accessible to all. Mr. Zafrulla, learned Additional Standing Counsel, however, supports the reasoning of learned Trial Court.

11. It is not denied that, when the statement was made Appellant No.1-Satya Prakash Dixit was in the custody of the police and according to the

I.O., he made the statement in presence of the witnesses and on the basis of such confessional statement, the bamboo stick (M.O.1) was seized. P.Ws.5 and 6, who are the witnesses to confessional statement of the Appellant No.1-Satya Prakash Dixit and consequent discovery of M.O.1 have not supported the prosecution case.

P.W.13, the Investigating Officer in Paragarph-3 of his examination in chief has testified thus:

> *"On 27.08.2016 I apprehended accused Satya Prakash Dixit and Ganesh Dixit. During interrogation accused Satya Prakash Dixit confessed his guilt. I recorded his confessional statement under Section 27 of Evidence Act. This is the confessional statement marked as Ext.3/2 …….and the accused lead us to his house for recovery of weapon of offence i.e. one bamboo stick. The bamboo stick was recovered from the house of the accused on his production. I seized the same and prepared the seizure list".*

12. We have seen in numerous cases that Section 27 of the Evidence Act has frequently been misused by the police and Court should be vigilant about the circumvention of its provision. In the present case, admittedly, the bamboo stick is not the weapon to cause the fatal assault. The fatal assault is strangulation by a saree. We fail to understand why a bamboo stick was used to assault first and then the deceased was strangulated to death. Obviously any form of attack by a blunt object shall cause the deceased to raise alarm thereby surfacing the hidden design of the assailants and no assailants in ordinary course of events shall follow such a course. We are conscious that, learned Trial Court has relied on some decisions to the effect that, even on the basis of evidence of the I.O., disclosure statement and consequent seizure can be held to be proved provided it inspires confidence of the Court.

From the sequence of events, the nature of death of the deceased and non-support of independent witnesses to the factum of confessional statement and consequent seizure compel us to disbelieve the evidence of the I.O. (P.W.13) in its entirety so far as this circumstance is concerned.

13. So far as Circumstance No.(iii) supra is concerned, the photographs taken by the D.S.F.L. Authority and the crime scene report prepared by the D.S.F.L. Authority being not matters of record and observation of learned Trial Court during trial only, we decline to comment upon the same and the said circumstance is held to be disproved.

14. Before Circumstance No.(iv), we shall prefer to take Circumstance No.(v) first "the falsity of defence plea of alibi". In this regard, Paragraphs-158 to 160 of the decision of Hon'ble the Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*** lessen our burden to discuss the circumstance at length. Paragraph-158 to 160 of the aforesaid decision reads thus:

> *"158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in* ***Deonandan Mishra v. State of Bihar****, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:*
>
> *But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, . . . such absence of explanation or false explanation would itself be an additional link which completes the chain."*
>
> *159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied :*
>
> *(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,*
>
> *(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and*
>
> *(3) the circumstance is in proximity to the time and situation.*
>
> *160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case where this Court observed thus:*
>
> *Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."*

From the aforesaid decision, it is clear that, falsity of defence plea can be taken into consideration, if other circumstances proved in the case point unfailingly to the guilt of the accused. Such a view, however, cannot be taken in the present case so far as the guilt of the Appellants is concerned, as found from our discussion supra.

15. Circumstance No. (iv) is silence of the Appellants regarding cause of death (homicidal or suicidal) of the deceased when there was no marital discord and she should have lived to take care of a three years old son.

Mr. B.N. Mohapatra, learned counsel for the Appellants submits that, the Trial Court has shifted the burden to the Appellant so far as the present circumstance is concerned under Section 106 of the Evidence Act misconceivedly and on the basis of the confessional statement of Appellant No.1 before the police, he has held all the accused persons guilty.

Mr. Zafrulla, learned Additional Standing Counsel, on the other hand, submits that when the death has been caused in the privacy of the matrimonial house and no material is coming out from the Appellants as to how and under what circumstance death of the deceased was caused burden obviously shifts to the inmates of the house to explain the cause of death (suicidal or homicidal) of the deceased.

16. In Paragraph-23 of the judgment, learned Trial Court has held thus:

> *"23. Section 34 I.P.C. is attached, in a case for which it is difficult to distinguish between the acts of individual members of a party who act in furtherance of common intention of all or to prove exactly what part was taken by each of them. Section 34 of I.P.C. lays down the principle of constructive liability which means the meeting of the mind before the act expecting a particular result. To prove the liability U/S 34 of I.P.C., prosecution has to prove that:*
>
> *(a) one criminal act is done by severalpersons,*
>
> *(b) such act is done in furtherance of common intention of all, and lastly*
>
> *(c) each of such persons is liable for that act in the same manner as if it were done by him along.*
>
> *In the present case the accused persons in furtherance of common intention committed the crime. Without participation of either of them the offence could not be completed.* ***During commission of the crime one of the accused was holding the legs of accused, one holding the hands and another strangulate the victim****. So as*

per the provision of law, the accused persons are coming under the ambit of constructive liability and all of them are equally liable."

Emphasis added

From the aforesaid finding, we are constrained to hold that without evidence on record, learned Trial Court has based the conviction of three persons on the basis of confessional statement of Appellant No.1-Satya Prakash Dixit.

17. So far as application of Section 106 of the Evidence Act is concerned, Hon'ble the Supreme Court in a recent decision in the case of **Nagendra Sah vs. State of Bihar (2021) 10 SCC 725** from Paragraphs18 to 21 has held thus:

"18. Now we come to the argument of the prosecution based on Section 106 of the Evidence Act. Section 106 reads thus:-

"106. Burden of proving fact especially within knowledge. – When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

19. Under Section 101 of the Evidence Act, whoever desires any Court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101. On the issue of applicability of Section 106 of the Evidence Act, there is a classic decision of this Court in the case of ***Shambu Nath Mehra v. The State of Ajmer (1956) SCR 199*** *which has stood the test of time. The relevant part of the said decision reads thus :-*

"Section 106 is an exception to section 101. Section 101 lays down the general rule about the burden of proof. "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

Illustration (a) says-

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime".

This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the ontrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are ***Attygalle v. Emperor*** *and* ***Seneviratne v. R.***

Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused,the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

> *20. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court canalways draw an appropriate inference.*
>
> *21. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established bythe prosecution is not established, the failure of the accused to discharge the burden Under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."*

18. Further going through the judgment of Hon'ble the Supreme Court in the case of **Nagendra Sah** (supra), we found in that case that the Appellant had committed the offence of uxoricide. She died of alleged burn injuries. Medical Officer on autopsy found that cause of death was "asphyxia due to pressure around neck by hand and blunt substance". The defence plea in the case was one of accidental death of the deceased. In course of scrutiny of evidence Hon'ble the Supreme Court came to finding that there is nothing on record to show that relationship was strained between the Appellant and his wife and some more persons including the parents of the Appellant were staying in the spot house beside the Appellant. With the aforesaid facts in the background and on discussion of the law as settled in the case of Sharad (supra) Hon'ble the Supreme Court in Paragraph-17 of the judgment held thus:

> *"17. In this case, as mentioned above, neither the prosecution witnesses have deposed to that effect nor any other material has been placed on record to show that the relationship between the appellant and the deceased was strained in any manner. Moreover, the appellant was not the only person residing in the house where the incident took place and it is brought on record that the parents of the appellant were also present on the date of the incident in the house. The fact that other members of the family of the appellant were present shows that there could be another hypothesis which cannot be altogether excluded. Therefore, it can be said that the facts established do not rule out theexistence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis of the guilt of the appellant."*

19. We have already held and concluded in this case that, the circumstances established by the prosecution has not been proved except the

fact that the deceased died a homicidal death in the privacy of her matrimonial home. The death might have been caused conjointly by the Appellants and mother-in-law of the deceased or alone by any one of them. If the death would have been caused conjointly as held by the trial Court on the basis of confessional statement of Appellant No.1 recorded under Section 27 of the Evidence Act, there would have been marks of ecchymosis or bruises on both the hands and legs of the deceased as the assailants would have applied sufficient force and pressure to pin the deceased down to the ground. There is however no such evidence by the Doctor (P.W.7). It is therefore doubtful whether the death of the deceased was caused by one person or more than one person. There is scope for alternative hypothesis in this case also which points towards the innocence of the Appellants.

20. Therefore, the question that survives for consideration is whether only on the basis of opinion of the Medical Officer (P.W.7), who conducted the autopsy over the dead body of the deceased regarding the cause of death, can be held to be sufficient to hold the Appellants guilty. We are of the merited view that, only on the basis of post-mortem report and the opinion of the doctor when other circumstances are held to be disproved the Appellants cannot be convicted for the offence punishable under Sections 302/34 IPC (***See Balaji Gunthu Dhule vs. State of Maharashtra (2012) 11 SCC 685) and AIR (2013) SC 264***).

21. In the result, the conviction of the Appellants under Section 302/34 IPC by the learned Additional Sessions Judge, Rairangpur in S.T. No.19 of 2017 and consequent sentence recorded thereunder are set aside. The appeal is allowed. Each of the Appellants be released forthwith, if their detention is not required in any other case.

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2022 (I) ILR - CUT- 774

BISWAJIT MOHANTY, J.

C.R.P. NO. 2 OF 2022

HEMALATA PADHY ……..Petitioner

.V.

KHITI SWAIN & ANR. ……..Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 115 – Revision – Other Proceeding – Meaning – Discussed.

Case Laws Relied on and Referred to :-

1. (1980) 4 SCC 81 : Vishnu Awatar Vs. Shiv Autar and others.
2. Vol. 34(1992) O.J.D. 462(Civil) : Smt. Banarasi Devi Saha Vs. Basudev Lal Dhanuka.
3. (2015) 1 SCC 466 : Ram Chandra Aggarwal and another Vs. the State of Uttar Pradesh and Anr.
4. 2003(I) OLR-508 : M/s Simplex Engineering and Foundary Works Ltd and two others Vs. Bhubaneswar Pattnaik
5. 2003 (Supplementary) OLR-746: Sri Surendranath Tripathy Vs. Smt. Indira Panda
6. 2010(1)OLR-42. : Md. Noorullah Shareef Vs. Senior Post Master, General Post Office (GPO), Buxibazar,Cuttack-1

For Petitioner : Mr. S.Dash
For Opp. Parties : None

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

B. MOHANTY, J.

This civil revision has been filed challenging the judgment dated 8.12.2021 passed by the learned District Judge, Ganjam, Berhampur in F.A.O. No. 5 of 2020 filed under Order 43 Rule-1(d) of the Code of Civil Procedure, 1908, for short "the Code".

2. The case of the present petitioner is that she being plaintiff had instituted C.S. No. 168 of 2012 before the learned Civil Judge (Sr.Divn.), Berhampur, Ganjam impleading the present opposite parties as defendants. According to Mr.Dash, learned counsel the petitioner the said civil suit which was valued at Rs.67,600/- was decreed ex-parte against the defendants and accordingly the defendants were directed to vacate the suit house and pay arrear rent and damages. The present opposite parties filed C.M.A. No. 17 of 2019 before the learned Civil Judge (Sr.Divn.), Berhampur under Order 9 Rule-13 of "the Code" read with Section 5 of the Limitation Act, 1963 with prayer to set aside the ex-parte judgment and decree in C.S. No. 168 of 2012 by condoning the delay in filing the C.M.A. for restoration of the original suit to its file. The same having been dismissed on contest, the opposite party No.1 preferred an appeal under Order 43 Rule-1(d) of "the Code" styled as F.A.O. No.5 of 2020 against such dismissal order dated 13.2.2020 passed by the learned Civil Judge (Sr.Divn.), Berhampur. The said F.A.O. was allowed

on contest on 8.12.2021 against the present petitioner subject to payment of cost, consequently the learned District Judge set aside the exparte order dated 3.9.2013 passed in C.S. No. 168 of 2012 so also the ex-parte judgment and decree passed in the said suit under Anneuxre-2. Challenging the said judgment dated 8.12.2021 under Annexure-2 as rendered in F.A.O. No. 5 of 2020, the present civil revision has been preferred.

3. At the outset when Mr.Dash, learned counsel for the petitioner was asked about maintainability of the civil revision as the impugned judgment does not arise out of a original suit or other original proceeding in the background of the decision of the Supreme Court as rendered in ***Vishnu Awatar V. Shiv Autar and others*** reported in ***(1980) 4 SCC 81*** and the judgment of this Court as rendered in ***Smt. Banarasi Devi Saha V. Basudev Lal Dhanuka*** reported in ***Vol. 34(1992) O.J.D. 462(Civil)*** and also on the ground that the suit was valued at less than Rs.5/- lakhs, Mr. Dash submitted that civil revision is maintainable as the impugned judgment under Annexure-2 though passed in an appeal is clearly covered by the phrase 'other proceedings' as used in Section 115 of "the Code" as in force in State of Odisha as on date. In this context he relied upon following four decisions.

(i) ***Ram Chandra Aggarwal and another V. theState of Uttar Pradesh and another*** reported in ***A.I.R.1966 Supreme Court 1888***.

(ii) ***M/s Simplex Engineering and Foundary Works Ltd and two others V. Bhubaneswar Pattnaik*** reported in ***2003(I) OLR-508.***

(iii) ***Sri Surendranath Tripathy V. Smt. Indira Panda*** reported in ***2003 (Supplementary) OLR-746*** and

(iv) ***Md. Noorullah Shareef V. Senior Post Master, General Post Office (GPO), Buxibazar***, Cuttack-1 reported in ***2010(1)OLR-42.***

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

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

> "115. Revision-(1) The High Court, in cases arising out of original suits or other proceedings of the value exceeding five lakhs rupees and the District Court in any other cases, including a case arising out of an original suit or other proceedings instituted before the commencement of the Code of Civil Procedure (Orissa Amendment) Act, 2010 may call for the record of any case which has been decided by any Court subordinate to the High Court or the District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate Court appears-
>
> (a) to have exercised a jurisdiction not vested in it by law; or
>
> (b) to have failed to exercise a jurisdiction to vested; or
>
> (c) to have acted in exercise of its jurisdiction illegality or with material irregularity, the High Court or the District Court, as the case may be,may make such order in the cases as it thinks fit;
>
> Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the District Court, the High Court alone shall be competent to make an order under this Section.
>
> (2) The High Court or the District Court, as the case may be, shall not under this section, vary or reverse any order, including an order deciding an issue, made in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.
>
> (3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court or District Court, as the case may be.
>
> Explanation- In this section, the expression "any case which has been decided" includes any order deciding an issue in the course of a suit or other proceeding."

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

7. In ***Ram Chandra Aggarwal*** case ***(supra),*** there exists no discussion on the above noted phrase as it occurs in Section 115 C.P.C. of "the Code". It mainly deals with the word "proceeding" as used in Section 24(1)(b) of "the Code". While interpreting the same word, the Supreme Court has made it clear that the expression 'proceeding' as used in that Section is not a term of art which has acquired a definite meaning. What it means when it occurs in a particular statute or a provision of a statute is to be ascertained by looking at

the relevant statute and the context in which it has been used. In the opinion of this Court not only the language of Section 24(1)(b) and Sub-Section of 115 of "the Code" are different so also the context in which the phrase 'other proceeding' has been used. While Section 115 deals with power of this Court to revise an order; Section 24(1)(b) deals with general power of this Court relating to transfer and withdrawal of cases. Therefore, the context in which the phrase 'other proceeding' has been used in both the statutes are different and same general meaning cannot be given to the phrase 'other proceedings' as occurring under Section 115 of C.P.C. It is more so particularly when the phrase 'other proceedings' has been authoritatively interpreted by the Supreme Court in ***Vishnu Awatar case (supra)*** to mean proceedings of an original nature and the same cannot include decisions rendered in appeals and revisions. It is to be reiterated here that the Supreme Court in ***Ram Chandra Aggarwal case (supra)*** has made it clear as indicated earlier that the xpression proceeding used in the statute does not have a definite meaning and without doubt its interpretation will vary from statute to statute depending on the context in which the said word has been used. Therefore this decision which does not interpret the phrase "other proceedings" as used in Section 115 is of no help to the petitioner.

8. With regard to ***M/s Simplex Engineering and Foundary (supra)*** relied upon by Mr.Dash it may be noted here that the same is also factually distinguishable as there unlike the present case an order passed by the learned Civil Judge (Sr.Divn.), Rourkela in an application under Order 26 Rule 1 C.P.C. filed in connection with an Order 9 Rule 13 petition relating to a suit where ex-parte decree has been passed by the trial/original Court was under challenge. Even then it was held there that since the application filed by the petitioner therein under Order 26 Rule 2 being not prescribed in GRCO to be registered as M.J.C. or Misc. Case and that being an Interlocutory Application relating to examination of a witness in commission, therefore the same cannot be given the meaning of the term proceeding and thus the impugned order is not revisable under Section 115 of "the Code". In such background, this Court fails to understand how this decision will be of any help to the petitioner. In any case it is reiterated that the impugned order passed there arose out of a suit unlike in the present case.

9. In ***Sri Surendranath Tripathy (supra)*** again the facts are different. There the suit was dismissed for default and the plaintiff filed an MJC under Order 9 Rule 9 CPC to restore the suit. When such an application was

allowed restoring the suit that order was challenged in the civil revision. There also unlike the present case what was under challenge was an order passed by the Court arising out of the original suit itself. Further in that case there exists no discussion about the meaning of phrase 'other proceedings', though the question of maintainability of the revision was raised. In fact in that case there exists no issue relating to interpretation of phrase 'other proceedings'. Therefore this case is also factually distinguishable and cannot be of any help to the petitioner.

10. With regard to the last decision cited by Mr.Dash i.e. ***Md. Noorullah Shareef (supra)*** it may be noted here that though the question of maintainability of revision was raised but the said question was not raised vis-à-vis the meaning of phrase 'other proceedings'. No doubt there, this Court entertained the Civil Revision challenging the order of the Ad-hoc Additional District Judge (FTC-1), Cuttack in Misc. Appeal No. 119 of 2002, however the issue whether the order passed in an appeal by an Appellate Court can be revised under Section 115 by this Court was not raised. In fact attention of this Court was not drawn to the decision rendered in ***Vishnu Awatar (supra)*** and ***Banarasi Devi Saha (supra).*** Since the issue with which this Court is concerned at present is with regard to the meaning of the phrase 'other proceedings' was not raised there and the attention of the Court was not drawn to the decisions rendered in ***Vishnu Awatar (supra)*** and ***Banarasi Devi Saha (supra)***, the said decision cannot be of any help to the petitioner. Rather a holistic reading of the judgment of Supreme Court as rendered in ***Vishnu Awatar (supra)*** makes it clear that the phrase 'other proceedings' can only mean proceedings of an original nature, which are not of the nature of suits, like arbitration proceedings. This phrase cannot include decisions pronounced in appeals and revisions. The words " or other proceedings" have to be read ejusdem generis with the words "original suits". In other words the phrase 'other proceedings' will not cover cases arising out of decisions made in the appeals or revisions. If the District Court has not decided in its original jurisdiction then such order is not amenable to the revisional jurisdiction of High Court. While referring to the language of Section 115 of the Code of Civil Procedure (Uttar Pradesh Amendment) Act, 1978, which is almost in pari materia with the provision of Section 115 of "the Code" as is in force in State of Odisha so far as the use of phrase "other proceeding" is concerned, the Supreme Court pronounced clearly that the decisions of the District Courts rendered in appeal or revision are beyond revisional jurisdiction of High Court. But where original decision has been made by the District Court,

the High Court's revisional power will come into play. The same thing was reiterated by this Court in ***Smt. Banarasi Devi Saha (supra)*** where issue involved was whether a civil revision under Section 115 of "the Code" would lie against a revisional order passed by the District Judge exercising the jurisdiction under the same section as amended. There this Court held that a revision does not lie to this Court against a revisional order passed by the High Court. In such background since in the present case the impugned order pertains to an order passed in appeal filed under Order 43 Rule (1)(d) CPC, this Court is of the opinion that Civil Revision is not maintainable.

11. Further conceding for a moment but not admitting that the impugned order is covered by the phrase "other proceedings" as used in Sub-Section 1 of Section 115 of 'the Code', then also the present civil revision is not maintainable as it arises in connection with an original suit pending before the trial Court whose valuation does not exceed Rs.5/- lakhs. For all these reasons, the civil revision being not maintainable, is hereby dismissed. However the dismissal of civil revision will not be a bar for the petitioner to file appropriate application before appropriate forum for redressal of her grievances, if she is so advised. For such purposes certified copies enclosed to this petition can be taken back after the same are substituted by authenticated Xerox copies.

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2022 (I) ILR - CUT- 780

Dr. B. R. SARANGI, J.

W.P.(C) NO. 38690 OF 2021

Dr. DEEPAK KUMAR SAMAL & ORS. ……..Petitioners

.V.

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

THE ORISSA RESERVATION OF VACANCIES IN POSTS AND SERVICES (FOR SCHEDULE CASTES & SCHEDULE TRIBES) Act, 1975 – Section 7 – De-reservation of posts – Post of Asst. Surgeon – Reserved for S.C & S.T candidates – Such post could not filled up even for consecutive three years of reservation – Application for de-reservation of the post – Permissibility and maintainability of Writ

petition questioned – Held, it is not justified to issue writ of mandamus or direction to the Govt. to de-reserve the posts – Rather it is the complete domain of the authority to look into the grievances of the petitioners and pass appropriate order in accordance with law – Therefore the authority shall act in consonance of the provisions contained in sections 6 & 7 of the ORV Act, 1975 as well as law laid down in G.S Gill & Anr. Reported in (1997)6 SCC 129.

Case Law Relied on and Referred to :-

1. (1997) 6 SCC 129 : State of Punjab & Ors. Vs. G.S. Gill and Anr.

For Petitioners : Mr. A. Mishra & Mr. R.K. Jena.

For Opp. Parties : Mr. B.P. Tripathy, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 22.12.2021

Dr. B.R. SARANGI, J.

The petitioners, who are 173 number un-reserved category doctors, have filed this writ petition seeking direction to opposite party no.1 to de-reserve the carried forward reserved SC & ST posts of Medical Officers (Asst. Surgeon) in Group-A (Junior Branch) of Odisha Medical and Health Services cadre, which are not being filled up even for consecutive three recruitment years, as per section 7 of ORV Act, 1975, and they further seek direction to the opposite parties to keep in abeyance the selection process pursuant to advertisement no.17 of 2021-22 in Annexure-6 issued by opposite party no.2 till opposite party no.1 makes such de-reservation.

2. The facts of the case, in brief, are that Odisha Public Service Commission (OPSC) issued advertisement No.18 of 2015-16 for recruitment of 372 posts of Medical Officers (Assistant Surgeons) in Group-A of the Odisha Medical & Health Services Cadre under the Health and Family Welfare Department, which included 186 posts for unreserved category, 60 posts for SC category and 84 posts for ST category. Pursuant to selection, OPSC recommended the names of 186 candidates from unreserved category, 60 candidates from SC category and 75 candidates from ST category for appointment. Therefore, 9 posts from ST category remained unfilled.

2.1. Similarly, OPSC issued advertisement No.07 of 2016-17 for recruitment of 808 posts of Medical Officers (Assistant Surgeons) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under the

Health and Family Welfare Department, wherein 404 posts were for unreserved category, 131 posts were for SC category and 182 posts were for ST category. Pursuant to selection, OPSC recommended the names of 404 candidates from urreserved category, 40 candidates from SC category and 739 posts from ST category and therefore, 91 posts from SC category and 143 posts from ST category remained unfilled.

2.2. Further, OPSC vide advertisement no.12 of 2017-18 advertised 2173 posts of Medical Officers (Assistant Surgeons) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department where 1062 posts were for unreserved category, 445 posts were for Scheduled Caste category and 666 posts were for ST category, but OPSC recommended the names of 447 unreserved category candidates, 22 SC candidates and 14 ST candidates for appointment and 423 posts from SC category and 652 posts from ST category remained vacant.

2.3. Thereafter, OPSC vide Advertisement no.18 of 2018-19 advertised 1950 posts of Medical Officers (Assistant Surgeons) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department wherein 838 posts were for unreserved category, 435 posts were for SC category and 677 posts were for ST category. After the selection process was over, OPSC recommended the names of 838 unreserved candidates, 41 SC candidates and 59 ST candidates for appointment and 394 posts from SC category and 818 posts from ST category could not be filled up due to non-availability of candidates in the respective categories.

2.4. Then, OPSC vide advertisement no.13 of 2019-20 advertised 3278 posts of Medical Officers (Assistant Surgeons) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department wherein 1358 posts were for unreserved category, 709 posts were for SC category and 1075 posts were for ST category. After the selection process was over, OPSC recommended the names of 1107 candidates from UR category, 82 candidates from SC category and 56 candidates from ST category and therefore 627 posts from SC category and 1019 posts from ST category remained vacant.

2.5. Thereafter, OPSC vide advertisement no.9 of 2020-21 advertised 2452 posts of Medical Officers (Assistant Surgeons) in Group-A (Junior Branch)

of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department where 633 posts were for unreserved category, 653 posts were for SC category and 1042 posts were for ST category. Pursuant to selection made, OPSC recommended the names of 633 candidates from unreserved category, 52 candidates from SC category and 35 candidates from ST category for appointment and in this process, 601 posts from SC category and 1007 posts from ST category remained vacant.

2.6. Subsequently, OPSC vide advertisement no.17 of 2021-22 advertised 1586 posts of Medical Officers (Assistant Surgeons) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under the Health and Family Welfare Department on special drive, where 585 posts were for SC category and 1001 posts were for ST category. Pursuant to said advertisement, only 154 candidates applied for, out of which 132 candidates were called for document verification after which the candidature of 47 candidates were cancelled for different reasons and finally out of 1586 posts advertised, only 81 candidates were selected and their names were recommended for appointment. Hence this application.

3. Mr. A. Mishra, learned counsel for the petitioners contended that as per Section-7 of Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes & Scheduled Tribes) Act, 1975, in any case of direct recruitment, if in any recruitment year, the number of candidates either belonging to Scheduled Castes or Scheduled Tribes is less than the number of posts reserved for them or such candidates are not available even after making special recruitment drive, those posts are to be left unfilled for a maximum period of three subsequent recruitment years, if candidates belonging to reserved category are not available during such period and, thereafter, if such posts still remain unfilled, those posts shall be filled up by candidates belonging to unreserved category after de-reserving in the prescribed manner. It is also contended that even though the Government have been taking the plea that there is dearth of doctors in the State of Odisha, for which they have introduced 2 years post PG mandatory services for the doctors, who get admitted in any government medical college in the State, and in the process are not allowing them to go for higher studies as well as to work anywhere as per their choice after completion of PG, but, as is evident from the present case, the Government have allowed huge number of posts to remain vacant instead of filling up of the same by de-reserving the posts by complying Section 7 of ORV Act, 1975. It is further contended that

in the interest of justice, equity and fair play, if the Government will take necessary steps for de-reservation of posts meant for the SC & ST candidates, which are lying vacant for years together, the dearth of doctors in the State will be mitigated partially. It is further contended that there are 1505 posts of Medical Officers lying vacant due to non-availability of SC & ST candidates. Though the candidates like the petitioners are interested to work in the said posts remaining within the State after completion of their MBBS course, the Government have not taken any steps to allow them to work and always taken a plea that there is dearth of doctors in the State. Thereby, it is contended that the interest of justice would be best served if the posts reserved for the SC & ST category candidates, which are not been filled up for more than three consecutive recruitment years, are filled up by the unreserved category candidates by complying the provisions of Section 7 of the ORV Act, 1975. It is further contended that starting from advertisement no.18 of 2015-16 till date, the reserve vacancies available for SC & ST categories candidates have not been filled up. Since those vacancies are being carried forward to next recruitment year or in the next advertisement right from the year 2015-16, without de-reserving the said posts, the same is in violation of Section 7 of the ORV Act, 1975.

4. Mr. B.P. Tripathy, learned Additional Government Advocate contended that the petitioners, who claim for de-reservation of SC & ST posts, cannot seek issuance of writ of mandamus therefor. As such, no writ of mandamus can be issued at their instance for de-reservation of posts by this Court. In support of his contentions, he has relied upon the judgment of the apex Court in ***State of Punjab & Ors v. G.S. Gill and another***, (1997) 6 SCC 129.

5. This Court heard Mr. A. Mishra, learned counsel for the petitioners and Mr. B.P. Tripathy, learned counsel appearing for the opposite parties-State. In view of urgency involved, with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of fresh admission.

6. In compliance of the order dated 09.12.2021, Mr. A. Mishra, learned counsel for the petitioners prepared a chart indicating how many posts meant for reserved category are lying vacant after three successive recruitment years, due to non-availability of SC & ST candidates, and are to be de-reserved for unreserved category candidates. In compliance thereof, learned

counsel for the petitioners has filed an affidavit on 15.12.2021, paragraph-4 whereof reads as follows:

> "4. That details of post of Medical Officers (Assistant Surgeons) in Group – A(Junior Branch) of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department advertised from 2015 till date along with number of posts filled up by SC and ST categories are mentioned below :-
>
> *1. Advertisement no-18 of 2015-16*
> *Total number of posts advertised: 372*
> *Reserved posts for SC category. 60*
> *Reserved posts for ST category. 84*
> *Candidates selected from SC category 60*
> *Candidates selected from ST category 75*
> ***Total number of ST posts remained unfilled = 09.***
>
> *2. Advertisement no-07 of 2016-17.*
> *Total number of posts advertised: 808*
> *Reserved posts for SC category. 131*
> *Reserved posts for ST category. 182*
> *Candidates selected from SC category. 91*
> *Candidates selected from ST category 143*
> ***Total number of SC posts remained unfilled = 40***
> ***Total number of ST posts remained unfilled = 39***
>
> *3. Advertisement no- 12 of 2017 – 18.*
> *Total number of posts advertised: 2173*
> *Reserved posts for SC category. 445*
> *Reserved posts for ST category. 666*
> *Candidates selected from SC category 22*
> *Candidates selected from ST category 14*
> ***Total number of SC posts remained unfilled = 423***
> ***Total number of ST posts remained unfilled = 652***
>
> *4. Advertisement no- 18 of 2018 – 19.*
> *Total number of posts advertised: 1950*
> *Reserved posts for SC category. 435*
> *Reserved posts for ST category. 677*
> *Candidates selected from SC category 41*
> *Candidates selected from ST category 59*
> ***Total number of SC posts remained unfilled = 394***
> ***Total number of ST posts remained unfilled = 618***
>
> *5. Advertisement no- 13 of 2019 – 20.*
> *Total number of posts advertised: 3278*
> *Reserved posts for SC category. 709*

Reserved posts for ST category.	*1075*
Candidates selected from SC category	*82*
Candidates selected from ST category	*56*
Total number of SC posts remained unfilled =	***627***
Total number of ST posts remained unfilled =	***1019***

6. Advertisement no- 9 of 2020 – 21.	
Total number of posts advertised:	*2452*
Reserved posts for SC category.	*653*
Reserved posts for ST category.	*1042*
Candidates selected from SC category	*52*
Candidates selected from ST category	*35*
Total number of SC posts remained unfilled =	***601***
Total number of ST posts remained unfilled =	***1007***

7. Advertisement no- 11 of 2021 – 22.	
Total number of posts advertised:	*1586*
Reserved posts for SC category.	*585*
Reserved posts for ST category.	*1001*
Total No of Candidates selected from SC and ST category	*81*
Total number of SC & ST posts remained unfilled =	***1505***

8. Advertisement no- 17 of 2021 – 22.	
Total number of posts advertised:	*1871*
Reserved posts for SC category.	*576*
Reserved posts for ST category.	*985*
Candidates selected from SC category	*22*

It is submitted that selection pertaining to advertisement no-17 of 2021–22 has not yet over."

7. It appears that the petitioners, who are 173 number un-reserved category doctors, have approached this Court claiming employment under the State authority, pursuant to advertisement issued under Annexure-6 bearing advertisement no.17 of 2021-22 for recruitment to the post of Medical Officers (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health & Family Welfare Department. The number of posts advertised is 1871, out of which for SC category 576 (192-w) posts and for ST category 985 (323-w) posts are available to be filled up by following recruitment process. The posts meant for reserved category are not being filled up with effect from 2015-16 till date. More so, in every year vacancies available for SC & ST category are being carried forward to next recruitment year and in the meantime seven recruitments have already been conducted, but the posts meant for SC & ST

have not been filled up. In compliance of the provisions contained in Sections-6 and 7 of the ORV Act, 1975 the posts have to be de-reserved, if the said posts are not filled up for three consecutive recruitment years. Sections 6 and 7 of the ORV Act, 1975, which are relevant for an effective adjudication of this case, are quoted hereunder:-

> *"6. Exchange of reservation between the Scheduled Castes and Scheduled Tribes:- The reserved vacancies in appointments shall be exchanged between the Scheduled Castes and Scheduled Tribes in the event of non-availability of candidates from the respective communities, but the vacancies reserved for a particular community shall continue to be reserved for that community only for two recruitment years and if candidates are not available for appointment in particular reserved vacancies in the third year, the vacancy so filled by exchange shall be treated as reserved for the candidates of that particular community who are actually appointed.*
>
> *Provided that nothing in this section shall apply to reserved vacancies in appointments in respect of Class III and Class IV Posts and Services.*
>
> *7. Carry forward of reservation and de-reservation:- If, in any recruitment year, the number of candidates either from Scheduled castes or Scheduled Tribes is less than the number of vacancies reserved for them even after exchange of reservation between the Scheduled Castes and Scheduled Tribes the remaining vacancies may be filled up by general candidates after de-reserving the vacancies in the prescribed manner, but the vacancies so de-reserved may be carried forward to subsequent three years of recruitment:*
>
> *Provided that in the years following the recruitment year the normal reserved vacancies together with the vacancies carried forward shall not exceed fifty percent of the total number of vacancies of the year in which recruitment is made and the excess over fifty per cent of the reserved vacancies shall be carried forward to subsequent years of recruitment.*
>
> *Provided further that the provisions of this section shall not apply to the reserved vacancies to be filled up by promotion on the basis of selection where such promotion is to be made-*
>
> *(a) from class III posts to Class II posts;*
>
> *(b) within Class II posts;*
>
> *(c) from Class II posts, to Class I posts, and*
>
> *(d) from posts in the lowest rung to class I]*
>
> *Provided also that nothing in the Section shall apply to the vacancies reserved in respect of Class III and Class IV posts. II candidates are not available for filling up such reserved vacancies these remaining vacancies shall be filled up by holding*

fresh recruitment only from candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be, and sub-section (5) of Section 9 shall not apply to such vacancies."

8. On perusal of the aforementioned provisions, it is made clear that if. in any recruitment year, the number of candidates either from Scheduled Castes or Scheduled Tribes is less than the number of vacancies reserved for them even after exchange of reservation between the Scheduled Castes and Scheduled Tribes, the remaining vacancies may be filled up by general candidates after de-reserving the vacancies in the prescribed manner, but the vacancies so de-reserved may be carried forward to subsequent three years of recruitment. It is stated that for the recruitment year 2021-22, such principles have not been followed by de-serving the posts.

9. In **G.S. Gill** (supra), the apex Court held as follows:

"Carry-forward rule is constitutionally permissible. It is an extension of the principle of providing facility and opportunity to secure adequacy of the representation to SCs and STs mandated by Article 335. It should be carried forward for three years. Even in the post when the vacancy as per roster was available, but candidates were not available, same could be carried forward for three years. However, in each recruitment year, the carry-forward rule cannot exceed 50% of the vacancies. That question however does not arise in a situation where there is a single post/cadre.

Xxx xxx xxx

"Whether or not reserved vacancies should be dereserved, is a matter falling primarily within the administrative discretion of the Government. There is no right in general candidates to seek filling up of the vacancies belonging to the reserved category and to insist on dereservation of reserved vacancies so long as it is possible in law to fill up the reserved vacancies. Carried-forward (unfilled) vacancies reserved for SCs and STs should be filled up only by the reserved candidates and general candidates have no right to seek direction for dereservation thereof for filling up of the same by general candidates. In the instant case, Government issued orders to carry forward for two years. The direction or mandamus to dereserve the solitary post was clearly unconstitutional because no mandamus could be issued to disobey the law or prohibit the authorities from discharging the functions. It would, be therefore, manifestly illegal to seek a mandamus or direction; nor would the court be justified to issue such mandamus or direction to the appropriate Government to dereserve vacancy."

10. In view of such position, this Court is of the considered view that it is not justified to issue writ of mandamus or direction to the appropriate Government to deserve the posts. Rather it is the complete domain of the

authority to look into the grievance of the petitioners and pass appropriate order in accordance with law. Therefore, the State authority shall act in consonance of the provisions contained in Sections 6 and 7 of the ORV Act, 1975 and in terms of the law laid down by the apex Court in **G.S. Gill** (supra) as expeditiously as possible so that unreserved categories applicants can get the benefits as due and admissible in accordance with law.

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

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2022 (I) ILR - CUT- 789

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

W.P.(C) NO. 9848 OF 2012

SASHIKANTA DAS ……..Petitioner

.V.

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

SERVICE JURISPRUDENCE – General principle for the computation of length of service – Whether service render in different cadre can be consider for seniority for the directorate cadre post – Held, No. – In the service jurisprudence, the general rule is that if a govt, servant holding a particular post is transferred to the same post in the same cadre, transfer will not wipe out his length of service in the post till the date of transfer and period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post.

In the present case the petitioner joined in district cadre altogether and brought over the directorate only on 03.10.2007, it cannot be construed that he has completed 10 years of continuous service by 2007, so as to entitled him to get promotion to the post of Junior Assistant. Writ petition dismissed. (Para-13)

Case Laws Relied on and Referred to :-

1. 2009 (Supp.-I) OLR 682: Radhashyam Panigrahi Vs. Registrar (Admn.), Orissa High Court.

2. 2009 (Supp.II) OLR 757: Santosh Kumar Sahu Vs. District Judge, Kalahandi & Nuapada.
3. Civil Appeal No. 3792 of 2019 : Pratibha Rani and others Vs. Union of India
4. AIR 1996 SC 764 : Union of India Vs. C.N. Ponnappan.
5. (2006) 5 SCC 386 : K.P. Sudhakaran Vs. State of Kerala.

For Petitioner : Mr. K.K. Swain and P.N. Mohanty.

For Opp. Parties : Mr. B.P. Tripathy [O.P.Nos.1 to 3] , M/s. Pami Rath and S. Gumansingh (Intervenor)

JUDGMENT Date of Hearing & Judgment: 21.03.2022

Dr. B.R.SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 05.04.2012 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2894 (C) of 2011 at Annexure-9, the circular dated 26.07.2011 of the State Government at Annexure-8, so also the order dated 02.08.2011 at Annexure-7, and to issue direction to the opposite parties to consider his case for promotion to the post of Junior Assistant, Group-C by declaring him eligible for such promotion.

2. The factual matrix of the case, in brief, is that the petitioner was appointed as a Cook, by virtue of the order dated 13.02.1997, in the office of the Superintendent of Circle Jail, Cuttack, Choudwar. Pursuant to which, he joined in the said post on 22.02.1997 and continued to discharge his duties to the best satisfaction of the authority. While he was so continuing, he was transferred to the office of the D.P.O., ACS, Sambalpur to work as a Peon. From there, by virtue of the order dated 16.08.2003, he was sent on deputation to the office of the I.G. of Prisons to work as a Peon. Thereafter, on 03.10.2007, the petitioner was again transferred to the office of the S.D.P.O., G. Udaygiri to work as a Peon on regular basis, pursuant to which, he joined in the office of the I.G. of Prisons and DCS, Orissa on 03.10.2007. But the petitioner claimed that he has rendered 10 years continuous service and, therefore, he is entitled to get promotion to the post of Junior Assistant in terms of Rule-12 and 12 (A) of Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Rules, 1994 (for short "Rules, 1994"). The said benefit having not been extended, the petitioner approached the tribunal by filing O.A. No. 2894(C) of 2011 and the tribunal in turn, vide order dated 05.04.2012, dismissed the original application. Hence this application.

3. Mr. K.K. Swain, learned counsel for the petitioner contended that since the petitioner was rendering service as a Cook w.e.f. 13.02.1997 and, as such, has completed 10 years of continuous service, he is entitled to get promotion to the post of Junior Assistant from the year 2007. But the same was denied to him on the ground that he has not completed 10 years of continuous service. Relying upon Rule-12 of Rules, 1994 and 12 (A) of Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Amendment Rules, 2001, it is contended that if the initial date of joining of the petitioner as Cook w.e.f. 13.02.1997 is taken into consideration, the petitioner has completed 10 years of service from the year 2007. Therefore, the benefit of promotion should have been extended to the petitioner along with all consequential service and financial benefits as due and admissible to him in accordance with law. It is contended that such benefit has not been extended to the petitioner in view of the clarification issued by the authority on 02.08.2011, in pursuance of the Home Department letter no.32667 dated 26.07.2011. It is contended that if as per Rules, 1994, which were framed in exercise of power conferred under Article 309 of the Constitution of India, the petitioner is entitled to get the benefit of promotion, by issuing an administrative circular, the same cannot be denied. To substantiate his contention, he has relied upon the judgments of this Court in the cases of ***Radhashyam Panigrahi v. Registrar (Admn.), Orissa High Court***, 2009 (Supp.-I) OLR 682; ***Santosh Kumar Sahu v. District Judge, Kalahandi and Nuapada***, 2009 (Supp.II) OLR 757 and of the apex Court in the case of ***Pratibha Rani and others v. Union of India*** (Civil Appeal No. 3792 of 2019 arising out of SLP (C) No. 31728 of 2018 disposed of on 10.04.2019).

It is further contended that the past service rendered by the petitioner should have been taken into consideration for computing the continuous service, in view of the observation made by the apex Court in paragraph-4 of the judgment rendered in the case of ***Union of India v. C.N. Ponnappan***, AIR 1996 SC 764. It is thus contended that the tribunal has failed to count the service of the petitioner and on an erroneous appreciation of law, rejected the claim of the petitioner. Therefore, the petitioner has approached this Court by filing the present writ petition.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties contended that initially the petitioner was

appointed as a Cook, which is a district cadre post and, as such, on his request, he was brought over to the directorate cadre post. As per Rules, 1994, the petitioner, having not completed 10 years of continuous service, is not entitled to the benefit, as claimed by him. As such, he justifies the order impugned passed by the tribunal and contended that this Court should not interfere with the same at this stage.

5. Ms. Pami Rath, learned counsel appearing for the intervenor-opposite party contended that the petitioner was never senior to the intervenor, rather the gradation list, which has been placed on record by way of Misc. Case No.15515 of 2012 and published vide order dated 14.09.2007 at Annexure-3 to the misc. case, does not contain the name of the petitioner, whereas the intervenor's name finds place at sl.no.24 of the said gradation list. More so, the petitioner never challenged the said gradation list at any time, after its publication on 14.09.2007. Thereafter, a subsequent gradation list was published on 15.01.2009, wherein the name of the petitioner finds place at sl.no.33, having joined on 03.10.2007 in the Heads of Department, whereas the name of the intervenor finds place at sl.no.25 having joined in Heads of Department on 17.06.1999. Consequentially, the promotion given on the basis of continuous service of 10 years to the intervenor is well justified and, as such, the claim of the petitioner cannot sustain in the eye of law, as he had not completed 10 years continuous service from the date of joining i.e. 03.10.2007. As a consequence thereof, the tribunal has not committed any error in denying the benefit to the petitioner so as to warrant interference by this Court. To substantiate her contention, she has relied upon the judgment of the apex Court in the case of ***K.P. Sudhakaran v. State of Kerala***, (2006) 5 SCC 386.

6. This Court heard Mr. K.K. Swain, learned counsel for the petitioner; Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State-opposite parties; and Ms. Pami Rath, learned counsel appearing for intervenor-opposite party by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. Undisputedly, the petitioner was appointed as a Cook in the office of Circle Jail, Cuttack, Choudwar on 13.02.1997, which is a district cadre post. After joining in the said post, he was transferred from place to place. On his request to come over to the directorate of Heads of Department category,

vide his representation dated 25.09.2007 at Annexure-A/3 to the additional affidavit filed by the intervenor, he was brought over to the Heads of Department, pursuant to which he joined on 03.10.2007. Thereby, his earlier service rendered in the district cadre post cannot be taken into consideration for determination of continuous service.

8. It is worthwhile to mention here that in exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor was pleased to amend the Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Rules, 1994 and formulated the Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Amendment Rules, 2001, of which Rule-12-A reads as under:

> "12-A- Percentage of filing of vacancies and eligibility criteria
>
> (1) 5% of vacancies in the post of Junior Assistant in the office of a Heads of Departments shall be filled up by way of promotion from among the Group-D employees of that office on the basis of recommendation of the Departmental Promotion Committee constituted under rule 16 (1);
>
> Provided that in case required number of Group-D employees are not available for promotion to the post of Junior Assistant in a particular year, these vacancies shall be filled up by candidates recruited under rule 4 (1) (i).
>
> (2) No Group-D employee shall be eligible for consideration for promotion to the post of Junior Assistant unless he has given willingness to that effect in writing and has put in minimum of 10 years of continuous service and has passed +2 Arts/Science/Commerce or possess such other qualification as are equivalent to pass in +2 examination."

9. On perusal of the aforementioned provisions, it is made clear that no Group-D employee shall be eligible for consideration for promotion to the post of Junior Assistant unless he has given willingness to that effect in writing and has put in minimum of 10 years of continuous service and has passed +2 Arts/Science/Commerce or possess such other qualification as are equivalent to pass in +2 examination. Needless to say, the petitioner, having joined as Cook in the district cadre post on 13.02.1997, cannot claim that he has got 10 years of continuous service by 2007 and is otherwise eligible to get promotion to the post of Junior Assistant. Rather, the documents available on record, i.e., Annexure-A/3, clearly indicates that the petitioner

had made request on 25.09.2007, stating that he should be brought over to the prison directorate, as one post of peon was lying vacant, and on consideration of the same, he was brought over to the directorate cadre post on 03.10.2007. Pursuant thereto, he joined and continued to rendering service in the directorate cadre, thereby foregoing his service rendered under the district cadre. In view of such position, the claim made by the petitioner, that he has rendered 10 years of continuous service in terms of Rule-12-A of Rules, 2001, cannot have any justification, as he was brought over to the directorate cadre only on 03.10.2007.

10. Since the petitioner joined in the directorate cadre and his name found place at sl.no.33 of the gradation list, which was published on 15.01.2009, whereas the name of the intervenor-opposite party found place at sl.no.25 of the said gradation list, taking into account his date of initial entry in the directorate as 17.06.1999, the intervenor-opposite party having completed 10 years continuous service in the directorate, was eligible to get promotion to the post of Junior Assistant, whereas the petitioner, having brought over to the directorate cadre on 03.10.2007, cannot be construed to have completed 10 years of continuous service in the directorate cadre post. Thereby, the amended Rules-12-A of Rules, 2001 cannot come into the rescue of the petitioner to get promotion to the post of Junior Assistant.

11. Contention was raised by Mr. K.K. Swain, learned counsel for the petitioner that the Rules, which have been framed in exercise of power conferred under proviso to Article 309 of the Constitution of India, cannot be supplanted by an administrative instructions issued by the authority, a copy of which has been annexed as Annexure-7 to the writ petition. But fact remains, rules do not specify how 10 years continuous service is to be counted. Therefore, the Home Department, vide letter no.32667 dated 26.07.2011, envisaged the principles for counting of continuous service in the post of Peon in the directorate cadre. Thereby, the instructions issued on 02.08.2011 vide Annexure-7, may be an executive instruction, but that is with reference to Rule-12-A(2) and, as such, provisions have been made to supplement but not to supplant the same and, as such, it cannot be said that such administrative instructions are contrary to the rules. Thereby, the ratio decided in ***Radhashyam Panigrahi*** and ***Santosh Kumar Sahu*** (supra), on which reliance was placed by learned counsel for the petitioner, has no application to the present case. So far as the judgment of the apex Court in the case of ***C.N. Ponnappan (supra)*** is concerned, which was relied upon by

the learned counsel for the petitioner, the fact of said case is totally different and distinguishable from that of the present case and, as such, the said case is not applicable to the present case. Similarly, the judgment of the apex Court in the case of ***Pratibha Rani*** (supra), is of no help to the petitioner, as the same has no applicability to the present case, in view of the fact that the present case involves two separate rules and two separate cadres and 10 years continuous service is to be adjudged in consonance with Rule-12-A of Amendment Rules, 2001.

12. Reliance was placed by Ms. Pami Rath, learned counsel for the intervenor-opposite party on the judgment of the apex Court in K.P. Sudhakaran (supra), paragraph-11 of which reads as under:-

> *"11. In service jurisprudence, the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, the transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. But where a government servant is so transferred on his own request, the transferred employee will have to forego his seniority till the date of transfer, and will be placed at the bottom below the junior most employee in the category in the new cadre or department. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service rules."*

13. A bare reading of the aforementioned paragraph would go to show that in service jurisprudence, the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. Thereby, applying the same principles to the present case, if the petitioner joined as a Cook in different cadre altogether and brought over to the directorate only on 03.10.2007, it cannot be construed that he has completed 10 years of continuous service by 2007, so as to entitle him to get promotion to the post of Junior Assistant. Rather, the intervenor-opposite party, having

joined in the directorate cadre on 17.06.1999, had acquired continuous service of 10 years and is entitled to get promotion to the post of Junior Assistant in terms of Rule-12-A of the Amendment Rules, 2001.

14. In view of the above factual and legal analysis, this Court is of the considered view that the tribunal has not committed any error apparent on the face of record by denying the benefit claimed by the petitioner. Therefore, the order dated 05.04.2012 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2894 (C) of 2011 under Annexure-9 does not warrant any interference by this Court.

15. In the result, the writ petition merits no consideration and the same is hereby dismissed. However, there shall be no order as to costs.

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2022 (I) ILR - CUT- 796

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

W.P.(C) NO. 11445 OF 2011

PURNA CHANDRA MOHAPATRA ……..Petitioner

.V.

STATE OF ORISSA AND ANR. ……Opp. Parties

(A) ORISSA SERVICE CODE – Rule 74(b) or (c) r/w financial department resolution dated 03/05/1985 – Stepping up of pay to the senior – When to be granted? – Held, the general norm is that a senior cannot be paid less than to his junior – Even if anomaly in senior's pay is due to difference of incremental benefits – His pay has to be stepped up with reference to higher pay of the junior. (Para-19)

(B) LAW OF INTERPRETATION – External Aid – When a word is not defined in the statute – Effect of – Held, It is the trite law that if no specific definition has been given to a word or phrase in the Act, then the meaning attached to the same in the dictionary is to be taken as external aid for entertainment of the same. (Para-11)

(C) CONSTITUTION OF INDIA,1950 – Article 14 – Right to equality – When the state had allowed similarly situated person to step up pay at par with that of their junior, discrimination with regard to extension of similar benefits to the petitioner, is violation to the Article 14 of the constitution of India. (Para-20)

Case Laws Relied on and Referred to :-

1. AIR 1942 PC 40 : Coca-Cola Company of Canada Ltd. Vs. Pepsi-Cola Compan of Canada Ltd.
2. AIR 1957 SC 871 : Mangoo Singh Vs. Election Tribunal.
3. AIR 1958 SC 353 : Workmen Vs. Management, D.T.E.
4. AIR 1961 SC 1325 : Ramavatar Vs. Asstt. STO.
5. AIR 1965 SC 1839 : Sk. Gulfan Vs. Sanat Kumar.
6. AIR 1968 SC 922 : South Bihar Sugar Mills Ltd. Vs. Union of India.
7. (1976) 3 SCC 864 : CWT Vs. Officer-in-Charge (Court of Wards).
8. 1985 Supp SCC 280 : State of Orissa Vs. Titaghur Paper Mills Co. Ltd.
9. (2009) 3 SCC 94 : Gurcharan Singh Grewal Vs. Punjab SEB.

For Petitioner : Mr. Basudev Pujari, N. Maharana, M.R. Nayak and S.K. Pradhan.

For Opp. Parties: Mr. A.K. Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 22.03.2022

Dr. B.R.SARANGI, J.

The legality and propriety of the order dated 11.08.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar dismissing the O.A. No. 625 of 1998, which was filed by the petitioner seeking stepping up of his pay at par with his junior, is under challenge in the instant writ petition.

2. The petitioner, while serving as Under Secretary in Orissa Administrative Service (OAS) Class-I (Jr.), approached the Orissa Administrative Tribunal seeking stepping of up of his pay at par with his junior-Ananta Charan Mohanty, who was also serving as OAS Class-I (Jr.). The case of the petitioner, in a nutshell, is that he joined as a Lower Division Assistant in Revenue and Excise Department on 30.07.1964, whereas his junior Ananta Charan Mohanty joined as Junior Typist on 08.04.1959. Subsequently, both of them were brought over to the Gr.I Assistant Cadre in Revenue and Exercise Department during the period from 28.04.1966 to 30.06.1976. The petitioner was inducted to OAS Class-II cadre, from the cadre of Gr.I Assistant, on 09.07.1979, and promoted to OAS Class-I (Jr) with effect from 15.09.1994, whereas Shri Mohanty was inducted from the

cadre of Legal Assistant to OAS Class-II cadre, on 20.06.1980, and promoted to OAS Class-I (Jr) with effect from 29.11.1994. Even though Shri Mohanty was junior to the petitioner both in OAS Class-II and OAS Class-I (Jr) cadres, but was getting higher scale of pay than the petitioner. A comparative chart showing placement of the petitioner and Shri Mohanty in OAS Class-II and OAS Class-I (Jr) cadres and the basic salary granted to them at the entry level in both the ranks is given below:-

A. Name	*Placing in the Civil Test*	
	O.A.S,Class-II	*O.A.S, Class -I*
P.C.Mohapatra	*327*	*494*
A.C.Mohanty	*329*	*496*

B. Name	*Basic pay and scale of pay at Entry level.*	
	Class –II	*Class - I*
P.C.Mohapatra	*Scale Rs.525-1150/- Basic Rs.575/-*	*Rs.2200-4000/- Basic Rs. 3000/-*
A.C.Mohanty	*Basic Rs.730/-*	*Basic Rs. 3400/-"*

2.1 The petitioner, having come to know that his junior is getting higher scale of pay than him, represented to the Government to step up his pay to the level of his junior. Since the State opposite parties sat over the matter, the petitioner consequentially moved the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. No. 625 of 1998 with the following prayer:-

> *"(i) declare that the 4th condition in the resolution of the Govt. in Finance Dept. dt 3rd may, 1995 that the junior officer was not drawing a higher rate of pay than the senior in the low part as ultravires and violative of Article -14 and 16(i) , 39(d) of the constitution vide annexure -3;*
>
> *(ii) direct the respondent no.1 to consider the claim of the applicant and allow him the benefit of step-up pay and differential pay than that of his junior from the date his junior was given higher pay.*
>
> *(iii) Declare that the applicant is entitled to get the same pay as that of his junior shri Ananta Charan Mohanty from the date of entry into the O.A.S. Cadre-II*
>
> *(iv) pass any other order (s) in favour of the applicant and in the interest of justice."*

2.2 Opposite party No.1 filed counter affidavit before the tribunal contending that the petitioner was not entitled to get the relief sought by him.

Basically, it was pleaded so on the ground that the petitioner's pay was lesser than that of Shri Mohanty before they were taken into the OAS cadre. More specifically, at paragraph-4 of the counter affidavit it was stated as follows:-

> *"4 That in reply to paragraph-6.3 of the original application, it is humbly submitted that it is not a fact that the applicant's pay should have been regulated at a higher scale vis-à-vis his junior in the cadre as has been averred to.*
>
> *That applicant's case of stepping up of his pay in par with that of his junior is strictly to be examined in accordance with the instruction as well as conditions as stipulated in Finance Department Resolution No. 19168-F dt.3.5.1985 (Annexure - 3) of the original application. The applicant does not confirm to all the conditions stipulated in Finance Department Resolution referred to above. Had Sri Mohapatra submitted any representation earlier as has been averred to, the same would have been examined in details and communicated with necessary orders of Govt. thereon beforehand.*
>
> *The fact of the case is that originally the applicant joined as L.D. Assistant in Revenue and Excise Department on 30.7.64 whereas his counterpart, Sri Ananda Charan Mohanty joined in the Department as a junior Typist on 8.4.59. His counterpart, Sri Mohanty was brought over to the Asst. Cadre of the Department on 2.12.61 as the L.D. Assistant and on 1.3.64; he was promoted to the cadre of Gr.II Assistant with his basic pay of Rs. 145/- P.M. whereas the applicant joined as the L.D. Assistant on 30.7.64 and was drawing pay of Rs.90/- only. Since then Sri Mohanty has been drawing higher pay than the applicant all among till now as would be evident from the statement which is filled as Annexure-A to this Counter. It is a fact that the applicant and his counterpart belonged to Gr.-I Assistant cadre of Revenue and Excise Department for the period from 28.4.66 to 30.6.76 wherein also Sri Mohanty was drawing higher pay than the applicant. It is also a fact that the applicant and his counterpart joined in O.A.S.II cadre against the same Recruitment year but at the time of recruitment, they both did not belong to the same Cadre. The applicant was recruited from the cadre of GR. I Asst. whereas his counterpart was born in the cadre of legal Assistant which bears higher scale of pay than the post of Gr-I Assistant and also Sri Mohanty was higher pay than the applicant for his longer period of service as well as higher scale of pay.*
>
> *This being the factual aspects, the claim of the applicant, being non-existence in the eye of law not fulfilling the terms and conditions prescribed in the Finance Department Resolution referred to above, merits no consideration."*

2.3 In response to the counter affidavit filed on behalf of the State, the petitioner filed his rejoinder affidavit before the tribunal, indicating therein that one Rama Chandra Panda, in similar circumstances, was granted stepping up of his pay since his junior was getting more pay than him. It was also pleaded that a host of others had also been granted the benefit of

stepping up of pay in similar circumstances. The petitioner had also relied upon a list of such officers, which was annexed to O.A. No. 133 of 2003 (Ramesh Chandra Mishra v. State of Orissa). But the tribunal, without considering the same in proper perspective, dismissed the claim of the petitioner for granting stepping up of his pay at par with his junior, relying upon the Finance Department Resolution dated 03.05.1985. Hence, this writ petition.

3. Mr. Basudev Pujari, learned counsel appearing for the petitioner contended that the petitioner and Shri Mohanty both were brought into the OAS Class-II cadre from two different sources. The petitioner was brought from the Assistant Cadre of Revenue and Excise Department, whereas Shri Mohanty was brought from the cadre of Legal Assistant. The petitioner was inducted to OAS Class-II cadre prior to Shri Mohanty and was placed at sl.no.327 whereas the latter was placed at sl.no.329 in the gradation list. On their promotion to OAS Class-I (Jr), in the gradation list, the petitioner got placement at sl. no. 494 and Shri Mohanty was placed at sl.no.496. The basic pay scale was granted to the petitioner as well as Shri Mohanty, at Rs.525-1150/- in OAS Class-II cadre and Rs. 2200-4000/- in OAS Class-I (Jr) cadre. Consequently, the salary of the petitioner in OAS Class-II was fixed at Rs.575/-, whereas the salary of Shri Mohanty in OAS Class-II was fixed at Rs.730/-. Thereafter, the salary of the petitioner in OAS Class-I (Jr) was fixed at Rs.3000/-, whereas the salary of Shri Mohanty in OAS Class-I (Jr) was fixed at Rs.3400/-. As a consequence thereof, it is contended that the tribunal has failed to appreciate the factual matrix and proceeded to decide the matter on a wrong premises. There may be entry into OAS Class-II cadre from different cadres, but once they joined in the OAS Class-II cadre, the pay of the senior (petitioner) has to be at par with his junior (Shri Mohanty). In subsequent promotional posts also, such benefit should have been granted to the petitioner. It is further contended that for similarly situated employees, if such benefit has already been extended, why discrimination shall be made in respect of the petitioner, which would violate Article 14 of the Constitution of India.

4. Mr. A.K. Mishra, learned Additional Government Advocate appearing for the State opposite parties contended that the petitioner has been denied the benefit of stepping up of pay at par with his junior, taking into consideration the Finance Department Resolution dated 03.05.1985, as the petitioner has not satisfied the conditions stipulated therein. He justifies the

order passed by the tribunal denying the benefit of stepping up of pay, so far as the petitioner is concerned, even though he is senior to Shri Mohanty in OAS Class-II cadre as well as in OAS Class-I (Jr) cadre. Hence, the order passed by the tribunal does not warrant interference of this Court. Therefore, he seeks for dismissal of the writ petition.

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

6. The undisputed facts, as borne out from the record, are that though the petitioner and Shri Mohanty belonged to two different cadres, but, on being promoted, they joined in OAS Class-II cadre, where the petitioner was senior to Shri Mohanty, as is evident from their placement in the gradation list, in which the petitioner was placed at sl. no. 327 and Shri Mohanty was at sl. no. 329.Subsequently, both of them got promoted to the OAS Class-I (Jr.) cadre and there also petitioner was placed in the gradation list at sl. no. 494 and Shri Mohanty was placed at sl. No. 496. There is no dispute with regard to the fact that in OAS Class-II the salary of the petitioner was fixed at Rs.575/-, whereas the salary of the Shri Mohanty was fixed at Rs.730/-. Similarly, in OAS Class-I (Jr) the salary of the petitioner was fixed at Rs.3000/-, whereas the salary of the Shri Mohanty was fixed at Rs.3400/-. At that stage, having come to know that his junior his getting higher pay than him, the petitioner sought stepping up of his pay at par with his junior, but such benefit was denied to him relying upon the resolution of the Government of Odisha in Finance Department dated 03.05.1985.

7. For a just and proper adjudication of the case, the resolution dated 03.05.1985 of the Government of Odisha in Finance Department is extracted hereunder:-

"No. CS-I-80/85. 19168 /F .
GOVERNMENT OF ORISSA
FINANCE DEPARTMENT
...
RESOLUTION.
Dated, the 3 Bhubaneswar, May 1985.

Subject: *STEPPING UP OF PAY OF THE SENIOR OFFICER TO THAT OF HIS JUNIOR – INSTRUCTION REGARDING*

Ref. Resolution

i) No. 8353, CS-I-18/68/F., dt 16th March, 1698.
ii) No. CS-I-6/75-20741/F., dt.26th May, 1975.
iii) No. CS-I -6/75-18728-F., dt 14th April, 1976.
iv) No. 41665-CS- I/31/78/ F., dt. 29th July,1978.

In the supersession of all circulars and instructions on the subject and In line with the instruction issued in this regard by the Government of India, the Governor, has been pleased to decide that the benefit of stepping up of pay should be allowed to the Senior only in the case of promotion to the higher post for removing the anomalies on account of fixation of pay under Rule,47(b) or (c) of the O.S.C Where a Senior Government Servant promoted or appointed to a higher post, draws less pay in that post than his junior who was promoted or appointed to the higher post subsequently, the pay of the Senior Officer in the higher post should be stepped up to a figure equal to the pay as fixed for the junior in that higher post. Steeping up of pay should be done with effect from the date of the promotion or appointment of the Junior Officer to the higher posts that is, from the date on which he actually got the pay of the higher post than his Senior and should be subject to the following condition.-

a) Both the Junior and Senior Officer should belong to the same cadre and the posts in which they have been promoted or appointed should be identical in the same cadre.

b) The scales of pay of the lower and higher posts, in which they are entitled to draw pay should be identical.

c) The Senior Officer is senior to the Junior Officer both in the lower post as well as in the higher post.

d) The Junior Officer was not drawing a higher rate of pay than the senior in the lower post.

2. Fixation of pay relating to step up would be made under Rule 80 of the O.S.C and when stepping up would be allowed the dates of increment as fixed in the case of junior Officer will also be the dates of increment of the Senior Officer. All pending cases shall be decided in accordance with the above instruction.

3. The above instructions will come into force with immediate effect

ORDER- Ordered that the Resolution be published in the next issue of the Orissa Gazette for general information.

BY ORDER OF THE GOVERNOR R.K.BHUJABAL
SECRETARY TO GOVERNMENT.

Memo No. 19169(157)/ F. Dated. 3.5.85
Copy forwarded to All Departments of Government and Others.

Sd/-
JOINT SECRETARY TO GOVERNMENT.

Government of Orissa
Revenue & Excise Department.
Memo No. 25903/-RE, Dated .16/5/85
RVE (B) 360/ 85 (pt.)

Copy forwarded to all Branches/Guard File (with 5 spare copies) for information and necessary action.

Sd/-
Under Secretary to Government.

8. On perusal of the resolution, as extracted hereinbefore, it is made clear that the benefit of stepping up of pay shall be allowed to the senior only in the case of promotion to the higher post for removing the anomalies on account of fixation of pay under Rule-74(b) or (c) of the O.S.C. subject to the conditions mentioned in sub-clauses (a) to (d). As per sub-clause (a), both the junior and senior officer should belong to the same cadre and the posts in which they have been promoted or appointed should be identical in the same cadre. In this case, although the petitioner and Shri Mohanty had belonged to two different cadres, but, when they were promoted to OAS Class-II cadre, they belonged to same cadre and their posts were identical, and undisputedly the petitioner was senior to Shri Mohanty in the gradation list having placement at sl. no. 327 and sl. No. 329 respectively. Subsequently, both of them were promoted to the cadre of OAS Class-I (Jr.) having their placement in the gradation list at sl.no. 494 and sl. No. 496 respectively and in the said cadre also the petitioner was senior to Shri Mohanty. Therefore, sub-clause (a) of the resolution is satisfied. According to sub-clause (b), the scales of pay of the lower and higher posts, in which they are entitled to draw pay, should be identical. To that extent, there is no dispute that scales of pay of OAS Class-II and OAS Class-I (Jr) are identical to each other and accordingly the petitioner's scale of pay was fixed in terms of said scales of pay in the respective cadre. The petitioner has satisfied this condition to be eligible to get the benefit of stepping up of pay. As per sub-clause (c), the Senior Officer is senior to the Junior Officer both in the lower post as well as in the higher post. In the case at hand, the petitioner is senior to Shri Mohanty both in the lower post, i.e. OAS Class-II and also in the next promotional higher post, i.e. OAS Class-I (Jr). Hence, the petitioner has fulfilled this condition also. But

so far as sub-clause (d) is concerned, the junior officer must not draw higher rate of pay than the senior. But, here in this case, in the lower post, Shri Mohanty, being the junior officer, was drawing higher rate of pay than the senior officer, viz., the petitioner. It is this condition, i.e., sub-clause (d), which was apparently not found in favour of the petitioner by the tribunal in the impugned judgment.

9. It is of relevance to note, this fact was not disputed by the petitioner. In the rejoinder affidavit filed before the tribunal, the petitioner had specifically mentioned that the State opposite parties had allowed one Rama Chandra Panda, OAS (I) Retd. to step up his pay at par with his junior Md. A. A. Khan, who was drawing higher pay from time to time in the lower post/cadre vide Rev. Dept. order No. 40992/R dated 1.9.1990. Apart from that, the opposite parties had also allowed a number of OAS officers to step up pay at par with their juniors, who were drawing higher pay from time to time in lower post/ cadre. A list of such officers had also been annexed to O.A. No. 133 of 2003 (Ramesh Chandra Mishra vrs. State of Orissa) as Annexure-25, which had not been disputed by the State opposite parties, who were also the opposite parties in the said Original Application. But the tribunal on erroneous appreciation of the fact and referring to the Finance Department Resolution dated 03.05.1985, as mentioned above, came to a finding that the petitioner was unable to produce any concrete case in which the pay of senior was stepped up with reference to the pay of the junior under similar circumstances. Thereby, the stand taken by the petitioner in his rejoinder affidavit has also not been considered by the tribunal, which amounts to non-application of mind. The tribunal reached an erroneous finding in the order itself. Though the tribunal relied upon the factual matrix as delineated above, but observed that the petitioner has not fulfilled the condition necessary for stepping up of the pay as laid down in Finance Department Resolution dated 03.05.1985. The tribunal has not appreciated the fact in its proper perspective inasmuch as the Finance Department Resolution dated 03.05.1985 is fully applicable to the petitioner as both the petitioner and Shri Mohanty, who is admittedly junior to the petitioner, belong to the same cadre of OAS Class-II and subsequently promoted to OAS Class-I (Jr) and their appointment is identical in the same cadre.

10. Rule-11 of the Orissa Service Code states that cadre means, strength of service or part of service sanctioned as a separate unit. Therefore, the petitioner and Shri Mohanty, who was junior to the petitioner, both belonging

to OAS Class-II cadre, become the strength of service or part of service sanctioned as a separate unit. More so, their scale of pay in lower or higher post in which they entitled to draw pay should be identical. More specifically, the petitioner is a senior officer and senior to his junior officer Shri Mohanty both in the lower post, i.e. OAS Class-II as well as in the higher post, i.e. OAS Class-I (Jr). But the junior officer Shri Mohanty was drawing higher rate of pay than that of the pay of the petitioner. Therefore, the petitioner prayed for stepping up of his pay, which is well in consonance of the resolution dated 03.05.1985. The tribunal's finding is that the petitioner does not fulfill the 4th condition of the resolution dated 03.05.1985, meaning thereby, the junior to the petitioner, Shri Mohanty was getting higher rate of pay than that of the petitioner, in the lower post, i.e., OAS Class-II.

11. It is trite-law that if no specific definition has been given to a word or phrase in the Act, then the meaning attached to the same in the dictionary is to be taken as external aid for interpretation of the same.

12. In ***Coca-Cola Company of Canada Ltd. v. Pepsi-Cola Company of Canada Ltd.***, AIR 1942 PC 40, it has been clearly held that dictionaries could always be referred to in order to ascertain not only the meaning of the word, but also the general use of it.

13. In Mangoo Singh v. Election Tribunal, AIR 1957 SC 871, the apex Court held as follows:-

> *"We have been referred to several meanings of the word 'demand' in standard English dictionaries and law lexicons. When the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers. It is sufficient for our purpose to state that even in standard dictionaries and law lexicons, it is well recognised that the word demand' may mean simply a 'claim or 'due', without importing any further meaning of calling upon the person liable to pay the claim or due."*

14. Similar view has also been taken by the apex Court in ***Workmen v. Management, D.T.E***., AIR 1958 SC 353; ***Ramavatar v. Asstt. STO***, AIR 1961 SC 1325 and ***Sk. Gulfan v. Sanat Kumar***, AIR 1965 SC 1839.

15. In ***South Bihar Sugar Mills Ltd. v. Union of India***, AIR 1968 SC 922, the apex Court held, if the Act does not define a word, the Legislature must be taken to have used that word in its ordinary dictionary meaning.

16. In CWT v. Officer-in-Charge (Court of Wards), (1976) 3 SCC 864, the dispute was whether the several lands held by the respondent were "agricultural lands" and hence excluded from the definition of "assets" given in Section 2 (e) of the Wealth Tax Act, 1957. The apex Court held:

> *"Agricultural land" is a species of land. It must be land which could be said to be either actually used or ordinarily used or meant to be used for agricultural purposes. In other words, "agricultural land" must have a connection with an agricultural user or purpose. It is on the nature of user that the meanings of "agricultural purpose" and "agriculture" becomes relevant. It is true that, in Raja Benoy Kumar Sahas Roy's case (supra), this Court pointed out that meanings of words used in Acts of Parliament are not necessarily to be gathered from dictionaries which are not authorities on what Parliament must have meant. Nevertheless, it was also indicated there that, where there is nothing better to rely upon, dictionaries may be used as an aid to resolve an ambiguity. The ordinary dictionary meaning cannot be discarded simply because it is given in a dictionary. To do that would be to destroy the literal rule of interpretation. This is a basic rule relying upon the ordinary dictionary meaning which, in the absence of some overriding or special reasons to justify a departure,. must prevail."*

17. In ***State of Orissa v. Titaghur Paper Mills Co. Ltd.***, 1985 Supp SCC 280, the apex Court held as follows:-

> *"The dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common 1 parlance. In doing so the court must bear in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the court, therefore have to select the particular meaning which would be relevant to the context in which it has to interpret that word.*

18. In view of the law laid down by the apex Court, as discussed above, "stepping up" of pay having not been defined in the Act and the rules itself, the ordinary meaning prescribed in the dictionary has to be taken into consideration to come to a conclusion. Therefore, the ordinary meaning attached to the word "step up", as derived from the various dictionaries, are quoted herein below:-

> *"According to **Merriam Webster** dictionary, "step up" means to increase, augment, or dvance especially by one or more steps.*
>
> *As per **Britannica dictionary**, "step up" means an increase in size or amount.*
>
> *In **Collins English Dictionary**, the word "step up" has been defined as, "If you step up something, you increase it or increase its intensity.*

The word "step up" in ***American English Dictionary*** *means as follows:-*

a. *To raise or increase by degrees to step up production.*
b. *To be promoted; advance*
c. *To make progress; improve"*

In the ***Free Dictionary****, "step up" means*

1. *To increase, especially in stages: step up production*
2. *To come forward: step up and be counted."*

19. In view of the aforesaid meaning attached to the words "stepping up of the pay" and applying the same to the factual matrix of the case in hand, there is no iota of doubt that the principle has already been set up by the apex court in ***Gurcharan Singh Grewal v. Punjab SEB***, (2009) 3 SCC 94, wherein the apex Court has held that the general norm is that a senior cannot be paid less than his junior even if anomaly in senior's pay is due to difference of incremental benefits. His pay has to be stepped up with reference to higher pay of the junior.

20. Apart from the above, the stand taken by the petitioner that so far as similarly situated persons are concerned, the State had allowed one Rama Chandra Panda, OAS (I) Retd. to step up his pay at par with that of his junior Md.A.A.Khan, who was drawing higher pay from time to time in the lower post/ cadre vide Revenue Department order No. 40992/R dated 1.9.1990. Besides him, the opposite parties had also allowed a number of OAS officers to step up pay at par with their juniors, who were drawing higher pay from time to time in lower post/ cadre. A list of such officers had also been annexed to O.A. No. 133 of 2003 (Ramesh Chandra Mishra vrs. State of Orissa) as Annexure-25, which had not been disputed by the State opposite parties. Thereby, there is discrimination with regard to extension of similar benefits to the petitioner, which violates Article 14 of the Constitution of India. And as such, the tribunal has not dealt with such part of the contention raised by the petitioner while passing the impugned order. Thereby, there is non-application of mind by the tribunal while passing such order. As the undisputed fact is that the junior to the petitioner, namely, Shri A.C. Mohanty was drawing higher pay in OAS Class-II cadre, before being promoted to OAS Class-I (Jr) cadre, therefore, the petitioner ought to have asked for stepping up of his pay much earlier when both of them were continuing in

OAS Class-II cadre itself. Having not done so and making such a claim after being promoted to OAS Class-I (Jr.) cadre, the stand has been taken by the State that it is hit by the principle of waiver and also limitation, as has been prescribed under the Administrative Tribunals Act 1985. When discrimination has been meted out to the petitioner, the principle of waiver or limitation, as stated in the counter affidavit filed by the State, has no meaning, in view of the fact admittedly a junior to the petitioner is receiving higher pay than that of the petitioner.

21. Keeping in view the judgments of the apex Court, as mentioned above, and also by applying the provisions of Article 14 of the Constitution of India, this Court is of the opinion that the petitioner is entitled to get the benefit of stepping up of pay at par with his junior Shri A.C. Mohanty from the date he was inducted to OAS Class-II, i.e. from 20.06.1980 and the pay scale of the petitioner should be revised accordingly and he should be granted differential arrear benefits, as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment. The opposite parties are directed accordingly.

22. Consequentially, the order dated 11.08.2010 passed by the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. No. 625 of 1998 cannot sustain in the eye of law and same is liable to be quashed and, hereby quashed. The writ petition is accordingly allowed. No order as to costs.

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2022 (I) ILR - CUT- 808

D.DASH, J.

S.A. NO. 416 OF 1999

PARI ROUT ……..Appellant

.V.

ALEKHA CH. ROUT & ORS. ……..Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 23, Rule-3 and 3-A – Compromise decree – Separate suit for setting aside of the same on the ground that it was unlawful – Held, not maintainable – To challenge compromise decree on ground that decree was not lawful, void or

voidable, party to concerned decree based on compromise has to approach same Court which recorded compromise – Neither any appeal against the order recording the compromise nor remedy by way of filling a fresh suit is available in cases covered by rule 3-A of order 23 CPC. (Para-14)

Case Laws Relied on and Referred to :-

1. (2006) 5 SCC 566 : Pushpa Devi Bhagat Vs. Rajinder Singh.
2. (2014) 15 SCC 471 : R. Jajanna Vs. S.R. Venkataswamy.
3. (2020) 26 SCC 629 : Triloki Nath Singh Vs. Anirudh Singh (dead through legal representatives and others)

For Appellant : Mr. S.P.Mishra, Sr. Adv., S. Mishra, S. Dash & S. Nanda

For Respondents: Mr. P.K. Sahoo

JUDGMENT Date of Hearing 28.02.2022 : Date of Judgment: 07.03.2022

D.DASH, J.

The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as 'the Code') has assailed the judgment and decree passed by the learned Additional District Judge, Kendrapara in Title Appeal No.47 of 1993.

By the same, the judgment and decree passed by the learned Munsif, Kendrapara in Title Suit No.175/134 of 1984-1987 have been confirmed. The Respondent No.1 as the Plaintiff had filed the suit with the prayer that the final decree passed on 13.06.1961 by the learned Munsif, Kendrapara in Title Suit No.261 of 1957 in finally disposing the suit for partition on acceptance of the compromise arrived at amongst the parties as lawful, which came to be drawn on stamp paper and thus sealed and signed on 16.03.1963 be declared as invalid, inoperative and tainted with fraud not binding on the Plaintiff. The suit having been decreed, the Defendant No.2 being aggrieved by the same had filed the Appeal under section 96 of the Code. That Appeal has also been dismissed.

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. It is the case of the Plaintiff that one Bidei was the common ancestor who had acquired 'B' schedule land measuring A.11.73-10 kadi, which stood inherited by his three sons, namely, Upendra, Sapani and Mana as the members of the Hindu undivided family. Upendra and Mana died successively and ultimately Mana's branch stood extinct on the death of his only son Karuni. Sapani became the Karta of the family because Narayan the only son of the Upendra was a minor then. It is stated that Sapani taking advantage of the minority of Narayan and illiteracy of Narayan's mother Sunei as well as Gokhei, the widow of Mana got his nine annas share recorded in respect of the 'B' schedule properties in his favour in the Revisional Settlement of the year 1929 when there was no partition in metes and bounds. It is further alleged that Sapani tried to grab away Mana's share in respect of the said properties ignoring the interest of Narayan. Sapani said to have played the mischief by fictitiously showing one of his sons Kinei as the adopted son of Gokhani, the widow of Mana and managed to get the name of Gokhani recorded as maintenance holder in the record of right of Revisional Settlement of the year 1929. Kinei died before the Revisional Settlement of the year 1929 leaving his widow Jema for which Sapani set up his grand-son Hari, son of Dhruba, to be the adopted son of Jema and thereby Sapani put pressure on Jema to relinquish her share in favour of Hari, son of Dhruba. Despite objection of Jema, the Settlement Authority allotted seven annas share to Narayan, seven annas share to Sapani and two annas share to Hari son of Dhruba over 'B' schedule properties, which is said to be the fraudulent act of Sapani.

It is further stated that after Sapani's death, his son Kanduri obtained a declaratory decree in the Title Suit No.170 of 1930 wherein the court declared that Hari was not the adopted son of Kinei and Sapani's three surviving sons, namely, Kanduri, Dhruba and Jagu are entitled to nine annas share in respect of the schedule 'B' properties covering an area of Ac.9.70. In the said suit, i.e., Title Suit No.170 of 1930, Sunei, the mother of Narayan, though was alive was not made a party nor any share was given to her in the said suit. Narayan was illiterate then. It is stated that the judgment and decree in title Suit No.170 of 1930 is thus not binding on Narayan or his mother Jema in respect of the allotment of the shares in the said suit, which is said to have been obtained by practising fraud and mis-representation and that the same was never acted upon. It is further stated that after the death of Mana s/o. Bidei, his 1/3rd interest devolved upon the other co-sharers equally, i.e., Narayan and Sapani as Mana's branch stood extinct. Hence, Narayan's

branch and Sapani's branch each are entitled to eight annas interest in respect of Bidei's property and Sapani's branch was not entitled to nine annas share.

Jagu son of Sapani died leaving his widow Bhuji-Defendant No.6, who has been deprived of her legitimate share in the joint family property of Dhruba and Kanduri. In Title Suit No.261 of 1957 for partition filed by Dhruba, there was a compromise allotting nine annas share to Hari, Kanduri and Bhuji and only seven annas share to Narayan, which is now challenged as illegal, void and based on fraudulent action as Pari one of the sons of Dhruba was not impleaded as party after the death of Dhruba during the pendency of the suit where Hari son of Dhruba was not given any share. Kishore daughter of Dhruba being minor was represented by her mother Hara Bewa even through there was clash of interest between the mother and the daughter. Accordingly, Kishore daughter of Dhruba was not properly represented in T.S. No.261 of 1957, Jema wife of Kinei was not given any share in the compromise decree (Ext.P) which is said to have been obtained by Kanduri by fraud, coercion and mis-representation wherein the L.T.I. of Narayan was taken without explaining the content and the terms of the compromise. So, this suit came to be filed by Alekha (Narayan's branch) stating that the compromise decree in T.S. No.261/1957 is not enforceable in law as the same is void, illegal, tainted and based on fraudulent action of Kanduri because there was no justification in allotting larger share to Sapani's branch.

4. Defendant Nos.2 to 5 contested the suit by filing written statement. It is stated that the Plaintiff was not born at the time when the compromise decree was passed in Title Suit No.261 of 1957. They state that Upendra, Sapani and Mana all sons of Bidei were in joint possession of the properties even after their father's death and Mana as well as Upendra died before the Revisional Settlement of the year 1929 for which Narayan son of Upendra and Karuni son of Mana were living with Sapani after their father's death. It is stated that Suni wife of Upendra and Gokhani wife of Mana had no right over the properties prior to the Revisional Settlement of the year 1929 and there was family separation between Sapani and Narayan when Sapani got nine annas share whereas Narayan son of Upendra got seven annas share. It is explained that Sapani got larger share on account of the fact that he was obligated to pay the family loan in respect of the above. Sunei wife of Upendra is said to have sold A.0.05 of the bari land and Ac.0.56 of the

agricultural land to Sapani out of seven annas interest. Accordingly, it is alleged that the compromise decree in T.S. No.261 of 1957 is valid.

5. The Trial Court on the above rival pleadings framed as many as five issues. Answering the issue no.4 as to the legality of compromise decree under challenge, the Trial Court has answered the same in favour of the Plaintiff holding the preliminary decree passed in Title Suit No.261 of 1957 on compromise as illegal. Having held as above, the final decree passed on 16.03.1963 in Title Suit No.261 of 1957 has been declared illegal and invalid.

The Lower Appellate Court being moved by the aggrieved Defendant No.2 has held the First Appeal to be devoid of any merit.

Hence the present Second Appeal.

6. The Appeal had been admitted to answer the substantial questions of law as stated in Ground No.(A) to (D), which are the followings:-

(A) Whether the learned courts below have adopted erroneous legal approach and have committed serious error of law by recording the finding that "although Naran put his LTI on the compromise as it is established by the Plaintiff in his evidence that LTI of Naran was obtained an application of fraud and coercion, so for all these grounds, the compromise decree as stated above, should not be accepted as genuine" although law is well settled that fraud like any other charges of criminal offence whether made is civil or criminal proceeding must be established beyond reasonable doubt, in the present case since there is absolutely no evidence adduced on behalf of the Plaintiff to substantiate the fraud and coercion, mere assertion of the Plaintiff that the compromise decree was obtained by fraud and coercion cannot be acceptable in law particularly when admittedly the plaintiff was not born when the judgment was pronounced in T.S. 261 of 1957 and as such the plaintiff is not the competent person to speak, about the allegation of fraud practice on Naran and therefore the entire approach of the learned courts below by coming to the aforesaid conclusion is totally perverse, based on no evidence and as such the impugned judgment and decree basins on the aforesaid erroneous finding are liable to be set aside.

(B) Whether the learned lower appellate court has committed serious error of law and procedure by recording the erroneous finding that;

"Similarly the decision reported in 34 (1992) OJD Page 428 is not applicable to the present facts and circumstances of the case. Under such circumstances the Plaintiff Alekh has the right to challenge the compromise decree passed in T.S. No.261 of 1957" although admittedly the present suit has been filed by Plaintiff in the year 1984, claiming the relief to set aside the compromise decree passed in T.S. No.261 of 1957 on the ground that, the same has been obtained by practicing fraud and coercion and although it is the settled position of law that after introduction of order 23 Rule 3-A in C.P.C. w.e.f. 1.2.77, no suit shall lie to set ide a decree on the ground that the compromise on the basis of which the decree has been passed was not lawful and obtained by practicing fraud and coercion, and as such the impugned judgment and decree passed by the learned lower appellate court confirming the judgment and decree passed by the trial court is vitiated in law and the same is liable to be set aside.

(C) Whether the learned courts below have committed serious error of law and procedure holding therein that "the date of decree for partition is to be governed by the stamp Act and in case the decree isin respect of a suit for partition, it is only effective after the decree is scribed in tamp paper and became effective, otherwise it does not affect the right of a party, so the date of decree in T.S. No.261/1957 is to be effected from 16.03.1963 when it was signed by the presiding officer. Thus it was found that the Plaintiff has got locus standi to file the suit and it does not suffer from any irregularity " it was further erroneously held by the lower appellate court that "in a suit for partition without final decree being drawn up, no appeal can be preferred and therefore the date of final decree is criterian in a suit for partition without final decree being drawn up, no appeal can be preferred and therefore, the date of final decree is the criterian in a suit for partition", the entire approach of the learned courts below by coming to the aforesaid finding is erroneous since it is the settled position of law that a decree came into existence as soon as the judgment is pronounced and not on a date when it is sealed and signed and for the purpose of limitation the date of judgment is to be taken as the date of decree. Thereafter the entire approach of the learned courts below is vitiated in law, erroneous and as such the impugned judgment and decree passed by both the courts below are liable to be set aside.

(D) Whether the learned courts below have committed serious error of law and procedure in holding that "on a partition suit the decree is enforceable after stamp appear is supplied and the decree is drawn up, since in

T.S.No.261 of 1957 the decree is drawn up finally on 16.03.1963 when the Plaintiff was in his mother's womb and took birth on 22.11.1963, he is competent to challenge the compromise decree in any of the ground being a coparcener in the family", although it is the settled position of law that even if the decree is drawn up after stamp paper is supplied, the date of the decree is to be taken in law as the date of judgment and he limitation for filing the appeal or any other suit challenging the aforesaid judgment and decree is to be computed from the date of judgment and not from the date of decree, in the present case since the Plaintiff took birth much after the date of the judgment, i.e., after 4 years in the year 1965, the entire approach of the learned courts below in coming to a conclusion that the plaintiff is competent to challenge the decree in T.S.261/57 by filing the present suit is totally erroneous, illegal and as such the judgment and decree passed by both the courts below are liable to be set aside.

7. In course of hearing Mr. S. Mishra, learned counsel for the Appellant and Mr. P.K.Sahoo, learned counsel for the Respondents accorded their consent that the following substantial questions of law also arises here in this Appeal for being answered:-

> "Whether the courts below have erred in law in entertaining the suit, i.e., T.S. No.175 of 1984 (T.S. 134/1987) to declare the final decree dated 16.03.1963 passed in T.S. No.261 of 1957 as follow up action to the judgment and preliminary decree passed on 13.06.1961 on compromise as invalid, inoperative and tainted with fraud, as not binding on the Plaintiff in view of the specific bar contained in Order-23, Rule3(A) of the Code of Civil Procedure for which the suit is not maintainable".

At the outset, Mr. Mishra, learned counsel for the Appellant and Mr. Sahu, learned counsel for the respondents fairly submitted that the above additional substantial question of law needs to be answered first and in the event the answer is recorded against the maintainability of the suit in hand, the other substantial questions of law at A to D of forgoing para-6 would no more stand to be answered.

8. In the case the Plaintiff by filing the suit (T.S. 175/134 of 1984/1987) on 14.11.1984 has sought for a declaration that the judgments and decrees passed in title Suit No.261/1957 are illegal, invalid, inoperative and tainted with fraud as also not binding on him. The suit had been instituted on 20.12.1957. The suit finally decreed on compromise on 13.09.1961. Upon supply of the stamp paper of the required value; the final decree was drawn

on stamp paper and then sealed and signed on 16.03.1963. All these above have been questioned and sought to be completely nullified in this suit instituted in the year 1984 when about long 25 years had rolled by then.

9. Mr. Mishra, learned counsel for the Appellant referring to the provision of Order23, Rule-3-A of the Code submitted that in view of said bar created under law long before the institution of the suit, the Plaintiff in questioning the lawfulness of the compromise was to approach the same court which recorded the compromise and that was the only course left open to him and the present suit is not at all maintainable. According to him, although this question had been raised before the learned First Appellate Court, the same has been conveniently side lined.

10. Mr. Sahoo, learned counsel for the Respondents submitted that the provision of Order-23, Rule 3-A of the Code came to be inserted by the Code of Civil Procedure (Amendment Act), 1976 and, therefore, the said provision cannot be applied to the given suit wherein the final decree passed on compromise long before the introduction of the barring provision in the Code is the subject matter.

11. For addressing the above submission, the precise question that stands for determination is as to whether on the face of the provision of Order-23, Rule-3 and Rule-3-A of the Code as those stand w.e.f. 01.02.1977 after coming into force of the Code of Civil Procedure (Amendment Act), 1976 as on 01.02.1977, the suit filed by the Plaintiff in seeking a declaration against the final decree on compromise in Title Suit No.261 of 1957 is maintainable.

Chapter-V of the Code of Civil Procedure (Amendment Act), 1976 (Act No.104 of 1976) is dedicated with the heading **'Repeal and Savings'**. Sub-section-2 of section 97 of the said Act contains the non-obstante clause and begins as:– notwithstanding that the provision of this Act have come into force or the repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897). It then goes on to narrate one by one the affect/impact of the law as amended on the matters pending as also to the future actions to be founded upon past happenings or events.

Clause (s) of the said section refers to the amendments made in Order-23 of the First Schedule by Section 74 of the Act. It reads that the said

amendment as well as the substitution made in Order-23 of the First Schedule by Section-74 of the Act shall not apply to any suit or proceeding pending before the commencement of the said Section-74. This makes clear that insofar as the suits to set aside a decree on the ground that the compromise on which the decree/s passed was not lawful, filed up-to 31.01.1976 and as such pending; the newly introduced provisions of Order-23 would have no applicability. Therefore, it goes without saying that the bar contained under Rule-3-A of the Code coming into force w.e.f. 01.02.1977 would apply only to the suits coming to be instituted from 01.02.1977 onwards. Most importantly, the attractibility of the amended provisions has no reference to the institution of the earlier suit or the date of decree passed on compromise, which is sought to be nullified in the subsequent suit and as such those are not kept out of the purview.

In view of what has been said above now let us proceed to have a look at the provision of Order-23, Rule-3 and Rule-3-A of the Code. Rule 3 of Order 23 of the Code reads:-

"3- Compromise of suit- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit.

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

12. The legislative intent behind the scheme of Order-23, Rule-3 and Rule 3-A of the Code added with effect from 01.02.1977 and the one as provided in Sub-section 3 of Section 96 of the Code has been elaborately stated in *Pushpa Devi Bhagat v. Rajinder Singh, (2006) 5 SCC 566*. It has been said at Para-17 that:-

> "17. The position that emerges from the amended provisions of Order-23 can be summed up thus:
>
> (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.
>
> (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.
>
> (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A; and
>
> (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule-3, Order 23".

It lays down that the only remedy available to a party to a consent decree or the person claiming through that party or a person asserting interest over the subject matter to avoid such consent decree is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. One more remedy may, however, cannot be denied to a person, who being not purposely made a party although he/she was a necessary party, his interest has been affected by said consent decree and that is when said decree is sought to be executed and the person not a party to the said suit and has not lend his/her hands to the said consent decree is being dispossessed or his right as being exercised in the field is being infringed.

13. In case of *R. Jajanna v. S.R. Venkataswamy (2014) 15 SCC 471* at para-11 the Apex Court have again stated the scope of intent of Order-23, Rule-3 and Rule 3-A of the Code and those runs as under:-

> "11. It is manifest from a plain reading of the above that in terms of the proviso to Order 23 Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed

by the parties, the court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order 23 Rule 3, the agreement or compromise shall not be deemed to be lawful within the meaning of the said Rule if the same is void or voidable under the Contract Act, 1872. It follows that in every case where the question arise whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order 23 Rule 3-A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone who can examine and determine that question. The court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order 23, Rule 3-A CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No.5326 of 2005 to challenge the validity of the compromise decree, the court before whom the suit came up rejected the plaint under Order 7 Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order 23 Rule 3-A CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No.5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher court."

14. In case of *Triloki Nath Singh v. Anirudh Singh (dead through legal representatives and others) (2020) 26 SCC 629*, it has been held that:-

17. By introducing the amendment to the Civil Procedure Coe (Amendment) 1976 w.e.f. 1-2-1977, the legislature has brought into force order 23 Rule 3-A, which creates bar to institute the suit to set aside a decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the court of competent jurisdiction once and for all.

18. Finality of decisions is an underlying principle of all adjudicating forums. Thus, creation of further litigation should never be the basis of a compromise between the parties. Rule 3-A of order 23 CPC put a specific bar that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The scheme of order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The court can be instrumental in having an agreed compromise effected and finality attached to the same. The court should never be party to imposition of a compromise upon an

unwilling party, still open to be questioned on an application under the proviso to Order 23 Rule 3 CPC before the court.

19. It can be further noticed that earlier under Order 43 Rule 1(m), an appeal which recorded the compromise and decided as to whether there was a valid compromise or not, was maintainable against an order 23 Rule 3 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act, aforesaid clause has been deleted, the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under order 23 Rule 3. Being conscious of this fact that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1-A was added to Order-43 which is as follows:

"1 A. Right to challenge non-appealable orders in appeal against decree.- (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contended that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

20. Thus, after the amendment which has been introduced, neither any appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23 CPC. As such, a right has been given under Rule 1-A(2) of Order 43 to a party, who denies the compromise and invites order of the court in that regard in terms of the proviso to Order 23 Rule 3 CPC while preferring an appeal against the decree. Section 96(3) CPC shall not be a bar to such an appeal, because it is applicable where the factum of compromise or agreement is not in dispute.

15. The obtained facts and circumstances being tasted in the touchstone of the above settled law, the answer to the substantial question of law as at the foregoing para-7 runs against the maintainability of the suit instituted on 14.11.1984 in impeaching the final decree dated 13.06.1961 passed on compromise, which came to be drawn on the stamp paper and accordingly sealed and signed on 16.03.1963. For the answer as above, the other substantial questions of law at (A) to (D) of the foregoing para-5 do not survive and are no more found necessary for being answered.

16. In view of all the aforesaid, the judgment and decree passed by the Trial court in T.S. No.175/134 of 1984-1987 as confirmed by the First

Appellate Court in Title Appeal No.47 of 1993 cannot be sustained. The suit filed by the Plaintiff is thus liable to be dismissed.

17. Resultantly, the Appeal stands allowed and in the circumstances without any cost. The judgments and decrees passed in T.S. No.175/134 of 1984-1987 as confirmed in Title Appeal No.47 of 1993 are hereby set aside. The suit filed by the Plaintiff being dismissed; he stands non-suited.

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2022 (I) ILR - CUT- 820

D.DASH, J.

RSA NO. 422 OF 2011

BALBIR KAUR ……..Appellant

.V.

BALBIR SINGH & ORS. ……..Respondents

THE BENAMI TRANSACTION(PROHIBITION) ACT, 1988 – Section 4 (3) (a) – Prohibition of the right to recover property held Benami – Whether the transaction attracts the provision under section 4(3) when the Record of Right in respect of the said land has been prepared in the name of defendants no 1 to 3 to the knowledge of plaintiff and he had never raised any objection to the same – Held, Yes – The appeal stands dismissed. (Para-14)

For Appellant : Mr. .A.C. Panda, B.K. Sahoo A.R. Mohanty, S. Sahoo A. Mishra.

For Respondents: Mr.Sanjeev Udgata, Satyabrata Udgata & A. Mishra.

JUDGMENT Date of Hearing & Judgment: 31.03.2022

D.DASH, J.

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree dated 29.10.2011 and 03.11.2011 respectively passed by the learned dditional District Judge, Rourkela in R.F.A. No.03 of 2010.

By the same, the judgment and decree dated 08.12.2009 and 16.12.2009 respectively passed by the learned Civil Judge, Senior Division, Rourkela in Civil Suit No.219 of 2008 have been set aside.

The Appellant with her parents, being the Plaintiffs before the Trial Court, had succeeded in getting a preliminary decree by allotment of 1/10th share for each from out of the suit land having obtained a declaration that registered sale deed dated 10.03.1973 (Ext.2) is a benami transaction of the suit land which had been filed purchased by Plaintiff No.1 (father) in the name of her three sons. The Respondents 1 to 3 (Defendants) having suffered from the said judgment and decree passed by the Trial Court, had carried the First Appeal under Section 96 of the Code. They have been successful in the said Appeal.

The present second Appeal has been filed by the Plaintiff No.3 alone arraigning, the co-Plaintiffs as Respondent No.8 when the other Plaintiff (mother) had expired for which she was not made a part. Said Respondent No.8 has in the meantime passed away.

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

3. Plaintiffs' case is that Plaintiff No.1 was an employee under the Steel Authority of India Limited in its Steel Plant at Rourkela since the year 1955. During his service period, he had purchased the suit property measuring 9.5 decimals of land from one Mangal Oram for a consideration of Rs.10,000/- in the name of his sons, the Defendants 1 to 3, who were then minors. It is their case that the sale deed was executed benami in the name of three sons (Defendants 1 to 3) for protection of the property for a long period and for the benefit of the members of the family. It is stated that Plaintiff No.1 has constructed a house over the said suit land and the Plaintiffs were staying in the living rooms and some shop rooms had been let out to different tenants. It is also stated the name of Plaintiff No.2 (mother) and the Defendants 1 to 3 were running a registered partnership firm in the name and style of M/s.Preetam Engineering Works. When Defendants 1 to 3 attained majority, they got the suit land recorded in their name. The Plaintiffs then demanded their share on the profit and the rent to which the Defendants did not agree. It is stated that Defendant No.1 thereafter started to put up new construction

over the suit land for which the matter had to be reported at the police station and as no action was taken, the suit has come to be filed.

4. The Defendants 1 to 3, while traversing the averments taken in the plaint, have stated that they have purchased the suit property from out of their own income from milk business. It is stated that the owner of suit land, namely, Mangal Oram has executed the sale deed in their name and as they were minors, their father, as the guardian, represented them in the said sale deed. It is stated that they being the owners of the suit land, the Record of Right in respect of the suit land stands in their name. It is their case that the Plaintiff was a low paid employee of the Steel Plant and had no capacity to purchase the land, construct a house and shop rooms over the same by spending money after meeting all the expenses for running the family. The Defendants 1 to 3 assert to have constructed the house over the purchased land and in course of time to have established the business firm in the name M/s.Preetam Engineering Works by incurring loan from the Bank of Baroda. They state that the rent and profits of the business is of course being distributed amongst the Plaintiffs and the Defendants 1 to 3 as per the verbal statement amongst them in that regard. In summing up, it has been stated that they are the owners in possession of the suit property where the Plaintiffs have got nothing to do.

5. Faced with above rival pleadings, the Trial Court, framing six issues, has rightly taken up issue no.3, at the first instance as it is the foundation upon which the fate of the lis stands. This issue is whether the transaction in question by registered sale deed dated 10.03.1973 is to be held to be a benami transaction and thereby whether it is to be said that the suit property is the property of the Plaintiffs and Defendants or it be said that Defendants 1 to 3 are the owners of the same wherein the parties other than them have no claim.

The Trial Court, upon examination of the evidence and their evaluation, has held that the Plaintiff No.1 has paid the consideration for the transaction and then the Defendants 1 to 3 had no source of income and there was no contribution from their side. With such finding it having taken other surrounding circumstances with regard to dealing and user of the property keeping in view the relationship between theparties, the answer has been returned that the property is the property of the parties although from Ext.2, it appears to have been purchased in the name of Defendants 1 to 3. Practically this finding has led the Trial Court to pass the preliminary decree for partition entitling the parties to their respective shares.

6. The Defendants 1 to 3 being aggrieved by the judgment and decree passed by the Trial Court having filed an Appeal, have been successful. Therefore, the Plaintiffs being non-suited; the Plaintiff No.3 has filed the instant Second Appeal.

7. The present Appeal has been admitted on 18.05.2012 on the following substantial questions of law-

> "(a) Whether the learned lower appellate court was justified in holding that the suit transaction under Ext.2 was hit by the bar under section 4(1) of the Benami Transaction (Prohibition) Act, 1988? ; and
>
> (ii) Whether the suit transaction attracts the provision under section 4(3) of the Benami Transaction (Prohibition) Act, 1988"

8. Mr.A.C. Panda, learned counsel for the Appellant submits that when duly analyzing the evidence on record both oral and documentary, the Trial Court had arrived at a conclusion that price for the transaction has been paid by Plaintiff No.1 and thereafter he with his other family members enjoyed the property stretching over a long period; such finding being justified, the Trial Court had rightly held the properties not to be the property of Defendants 1 to 3 to the exclusion of others but to be the property of all the parties. According to him the First Appellate Court ought not to have negated the finding of the trial on the foundational facts. It is submitted that the property being purchased under the sale deed by the father by spending money from his own source and as thereafter all the members of the family since have continued to enjoy the properties as such; the First Appellate Court has fallen in grave error in holding that the suit is hit by the provision of Section 4(1) of the Benami Transaction (Prohibition) Act, 1988 (in short, 'the BTP Act') as it was prior to coming into force of Amendment Act 43 of 2016 w.e.f. 01.11.2016 when it is clearly out of the purview of the same as provided in clause (a) to section 3 of section 4 of the Act.

9. Mr.S.Udgata, learned counsel for the Respondents 1 to 3, on the contrary, has supported the findings recorded by the First Appellate Court. According to him, mere payment of price for the same by the father is not the conclusive proof that although the property has been purchased in the name of the minor sons; the same would enure to his own benefit and also to the benefit of other members of the family. It is submitted that even if for a moment, it is accepted that Plaintiff No.1 had paid the consideration for the

said purchase of the suit land, that would not suffice the purpose of recording the finding that the property is not the property of Defendants 1 to 3. He further submits that the relationship between the parties, the dealing of the property by all or some of them, during the entire or some period is not of that significance to record the finding in the facts and circumstances of the present case in favour of the claim of the Plaintiffs.

10. Keeping in view the submissions made, I have carefully read the the judgments passed by the Courts below. I have also gone through the plaint, written statement and have perused the evidence both oral and documentary.

11. In order to search out the answer for the substantial questions of law, at the cost of repetition, the foundational facts for the claim of the Plaintiffs over the suit property need be narrated. It has been averred in the plaint that Plaintiff No.1 was an employee in the Steel Plant at Rourkela and he, out of his income from salary, had purchased the suit land from the owner in possession in the name of his minor sons (Defendants 1 to 3). The registered sale deed in question is Ext.2. The Defendants 1 to 3 are the vendees therein and they have been represented by Plaintiff No.1 as their father guardian as then they were aged about 4, 8 and 12 years respectively.

So, even without going for churning out the evidence, this Court is of the view that at that time, Defendants 1 to 3 could not have provided the funds for the said purchase of the suit land and it must be provided either by Plaintiff No.1 himself or he by arranging the funds form his own source or with the help of others must have so arranged for the transaction.

In a case of benami transaction when the claim of one of the members of the family arises against the other in whose name the father has purchased the properties, when he was a minor, the most important aspect to be taken into account is the intention of the father behind the purchase of the property in the name of that minor son, i.e, whether the father at that time, purchased the property in the name of his minor son/s not to solely benefit him them or to benefit himself as well as other members too. In the instant case, the Defendants 1 to 3 are the three sons of the Plaintiff Nos.1 and 2. All others are the daughters. So, whether the purchase was with intention to exclude the daughters from the said property and to benefit the sons by acquiring that property is the paramount consideration and that stands for being answered.

Adverting, the plaint averments, it is seen that the Plaintiffs claim that the sale deed was executed in the name of Defendants 1 to 3 for protection of the property for a long period and for benefit of the members of the family. This, on a plain reading, does not make any meaning to cull out the intention in either way. If we look to the first part that it was to protect the property for a long period, it gives rise to an inference that the intention was to deprive the other members of the family. So, this fundamental aspect as to the intention of Plaintiff No.1 is not getting expressed in the pleading. The evidence of P.W.2 (father) when read carefully also do not show that he had the intention at the time of purchase to benefit all the members of the family but not the three sons of Defendants 1 to 3 to the exclusion of others.

12. The provision of sub-section 4 of the BTP Act is as under:-

> **"4.Prohibition of the right to recover property held benami:-**
>
> (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property;
>
> (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.
>
> (3) Nothing in this section shall apply:-(a) where theperson in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

The provision as it stood then contained a prohibition as to the right to the recovery of the property held benami. Sub-section 3 in its clause (a) was excluding the cases where a person in whose name the property is held as a coparcener in a Hindu undivided family and when the property is held for the benefit of them in the family. The Trial Court when banking upon this clause (a) to sub-section (3) of section 4 of BPT Act says that the suit is not hit by the provision of section 4 of the Act; the First Appellate Court has taken a view to the contrary. Without going to examine the tenability of the reasons given by the Courts below, taking the view at their respective level, when the

plaint case is given a careful reading, it appears to have not been pleaded that there was a Hindu undivided family at the relevant point of time of purchase and that said Hindu undivided family had any joint family property at their hands being under the enjoyment of the members of the joint family either directly or indirectly and more importantly, that the joint family had the income and that has been the source in providing the consideration for the transaction. So, the basic facts to bring the case within the exception under clause (a) of sub-section (3) of section 4 of the Act are wholly lacking in the pleading and evidence. In fact the very coparcenery being then so in existence is stated nowhere. The evidence of P.W.1 being gone through, it is seen that he has stated in his examination in chief that the said sale was benami transaction and he had purchased the said land by paying money from his own salary but in place of purchaser, the names of Defendants 1 to 3 was mentioned and they were then aged about 12, 10 and 4 years respectively. His intention as he states to protect the property for a long period and for the benefits of the members of his own family and not otherwise. This P.W.1 has no where stated that purchase was never to benefit to Defendants 1 to 3. In cross-examination, he has again stated that he does not so want. The case projected is thus the purchase was to benefit the Defendants 1 to 3 as well as all others. He has also stated that the record of right in respect of the said land has been prepared in the name of Defendant Nos.1 to 3 to his knowledge and he had never raised any objection to the same.

For all the aforesaid; the answers to the substantial questions of law run in the direction of non-suiting the Plaintiffs enforcing their right in claiming share over the suit properties as against Defendants 1 to 3.

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

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2022 (I) ILR - CUT- 826

BISWANATH RATH , J.

W.P.(C) NO. 38383 OF 2021

SANJULATA BARIK ……..Petitioner

.V.

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

ORISSA PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1972 – Section 09 r/w Rule 10 of Orissa Public Premises (Eviction of Unauthorised Occupants) Rules, 1998 – Appeal & Procedure of hearing the Appeal – Notice to Estate Officer & Calling of records – Whether necessary? – Held, Yes.

Case Law Relied on and Referred to :-

1. 67(1989)C.L.T.85: Prafulla Chandra Das -Vs- Revenue Divisional Commissioner (Central Division), Cuttack and Ors.

For Petitioner : Mr. Akshaya Kumar Nayak

For Opp. Parties: Mr. S.P.Panda, Addl. Govt . Adv.

JUDGMENT Date of Hearing & Judgment: 06.01.2022

BISWANATH RATH , J.

This writ petition involves the following prayer:

> "It is therefore humbly prayed that, the Hon'ble Court would graciously be pleased to admit this writ application and issue notice to all the Opposite parties to show cause as to why the order of the Director, G.A. Department-Opp. party No.1 be not quashed and as to why the representation dated 20.10.2021 pending before the Secretary, B.D.A. be not considered if the Opposite parties do not show any sufficient cause or fail to show cause at all this Hon'ble Court may allow this writ petition by quashing the order dated 24.11.2021 vide Anenxure-7 and also direct the B.D.A. to consider the representation of the petitioner dated 20.10.2021 for allotment of the aforesaid Plot No.505/530 under Khata No.79 and this Hon'ble Court may further pleased to direct the opposite parties not to take any coercive action against the petitioner till consideration of the representation dated 20.10.2021.
>
> And may pass any other order(s)/direction and issue writ(s) as this Hon'ble Court deems just and proper as circumstances justify in favour of the petitioner;
>
> And for this act of kindness, the petitioner shall as in duty bound ever pray."

2. Short background involving the case is that involving an encroachment over public premises and a proceeding under the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972 vide O.P.P. Case No.5/16(L) was initiated against the petitioner and by order dated 7.6.2016, petitioner was directed to vacate the disputed land. Petitioner came to this Court in W.P.(C).No.20674 of 2016 challenging such action of the public authority. Hearing the matter, the writ petition was disposed of virtually by

an order of remand and deciding such issue giving opportunity of hearing to the petitioner, as finds place at Annexure-1.It appears, pursuant to such direction of this Court, the Estate Officer disposed of the original proceeding observing the petitioner is an encroacher and as such directed the petitioner for vacation of the disputed land vide Annexure-3. It is pursuant to disposal of the original proceeding, being aggrieved, the petitioner preferred appeal, registered as Appeal Case No.36 of 2017(L) in the court of Director of Estates, Odisha, Bhubaneswar. This appeal appears to have been disposed of vide impugned order dated 10.03.2021 at Annexure-4 dismissing the appeal thereby directing the petitioner to vacate the disputed land. Further plea reveals order at Annexure-4 was assailed in this Court vide W.P.(C).No. 21944 of 2021, which matter came to be disposed of with the following observation.

> "6. Accordingly, this Court, without expressing any opinion on the merit of the case of the Petitioner, disposes of the writ petition with a direction that in the event the Petitioner appears before the Director of Estate-Opposite Party No.2 on 9th September,2021 along with certified copy of this order, she shall be given an opportunity to have her say in the matter. Till a fresh decision is taken, the Opposite Party No.2 shall do well to keep the order dated 10th March, 2021 (Annexure-7) passed in Appeal Case No.36/2017 (L) in abeyance, which shall be subject to the order to be passed by the Director of Estate, as aforesaid."

It pursuant to above direction, the matter in Appeal was reheared and again the appeal was dismissed vide Annexure-7, impugned herein.

3. Taking this Court to the factual aspect indicated herein above, Mr.Nayak, learned counsel appearing for the petitioner challenges the appeal order on the premises that once Rule 10 of Orissa Public Premises (Eviction of Unauthorised Occupants) Rules, 1988 prescribes a manner of disposal of appeal and requiring disposal of appeal only after calling for records involving the dispute and providing a notice thereof to the Estate Officer involved, no appeal should have been decided without complying such formalities. It is for non-compliance of the provision at Rule 10 referred to hereinabove, Mr.Nayak, learned counsel for the petitioner submitted that the appeal order since remain contrary to Rule 10 referred to hereinabove, must be interfered with and set aside. Further, there should also be a direction for re-disposal of the appeal taking into consideration the provision at Section 9 of the Act and Rule 10 indicated hereinabove. To substantiate his case, Mr.Nayak, learned counsel also relied on a Division Bench decision of this

Court in the case of ***Prafulla Chandra Das –Versus-Revenue Divisional Commissioner (Central Division), Cuttack and Others***, 67 (1989) C.L.T. 85. Taking this Court through the decision, Mr.Nayak, learned counsel also claims support of the decision to his submissions.

4. Mr.Panda, learned Additional Government Advocate appearing for the State authority in support of the appeal order however referring to Rule 10 of the Orissa Public Premises (Eviction of Unauthorised Occupants) Rules, 1988 requiring notice to Estate Officer before disposal of appeal should be considered to be a requirement, in the event the appellate authority decides against the Estate Officer. It is for the appeal decided against the petitioner, Mr.Panda, learned Additional Government Advocate while submitting that there is no requirement of service of notice on the Estate Officer and non-service of notice on the Estate Officer would have been fatal, had appeal would have been allowed in favour of the petitioner. Mr.Panda, learned State Counsel also supported the impugned judgment at Annexure-7 reading through the reasoning and findings therein. It is in the above premises, Mr.Panda, learned Additional Government Advocate attempted to justify the appellate order.

5. Considering the rival contentions of the parties, this Court finds Section 9 of the Act, 1972 reads as follows:

> 9. **Appeals**.—(1) An appeal shall lie from every order of the Estate Officer made under Section 4-A, Section 5 or Section 7.
>
> (i) in respect of any public premises situated within Cuttack and Bhubaneswar [Municipalities] and owned by the General Administration Department of the Government to an appellate authority who shall be the Director of Estates or such other officer including the Additional Director of Estates as the Government may by notification specify in this behalf, and]
>
> (ii) in respect of any other public premises to the Collector within whose jurisdiction such premises are situate."

Similarly, Rules 10 of the rules, 1988 reads as follows:

> "**10. Procedure in appeal**-(1) The memorandum of appeal filed under Section 9 of the Act shall precisely state the grounds of objection to the order appealed against and shall be accompanied by a copy of such order.
>
> (2) On receipt of the appeal the appellate authority shall call for the records of the proceedings before, the Estate officer and such other particulars as may be required

and shall appoint a date and time for the hearing of the appeal by sending notice thereof to the Estate Officer against whose orders the appeal is preferred and to the appellant as well as the authority concerned and whose administrative control the premises situates.

(3) The appellant shall along with the memorandum of appeal supply copies thereof to be served on the respondents."

Even though Section 9 of the Act, 1972 nowhere refers to any opportunity to the Estate Officer in the event of disposal of the appeal at the stage of admission and only on perusal of records but, however, Rule 10 of the Rule, 1988 mandates call for records of the proceedings before, the Estate Officer and such other particulars as may be required and shall appoint a date and time for the hearing of the appeal also sending notice thereof to the Estate Officer against whose order the appeal is preferred. It is for the statutory provision mandating notice to the Estate Officer in the ultimate disposal of appeal, this Court finds there is force in the submission of Mr.Nayak, learned counsel for the petitioner so far it relates to non-compliance of statutory provision indicated hereinabove. This Court here also takes into account the decision cited by Mr.Nayak, learned counsel for the petitioner. Reading the decision, this Court finds through paragraphs-5 and 6, the Division Bench of this Court came to observe as follows:

"5. Section 9 of the Act makes provision for an appeal to the Revenue Divisional Commissioner from every order passed by the Estate Officer. According to section 10, every order of the appellate authority is final and cannot be called in question in any original suit, application or execution proceedings. There is a specific provision in section 14 to the effect that no suit or other proceeding in respect of matters or disputes for determining or deciding which provision is made in the Act shall be instituted in any Court of law, except under, and in conformity with, the provisions thereof. The provisions of sections 10 and 14 are stringent indeed and to a large extent have curtailed the right of a person aggrieved by an order of the Estate Officer or the appellate authority and have vested authority of finality with them. In other words, by virtue of these provisions wide powers have been vested by the statute on them, so much so that their decisions shall be treated as final and cannot be called in question before any forum or authority. In keeping with these provisions, rule 8 of the Orissa Public Premises (Eviction of Unauthorised Occupants) Rules 1962 (referred to as the ('1962 Rules') provided as follows:—

"8 Procedure in appeals:— (1) An appeal preferred under Section 9 of the Act shall be in writing, shall set forth concisely the grounds of objection to the order appealed against, and shall be accompanied by a copy of such order.

(2) On receipt of the appeal and after calling for and perusing the record of the proceedings before the Estate Officer, the appellate officer shall appoint a time and

place for the hearing of the appeal and shall give notice thereof to the Estate Officer against whose orders the appeal is preferred and to the appellant."

The 1962 Rules were repealed by rule 11 of the Orissa Public Premises (Eviction of Unauthorised Occupants) Rules, 1988 (referred to as the '1938 Rules'), framed by the State Government in exercise of powers conferred by section 17 of the Act. By operation of rule 1(2) these rules came into force on 8-2-1988 when they were published in the official gazette. The provisions of rule 10 of the 1988 Rules are almost identical to rule 8 of the 1962 Rules with some more additions and is quoted below:—

"10(1). The memorandum of appeal filed under Section 9 of the Act shall precisely state the grounds of objection to the orders appealed against and shall be accompanied by a copy of such order.

(2) on receipt of the appeal the appellate authority shall call for the records of the proceedings before the Estate Officer and such other particulars as may be required and shall appoint a date and time for the hearing of the appeal by sending notice thereof to the Estate Officer against whose orders the appeal is preferred and to the appellant as well as the authority concerned under whose administrative control the premises situates.

(3) The appellant shall along with the memorandum of appeal supply copies thereof to be served on the respondents."

sub-rule (2) thereof is of primary importance, because it prescribes a particulars mode of disposal of an appeal under section 9 of the Act. According to it, on receipt of an appeal, the appellate authority shall have to follow the following procedure:—

(a) The records of the proceedings before the Estate Officer shall be called for along with such other particulars as may be required;

(b) A date and time for hearing the appeal shall be appointed by sending notice thereof to the Estate Officer against whose order the appeal is preferred;

(c) Notice of the date and time of hearing shall be sent to the appellant;

(d) Such notice shall also be sent to the authority concerned under whose administrative control and premises situates; and

(e) As contemplated in sub-rule (3) copies of the memorandum of appeal shall be supplied so as to be served on the respondents.

The procedure is of mandatory character because of the use of the word 'shall' in sub-rule (2) of rule 10. The procedure is complete by itself and does not admit of any departure to be made by the appellate authority. It does not give any discretion to it to dismiss an appeal summarily without sending for the records and causing

> service of notice to the Estate Officer, the appellant, as well as the authority concerned under whose administrative control the premises-situates. There is also no other provision in the 1988 Rules authorising the appellate authority for summary dismissal of an appeal.
>
> 6. Having regard to the provisions of the Act and the Rules, we are of the view that the appellate authority has not been conferred with any specific power to dispose of/dismiss an appeal preferred before it in a summary manner. It has to comply with rule 10 of the 1988 Rules. In the aforesaid view of the matter, the impugned order cannot be supported and the appeal has to be remanded for disposal in accordance with law in the light of the discussion made in this judgment."

Reading the above, this Court finds there is also legal support to the claim of Mr.Nayak, learned counsel appearing for the petitioner. It is in this view of the matter and for failure of compliance of a statutory requirement, this Court while interfering in the impugned order at Annexure-7, sets aside the same.

6. For fresh requirement of the hearing of the appeal, this Court on interfering in the impugned order at Annexure-7 restores the appeal to the stage of admission and directs the appellate authority to dispose of the appeal in strict terms of Rule10 of Orissa Public Premises (EUO) Rules, 1988 further also giving opportunity of hearing to the petitioner as well as the Estate Officer.

7. Let a copy of this judgment be produced before the appellate authority by the petitioner within a period of seven days and the appeal proceeding be also concluded within a period of three months from the date of receipt of the copy of this judgment. For the decision herein involves a contest, it is also open to the Estate Officer involved to appear with records involved before the Appellate Authority and contest the appeal. Till disposal of appeal, there shall be no coercive action against the petitioner.

8. For the cause of action involving Annexure-8 if so advised, petitioner may approach by way of independent writ petition.

9. The writ petition succeeds so far the impugned order at Annexure-7. No cost.

10. A free copy of this judgment be handed over to Mr.S.P.Panda, learned Additional Government Advocate.

2022 (I) ILR - CUT- 833

S.K. SAHOO, J.

I.A. NO. 1077 OF 2021

(Arising out of CRLA No. 600 of 2021)

PRADEEP SANTI .....Appellant

.V.

STATE OF ODISHA(VIG.) .....Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 389(1) – Stay operation of the order of conviction – Conditions therein – Held, appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the appellant must made out a very exceptional case and wherein failure to stay of the order would lead to injustice and irreversible consequences.

In the present case the appellant has failed to make out a very exceptional case or special reasons for keeping the conviction in abeyance as such, in the facts and circumstances of the case, the relief sought for by the petitioner for staying the order of conviction cannot be granted. (Para-7)

Case Laws Relied on and Referred to :-

1.(2021) 84 OCR 561 : Sanatan Dash Vs. State of Odisha (Vig.).
2. (2017) 68 OCR 510: Sidhartha Kumar Nath Vs. State of Orissa.
3. (1995) 2 SCC 513 : Rama Narang Vs. Ramesh Narang.
4. A.I.R. 2001 SC 3320: K.C. Sareen Vs. C.B.I., Chandigarh.
5. 2012 (10) SCALE 265 : State of Maharastra through C.B.I. Vs. Balakrishna Dattatrya Kumbhar.
6. (2022) 85 OCR 667 : Pruthwiraj Lenka Vs. State of Odisha (Vig.).

For Appellant : Mr. Sourya Sundar Das.

For Respondent : Mr. Sanjaya Kumar Das,Standing Counsel (Vig.).

JUDGMENT Date of Judgment: 28.03.2022

S.K. SAHOO, J.

The appellant/petitioner Pradip Shanti who was the Junior Accountant in the office of the S.D.O., Electrical, Ghatagaon has filed this I.A. under

section 389 of Cr.P.C. for stay of operation of order of conviction passed by the learned Special Judge (Vigilance), Keonjhar in V.G.R. Case No. 06 of 2014 (Vigilance) / T.R. No.13 of 2014 vide impugned judgment and order dated 28.10.2021 in convicting him under section 13(2) read with section 13(1)(d) and section 7 of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and sentencing him to undergo rigorous imprisonment for four years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo further R.I. for six months for the offence under section 13(2) read with section 13(1)(d) of 1988 Act and R.I. for three years and to pay fine of Rs.5,000/- (rupees five thousand) only, in default, to undergo R.I. for a further period of three months for the offence under section 7 of the 1988 Act and both the substantive sentences were directed to run concurrently.

2. The prosecution case, in short, is that P.W.5 Antaryami Sahu lodged a written report addressed to the Superintendent of police (Vigilance), Balasore dated 26.05.2014 stating therein that he was having a water servicing centre at Ghatagaon market and to that centre, electric connection was taken and his consumer number is GH 1801. On 25.02.2014, one electric bill for Rs.4346/- was received by him from Ghatagaon electricity office for payment of such dues. It is also mentioned in the F.I.R. that in between 13.08.2012 to March 2014, he had paid electricity dues of Rs.15,485/- at the electricity office at Ghatagaon. It is also stated in the F.I.R. that in order to rectify such faulty bill, he visited the Ghatagaon electric office two to three times and also filed an application for rectification, but till the date of lodging of F.I.R., no rectification was made. As the electric bill was not rectified, P.W.5 met the petitioner in his office who told him that for rectification of the bill, he (petitioner) would have to visit the Division office two to three times and for such purpose, P.W.5 has to pay some money for the expenses. It is further stated in the F.I.R. that on 26.05.2014 when he met the petitioner in his office for correction of bill, he told him to pay Rs.2000/- (rupees two thousand) as bribe. He also told that work would be done subject to such payment. It is also stated in the F.I.R. that since the bill correction was urgently required, having no alternative, despite his unwillingness, P.W.5 decided to pay Rs.2000/- to the petitioner on 27.05.2014 and lodged the F.I.R. before the vigilance police to take necessary action.

After the F.I.R. was lodged by P.W.5, as per the orders of the S.P. (Vigilance), Balasore, Vigilance P.S. Case No.22 of 2014 was registered and trap preparation commenced by the Inspector Vigilance. P.W.5 joined the

preparation meeting which was held at Tarini temple trust guest house, Keonjhar. P.W.5 produced the currency notes of Rs.2000/- and necessary preparation was made and instructions were imparted to him as to how such money was to be handed over to the petitioner on demand.

Accordingly, P.W.5 along with official witnesses and Vigilance officials came to the office of the petitioner to trap the petitioner. P.W.5 paid the tainted money of Rs.2000/- to the petitioner on demand to which the overhearing witness relayed signal, consequent upon which the Vigilance officials rushed inside the office and the petitioner was challenged by the trap laying officer to have received bribe and ultimately tainted money of Rs.2000/- was recovered from the petitioner at the spot. The tainted money as well as other articles was seized at the spot. On completion of investigation, charge sheet was placed before the Court against the petitioner for the aforesaid offences to stand his trial in the court of law.

3. The learned trial Court in its impugned judgment has been pleased to hold that at the relevant point of time the petitioner was working as a public servant as he was the Junior Accountant in the office of the S.D.O., Electrical, Ghatagaon. It is further held that during examination under section 313 of Cr.P.C., the petitioner had admitted that on the date of trap, when both his hands were washed with sodium carbonate solution, the colour of the solution turned pink. Keeping these undisputed facts of the case in mind, the learned trial Court scrutinized the evidence available on record and came to hold that the prosecution has successfully proved the preparation report under Ext.2. It was further held that P.W.5 has stated consistently at every stage of the case regarding the demand of bribe of Rs.2000/- by the petitioner from him prior to 27.05.2014. The learned trial Court further held that there is nothing to entertain any doubt or suspicion regarding the demand of bribe by the petitioner otherwise P.W.5 would not have consented to pay the amount even assuming such consent was at the instance of some other individuals. It was further held that the prosecution has successfully proved the factum of demand and acceptance of bribe money by the petitioner as well as recovery of the same from the possession of the petitioner by leading cogent, clear and trustworthy evidence. Accordingly, the learned trial Court came to the conclusion that the offences under section 13(2) read with section 13(1)(d) and 7 of the P.C. Act, 1988 has been committed by the petitioner and the petitioner was found guilty of such charges.

4. Mr. Sourya Sundar Das, learned Senior Advocate appearing for the petitioner contended that the learned trial Court has illegally convicted the petitioner under section 13(2) read with section 13(1)(d) of the 1988 Act. He further argued that the learned trial Court in the impugned judgment has picked and chosen only the portion of evidence of the prosecution to be utilized against the appellant and discarded the rest evidence in favour of the petitioner without any justifiable reason. It was further asserted that the deposition of the witnesses of the prosecution during the cross-examination was not taken into account. He further argued that had the learned trial Court considered the evidence in favour of the petitioner and not ignored the same, the impugned order of conviction would not have come into existence. The finding recorded by the learned trial Court is out and out perverse and without any application of its judicial mind and therefore, the impugned judgment is bad in the eye of law. He further submitted that the petitioner is the only breadwinner in the family and the entire family of the petitioner has settled down and accommodated its needs to the emoluments received by the petitioner and his family would face economic ruination if the order of conviction is not stayed consequent upon which there is possibility of the job being taken away. He further submitted that the apprehension of losing the job may not be the sole criteria for granting stay of conviction, but the exceptional and special circumstances which exist in the facts of the case sufficiently indicate that the present litigation is luxury litigation on the part of the prosecution at the cost of the petitioner. Therefore, when the prosecution has not proved the guilt of the petitioner to the hilt, this Hon'ble Court may be pleased to pass an order of stay of conviction. He placed reliance in the cases of **Sanatan Dash -Vrs.- State of Odisha (Vig.) reported in (2021) 84 Orissa Criminal Reports 561 and Sidhartha Kumar Nath -Vrs.- State of Orissa reported in (2017) 68 Orissa Criminal Reports 510**.

5. Mr. Sanjaya Kumar Das, learned Standing Counsel for the Vigilance Department appearing for the opposite party vehemently opposed the prayer for stay of conviction and also filed his objection to such petition. It is contended that the learned trial Court after going though the evidence on record has rightly found the petitioner guilty and since stay of conviction should be exercised only in exceptional circumstances and in rare cases where failure to stay conviction would lead to injustice and irreversible consequences, nothing having been pointed out by the learned counsel for the petitioner in that respect, no favourable order should be passed in his favour.

It is further contended that besides getting legal remuneration, demanding and accepting bribe has come a 'MANTRA' in the public institutions by the public servants. It has become a contagious disease in the society, which needs social reforms and judicial inference to get rid of the same. He further submitted that so far as the contentions of suspension/stay of conviction and sentence of the petitioner is concerned, the interim application is liable to be dismissed because of his conviction and sentence for committing the offence under the Prevention of Corruption Act and being held to be a corrupt public servant by accepting illegal gratification as a 'motive'. He further submitted that as the law is equal to all and to be judged impartially, the petitioner does not stand in a different footing to be considered in any special circumstances, when he has been found guilty for adopting corruption by thinking it to be his official act. He further contended that the petitioner ought to have thought of the consequences regarding demand and acceptance of bribe money against discharging the official duties. He also contended that in the event, the petitioner succeeds in the criminal appeal preferred by him before this Court, he would be at liberty to claim all of his consequential benefits from the Government and in view of the above, the misc. Case should be dismissed. He placed reliance in the cases of **Rama Narang -Vrs.- Ramesh Narang and others reported in (1995) 2 Supreme Court Cases 513, K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in A.I.R. 2001 Supreme Court 3320, State of Maharastra through C.B.I. -Vrs.- Balakrishna Dattatrya Kumbhar reported in 2012 (10) SCALE 265, Pruthwiraj Lenka -Vrs.- State of Odisha (Vig.) reported in (2022) 85 Orissa Criminal Reports 667**.

6. First, let me deal with the ratio laid down in the cases which were placed by the learned counsel for the respective parties on the ambit and scope of section 389(1) of Cr.P.C. relating to stay of order of conviction by the appellate Court.

In the case of **Rama Narang** (supra), it is held as follows:-

> "15. Under the provisions of the Code to which we have already referred, there are two stages in a criminal trial before a Sessions Court, the stage upto the recording of a conviction and the stage post-conviction upto the imposition of sentence. A judgment becomes complete after both these stages are covered. Under Section 374(2) of the Code, any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court. Section 384 provides for summary dismissal of appeal if the Appellate Court does not find sufficient ground

> to entertain the appeal. If, however, the appeal is not summarily dismissed, the Court must cause notice to issue as to the time and place at which such appeal will be heard. Section 389(1) empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'Order' in Section 389(1) mean order of conviction or an order similar to the one under Sections 357 or 360 of the Code? Obviously the order referred to in Section 389(1) must be an order capable of execution. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities.....
>
> 16. In certain situations, the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case, the power under Section 389(1) of the Code could be invoked. In such situations, the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order 'for reasons to be recorded by it in writing'. If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction, how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification ceased to operate."

In the case of **K.C. Sareen** (supra), it is held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It was further held that corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises, the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic policy. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt

until he is exonerated by a superior Court. The mere fact that an appellate Court or revisional forum has decided to entertain his challenge and to go into the issues and findings made against, such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fall out would be one of shaking the system itself. Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction. The above policy can be acknowledged as necessary for the efficacy and proper functioning of public offices. If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant, the appellate Court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment of suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision.

In the case of **Balakrishna Dattatrya Kumbhar** (supra), it is held as follows:-

> "15. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in

> the case are such, that they warrant such a course of action by it. The Court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

In the case of **Pruthwiraj Lenka** (supra), it is held that law is well settled that possible delay in disposal of the appeal and/or presence of arguable points in the appeal by itself may not be sufficient in staying the order of conviction of the trial Court without assigning any special reasons. An order granting stay of conviction is not the Rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative.

The decisions relied upon by the learned counsel for the petitioner in the cases of **Sanatan Dash** (supra) and **Sidhartha Kumar Nath** (supra) are rendered while adjudicating the criminal appeals of the respective appellant at the final stage of hearing on merit and those are not while dealing with applications under section 389 of Cr.P.C. for stay of order of conviction. The appreciation of evidence in detail at such final stage of hearing of criminal appeal is not to be adopted at the stage of dealing with interim application for stay of conviction.

Thus, an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate, but where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. The appellant has to make out a rare and exceptional case for the grant of stay against conviction under section 389 of Cr.P.C. There must be special and compelling circumstances in justification for the grant of such stay against conviction. There should be irreversible consequences leading to injustice and irretrievable damages in the event of non-grant of stay against conviction. The impugned judgment of conviction should be based on no evidence or against the weight of evidence, which must prima facie appear on the face of it without conducting a detailed analysis into the merit of the case. Possible delay in disposal of the appeal and that there are arguable points by itself may not be sufficient to grant stay of conviction.

7. In view of the ratio laid down in the aforesaid decisions and keeping in view the submissions raised by the learned counsel for the respective parties, it is to be seen whether the petitioner has made out a very exceptional case for grant of stay of order of conviction? What the evil that is likely to befall on the petitioner, if the order of conviction is not stayed? Whether failure to stay the order of conviction would lead to injustice and irreversible consequences?

The contentions raised by the learned counsel for the petitioner that the learned trial Court in the impugned judgment has picked and chosen only the portion of evidence of the prosecution to be utilized against the appellant and discarded the rest evidence in favour of the petitioner and that the deposition of the witnesses of the prosecution during the cross-examination was not taken into account, is not acceptable as the learned Court has analysed the evidence in detail in its 44 pages judgment and observed in discussing the evidence of the informant (P.W.5) that he has been strenuously cross-examined by the defence, but nothing fruitful could be elicited from his mouth to discard his evidence. It is further observed that except some bald suggestions, nothing substantial is available on record that P.W.5 had any prior animosity with the petitioner and why he would depose falsehood in such a manner implicating the petitioner. The learned Court below has also came to the conclusion that there is nothing available on record to suggest in any manner that any of the public servants like P.Ws.3, 4 and 9 has any prior enmity with the petitioner and therefore, the no genuine or reasonable ground was found to approach the evidence of these public servants with suspicion. The effect of non-production of tainted money during trial by the prosecution was also discussed in paragraph 17 of the impugned judgment and it was held that non-production of some documents seized after the trap would not vitiate the claim of prosecution especially due to presence of overwhelming evidence from the evidence of P.W.3 and P.W.4, the independent witnesses and P.W.5. The learned trial Court discussing the evidence on record held that the cumulative effect of evidence of P.Ws. 3, 4, 5, 9 and 10 and in particular the recovery and seizure of tainted money from the petitioner and seizure of such other articles at the spot unerringly suggested the demand by the petitioner. Considering the challenge made by the defence to the sanction order (Ext.21) issued by the Managing Director, NESCO, Balasore, the learned trial Court discussed the law as well as evidence in paragraph 20 of the impugned judgment and held that there was due application of mind by the sanctioning authority.

After carefully analyzing the finding of the learned trial Court, the submission made by the learned counsel for the respective parties and the evidence on record, at this stage, it cannot be said that it is a case of no evidence against the petitioner. Whether the evidence available on record would be sufficient to uphold the impugned judgment and order of conviction of the petitioner or on the basis of points raised by the learned counsel for the petitioner, benefit of doubt is to be extended to the petitioner is to be adjudicated at the final stage when the appeal would be heard on merit. Giving any finding on the merits of the case is likely to cause prejudice to either of the parties. This Court will certainly have a duty to make deeper scrutiny of the evidence and decide the acceptability or creditworthiness of the evidence of witnesses at the final stage of hearing of the appeal on merit.

The contentions raised by the learned counsel for the petitioner that petitioner is the only breadwinner in the family and the entire family of the petitioner depend upon the emoluments received by the petitioner from his service and that the family of the petitioner would face financial hardship as there is possibility of losing the job if the order of conviction is not stayed, in my humble view does not bring it within rare and exceptional case or special and compelling circumstances for the grant of stay against conviction. Those are normal circumstances which will appear in almost every case where the public servant is convicted in corruption charges. Merely because a public servant is a 'family man', a married person having children are not the criteria for adopting a sympathetical attitude for grant of stay of order of conviction. Whether the authority would dismiss the petitioner from his job on account of his conviction or how the petitioner or his family would survive and maintain themselves in case the petitioner loses his job are not criteria to grant such interim relief.

Therefore, I am of the humble view that for the limited purpose of ascertaining whether stay of order of conviction be granted or not, I find that the appellant has failed to make out a very exceptional case or special reasons for keeping the conviction in abeyance and as such, in the facts and circumstances of the case, the relief sought for by the petitioner for staying the order of conviction cannot be granted.

8. Accordingly, the interim application being devoid of merits, stands dismissed.

By way of abundant caution, I would like to place it on record that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for staying the order of conviction of the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done at the final stage of the hearing of the criminal appeal on merit.

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2022 (I) ILR - CUT- 843

K.R. MOHAPATRA, J.

W.P.(C) NO. 8385 OF 2022

SANTILATA BEHURIA .....Petitioner

.V.

BASANTA KUMAR BEHURIA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 340 r/w section 195 (1)(b)(I) – Scope of – Held, before taking action under clauses (a) to (e) of subsection (1) of section 340 Cr.P.C, the Court must be prima facie satisfied that an offence enumerated under section 195 Cr.P.C. has been committed – If the Court proceeds to make an inquiry into the veracity of the statement made in the 'affidavit of disclosure' at any stage before dealing with such affidavits along with other materials available in the case, then it will certainly prejudice the case of either of the parties in the proceeding itself – Thus, such an application, if filed, can only be considered at the time of final hearing of the case – In other words, it can only be considered at the time of final adjudication of the proceeding. (Para-6)

Case Laws Relied on and Referred to :-

1. (2021) 2 SCC 324 : Rajnesh Vs.Neha & Another.
2. (2005) 4 SCC 370 : Iqbal Singh Marwah and another Vs. Minakshi Marwah.
3. 2019 SCC Online Bom 99 :Dr. Santosh Chandrasekhar Shetty Vs. Ameeta Santosh Shetty and Another

For Petitioner : Mr. Amit Prasad Bose.
For Opp. Party : None

ORDER Date of Order: 08.04.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. This writ petition has been filed assailing the order dated 28th March, 2022 (Annexure-1) passed by learned Judge, Family Court, Jajpur in C.P. No.152 of 2020, whereby he rejected an application filed by the Petitioner under Section 340 read with Section 195 (1)(b)(i) Cr.P.C. praying inter alia to file a complaint against the Opposite Party alleging commission of offence under Section 199 read with Sections 193 and 209 I.P.C by filing false affidavit in terms of the guidelines in the case of ***Rajnesh -vrs.- Neha & Another, reported in (2021) 2 SCC 324.*** Initially the Petitioner moved the petition before recording of the evidence, which was disposed of by the Family Court vide order dated 13th July, 2021, holding as under:

> "So, the materials on record, coupled with surrounding circumstances and the stage of the case, in my considered view are not sufficient to prima facie hold that the respondent has given any false affidavit knowingly or believing to be false. However, if in course of trial/conclusion of trial, it comes to light that such a mischief has been committed by the respondent the Petitioner is at liberty to take steps. Accordingly, the petition is disposed of. Put up on 23.07.2021 for hearing of this case."

Assailing the same, the Petitioner filed W.P.(C) No.24580 of 2021 and this Court disposed of the writ petition vide order dated 30th November, 2021 holding as under;

> "Court does not find that the Family Court acted with material irregularity or illegality in making impugned order since at the stage of complaint made by Petitioner, she cannot presume that the affidavit, allegedly wherein false evidence is given, will be relied upon for what it says. The adjudication process for determination of maintenance to be paid to her will cause the affidavit to be analyzed for its evidentiary value. It is only on the finding in the maintenance case that it can be said by Court on a complaint to be thereafter made that it is a fit case for Petitioner to be prosecuted."

3. Relying upon the observations made by this court (supra) and the observation made by Hon'ble Supreme Court at paragraph-72.8 (h) in the case of Rajnesh (supra), the Petitioner, by filing a petition (Annexure-11), again moved learned Judge, Family Court, Jajpur to file complaint against the

Opposite Party before the Magistrate having jurisdiction for alleged commission of offence under Section 199 read with Sections 191 and 193 IPC. For the purpose of our discussion Paragraph-72.8(h) of **Rajnesh** (supra) is reproduced hereunder;

> "72.8(h) The pleadings made in the applications for maintenance and replies filed should be responsible pleadings; if false statements and misrepresentations are made, the Court may consider initiation of proceeding under Section 340 Cr.P.C. and for contempt of Court."

Said petition was rejected vide order dated 28th March, 2022 under Annexure-1. Hence, this writ petition has been filed assailing the order under Annexure-1.

4. Mr. Bose, learned counsel for the Petitioner submits that on earlier occasion, learned Judge, Family Court, Jajpur refused to entertain the application on the ground that the parties had not submitted their evidence in affidavit and hearing of the civil proceeding had not begun. Presently, the evidence of the parties has been closed and the matter is at the stage of argument. Thus, learned Judge, Family Court, Jajpur could have appreciated the evidence on record and sent the complaint to the magistrate having jurisdiction to take cognizance of the offence complained of. But, learned Judge, Family Court most illegally and erroneously interpreting the observations made by this Court while disposing of W.P.(C) No.24580 of 2021, rejected the petition under Annexure-1.

4.1. It is his submission that when the evidence of the parties in the civil proceeding has already been closed and the matter is at the stage of argument, learned Judge, Family Court, Jajpur was free to scrutinize and appreciate the evidence on record for consideration of the petition under Annexure-1. As such, learned Judge, Family Court failed to exercise the jurisdiction vested under law, which has resulted in flagrant miscarriage of justice. Hence, he prays for setting aside the impugned order under Annexure-1 and to direct learned Judge, Family Court, Jajpur to entertain the petition filed under Section 340 of Cr.P.C. read with Section 195 (1)(b)(i) of the Cr.P.C. on merit and proceed with the matter accordingly.

5. Section 340 Cr.P.C. reads as follows;

> **"340. Procedure in cases mentioned in section 195.—**
> (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be

made into any offence referred to in clause (b) of subsection (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and (e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by subsection (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed,—

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.

(4) In this section, "Court" has the same meaning as in Section 195."

Chapter XXVI of Cr.P.C. deals with provisions as to offences affecting administration of justice. Section 340 Cr.P.C. deals with the procedure in cases mentioned in Section 195 Cr.P.C., which deals with procedure for prosecution for contempt of lawful authority or public servants, for offences against public justice and for offences relating to documents in evidence. Further, direction at Paragraphs-72.2 (b) and 72.3 (c) of **Rajnesh** (supra) requires an applicant while making claim for maintenance or the respondent thereto while submitting reply, to submit 'Affidavit of Disclosure' of Assets and Liabilities, as the case may be, along with their respective pleadings. Thus, 'Affidavit of Disclosure' being an integral part of the pleadings, is squarely covered under the rigors of Paragraph-72.8 of **Rajnesh** (supra). On perusal of the order passed in W.P.(C) No.24580 of 2021, it is crystal clear that this Court while disposing of the said writ petition has

categorically held that cognizance of the offence for filing false affidavit can only be taken after the finding is recorded in the maintenance case (C.P. No.152 of 2020), when the Court will be in a position to entertain such an application for initiating the proceeding against wrongdoer (Opposite Party).

6. Section 340 Cr.P.C. clearly stipulates that when on an application made to it under the provision, the Court is of the opinion that an inquiry should be made into any offence appears to have been committed in or in relation to a proceeding in that Court, or as the case may be,… etc. the Court, after such preliminary inquiry, may act in accordance to the procedure laid down in clauses (a) to (e) of sub-section (1) of Section 340 Cr.P.C.

Thus, before taking action under clauses (a) to (e), as referred to above, the Court must be prima facie satisfied that an offence enumerated under Section 195 Cr.P.C. has been committed. If the Court proceeds to make an inquiry into the veracity of the statement made in the 'Affidavit of Disclosure' at any stage before dealing with such affidavits along with other materials available in the case, then it will certainly prejudice the case of either of the parties in the proceeding itself. Thus, such an application, if filed, can only be considered at the time of final hearing of the case. In other words, it can only be considered at the time of final adjudication of the proceeding. In the case of ***Iqbal Singh Marwah and another – vrs -Minakshi Marwah and another reported in (2005) 4 SCC 370*** it is held that 'Sub-section (1) of Section 340 Cr.P.C. contemplates holding of a preliminary enquiry. Normally, a direction for filing of a complaint is not made during pendency of the proceeding efore the court and this is done at the stage when the proceeding is concluded and the final judgment is rendered.' (see paragraph-24).

Further, High Court of Bombay in the case of ***Dr. Santosh Chandrasekhar Shetty –vrs- Ameeta Santosh Shetty*** and Another reported in 2019 SCC Online Bom 99, relying upon the ratio in ***Iqbal Singh Marwah*** (supra) and several other case laws summarised the scope of Section 340 Cr.P.C. as follows;

> *"27. The law laid down by the Apex Court on section 340 of Criminal Procedure Code in the aforesaid decisions can be summarised as under:—*
>
> *A) The Court is not bound to make a complaint regarding commission of offence and the said course will be adopted only if the Court is of the opinion that it is expedient in the interests of justice to do so and not in every case;*

B) Before ordering filing of complaint, the Court may hold a preliminary enquiry. But it is not necessary to hold preliminary enquiry in every case and when the Court is otherwise in a position to form an opinion which is a condition precedent for initiating action under section 340, the Court may dispense with the enquiry;

C) Even if the Court comes to the conclusion that prima facie, a case of commission of offence is made out, it is not necessary in every case to direct filing of a complaint. The Court cannot direct filing of a complaint unless on the basis of material on record it is of the opinion that it is expedient in the interests of justice to direct filing of a complaint. As held by the Constitution Bench of the Apex Court in the case of Iqbal

Singh (supra), expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by the alleged offence but having regard to the effect or impact of such commission of offence has upon the administration of justice.

D) As observed in paragraph 24 of the decision of the Constitution Bench in the case of Iqbal Singh, normally a direction for filing of a complaint is not made during the pendency of proceedings and that is done at the stage when proceeding is concluded and final judgment is rendered."

7. In view of the above, no further discussion is required to consider the scope of entertaining a petition under Section 340 Cr.P.C., which can only be entertained after the final order is passed in the Proceeding, i.e., C.P. No. 152 of 2020.

8. Thus, learned Judge, Family Court, Jajpur has committed no error in not entertaining such an application at the stage of argument in the roceeding. However, the Petitioner, if so advised, may file a fresh application under Section 340 Cr.P.C. with a prayer to learned Judge, Family Court, Jajpur to consider the same after final disposal of C.P. No. 152 of 2020.

9. With the aforesaid observation, this writ petition is disposed of without interfering with the impugned order.

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2022 (I) ILR - CUT- 849

B.P. ROUTRAY, J.

MACA NO. 617 OF 2012

SURYAMANI JENA AND ORS. ……..Appellants

.V.

SECRETARY, HOME DEPARTMENT, GOVERNMENT OF ODISHA. ……Respondent

MOTOR ACCIDENT CLAIM – Whether the tribunal is justified by counting the age of parents instead of deceased for the purpose of multiplier of compensation? – Held, No. – In view of the authoritative pronouncements of Hon'ble Apex Court, the logic of counting age of the parents for the purpose of multiplier as the dependents do not held good and the Tribunal has failed on his approach in counting the age of parents, instead the age of deceased. (Para-11)

Case Laws Relied on and Referred to :-

1. (2017) 16 SCC 680 : National Insurance Company Ltd. Vs.Pranay Sethi & Ors.
2. (2009) 6 SCC 121 : Sarla Verma Vs.DTC.
3. (2013) 9 SCC 65 : Reshma Kumari Vs.Madan Mohan.
4. (2013) 9 SCC 54 : Rajesh Vs.Rajbir Singh.
5. (2015) 6 SCC 347 : Munna Lal Jain Vs.Vipin Kumar Sharma.
6. (1996) 4 SCC 362 : UP SRTC Vs.Trilok Chandra.
7. (2018) 3 SCC 18 : Sube Singh and Anr. Vs.Shyam Singh (dead) and Ors.
8. (2015) 2 SCC 180 : Ashvinbhai Jayantilal Modi Vs.Ramkaran Ramchandra Sharma.
9. (2012) 6 SCC 421: Santosh Devi Vs.National Insurance Co. Ltd.
10. (2020) 18 SCC 808 : Joginder Singh and Another Vs.ICICI Lombard General Insurance Company.
11. (2019) 5 SCC 554 : Royal Sundaram Alliance Insurance Co. Ltd. Vs.Mandala Yadagari Goud.
12. (2018)MACA Nos. 570 & 640 : Divisional Manager, Reliance General Insurance Co. Ltd. Vs.Manjushree Mohapatra and Anr.

For Appellants : Mr. K. C. Nayak.

For Respondent: Mr. Sarojananda Mishra, Addl. Gov. Adv.

JUDGMENT Date of Judgment: 04.05.2022

B.P. ROUTRAY, J.

1. Present appeal by the claimants is directed against the impugned judgment dated 23rd April, 2012 of learned 1st MACT, Cuttack passed in

MAC No.601 of 2009 wherein compensation to the tune of Rs.5,44,500/- along with interest @ 7.5% per annum from the date of filing of the claim application, i.e. 19th October, 2009 has been granted on account of death of the deceased in the motor vehicular accident dated 7th August, 2009.

2. The claimants who are present Appellants are the parents and sister of the deceased. The deceased was a bachelor. The case of the claimants is that on 7th August, 2009 when the deceased was going in his motor cycle, the police van bearing registration number OR 05 B 2622 (hereinafter referred as 'offending vehicle') dashed against it from the backside and ran over the deceased resulting his death.

3. The learned Tribunal while fixing negligence on the part of the driver of the offending vehicle directed for payment of compensation to the foresaid tune taking the monthly income of the deceased at Rs.4,500/- and applying multiplier '15'. While determining the multiplier the learned Tribunal counted the age of the parents of the deceased instead of the deceased.

4. The Appellants challenged the quantum of compensation mainly on the ground that the learned Tribunal has erred in law by counting the age of the parents for the purpose of multiplier. They further submitted that despite the salary certificate of the deceased filed on record, the learned Tribunal disbelieving the same had determined the monthly income taking him as a skilled labourer @ Rs.150/- per day.

5. First coming to examine the income of the deceased it reveals that the salary certificate under Ext.12 was produced from the side of the Claimants with the claim that he was serving as Branch Manager of a finance company at Bargarh, namely Ashmitha Micro Finance Ltd. And getting salary of Rs.14,734/- per month. The learned Tribunal disbelieved such claim of monthly income to the extent of Rs.14,734/- by discarding the salary certificate on the ground that the same has not been satisfactorily proved. It is true that P.W.3 examined on behalf of the Claimants was the Area manager of the aforesaid finance company who has stated about the occupation and working of the deceased in the company as such. The learned Tribunal without discussing the evidence of said P.W.3 discarded the claim of the Appellants with regard to his income and took him as a skilled labourer capable of earning Rs.150/- per day. No such rationality is seen behind such

approach of the Tribunal to discard the income of the deceased adduced through P.W.3. The position of P.W.3 as an Area Manager of the company and proving the salary certificate by coming to the witness box is not sufficiently rebutted in his cross-examination. Therefore, the approach of the Tribunal is not found reasonable to take the income of the deceased as a skilled labourer. As such, the income of the deceased is accepted at Rs.14,734/- and considering the statutory deductions there-from as per the prevalent tax rate for the financial year 2009-10, the income of the deceased can safely be assessed at Rs.14,000/- per month.

6. Admittedly the deceased was a bachelor aged about 25 years. No challenge is there to the said finding of the learned Tribunal. As per the principles decided in the case of ***National Insurance Company Ltd. v. Pranay Sethi and Others (2017) 16 SCC 680*** it has been held as follows:-

> "xxx xxxx xxxx
>
> 37. Before we proceed to analyse the principle for addition of future prospects, we think it seemly to clear the maze which is vividly reflectible from ***Sarla Verma v. DTC, reported in (2009) 6 SCC 121, Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65, Rajesh v. Rajbir Singh, (2013) 9 SCC 54 and Munna Lal Jain v. Vipin Kumar Sharma, (2015) 6 SCC 347.*** Three aspects need to be clarified. The first one pertains to deduction towards personal and living expenses. In paragraphs 30, 31 and 32, Sarla Verma (supra) lays down:-
>
> "30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in ***UP SRTC v. Trilok Chandra, (1996) 4 SCC 362***, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.
>
> 31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a

> dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.
>
> 32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and ependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non- earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

7. The Constitution Bench of the Hon'ble Supreme Court have further observed in ***Pranay Sethi*** case (supra) that for the purpose of multiplier the table placed in the case of ***Sarla Verma v. DTC, reported in (2009) 6 SCC 121*** has to be followed. No different approach was taken to count the age of the parents in case of a bachelor. The probable reason may be that, the parents are still alive and it would be inappropriate to consider the expected life duration of living persons. So the multiplier is decided in reference to the age of the deceased based on the normal expectancy of his life and not the expected life duration of his parents who are not dead.

8. In ***Sube Singh and Anr. v. Shyam Singh (dead) and Ors., (2018) 3 SCC 18***, the Hon'ble Supreme Court in answering the question regarding application of multiplier with reference to age of the parents of the deceased, have observed as follows:-

> "The sole question to be answered in this appeal is: whether the High court was right in applying multiplier 14 for determining compensation amount in a motor accident claim case in reference to the age of parents of the deceased whilst relying on the decision of this Court in ***Ashvinbhai Jayantilal Modi v. Ramkaran Ramchandra Sharma, (2015) 2 SCC 180***?
>
> xxxxxxx xxxxx xxxxx
>
> 4. On the basis of the finding recorded by the Tribunal and affirmed by the High Court, it is evident that the deceased was 23 years of age on the date of accident i.e. 22-9-2009. He was unmarried and his parents who filed the petition for compensation were in the age group of 40 to 45 years. The High Court, relying on the decision in ***Ashvinbhai Jayantilal Modi*** case (supra) held that multiplier 14 will be applicable in the present case, keeping in mind the age of the parents of the deceased. The legal position, however, is no more res integra. In ***Munna Lal Jain v. Vipin Kumar Sharma, (2015) 6 SCC 347*** decided by a three-Judge Bench of this

Court, it is held that multiplier should depend on the age of the deceased and not on the age of the dependents. We may usefully refer to the exposition in paras 11 and 12 of the reported decision, which read thus:

"11. The remaining question is only on multiplier. The High Court following ***Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421*** has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for some time; but that has been given a quietus by another three-Judge Bench decision in ***Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65***. It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:

'36. In ***Sarla Verma v. DTC, (2009) 6 SCC 121***, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in ***Sarla Verma*** case (supra) that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us torevisit the law on the point as we are in full agreement with the view in Sarla Verma case (supra).'

12. In ***Sarla Verma*** case (supra) at para 19 a two-Judge Bench dealt with this aspect in Step 2. To quote:

'19….. Step 2 (Ascertaining the multiplier) Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the deceased.'"

5. Considering the aforementioned principle expounded in Sarla Verma case (supra), which has been affirmed by the Constitution Bench of this Court in ***National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680***, the appellants arejustified in insisting for applying multiplier 18."

9. In the case of ***Joginder Singh and Another v. ICICI Lombard General Insurance Company, (2020) 18 SCC 808***, Hon'ble Apex Court relying on the observations of Sube Singh case (supra) have held as follows:-

"xxxxxxxx xxxxxxxxxxx

6. We have perused the judgments of the courts below, and find that the wrong multiplier has been applied to the facts of the present case. The issue with respect to whether the multiplier to be applied in the case of a bachelor, should be computed on the basis of the age of the deceased, or the age of the parents, is no longer res integra. This issue has been recently settled by a three-Judge Bench of this Court in ***Royal Sundaram Alliance Insurance Co. Ltd. v. Mandala Yadagari Goud, (2019) 5 SCC 554***, wherein it has been held that the multiplier has to be applied on the basis on the age of the deceased. The Court held that:

'10. A reading of the judgment in Sube Singh case (supra) shows that where a three-Judge Bench has categorically taken the view that it is the age of the deceased and not the age of the parents that would be the factor of the purposes of taking the multiplier to be applied. This judgment undoubtedly relied upon ***Munna Lal Jain*** case (supra) which is also a three-Judge Bench judgment in this behalf. The relevant portion of the judgment has also been extracted. Once again the extracted portion in turn refers to the judgment of a three-Judge bench in ***Reshma Kumari*** case (supra). The relevant portion of Reshma Kumari case in turn has referred to ***Sarla Verma*** case and given its imprimatur to the same. The loss of dependency is thus stated to be based on : (i) additions / deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. It is the third aspect which is of significance and Reshma Kumari categorically states that it does not want to revisit the law settled in Sarla Verma casein this behalf.

11. Not only this, the subsequent judgment of the Constitution Bench in ***Pranay Sethi*** case (supra) has also been referred to in Sube Singh case for the purpose of calculation of the multiplier.

12. We are convinced that there is no need to once again take up this issue settled by the aforesaid judgments of three- Judge Bench and also relying upon the Constitution Bench that it is the age of the deceased which has to be taken into account and not the age of the dependents'

7. In the present case, since the deceased was 20 years old, a multiplier of '18' ought to have been applied as per the decision of this Court in ***Sarla Verma*** case."

10. Further this Court in the case of ***Divisional Manager, Reliance General Insurance Co. Ltd. v. Manjushree Mohapatra and Another***, (in MACA Nos.570 & 640 of 2018, decided on 6th December, 2019) have held that, when a bachelor dies, his age shall be taken into account while applying multiplier. However said decision of this court in Manjushree Mohapatra case (supra) has been stayed by the Hon'ble Supreme Court in SLP (Civil) Nos.11757-11758 of 2019.

11. In view of the authoritative pronouncements discussed above, the logic of counting age of the parents for the purpose of multiplier as the dependents does not hold good and the Tribunal has failed in his approach in counting the age of the parents, instead of the age of the deceased.

12. No challenge has been made from the side of the Respondent with regard to the dependency of the parents and unmarried sister of the deceased. Nothing has also been brought on record to discard the claim of dependency of the father and unmarried sister on the deceased. Therefore the finding of the learned Tribunal in favour of the claimants as dependents of the deceased is left undisturbed.

13. Applying the principles enumerated in ***Pranay Sethi*** case (supra) the compensation amount is modified as per the following table.

(i)	50% of annual income	Rs.7000/- X 12 = Rs.84,000/-
(ii)	Adding 40% towards future prospects	Rs.84,000 + Rs.33,600/- = Rs.1,17,600/-
(iii)	Applying multiplier '17'(in reference to the age of the deceased)	Rs.1,17,600 X 17 = Rs.19,99,200/-
(iv)	Adding Rs.70,000/- towards funeral expenses, loss of estate and loss of filial consortium for the mother, the total compensation comes to	Rs.19,99,200 + Rs.70,000/- = **Rs.20,69,200**

14. In the result the appeal is disposed of with a direction to the Respondent, i.e., State of Odisha to deposit the total compensation of Rs.20,69,200/- (twenty lakh sixty-nine thousand two hundred) along with interest @ 6% per annum from the date of filing of the claim application, i.e. 19th October, 2009 before the learned tribunal within a period of two months from today; where-after the same shall be disbursed in favour of the claimants on such terms and proportion to be decided by the learned Tribunal.

15. The appeal is disposed of.

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2022 (I) ILR - CUT- 856

S.K. PANIGRAHI, J.

CRLA NO. 568 OF 2020

JADA @ BASANTA MALIK .....Appellant

.V.

STATE OF ODISHA & ANR. .....Respondents

THE JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 – Section 12 – Power under – Offences under section 376AB of the Indian Penal Code, 1860 r/w section 6 of POCSO Act – The learned special judge has not taken into consideration the consequences of Psycho-Social counselling report – Effect of – Held, Not justified – Criminal Appeal allowed. (Para-9)

For Appellant : Mr. Partha Sarathi Nayak

For Respondents: Mr. Karunakar Gaya, ASC.

ORDER Date of Order: 30.03.2022

S.K. PANIGRAHI, J.

1. This matter is taken up through hybrid arrangement.

2. This criminal appeal has been filed by the appellant challenging the order dated 02.11.2020 passed by the learned Special Judge, Balasore in Special Case No.235 of 2020 arising out of Soro P.S. Case No.242 of 2020 registered under Section 376AB of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act" for brevity) rejecting the prayer of the appellant to release him on bail in exercise of power under Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act' for brevity).

3. The case of the prosecution is that on 06.08.2020 the complainant Janardan Jena of village Nandigan Samil Kanpur, in the district of Balasore reported before the Soro Police Station that on 05.08.2020 afternoon at 5.00 P.M. he along with his wife had been to cultivated land. When they returned, they found that in their absence, the appellant came to his house and committed penetrative sexual assault with his minor daughter without her

consent. Accordingly, Soro P.S. Case No.242 of 2020 was registered under Section 376AB of the I.P.C. read with Section 6 of the POCSO Act against the appellant.

4. As it appears from the materials available on record, the date of birth of the victim in this case is 18.04.2011. On 05.08.2020, in the absence of ictim's parents the appellant stated to have entered into the house of the ictim in the evening and committed penetrative sexual assault with the ictim. The appellant being the child in conflict with law (hereinafter referred to as "the CCL") was arrested on 10.08.2020 and he was produced before the learned Principal Magistrate, Juvenile Justice Board, Balasore in the foresaid case. Learned Principal Magistrate, Juvenile Justice Board, Balasore, after preliminary assessment under Section 15 of the Act, transferred the case to the Special Court, Balasore. The CCL approached for bail before the learned Special Judge, Balasore. Learned Special Judge, Balasore vide order dated 02.11.2020 rejected the application for bail of the CCL with the observations that if the CICL would be allowed to be released on bail, he might come in contact with anti-socials and the chances of his social reformation would be less.

5. Challenging the impugned order, learned counsel for the appellant submits that such observations of the court below are baseless and without materials on record. The CCL committed the alleged crime, though heinous one, but without understanding the consequence as revealed from the psychosocial counseling report and the circumstances as revealed from the psycho-social counseling report that due to some previous family dispute, the family of the victim has made false allegation against the CICL, the court below should not have refused the prayer of the CCL, simply observing that if the CICL would be allowed to be released on bail, he might come in contact with anti-socials and the chances of his social reformation would be bleak. In such circumstances, learned counsel for the appellant submits that the CCL deserves to be released on bail extending the benefit of Section 12 of the Act.

6. Learned counsel for the State, on the other hand, raises objection to such prayer advancing the submission that as in the order of the learned Special Judge, Balasore it was observed that if the CICL would be allowed to be released on bail, he might come in contact with anti-socials and the chances of his social reformation would be less, hence, the impugned order does not deserve to be interfered with.

7. Section 12 of the Act mandates that a CCL is required to be released on bail unless there are reasonable grounds for believing that his release would bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. Therefore, refusal of bail to a CCL can be made on the existence of circumstances detrimental to his/ her interest or if the same shall defeat the ends of justice. Materials must be there in the record to substantiate the refusal on the aforesaid ground. The same can be visualized from Section 12 of the Act which reads as follows:

> *"**Bail to a person who is apparently a child alleged to be in conflict with law**.- (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person.*
>
> *Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision. (2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a board.*
>
> *(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.*
>
> *(4) When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."*

8. From the impugned order passed by the learned Special Judge, Balasore, it appears that while rejecting the prayer made by the appellant, he has not taken into consideration the consequence of the psycho-social counseling report. The said report also categorically reveals that due to the family dispute, the family of the victim has made false allegation against the CICL. Therefore, rejection of prayer for bail of the CCL by the learned Special Judge, Balasore with the observation that if the CICL would be

allowed to be released on bail, he might come in contact with anti-socials and the chances of his social reformation would be less, is without any justifiable material in this regard. The learned Special Judge, Balasore without appreciating the materials in its proper perspective including the psycho-social counseling report has refused for bail of the CCL.

9. From the aforesaid, it appears to this Court that the court below has exercised its jurisdiction vested on it with material irregularity, inasmuch as no justifiable material being there to refuse bail to the CCL, still the same was refused.

10. Therefore, this Court allows this CRLA and sets aside the impugned order passed by the court below. Consequently, the prayer made by the appellant is allowed. The court in seisin over the matter is directed to release the appellant on bail in the aforesaid case on such terms and conditions as he deems just and proper.

11. With the aforesaid order, this CRLA stands disposed of being allowed.

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2022 (I) ILR - CUT- 859

MISS. SAVITRI RATHO, J.

CRLMC NO. 2732 OF 2021

Sk. WASIM .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 457 – Release of vehicle – Offences under Prevention of Cruelty Animal Act, 1960 r/w Prevention of Cruelty to Animals (Care and Maintenance of case Property Animals) Rule, 2017 – Rule 5 – Execution of bond – Whether release of vehicle is a bar? – Held, No. – There is no bar for interim release of the vehicle involved in an offence under section PCA Act and no useful purpose will be served by allowing the vehicle to lie open & exposed to the Sun & rain. (Para-10)

Case Laws Relied on and Referred to :-

1. (2021)CRLMC No.199 : Jiba Bikash Parisad Vs. State of Odisha and another.
2. (2003) 24 OCR (SC) 444 : Sunderbha1 Ambalal Desai Vs. State of Gujarat.
3. (2022) 85 OCR 705 : Ashis Ranjan Mohanty Vs. State and Ors.
4. (1977) 4 SCC 358 : Basavva Kom Dyamangouda Patil Vs. State of Mysore.
5. (2002) 10 SCC 283: Sunderbhai Ambalal Desai Vs. State of Gujarat.
6. (2010) 6 SCC 768 : General Insurance Council Vs. State of A.P.
7. (2014) CRLMC No.4485 of 2013 : Delhi High Court in Manjit Singh Vs. State
8. 2021(I) OLR 1005 : Dasharath Sharma Vs. State of Odisha.

For Petitioner : Mr. Partha Sarathi Das.

For Opp. Party : Mr. P.K. Mohanty, Addl. Standing Counsel.

ORDER Date of Order: 25.03.2022

MISS. SAVITRI RATHO, J.

1. I have heard Mr. Partha Sarathi Das, learned Senior Counsel for the petitioner and Mr. P.K. Mohanty, learned Addl. Standing Counsel through hybrid mode.

2. In this application under Section 482 Cr.P.C., the petitioner has challenged the order dated 06.12.2021 passed in Criminal Revision No.06 of 2021 by the learned Addl. Sessions Judge, Rairangpur (Annexure-4) confirming the order 22.11.2021 passed in C.M.C. No.103 of 2021 by the learned S.D.J.M., Rairangpur (Annexure-3) rejecting the application of the petitioner filed under Section 457 of Cr.P.C.

3. The case of the prosecution is that on 06.10.2021 one Sareiruddin purchased seven cattle from the nearest weekly market organized by Regulatory Marketing Committee, Rairangpur and the said cattle were being transported in the petitioner's vehicle bearing registration no.OD11A-1454 from Rairangpur to Bisoi. On the way at Badampahar, the police seized the vehicle alongwith the cattle as the driver of the vehicle could not produce any documents in support of such transportation. On the basis of written report, FIR was registered vide Padampahar P.S. Case No.121 of 2021 under Sections 279/379/411/34 of IPC read with Section 11 (d) (e) (f) of Prevention of Cruelty Animals Act, 1960 (in short "PCA Act").

4. Vide order dated 22.11.2021, the learned S.D.J.M., Rairangpur before going into the merits of the petition filed under Section 457 Cr.P.C., rejected

the same on the ground that the petitioner has not filed the original documents, viz., the original Smart Card, the original Registration Certificate, particulars of which is required to know the ownership of the seized vehicle. The learned SDJM should have granted opportunity to the petitioner to file such documents and thereafter proceeded to hear the case on merits but he rejected the application for which the petitioner challenged the order by filing a Criminal revision.

5. Before the revisional court, the petitioner produced the documents in support of ownership of the vehicle and learned Addl. Sessions Judge, Rairangpur rightly found fault with the learned SDJM for adopting a hypertechnical approach and not providing opportunity to produce documents in support of ownership of the vehicle . Thereafter the revsional court dealt with the matter on merits and after referring to the decision of this Court in the case of Jiba ***Bikash Parisad v. State of Odisha and another*** (CRLMC No.199 of 2021 and batch of cases) and other cases dismissed the Criminal Revision by order dated 21.10.2021 holding that the vehicle in question cannot be released in favour of the petitioner in his interim zima pending trial.

6. Mr. Partha Sarathi Das, learned counsel for the petitioner submits that there is no bar in the PCA Act for interim release of a vehicle and Rule-5 of Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017 (in short the "P.C.A. Rules) does not stand as a bar for interim release of the vehicle seized in connection with a case registered under the PCA Act and the vehicle can be released after imposing certain conditions. He further submits that in view of Rule 5 (4) and 5 (5) of the P.C.A. Rules, the vehicle in question can be released in favour of the owner once the cost of transport, treatment and care of animal is realized/paid. So, he prays that the matter may be remitted back to the learned S.D.J.M., Rairangpur to determine such cost and release the vehicle in favour of the petitioner. He further submits that the vehicle is lying in open sky being exposed to sun and rain since 10.10.2021 and as per the mandate of Hon'ble Supreme Court in the case of ***Sunderbha1 Ambalal Desai vs. State of Gujarat*** reported in (2003) 24 OCR (SC) 444, the vehicle should be released in favour of the petitioner during trial.

7. Mr. P.K.Mohanty, learned Addl. Standing Counsel vehemently opposes the said submission stating that in view of Rule 5 of P.C.A. Rules

and decision of this Court in ***Jiba Bikash Parisad*** (supra), the learned Revisional Court has rightly held that the vehicle in question cannot be released in favour of the petitioner in his interim zima pending trial. Therefore, he prays that this application under Section 482 Cr.P.C. being in the nature of a second revision, should be dismissed.

8. Rule 5 of the PCA Rules is extracted below :

> *"5. Execution of bond.—(1) The magistrate when handing over the custody of animal to an infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala shall determine an amount which is sufficient to cover all reasonable cost incurred and anticipated to be incurred for transport, maintenance and treatment of the animal based on the input provided by the jurisdictional veterinary officer and shall direct the accused and the owner to execute a bond of the determined value with sureties within three days and if the accused and owner do not execute the bond, the animal shall be forfeited to infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala.*
>
> *(2) The infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala having the custody of the animal may draw on from the bond on a fortnightly basis the actual reasonable cost incurred in caring for the animal from the date it received custody till the date of final disposal of the animal.*
>
> *(3) The magistrate shall call for the accused and the owner to execute additional bond with sureties once eighty per cent, of the initial bond amount has been exhausted as cost for caring for the animal.*
>
> *(4) Where a vehicle has been involved in an offence, the magistrate shall direct that the vehicle be held as a security.*
>
> *(5) In case of offence relating to transport of animals, the vehicle owner, consignor, consignee, transporter, agents and any other parties involved shall be jointly and severally liable for the cost of transport, treatment and care of animals.*
>
> *(6) In cases where a body corporate owns the animal, the Chief Executive Officer, President or highest-ranking employee of the body corporate, the body corporate and the accused shall be jointly and severally liable for the cost of transport, treatment and care of the animal.*
>
> *(7) In cases where the Government owns the animal, the Head of the Department and the accused shall be jointly and severally liable for the cost of transport, treatment and care of the animal.*
>
> *(8) If the owner and the accused do not have the means to furnish the bond, the magistrate shall direct the local authority to undertake the costs involved and recover the same as arrears of land revenue."*

A reading of the provisions reveals that there is no bar or prohibition for interim release of vehicles although there is a provision for holding such a vehicle as security.

9. The Supreme Court in **Sunderbhai Ambalal Desai** (supra) has laid down the parameters for considering an application for interim custody expeditiously so that the owner of the article would not suffer because of it lying unused or by its misappropriation and the court or the police would not be required to keep the vehicle in safe custody. It has observed as under:-

> *"7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-*
>
> *1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;*
>
> *2. Court or the police would not be required to keep the vehicle in safe custody;*
>
> *3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and*
>
> *4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles."*

In ***Jiba Bikash Parisad*** (supra) this Court has held that the provisions of the PCA Act and the PCA Rules have to be kept in mind while deciding an application for interim release and set aside the orders directing for release which had been passed without considering the relevant provisions. The relevant portions of the judgement are extracted below :

> *…"11. The Hon'ble Supreme Court of India in its order dated 7th May, 2014 passed in Civil Appeal No.5387 of 2014 have observed that,*
>
> *"PCA Act is a welfare legislation which has to be construed bearing in mind the purpose and object of the Act and the Directive Principles of State Policy. It is trite law that, in the matters of welfare legislation, the provisions of law should be liberally construed in favour of the weak and infirm. Courts also should be vigilant to see that benefits conferred by such remedial and welfare legislation are not defeated by subtle devices. Court has got the duty that, in every case, where ingenuity is expanded to avoid welfare legislations, to get behind the smoke-screen and discover the true state affairs. Court can go behind the form and see the substance of the devise for which it has to pierce the veil and examine whether the*

guideline or the regulations are framed so as to achieve some other purpose than the welfare of the animals. Regulations or guidelines, whether statutory or otherwise, if they purport to dilute or defeat the welfare legislation and the constitutional principles, Court should not hesitate to strike them down so as to achieve the ultimate object and purpose of the welfare legislation. Court has also a duty under the doctrine of parents patriae to take care of the rights of animals, since they are unable to take care of themselves as against human beings."

12. In another case, where one claimant, namely, Sayed Samim Quadari approached this Court in Criminal Revision No.333 of 2019 praying for interim release of the vehicle that was transporting the cattle illegally in a similar manner involving offences under the PCA Act, this Court by order dated 29th May, 2019 directed the learned S.D.J.M., Angul to consider the matter afresh for release of the vehicle. The same was challenged by the complainant before the Hon'ble Supreme Court of India. The Supreme Court in its order dated 5th July, 2019 passed in Special Leave Petition (Criminal) No.6472 of 2019 observed that,

".....xxxxx.....We have gone through the order passed by the High Court. The High Court remitted the matter to the Court below to consider application under Section 457 of the Cr.P.C. filed by the petitioners for release of truck afresh on its own merits. We have no doubt that while considering the application, the Magistrate shall also take into consideration the provisions of the Prevention of Cruelty to Animals (Case and Maintenance of Case Property Animals) Rules, 2017. We do not find it a fit case to entertain the special leave petition. Subject to the above observations, the special leave petition is disposed of."

13. In the instant case, the revisional courts while directing the interim release of the vehicles have not taken into consideration the provisions enshrined in the PCA Act and 2017 Rules. The revisional courts appear to be ignorant of the provisions in the Act and Rules. Such provisions enshrined under the PCA Act and Rules are mandatory to be considered, specifically Rule 5 of the 2017 Rules, before deciding the prayer for interim release of the vehicle involved in offences under the PCA Act. The revisional courts have neither considered those relevant provisions nor the cost incurred by the petitioner for maintenance and care of the rescued animals. The learned revisional courts have also not considered the report of the MVI in respect of the seized vehicle which reveals some discrepancy in the chassis number of the vehicle. The petitioner, who is a registered SPCA, has categorically submitted that he has incurred expenses while keeping those cattle for their maintenance and care as well as health examination. This has also not been considered by the revisional courts before directing for release of the vehicles"

Recently , in the case of ***Ashis Ranjan Mohanty vs State and others*** reported in (2022) 85 OCR 705 - a PIL filed by a practicing Advocate concerned about the ever-growing stock of seized vehicles and other properties in the various police stations in the State of Odisha a division bench of this Court, after referring to and discussing the decisions of the

Supreme Court in ***Basavva Kom Dyamangouda Patil v. State of Mysore: (1977) 4 SCC 358; Sunderbhai Ambalal Desai v. State of Gujarat : (2002) 10 SCC 283, and General Insurance Council v. State of A.P. : (2010) 6 SCC 768 and the Delhi High Court in Manji Singh v. State decided on 10th September 2014 in CRLMC No.4485 of 2013***), has held as follows :

> *"…13. It is clarified that hereafter as far as release of the vehicle is concerned, the directions issued in this order would prevail.*
>
> *14. In light of the decisions of the Supreme Court referred to hereinbefore, and the directions issued in Manjit Singh v. State (supra), the following specific directions are issued: Articles/properties in general*
>
> *15. (i) Within one week of their seizure, properties seized by the police during investigation or trial are to be produced before the Court concerned;*
>
> *(ii) the concerned Court shall expeditiously, and not later than two weeks thereafter, pass an order for its custody in terms of the directions of the Supreme Court in* ***Basavva Kom Dyamangouda Patil v. State of Mysore (1977) 4 SCC 358; Sunderbhai Ambalal Desai v. State of Gujarat (2002) 10 SCC 283, and General Insurance Council v. State of A.P. (2010) 6 SCC 768.***
>
> *(iii) In any event, no property will be retained in the malkhana of the Court or in the police station longer than a period absolutely necessary for the purposes of the case; if it has to be longer than three months, the Court concerned will record the reasons in an order but on no account will the period of retention exceed six months.*
>
> *(iv) In the event the property seized is perishable in nature, or subject to natural decay, or if cannot for any reason be retained, the Court concerned may, after recording such evidence as it thinks necessary, order the said property to be disposed of by way of sale, as the Court considers proper, and the proceeds thereof be kept in a separate account in a nationalized bank subject to orders of the concerned court.*

Vehicles

> *16. As regards the vehicles, the following directions are issued:*
>
> *(I) Vehicles involved in an offence may be released either to the rightful owner or any person authorised by the rightful owner after*
>
> *(a) preparing a detailed panchnama;*
>
> *(b) taking digital photographs and a video clip of not more than 1 minute duration of the vehicle from all angles;*

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

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

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

(f) obtaining a security bond.

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

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

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

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

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

General directions

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

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

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

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

(iv) Special features of the property in question could be noted in the Court's order itself in the presence of parties or their counsel. Besides, a mahazar clearly describing the features and dimensions of the movable properties which are the subject matter of trial could be drawn up.

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

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

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

10. In view of the aforesaid discussion and the directions contained in the decisions of the Apex Court and this Court referred to above, it is apparent that there is no bar for interim release of the vehicle involved in an offence under Section PCA Act and no useful purpose will be served by allowing the vehicle to lie in the open exposed to the elements. In fact an application under Section – 457 of the Crl.P.C for interim release of the vehicle should be considered as soon as possible, but keeping in mind the provisions of the PCA Act and Rule 5 of the PCA Rules as it has been seized in connection with a case where one of the offences is under the PCA Act. For proper adjudication of the application, the learned Magistrate should call for a report regarding the expenses incurred and to be incurred for looking after the cattle and after directing for payment of such expenses which have been incurred and will be necessary for their upkeep and other conditions direct for release of the vehicle in the custody of the registered owner. In case of failure of the registered owner or the insurer in coming forward to take custody of the vehicle, the vehicle should be put to auction and the proceeds kept in fixed deposit and made subject to decision in the trial.

Therefore, considering the submissions of the learned counsel for the respective parties and the fact that the vehicle is lying being exposed to sun and rain for which its value is going down everyday, I am inclined to set aside the order dated order dated 06.12.2021 passed in Criminal Revision No.06 of 2021 by the learned Addl. Sessions Judge, Rairangpur (Annexure-4) and the order 22.11.2021 passed in C.M.C. No.103 of 2021 by the learned S.D.J.M., Rairangpur (Annexure-3) and remand the matter to the learned SDJM with a direction to hear the application for interim release of the vehicle, i.e., Bolero Pick up bearing Registration No.OD-11A-1454, afresh keeping in view the discussion and decisions of the Supreme Court and this Court referred to above referred to above and the provisions of Rule-5 of the P.C.A. Rules and the PCA Act and affording a chance of hearing to the parties concerned. The petitioner should file the documents in support of ownership of the vehicle before learned SDJM. The learned Magistrate should endeavour to complete the entire exercise within a period of three weeks from receipt of a copy of this order or production of the certified copy of this order (whichever is earlier) after giving opportunity of hearing to the parties.

11. The CRLMC is accordingly disposed of.

12. Urgent certified copy of this order be granted as per rules. Copy of this order be sent to the learned SDJM Rairangpur for compliance .

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2022 (I) ILR - CUT- 868

R.K. PATTANAIK, J.

CRLMC NO. 2240 OF 2009

INDRAJIT SENGUPTA & ANR. .....Petitioners

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 20(2) – Principle of double jeopardy – Applicability – Discussed – Held, not applicable – In this case,the petitioners were convicted in 2 (c) (c) case for an offences under sections 3 and 14 of the child labour (Prohibition and Regulation) Act,1986 – A written report was lodged under section (s)

342 and 323 r/w 34 of IPC at Purighat police station and order of cognizance was also passed by the learned SDJM in G.R case arising out of P.S case – As the offences under the special Act, 1986 are quite different and distinct from the offences under section (s) 342 and 323 read with 34 of IPC – The principle of double jeopardy does not apply to the present case. (Para-10)

Case Laws Relied on and Referred to :-

1. AIR 1959 SC 375: Thomas Dana Vs. State of Punjab.
2. 2010 SLP Criminal Nos.3411-3412 of 2009 : Institute of Chartered Accountants Vs. Vimal Surana.
3. (2019)18 SCC 145: State of Maharashtra Vs. Sayyed Hassan Subhan.

For Petitioners : Mr. S. K. Dalai
For Opp. Parties: Mrs. S. Patnaik, AGA.

JUDGMENT Date of Judgment: 07.04.2022

R.K.PATTANAIK, J.

1. The petitioners have filed the instant application under Section 482 Cr.P.C. challenging the correctness of the impugned order of cognizance dated 25th April, 2008 passed in G.R. Case No.130 of 2007 arising out of Purighat P.S. Case No.21 of 2007 pending in the file of learned S.D.J.M.(Sadar), Cuttack on various grounds *inter alia* contending that such a prosecution is in violation of Article 20 of the Constitution of India, 1950 and also Section 300 Cr.P.C. as they could not have been prosecuted once again for the self-same incident which amounts to double jeopardy.

2. A prosecution was launched after a written report was lodged at Purighat P.S. registered under Section(s) 342 and 323 read with 34 I.P.C. with the allegation that OP No.2's son, namely, OP No.3, who was working in the house of the petitioners was illtreated and assaulted. For the alleged occurrence, as contended by the petitioners, the District Labour Officer (in short 'DLO') as well as IIC, Purighat P.S. took up the matter and in that respect, a complaint was filed by the DLO before the court below under Section 3 and 14 of the Child Labour (Prohibition and Regulation) Act, 1986 (in short 'the Act') and also a written report lodged by OP No.2 which ultimately led to the submission of chargesheet under Section(s) 342 and 323 read with 34 I.P.C. and thereafter, the cognizance was taken of said offences. It is pleaded that pursuant to the complaint filed by the DLO, order of cognizance for an offence under Section 14 of the Act, 1986 was passed and

the petitioners were put to trial and later on convicted and sentenced. As against the above facts, the petitioners further pleaded that once having been convicted for an offence under Section 14 of the Act, 1986, for the same incident and set of facts, another prosecution under Section(s) 342 and 323 read with 34 I.P.C. cannot be maintained.

3. Heard learned counsel for the petitioners and learned Additional Government Advocate for OP No.1.

4. As it appears from the record, the petitioners have been convicted in 2.C.C. No.84 of 2007 by a judgment dated 23rd May, 2009 of the learned S.D.J.M. (Sadar), Cuttack directing both of them to undergo S.I. for a period of six months with a fine of Rs.10,000/- each and in default to undergo S.I. for a period of one month and being aggrieved of the conviction, Criminal Appeal No.28 of 2009 was filed before the Sessions Court. It is further made to appear that the petitioners in CRLMC No.1827 of 2007 challenged the F.I.R. before this Court which was disposed of by an order 21st February, 2008 declining to interfere with the observation that the petitioners may not even be chargesheeted on completion of investigation. After submission of charge sheet and passing of the impugned order dated 25th April, 2008 under Annexure-5, the petitioners once again approached this Court in CRLMC No.1187 of 2008 which was, however, stated to have been withdrawn and disposed of on 7th July, 2009. The petitioners have questioned the legality of the impugned order i.e. Annexure-5 on the ground that the offences punishable under Section(s) 342 and 323 I.P.C. have not been made out while considering the F.I.R. and other materials including the charge sheet i.e. Annexure-4. It is also contended that when the petitioners have already been convicted by a judgment dated 23rd May, 2009 by the learned S.D.J.M.(Sadar), Cuttack in 2 C.C. No.84 of 2007 (Annexure-3), again they cannot be prosecuted which violates the law envisaged in Section 300 Cr.P.C.

5. In so far as the conviction of the petitioners is concerned, it is in respect of an offence punishable under Section 14 of the Act, 1986 and the issue was whether they employed OP No.3 in labour work in their house in contravention of the provisions of Section 3 thereof and in that respect, the learned S.D.J.M. (Sadar), Cuttack reached at a conclusion that the alleged offence was made out. In other words, the engagement of OP No.3 aged about 13 years as a caretaker in the house of the petitioners was established by considering the evidence produced before the court concerned.

6. Learned counsel for the petitioners contends that since Article 20 of the Constitution of India, 1950 envisages that no person shall be prosecuted and punished for the same offence more than once which is a constitutional right guaranteed with a protection against double jeopardy and in view of Section 300 Cr.P.C., a person once convicted or acquitted, not to be tried for the same offence, the learned court below after having failed to take ognizance of the above law, erred in passing the impugned order of cognizance dated 25th April, 2008.

7. In the instant case, there is no denial to the fact that the petitioners were proceeded in a complaint filed by the DLO before the court of learned S.D.J.M. (Sadar), Cuttack which finally ended in conviction in 2 CC No.84 of 2007 for an offence punishable under Section 14 of the Act, 1986. It is claimed that the prosecution under Sections 342 and 323 read with 34 IPC amounts to double jeopardy on the ground that for the same incident the petitioners have already been tried and convicted. The learned counsel for the petitioners referred to Section 300 Cr.P.C. and its essential ingredients besides placing reliance on Article 20(2) of the Constitution of India, 1950.

8. The rule of double jeopardy is based on the principle that once a person convicted or acquitted cannot be subjected to a criminal prosecution for the same offence. The terms **'autrefois acquit'** and **'autrefois convict'** mean previously acquitted and previously convicted respectively which have been accepted as doctrines that govern the field of criminal trials. In fact, Article 20 of the Constitution of India, 1950 protects in respect of conviction of offences. Article 20(2) contains the rule against double jeopardy which enumerates that no person shall be convicted for the same offence more than once which has in fact been borrowed from the 5th Amendment of the US Constitution. Likewise, the Cr.P.C. inculcates the principle of autrefois convict as well as autrefois acquit which has a wider reach under the criminal jurisprudence, whereas, Article 20 of the Constitution of India, 1950 outlines general rule against double jeopardy.

9. In **Thomas Dana Vrs. State of Punjab** reported in **AIR 1959 SC 375**, it has been held by the Supreme Court that to claim protection against double jeopardy as envisaged in Article 20(2) of the Constitution of India, 1950, it is necessary to show that there was a previous conviction and that the prosecution led to punishment and the accused is being punished for the same offence again. In the decision (supra), it was made clear that for the same

offence, person having been convicted cannot be prosecuted again for that offence which would amount to double jeopardy. In the case of Institute of Chartered Accountants Vrs. Vimal Surana reported decided in SLP Criminal Nos.3411-3412 of 2009 dated 1st December, 2010, the Supreme Court held that a person can be convicted for the same action under different Acts as apply to the offences wherein prosecution under Sections 419 and 420 IPC was challenged on the ground that the accused had also been subjected to criminal action under Sections 24 and 26 of the Chartered Accountants Act. Similarly, in another case of the Supreme Court in State of **Maharashtra Vrs. Sayyed Hassan Subhan** reported in (2019) 18 SCC 145, it was held and observed that complaints under the Foods Safety and Standards Act, 2006 and Sections 188 and 272 IPC to be maintainable so long as the ingredients of the offences stood satisfied.

10. The expression 'same offence' appearing in Section 300 Cr.P.C. read with Article 20(2) of the Constitution of India means that the offence for which the accused has been tried and the offence for which he is again being tried must be identical. The subsequent trial is bared only if the ingredients of the two offences are identical and not when they are different even though may have resulted from the commission or omission arising out of the same set of facts. In the instant case, the petitioners were subjected to criminal prosecution for an offence under Section 14 of the Act, 1986 and convicted thereunder for having engaged O.P.No.3 by then aged about 13 years in labour work and for having contravened Section 3 of the said Act for employing a child. The offence under the Act, 1986 is quite different and distinct from the IPC offences. It is not that the offences under the Special Act and IPC to be identical for which the petitioners can claim immunity against the criminal prosecution in G.R. Case No.130 of 2007. The issue which was before the court below in the other case for determination was whether the petitioners had employed O.P.No.3, a child below 14 years of age in their house as a domestic worker or servant in contravention of Section 3 of the Act, 1986 which is made punishable under Section 14 of the said Act and finally, convicted them for having violated the labour law. In so far the proceeding in G.R. Case No.130 of 2007 is concerned, it is altogether an independent action and for offences which are dissimilar to the offence under Act, 1986. In view of the aforesaid discussion and being conscious of the settled position of law, the Court is of the considered view that the principle of double jeopardy does not apply to the present case and therefore, the learned court below did not commit any wrong or legal error in taking

cognizance of the offences punishable under Sections 323 and 342 read with 34 IPC.

11. Accordingly, it is ordered.

12. In the result, application under Section 482 Cr.P.C. stands dismissed.

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2022 (I) ILR - CUT- 873

SASHIKANTA MISHRA, J.

WPC (OAC) NO. 2088 OF 2015

SAILENDU KUMAR PANDA ……..Petitioner

.V.

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

(A) ODISHA CIVIL SERVICE (Classification, Control and Appeal) RULES, 1962 – Rule 15(3) – Departmental proceeding – Non supply of relevant documents – Effect of – Held, – Non supply of required documents without assigning any reason is violation of the principle of natural justice. (Para-10)

(B) DISCIPLINARY PROCEEDING – Disciplinary authority disagred with the recommendation of enquiring officer – Reason for such disagreement not disclosed – Effect of – Held, amounts to violation of natural justice, the requirement to record reason can be regarded as one of the principle of natural justice – Impugned order quashed – Writ petition allowed. (Para-12)

Case Laws Relied on and Referred to :-

1. (2017) Supp.1 OLR-479 :Narottam Pati Vs North Eastern Supply Company.
2. AIR 1974 SC 862 : Travancore Rayons Ltd Vs. The Union of India.
3. (1990)4 SCC 549 : S.N. Mukherjee Vs. Union of India.

For Petitioner : Mr.B. Mohanty, B.S.Rayaguru S. Patnaik, A. Patnaik, S. Mohapatra.

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

JUDGMENT Date of Judgment: 15.03.2022

SASHIKANTA MISHRA, J.

The petitioner has filed the I.A. seeking the following relief:

> *"I) The order vide office Order No. 2F (Con)- 38/2010 5368/F & E dt.26.03.2015 passed by the Respondent No.1 under Annexure-12 shall be quashed.*
>
> *II) The action of the respondents shall be declared as illegal."*

2. The brief facts of the case are that the petitioner entered into service as Forest Ranger on 06.02.1986 in Karanjia Division. He was posted as Range Officer at Hadagarh Range of Keonjhar Wildlife Division w.e.f. 08.06.2005. While working as such, a departmental Proceeding was drawn against him by the office of the Principal, CCF Wildlife, Keonjhar on the allegation that he had given false deposition in C.S. No.16/2007 in the Court of Civil Judge (Junior Division), Anandpur. A Memorandum was issued on 13.01.2011 proposing to hold an enquiry against the petitioner under Rule 15 of OCS (CCA) Rules, 1962 containing the substance of imputation of misconduct and article of charges and he was asked to submit his written statement of defence within 30 days. The petitioner, vide letters dated 05.02.2011, 15.02.2011 and 01.03.2011, addressed to the opposite party no.1 and letters dated 04.03.2011, 18.04.2011 and 15.07.2011 addressed to opposite party no.3, requested for supply of documents. The petitioner also met the Additional Secretary to Government, Forest and Environment Department, Odisha Bhubaneswar in the Grievance Cell on 21.01.2012 objecting to holding of enquiry without supplying the relevant documents. However ignoring the objection of the petitioner, the Divisional Forest Officer, Cuttack Forest Division was appointed as Enquiring Officer, who submitted his enquiry report on 07.12.2013 holding the petitioner guilty of the charges and proposed the punishment of stoppage of two annual increments with cumulative effect and censure. It is stated that the petitioner had been submitting several representations to the Enquiring Officer for supply of documents and objected to recording of his statement from the very first date of the enquiry. The Enquiring Officer, vide letter dated 21.02.2012 also asked the Marshalling Officer to supply the documents. On 01.02.2013, the DFO, Anandapur intimated the Enquiring Officer that the available information had already been supplied to the applicant, but the same according to the petitioner was not correct, as informed by him to the Enquiring Officer on 06.02.2013. The petitioner subsequently submitted that in the absence of the relevant documents he was unable to submit his written

statement of defence but ignoring such request the Enquiring Officer proceeded with the enquiry and concluded it. On 30.07.2014, the opposite party no.1 issued a second show cause notice to the petitioner directing him to submit his representation on the penalty proposed by the disciplinary authority. The disciplinary authority having disagreed with the punishment proposed by the Enquiring Officer proposed to inflict major punishment of withholding of three increments with cumulative effect and withholding promotion for next three years.

It is further stated by the petitioner that the relevant documents include the correct and not final digitized map prepared by Geo Infotech, Bhubaneswar but the same was not supplied to the petitioner, for which he was unable to submit his written statement of defence, which is serious violation of the principles of natural justice. It is also stated that the disciplinary authority, though disagreed with the punishment proposed to be inflicted by the Enquiring Officer, has not cited reasons for the same as required by law. On such facts, the petitioner has prayed for quashing of the order dated 26.03.2015 imposing the penalty on him.

3. A counter has been filed by the opposite party no.1 admitting the matters of record but disputing the averments relating to non-supply of documents to the petitioner. It is stated that all the documents have been supplied to the petitioner but he did not submit his written statement. The imposition of major punishment is sought to be justified on the ground that mistakes committed by the petitioner are grievous in nature and due to his fallible misconduct and as the punishment proposed to be inflicted by the Enquiring Officer was too lenient. It is stated that the petitioner gave a different statement than the written statement filed in the Civil Suit, for which the judgment in the case was passed against the Government by holding that mining operation is not within the area of Hadagarh Sanctuary. Further, petitioner submitted some maps prepared by him, which are not approved maps, nor obtained prior permission of the authority before submitting the same in the CivilCourt.

4. The petitioner has filed a rejoinder to the counter mainly stating that though certain documents had been supplied to him, yet the same were not complete and particularly, the digitized map of Hadagarh Sanctuary prepared by Geo Infotech, Bhubaneswar conforming to the notification of the sanctuary, which was the subject matter of the civil suit, was not supplied

and instead a copy of the Sanctuary Outline Map on Topo sheet showing the same boundary of sanctuary as per proclamation made by DFO was supplied, wherein the de-reservation of forest area was not depicted. It is further stated that the information upon which the article of charges is proved, are not grave but the petitioner has been slapped with a major penalty. It is finally submitted that neither the Enquiring Officer nor the disciplinary authority have taken into consideration the fact that the petitioner was unable to defend himself properly in the enquiry for want of relevant documents.

5. Heard Mr. T.K. Patnaik, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel.

6. It is forcefully argued by Mr. Patnaik that the enquiry in question was held is complete violation of the principles of natural justice as the relevant documents, basing on which the charges were framed, were never supplied to the petitioner. Since the crux of the dispute relates to alleged giving of false deposition by the petitioner before the Civil Court as also submission of the wrong map of the Hadagarh sanctuary it was incumbent upon the Enquiring Officer to ensure that the concerned maps and other documents defining the area of the sanctuary ought to have been supplied to the petitioner. In the absence of such documents, the petitioner was not able to defend himself. It is contended by Mr. Patnaik that even the Enquiring Officer himself wrote to the Marshaling Officer to submit the documents, but even though the documents specifically sought for by the petitioner were not supplied to him, the enquiry was held and the petitioner was found guilty. Since the principles of natural justice as enshrined under Rule-15 of the OCS (CCA) Rules, 1962 have been given a complete go bye, the entire proceeding, according to Mr. Patnaik, is rendered a nullity in the eye of law. In this context, Mr. Patnaik has relied upon a decision of this Court in the case of **Narottam Pati vs. North Eastern Supply Company**, reported in 2017 (Supp.I) OLR-479. Mr. Patnaik also argued that even otherwise the impugned order inflicting major penalty on the petitioner is bad in law as no reason has been ascribed by the disciplinary authority despite disagreeing with the punishment proposed by the Enquiring Officer.

7. Per contra, Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State has contended that all the relevant documents have been supplied to the petitioner, which would be evident from a bare reading of the enquiry report itself. The petitioner, according to Mr. Panigrahi, could have

submitted his written statement on the basis of the documents so supplied, but instead of doing so, he chose to submit repeated representations, evidently to scuttle the enquiry proceeding. Mr. Panigrahi further argues that the enquiry was held with due deference to the principles of natural justice giving full opportunity to the petitioner to defend himself. As regards the impugned order, it is submitted by Mr. Panigrahi that the disciplinary authority has clearly mentioned in the impugned order the reasons why he chose to differ from the penalty proposed by the Enquiring Officer and therefore, the ground raised by the petitioner is not tenable.

8. Before delving into the merits of the rival contentions as noted above, it would be relevant to refer to Rule-15 of the OCS(CCA) Rules, sub-Rule(3) of which reads as under:

> *"15.* ***Procedure for imposing penalties*** *– xx xx xx*
>
> *(3) The Government servant shall for the purpose of preparing his defence, be supplied with all the records on which the allegations are based. He shall also be permitted to inspect and take extracts from such other official records as he may specify, provided that such permission may be refused if, for reasons to be recorded in writing in the opinion of the disciplinary authority such records are not relevant for the purpose or it is against interest of the public to allow him access thereto."*

From a bare reading of the above provision, it is clear that all records on which the allegations are based, which are required by the Government servant for the purpose of preparing his defence shall be supplied to him. Further, if the records sought for are considered not relevant for the purpose or it is against interest of the public to allow him to access thereto, permission may be refused for reasons to be recorded in writing.

9. Coming to the facts of the case, it is seen that the petitioner, after issuance of the memorandum containing the imputation of misconduct and article of charges, repeatedly requested the concerned authorities to submit the relevant documents, the list of which has been enclosed to one of his representations dated 05.02.2011 (Annexure-2). It further transpires that some documents as listed in his representation were supplied to the petitioner but vide letter dated 21.01.2012 enclosed as Annexure-3, the petitioner stated that certain wrong documents had been sent, which he returned with request to supply him the correct documents as per serial nos.6, 33, 41, 43 and 45 of his representation dated 05.02.2011. The petitioner further claims that the

map vide serial no. 33 of the said representation was not given but was clubbed with serial no. 41. In so far as the map is concerned, which appears to be vital to the case of the petitioner, is a not final map said to have been prepared by M/s. Geo Infotech, Bhubaneswar apparently at the instance of the Government, but the same was not supplied. The Enquiring Officer vide letter under Annexure-8 also requested the D.F.O., Keonjhar (Wild Life) Division to supply the required documents to the petitioner to enable him to submit the written statement.

10. From the above narration it appears that the petitioner wanted several documents for preparation of his written statement, out of which some were supplied leaving out the rest. Such contention of the petitioner has not been controverted in any manner by the opposite parties. If according to the concerned authorities, the documents sought for by the petitioner were not relevant or against interest of the public to allow him access thereto, such fact ought to have been duly communicated to him and even stated so in the counter affidavit filed by the opposite party no.1. The assertions made in the writ petition relating to non-supply of documents have simply been denied and even the letter written by the Enquiring Officer to the Marshalling Officer has been denied in a manner to suggest that no such letter was ever written. That apart, it is simply stated that all the documents were supplied even though the petitioner had specifically listed as many as 56 documents in his representation enclosed as Annexure-2 to the writ petition. The counter affidavit does not contain any positive assertion that all the 56 documents had been supplied to the petitioner. It is stated at the cost of repetition that if some out of the 56 documents were supplied and others were not, then the reasons for non-supply of the same has also not been stated. As regards the map at serial no. 33, nothing is forthcoming from the side of the opposite parties as to if the same was supplied or if not, the reason for its nonsupply. This Court therefore, finds that the petitioner, being deprived of the relevant documents was unable to submit his written statement of defence, which is a violation of the principle of natural justice underlying the specific provision under sub-rule(3) of Rule-15 of the OCS (CCA) Rules for which the enquiry proceeding is liable to be held as vitiated.

11. As has already been discussed hereinbefore, the Enquiring Officer, after rendering a finding of guilt against the petitioner proposed imposition of the punishment of stoppage of two annual increments with cumulative effect and censure. The disciplinary authority however, did not accept the

recommendation of the Enquiring Officer and imposed higher penalties, namely withholding of three increments with cumulative effect and withholding promotion for next three years. In this context, Rule-15(10)(i)(b) are relevant and is quoted hereinbelow.

> *"(b) On receipt of the representation referred to in Sub-clause (a) the disciplinary authority having regard to the findings on the charges, is of the opinion that any of the penalties specified in Clauses (vi) to (ix) of Rule 13 should be imposed, he shall furnish to the delinquent Government servant a statement of its findings along with brief reasons for disagreement, if any, with the findings of the Enquiring officer and give him a notice by Registered post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty :*
>
> *Provided that in every case in which it is necessary to consult the Commission under the provision of the Constitution of India and the Odisha Public Service Commission (Limitation of Functions) Regulation, 1989 the record of Inquiry together with a copy of the notice given under Sub-clause (a) and the representation if any, received within the specified time in response to such notice shall be forwarded by the disciplinary authority to the Commission for its advice."*
>
> *(Emphasis supplied)*

Admittedly, the penalty of withholding of three increments with cumulative effect is a major penalty. It was therefore, incumbent upon the disciplinary authority to cite specific reasons for disagreeing with the recommendations of the Enquiring Officer with regard to the punishment to be inflicted. In the instant case, it is simply stated by the disciplinary authority that considering the serious matter of misconduct, the competent authority disagreed with the penalty suggested by the I.O. as it is too lenient.

12. It goes without saying that the penalty imposed on a Government servant must be commensurate to the charges proved against him and therefore, it is the bounden duty of the disciplinary authority to examine such aspect and indicate specifically as to why it is deemed proper to differ from penalty proposed by the Enquiring Officer. Simply by stating that the misconduct is serious or that the penalty suggested is too lenient cannot satisfy the requirement of the Rule quoted hereinbefore. Even otherwise, it is the settled principle of law that recording of reasons by the concerned authority would enable the Court to examine as to what had weighed upon its mind while passing the order in question and so decide whether the same is correct or not.

The obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with judicial power. The above view was taken by the apex Court in the case of **Travancore Rayons Ltd. vs. The Union of India**, reported in AIR 1974 SC 862.

Further, in **S.N. Mukherjee vs. Union of India** reported in (1990)4 SCC 549, the apex Court held that the requirement to record reasons can be regarded as one of the principles of natural justice, which governs exercise of power by administrative authorities.

Both the cases as above have also been relied upon by this Court in the case of **Narottam Pati (supra)** relied upon by the petitioner involving somewhat similar facts as the present case.

13. For the forgoing reasons therefore, this Court is persuaded to hold that the disciplinary proceeding initiated against the petitioner, culminating in a finding of guilt having been conducted in gross violation of the principles of natural justice, as enshrined under Rule 15(3) of the OCS(CCA) Rules, 1962 stands vitiated. Further, the impugned order imposing penalty by the disciplinary authority being devoid of reasons is also rendered unsustainable in the eye of law. Consequently, the impugned order under Annexure-12 is hereby quashed.

14. The writ petition is thus, allowed.

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2022 (I) ILR - CUT- 880

SASHIKANTA MISHRA, J.

BLAPL NO.1245 OF 2022

ASHOK KUMAR SAHA ……..Petitioner

.V.

UNION OF INDIA ……...Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Grant of bail in economic offences – The offences are under sections 420/408/409/ 120-(B)/34 of IPC r/w Sections 4,5 and 6 of Prize Chits and Money Circulation Scheme (Banning) Act,1977 – Held, Not allowed – Allegation levelled against the petitioner are very serious in as much as large number of depositors have been duped of their hard earned money and the amount so swindled is huge, trial is yet to begin – Considering the status and position of the petitioner the possibility of tampering with evidence or influencing the poor depositors at his instance cannot be ruled out entirely – This Court not inclined to allow the prayer for bail. (Para-11)

Case Law Relied on and Referred to :-

1. AIR 2013 SC 1933 : Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation.

For Petitioner : Mr M. Kanungo, Sr. Adv. & Mr. M. Swain

For Opp. Party : Mr. Sarthak Nayak, Special P.P.-cum-Retainer Counsel,CBI.

ORDER Date of Order: 28.03.2022

SASHIKANTA MISHRA, J.

The petitioner is in custody since 12.09.2015 in connection with SPE No. 34/2014 corresponding to T.R. No. 4 of 2017 of the Court of learned Special Judge (CBI-1), Bhubaneswar, Khurda for the alleged commission of offence under Sections 420/408/409/120-B/34 of IPC read with Sections 4, 5 and 6 of Prize Chits & Money Circulation Scheme (Banning) Act, 1977.

2. The prosecution case, bereft of unnecessary details is that the petitioner is one of the Directors of Rose Valley Group of Companies including Rose Valley Hotels and Entertainments Ltd., Rose Valley Real Estate Constructions Ltd. and Real Estate & Land Bank India Ltd. In such capacity, the petitioner is alleged to have entered into a conspiracy with other Directors and officials of the said companies to collect deposits from the public giving false assurance of returning high profits thereon. Basing on such false assurance, the agents of the companies collected huge amounts from ordinary persons across the country running into thousands of crores and utilized the same for other purposes without making any returns to the depositors. In so far as the present petitioner is concerned, it is alleged that he occupied a pre-eminent position in Rose Valley Group and was part of the decision-making process of the company and as such, he is responsible for non-return of

around Rs.9,000 crores to the depositors of Rose Valley Group across the whole of India. As such, it is alleged that the petitioner is guilty of criminal conspiracy, cheating, criminal breach of trust and of promoting and running price chit and money circulation schemes. In so far as the State of Odisha is concerned, it is alleged that a total sum of Rs.713,06,24,493/- remains outstanding for repayment to the depositors.

Be it noted here that as per orders passed by the Hon'ble Supreme Court of India on 09.05.2014 in W.P.(C) Nos. 401 of 2013 and 413 of 2013, 44 cases were registered by the CBI/SCB/SIT/KOLKATA in respect of 44 companies collecting money from the public in Odisha. The present case is one amongst the said 44 cases.

3. Heard Mr. M. Kanungo, learned Senior Counsel appearing along with Mr. M. Swain, learned counsel for the petitioner and Mr. Sarthak Nayak, learned counsel appearing for CBI.

4. Mr. Kanungo would contend at the outset that the very fact that the petitioner is in custody for more than 6 and ½ years makes him entitled to be released on bail. It is submitted that in so far as the offence under Section 420 is concerned, the maximum punishment prescribed is seven years. Similarly, the maximum punishments prescribed for the offence under Sections 4 and 6 of the Prize Chits & Money Circulation Scheme (Banning) Act, 1977 are three years each and so far as the offence under Section 409 of IPC is concerned, though the punishment prescribed is imprisonment for life or with imprisonment for a term which may extend to ten years, the same in its application to the State of Odisha, has to be treated as punishment for maximum period of seven years only. Elaborating on his arguments learned Sr. Counsel would contend that the offence under Section 409 of IPC is triable by the Court of Judicial Magistrate First Class in Odisha. As per Section 29(2) of the Cr.P.C., the Court of a Magistrate of First Class can only pass a sentence of imprisonment for a term not exceeding three years. In such event if the Magistrate finds that the accused is guilty and deserves more punishment than what he is empowered to impose, then taking recourse to the provision under Section 325 of Cr.P.C., the said Magistrate may submit the case to the Chief Judicial Magistrate for passing adequate sentence. Mr. Kanungo argues that since the Chief Judicial Magistrate can impose a sentence of imprisonment not exceeding seven years as per Section 29(1) of Cr.P.C. in so far as the State of Odisha is concerned, the maximum

punishment for the offence under Section 409 IPC has to be treated as 7 years only. Mr. Kanungo has also submitted that the State of Madhya Pradesh has brought an amendment to Section 409 of IPC to make it triable by the Court of Sessions instead of the Magistrate First Class. According to Mr. Kanungo, such amendment has not been made in the State of Odisha. This, according to Mr. Kanungo clearly reveals the legislative intent of the offence under Section 409 of IPC being triable by the Court of Magistrate First Class and therefore, the maximum period of punishment that can be imposed has to be held as seven years. Since the petitioner in the instant case has admittedly been incarcerated as an under-trial prisoner for more than half of the seven-year period, he is entitled to be released on bail as per the provisions under Section 436-A of Cr.P.C.

On merits, it is argued by Mr. Kanungo that the petitioner has beenentangled in the case without any specific allegation made against him, rather because of his status as the Director of the company he has been implicated only on suspicion. It is further submitted that the petitioner has resigned from the Rose Valley Company in the year 2012 and whatever money he has in his bank account is out of his own income including EPF dues and therefore, the question of cheating the public does not arise. It is finally submitted by Mr. Kanungo that though the I.O. submitted a preliminary charge sheet yet, despite lapse of more than six years, the final charge sheet has not been submitted, which is a deliberate ploy to keep the petitioner in custody citing continuance of investigation.

5. Per contra, Mr. Sarthak Nayak, learned counsel appearing for the CBI has forcefully opposed the prayer for bail by submitting that Section 436-A of Cr.P.C. would not be applicable to the petitioner because, as per the said provision, the maximum punishment prescribed for the offence in question has to be taken into consideration for releasing the accused on bail. Disagreeing with the interpretation made by Mr. Kanungo with regard to the provision under Section 409 of IPC in its application to the State of Odisha, Mr. Nayak would argue that Section 436-A Cr.P.C. does not permit of any such interpretation as the language employed therein is clear and unambiguous. Since the maximum punishment prescribed under the said provision is imprisonment for life, the petitioner cannot claim the benefit under Section 436-A Cr.P.C. on the ground of put in more than six years in prison.

On merits, it is submitted by Mr. Nayak that the petitioner was a prominent member of the group that hatched the conspiracy to dupe gullible depositors solely with the intention of cheating them. In the process, the said group has collected astronomical sums of money running into thousands of crores which still remain to be paid to the poor depositors.

It is further contended that the modus operandi and the network created by the aforementioned group spreads to almost every nook and corner of the country for which investigation is still in progress including continuance of forensic auditing. Moreover, considering the pre-eminent position of the petitioner, it is likely that he may influence the poor depositors who mostly belong to the lower strata of the society and thereby influence the trial.

6. I have given my anxious consideration to the rival contentions noted above as also have perused the materials on record carefully. To address the first contention advanced by learned Senior Counsel it would be profitable to refer to the provision under Section 436-A of Cr.P.C.

> *436-**A. Maximum period for which an undertrial prisoner can be detained**.- Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties;*
>
> *Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties;*
>
> *Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.*

A bare reading of the provision makes it clear that the said benefit would be applicable only when the accused had undergone detention for a period extending up to one-half of the 'maximum' period of imprisonment specified for the offence in question.

7. Now, there is no dispute that the maximum period of punishment prescribed under Section 409 of IPC is imprisonment for life. The arguments

putforth by Mr. Kanungo that the maximum period of punishment under Section 409 of IPC in so far as the State of Odisha is concerned should be treated as seven years only because the same is an offence triable by the Magistrate First Class, is fallacious and untenable. For such an argument to hold good, there must be a corresponding enabling provision in section 436-A of Cr.P.C.. There is no gainsaying that when the statute prescribes a thing to be done in a particular manner, the same shall be done in that manner or not at all. So unless the language employed in Section 436-A of Cr.P.C. is amenable to any such interpretation, the point canvassed by Mr. Kanungo cannot be accepted. To reiterate, when the provision under Section 436-A of Cr.P.C. lays down in clear and unambiguous terms that the 'maximum' period of imprisonment specified for the offence in question has to be reckoned, there cannot be any watering down of the same and therefore, in so far as section 409 of IPC is concerned, this Court is of the humble view that the maximum period of imprisonment has to be treated as imprisonment for life in the context of Section 436-A of Cr.P.C.. The interpretation sought to be made by Mr. Kanungo cannot, by its very nature be read into the provision under Section 436-A of Cr.P.C. particularly in view of the strict language employed therein.

Therefore, this Court is unable to accept the contention advanced by Mr. Kanungo.

8. Having dealt with the legal proposition as narrated above, this Court, after examining the materials on record finds that the amount of money collected by the group of companies of which the petitioner was one of the Directors is really astronomical being to the tune of Rs.9000 crores for the whole of India and more than Rs.700 crores in so far as the State of Odisha is concerned. Though it is claimed that the petitioner had no role to play, the same is difficult to believe in view of the fact that he had occupied a pre-eminent position in all the three companies, which were involved in collection of money from private depositors. Further, there are materials to show that he was also involved in the decision-making process of all the companies in his capacity as the Director. It has been submitted that the petitioner is no longer the Director of the company having resigned since 2012, but as it appears from the FIR, the petitioner was the Director of Real Estate and Land Bank India Ltd. From 13.10.2011 to 27.02.2012, but in so far as Rose Valley Hotels and Entertainments Ltd. is concerned, he has been continuing as the Director since 02.02.2010 and in so far as Rose Valley Real

Estate Constructions Ltd. Is concerned, he has been continuing as such since 17.05.2006.

9. As regards the arguments that there is inordinate delay in completion of investigation, it is to be noted that a huge network was built by the companies all over the country involving several stakeholders and institutions and hence, the inability of CBI to submit final charge sheet is understandable and cannot enure to the benefit of the accused petitioner.

10. In the case of Y**.S. Jagan Mohan Reddy vs. Central Bureau of Investigation**, reported in AIR 2013 SC 1933, the apex Court held as follows;

> *15. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.*
>
> *16. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.*

11. As has already discussed hereinbefore, the allegations levelled against the petitioner are very serious inasmuch as a large number of depositors have been duped of their hard-earned money and the amount so swindled is huge, Trial is also yet to begin. Considering the status and position of the petitioner, the possibility of tampering with the evidence or influencing the poor depositors at his instance cannot be ruled out entirely. Taking into consideration all the above factors therefore, this Court is not inclined to allow the prayer for bail.

12. The BLAPL therefore stands rejected.

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2022 (I) ILR - CUT- 887

A.K. MOHAPATRA , J.

CRLREV NO. 34 OF 2022

BASUDEV SINGH ……..Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

(A) CRIMINAL TRIAL – Offence under NDPS Act – Interim release of vehicle – Whether section 60(3) of the Act is a bar to interim release of vehicle? – Held, No.

(B) CRIMINAL TRIAL – Offence under NDPS Act – Trial of the case – Whether code of criminal procedure applies to the trial under the NDPS Act? – Held, Yes.

Case Laws Relied on and Referred to :-

1. (2017)(66) OCR: Kishore Kumar Choudhury Vs. State of Orissa.
2. (2002) 10 SCC 283: Sunderbhai Ambalal Desai Vs. State of Gujarat.
3. (1977) 4 SCC 358 : Basavva Kom Dyamangouda Patil Vs. State of Mysore.
4. (1978) 2 SCC 491: Ram Parkash Sharma Vs. State of Haryana.
5. (2010) 6 SCC 768: General Insurance Council and others Vs. State of Andhra Pradesh.
6. (2002) SCC On Line Karnataka : K.W. Ganapathy Vs. State of Karnataka.
7. (2021)W.P.(C) No.31622: Ashis Ranjan Mohanty (Adv.) Vs. State of Odisha and Others.
8. (2019) 1 OLR 275: Ghasana Mohapatra Vs. State of Odisha.
9. (2021) 81 OCR 635: Ramakrushna Mahasura Vs. State of Odisha.
10. 2013 (I) OLR 820 : Balabhadra Nayak Vs. State of Orissa.
11. 2009 (II) OLR 946: Subash Chandra Panda Vs. State of Orissa.

For Petitioner : Mr. B.K. Swain

For Opp. Party : Mr. K.K. Nayak, Addl. Standing Counsel

JUDGMENT Date of Hearing 23.02.2022 : Date of Judgment: 31.03.2022

A.K. MOHAPATRA , J.

1. The present criminal revision petition has been filed by the Petitioner under Section 401 Cr.P.C. challenging the order dated 28.12.2021 passed by the learned Sessions Judge-cum-Special Judge, Phulbani, in Crl. Misc. Case No.27 of 2021, which arises out of C.T. Case No.11 of 2020, corresponding to Phiringia P.S. Case No.13 of 2020, thereby rejecting the petition under

Section 457 of Cr.P.C. filed by the Petitioner to release the vehicle bearing RegistrationNo.OD-24-7214 (Swift Dezire Car).

2. The factual background of the case, in a nutshell, is that on 27.01.2020 at about 6.00 A.M., the IIC, Phiringia P.S., namely, P.S.S. Rao received credible information from his sources that two persons are in possession of Ganja, i.e. flowering and fruiting tops of cannabis plant were transporting the same in a Swift Dezire Car bearing Registration No.OD-24-7214 and they are likely to pass through Majhipada road. Upon getting such information, the IIC, Phiringia P.S. formed a team and proceeded to the spot, i.e. village Majhipada to verify the veracity of the information received. After reaching the spot, they waited for the suspicious vehicle by concealing their presence. At about 8.40 A.M., they intercepted the Swift Dezire Car bearing No.OD-24-7214 along with two persons including the driver. On being asked, they disclosed their names as (1) Basudev Singh (present Petitioner), S/o.Manmohan Singh of village Purna, PS-Raghunathpur, Dist.-Jagatsinghpur and (2) Babuna Swain, S/o.Sadhu Charan Swain of village-Jagatpur Road, Dasapalla, PS-Dasapalla, Dist.-Nayagarh. After completion of formalities of search, the vehicle was searched and a jerry bag containing 30 kgs. 200 grams of Ganja was recovered from the dickey of the Car. Thereafter, the contraband Ganja and the vehicle was seized. Both the above named persons were arrested and were forwarded to the court on the allegation of commission of offences under Section 20(b)(ii)(C)/25/27 of the NDPS Act, 1985. Seizure list was prepared on 27.01.2020. After completion of the investigation, charge-sheet has been submitted under the aforesaid sections.

3. While the matter stood thus, the Petitioner filed a petition under Section 457 Cr.P.C. bearing Crl. Misc. Case No.16 of 2021 before the trial court for release of his vehicle (Swift Dezire Car) bearing No.OD-24-7214 on the ground that there is no dispute with regard to the ownership of the vehicle. After hearing the parties, learned Special-cum-Sessions Judge, Phulbani by order dated 15.09.2021 rejected the application of the Petitioner without assigning any reason whatsoever.

4. The said order dated 15.09.2021 was earlier challenged before this Court Crl. Rev. No.421 of 2021. This Court after hearing the parties and with an observation that the matter of release of vehicle was not considered in its proper perspective and no reason has been assigned while rejecting such

application of the Petitioner under Section 457 Cr.P.C., this Court was pleased to set aside the order dated 15.09.2021 and directed the court below to consider the application of the Petitioner afresh by giving opportunity of hearing to the parties and to dispose of the application within a period of 30 days from 02.12.2021, i.e. the date of passing of the order in CRLREV No.421 of 2021.

5. After the matter was remitted back to the court of learned Special Judge, Phulbani, the application of the Petitioner was again re-registered as Criminal Misc. Case No.27 of 2021 (36/2021) and the same was taken up for hearing. After hearing both the sides, learned Special Judge, Phulbani by order dated 28.12.2021 has again rejected the application of the Petitioner filed under Section 457 Cr.P.C. to release the aforesaid vehicle.

6. While rejecting the aforesaid application of the Petitioner, learned Special Judge, Phulbani raised the following objections:

> (i) The investigation of the case is over and chargesheet has been filed. As such, prima facie evidence is available against the Petitioner for commission offences under the NDPS Act.
>
> (ii) The vehicle seized from the possession of the accused person is liable to be confiscated at the end of trial, if the accused are found guilty;
>
> (iii) In the event the vehicle is released in favour of the accused Petitioner, he is likely to use the same for the same purpose and he may misuse the same for committing crime.

7. Finally, on considering the submissions made by learned counsels for the parties it is found that the vehicle is involved in the offences under Section 20(b)(ii)(C)/25/29 of NDPS Act and that the vehicle was found transporting contraband Ganja without any authority. Accordingly, the court hold that the seized vehicle is liable for confiscation and that, if the vehicle is released to the Petitioner, he is likely to use the same for commission of similar type of offences. Accordingly, the application under Section 457 Cr.P.C. had been rejected by the Special Judge, Phulbani.

8. Challenging the aforesaid rejection order, the present revision application was filed by the Petitioner on the ground that the order passed by the learned court below is erroneous and illegal and that the Petitioner who is admittedly the owner of the vehicle has been falsely implicated in the case

and that the Petitioner has been released on bail by this Court and the confiscation proceeding, if any, under Section 60 of the NDPS Act can only be done after conclusion of the trial and in the event the accused is found guilty of commission of the aforesaid offences. But during trial, there is no bar for interim release of the vehicle under the provision of the Code of Criminal Procedure.

9. It is submitted by learned counsel for the Petitioner that relying upon the ratio laid down by this Court in the case of **Kishore Kumar Choudhury vs. State of Orissa**, reported in **2017 (66) OCR** as well as the judgment of the Hon'ble Supreme Court of India in the case of **Sunderbhai Ambalal Desai vs. State of Gujarat**, reported in **(2002) 10 SCC 283**, it was observed that the vehicle should not be kept in court premises or police premises for an indefinite period till conclusion of trial by keeping it exposed to sky, sun and rain and the condition of the vehicle to be deteriorated by remaining idle in the police stations. He has further submitted that in the event the vehicle is not maintained properly and keep stationary at one place, the same would turn into a piece of junk, as a result of which, the value of the vehicle would deteriorate drastically and eventually the same would be sold at a scrap value.

10. Learned counsel for the Petitioner further submits that although the Petitioner is an accused in the above noted case, being the owner of the offending vehicle, he had no knowledge about the contraband articles, which were kept in his vehicle at the instance of the other occupant of the vehicle, i.e. the co-accused person, namely, Babuna Swain. It has also been submitted by learned counsel for the Petitioner that Petitioner had gone on the request of the co-accused Babuna Swain, as the said person had taken the vehicle on rent and therefore Section 60 of NDPS is not attracted to the facts of the present case.

11. It is further submitted by learned counsel for the Petitioner that no doubt, the vehicle can be confiscated under Section 60 of the NDPS Act by the Special Court constituted under Section 36 of the said Act, the provision contained under Sections 451 and 452(1) of the Cr.P.C. are required to be followed while considering he application for release of the vehicle. Further, it was submitted that since none of the provisions of NDPS Act are inconsistence with the provision of the Cr.P.C., the right to interim custody under Section 457 of the Cr.P.C. cannot be denied.

12. Learned counsel for the State on the other hand supports the impugned order rejecting the application under Section 457 Cr.P.C. by the Special Court, Phulbani. It is further submitted by learned State Counsel that the Petitioner was arrested and the vehicle was seized from the spot. Therefore, a prima facie case is well made out against the present Petitioner. Moreover, the investigation of the case has been concluded and charge-sheet has been filed. He further expresses his apprehension that in the event the vehicle will be released, the same may not be available for the Confiscation Proceeding at the conclusion of the trial and in the event the Petitioner is found guilty of the alleged offences and that the possibility of petitioner's transferring the vehicle during pendency of the trial by creating a third party interest over the vehicle cannot be ruled out. In such view of the matter, learned counsel for the State vehemently opposes the interim release of the vehicle in favour of the Petitioner.

13. Heard learned counsel for the Petitioner as well as learned Additional Standing Counsel for the State. Perused the records and the relevant documents.

14. It is undisputable fact that the vehicle was intercepted on the basis of the information received from reliable sources by the IIC of the concerned police station and the contraband Ganja was seized from the dickey of the vehicle. Further, the Petitioner and other coaccused persons were arrested from the spot. Thereafter, the contraband articles as well as the vehicle were seized by the police. Since the date of seizure, i.e. 27.01.2020, the vehicle is lying in the premises of Phiringia police station in a stationary condition exposed to sun and rain.

15. The issue of vehicles accumulating in different police stations had drawn the attention of the Hon'ble Supreme Court for the first time in the case of **Basavva Kom Dyamangouda Patil vs. State of Mysore**, reported in **(1977) 4 SCC 358**, In paragraph-4 of the said judgment, Hon'ble Supreme Court observed as under:

> "4. The object and scheme of the various provisions of the Code (Cr.P.C.) appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original

owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice….The object of the Code (CrPC) seems to be that any property which is in the control of the Court either directly or indirectly, should be disposed off by the court and a just and,proper order should be passed by the Court regarding its disposal. In this broad sense, therefore, the court exercises an overall control on the actions of police officers in every case where it has taken cognizance."

16. In **Ram Parkash Sharma v. State of Haryana**, reported in **(1978) 2 SCC 491**, in paragraph 3 of the judgment, the Hon'ble Supreme Court of India has observed as follows;

"3. Section 457 covers the facts of the present case. The police have recovered a considerable sum of money from the appellant and the money is stated to be seized in connection with an offence registered against an accused person, namely, Bansi Lal. Whether the appellant himself will be a witness or an accused is not possible to state at the present moment according to the counsel for the State. Be that as it may, the situation is squarely covered by Section 457 CrPC. However, the fact that the court has power to dispose of property seized by the police but not yet produced before the Court does not mean that the Special Judge must always release such property to the person from whom the property has been recovered, especially when the stage of the case is in suspicion, the investigation is not over and chargesheet has not yet been laid. The court has to be circumspect in such a situation before releasing the property. While we reverse the decision of the courts below that the Special Judge had no power to release the seized property, we should not be taken to mean that whenever the claimant asks for the property back, he should be given back the said property. That has to be decided on its own merits in each case and the discretion of the court has to be exercised after due consideration of the interests of justice including the prospective necessity of the production of these seized articles at the time of the trial. If the release of the property seized will, in any manner, affect or prejudice the course of justice at the time of the trial, it will be a wise discretion to reject the claim for return."

17. In ***Sunderbhai Ambalal Desai vs. State of Gujarat, reported in (2020) 10 SCC 283***, the Hon'ble Supreme Court of India has observed as under:

"7. In our view, the powers under Section 451 CrPC should be exercised expeditiously and judiciously. It would serve various purposes, namely:

1. owner of the article would not suffer because of its remaining unused or by its misappropriation;

2. court or the police would not be required to keep the article in safe custody;

3. if the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary,evidence could also be recorded describing the nature of the property in detail; and

4. this jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

Vehicles

15. Learned Senior Counsel Mr Dholakia, appearing for the State of Gujarat further submitted that at present in the police station premises, a number of vehicles are kept unattended and vehicles become junk day by day. It is his contention that appropriate directions should be given to the Magistrates who are dealing with such questions to hand over such vehicles to their owners or to the person from whom the said vehicles are seized by taking appropriate bond and guarantee for the return of the said vehicles if required by the court at any point of time.

16. However, the learned counsel appearing for the petitioners submitted that this question of handing over the vehicle to the person from whom it is seized or to its true owner is always a matter of litigation and a lot of arguments are advanced by the persons concerned.,

17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the court. If the said vehicle is insured with the insurance company then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.

14. It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only do they occupy substantial space in the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its roadworthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several

valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, we direct that all the State Governments/Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further direct that the activities of each and every police station, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the division/Commissioner of Police concerned of the cities/Superintendent of Police concerned of the district concerned."

18. In **General Insurance Council and others vs. State of Andhra Pradesh**, reported in **(2010) 6 SCC 768**, in paragraph 14 of the said judgment, Hon'ble Supreme Court has observed as under:

"13. In our considered opinion, the aforesaid information is required to be utilised and followed scrupulously and has to be given positively as and when asked for by the insurer. We also feel, it is necessary that in addition to the directions issued by this Court in Sunderbhai Ambalal Desai [(2002) 10 SCC 283 : 2003 SCC (Cri) 1943] considering the mandate of Section 451 read with Section 457 of the Code, the following further directions with regard to seized vehicles are required to be given:

(A) Insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the jurisdictional court. Ordinarily, release shall be made within a period of 30 days from the date of the application. The necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release.

(B) The photographs so taken may be used as secondary evidence during trial. Hence, physical production of the vehicle may be dispensed with.

(C) Insurer would submit an undertaking/guarantee to remit the proceeds from the sale/auction of the vehicle conducted by the Insurance Company in the event that the Magistrate finally adjudicates that the rightful ownership of the vehicle does not vest with the insurer. The undertaking/guarantee would be furnished at the time of release of the vehicle, pursuant to the application for release of the recovered vehicle. Insistence on personal bonds may be dispensed with looking to the corporate structure of the insurer."

14. It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only do they occupy substantial space in the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its roadworthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several

valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, we direct that all the State Governments/Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further direct that the activities of each and every police stations, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the division/Commissioner of Police concerned of the cities/Superintendent of Police concerned of the district concerned."

19. In **K.W. Ganapathy v. State of Karnataka reported in 2002 SCC On Line Karnataka**, the Karnataka High Court was called upon to decide the issue of interim custody of the seized property. The Karnataka High Court divided the properties seized into two distcinct catagories 1. Properties having evidentiary value required to be protected for a fair trial, and 2. Property only having property value required to be secured for final order under section 452 Cr.P.C.. The relevant portions of the judgment of the Karnataka High Court has been extracted here in below;

"4. After hearing the counsel for the State and the petitioner, I find that the grievance made out by the petitioner is genuine. Of course, in the usual course of routine conditional orders are passed while delivering the property to the interim custody. When the property has any evidentiary value, it is to be kept intact and to ensure its production during the course of evidence for the purpose of marking as a material object the condition of non-alienation is imposed. However, when the property has no evidentiary value and only the value of the property is to be properly secured for passing of final order under Section 452 Cr.P.C., the necessity of keeping such properties intact by imposing onerous conditions, prohibiting its alienation or transfer would not be necessary in law.

5. The production of property which has evidentiary value during evidence is a part of a fair trial. With the advanced technology, it is not necessary that the original of the property inevitably has to be preserved for the purpose of evidence in the changed context of times. The reception of secondary evidence is permitted in law. The techniques of photography and photo copying are far advanced and fully developed. Movable property of any nature can be a subject matter of photography and taking necessary photographs of all the features of the property clearly is not a impossible task in photography and photo copying. Besides, the mahazar could be drawn clearly describing the features and dimensions of the movable properties which are subject matters of criminal trial. Many a time, we find as a routine course, the Courts impose condition of non-alienation and to keep the property intact without alteration in any manner. Many a time such conditions act harshly upon rightful owners of the property from exercising their lawful ownership rights.

6. Irrespective of the fact whether the properties have evidentiary value or not it is not necessary that the original of the property has to be kept intact without

alienation. As suggested above, the photography or photostat copy of the property can be taken and made a part of the record duly certified by the Magistrate at the time when the interim custody of the property is handed over to the claimant. In the event of the original of the property not produced in the evidence, photograph could be used as secondary evidence during the course of evidence. Ultimately, while passing final orders, it is only the value of the property that becomes a prime concern for the Court. If a person to whom the interim custody is granted, is not entitled to the properly or its value and if some other person is held to be entitled to have the property or its value by taking necessary bonds and security from the person to whom interim custody is granted, the value could be recovered and made payable to the person entitled to. The rightful owners, who have lost the property by an act of crime even after detection and recovery are continued to be prevented from beneficial possession and enjoyment of the same by the archaic conditions imposed as a regular routine despite the changed context of scientific developments.

9. In the instant case, the vehicle in question is a car and it has no evidentiary value, it is only required for the purpose of passing final orders under Section 452 Cr. P.C. Therefore, to ensure the recovery of its value, it is suffice only necessary bonds and security is to be taken from the petitioner to recover the value from him in the event of final orders going adverse to him."

20. This Court in a PIL filed by a practicing Advocate with a prayer as to how to deal with the ever growing seized vehicles and other properties in various police stations in the State of Odisha, i.e. in the matter of **Ashis Ranjan Mohanty (Adv.) vs. State of Odisha and others** in (W.P.(C) No.31622 of 2021) decided **on 31.01.2022**, while adjudicating the aforesaid issue, this Case has came to learn about the fact that large number of seized vehicles are dumped in police stations are causing encroachment on the public road adjoining the police stations and further due to lack of proper maintenance and due to expose to the sun, rain, the said vehicles were turning to junk, as such, are losing its value. A Division Bench of this Court after a thorough discussion on the issue and considering all aspects of the matter have set up a guideline for release of such vehicles, which reads as follows:

"Vehicles

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

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

(a) preparing a detailed panchnama;

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

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

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

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

(f) obtaining a security bond.

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

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

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

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

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

21. Further while laying down the guidelines to deal with the seized vehicles, the Division Bench of this Court has also taken note of the judgment rendered by a Single Bench in the case of **Ghasana Mohapatra vs. State of Odisha**, reported in **(2019) 1 OLR 275** and **Ramakrushna Mahasura vs. State of Odisha**, reported in **(2021) 81 OCR 635**. After

taking note of the above two judgments, the Division Bench of this Court has categorically stated that so far as release of vehicle is concerned, the directions as has been issued by this Court in **Ashis Ranjan Mohanty (supra)** would prevail.

22. Further, in **Ashis Ranjan Mohanty (supra)**, the Division Bench of this Court under the heading 'General Directions' under Paragraph-17 (v) has also provided a safeguard, which is quoted hereinabove:

> "17(v) If a person to whom the interim custody of the property/vehicle is granted is ultimately found not entitled to it, and is unable to return it, its value shall be recovered by enforcing the bonds and the security taken from such person or recovering the monetary value from him as arrears of land revenue."

23. In view of the judgment delivered by the Division Bench of this Court in **Ashis Ranjan Mohanty (supra)**, the law with regard to release of seized vehicle has been crystallized and the direction issued by the Division bench of this Court have to be followed by the trial courts in the entire State of Odisha while considering the application for interim release of the seized vehicles.

24. So far as the confiscation of the vehicle in question is concerned, Section 60 (3) of the NDPS Act deals with the liability of illicit drugs, substances, plants, articles and conveyances to confiscation, which reads as under:

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

25. With regard to the procedure to be followed while confiscating any seized articles/vehicles, the provision as enshrined under Section 63 of the NDPS Act is applicable. Section 63 of the NDPS Act reads as under:

> ***"Section 63 ~ Procedure in making confiscations****– In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the Court shall decide whether any article or thing seized under this Act is liable to confiscation under Section 60 or section 61 or section 62 and, if it decides that the article is so liable, it may order confiscation accordingly."*

26. In view of the aforesaid provisions, a vehicle seized under the NDPS Act for the alleged commission of crime of carrying contraband articles can only be confiscated after the accused is convicted in the trail. In other words, the confiscation proceeding could only be initiated only after conclusion of the trial. Therefore, the vehicle which has been seized in connection with the offences shall remain dumped /stationary at the police station for months/ years together. Moreover, the provision contained in section 60(3) of the NDPS Act doesn't stand on the way for interim release of vehicles involved in the offence punishable under the NDPS Act. Such view of this Court is supported by a judgment of this Court in the matter of **Balabhadra Nayak vs. State of Orissa**, reported in **2013 (I) OLR 820**. Paragraph 6 of the aforesaid judgment reads as follows;

> "6. Section 60(3) of the NDPS Act is no bar for interim release of the vehicle as the said provision is only substantive in nature and speaks of the liability of the vehicle to be confiscated where the owner fails to prove that it was used without his knowledge or connivance or the knowledge and connivance of his agent in charge of the vehicle."

27. The next question that crops up for consideration in the context of the present dispute is the applicability of the provisions of the Criminal Procedure Code, 1973 to the trials under NDPS Act. In this context the provisions of section 51 of the NDPS Act is noteworthy;

> "**Section 51** – Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures- The provisions of the Code of Criminal Procedure, 1973, shall apply, in so are as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."

Provisions contained in Section 51 of the NDPS Act has been interpreted by this Court **in Subash Chandra Panda vs. State of Orissa**, reported in **2009 (II) OLR 946**. The observation of this court in paragraph 5 of the judgment has been extracted here in below;

> "…….A cursory reading of the aforesaid provision in Section 51 of the Act makes it clear that the provisions of the Cr.P.C. will not apply if they are inconsistent with the provision of the Act in respect of warrants issued, arrests, searches and seizures made under the Act. There is provision in Section 55 of the Act interdicting an Officer-in-charge of a Police Station to take charge of and keep in Safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of the Police Station and which may be delivered to him.

> There is no express provision in the act for release of the property like vehicle or conveyance in interim custody of a rightful owner. Provision contained in Section 51 of the Act does not expressly bar operation of the provision of the Cr.P.C. if they are not inconsistent with the provision of the Act. Taking into consideration the stage of the confiscation proceeding in the scheme of the trial as provided under Section 60(3) of the Act, safe custody of the articles seized and delivered to a police officer under Section 55 of the Act pending order of the Magistrate, absence of any specific provision in the Act for release of valuable articles like vehicle etc. in the interim custody of the registered owner and especially in view of the mandate for confiscation of a vehicle or conveyance after the trial is concluded and further fact that the commercial price of such an article is to be protected in the interest of justice, I have no hesitation to hold that operation of Sections 451 and 457 Cr.P.C. is not specifically excluded by Section 51 of the Act. In my view I am supported by the decisions rendered in the case of B.S. Rawant v. Shaikh Abdul Karim : 1989 Cri LJ 1998 Madanlal v. State NCT of Delhi : 2002 Criminal Law Journal 2605; and Sujeet Kumar Biswas v. State of U.P. : 2001 Criminal Law Journal 4431."

28. By the time the trial is concluded, the seized vehicle would be reduced to a piece of junk thereby losing its value drastically and ultimately the same would be sold at a scrap value. Therefore keeping the seized vehicle stranded/ dumped/stationary at the police stations would not enure to any one's benefits either for the State or the actual owner of the vehicle. The commercial value of the vehicle in question would go down considering the deteriorated condition of the vehicle. Moreover, the Govt. has to spent additional amount on security and safe keep of the vehicles seized which is an additional burden on the Govt. Keeping the said fact in mind, the legislatures have incorporated Sections 451 and 452 in criminal procedure code. Section 451 of the Cr.P.C. confers power upon the trial court to pass necessary order for custody and disposal of the property pending trial. A close scrutiny of the provision contained under Section 451 Cr.P.C. would reveal that the trial court is vested with wide power to deal with the seized property as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

29. Similarly the provision contained under Section 457 Cr.P.C. lays down the procedure to be followed by the police upon seizure of the property. Since the impugned order has been passed while dealing with in an application u/s.457 Cr.P.C. it would be apt to quote the provision of Section 457 hereunder:

> *"**457. Procedure by police upon seizure of property**-*
>
> *(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property. (2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."*

30. A bare reading of Section 457 Cr.P.C. gives a clear impression that in a criminal enquiry or trial, the Magistrate has been vested with wide powers to pass such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

31. Sub-Section 2 of Section 457 provides the Magistrate may order the property to be delivered to a person lawfully entitled to on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation. Therefore, there is no bar in law for interim release of vehicle in favour of a known owner of the vehicle.

32. Despite such wide power having been conferred on the Courts/ judicial magistrates, it is observed that the Courts are passing orders in a routine manner rejecting the application for release of the vehicle in a mechanical manner. As a result of which vehicles are piling up in police stations and at times blocking the public roads which are being used as parking place in the absence of adequate space in the police station. Such scenes are very common in every police station of the State. Time has come to deal with the problem head on and every endeavour must be made to ensure that the load of iron junks under which almost all police stations are

buried be relieved of that burden in a manner which will be most beneficial to all stakeholders and in a manner as provided under the law. The Courts and magistrates have to act in a proactive manner. Further, instead of passing orders in a mechanical manner rejecting applications for release of such vehicles, possibilities must be explored for at least interim release of the seized vehicle in accordance with the guidelines issued by this court in **Asish Ranjan Mohanty's case (supra).**

33. Whether we admit it or not, it is a well known fact that the criminal trial is not likely to be concluded shortly because of the procedural requirements and many witnesses are to be examined in the trial. Therefore, it would not be proper and it may not be in the interest of justice to keep the vehicles stranded/ dumped/stationary at a police station thereby allowing the property/vehicle to lose its value drastically due to exposure to extreme weather condition and lack of timely maintenance. Further even after the conclusion of the trial, if it is found that the accused is guilty and is convicted and the vehicle seized is to be confiscated, in such eventuality, State is not likely to gain much as by then the vehicle would have turned into a piece of scrap.

34. Considering all the aforesaid aspects and taking a holistic view of the matter, this Court is of the considered view that no fruitful purpose would be achieved by simply keeping the seized vehicles at the police stations without proper maintenance and by keeping the vehicles exposed to open sky, sun and rain under extreme weather conditions and keep on spending a huge sum of money for the safety and security of the seized vehicle. On the contrary, if the vehicle is given on interim release in favour of the person with the terms and conditions and following the guidelines laid down by this Court in the case of Ashis Ranjan Mohanty (supra), the deteriorating condition of the vehicles and the loss commercial value of the vehicle could be prevented to a large extent. Further the court below can always impose conditions to ensure that the vehicle is not misused/alienated and the same is produce before the court below as and when it is required by the court. In addition to the conditions laid down by this Court in Ashis Ranjan Mohanty (supra), the trial court can always intimate the fact of interim release of the vehicle in favour of the owner to the concerned RTO/RTA, who shall record the same in the registrar so that any attempt to alienate the same or create any third party interest in any manner would be prevented.

35. In view of the aforesaid discussion, this Court deems it proper to allow the criminal revision petition by setting aside the order 28.12.2021, passed by the learned Sessions Judge-cumSpecial Judge, Phulbani in Crl. Misc. Case No.27 of 2021, arising out of C.T. Case No.11 of 2020, corresponding to Phiringia P.S. Case No.13 of 2020 and the vehicle bearing Registration No.OD24-7214 (Swift Dezire Car) is directed to be released interimly in favour of the recorded owner subject to the terms and conditions as laid down by the Division Bench of this Court in the case of Ashis Ranjan Mohanty (supra) paragraph 16 (I) (a) to (f) which has been quoted here in below;

> (I) Vehicles involved in an offence may be released either to the rightful owner or any person authorised by the rightful owner after
>
> (a) preparing a detailed panchnama;
>
> (b) taking digital photographs and a video clip of not more than 1 minute duration of the vehicle from all angles;
>
> (c) encrypting both the digital photograph and thevideo clip with a hashtag with date and time stamp with the hash value being noted in the order passed by the concerned court;
>
> (d) preserving the encrypted digital photograph and video clip on a pen drive to be kept in a secure cover in the file and preferably also uploading it simultaneously on a server kept either in the concerned Court premises or in the server of the jurisdictional District Court
>
> (e) preparing a valuation report of the vehicle by an approved valuer;
>
> (f) obtaining a security bond.
>
> The interim release of the vehicle shall also be subject to further condition as follows;
>
> (i) The petitioner shall not transfer or dispose of or create any third party interest in any manner whatsoever in respect of the offending vehicle to anyone else and shall not make any change in its body, colour or engine;
>
> (ii) It is needless to say that make, colour, chassis number and engine number of the offending motorcycle shall be furnished by the petitioner before the Trial Court with an undertaking that no damage shall be caused or no part of the vehicle be substituted and subject to reasonable wear and tear the vehicle shall be kept in a good condition;

(iii) He/ She shall keep the vehicle insured at all times and produce the Insurance Certificate before the Trial Court as and when called upon;

(iv) The Petitioner or his agent authorized person shall produce the vehicle before the concerned court as and when the same would be required in a confiscation proceeding by the court;

(v) An intimation shall be given to the RTO/RTA under whose jurisdiction the vehicle has been registered not to allow transfer of ownership/creation of any charge hypothecation etc/grant NOC etc. in respect of the seized vehicle without the permission of the court in seisin over the matter;

(vi) The petitioner shall also file an undertaking before the Trial Court that the offending motorcycle shall not be used for commission of any offence of similar nature.

36. Since necessary infrastructural facilities have not been made available to the Courts in the State of Odisha as of now, the compliance of conditions under (I) (a) to (f) shall be followed as far as possible and practicable, however, condition under clause (i) to (vi) are required to be followed mandatorily in every case involving interim release of the vehicle seized. The Revision Petition is accordingly allowed. There shall be no order as to cost.

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2022 (I) ILR - CUT- 904

V. NARASINGH, J.

W.P.(C) NO. 902 of 2018

KAMINI ACHARJYA ……..Petitioner

.V.

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

PAY SCALE – Discrimination – Held, when octroi tax collector/octroi Tax Sarker are same post with same nature of work, depriving of the petitioner with same scale of pay only because the post of octroi tax Sarker does not find in the notification and corrigendum is not rational and it ex-facie violative of Article 14 and amounts to colourable exercise of power.

Impugned orders are set aside, writ petition allowed.

(Para-9)

For Petitioner : Mr. S.K. Ojha
For Opp. Parties : Mr. D.Mund, AGA.

JUDGMENT Date of Hearing & Judgment: 07.04.2022

V. NARASINGH, J.

1. The petitioner's husband –Gouri Sankar Acharya was appointed as a Octroi Tax Sarkar on temporary basis in Koraput N.A.C along with three others. On 08.04.1987 for non-sanction of posts by the Government all the four incumbents including the petitioner were discharged from their service on 06.10.1990. After due sanction, the husband of the petitioner was appointed as a Octroi Tax Sarkar in the regular establishment and as per the 6th Pay Commission recommendation all the Tax Collectors, Sarkars and other categories were placed in pay band of Rs.4440-7440 with Grade Pay (GP) of Rs. 1600/-.

2. At that stage being aggrieved by such fixation, matter was carried to the Apex Court and in terms of the order passed by the Apex Court, the Tax Collectors, Octroi Tax Sarkar were placed in the Pay Band of Rs. 5200-20200/- with Grade Pay (GP) Rs.1900/- and the same was followed by corrigendum dtd. 22.05.2012 issued by the Government of Odisha in Housing and Urban Development Department, wherein it was stated that "the category of Octroi Tax Collector was inadvertently left out and the same is now included " . Such corrigendum is on record at Annexure-3. In terms of such corrigendum the pay of the husband of the petitioner was duly fixed in the higher grade as per the Officer Order dtd. 02.08.2013 of the Executive Officer, NAC, Koraput, the administrative authority, wherein his pay scale was clearly stated to be Rs.5200-20200 with Grade Pay (GP) of Rs.1900/- with effect from 01.04.2012. Such fixation was vetted by endorsement dtd. 02.08.2013 in his Service Book at Page-36 (Annexure-1) of the writ petition.

3. As ill luck would have it, the husband of the petitioner passed away on 08.05.2013 and after passing away of her husband the entitlement of the deceased husband of the petitioner was again verified and approved as is clear from the endorsement at Page-39 of the Brief.

4 That, after passing away of the husband when the petitioner was eagerly looking forward to family pension to sustain herself, she received letter dtd. 22.07.2016 at Annexure-5 issued by the Housing and Urban

Development Department directing the Executive Officer, Koraput Municipality to comply with the audit objection that the deceased husband of the petitioner was not eligible to be paid emoluments in the scale of pay of Rs.5200-20200 with Grade Pay (GP) of Rs.1900/-, with effect from 16.03.2012, inter alia on the ground, that the husband of the petitioner who was working as Octroi Tax Sarkar is not eligible to get such scale and grade.

5. In terms of the letter by the Housing and Urban Development Department dtd. 22.07.2016 as referred to above, under letter dtd. 24.05.2017 at Annexure-7 which is impugned herein the Executive Officer, Koraput Municipality, Koraput was asked to comply the audit objection as raised. It was also stated that recovery of excess amount to be intimated to the Administrative Department, i.e., Housing and Urban Development Department.

6. The issue, which falls for consideration of this Court is entitlement of the petitioner's husband to emolument in pay band of Rs.5200-20200 with Grade Pay (GP) of Rs.1900/- since designation of "Tax Sarkar" does not find place in the notification at Annexure-2 (16.03.2020).

7. Mr. Ojha, Learned counsel for the petitioner places reliance on the letter of Koraput Municipality addressed to the Under Secretary to Government of Odisha, Housing and Urban Development Department dtd. 26.11.2016 (Annexure6) more particularly Para-2 thereof, which is quoted hereunder for ready reference.

> "Para No.2 Housing & Urban Development Order No. 8105/HUD Dt. 16.03.2012 has been modified & according to corrigendum No. 14473/HUD, Dt.22.05.2012 (copy enclosed), Octroi Tax Collector/Octroi Tax Sarkar (O.T.C & O.T.S are same post with same nature of work and same scale of pay having change of nomenclature name) are eligible to get pay scale of Rs.5,200-20,200 with Grade Pay-Rs.1,900/-. This matter has been again concurred by Finance Department vide letter No. 28851/HUD Dt. 16.10.2012".

8. On a bare perusal of the communication at Annexure-6 addressed to the Government in the Housing and Urban Development Department, it is seen that referring to the corrigendum dtd. 22.05.2012 the Executive Officer of the Koraput Municipality has clearly indicated that the Octroi Tax Collector/Octroi Tax Sarkar (OTC and OTS) are "same posts with same nature of work and same scale of pay having change of nomenclature name"

are eligible to get pay scale of Rs.5200-20200/- with Grade Pay of Rs.1900/-. It has also been indicated therein that the same has concurrence of the Finance Department. It is also submitted by the learned counsel for the petitioner referring to the absorption of DLR and NMR workers against non-tax LFS existing vacancies in different ULBs by the Government notification dtd. 05.08.2013 at Annexure-4 that the Tax Sarkar of different municipality are being paid Scale of Pay of Rs.5200-20200 with Grade Pay of Rs.1900/-.

9. He draws the attention of the Court to the incumbents whose name appear at SL. Nos. 14,17,20 and 26 relating to Berhampur Municipal Corporation as well as Serial Nos. 261 to 263 and 265 relating to the self same Municipality i.e., Jeypore where the husband of the petitioner served as an Octroi Tax Sarkar clearly indicating that the scale of pay is Rs. 5200-20200 with Grade Pay (GP) of Rs.1900/-. It is thus Wasserted that there is no rational in issuing Annexure-7 and it is ex-facie violative of Article-14 and amounts to colorable exercise of power and hence liable to be set aside and it is also submitted that because of such curious understanding of the Pay Band applicable to the husband of the petitioner, the widow is left in the lurch and she is not getting her dues.

10. Mr. Mund, Learned Counsel for the State relying on the counter affidavit submits that since admittedly the post of Octroi Tax Sarkar does not find place in the Notification and corrigendum (Annexures-2 & 3 respectively) on which reliance is placed by the petitioner, there is no irregularity or illegality in issuance of Annexure-7. In as much as since it is a policy decision and as the matter has financial implication, the notification has to be interpreted in Stricto senso and no inference as prayed for can be drawn from, referring to others cases of similar nature. As such seeks dismissal of the writ petition.

11. On consideration of materials on record, it is seen that the petitioner has clearly averred in Paragraph-6 of the writ petition, the basis for entitlement.

12. While replying to such paragraph answering the Opposite Party has chosen to give evasive reply. In as much as the assertion that the petitioner has been discharging duties at par with others as mentioned in Annexure-6, has not been answered. The contention of the petitioner referring to the absorption of DLR and NMR workers against Non-LFS existing vacancy in

different ULBs as contained in (Annexure-4) and Scale of Pay of Tax Sarkar therein that is Rs.5200-20200 with Grade Pay of Rs.1900/- remained uncontroverted.

13. In view of such stand of the answering Opposite Parties, this Court has no hesitation to hold that the action of the Opposite Parties not extending the benefit of pay fixation of the petitioner's husband in the Pay Band of Rs.5200-20200 with Grade Pay (GP) Rs.1900/- is liable to be set aside. It is thus directed that the pensionery benefits of the petitioner be fixed, treating the husband of the petitioner to be entitled to emoluments in the Pay Band of Rs.5200-20200 with Grade Pay (GP) of Rs.1900/..

14. The direction as contained in Paras-2, 3 & 4 of the impugned Annexure-7 are set aside and the Opposite Party No.1 is directed to fix the pensionery benefits of the petitioner treating her deceased –husband as entitled to emoluments in Pay Band of Rs.5200-20200 with Grade Pay (GP) Rs.1900/- and issue necessary direction to the Collector, Koraput, since it is brought on record by virtue of Notification dtd. 10.03.2021 of the Housing and Urban Development Department that the District Magistrate is the Pension Sanctioning Authority. On the prayer of the learned counsel for the petitioner, the Collector, Koraput implead as Opposite Party No.4, in Court.

15. Since it is stated that the husband of the petitioner has passed away on 08.05.2013 and the petitioner is not getting family pension as due (except the Provisional Pension), the authority would do well to calculate and make payment as per the entitlement of the petitioner within a period of four months from the date of production/receipt of the certified copy of this Judgment.

16. Accordingly, the writ petition is allowed. There shall be no order as costs.

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2022 (I) ILR - CUT- 909

V. NARASINGH, J.

W.P.(C) NO. 5568 OF 2011

GYANANENDRA KUMAR BISWAL ……Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 14 – Discrimination in extending the financial benefit at par with regular employees – Effect of – Held, bad in law – When the work is of continuous nature denying an incumbent his legitimate dues taking recourse to fictional break of one day suffers from the malady of discrimination and patently violative of the equality envisaged under Article 14 of the constitution of India. (Para-8)

(B) UNTIL FURTHER ORDER STATUS – Effect of – The petitioner has been working for more than two decades – The opposite party corporation not granting the petitioner financial benefits at par with others 'until further order status' being ex-facie illegal is liable to be set aside.

Writ petition allowed. (Para-9)

Case Laws Relied on and Referred to :-

1. (2015)(I) OLR 875 : Santosh Kumar Sahoo Vs. State of Odisha and Ors.
2. (1991)AIR SC 1286 : Sri Rabinarayan Mohapatra Vs. State of Orissa & Ors.

For Petitioner : Mr. G.N. Mishra, S.C.Sahoo & B.Priyadarshi.

For Opp. Parties : Mr. A.K.Mishra, A.K.Sharma, M.K.Dash, P.K.Dash, S.Mishra & Ms. S.Mishra, ASC.

JUDGMENT Date of Hearing: 16.03.2022: Date of Judgment: 12.04.2022

V. NARASINGH, J.

1. The petitioner joined the Opposite Party-Orissa State Civil Supplies Corporation Ltd., Bhubaneswar (hereinafter to refer as "the Corporation", in short) in the year 1987. Alleging discrimination in the matter of grant of financial benefits such as annual increment, H.R.A., T.A. etc. which have been made available to the employees junior to him has approached this Court in the present writ petition.

2. Uncontroverted facts which are relevant for considering the prayer of the petitioner is stated in brief: the petitioner was appointed as Sales Assistant-cum-Godown Assistant on temporary basis in the time scale of Rs.780-1160/- P.M. for a period of 89 days as per order dated 11.05.1987 of the Corporation at Annexture-1. It is submitted by the learned counsel for the petitioner that though he has been working for more than two decades because of the artificial break of one day in every 44 days of service he is being denied financial benefits, such as annual increments, T.A., D.A. etc. payable to the regular employees. It is submitted though in the resolution of the 71st meeting of the Board such fictional break of one day was discontinued while other similarly circumstanced and even juniors have been extended financial benefits at par with regular employees but such benefits have been denied to the petitioner without any rhyme or reason. The relevant extract of the said resolution is quoted hereunder for ready reference:

> *"The Board noted that 22 employees were working with the Corporation for a period of 3 years on temporary basis with the retention of their appointment after a period of 44 days at a time.*
>
> *It was decided that an ad hoc appointment of the above personnel on an "Until Further Orders" should be made to avoid repeated renewal of their appointments."*

3. In terms of the said resolution the Board in its 142nd meeting resolved that the persons similarly circumstanced with the petitioner were to be given "Until Further Orders" status by eliminating one day break. The only exception was that such benefit was not to be extended to the employees who are involved in misappropriation/defalcation. The learned counsel for the petitioner submitted that in spite of the decision of the Board in its 142nd Board meeting he has been denied the financial benefits which were otherwise extended to the similarly circumstanced.

4. Mr. A.K.Mishra, learned counsel for the Corporation stated that the ground of discrimination as urged is illusory and the petitionr is not entitled to the benefits as claimed.

5. Mr.G.N.Mishra, learned counsel for the petitioner also relied upon a judgment of this Court in the case of **Santosh Kumar Sahoo Vs. State of Odisha and Ors.;** reported in 2015(I) OLR 875 relating to the self-same Corporation and wherein after considering the grievance of the petitioner

therein (Santosh Kumar Sahoo), this Court directed all financial benefits to be extended to him.

6. Taking into account the contentions raised by the counsel for the parties and on going through the resolution annexed to the present writ petition, it is clear that the petitioner was initially engaged for a period of 89 days and though he was allowed to continue in service there was a fictional break of one day after 89 days and in some circumstances there was break of one day after spell of 44 days.

7. It is not disputed by the learned counsel for the Corporation that similarly situated persons who were initially engaged on daily wage basis and later on granted time scale pay by virtue of "Until Further Orders" status resolution of the Board, herein above adverted to were extended all financial benefits at par with regular employees.

8. In view of such submission of the learned counsel for Corporation the action of the authorities in not granting the petitioner the financial benefits at par with regular employees is patently violative of the equality nerve envisaged under Article 14 of the Constitution of India. That apart law is no longer res integra that when the work is of continuous nature denying an incumbent his legitimate dues taking recourse to fictional break of one day after 89 days or 44 days as the case may be suffers from the malady of discrimination as such bad in law. In this context reference may be made to the case of **Sri Rabinarayan Mohapatra v. State of Orissa and others**, reported in AIR 1991 SC 1286. The ratio in the said judgment deprecating adhocism by making appointment for short spell with one day break in between has been consistently followed by a catena of judgments of the Apex court.

9. Applying the ratio of the principle laid down in the case Rabinaryan Mohapatra (supra) and other judgments and in view of the judgment of this Court in the case of Santosh Kumar Sahoo (supra) the action of the Opposite Party Corporation not granting the petitioner financial benefits at par with others with "until Further Orders" status being ex-facie illegal is liable to be set aside .

10. The Opposite Party Corporation is thus directed to extend to the petitioner financial emolument from 2001, the date from which such benefit

was admittedly extended to the juniors in terms of Annexure-5 Board resolution of 142nd Meeting of the Board of Corporation at par with the employees who have been conferred the status of "Until Further Orders" within a period of six months from the date of receipt/production of this Judgment.

11. The writ petition is allowed. There shall be no order as to cost.

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