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In the present case the suit land already being recognised as "Amrutamanohi" status and is governed by Temple Act, 1955 as such there was no basis to execute any permanent lease dead or registered sale deeds by any parties – The registered sale deeds were therefore, void ab initio.

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2022 (II) ILR - CUT- 1

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

JCRLA NO. 83 OF 2005

KARPURA GAUDA .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence under section 302 and 307 of Indian Penal Code, 1860 – Conviction – Murder of children 8 and 5 years old – Plea of absence of motive – Effect of – Held, motive not to be crucial if there is direct evidence of unimpeachable character on record – This Court is of the humble view that, the direct evidence against the Appellant is not only overwhelming but also reliable and worthy of credence and hence, absence of motive assumes no significance – The JCRLA stands dismissed. (Para-11)

Case Laws Relied on and Referred to :-

1. 1963 AIR SC 340 : Gurucharan Singh Vs. state of Punjab.
2. 1966 AIR SC 1322 : Rajinder Kumar & Anr. Vs. State of Punjab.
3. AIR 1973 SC 2622 : Shivaji Sahebrao Bobade & Anr. Vs. State of Maharastra.
4. 2020 SCC Online SC 626 : Shor Vs State of U.P. & Anr.
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For Appellant : Mr. Pulakesh Mohanty

For Respondent : Mr. Sk. Zafarulla, ASC

ORDER Date of Order : 31.03.2022

R. K. PATTANAIK, J.

1. Present appeal is at the behest of the Appellant, who has assailed the correctness, legality and judicial propriety of the impugned judgment passed in Criminal Trial No.19 of 2003 by the learned Sessions Judge, Koraput-Jeypore for having been held guilty for offences punishable under Section(s) 302 and 307 IPC and sentenced him to undergo imprisonment for life on the grounds stated therein.

2. Precisely stated, the alleged incident is dated 31st August 2002. On that date, the informant, while was returning to his house at 6 A.M after

attending nature's call, was informed about the incident, where after, he rushed to the spot and found his elder son aged about 8 years and younger son of 5 years old lying dead with bleeding injuries and that the Appellant to be the author of the crime. After the above incident, an F.I.R. was lodged by the informant and as a result, Boriguma P.S. Case No.101 was registered under Section(s) 302 and 307 IPC and thereafter, investigation was commenced. After closure of investigation, charge sheet was submitted against the Appellant under the alleged offences to stand his trial in the court of law.

3. During and in course of the trial, prosecution examined as many as 19 witnesses and exhibited nearly 20 documents besides 07 material objects in order to prove its case, whereas, the Appellant as a means defence neither adduced oral nor documentary evidence to disprove the prosecution's claim. Considering the evidence on record, the learned court below arrived at a logical conclusion that the prosecution was able to successfully establish its case and consequently, held the Appellant guilty under Section(s) 302 and 307 IPC and convicted him thereunder, however, imposed sentence only for the offence of murder without any separate sentence for the offence of Section 307 IPC.

4. Heard Mr. Pulakesh Mohanty, learned counsel for the Appellant and Mr. Sk. Zafarulla, learned ASC appearing for the State.

5. According to learned counsel for the Appellant, the court below failed to examine and appreciate the materials on record and erroneously passed the order of conviction and also sentence which deserves to be interfered with in the interest of justice. Mr. Mohanty made the Court to go through the evidence of the prosecution while advancing argument to the effect that the learned court below fell into gross error in arriving at a conclusion that the Appellant to be responsible for the alleged killings.

6. On the contrary, learned ASC contended that there is direct evidence on record to prove and establish the involvement of the Appellant. Mr. Zafarulla referring to the relevant evidence contended that the Appellant was the assailant and primarily responsible for the killing of the deceased children and therefore, the learned court below rightly appreciated it and convicted him. Its judgment therefore calls for no interference.

7. According to the evidence, P.W.1, who was present at the spot was assaulted by the Appellant for which he received injuries. P.W.1 further deposed that the Appellant went towards the house of one Purna Gouda holding an axe in his hand and after sometime, when he reached at the spot, saw one of the deceased, namely, Rabi lying dead on the road and shortly thereafter, found the dead body of his other son near the house of Purna Gouda. P.W.1 was cross examined but his testimony could not be impeached. P.W.2 was also present near the spot and stated to have witnessed the Appellant with an axe in his hand carrying out assault on the deceased, namely, Subash and later on, she was informed about the death of other deceased, namely, Purna Gouda after being assaulted by him. P.W. 3 deposed that the Appellant had held an axe and was on the verge of assaulting him but thereafter, villagers raised alarm for the Appellant having killed the both the children. P.W. 3 also deposed that the villagers chased the Appellant and caught hold of him. Both P.Ws.2 and 3 were cross-examined by the defence but nothing substantial could be elicited shaking their credibility. The informant has been examined as P.W.5 and deposed that while he was returning home, P.W.4 informed him about the incident and thereafter, found both his sons lying dead with bleeding injuries. Such evidence of P.W.5 received ample corroboration from P.W.4. In fact, according to P.W. 4, he was very much present at the spot and saw the Appellant assaulting the elder son of P.W.5 by means of an axe on his neck, face and head, where after, he shouted. P.Ws.1 to 4 identified the weapon of offence (MO.I). P.W.5 was also cross-examined. However, during such cross-examination, no material could be elicited to damage the version of P.W.5. One more witness, namely, P.W.7 also corroborated P.W.5 and deposed that the Appellant was chased, while he was trying to run away, the villagers could able to catch hold of him and on being interrogated, he disclosed about the killing of the children with the help of an axe. P.W.10 deposed that inquest was conducted in his immediate presence during which I.O. collected blood stained earth and other items from the spot. Over and above, P.W.12, the M.O. who conducted the post-mortem in respect of the body of Subash deposed that during such examination found the external injuries which are hereunder:

(i) incised wound of size 1” over outer angle of left eye;

(ii) incised wound 1” over right malar area of cheek on right side cheek Below the eye;

(iii) incised wound 1” over right angle of mouth; and

(iv) incised wound 3” x ½” over right cheek,

besides an internal injury of fracture and dislocation of both side mandible and all the above injuries held to be ante-mortem in nature with an opinion that it might have been caused by a sharp cutting weapon like axe. According to P.W.12, the cause of death of the deceased was due to the above injuries causing shock and hemorrhage. P.W. 12 proved the P.M. report as Ext.13 and his signature thereon as Ext.13/1.

8. P.W.12 also conducted the post-mortem over the dead body of the other victim, namely, Rabi and similarly found number of external injuries where are as follows:

(i) incised wound 3" x ½" over malar area of cheek up to left nostril;

(ii) incised wound of size 2" x ½" over left cheek up to left pinnae;

(iii) incised wound 1 ½ " x ½" over right mandible;

(iv) incised wound 1" x ½" over right angle of mandible;

(v) incised wound ¼" over occiput;

(vi) incised wound ¼" over nap of neck.

That apart, P.W. 12 noticed fracture and dislocation of both left and right mandible and also fracture of left maxilla and as per his opinion, all the injuries to be ante mortem in nature and again might have been caused by an object like axe. The cause of death as deposed by P.W.12 was on account of shock and hemorrhage. Similarly, P.W.12 proved the P.M. report in respect of the deceased as Ext.14 and his signature on the same as Ext.14/1.

9. The weapon of offence i.e. axe which was seized was sent for examination to P.W.12, who further opined that the injuries found on the person of the deceased children could be possible with it. The report submitted by P.W.12 on the query sent by the IO has also been marked as Ext.15/1 and his signature thereon as Ext.15/2. P.W.12 was cross-examined on Ext.15/1, but again no extenuating material could be elicited by the defence. The wife of P.W.5 was examined as P.W.17 and she also narrated the alleged incident. The IO as P.W.19 deposed that he examined P.W.5 and other witnesses during investigation, visited the spot, prepared spot map, conducted inquest over the dead bodies and also prepared inquest reports marked as Exts.9 and 10. P.W.19 also deposed that he collected sample of blood stain from the spot where the bodies were lying and seized it as per

Ext.11. P.W.19 apart from collecting other evidence made seizure of the weapon of offence i.e. MO 1. During investigation, as is deposed by P.W.19, the sons of the Appellant had a quarrel with the deceased children about two months back and out of grudge, the alleged murder was committed. The defence cross-examined P.W.19 by suggesting that there was no motive behind the alleged incident. But, considering the direct and substantial evidence, the motive if any of the appellant becomes absolutely insignificant. The C.E. report stands marked as Ext.20 which indicated presence of human blood on the exhibits sent for examination. The above evidence on record led the learned court below to reach at a logical conclusion that the Appellant alone to be responsible for the alleged murder. According to this Court, such a conclusion is not misplaced at all rather received concurrence from the evidence on record.

10. The Court finds that the Appellant was caught at the spot by the villagers and was completely responsible for the alleged killings. P.W.5 as well as the ocular witnesses, namely, P.Ws.3, 4 and others satisfactorily proved the involvement of the Appellant and their evidence could not be disturbed despite being intensely cross examined. The medical evidence also corroborated the prosecution case. The number of injuries both external and internal as proved by P.W.12 established that the Appellant with the help of the alleged axe gave repeated blows on to the vital parts of the victims which proved to be fatal. With the above conclusion and having examined the entire evidence, this Court does not find any wrong or infirmity in the order of conviction passed by the learned court below. The involvement of the Appellant in the killing of innocent children is well established by the prosecution beyond any doubt. In such view of the matter, the Court finds no ground to take a different view than the one which has been expressed by the learned court below.

11. A pertinent question may arise for consideration regarding the motive of the Appellant in committing the crime. The evidence of P.W.5 does not reveal existence of any hostility between him and the appellant. Rather P.W.5 during cross-examination admitted about absence of any previous enmity with the Appellant. What then propelled the Appellant to commit the crime by taking away lives of two innocent children when there was no animosity proved to exist between both the sides? P.W.5 during cross-examination admitted that he had not confronted the Appellant the reason behind the killings even though they had prior cordial relationship before the incident.

Such evidence of P.W.5 about not having any bitterness between the families is also revealed by P.W.17. The evidence against the Appellant is so direct and overwhelming but quite unusually, there appears no trace of any hostility and motive is not clear. As earlier mentioned, P.W.19 had disclosed about some incident of quarrel between the children of both sides. But, again what hinges the most, can such an incident of two months old be the reason to carry out and execute the killings? Admittedly, it is no case of any insanity of the Appellant being ever the defence during trial. Whether to accept and rely upon the evidence and to return a verdict upholding the decision of the learned court below? The reply has to be in the affirmative in view of the direct evidence. There is no tenebrosity in the settled position of law that in case of lack of motive being acknowledged, it is of little concern and even pales into insignificance when the crime is proven by direct evidence. In plethora of decisions, the Supreme Court time and again reiterated the rule that motive not to be crucial if there is direct evidence of unimpeachable character on record. As it is known, Section 8 of the Indian Evidence Act, 1872 deals with the aspect of motive and its relevancy. Normally, there is motive behind every criminal act which is either disclosed or found hidden. If the motive is proved, the case of the Prosecution becomes easier to accept. But, where ocular evidence is clear and unblemished, establishment of motive is not sine qua non which is the settled position of law. In this regard, a reference may be had to a decision of the Supreme Court in the case of ***Gurucharan Singh v. state of Punjab 1963 AIR SC 340***, wherein, it is held that where positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance. In ***Rajinder Kumar and another v. State of Punjab 1966 AIR SC 1322,*** the Supreme Court held the view that motive is a relevant fact and its absence is also a circumstance which is relevant for assessing the evidence and a case is not at all weakened by the fact that motive is not established as it often happens that the accused himself knows what moved him to a certain course of action. In fact, the decision of the Supreme Court in ***Shivaji Sahebrao Bobade and another v. State of Maharastra AIR 1973 SC 2622*** is a legal classicus on the point wherein it has been observed that proof of motive satisfies the judicial mind about the likelihood of the authorship but its absence only demands deeper forensic search and cannot undo the effect of evidence otherwise sufficient. Having discussed so far and without burdening the case with more citations, this Court is of the humble view that the direct evidence against the Appellant is not only overwhelming but also reliable and worthy of credence and hence, absence of motive assumes no significance.

12. Mr. Mohanty, learned counsel for the Appellant relied upon the following decisions of the Supreme Court, such as, ***Shor v. State of U.P. and another 2020 SCC Online SC 626; Kokaiyabai Yadav v. State of Chhattisgarh (2017) 13 SCC 449; Jayantilal Verma v. State of M.P. 2020 SCC Online SC 944; and Rajendra Singh V. State of U.P. (2019) 73 OCR (SC) 419.*** However, in the humble opinion of the Court, the above decisions are totally inapplicable to the present case. In ***Shor*** (supra), the Supreme Court was seized of a decision regarding pre-mature release of the convict, who had been in judicial custody for nearly 28 years. The decision in ***Kokaiyabai Yadav*** ibid similarly related to remission of sentence so also the case of ***Rajendra Singh*** (supra). The other case in ***Jayantilal Verma*** renders no help or assistance to the defence either. The Court after having gone through the above citations holds that none is applicable. Thus, the Court arrives at an inescapable conclusion that the Appellant to be the author of the crime and no one else and in so far as appreciation of evidence is concerned, it has been properly evaluated by the learned court below. In other words, the order of conviction vis-à-vis the Appellant and also the sentence of life imprisonment is absolutely justified and in accordance with law and therefore, it need not be disturbed.

13. Accordingly, it is ordered.

14. In the result, the JCRLA stands dismissed.

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2022 (II) ILR - CUT- 07

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

W.P.(C) NO.16574 OF 2011

MOHANLAL PANCH & ANR. ……..Petitioners

.V.

SRI JAGANNATH MAHAPRABHU BIJE PURI MARFAT SRI MANDIR PARICHALANA COMMITTEE, PURI & ORS. ……Opp. Parties

SHRI JAGANNATH TEMPLE ACT, 1955 – Section 5 r/w section 08 of the Orissa Estate Abolition Act, 1951– Whether it is necessary for the Temple Committee to file any claim petition under section 8 of the OEA Act, in respect of its own Land which were already vested under section 5 of Temple Act – Held, Not needed. (Para-28)

In the present case the suit land already being recognised as "Amrutamanohi" status and is governed by Temple Act, 1955 as such there was no basis to execute any permanent lease dead or registered sale deeds by any parties – The registered sale deeds were therefore, void ab initio.

Case Laws Relied on and Referred to :-

1. AIR 1989 SC 464 : Lord Jagannath through Jagannath Singri Narasingh Das Mahapatra Sridhar Panda Vs. State of Orissa.
2. AIR 2016 SC 564 : Sri Jagannath Temple Managing Committee Vs. Siddha Math.

For Petitioners : Mr. D.P. Mohanty

For Opp. Parties : Mr. Debakanta Mohanty, A.G.A, Mr. Subrat Satpathy

JUDGMENT Date of Judgment: 10.05.2022

Dr. S. MURALIDHAR, C.J.

1. The two Petitioners, who are residents of Puri, have challenged an order dated 25th April 2011 passed by the Board of Revenue, Orissa in OEA Revision Case No.133 of 2008. By the said order passed in the aforementioned revision case under Section 38B of the Orissa Estate Abolition Act, 1951 (OEA Act), the order dated 4th June 2008 of the Additional District Magistrate (ADM), Puri in OEA Appeal Case No.8 of 1999 was affirmed and the aforementioned revision case filed by the present two Petitioners was dismissed. The aforementioned order dated 4th June 2008 of the ADM, Puri had dismissed the appeal filed by the present Petitioners against an order dated 18th May 1999 of the Tahasildar, Puri-cum-OEA Collector in OEA Claim Case No.173 of 1990 which had been filed by the Administrator of Sri Jagannath Temple, Puri (Opposite Party No.1).

Background facts

2. The background facts are that the aforementioned claim case was filed before the Tahasildar, Puri by Opposite Party No.1 for fixation of fair

and equitable rent and settling the land admeasuring Ac. 4.960 decimals in favour of Sri Jagannath Mahaprabhu Bije Puri Marfatdar Sri Jagannath Temple Managing Committee, Puri under Sections 6 and 7 of the OEA Act. The said land is located in Khata No.123 Plot Nos.68, 69, 70 and 71 in Mouza-Markandeswar Sahi District-Puri. The contesting Claimant was the Sri Jagannath Puri Gosala (Opposite Party No.3).

3. Notice and proclamation inviting public objections was served by notices dated 24th December, 1998. The present Petitioners subjected their objections by claiming that they had purchased suit Plot No.170 Ac.1.084 pertaining to Khata No.149 by a registered sale deed dated 7th December 1998 and that Petitioner No.2 had purchased Plot No.203 Ac.0.101 and Plot No.204 Ac.2.102 of the same Khata No.149 by a registered sale deed dated 30th November 1998 from the President Babubhai Chhagalani and Secretary Arabinda Parekha of Sri Jagannath Puri Gosala through Kishnalala Panch power of attorney holder by a registered power of attorney dated 23rd September, 1998.

4. In turn, it was claimed that Sri Jagannath Puri Gosala Marfat Secretary Purusottam Sundar Das was the recorded land owner in respect of the suit land by virtue of permanent registered lease deed dated 31st July 1931 which had been executed by one Niladri Sahu by obtaining permission from the Civil Court. It was further claimed that "the suit Plot Nos.170, Ac.1.084; 203 Ac.0.102 and 204 Ac.2.102 related to the part of Sabik Plot Nos.68, 69, 70 and 71 of Sabik Khata No.123. The Sabik Khata No.123 containing the Sabik Plot Nos.68, Ac.4.280; 69, Ac.0.160; 70, Ac.0.010 and 71, Ac.0.010 stood recorded in the name of Sri Jagannath Dev Marfat Mahant Sri Ram Das Guru Keshab Das of Badasantha Math in the ROR of 1899 Settlement in Amrutamanohi status".

5. The further case was that the suit property had not been declared as a trust estate property by the OEA Tribunal and hence, it had not vested in the Government on 18th March, 1974 when the Government of Odisha issued a notification under Section 3A of the OEA Act whereby the estate of Lord Jagannath Mahaprabhu Bije Puri vested in the State Government.

6. The above vesting notification dated 18th March, 1974 was the subject matter of challenge in this Court in OJC No.233 of 1977 and was rejected by this Court. Ultimately, the judgment of this Court was upheld by

the Supreme Court of India in ***Lord Jagannath through Jagannath Singri Narasingh Das Mahapatra Sridhar Panda v. State of Orissa AIR 1989 SC 464.***

7. The Government of Orissa subsequently issued a notification dated 18th April 1989 extending the time for filing cases under Section 8A of the OEA Act. It is within this extended time that the Administrator of Sri Jagannath Temple, Puri filed the aforementioned OEA Claim Case No.173 of 1990. The Tahasildar taking note of Section 5 of the Shri Jagannath Temple Act,1955 corrected the record of rights (ROR) in favour of Opposite Party No.1 namely Sri Jagannath Mahaprabhu Bije Puri Marfatdar Managing Committee Sri Jagannath Temple, Puri.

8. Section 5 of Shri Jagannath Temple Act reads as under:

> "Notwithstanding anything in any other law for the time being in force or custom, usage or contract, Sanad, deed or engagement, the administration and the governance of the Temple and its endowments shall vest in a Committee called the Shri Jagannath Temple Managing Committee constituted as such by the State Government, and it shall have the rights and privileges in respect thereof as provided in Section 33. It shall be a body corporate, having perpetual succession and a common seal, and may, be the said name sue and be sued."

9. The aforementioned provision came up for interpretation in the Supreme Court of India in the decision in ***Sri Jagannath Temple Managing Committee v. Siddha Math AIR 2016 SC 564***. Among the questions framed for consideration by the Supreme Court was "whether the suit lands can vest in the Respondent Math in light of the provisions of the Shri Jagannath Temple Act, 1955". In para 25 of the said judgment, the conclusion reached by the Supreme Court was as under:

> "It is a settled principle of law that once a property is vested by an Act of legislature, to achieve the laudable object, the same cannot be divested by the enactment of any subsequent general law and vest such property under such law."

Order of the ADM

10. The Petitioners were aggrieved by the above decision of the Tahasildar, Puri and filed OEA Appeal No.8 of 1999 under Section 9 of the OEA Act before the ADM, Puri. By the order dated 4th June 2008, the ADM dismissed the aforementioned appeal.

11. The ADM noted that the recital of the registered sale deed dated 6th August 1931 revealed that the suit land belonged to 'Amrutamanohi' of Sri Jagannath Mahaprabhu under D. Register No.13356/A-47. This had, by notification dated 14th September 1963, been declared by the OEA Tribunal as trust estate under Section 13 (E) of the OEA Act. It was therefore held that the suit land had vested in the Government on 18th March 1974 and not on 29th April 1963.

12. The ADM further held that the suit land belonged to Amrutamanohi of Sri Jagannath Mahaprabhu Bije Puri and that the suit land was governed by the Shri Jagannath Temple Act, 1955. The so-called permission obtained from the Court as claimed by the Petitioners for Niladri Sahu to execute the registered lease deed was not accepted by the ADM because "nobody has produced the said permission before this Court for examination." Thus, since Niladri Sahu had no authority to execute the permanent lease deed, it was held to be ab initio void in the eye of law. The preparation of the RORs in the name of Sri Jagannath Puri Gosala in Khata No.149 under Bebandobasta status by the settlement authority on the basis of the above "null and void document" was held to be "wrong and illegal as per law".

13. As a consequence, it was held that the vendor who executed the registered sale deeds dated 7th December 1998 and 30th December 1998 had no right, title and interest in the suit land so as to alienate it in favour of the present Petitioners.

14. It was further noticed that the Petitioners had not filed any application to implead themselves as party in OEA Claim Case No.173 of 1990 and as such their locus standi was also questioned. Accordingly, the ADM concluded that there was no illegality in the order dated 18th May 1999 of the Tahasildar, Puri.

Order of the Board of Revenue

15. Aggrieved by the above orders, the Petitioners filed OEA Revision Case No.133 of 2008 before the Board of Revenue, Orissa.

16. In the impugned order dated 25th April 2011, the Member, Board of Revenue noted that the suit Sabik Khata No.123 was under 'Amrutamanohi' status which as per the settled principle of law was an intermediary status of

land belonging to Sri Lord Jagannath Bije Puri. It was further noticed that "as per instructions communicated in L.No.17920/R dated 03.04.1992 of Government of Orissa in Revenue & Excise Department to Land Reforms Commissioner, Orissa, Cuttack the meaning of "endowment" is shown to be wide and includes properties held by Mathas as Marfatdars of Lord Jagannath. And according to above instruction of Government, claims under Section 6 & 7 of OEA Act by a recorded Marfatdar other than Shri Jagannath Temple Managing Committee in respect of estates of Lord Jagannath are not maintainable".

17. It was further concluded by the Board of Revenue that

> "during any sale transaction of land the onus lies on the vendee to verify the ownership of vendor of that land and to obtain all relevant documents o such ownership from the vendor for mutation purposes. But it is seen that the Petitioners have not substantiated their claim in the revision petition through relevant documents regarding the order passed in 1926 in the appeal case filed by the Mahanta before the Hon'ble Privy Council and the permission granted by the District Judge in 1931 to the lessor for executing permanent lease deed No.2952 dated 31.07.1931 in favour of present Opposite Party No.3. As such, the Petitioner's claim of having right, title and interest on the suit property is not proved for want of substantiation."

18. It must be mentioned here that while directing notice to be issued in the present writ petition on 27th March 2012, status quo was ordered in respect of the properties in question.

19. This Court heard the submissions of Mr. D.P. Mohanty, learned counsel for the Petitioners and Mr. Debakanta Mohanty, learned Additional Government Advocate (AGA) appeared for the State and Mr. Subrat Satpathy, learned counsel appeared for Opposite Party No.1.

Submissions of counsel for the Petitioners

20. Mr. D.P. Mohanty, learned counsel for the Petitioners submitted that the claims of the present Petitioners had not been considered in the proper perspective. He claimed that the permanent lease was granted in favour of the vendor of the Petitioners as early as 1931 by which date neither the OEA Act nor the Orissa Hindu Religious Endowments Act, 1939 (OHRE Act) repealed by the OEA Act had come into operation. Since the property had been leased out by the ex-intermediary in favour of the Jagannath Puri Gosala i.e., the

vendor of the Petitioners much prior to the date of estate, the vesting of the property under Section 3A of the OEA Act can have no effect on the lease hold property.

21. Mr. Mohanty submitted that Opposite Party No.3 should automatically be treated as a Stitiban tenant under the State under Section 8 of the OEA Act. He submitted that such a record was in fact published but the only irregularity was that instead of describing Opposite Party No.3 i.e. the Gosala as Stitiban (permanent tenant) status was described as 'Bebandobast'. According to him, the Tahasildar should have corrected the said irregularity by fixing a fair rent in favour of the recorded owner.

22. Mr. Mohanty further submitted that the Math in question was never declared as a trust estate under Section 13 E of the OEA Act and that there was no basis for such a conclusion. He questioned the *locus standi* of Opposite Party No.1 to file an application for settlement of the property under Sections 6 and 7 of the OEA Act. It was also barred by limitation. According to him, merely because the status of the property was described as 'Amrutamanohi' in the settlement ROR of 1899, it did not ipso facto give a right to Opposite Party No.1 that too after long lapse of 90 years to get itself settled under Sections 6 and 7 of the OEA Act.

23. Mr. Mohanty referred to the fact that the recorded owner Badasantha Matha of Markandeswar Sahi Town Puri was an intermediary recorded under Serial No.13356 of Register D of the Puri Collectorate and leased out the disputed property to the Puri Gosala as early as 1931. He maintained that Opposite Party No.1 had no interest in the property in question.

Submissions of counsel for the Opposite Parties

24. Countering the above submissions, both Mr. Debakanta Mohanty, learned AGA and Mr. Subrat Satapathy, learned counsel submitted that once it was clear that the land in question was the 'Amrutamanohi' of Sri Jagannath Mahaprabhu, it automatically vests in the Temple in terms of Section 5 of the Shri Jagannath Temple Act. Even the recital in the registered lease deed 2952 reveals that the suit land belongs to 'Amrutamanohi' of Sri Jagannath Mahaprabhu Bije Puri.

25. Counsel for the opposite Parties pointed out that a perusal of the notification dated 14th September 1963 revealed that D.R. No.13356/A-47

had been declared by the Tribunal as trusted estate under Section 13E of the OEA Act. The so-called permission obtained from the Court for execution of the lease deed by Niladri Sahu was non-existent. Leaned counsel for the respective Opposite Parties therefore submitted that the judgment of the Supreme Court in ***Sri Jagannath Temple Managing Committee v. Siddha Math*** (supra) was a complete answer to all the contentions of the learned counsel for the Petitioners.

Analysis and Reasons

26. The above submissions have been considered. The history of the vesting of the properties of Lord Jagannath Mahaprabhu Bije Puri can be traced back to the notification dated 18th March 1974 issued by the Government of Odisha under Section 3-A of the OEA Act. This was the subject matter of the decision of the Supreme Court in ***Lord Jagannath v. State of Orissa*** (supra).

27. In ***Sri Jagannath Temple Managing Committee v. Siddha Math*** (supra), the Supreme Court again traced this complete history and explained as under:

> "21.xxx The OEA Act, 1951 was enacted to provide for the abolition of all rights, title and interest in the land of intermediaries and vesting the same in the State. The Act was thus meant to abolish the interest of the intermediaries in the land. A Constitution Bench of this Court, upholding the constitutional validity of the Act in the case of *K.C Gajapati Narayan Deo & Ors. v. State of Orissa AIR 1953 SC 375* held as under:
>
> "The primary purpose of the Act is to abolish all zamindari and other proprietary estates and interests in the State of Orissa and after eliminating all the intermediaries, to bring the ryots or the actual occupants of the lands in direct contact with the State Government. It may be convenient here to refer briefly to some of the provisions of the Act which are material for our present purpose. The object of the legislation is fully set out in the preamble to the Act which discloses the public purpose underlying it. Section 2(g) defines an "estate" as meaning any land held by an intermediary and included under one entry in any of the general registers of revenue-paying lands and revenue-free lands prepared and maintained under the law for the time being in force by the Collector of a district. The expression "intermediary" with reference to any estate is then defined and it means a proprietor, sub-proprietor, landlord, land-holder... thikadar, tenure-holder, under-tenure-holder and includes the holder of inam estate, jagir and maufi tenures and all other interests of similar nature between the ryot and the State. Section 3 of the Act

> empowers the State Government to declare, by notification, that the estate described in the notification has vested in the State free from all encumbrances. Under section 4 it is open to the State Government, at any time before issuing such notification, to invite proposals from "intermediaries" for surrender of their estates and if such proposals are accepted, the surrendered estate shall vest in the Government as soon as the agreement embodying the terms of surrender is executed. The consequences of vesting either by issue of notification or as a result of surrender are described in detail in section 5 of the Act. It would be sufficient for our present purpose to state that the primary consequence is that all lands comprised in the estate including communal lands, non-ryoti lands, waste lands, trees, orchards, pasture lands, forests, mines and minerals, quarries rivers and streams, tanks, water channels, fisheries, ferries, hats and bazars, and buildings or structures together with the land on which they stand shall, subject to the other provisions of the Act, vest absolutely in the State Government free from all encumbrances and the intermediary shall cease to have any interest in them."

28. The insertion of Section 2(oo) by the amendment of 1974 was disapproved by the Supreme Court in ***Sri Jagannath Temple Managing Committee v. Siddha Math*** (supra). It set aside the settlement of land belonging to the Temple in favour of various Maths as Marfatdars of Sri Jagannath Mahaprabhu Bije Puri and held this to be in violation of Shri Jagannath Temple Act, 1955. The Supreme Court went to the extent of holding that there was no need for the Temple Committee to file a claim proceeding under Section 8A of the OEA Act in respect of its own lands which were already vested in it under Section 5 of the Temple Act of 1955. It was categorically held "the suit land vests in the temple committee itself".

29. The upshot of the discussion in ***Sri Jagannath Temple Managing Committee v. Siddha Math*** (supra) is that with the land already being recognized as having "Amrutamanohi" status there was nothing more to be done as far as Opposite Party No.1 was concerned. The registered lease deed itself recognized this status. The suit land vested on 18th March 1974 and is governed by the Shri Jagannath Temple Act, 1955.

30. As rightly pointed out concurrently by the Tahasildar, the ADM and the Board of Revenue, there was no basis for Niladri Sahu to have executed the permanent lease deed. There was no valid title to be conveyed by the Jagannath Puri Gosala in favour of the present Petitioners. The registered sale deeds were, therefore, void ab initio. Section 5 of the Shri Jagannath Temple Act is categorical and therefore any attempt to convey title contrary thereto cannot have any validity in the eye of law.

31. Consequently, the Court is satisfied that no error has been committed in the concurrent orders of the Tahasildar, the ADM and the Board of Revenue. The present writ petition is without any merit and is dismissed as such with no order as to costs. The interim orders passed by this Court stand vacated.

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2022 (II) ILR - CUT- 16

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

AHO NO. 34 OF 2000

ORISSA STATE HOUSING BOARD, BHUBANESWAR ……..Appellant

.V.

SEBATI DEI @ ROUTRAY (SINCE DEAD) REPRESENTED BY HER LRS. ……...Respondents

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 80 – Mandatory requirement of – The respondent No.1 impleaded State represented through Revenue Department as a party in the suit whereas the suit property is recorded in the name of G.A. Department – Whether the G.A. Department specifically need to be impleaded as a party? – Held, Yes – At a theoretical level it may be possible to contend that State of Odisha is one entity and all the department functioned as State of Odisha, the facts remains that in the matter of this nature unless the appropriate department is impleaded, it cannot be said that the suit against one department would tantamount to a suit against the other as well as the ex-parte decree cannot said to be binding on the G.A. department and consequently on the OSHB. (Para-29)

(B) FRAUD – It is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be judgment or order in law.

Case Law Relied on and Referred to :-

1. AIR 1951 Ori. 327 : Maheswar Naik & Ors. Vs. Tikayet Sailendra Narayan Bhanj Deo.
2. AIR 1994 SC 853 : S. P. Chengalvaraya Naidu Vs. Jagannath.
3. AIR 1978 SC 1608 : State of Punjab Vs. M/s. Geeta Iron and Brass Works Ltd.

4. AIR 1969 SC 674 : Raghunath Das Vs. Union of India.
5. AIR 1960 SC 1309 : The State of Madras Vs. C.P. Agencies.
6. 2009 (12) SCC 378 : State of Orissa Vs. Harapriya Bisoi.
7. (2003) 8 SCC 319 : Rama Chandra Singh Vs. Savitri Devi.
8. (2007) 4 SCC 221 : A. V. Papayya Sastry Vs. Govt. of A.P.
9. (1956) 2 QB 702 : Lazarus Estates Ltd. Vs. Beasley.

For Appellant : Mr. Dayananda Mohapatra
For Respondents : Mr. G. M. Rath.

JUDGMENT Date of Judgment: 10.05.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal by the Orissa State Housing Board (OSHB), Bhubaneswar is directed against an order dated 19th November, 1999 passed by the learned Single Judge of this Court in First Appeal (FA) No.260 of 1997. By the said impugned judgment, the learned Single Judge set aside the judgment dated 7th August, 1997 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Original Suit (O.S.) No.333 of 1993-I filed by the present Appellant as a Plaintiff against the Respondent No.1/Defendant No.1 (who was the Appellant in FA No.260 of 1997).

Background facts

2. The aforementioned suit had been filed by the OSHB for a declaration of title in respect of land admeasuring Ac.7.500 decimal in District Khurda, Mouza Chandrasekharpur [which is now within the Bhubaneswar Municipal Corporation (BMC) limits] under Sabak Khata No.303, Plot No.218, out of a larger area of Ac. 184.018 dec of a 1931 settlement which corresponds to Sabak Khata No.472 Plot No.258 and which further corresponds to Hal Khata No.619 Plot No.258/2020 (hereafter 'the land in question').

3. The case of the Appellant is that the land in question was Kisam 'Jhati Jungle' as recorded in the Record of Rights (RoR). Initially in 1931, it belonged to one Sri Madhusudan Deb, the Raja of Patia and was subsequently vested in the State upon the coming into force of the Orissa Estate Abolition Act ('OEA Act'). It is stated that since no tenant induction document was filed, the State Government became owner and possessor of the land in question. Subsequently an order dated 4th January, 1954 was issued by the State Government whereby all Khasmahal lands were

transferred from the State Government to the Cabinet Department [initially termed as Political and Service (P and S) Department and later as G.A. Department (Respondent No.5)].Thus the G.A. Department had control over the land in question since 1954. It is claimed by the Appellant that during the 1974 settlement, the land in question was recorded in the name of the G.A. Department.

4. Subsequently, by Notification No.773/72 dated 25th November 1972, all the Government lands included in Bhubaneswar Tahasil were transferred to the management and control of Respondent No.5 including the land in Plot No.218. Later, Ac.31.982 decimal of land appertaining to Plot No.258 and 258/2020 was transferred to the Appellant under Allotment Order No.8318 on 29th April, 1989. The land was to be utilized by the OSHB for construction and sale of houses to individuals in the Lower Income Group (LIG) Housing Scheme. The OSHB was required to pay a premium of Rs.63, 96,400/- to the State Government within 60 days from the date of the aforementioned order. Possession of the land consequent upon demarcation of the allotted area was to be made only after payment of premium and execution of the lease deed. Respondent No.1 filed a writ O.J.C.No.3181 of 1989 before the Hon'ble High Court and obtained a stay of construction in Plot No.258/2020.

T.S. No. 5 of 1988

5. As far as Respondent No.1 is concerned, she filed Title Suit (TS) No.5 of 1988 as *informa pauperis* in 1986, vide Miscellaneous Case No.518 of 1986. That Miscellaneous Case 518 of 1986 was allowed on contest on 6th January, 1988. Thereafter, the plaint was formally registered and numbered as TS No.5 of 1988. The State of Orissa through its Secretary, Revenue Department, the Collector Puri and the Tahasildar, Bhubaneswar were all impleaded in the said Misc. Case. They were the Defendants in TS No.5 of 1988 as well. It is stated that by the time of institution of the aforementioned TS No. 5 of 1988, the land in question stood recorded in favour of the State of Orissa. By a judgment dated 10th January, 1989 of the Civil Judge (Senior Division), Bhubaneswar, TS No.5 of 1988 was decreed ex parte on 10th January, 1989 declaring the title of Respondent No.1 herein in the land in question and confirming her possession. The Defendants to the suit were permanently restrained from interfering with the Plaintiff's possession of the land.

6. After the passing of the decree, the Government of Orissa filed Misc. Case No.26 of 1989 under Order 9 Rule 13 CPC for setting aside the ex-parte order. Misc. Case No. 26 of 1989 was dismissed for non-prosecution on 11th July, 1990. To restore this application, another application under Section 151 of the CPC was filed being Misc. Case No.193 of 1990. This too was dismissed on 19th September, 1990.

7. According to Respondent No.1, in the year 1933, the Patia Estate/Zamindari was sold in execution of a mortgaged decree and, therefore, was purchased by the Raja of Kanika. The ownership of the Estate was therefore changed from Raja Madhusudan Deb to the Raja of Kanika. Respondent No.1 traced her title from the Patta granted in her favour by the ex-zamindar of Kanika, Shri Shailendra Narayan Bhanja deo. The Patta/lease was claimed to be executed in the prescribed form by the Raja and was exhibited in the trial Court, as Ext.1. It was claimed that after grant of the aforesaid lease, the Raja of Kanika was realizing rents from the Plaintiff-lessee i.e. Respondent No.1 herein. On the abolition of the Estate by the OEA Act, the Raja of Kanika is stated to have submitted an Ekpadia to the Anchal and on the basis of the said Ekpadia, a Tenants' Ledger was maintained by the Anchal (Local Revenue Office).

8. According to Respondent No.1, the fact of change in the proprietary title of the Patia Estate was noticed and recognized in a judgment of this Court in ***Maheswar Naik & others v. Tikayet Sailendra Narayan Bhanj Deo, AIR 1951 Ori. 327***. In addition thereto, in the subsequent revenue documents, it is stated that the name of Shailendren Narayan Bhanja deo, the Raja of Kanika,finds place as proprietor. The Raja of Kanika is stated to have paid the competition for the vesting of the Patia Estate.

9. The occasion for Respondent No.1 to file TS No.5 of 1988 was the settlement of 1973, whereby the leasehold land in question was recorded in favour of the State of Orissa. Therefore, the aforementioned TS No.5 of 1988 was filed for a declaration of the right, title and interest, and confirmation of possession of Respondent No.1. It is stated that pursuant to the ex parte decree dated 10th January 1989, the RoR had been corrected to show the name of Respondent No.1 as the tenant of the suit land. She claimed to have been regularly paying rent to the local revenue authorities.

O.S. No. 333 of 1993-I

10. More than 3 years after the decreeing of TS No.5 of 1988, the OSHB filed O.S. No.333 of 1993–I in the court of the same Civil Judge (Senior Division), Bhubaneswar against Respondent No.1 as a Defendant. The Revenue Department, the Collector, Puri, the Tahasildar, Bhubaneswar and even the GA Department were all impleaded as proforma Defendants. The main reason for OSHB preferring the aforementioned suit was that when it took possession of the land on 29th April 1989, Respondent No.1 had filed a writ petition being O.J.C.No.3181 of 1989.

11. OSHB claimed that it was only after the filing of the above writ petition, did it come to know that Respondent No.1 had obtained an *ex-parte* decree in TS No.5 of 1988 to which the GA Department had not been made a party. It was alleged that Respondent No.1 had by suppressing several material facts and documents fraudulently obtained an *ex-parte* decree ignoring the real owner i.e. GA Department of the Government of Orissa. It was accordingly contented that the decree in TS No.5 of 1988 is a void one and would not affect the right, title and interest of the GA Department as well as the OSHB in any manner.

12. Resisting the above suit, Respondent No.1 questioned its maintainability, on the ground that it was barred by the principles of *res judicata*.It was contended that all the Government land of Chandrashekharpur was included within the area of the Bhubaneswar Notified Area Council in 1972 and all the Government land in Bhubaneswar Tahasil was transferred to the GA Department. Accordingly, it was pointed out that the suit land was never transferred to the GA Department. Even when in the 1974 settlement the suit land was recorded in the name of the GA Department, the note of the possession of Respondent No.1 had been recorded in the RoR in view of her continuous possession thereof since 1942.

Judgment of the trial Court

13. The trial Court, which decided O.S. No.333 of 1993–I by the judgment dated 7th August 1997, framed as many as 11 issues including one whether the suit was barred by the principles of res judicata and most importantly, whether the decree passed in TS No.5 of 1988 was void and not binding on the OSHB as well as the GA Department. This issue was taken up first for decision by the trial court.

14. The trial Court agreed with the Plaintiff that the circumstances under which the *ex parte* decree was obtained in TS No.5 of 1988 showed that the decree was fraudulently obtained and that it was void and not binding on the OSHB as well as the GA Department. In coming to the above conclusion, it was held that the entire Plot 258 (Sabik Plot 218) was to an extent of 184.19 decimal of which the land in question was to an extent of Ac.7.50 decimal. Respondent No.1 had claimed, in TS No.5 of 1988, title based on the Hata Patta. On perusal of the said document (Ext.1), it appeared that Ac.7.50 decimal was leased out in favour of Respondent No.1 in Plot No.218, but the boundary, and other description and sketch map were not mentioned in the document.

15. Further, it was noted that in TS No.5 of 1988, Respondent No.1 had only proved the Hata Patta, two rent receipts and the order of the settlement officer in Appeal Case No. 481 of 1988. Thus, according to the trial Court, Respondent No.1 had suppressed the above material documents and obtained the decree without making the GA Department a party. It was further noted that Respondent No.1 had, in O.J.C. No. 3181 of 1989 filed in this Court, included the order dismissing OEA Case No.95 of 1983 due to default on 10th December, 1985. It was sought to be contented by the OSHB that had the trial Court while deciding TS No.5 of 1988 been made aware of the *ex parte* dismissal of OEA Case No. 95 of 1983, then the suit might never had been decreed.

Impugned order of the Single Judge

16. Aggrieved by the above decree, Respondent No.1 filed FA No. 260 of 1997 before the Single Judge. The findings in the impugned order dated 19th November, 1999 of the learned Single Judge were as under:

(i) As per the requirement of section 80 CPC and Order XXVII CPC, the State Government is to be represented through Secretary. Since the State Government was represented through the Secretary, Revenue in TS No.5 of 1988, it could not be said that the State Government had not been properly represented. Moreover, the Collector of the district is also considered to be a representative of the State and he had been impleaded as Defendant No.2.

(ii) It was not the case of OSHB that notice to Defendants 2 to 4 i.e. the Revenue Secretary, the Collector and the Tahasildar had been suppressed in

the suit. On the other hand, there was no explanation on the side of the aforementioned three Defendants or even GA Department which was espousing the cause of the OSHB regarding the steps taken or not taken by the parties in the earlier suit. That *ex parte* decree was within the knowledge of all concerned as was evident from the averments in O.J.C. No.3181 of 1989.

(iii) Therefore, merely because the GA Department had not been impleaded as a party as such in the earlier suit, it could not be said that the decree is not binding on the State, which had been represented through the Revenue Secretary or the Collector. The earlier decree was therefore binding on all concerned including the Plaintiff, who claimed to be a subsequent lessee;

(iv) Even otherwise, the title of Respondent No.1 over Ac.7.50 decimal of land had been found on the basis of the admitted fact that the lease had been executed by the ex-zamindar in her favour in 1942. Subsequently, *Ekpadia* had been submitted indicating her name in tenants' role as was evident from Exts.A and C. Since she was a tenant in respect of the land in question prior to vesting, under section 8 (1) of the OEA Act, she continued on the same terms and conditions under the State Government. The mere dismissal of OEA Case No. 95 of 1983 for default cannot have the effect of negate the right of Respondent No.1 since that application was essentially administrative in nature;

(v) The learned single judge then commented on the finding of the trial Court that while the Plaintiff i.e. Respondent No.1 herein had laid claim over the plot No.258/2020, the description of the land in question in the decree was different. The learned Single Judge observed that if there was any discrepancy in the plaint on the one hand and the judgment in decree on the other, it cannot be raised in the collateral proceedings to impugned the validity of the earlier judgment or decree.

The present appeal

17. Assailing the above order of the learned Single Judge in FA No.260 of 1997, the above appeal has been filed in this Court by the OSHB. Initially, on 18th September, 2001 the present appeal by OSHB was dismissed by the Division Bench (DB) of this Court by an order dated 18th September, 2001.

The DB was of the view that the decision in the earlier suit i.e. TS No.5 of 1988 operated as *res judicata*. That *ex parte* decree was within the knowledge of all concerned as was evident from O.J.C. No.3181 of 1989. The DB simply noted "We have perused the impugned judgment and do not find any illegality therein."

18. The above order of the DB was set aside by the Supreme Court by the order dated 4th August 2003 in Civil Appeal No. 5515 of 2003 filed by the OSHB. The said order reads as under:

> "Heard learned counsel for the parties.
>
> Leave granted.
>
> The High Court of Orissa has dismissed the Letters Patent appeal only on the ground that an *ex-parte* decree obtained in an earlier suit would operate as *res judicata.* In our view this reasoning cannot be sustained as the suit was filed for a declaration that the earlier decree was null and void. We, therefore, set aside the impugned judgment and remit the matter back to the High Court for disposal on merits. As this is an old matter, we request the High Court to dispose of this case, as expeditiously as possible, in any case within a period of one year.
>
> The appeal is disposed off accordingly. No order as to costs."

19. Consequently, it has been argued on behalf of the OSHB that the point regarding *res judicata* would no longer be available to be argued by Respondent No.1 in the present case. This Court, therefore, proceeds to examine all the other issues arising from the order of the learned Single Judge.

Submissions on behalf of OSHB

20. On behalf of the OSHB, Mr. Dayananda Mohapatra, learned counsel made the following submissions:

(i) Respondent No.1, who had filed O.J.C. No.3181 of 1989 against the OSHB and Respondent Nos.2 to 5 praying for an injunction not to take any recourse to construction work, subsequently withdrew the writ petition and this led the OSHB to filing a suit i.e. O.S. No.333 of 1993–I where it assailed the decree granted in favour of Respondent No.1 in TS No.5 of 1988. OSHB also challenged the genuineness of the alleged Hata Patta, Ekpadia and the status of the intermediary i.e. the ex-landlord.

(ii) Respondent No.1 had in her plaint noted the subsequent transfer of land to the GA Department, but she referred to the note of possession as reflected in Ext.3 over suit plot No.258/2020. Defendant No.5 in the suit was Respondent No.5 in the appeal. It was earlier the P and S Department. It filed a written statement with the specific contention that consequent upon vesting of the entire land in the Government and the recording made during the 1974 settlement (Ext.2) and the 1988 Settlement (Ext.3), the Department was the owner of the land.

(iii) Respondent No.5 also referred to the filing of OEA Case No.95 of 1983 by Respondent No.1 before the OEA Collector claiming right, title and interest over the schedule property and her not succeeding in doing so. Respondent No.5 also referred to the discrepancy in recording of the note of possession in Ext.3, which was conspicuously silent in Ext.2 i.e. the RoR prepared on 1st April, 1974. It was also pointed out that the Hata Patta refers to Plot No.258 in Sabak Khata No.303 but the said plot was assigned during 1974 Settlement (Ext.2). Prior to 1974, the schedule plot corresponded to Sabak Plot No.218 (Ext.1). This fact itself indicated that the Hata Patta referred to in Ext.A is a subsequent creation to grab the property.

(iv) The consequence of not impleading the GA Department as a necessary party meant that the judgment passed in the earlier suit T.S. No. 5 of 1988 does not bind the GA Department any more. The GA Department being the rightful owner, allotted the land to the OSHB under Ext.4.

(v) In view of the judgment of the Supreme Court setting aside the earlier order passed by this Court in the present appeal, the question of the present proceedings being barred by the principles of res judicate does not arise.

(vi) It was revealed from Ext.5 i.e. the order of the Settlement Authority arising out of the objection filed by the Respondent No.1 to impleading the GA Department as a party that Respondent No.1 was aware that the GA Department was a necessary party. The suit was filed in 1988 whereas the aforementioned proceedings commenced from 24th December, 1987. Deliberately, therefore, Respondent No.1 did not implead GA Department as a party. Reliance is placed on the decision of the Supreme Court in ***S. P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853*** to urge that this amounts to a fraud.

(vii) The *informa pauperis* application of the Respondent No.1 i.e. Misc Case No. 518 of 1986 was disposed of by the trial Court on 6th January, 1988. Prior to this, Respondent No.1 had filed a Settlement Misc. Case No.181 of 1987, which was subsequently converted into Appeal No.481 of 1988. In those proceedings, Respondent No.1 had impleaded the GA Department as a party and the said proceedings commenced from 24th December, 1987. It was disposed of on 13th June, 1988 i.e. much prior to the institution of the suit. Therefore, Ext.5 showed that the Respondent No.1 was aware of the ownership of the GA Department so far as the property in question was concerned, but deliberately did not implead it.

(viii) The learned Single Judge referred to service of notice under Section 80 CPC on the Collector and the Secretary, Revenue Department and held that this was binding on the GA Department. Ext.3 refers to land recorded in the name of GA Department as per Rule 21 of the Odisha Survey and Settlement Rules, 1962. Once the GA Department has been recorded as the owner of the land neither the Collector nor the Secretary is competent to represent the GA Department save and except a Secretary to the GA Department. Consequently, the finding of the learned Single Judge in this regard was not sustainable in the eye of law.

(ix) The purpose of Section 80 CPC was to give the Government or the public officers sufficient notice so that they may consider the position and decide whether the claim of the Plaintiff should be accepted or resisted. The following decisions of the Supreme Court were referred to: ***State of Punjab v. M/s. Geeta Iron and Brass Works Ltd. AIR 1978 SC 1608, Raghunath Das v. Union of India AIR 1969 SC 674 and The State of Madras v. C.P. Agencies AIR 1960 SC 1309.*** Mere service of notice under Section 80 CPC on other Departments cannot be construed as service on the true owner i.e. GA Department.

(x) Ext.A viz., the Hata Patta relied upon by Respondent No.1 could not be a document of title. A plain examination of said Hata Patta would reveal that it was created at a subsequent point in time in order to grab the property of the GA Department. The following features of the said Hatta Patta would prove that it was fabricated:

(a) Though it refers to permanent lease, it is not a registered one as required under Section 17 of the Indian Registration Act. The decision of the Supreme Court reported in State of Orissa v. Harapriya Bisoi (2009) 12 SCC 378.

(b) It was not issued by the Intermediary and does not contain the signature of the Ex-Landlord.

(c) Swapneswara Mishra, who issued such Hata Patta, is not the owner of scheduled property. The authority of Sri Mishra has not been pleaded or proved.

(d) The said Swapneswara Mishra or the intermediary was not a party in the T.S.No.5 of 1988 and were not examined as witnesses.

(e) The original ROR of the year 1931 prepared under Odisha Tenancy Act refers to Khata No.303 plot no.218 area 184.18 of Kissam Jhata Jungle. Though the Hata Patta said to have been issued in the year 1942, it refers to Khata No.303 and Plot No.258. The said plot no.258 was introduced for the first time during settlement in the year 1974 (Exhibit-2). This proves that, "Exhibit-A" i.e. the Hata Patta was created/fabricated after the Hal settlement ROR issued in the year 1974. This itself proves the fraud committed by the Respondent No.1 before the Court relying upon created documents.

(f) Though the aforesaid Hata Patta refers to permanent lease of Ac 7.5 dec out of total area of Ac 184.18 dec, there is no sketch map attached to identify the alleged lease land out of the vast area.

(g) Exhibit-A (Hata Patta) reveals the seal which shows the name of Sailendra Narayan Bhanja Deo whereas Exhibit-B (the rent receipt given by the landlord and Exhibit-B/1 the alleged Ekpadia) refers to name of Rajendra Narayan Bhanj Deo.

(h) Exhibit-A does not show the boundary of the lease hold land, Exhibit-B shows the name of Kila as "Gadaken" whereas the suit land is in Kila "Patia".

(i) Exhibit-B rent receipt said to have been received by Ex Landlord does not show any date of payment of the rent. Year of printing of Exhibit-B was covered by pasting in white paper. The printed SAL (Odia Calendar Year) was over written as 1349 erasing the original reference of SAL No.1352. It shows pre-dating of the year.

(j) Exhibits A, B, B-1 and C were not referred to in T.S. No.05 of 1988 and/or before the settlement Authority in Appeal No.481 of 1988 (Exhibit-5).

For the first time those documents saw the light of the day while produced in the present suit.

(k) A cumulative assessment of the above facts would show that these are all subsequent creation including Exhibit-C.

(xi) Prior to filing of the suit and settlement appeal vide Ext.5, Respondent No.1 had filed OEA Case No. 95 of 1983 impleading State of Orissa as a party. The same was dismissed for default. The creation of tenancy was also negatived in Ext.5. Once Respondent No.1 had resorted to an OEA proceeding, she could not have maintained the suit as it was barred under Section 39 of the OEA Act.

(xii) Next, it was submitted that the claim of tenancy was raised 35 years after vesting of the Estate. At no point in time, had the OEA Collector recognized Respondent No.1 as tenant or accepted the rent. All of the above facts pointed out to the creation of the exhibits subsequently with the help of certain government officials. Reference was made to the judgment of the Supreme Court in ***State of Orissa v. Harapriya Bisoi, 2009 (12) SCC 378*** about a massive fraud to grab valuable property situated in the city of Bhubaneswar. Accordingly, it was submitted that the above facts would show the nature of fraud, creating documents and suppressing production of documents and, therefore, the learned trial Court had rightly passed the judgment and decree against Respondent No.1.

(xiii) The plaintiff-OSHB had produced Ext.17, the agenda of a Board Meeting of the OSHB held on 8th January, 1991, Ext.17/a (Memorandum) and Ext.18 (proceeding approved by the Chairman) in support of the construction of the houses and handing over of LIG houses to the GA Department (Ext.29). Ext.27 (letter dated 29th December, 1993), Ext.28 (letter dated 28th August, 1996) and Ext.L (the advance notice issued by Respondent No.1 admitting the possession of Appellant), Ext.6/b (copy of the writ petition and its contentions in paras-13 and 14), the Ext.8 (the withdrawal memo filed by Respondent No.1 withdrawing the writ admitting to the possession of the Appellant). All of these documents support the case of the Plaintiff that it was the GA Department which was the rightful owner and possessor of the suit land and it was the GA Department that throughout was in possession of the schedule property and its project had been constructed over the schedule property. The reversal of the well reasoned

judgment of the trial Court would jeopardize all the above constructions, and the flats and title thereto of the persons, who had been allotted those flats.

Submissions on behalf of Respondent 1

21. In reply to the above submissions, Mr. G.M. Rath, learned counsel appearing on behalf of Respondent No.1 submitted as under:

(a) The entire case of the Appellant is based on a letter of allotment dated 29th April, 1989 of the Government of Orissa in the GA Department whereunder an area of approximately Ac.31.882 decimal in Mouza Chandrasekharpur (now within the BMC limits) was stated to have been allotted in favour of OSHB for construction and sale of houses. It is submitted that such letter does not and cannot constitute a document of title. It simply proposed that the land would be leased in favour of OSHB subject to compliance by the OSHB of the terms and conditions stated therein whereupon a lease deed was to be executed in favour of the OSHB.

(b) In terms of such order, OSHB was required to pay premium of Rs.63,96,400/- within 60 days from the date of the order and get the lease deed executed in his favour. Possession of the land consequent upon demarcation was to be made only after payment of premium and execution of the lease deed aforesaid. Referring to the deposition of Plaintiff's Witness No.1 in para 27, it is pointed out that this condition had perhaps not been complied with. The said witness is supposed to have said as under:

> "…. The suit land was allotted to the State Housing Board subject to the condition that the housing board will enter into an agreement of lease on payment of premium to the Government. There is no order of the Government relaxing this condition. The state Housing Board has not yet entered into any agreement and has not paid the premium till today."

(c) OSHB had not pleaded or proved any other source of title and letter of allotment other than Ext.4 (the letter dated 29th April, 1989). With the conditions therein not having been complied with, the factual and legal presumption had to be that the allotment stood cancelled and, therefore, OSHB had no locus standi to file the suit or the present appeal.

(d) As regards the *ex parte* decree in TS No.5 of 1988 for declaration of title in favour of Respondent No.1, it is submitted that Misc. Case No.518 of 1986

was allowed on contest on 6th January, 1988 and Respondent No.1 was allowed to sue *informa pauperis*. The Opposite Parties in the said Misc. Case were the State of Orissa through the Secretary, Revenue Department, the Collector, Puri and the Tahasildar, Bhubaneswar and they therefore continued as Defendants in TS No.5 of 1988. By this time, the suit land stood recorded in favour of the State of Orissa. Respondent No.1 exhibited the RoR as Ext.2. Therefore, the institution of TS No.5 of 1988 against the Revenue Department was perfectly legitimate and in accordance with law. The mere fact that subsequently there was a transfer of the land by the Revenue Department to the GA Department would not affect the constitution of the suit or its result. Reference is made to the deposition of P.W.1 before the trial Court where he stated as under:

> "Government is the owner of all khas mahal and other Government lands. For proper utilization and maintenance different Government and khas mahal land are kept in charge of different departments from time to time. Collector of the District or a Secretary of the Government represents the Government in all litigations relating to all such properties as per Section 80 CPC."

It is accordingly submitted that in TS No.5 of 1988, the State Government was properly represented.

(e) The GA Department in whose favour the land was assigned during the pendency of the suit could not therefore avoid the decree on the plea that it was not a party to the suit. It was bound by the ex parte decree and, therefore, the subsequent transferee i.e. OSHB was equally bound by it.

(f) It could not be said that the Government of Odisha was not aware of the *ex parte* decree in TS No.5 of 1988 dated 10th January, 1989. The Government itself had filed Misc. Case No.26 of 1989 under Order 9 Rule 13 of the CPC for setting aside the *ex parte* decree. This was dismissed for non-prosecution on 11th July, 1990. An application being Misc. Case No.193 of 1990 to restore the said Misc. Case No.26 of 1989 was also dismissed on 19th September, 1990. The above sequence of events demonstrated that Government of Odisha was at all times fully aware of the *ex parte* decree. The subsequent suit being O.S. No.333 of 1993–I was clearly, therefore, barred in law.

(g) Respondent No.1 derived her title from the patta granted by the ex-Zamindar of Kanika, Shri Shailendra Narayan Bhanja Deo. The said

patta/lease was in the prescribed form of the Raja, which had been proved as Ext.A in the lower Court. This document was also filed and proved in TS No.5 of 1988 and marked as Ext.1. After the grant of the lease, the Raja of Kanika realized rent from the plaintiff-lessee. Such payment of rent had been proved under Ext.B in O.S. No.333 of 1993–I. These were also exhibited in TS No.5 of 1988 as Exts.2 and 3. On abolition of the Estate, the landlord i.e. the Raja of Kanika submitted an Ekpadia to the Anchal and on the basis of the said Ekpadia, Tenants' Ledger was maintained by the Anchal. Ext.C was the certified copy of the Ekpadia obtained from the office of the Tahasildar.

(h) OSHB has tried to build a case contrary to facts by alleging that the Raja of Kanika had no right to grant any lease in favour of Respondent No.1. It is explained that the Patia Estate originally belonged to Raja Madhusudan Deo. In 1933, the Patia Estate/Zamindari was sold in execution of a mortgaged decree and was purchased by the Raja of Kanika. This fact of change in the proprietary title of the Patia Estate was noticed by the Orissa High Court in a judgment reported in ***Maheswar Naik v. Tikayet Sailendra Narayan Bhanj Deo*** (supra). In addition thereto, in the subsequent revenue papers the name of Raja of Kanika i.e. Sri Shailendra Narayan Bhanja Deo also finds place as proprietor. This is borne out by the official gazette of the State of Orissa published at the time of vesting of the Estate/Zamindari and the same has been exhibited as Ext.M. The Raja of Kanika also paid compensation for the vesting of the Patia Estate. The compensation assessment order was exhibited as Ext.N. In the premises, the status of Raja of Kanika as proprietor of Killa Patia is beyond dispute.

(i) In the above circumstances, when in the Hal Settlement the leasehold land of Respondent No.1 was erroneously recorded in favour of the State of Odisha, Respondent No.1 had filed TS No.5 of 1988 for declaration of right, title and interest and confirmation of possession. When attempts at having the ex parte decree set aside failed, it became final and was binding on all the parties including the GA Department and its successor-in-interest i.e. the OSHB. The RoR showing the name of Respondent No.1 as tenant was exhibited as Ext.H. It is stated that subsequent thereto, the local revenue office authorities have been regularly receiving the rent from Respondent No.1. One of the rent receipts was exhibited as Ext.J.

(j) The following conclusions were irrefutable:

(i) The Patia Estate was sold to the Raja of Kanika in execution of mortgage decree in 1932-33 and therefore the Raja of Kanika became the proprietor of Killa Patia.

(ii) The Raja of Kanika settled the suit land in favour of the Respondent no.1 herein in the year 1942, pursuant to which the said Respondent became a tenant in respect of the suit land.

(iii) Upon such vesting, the Raja of Kanika submitted an ekpadia (list of tenants) showing the name of Sebati Dei (Respondent No.1) as one of the tenants (tenant in respect of the suit land) on the basis whereof the Tenants Ledger was prepared and maintained by the local revenue office.

(iv) Ignoring such Rent Roll, he suit land was recorded in favour of the State of Odisha in the Hal Settlement Khatian and it is this that led Respondent No.1 Sebati Dei (the tenant) to tile Title Suit No.5 of 1988 for declaration of her title, confirmation of possession and other consequential relief. This suit was decreed as aforesaid on 10th January,1989 and repeated attempts to set aside the said ex parte decree proved abortive.

(v) During the pendency of the suit aforesaid, Government of Odisha in the Revenue Department administratively transferred the land to the GA Department. It is submitted that if such department-wise allocation of Government land is treated/considered as assignment, the GA Department being a pendente lite assignee/transferee is bound by the decree passed against the State Government of Odisha in Title Suit No.5 of 1988.

(vi) After the decree dated 10th January, 1989 in T. S 5 of 1988, the name of Respondent No.1 has been incorporated in the Khatian and she has been paying rent to the Government.

(k) It is accordingly submitted that the well reasoned order of the learned Single Judge calls for no interference and the appeal ought to be dismissed.

Is the subsequent suit of the OSHB barred by res judicata?

22. In the first place, the Court would like to deal with the issue whether the *ex parte* decree in TS No.5 of 1988 would constitute *res judicata* as far as

the OSHB filing the subsequent suit i.e. O.S. No.333 of 1993–I in the Civil Court?

23. As already noticed, the Supreme Court set aside the order dated 18th September, 2001 of this Court dismissing the present appeal primarily on the ground that the present suit filed by the OSHB was to declare the earlier decree to be unlawful and, therefore, it could not be barred by the principle of res judicata.

24. Consequently, the conclusion as far as this issue is concerned has to be in favour of the OSHB and against Respondent No.1. In other words, the mere fact that there was an *ex parte* decree in TS No.5 of 1988, which the State of Odisha unsuccessfully tried to have set aside, would not bar the OSHB from maintaining O.S. No.333 of 1993–I in the Civil Court. Consequently, the entire edifice of the argument - that the Government of Odisha had filed a Misc. Case under Order 9 Rule 13 CPC to have the *ex parte* decree set aside, and that the said Misc. Case itself stood dismissed for non-prosecution and that the application to restore it also stood dismissed - would make no difference to the settled position as far as the present case is concerned that *ex parte* decree in TS No.5 of 1988 would not come in the way of OSHB maintaining O.S. No.333 of 1993–I.

Locus standi of OSHB to institute the subsequent suit

25. The next issue to be considered is the locus standi of OSHB to institute the subsequent suit O.S. No. 333 of 1993-I. While it is true that OSHB is seeking to establish its title by the allotment of the land in favour of the GA Department through the letter dated 29th April 1989, the fact of the matter is that Respondent No.1 appears to have been aware of this development even when she filed TS No.5 of 1988. It is not correct on the part of the counsel for the Respondent No.1 to contend that transfer of the land in favour of the GA Department was a development subsequent to the filing of TS No.5 of 1988.

26. It now transpires that this development had taken place even earlier. There are two settlements in the present case, which are critical. One is the settlement of 1974 and the next is the settlement of 1988. Even before TS No.5 of 1988 was filed, Respondent No.1 had filed OEA proceedings. What is unable to be disputed by Respondent No.1 is that the said OEA

proceedings was dismissed in default. It commenced on 24th December, 1987 and was disposed of on 13th June, 1988. This was initiated as Settlement Misc. Case No.181 of 1987 and was subsequently converted to Appeal No.481 of 1988. In this settlement proceedings, Respondent No.1 had herself impleaded the GA Department as a party and this is evident from Ext.5. Therefore, Respondent No.1 was clearly aware of the ownership of the GA Department so far as scheduled property is concerned. The fact that by the letter dated 29th April, 1989 the land in question was allotted in favour of the GA Department formally by the Government would make no difference to the fact that the Respondent No.1 acknowledged the GA Department to be the rightful owner of the suit land even prior to filing of TS No.5 of 1988. There is merit in the contention of the OSHB that for the reasons not explained by Respondent No.1 despite being aware of the above development, she chose not to implead GA Department as a party in T.S. No. 5 of 1988.

27. The learned Single Judge in discussing the requirement of a prior notice under Section 80 CPC appears to have overlooked the above important development. If indeed Respondent No.1 herself had initiated OEA proceedings, and was unsuccessful in those proceedings, and did not carry the matter any further in that direction, she could not have, while instituting TS No.5 of 1988, dropped the GA Department as a party to the suit. Thus, it appears to be a deliberate suppression by her of a material fact. The following observations in ***S. P. Chengalvaraya Naidu*** (supra) are relevant in this context:

> "5.xxx.The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One, who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.
>
> 6. xxx Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the Court. We don't agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B 15 and non-suited the plaintiff. A litigant, who approaches the Court, is bound to produce all the documents executed by him

> which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party."

28. In view of the above facts, OSHB was well within its rights to institute a suit to question the very validity of the decree in TS No.5 of 1988. That in fact was the main prayer in the suit.

The mandatory requirement of Section 80 CPC

29. There is merit in the contention of the OSHB that it was the GA Department, which should have been competent to answer the notice since it was the owner of the property. The decisions in ***M/s. Geeta Iron and Brass Works Ltd.*** (supra), ***Raghunath Das (supra) and*** C.P. Agencies (supra) bring out the object and the purpose of the 80 CPC. While at a theoretical level, it may be possible to contend that State of Odisha is one entity and all the Departments functioned as State of Odisha, the fact remains that in the matter of this nature unless the appropriate Department is impleaded, it cannot be said that the suit against one Department would tantamount to a suit against the other as well.

30. Since the ownership of the land in question is specifically recorded in the name of the GA Department representing the State of Odisha and not the Revenue Department, it becomes critical to implead the right Department in the suit. That not having been done, the *ex parte* decree in TS No.5 of 1988 cannot said to be binding on the GA Department and consequently on the OSHB.

The legal effect of the Hata Patta

31. Turning now to the Hata Patta, there is no answer at all provided by Respondent No.1 to the various deficiencies pointed out in the Hata Patta. The background to the allegation of fraud in creation of records cannot be said to be unfounded. In ***Harapriya Bisoi*** (supra), the Supreme Court did take account of the massive fraud that was being committed in the matter of transfer of lands of the ex-intermediaries. In para 31 of the said judgment, it was observed as under:

> "31. It is the stand of the appellant State that the "hatapatta" on the basis of which Kamala Devi has claimed her title is an unregistered document. Section 107 of the

> Transfer of Property Act, 1882 (in short "the T.P. Act") read with Section 17 of the Registration Act,1908 mandates that the conveyance of title through a written instrument of any immovable property worth more than Rs.100 for a period of one year or more must be registered. If such an instrument is not registered then Section 49 of the Registration Act read with Section 91 of the Evidence Act, 1872 precludes the adducing of any further evidence of the terms and contents of such a document. (*See S. Sita Maharani v. Chhedi Mahto AIR 1955 SC 328*). There is a further requirement of registration of the instrument of conveyance/agricultural lease under Sections 15 and 16 of the Orissa Tenancy Act, 1913."

32. In the present case, also there was no occasion for the Civil Court to examine the validity of the Hata Patta particularly since the decree was ex parte decree with no one challenging the exhibits at the time of their being produced in evidence. There was no testing of those documents in the true sense. What is serious is that Ext.A, which reveals the seal and shows the name of Shri Shailendra Narayan Bhanja Deo is different from Ext.B, which is supposed to be the rent receipt given by the landlord, which refers to the name of Rajendra Narayan Bhanja Deo. The Hata Patta refers to a permanent lease of Ac 7.5 out of the total area of Ac184.18 dec, but there is no sketch map attached to identify the lease land out of the vast area.

33. There is also a problem with the reference to the Khata numbers and Plot numbers. The Hatta Patta issued in 1942 refers to Khata No.303 and Plot No.258 whereas the original RoR of 1931 refers to Khata No.303 and Plot No.218 with an area of 184.18 with the Kisam 'Jhati Jungle'. Therefore, there are serious doubts created about the Hata Patta documents themselves.

34. Also, there is no answer to the submission of Mr. Mohapatra appearing for OSHB that the year of printing of Ext. B was covered by pasting it in white paper. The printed SAL (Orissa Calendar year) was over-written as 1349 erasing the original reference of SAL No.1352. This revealed the predating of the year. Serious doubts have in fact been created over the validity of these documents, which had been relied upon in TS No.5 of 1988.

Fraud vitiates all transactions

35. There is also merit in the contention on behalf of the OSHB that fraud vitiates all transactions. ***Warrington, C.J. in Short v. Poole Corporation (1926) 1 Ch 66*** held that:

"No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative."

36. In ***Lazarus Estates Ltd. v. Beasley (1956) 2 QB 702*** Lord Denning, LJ. held:

"No judgment of a Court, no order of Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

37. In the same ***Lazarus*** case Lord Parker, C.J. added:

"'Fraud' vitiates all transactions known to the law of however high a degree of solemnity."

38. The Supreme Court of India reiterated the above settled principle in ***Ram Chandra Singh v. Savitri Devi (2003) 8 SCC 319*** where it was held thus:

"15. xxx. Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together.

16. xxx Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

25.Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

39. In ***A. V. Papayya Sastry v. Govt. of A.P. (2007) 4 SCC 221***, the Supreme Court observed: "21.Now it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law."

40. Once it is shown that the documents, which formed the basis of the claim in TS No.5 of 1988, are themselves doubtful and a nullity, the learned Single Judge could not have ignored these stark facts to set aside the well-reasoned judgment and decree of the trial Court.

41. Further, this Court finds that the various documents placed by OSHB on record about construction of houses and handing over of LIG flats to the GA Department, have not been accounted for. All of these show that the GA Department was in continuous possession of the land in question and has developed flats, which have been handed over and which are now under occupation of various flat owners (allottees). The impugned judgment of the learned Single Judge overlooks the consequences of reversing the decree of the trial Court and what that would mean for all the subsequent transactions that have taken place.

Conclusion

42. Consequently, this Court is unable to sustain the impugned judgment of the learned Single Judge and it is hereby set aside. The Judgment and decree of the trial Court decreeing O.S. No.333 of 1993–I in favour of OSHB is restored to file. The interim order is vacated. The LCR be sent back forthwith.

43. The appeal is allowed in the above terms with cost of Rs.10,000/-, which shall be paid by the LRs of Respondent No.1 to the OSHB within four weeks.

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

STREV NO. 276 OF 2008

M/s. UPHAR UDYOG, ROURKELA, SUNDERGARH ……..Petitioner

.V.

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

ORISSA SALES TAX ACT, 1947 – Section 23 (3) (c) r/w Rule 50 (3) of the Odisha Sales Tax Rules, 1947 – Whether the Sales Tax Tribunal has the jurisdiction to levy the enhance tax on the assessee in absence of cross objection filed by the state – Held, No. – The Tribunal has exceeded its jurisdiction by remanding the case to the ACST for enhanced Tax on the assessee, without any cross appeal filed by the Revenue. (Para-13)

Case Laws Relied on and Referred to :-

1. 1994 92 STC 28 : Shyamsunder Sahoo Vs. State of Orissa.
2. 2004 135 STC 385 : Tin Plate Company of India Limited Vs. State of Bihar.

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

For Opp. Party : Mr. S. S. Padhy, Addl Standing Counsel

JUDGMENT Date of Judgment: 19.05.2022

Dr. S. MURALIDHAR, C.J.

1. The present revision petition by the Assessee arises out of an order dated 8th June, 2007 of the Orissa Sales Tax Tribunal (Division Bench), Cuttack (Tribunal) in S.A. No.913 of 2002-03 for the year 1998-99.

2. While admitting the present revision petition on 9th May 2008, the following Questions were framed for consideration:

> (a) Whether in the fact and circumstances of the case, the learned Tribunal is erred in law by disallowing the tax exemption on sale of finished products manufactured by the industrial unit under the diversification scheme?
>
> (b) Whether in the facts and circumstances of the case, the order of enhancement of assessment passed by the Ld. Tribunal without compliance of the provisions of Rule-50 (3) of the Orissa Sales Tax Rules is lawful and valid?

(c) Whether in the fact and circumstances of the case, the learned Tribunal has committed error of jurisdiction or is erred in law while deciding issues which are not before him in the appeal filed by the Petitioner in absence of cross objection filed by the State?

3. This Court heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Counsel for the Petitioner and Mr. S. S. Padhy, learned Additional Standing Counsel for the Department-Opposite Party.

4. The background facts are that the Petitioner is a registered dealer under the Orissa Sales Tax Act, 1947 (OST Act) as well as the Central Sales Tax Act, 1956 (CST Act). The Petitioner is a registered Small Scale Industrial Unit (SSI Unit) in terms of the Industrial Policy Resolution (IPR), 1986. It was engaged in manufacture of steel almirahs, racks, tables, air coolers, cabinets. For this, it has been granted a permanent registration certificate by the District Industries Centre (DIC), Rourkela.

5. After coming into force of the IPR 1989, the Petitioner undertook expansion and diversification by virtue of a separate project report, which was duly approved by the Competent Authority. The Petitioner started manufacturing new items viz., foundation packing and rings, gaskets, plates and packing exhaust smoke channel, electrical panel board sheet material like karai, G.P. Tray, Grain Storage Tank, Steel door and window.

6. The Project Manager of the DIC, Rourkela, who was the Competent Authority, issued in favour of the Petitioner a certificate of eligibility that the Petitioner was entitled to exemption from payment of sales tax on purchase of raw materials and sale of finished products under IPR-89 for a period of seven years from the date of commencement of commercial production i.e., 9 th September, 1998.

7. In terms of the notification issued on 16th August, 1990 by the Finance Department (FD), Government of Orissa, under Entry 30-FFF of the exemption list issued under Section 6 of the OST Act, existing SSI Unit of 1986 IPR, which had undertaken expansion or modernization or diversification after 1st December 1989, on the basis of a separate project report duly approved by the Financial Institution and starting commercial production thereafter within the State, again as certified by the Competent Authority, would be eligible for exemption from payment of sales tax for a

period of seven years from the date of commercial production to the extent of the increased commercial production over and above the existing installed capacity. This exemption would be available only once within the entire effective period.

8. Since the Petitioner was assessed to NIL demand in respect of the products relating to the pre-expansion period, it discontinued production of those products and thereafter only manufactured products under the diversification unit. Thus, the Petitioner claims that it did not manufacture and sell any product from out of the original installed capacity of the industrial unit.

9. While completing the assessment for the period 1998-99, the Sales Tax Officer (STO) by an order dated 21st January 2002 raised a tax demand by estimating the notional value of finished products, which the Petitioner's Industrial Unit could have produced for the period from 1st April 1998 to 9th September, 1998. According to the STO, this would work out to Rs.8,50,465/. The STO allowed exemption only in the sum of Rs.27,77,530/-. The net tax liability was worked out at Rs.1, 50,005/-.

10. Aggrieved by the above assessment order, the Petitioner filed an appeal before the Assistant Commissioner of Sales Tax (ACST), Sundargarh Range, Rourkela, who by an order dated 19th June, 2002 confirmed the assessment order and dismissed the Petitioner's appeal.

11. The Assessee then went in appeal before the Tribunal with S.A. No.913 of 2002-03. According to the Tribunal, the production and sale under the diversification scheme could not be construed to be increased commercial production over and above the installed capacity of the Unit and that the Petitioner had violated the stipulation laid down in the Finance Department Notification vide entry No.26-FF and 30-FFF (ii) of the Tax Free Schedule of the IPR, 1989. It was thus held that the Petitioner was not entitled to enjoy the benefit of exemption of tax on purchase of raw materials and sale of finished products under the diversification scheme.

12. The Tribunal further held that the levy of sales tax on the raw materials and sale of finished products @4% and 12% respectively and surcharge @ 10% on the tax on finished products was leviable. Accordingly, the order of the ACST was set aside and the case was remanded to the ACST

to make good the deficiency by issuing appropriate notice to the Appellant/Petitioner as to why the taxes as mentioned above would not be levied.

13. As regards questions (b) and (c) framed for consideration, viz., the correctness of the remand of the case by the Tribunal for levy of enhanced tax on the Assessee, the Court is of the view that the Tribunal exceeded its jurisdiction. In ***Shyamsunder Sahoo v. State of Orissa [1994] 92 STC 28***, this Court explained that the power of the Tribunal under Section 23(3)(c) of the OST Act to enhance the assessment is relatable to appeal or cross objection filed by the Revenue. In the present case, there is no such cross appeal by the Revenue and therefore, there was no occasion for the Tribunal to have remanded the issue of tax on raw materials and finished products including surcharge on finished products to the ACST for a fresh determination. In this context, the following observations in ***Shyamsunder Sahoo*** (supra) are relevant:

> "6. At this juncture it is relevant to refer to rule 50 of the Orissa Sales Tax Rules, 1947 (in short, "the Rules"). Sub-rule (3) of rule 50 provides that the appellate authority shall not enhance an assessment or penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement. The appellate authority is, therefore, obligated to bring to the notice of the appellant before it material on the basis of which enhancement is proposed. On being so indicated, the assessee shall be in a position to show cause against the proposed action. The narration of facts as referred to by the Tribunal go to show that no opportunity was granted to the assessee-petitioner to show cause against the proposed action for enhancement. This is really of no consequence in the case at hand because of our conclusion that the Tribunal has no power to enhance the assessment in the absence of an appeal or cross-objection. Therefore, the Member was not justified in directing restoration of the enhancement made by the assessing officer. That part of the order is nullified."

14. Consequently, Question (b) is answered in the negative and Question (c) is answered in the positive i.e., both Questions are answered in favour of the Assessee and against the Department. That portion of the impugned order of the Tribunal remanding the above issue to the ACST is hereby set aside.

15. As regards question (a), viz., the disallowance of tax exemption on sale of finished products manufactured by the industrial unit under the diversification scheme, the Court notes that a clarification on IPR 1989 was issued by the Director of Industries, Orissa by its letter dated 24th /28th May,

2001 with particularly the reference to the expression "enabling installed capacity", it was clarified as under:

> "Existing installed capacity means the capacity recorded in the permanent registration certificate (PMT) at the time of issue of the same and there is no provision to amend the same capacity frequently unless undertaken E/M/D, provided such E/M/D should fulfill the criteria as defined in relevant IPR. Similarly, in no case the original capacity recorded in the PMT can be reduced for the purpose of availing the incentives. In this connection, this office has already clarified that once eligibility certificate for S.T. concession is issued, it cannot be amended with every increase in fixed capital investment, vide this office letter No. 6738 dtd. 23.5.2000 (copy enclosed)."

16. In ***Tin Plate Company of India Limited v. State of Bihar [2004] 135 STC 385***, the Jharkhand High Court explained with reference to a similar issue and held as under:

> "13. In view of cause (15) of S.O. No. 478 read with S.O. No. 57 dated March 2, 2000,diversification of a unit is quite distinguishable from expansion/modernization of the unit and diversification of the unit cannot be equated with expansion/modernization of the unit. In case of diversification the facility of exemption of sales tax will be available on such raw materials which has been used in the commercial production and which has not been earlier produced by the unit and that the product manufactured is a new one. Therefore, in case of diversification there cannot be any incremental production which proceeds on the basis that the production of the relevant year should not exceed 2/3rd of the production capacity. In case of expansion/modernization the principle of production exceeding 2/3rd of the production capacity is only applicable. It is relevant to mention here that this principle of production exceeding 2/3rd of the production capacity cannot apply in case of diversification of the unit which postulates the production for the first time of the new products as the raw materials are used for the first time in case of diversification. Viewed thus, the principle of incremental production has no application in the case of diversification of the unit. This interpretation stands fortified due to the amendment of S/O. No. 478 by S.O. No. 57 dated 2nd March, 2000 referred to above which is to the effect that "and this facility shall be available to the unit to the extent of the actual production as a result of diversification". There can, however, be no doubt that exemption made with a beneficent object for encouraging investment in new machinery or plant have to be liberally construed. The provision in S.O. No. 478 read with S.O. No. 57 (supra) is made permitting exemption of tax for the purpose of encouraging an industrial activity. The said provision has to be liberally construed for all intent and purposes. It is the settled principle of law that an exemption provision cannot be denied full effect by a circuitous process of interpretation and the liberal language used in a notification must be given due weight. So if the tax-payer is within the plain terms of the exemption notification, he cannot be denied the benefit calling in aid, any

> supposed intention, and the language of the notification has to be given effect to. Based upon the facts aforesaid and the interpretation of clause (15.4) of S.O. No. 478 read with clause (Ga) of S.O. No. 57 dated March 2, 2000 the petitioner is entitled to full exemption in respect of the sales tax paid on the purchase of the raw materials i.e., HR coils for the production of the new product, i.e., TMBP which was not earlier produced in the unit of the petitioner for manufacture of ETP."

17. Once it was clear that the Petitioner had stopped manufacturing the products in terms of the original installed capacity and was manufacturing only under the diversification unit, there is no justification in withdrawing the exemption. In this context, again reference may be made to a circular dated 24th June 1999 issued by the Commissioner of Commercial Taxes, Orissa to all the authorities functioning under the OST Act wherein it was observed therein as under:

> "xxx xxx xxx
>
> Lately it has come to the notice that some of the assessing officers and first appellate authorities have allowed to such Industrial units undertaking Expansion/ Modernization/ Diversification, exemption of sales tax on entire purchase of raw materials and sales of finished products on the interpretation that the dictionary meaning of the term 'over and above' is 'in addition to' 'or' 'besides'. It seems that such authorities have taken out the term 'over and above' out of the context employed in the provision of the entry and have failed to make a harmonious interpretation of all the words used in it.
>
> In the connected entries the language is very clear. The term 'over and above' qualifies to the volume of finished products only. As the units before their expansion have certain finished products and that volume of finished products continues after the date of commercial production of the unit after expansion, the term 'over and above' has been used to separate the volume of additional finished products from the volume of products produced as per the installed capacity of the unit before going for expansion. The entries do not provide for any benefit of exemption in respect of finished product prior to the date of the expansion for which there is no scope for the term 'over and above' to qualify 'exemption' and therefore it is erroneous to interpret the term 'over and above' benefit of sales tax exemption in addition to the exemption already provided for.
>
> There is, no ambiguity in using the term 'over and above' when particular reference has since been made only to the additional volume of the finished products and the words 'increased commercial production' preceding the words 'over and above' makes the meaning more clear. This exemption has been granted only in respect of the additional volume of finished products and no exemption has been given for the finished products of the original installed capacity of the unit before Expansion/ Modernization/ Diversification.

> The assessing and appellate authorities are advised to keep the above points in mind while deciding the matters of granting exemption of sales tax in case of Expansion/ Modernization/ Diversification provided for in the aforesaid entries."

18. The plain dictionary meaning of expression 'over and above' would mean 'in addition to' or 'as well as'. Here there is no finished product of the original installed capacity and only under the diversification unit and therefore it was erroneous on the part of the Department to reject the claim of the Petitioner for exemption. Consequently, Question No.(a) is answered in the affirmative by holding that the Tribunal erred in law by disallowing the tax exemption on sale of finished products manufactured by the Petitioner's industrial unit under the diversification scheme. The impugned order of the Tribunal to that extent is set aside as are the corresponding orders of the STO and the ACST.

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

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2022 (II) ILR - CUT- 44

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

ITA NO. 68 OF 2009

M/s. JAISWAL PLASTIC TUBES LTD. ……..Appellant

.V.

ASST. COMMISSIONER OF INCOME TAX, BALASORE CIRCLE, BALASORE. ……...Respondent

INCOME TAX – Power of the income tax Appellate Tribunal – Whether the ITAT was justified in law in confirming the addition of Rs. 6,62,393/- on account of unexplained/non-existence alleged sundry creditors – Held, Yes. – When sufficient opportunity was granted to the appellant to furnish the evidence to prove the genuineness of such credit balance and the appellant was unable to avail such opportunity, the Tribunal has rightly taken the decision. (Para-15)

Case Laws Relied on and Referred to :-

1. 2007 (210) ELT 501 (Ori) : J.K. Corporation Ltd. Vs. Commissioner of Central Excise and Customs, Bhubaneswar
2. AIR 1997 SC 2077 : Achutananda Baidya Vs.Prafullya Kumar Gayen.
3. AIR 1959 SC 1238 : Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras.

For Appellant : Mr. Prakash Kumar Jena

For Respondent : Mr. R. Chimanka, Sr. Standing Counsel
Mr. A. Kedia, Junior Standing Counsel

JUDGMENT Date of Judgment: 19.05.2022

Dr. S. MURALIDHAR, C.J.

1. The present appeal by the Assessee is directed against an order dated 11th December 2008 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.98/CTK/07 for the assessment year (AY) 2003-04.

2. While admitting the present appeal on 4th September 2009, the following Questions were framed for consideration:

> "(i) Whether on the facts and in the circumstances of the case, the ITAT was right in law in holding that the Assessee's explanation with regard to addition of Rs.41,78,650/- cannot be accepted as true and whether that finding was vitiated by ignoring relevant evidences and submissions made before it and taking into account irrelevant materials?
>
> (ii) Whether on the facts and in the circumstances of the case, the ITAT was right in law in confirming the addition of Rs.72,478/- on account of fittings which has been sold along with the pipes, the value of which has been included in the closing stock of finished goods?
>
> (iii) Whether on the facts and in the circumstances of the case, the ITAT was right in law in confirming the addition of Rs.6,62,393/-on account of unexplained/non-existence alleged sundry creditors?"

3. The background facts are that the Assessee is engaged in manufacture of PVC pipes and fittings. For the AY in question, the Assessee filed its return of income on 28th November 2003 disclosing an income of Rs.3,67,370/-. The aforementioned return was processed initially under Section 143 (1) of the Income Tax Act, 1961 (Act) and the Assessee was granted a refund of Rs.10, 200/-. Subsequently, however, the Assessing

Officer (AO) i.e., the Assistant Commissioner of Income Tax (ACIT), Balasore Circle, Balasore issued notice to the Assessee under Section 143 (2) and 142 (1) of the Act. The AO asked the Assessee to file the details of its sundry creditors with their postal addresses and copies of the ledger accounts.

4. As per the books of account of M/s. Reliance Industries Limited (RIL), the Assessee had a debit balance of Rs.9,38,898/- whereas the books of account of the Assessee reflected a credit balance of Rs.2,16,50,327/- in the name of RIL. The AO, therefore, required the Assessee to reconcile the difference.

5. The Assessee explained that it was purchasing PVC resin from RIL and M/s. K.M. Enterprises (KME) was acting as an agent of RIL. It was further submitted that payment for such purchases were made to KME. In support of the contention, certain bills of RIL for purchase of PVC resin were furnished by the Assessee which showed KME to be an agent of RIL for the Calcutta region.

6. The Assessee claimed that there was a debit balance in the sum of Rs.1,65,32,778/- in the name of KME as on 31st March, 2003. Since the credit balance in the name of RIL was Rs.2,16,50,327/- and debit balance in the name of KME was Rs.1,65,32,778/-, the net credit balance in the name of RIL was worked out by the AO at a figure of Rs.51,17,549/-. The AO then took note of the figure of debit balance for the Assessee in the books of RIL i.e. Rs.9,38,898/- and worked out that the inflated credit balance as on 31st March 2003 was Rs.41,78,651/-.

7. The Assessee then gave an explanation, but the AO considered it to be vague, unsubstantiated and illogical and therefore rejected it. Accordingly, the aforementioned amount being the inflated credit balance of RIL was added as the income of the Assessee.

8. Likewise, as regards other sundry creditors, the Assessee had disclosed a credit balance of Rs.5,97,210/- in the name of Kabra Extrusion Technik Ltd. (KETL) Mumbai whereas the copy of the account of the Assessee in the books of KETL revealed that the credit balance should have been Rs.39,757/- as on 31st March,2003. Again, the explanation offered by the Assessee was not accepted and the excess credit balance of Rs.5,57,453/- was considered as income of the Assessee and this amount was added to the

taxable income. Similarly, in the case of Coastal Road Carriers (CRC) and Air Control & Chemical Company Ltd. (ACCCL), the credit balance of Rs.2,96,693/- was considered as income of the Assessee.

9. In appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] confirmed the addition of Rs.41,78,650/-. As regards the addition of Rs.5,57,453/- on account of KETL, this too was confirmed by the CIT(A). As regards the stock of finished goods, the Assessee's explanation regarding fittings was not accepted and the CIT(A) confirmed the addition of Rs.72, 478/- on this account.

10. The ITAT confirmed the additions to the tune of Rs.41,78,650/- which had been found by the AO to be the inflated credit balance of RIL. Relief was granted to the Assessee as regards addition of Rs.5,57,453/- on the account of KETL. The addition of Rs.72,478/- with regard to discrepancy of stock was also confirmed.

11. As regards the addition of Rs.6,62,393/-, it was noted that the CIT (A) had required the AO to submit a remand report in ten cases of sundry creditors whereas the AO had issued summons under Section 131 of the Act only in eight cases. Effort was not taken by the AO to enforce the attendance of some of the above parties. The ITAT concluded that the AO had given sufficient opportunity to the Assessee to furnish evidence to prove the genuineness of credit balance. It was held that if the parties did not appear despite notices, the burden shifted to the Assessee to ensure the presentation of such witnesses to justify its claim that the credit balance in the name of such party was genuine. Consequently, this addition was also not interfered with.

12. This Court heard the submissions of Mr. Prakash Kumar Jena, learned counsel for the Appellant and Mr. R. Chimanka, learned Senior Standing Counsel for the Income Tax Department.

13. Mr. Jena, learned counsel appearing for the Appellant pointed out that the AO had mentioned credit balance instead of debit balance and not considered the debit balance of KME amounting to Rs.25,74,770.29/-. In the memorandum of appeal, an entire reconciliation statement as per the ledger account of RIL and KME has been set out. It was contended that treating the debit balance of KME of Rs.1, 65,32,778/- as income was erroneous in terms

of accounting standards. The debit balance of 25,74,770.29/- in the account of KME could not have been treated as the income of the Assessee. In fact, no information had been called by the AO from KME at all and that would have confirmed to the AO what the debit balance was in its accounts. Reliance was placed on the decision of this Court in ***J.K. Corporation Ltd. v. Commissioner of Central Excise and Customs, Bhubaneswar 2007 (210) ELT 501 (Ori)*** where it was held that if the Tribunal does not consider the materials which are furnished before it and comes to a conclusion that consideration of relevant materials was necessary, such finding can be set aside by the High Court. To the same effect is the decision in ***Achutananda Baidya v. Prafullya Kumar Gayen AIR 1997 SC 2077 and Omar Salay Mohamed Sait v. Commissioner of Income Tax, Madras AIR 1959 SC 1238.***

14. The above submissions have been considered. As regards the Question No.(ii), the issue concerning differential stock has resulted in addition of only Rs.72,478/- and the Court therefore does not wish to examine this Question any further. The Court has examined the concurrent findings of the AO, CIT(A) and the ITAT in this regard and is of the view that they do not call for interference.

15. As regards Question No.(iii) concerning the addition of Rs.6,62,393/- on account of unexplained non-existent creditors, the Court is satisfied that sufficient opportunity was granted to the Appellant to furnish the evidence to prove the genuineness of such credit balance and the Appellant was unable to avail of such opportunity. Consequently, on Questions (ii) and (iii), this Court answers the Questions in the affirmative i.e. in favour of the Department and against the Assessee.

16. However, as regards Question No.(i), this Question is answered in the negative and relying on the above decisions of the Courts, the question of addition of Rs.41,78,650/- is remanded to the CIT(A) for examining it afresh in light of the evidence produced by the Assessee, which was not examined earlier. For this purpose, the matter would be listed before the CIT(A) on 18th July, 2022. It will be open to the CIT(A) to seek a fresh remand report from the AO and in particular, after issuing notice under Section 131 of the Act to KME to ask for its books of account for the relevant period.

17. The appeal is accordingly disposed of in the above terms.

2022 (II) ILR - CUT- 49

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

W.P.(C) NO. 7490 OF 2021

BASANTI SHIAL ……..Petitioner

.V.

THE PROPER OFFICER (ADDL. CT & GST OFFICER) & ANR. ……..Opp. Parties

ODISHA GOODS AND SERVICES TAX ACT, 2017 – Section 107, subsection (1) and (4) – Limitation prescribed for filling of Appeal – Whether can be condoned – Held, Yes – The delay caused should have been condoned by the appellate authority – The petitioner is entitled to avail the benefit of the judgment in (re: Cognizance for extension of limitation, suo-moto Writ Petition reported in (2020) 19 SCC 10; 2020 SCC online SC 343) (Para-17)

Case Law Relied on and Referred to :-

1 . W.P.(C) No.9095 of 2020 : Bijaya Kumar Ragada Vs. State of Odisha.

For Petitioner : Mr. Sriman Arpit Mohanty.

For Opp. Parties : Mr. Sidharth Sankar Padhy, ASC for the CT & GST

ORDER Date of Order: 11.03.2022

BY THE BENCH

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

2. Assailing the Order dated 31.12.2020 passed by the Additional Commissioner of State Tax (Appeal), Balasore Appellate Authority directed against the Order dated 06.03.2020 passed by the Proper Officer under Section 74(9) of the Odisha Goods and Services Tax Act, 2017 (referred to as "OGST Act" for brevity) and issued in Form GST DRC-07 prescribed under Rule 142(5) of the Odisha Goods and Services Tax Rules, 2017 (for short referred to as "OGST Rules"), the petitioner, being aggrieved by rejection of the appeal preferred under Section 107 in terms of sub-sections (1) and (4) thereof, approached this Court *inter alia* with the following prayers:

> "(a) *Issue a Writ in the nature of certiorari quashing the impugned order dated 31.12.2020 passed by the Opposite Party No.2 under Annexure-2;*

(b) *Issue a Writ in the nature of Mandamus directing the Opposite Party No.2 to restore the first appeal case No. AD2111200030682 to the file and dispose of the same in accordance with law; ****"

3. It is submitted by the counsel for the petitioner that the Appellate Authority failed to appreciate the fact and law in proper perspective. He submitted that having received the Order passed under Section 74 of the OGST Act on 06.03.2020, the petitioner filed the appeal on 13.11.2020 which is beyond the period stipulated under sub-sections (1) and (4) of Section 107. The Appellate Authority has observed the fact and assigned following reason while rejecting the appeal:-

*"**** On going through the records, it is seen that the impugned order was issued in Form GST DRC-07 vide Reference No. ZA2103200018848 on dated 06.03.2020 which shall be treated to be served on the petitioner dealer on the same day as it is issued electronically. In the normal course, the last date for filing of the appeal was 05.06.2020, but the appeal has been preferred on 13.11.2020 electronically but certified copy of the order appealed against has been submitted on 21.12.2020 in pursuant to show cause notice cited above. Hence, I find the appellant has not shown any diligence in pursuing the matter in time, there is no reason to entertain the appeal.*

To sum up, the appellant is found to be negligent and remained inactive for a long period of time. Indulgence cannot be shown to the appellant who has slumbered over his rights. In view of this, the application for condonation of delay is liable to be rejected as per provision of law.

*In view of the above facts and observation, the appeal petition filed by the petitioner is hereby rejected as per provision laid down under Section 107(1) & (4) of the Odisha Goods and Service Tax Act, 2017. ****"

4. The counsel for the petitioner citing the Judgment dated 23.03.2020 passed in *In re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No. 3/2020 [2020 SCC OnLine SC 343 = (2020) 19 SCC 10*] submitted that the Appellate Authority should have perceived the plight of the litigants that prevailed during the first phase of COVID-19 pandemic situation and entertained the appeal for hearing on merits.

5. Mr. Sidhartha Shankar Padhy, Advocate appearing for the Opposite Parties vehemently objected to the contention of the Petitioner and supported the order passed in appeal.

6. The provisions of sub-sections (1) and (4) of Section 107 of the OGST Act which were taken into consideration by the Appellate Authority to reject the appeal preferred by the petitioner reads thus:

> *"(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.*
>
> ***
>
> *(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month."*

7. Aforesaid provisions indicate that aggrieved person is required to file appeal within three months from the date of communication of impugned decision or order and the Appellate Authority is competent to condone the delay upon showing sufficient cause if the appeal is presented within a further period of one month. In the instant case admittedly having received the Order passed under Section 74 on 06.03.2020, the petitioner was required to file the appeal on or before 05.06.2020, i.e., three months from the date of communication, but the appeal was presented on 13.11.2020, i.e., beyond the condonable period.

8. From the above narration of facts, it is apparent that the period of three months from the date of communication of order sought to be appealed against got lapsed during period when the effect of COVID-19 virus was at its peak. Noteworthy here to refresh that the lock-down was imposed on 24.03.2020 and there was impediment for the petitioner to file the appeal on or before 05.06.2020.

9. The Hon'ble Supreme Court of India *In re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No. 3/2020 [2020 SCC OnLine SC 343 = (2020) 19 SCC 10]* vide Order dated 23.03.2020 considering the challenge faced by the country on account of COVID-19 Virus and resultant difficulties that would be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Law (both Central and/or State), directed as follows:

"To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction."

10. This Court considering gravity of situation, vide Order dated 05.05.2020 in the matter of ***Bijaya Kumar Ragada Vrs. State of Odisha, W.P.(C) No.9095 of 2020***, observed as follows:-

"2. Lock-down Phase 3.0 throughout the country for two weeks w.e.f. 04th May, 2020 is in currency now. Novel Corona Virus (COVID-19) has infected more than 46,000 persons so far across the country. The virus, Novel as it is, in absence of vaccine and medication to arrest its spread, declares with pride "Hide from me to be safe" and "Keep distance from my carrier to be alive". Hon'ble Prime Minister of India and Hon'ble Chief Minister of our State have taken well conceived, well thought of, justly considered, tough and hard steps to contain the crisis arising out of the virus.

3. Staying at home to be safe and maintaining social distance are the only ways to check spread of the virus. India countries cross sections of people of various religion, faith, cast, creed and colour. Law abidingness, however, has never been a natural habit of a part of the population. Irresponsibility is writ large when it comes to conforming to certain sets of discipline and order. In such a situation, locking down the entire country to keep the people safe was probably the only remedy available, though outcome of a very tough and difficult decision. We, therefore, are one in our view that Executive Government is best fitted and best suited to contain the crisis arising out of the virus in its own novel and extraordinary way, provided everything is done within the constitutional framework and there is proper co-ordination among the implementing agencies.

4. Locking down the entire country was the outcome of a tough decision in fact. Unlocking the country is going to be more tough and a difficult responsibility. In the process, however, the courts' work throughout the country has suffered and consequently the litigants have been suffering.

5. On the face of the crisis, we are sincerely concerned with the plight of the citizens and the litigants, majority of whom in our State are poor. They are not in a position

to come to the Court in such a situation to seek legal remedies. We also do not want rush of litigants in the Courts in contravention of the "Social Distancing" discipline.

6. For the consequential lockdown due to COVID-19 in three phases including the present one, working of this Court, other subordinate courts as well as judicial and quasi-judicial authorities working under the superintendence of this Court, has been affected to a great extent. The situation has resulted in hardship for the litigants and ordinary citizens to approach the court of law to take recourse to legal remedies. With a view to ensure that the litigants and citizens do not suffer on account of their inability to approach the court of law, we propose to invoke our plenary power under Article 226 and power of superintendence under Article 227 of the Constitution of India, our inherent power over the criminal matters under Section 482, Cr.P.C., our power of superintendence over criminal courts under Section 483, Cr.P.C. and our inherent power over the civil matters under Section 151 of the C.P.C.

7. We do not see a fathomable end to the present crisis,but we hope that, by the end of the ensuing Summer Vacation of this Court as well as the subordinate judiciary of the State, the situation shall be normal or at least near to normal. Keeping such hope in mind, in exercise of our power under Articles 226 and 227 of the Constitution of India read with Sections 482 & 483, Cr.P.C. and Section 151 of the Code of Civil Procedure, we issue the following directions to at least contain the plight of the litigants and non-litigants.

***

(xi) That it is further directed that if the Government of Odisha and/or any of its Department and/or functionaries, Central Government and/or its departments or functionaries or any Public Sector Undertakings or any Public or Private Companies or any Firm or any individual or person is/are, by the order of this Court or any Court subordinate to it or the Tribunals, required to do a particular thing or carry out certain direction in a particular manner in a time frame, which expired or is going to expire at any time, during the period of lockdown or the extended lockdown, time for compliance of such order shall stand extended up to 18th June 2020, unless specifically directed otherwise.

***"

Aforesaid arrangement made vide Order dated 05.05.2020 in ***Bijaya Kumar Ragada Vrs. State of Odisha, W.P.(C) No.9095 of 2020*** was being extended on various dates and vide Order dated 16.10.2020 this Court observed as follows:

"3. The aforesaid order was extended subsequently on 11.06.2020 till 15.07.2020 and thereafter on 15.07.2020 the said protections were extended till 31.08.2020 and on 31.8.2020 the protection was extended up to 15.10.2020.

xx xx xx xx

> *5. In view of the above, protection granted by this Court vide aforesaid order dated 05.05.2020 passed in this case in sub-paras (i) to (xii) of para 7 is extended up to 25th November, 2020 except to the extends with the modification specifically made.*
>
> *Put up this matter on 25th November, 2020."*

11. The Judgment/Order as referred to above indicates that the extensions have been granted on account of various difficulties faced on account of the COVID-19 pandemic. The extensions apply to both judicial and quasi judicial proceedings. The term "proceedings" being not defined, the same may be understood in the light of interpretations put upon by different Courts. Suffice it to refer to The Commander Coast Guard Region (East), Fort St. George, Chennai-9 and another Vrs. O. Konavalov and 4 others, O.S.A. No. 309 & 350 of 2000, decided on 10.01.2001, reported in 2001 SCC OnLine Mad 28 = MANU/TN/0029/2001 = (2001) 1 MLJ 420 wherein the Hon'ble Madras High Court after noticing that the term "proceeding" being not defined in the General Clauses Act, referred to Lexicons and observed as follows:-

> "The Court is of the considered view that the term 'proceeding' would only mean a legal process taken to enforce the rights."

12. Understanding the expression "proceeding" in the aforesaid perspective, it may also be noteworthy to refer to clarification issued from the Commissionerate of CT&GST, Odisha (At Cuttack) vide Letter No.8434-CCT-REV-REV-0130-2021/CT, dated 26.07.2021 which is to the following effect:-

> *"I am directed to attach herewith the clarification issued by CBIC regarding extension of limitation under GST Law in terms of Hon'ble Supreme Court order dated 27.04.2021. The Circle Heads are advised to circulate the order to all proper officers under their jurisdiction and advise them to dispose of proceedings in various stages as per the clarification. Range Heads are advised to conduct a meeting to explain the various issues covered in the clarification, in case of any doubts amongst the Circle/Proper Officers."*

13. The afore-mentioned attached document to the Letter of the Commissionerate of CT&GST, being File No. CBIC 20006/10/2021, dated 20.07.2021 of the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing clarified as follows:

"xxx xxx xxx xxx

2.1 The extract of the Hon'ble Supreme order dated 27th April 2021 is reproduced below for reference:

'We, therefore, restore the order dated 23rd March, 2020 and in continuation of the order dated 8th March, 2021 direct that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders. It is further clarified that the period from 14th March, 2021 till further orders shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

We have passed this order in exercise of our powers under Article 142 read with Article 141 of the Constitution of India. Hence it shall be a binding order within the meaning of Article 141 on all Courts/Tribunals and Authorities.'

2.2 The matter of extension of period of limitation under Section 168A of the CGST Act, 2017 was deliberated in the 43rd Meeting of GST Council. Council, while providing various relaxations in the compliances for taxpayers, also recommended that wherever the timelines for actions have been extended by the Hon'ble Supreme Court, the same would apply.

3. Accordingly, legal opinion was solicited regarding applicability of the order of the Hon'ble Supreme Court to the limitations of time lines under GST Law. The matter has been examined on the basis of the legal opinion received in the matter. The following is observed as per the legal opinion:-

(i) The extension granted by Hon'ble Supreme Court order applies only to quasi-judicial and judicial matters relating to petitions/ applications/ suits/ appeals/ all other proceedings. All other proceedings should be understood in the nature of the earlier used expressions but can be quasi-judicial proceedings. Hon'ble Supreme Court has stepped into to grant extensions only with reference to judicial and quasi-judicial proceedings in the nature of appeals/ suits/ petitions etc. and has not extended it to every action or proceeding under the CGST Act.

(ii) For the purpose of counting the period(s) of limitation for filing of appeals before any appellate authority under the GST Law, the limitation stands extended till further orders as ordered by the Hon'ble Supreme Court in Suo Motu Writ Petition (Civil) 3 of 2020 vide order dated 27th April 2021. Thus, as on date, the Orders of the Hon'ble Supreme Court apply to appeals, reviews, revisions etc., and not to original adjudication.

(iii) Various Orders and extensions passed by the Hon'ble Supreme Court would apply only to acts and actions which are in nature of judicial, including quasi-judicial exercise of power and discretion. Even under this category, Hon'ble Supreme Court Order, applies only to a lis which needs to be pursued within a time frame fixed by the respective statutes.

(iv) Wherever proceedings are pending, judicial or quasi-judicial which requires to be heard and disposed off, cannot come to a standstill by virtue of these extension orders. Those cases need to be adjudicated or disposed off either physically or through the virtual mode based on the prevailing policies and practices besides instructions if any.

(v) The following actions such as scrutiny of returns, issuance of summons, search, enquiry or investigations and even consequential arrest in accordance with GST law would not be covered by the judgment of the Hon'ble Supreme Court.

(vi) As regards issuance of show cause notice, granting time for replies and passing orders, the present Orders of the Hon'ble Supreme Court may not cover them even though they are quasi-judicial proceedings as the same has only been made applicable to matters relating to petitions/applications/suits, etc.

4. On the basis of the legal opinion, it is hereby clarified that various actions/compliances under GST can be broadly categorised as follows:

(a) Proceedings that need to be initiated or compliances that need to be done by the taxpayers:

These actions would continue to be governed only by the statutory mechanism and time limit provided/ extensions granted under the statute itself. Various Orders of the Hon'ble Supreme Court would not apply to the said proceedings/ compliances on part of the taxpayers.

(b) Quasi-Judicial proceedings by tax authorities: The tax authorities can continue to hear and dispose off proceedings where they are performing the functions as quasi-judicial authority. This may inter alia include disposal of application for refund, application for revocation of cancellation of registration, adjudication proceedings of demand notices, etc.

Similarly, appeals which are filed and are pending, can continue to be heard and disposed off and the same will be governed by those extensions of time granted by the statutes or notifications, if any.

(c) Appeals by taxpayers/ tax authorities against any quasi-judicial order:

Wherever any appeal is required to filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken,

the time line for the same would stand extended as per the Hon'ble Supreme Court's order.

5. *In other words, the extension of timelines granted by Hon'ble Supreme Court vide its Order dated 27.04.2021 is applicable in respect of any appeal which is required to be filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken, and is not applicable to any other proceedings under GST Laws.*

6. *It is requested that suitable trade notices may be issued to publicize the contents of this Circular."*

14. The clarification as issued by the Central Government and adopted by the State Government seems to be gesture of pragmatic approach to mitigate hardship of concerned during the unforeseen pandemic. When the OGST Act was enacted in 2017, in order to tide the situation like *force majeure* over, appropriate legislation was not in place. However, conceiving the gravity of circumstances that prevailed over entire world and visualizing insurmountable difficulties faced by human beings, new provisions by way of amendment to the OGST Act have been inserted in tune with the provisions of the Taxation and other Laws (Relaxation of Certain Provisions) Ordinance, 2020 and the Taxation and other Laws (Relaxation of Certain Provisions) Act, 2020. Section 168A thereof was first inserted with effect from 31.03.2020 by way of promulgation of the Odisha Goods and Services Tax (Amendment) Ordinance, 2020 (Odisha Ordinance No. 5 of 2020) by the Governor of Odisha on 09.06.2020 vide Law Department Notification No. 5278-I-Legis-22/2020/L, dt.11.06.2020, published in the Odisha Gazette Extraordinary No.856, dt.11.06.2020 and subsequently the same has been enacted as the Odisha Goods and Services Tax (Amendment) Act, 2020 (Odisha Act 5 of 2020) and was given effect from 31.03.2020.

15. Consequent upon introduction of provisions in Section 168A in the OGST Act and being empowered under said provisions, the Government of Odisha in Finance Department issued Notification bearing No. 18491–FIN-CT1-TAX-0002/2020 [SRO No.138/2020], dated 22.06.2020 which came into force with effect from the 20th day of March, 2020 with the following terms:

"In exercise of the powers conferred by Section 168A of the Odisha Goods and Services Tax Act, 2017 (Odisha Act 7 of 2017) (hereafter in this notification

referred to as the said Act), in view of the spread of pandemic COVID 19 across many countries of the world including India, the State Government, on the recommendations of the Goods and Services Tax Council, hereby notifies, as under,—

(i) where, any time limit for completion or compliance of any action, by any authority or by any person, has been specified in, or prescribed or notified under the said Act, which falls during the period from the 20th day of March, 2020 to the 30th day of August, 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended upto the 31st day of August, 2020, including for the purposes of—

(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the Acts stated above; or

(b) filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record, by whatever name called, under the provisions of the Acts stated above; but, such extension of time shall not be applicable for the compliances of the provisions of the said Act, as mentioned below—

(a) Chapter IV;

(b) sub-section (3) of Section 10, Sections 25, 27, 31, 37, 47, 50, 69, 90, 122, 129;

(c) Section 39, except sub-section (3), (4) and (5);

(d) Section 68, in so far as e-way bill is concerned; and

(e) rules made under the provisions specified at clause (a) to (d) above;

***"

16. As noticed above the Central Government as also the State Government in line with the Judgment of the Hon'ble Supreme Court have issued Orders/Notifications/ Circulars giving relaxation to the taxpayers for various compliances under the GST Laws. The Hon'ble Supreme Court disposed of In re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No. 3/2020 on 08.03.2021 [reported in (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50] with the following observations and directions:

"1. Due to the onset of Covid-19 Pandemic, this Court took suo motu cognizance of the situation arising from difficulties that might be faced by the litigants across the

country in filing petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central or State). By an order dated 27-3-2020 (sic 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343]) this Court extended the period of limitation prescribed under the general law or special laws whether compoundable or not with effect from 15-3-2020 till further orders. The order dated 15-3-2020 was extended from time to time. Though, we have not seen the end of the pandemic, there is considerable improvement. The lockdown has been lifted and the country is returning to normalcy. Almost all the Courts and Tribunals are functioning either physically or by virtual mode. We are of the opinion that the order dated 15-3-2020 has served its purpose and in view of the changing scenario relating to the pandemic, the extension of limitation should come to an end.

2. We have considered the suggestions of the learned Attorney General for India regarding the future course of action. We deem it appropriate to issue the following directions:

2.1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15-3-2020 till 14-3-2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15-3-2020, if any, shall become available with effect from 15-3-2021.

2.2. In cases where the limitation would have expired during the period between 15-3-2020 till 14-3-2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15-3-2021. In the event the actual balance period of limitation remaining, with effect from 15-3-2021, is greater than 90 days, that longer period shall apply.

2.3. The period from 15-3-2020 till 14-3-2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

2.4. The Government of India shall amend the guidelines for containment zones, to state:

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."

***"

17. Keeping in view the concern and context reflected in the Judgments, amendments to the statute and executive instruction/clarification, it is apt to say that the petitioner having filed appeal on 13.11.2020 before the Appellate Authority upon receipt of the Order in Form GST DRC-07 in terms of Rule 142(5) of the OGST Rules in connection with Section 74 of the OGST Act on 06.03.2020, the delay caused should have been condoned by the Appellate Authority. The petitioner is entitled to avail the benefit of the Judgment in [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343] read with the terms of disposal of contained In re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No. 3/2020, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 =(2021) 2 SCC (L&S) 50.

18. Having regard to the fact that the Judgments of Hon'ble Court(s) and Circulars/Instructions of the Government Department recognizing COVID-19 pandemic as a *force majeure* event and in view of the above discussions, the writ petition is allowed and the Order dated 31.12.2020 passed by the Additional Commissioner of State Tax (Appeal), Balasore-Appellate Authority (Annexure-1) is set aside. As a consequence, the Appellate Authority is directed to restore the First Appeal Case No. AD2111200030682 to file and adjudicate the issues raised by way of grounds of appeal by the petitioner on merits by adhering to the principles of natural justice in accordance with law, if the appeal is free from other defects. It is clarified that barring the issue of limitation based on which the Appellate Authority has rejected the first appeal, nothing is decided touching the merits of the Order dated 06.03.2020 passed under Section 74 of the OGST Act. With the aforesaid observation and direction, the writ petition is disposed of

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2022 (II) ILR - CUT- 60

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

W.P.(C) NO. 2427 OF 2022

M/s. SUMAN ENTERPRISES ……..Petitioner

.V.

COMMISSIONER OF SALES TAX & ORS. ……..Opp. Parties

ODISHA VALUE ADDED TAX ACT, 2004 – Section 77(4)r/w section 16(4) of the Odisha Entry Tax Act, 1999 – Pre-deposit amount – Whether can be waived or relaxed? – Held, No. – In the teeth of authoritative exposition of law with regard to scope of waiver of condition of pre-deposit for entertainment of appeal in absence of statutory provision, this Court is not persuaded to relax such a condition.

Case Laws Relied on and Referred to :-

1. (2012) 54 VST 1 (Ori) : Jindal Stainless Ltd. Vs. State of Odisha.
2. 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355 : Indian Oil Corporation Vs. Odisha Sales Tax Tribunal, Cuttack.
3. EPC JV, 2022 SCC On Line SC 184 : ECGC Limited Vs. Mukul Shriram.
4. 2019 SCC OnLine SC 1228 : Tecnimont Pvt. Ltd. Vs. State of Punjab.
5. 2021 SCC OnLine SC 1202 : VVF (India) Limited Vs. State of Maharashtra & Ors.

For Petitioner : Mr. Mukesh Agarwal & Ms. Ruchi Rajgarhia.

For Opp. Parties: Mr. Sunil Mishra, Addl. Standing Counsel (CT & GST Organisation).

ORDER Date of Order: 04.04.2022

BY THE BENCH

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

2. Questioning the propriety of the common Order dated 17.02.2021 passed by the Commissioner of Sales Tax, Odisha (opposite party No.1) in Revision Case Nos.KAL-111/V/2019-20 and KAL-112/E/2019-20 exercising powers under Section 79(2) of the Odisha Value Added Tax Act, 2004 (for brevity hereinafter referred to as "the OVAT Act") and Section 18(3) of the Odisha Entry Tax Act, 1999 (for short hereinafter referred to as "the OET Act") whereby the Orders dated 30.04.2019 of the Joint Commissioner Sales Tax, Balangir Range, Balangir-opposite party No.3 rejecting summarily the appeals being AA 16 (KA) of 2018- 19 (VAT) and AA-17 (KA) of 2018-19 (Entry Tax) vide Annexures-8 and 9 respectively filed at the behest of the petitioner-assessee have been upheld, the petitioner craves for indulgence of this Court invoking provisions of Article 226 of the Constitution of India and prays to set aside the impugned orders by taking cognizance of financial constraints in making statutory deposits in terms of Section 77(4) as amended by virtue of the Odisha Value Added Tax (Amendment) Act, 2017 and Section 16(4) of the OET Act against the demands of OVAT and OET to the

tune of Rs.82,61,160/- and Rs.9,60,297/- respectively pertaining to the tax periods from 01.04.2014 to 30.09.2015 under assessment for entertainment of appeals.

3. The petitioner, M/s. Suman Enterprises, dealing in cement, iron rod, tiles, bitumen, etc. unfurls the fact by way of writ petition that the assessments under Section 43 of the OVAT Act and Section 10 of the OET Act were undertaken pursuant to report submitted by the Deputy Commissioner of Commercial Tax, Koraput Division (Vigilance), Jeypore and without affording due and reasonable opportunity to the petitioner the opposite party No.2 raised huge demands which stand as follows:

	OVAT Act	OET Act
Tax	Rs. 82,61,160.09	Rs. 9,60,297.22
Penalty	Rs. 1,65,22,320.18	Rs.19,20,594.44
Total	Rs. 2,47,83,480.27	Rs. 28,80,891.66

3.1. The petitioner challenging the assessment orders dated 16.06.2017 passed under Section 43 of OVAT Act and Section 10 of the OET Act approached this Court by way of filing writ being W.P.(C) Nos.22136 of 2017 and 22138 of 2017 which came to be disposed of vide Order dated 02.01.2019. Relevant portion of Order dated 02.01.2019 in W.P.(C) No.22136 of 2017 is extracted herein below:

> *"*** Since the petitioner has an alternative remedy of appeal before the appellate authority, this writ petition stands disposed of with a direction that if the petitioner approaches the appellate authority by filing an appeal along with an application for condonation of delay within a period of four weeks from today, the appellate authority shall take into consideration all the contentions raised by the petitioner. While considering the prayer for condonation of delay, the Appellate Authority shall also take into consideration the period of pendency of this writ petition, i.e. from 23.10.2017 till today, for approaching the wrong forum under bona fide mistake in view of Section 14 of the Limitation Act. For a period of four weeks from today, no coercive action shall be taken against the petitioner. ***"*

3.2. Identical order has been passed in W.P.(C) No.22138 of 2017.

3.3. While entertaining the appeals being No.AA-16 (KA) of 2018-19 (VAT) and No.AA-17 (KA) of 2018-19 (Entry Tax), the Joint Commissioner of Sales Tax, Balangir Range, Balangir-opposite party No.3, the Appellate

Authority, sought for explanation as to why the appeal would not be rejected for want of compliance of Section 77(4) of the OVAT Act and Section 10 of the OET Act. To this, the petitioner placing material particulars demonstrated downward trend of its business activities by placing evidence such as income-tax returns and financial statements relating to 2014-15, 2015-16, 2016-17 and 2017-18.

3.4. The petitioner, in order to comply with the requirements for entertainment of appeals under Section 77(4) of the OVAT Act and Section 16(4) of the OET Act, required to deposit the amounts as follows:

OVAT Act as amended by virtue of the OVAT (Amendment)Act, 2017 [10% of tax in dispute]	OET Act [20% of tax in dispute]	Total
Rs. 8,26,116/-	Rs. 1,92,059/-	10,18,175/-

3.5. As stated by the petitioner in its compliance to show cause notice before the Joint Commissioner of Sales Tax-opposite party No.3 it is forthcoming that material was placed before the appellate authority to the effect that the financial health of the business does not permit it to deposit the amounts. The appellate authority while rejecting the appeals, merely observing that by way of filing written submission dated 10.04.2019, the petitioner expressed inability to make deposits as per requirement of the statutes.

3.6. The orders of summary rejection of appeals being carried in revision by the petitioner before the Commissioner of Sales Tax-opposite party No.1, no fruitful purpose was served. The Commissioner of Sales Tax-revisional authority referring to ***Jindal Stainless Ltd. Vrs. State of Odisha, (2012) 54 VST 1 (Ori),*** held that "when the statute prescribes a mandatory pre-deposit for the appeal to be admitted; it needs to be complied with" and consequently, refused to interfere with the orders of the appellate authority.

4. Mr. Mukesh Agarwal, learned counsel for the petitioner urged that neither the appellate authority nor the revisional authority did consider material placed on record. The authorities-opposite parties ought not to have rejected the merits of the appeal at the altar of defect or deficiency. The financial stress of the business that is continuing to be prevailed should have

been taken into consideration. Furthermore COVID-19 Pandemic has made the situation still worse affecting the livelihood of the proprietor. Hardship in complying with the statutory provision when pitted against merit of the case, the authorities-opposite parties are required to prefer the latter; or else the rigidity of the provision contained in the taxing statute would render alternative remedy illusory, unworkable and unwholesome.

5. Mr. Sunil Mishra, learned Additional Standing Counsel (CT&GST) stemming on the statutory provisions contained in Section 77(4) of the OVAT Act and Section 16(4) has supported the summary rejection of appeals by the appellate authority and consequent upholding by the revisional authority. He submitted that hardship is not to be weighed and such a factor must yield to bare requirement of the statute which admits of no ambiguity.

5.1. Arguing further, Mr. Mishra, counsel for the Revenue has submitted that the provisions of law relating to deposit of tax in dispute for entertainment of appeals do not envisage making out a prima facie case for waiver of pre-deposit. Section 77(4) of the OVAT Act and Section 16(4) of the OET Act no way envisaged making out a prima facie case for waiver of pre-deposit. The opposite parties-authorities are justified in not taking note of the case of financial hardship. Therefore, the orders of summary rejection of the appeals as upheld by the revisional authority do not warrant intervention.

6. Thus, the following question arises for consideration:

Whether the revisional authority-Commissioner of Sales Tax is legally justified in sustaining the orders rejecting appeals summarily by the appellate authority-Joint Commissioner of Sales Tax for want of deposit of 10% of the amount of tax in dispute under the OVAT Act and 20% of the amount of tax under the OET Act?

7. In ***Jindal Stainless Ltd. Vrs. State of Odisha, (2012) 54 VST 1 (Ori)*** this Court delved into the question as to whether the condition precedent for pre-deposit of 20% [reduced to 10% vide OVAT (Amendment) Act, 2017] 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 OVAT Act read with proviso to Rule 87 of the OVAT Rules is 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."

8. Before proceeding further in the matter it is relevant to gloss through the relevant provisions of the statutes which are reproduced hereunder:

Section 77 of the OVAT Act as it stands by virtue of the Odisha Value Added Tax (Amendment) Act, 2017	*Section 16 of the OET Act*
(4) No appeal against any order shall be entertained by the appellate authority, unless it is accompanied by satisfactory proof of payment of admitted tax in full and ten per centum of the tax or interest or both, in dispute. *(5) On admission of appeal, realization of the balance tax, interest or penalty, as the case may be, under dispute shall be deemed to be stayed in full till disposal of the appeal.*	*(4) No appeal against an order of assessment shall be entertained by the appellate authority, unless it is accompanied by satisfactory proof of payment of admitted tax in full and twenty per centum of the tax or interest or both, in dispute.* *(5) Subject to the provisions contained in sub-section (4), the appellate authority may, on application in that behalf filed by the dealer or person within the period as provided in sub-section (3), stay the realisation of the balance of tax, interest or penalty, as the case may be, under dispute either in part, or in full till disposal of the appeal.*

9. The aforesaid provisions unequivocally speak that for "entertainment of appeal", appeal under the OVAT Act is required to be accompanied by satisfactory proof of payment of admitted tax in full and ten per centum of the tax or interest or both, in dispute and that appeal under the OET Act is required to be accompanied by satisfactory proof of payment of admitted tax in full and twenty per centum of the tax or interest or both, in dispute.

9.1. It may be noteworthy that prior to amendment, the requirement of pre-deposit in respect of the OVAT Act was in *pari materia* with the OET Act. However, on the date of entertainment of appeal under the OVAT Act, i.e., in the year 2019, the Odisha Value Added Tax (Amendment) Act, 2017 (Odisha Act 8 of 2017) has already been in force. In view of exposition of law as made in ***Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355***, the petitioner and the statutory authorities are right in not disputing that the petitioner is required to deposit 10% of the tax in dispute in terms of Section 77(4) of the OVAT Act as amended in the Odisha Value Added Tax (Amendment) Act, 2017. Nonetheless, there being no amendment to sub-section (4) of Section 16 of the OET Act, the petitioner is required to deposit 20% of the tax in dispute for the purpose of entertainment of appeal.

9.2. 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:

> *"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:*
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> *"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."*

9.3. Such consistent approach can be traced out in recent Judgment being ***ECGC Limited Vrs. Mukul Shriram EPC JV, 2022 SCC On Line SC 184****.*

9.4. Conspectus of aforesaid Judgment suggests that on the date of entertainment of appeals the provisions as they stand would apply.

10. Be that be, 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* 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."*

10.1. The Hon'ble Supreme Court in the said case ***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 statutory intendment nugatory."*

10.2. Under aforesaid premise, in the teeth of authoritative exposition of law with regard to scope of waiver of condition of pre-deposit for entertainment of appeal in absence of statutory provision, this Court is not persuaded to relax such a condition. The orders rejecting the appeals summarily as affirmed by the Commissioner of Sales Tax revisional authority in exercise of power under Section 79(2) of the OVAT Act and Section 18(3) of the OET Act are hereby confirmed. The question for consideration as posed above is answered accordingly.

11. The petitioner in the alternative has made innocuous prayer for extending the benefit of pursuing remedy of appeal on deposit of 10% of the tax in dispute under the OVAT Act and 20% of the tax in dispute under the OET Act. This Court finds such a proposition mete and proper as the same would in no manner prejudice rights of either sides, nor do the authorities get influenced in any manner by any of the observations in deciding the case on its own merits. It is also submitted that after demand of tax and penalty being served on the petitioner-dealer, the petitioner has made certain deposits with the Department towards OVAT and OET.

11.1. Counsel for the petitioner has submitted that it has deposited certain amounts after demands being raised in the assessments and prayed for consideration of the same towards discharge of pre-deposit.

11.2. In ***VVF (India) Limited Vrs. State of Maharashtra and others, 2021 SCC OnLine SC 1202***, the Hon'ble Supreme Court of India has been pleased to direct for consideration deposits made on protest towards discharge of amount of pre-deposit. The Court observed as follows:

> *"11. While analyzing the rival submissions, it is necessary to note, at the outset, that, under the provisions of Section 26(6A), the aggregate of the amounts stipulated in the sub-clauses of the provision has to be deposited and proof of payment is required to be produced together with the filing of the appeal. Both clauses (b) and (c) employ the expression "an amount equal to ten per cent of the amount of tax disputed by the appellant". The entirety of the undisputed amount has to be deposited and 10 per cent of the disputed amount of tax is required to be deposited by the appellant. In the present case, the appellant disputes the entirety of the tax demand. Consequently, on the plain language of the statute, 10 per cent of the entire disputed tax liability would have to be deposited in pursuance of Section 26(6A). The amount which has been deposited by the appellant anterior to the order of assessment cannot be excluded from consideration, in the absence of statutory language to that effect. A taxing statute must be construed strictly and literally. There is no room for intendment. If the legislature intended that the protest payment should not be set off as the deposit amount, then a provision would have to be made to the effect that 10 per cent of the amount of tax in arrears is required to be deposited which is not the case. Justice Bhagwati in A.V. Fernandez v. State of Kerala, AIR 1957 SC 657, writing for a Constitution Bench, elucidated the principle of strict interpretation in construing a taxing statue as follows:*
>
> *'29. In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case of not covered within the four corners of the*

provisions of the taxing statue, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter.'

12. The High Court, while rejecting the petition, placed reliance on the fact that there has to be a proof of payment of the aggregate of the amounts, as set out in clauses (a) to (d) of Section 26(6A). The second reason which weighed with the High Court, is that any payment, which has been made albeit under protest, will be adjusted against the total liability and demand to follow. Neither of these considerations can affect the interpretation of the plain language of the words which have been used by the legislature in Section 26(6A). The provisions of a taxing statute have to be construed as they stand, adopting the plain and grammatical meaning of the words used. Consequently, the appellant was liable to pay, in terms of Section 26(6A),

10 per cent of the tax disputed together with the filing of the appeal. There is no reason why the amount which was paid under protest, should not be taken into consideration. It is common ground that if that amount is taken into account, the provisions of the statute were duly complied with. Hence, the rejection of the appeal was not in order and the appeal would have to be restored to the file of the appellate authority, subject to due verification that 10 per cent of the amount of tax disputed, as interpreted by the terms of this judgment, has been duly deposited by the appellant."

11.3. On the same principle, the petitioner in the present case is entitled to adjust amounts paid after demands being raised in the assessments. The petitioner is at liberty to deposit 10% of the tax in dispute under the OVAT Act and 20% of the tax in dispute under the OET Act on or before 30th April, 2022 subject to adjustment of such deposits which are claimed to have been made after demands of tax and penalty pursuant to Assessment Orders dated 16.06.2017 are raised. In the event of such deposits being made by the petitioner in terms of Section 77(4) of the OVAT Act and Section 16(4) of the OET Act, the appellate authority shall restore both the appeals to file and proceed with the appeals for hearing on merits.

11.4. As is apparent from the Orders dated 30.04.2019 vide Annexures-8 and 9, the appeals were filed in compliance of Order dated 02.01.2019 passed in writ petition(s). Since statutory deposits as discussed in the foregoing paragraphs were not made, the appeals were rejected summarily. Summary rejection orders were carried in revision before the Commissioner of Sales Tax, Odisha who has upheld the rejection orders of the appellate authority. It appears the petitioner has been bona fide pursuing its matter before different fora. Since the counsel for the petitioner has prayed for grant of opportunity

to make statutory deposit, it is, therefore, pertinent to observe that the appellate authority shall not raise any objection as to limitation in view of the fact that the petitioner has been pursuing its matter diligently.

11.5. So far as stay of recovery of demand of tax and penalty under the OVAT Act is concerned, in view of Section 77(5) as amended by virtue of the Odisha Value Added Tax (Amendment) Act, 2017, realization of the balance tax and penalty under dispute shall remain stayed till disposal of the appeal.

11.6. Further, so far as stay of recovery of demand of tax and penalty under the OET Act is concerned, it is relevant to have reference to the benevolence of the Commissioner of Sales Tax, Odisha vide Letter No.4508/CT, dated 22nd March, 2017 wherein it has been stated thus:

> *"As you are aware, as per Section 77(4) of the OVAT Act, a dealer has to pay 20% of the tax and interest, in dispute, as mandatory pre-deposit without which his first appeal cannot be entertained by the First Appellate Authority. Section 77(5) of the Act provides that the First Appellate Authority may, on application filed by the dealer within the prescribed period, stay the realization of balance tax, interest or penalty, under dispute, either in part or in full, till disposal of the first appeal.*
>
> *It is seen that the First Appellate Authorities, while disposing stay applications of dealers, generally order for payment of some more amount of tax, interest or penalty in addition to the mandatory pre-deposit. Very often the dealers approach the Commissioner, under Section 79(2) of the Act, seeking revision of the stay order of the First Appellate Authorities. In some cases, not being satisfied with the revision order of the Commissioner, the dealers do also approach the Hon'ble High Court for a favourable order.*
>
> *Therefore, in order to avoid unnecessary litigations, it is hereby advised that First Appellate Authorities, while disposing stay applications of dealers pertaining to VAT, CST and ET demands, should not insist on payment of tax, interest or penalty beyond the mandatory pre-deposit amount. Accordingly, stay applications should be disposed of quickly (grant of stay on the balance demand, as applied by the dealer, will not require any hearing) and time thus saved should rather be utilized for expeditious disposal of first appeal cases in the larger interest of revenue as well as the dealers.*
>
> *This communication is purely of advisory nature."*

On the fact and in the circumstances of the instant case, the appellate authority, while entertaining the appeal under the OET Act, or the recovery

officer, as the case may be, therefore, need not insist for more than what is deposited in terms of Section 16(4) of the OET Act during the pendency of the appeal.

11.7. Subject to satisfaction of the conditions enumerated above, the appeals under the OVAT Act and the OET Act are directed to be entertained and disposed of on merits.

12. With this, the present writ petition stands disposed of. No costs.

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2022 (II) ILR - CUT- 72

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

CRIMINAL APPEAL NO. 355 OF 2014

JUDHISTER MAJHI .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offences under section 302 and 498-A of the Indian Penal Code, 1860 – Conviction based on circumstantial evidence – The circumstances established by the prosecution do not lead to only one possible of inference regarding guilt of the appellant – Whether the post mortem report and opinion of the medical officer is sufficient to held the appellant guilty? – Held, No. – We are of the merited view that, only on the basis of post-mortem report and opinion of the medical officer, when other circumstances are held to be disproved the appellant cannot be convicted – Appeal allowed.

Case Laws Relied on and Referred to :-

1. (2021) 10 SCC 725 : Nagendra Sah Vs. The State of Bihar.
2. AIR (1963) SC 200 : M.G. Agarwal Vs. State of Maharashtra.
3. (2012) 11 SCC 685 : Balaji Gunthu Dhule Vs. State of Maharashtra.

For Appellant : Mr. Sahasransu Sourav
For Respodent : Mrs. Saswata Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 08.03.2022 : Date of Judgment: 21.04.2022

C.R. DASH, J.

The convict is the Appellant. He was prosecuted for the offences punishable under Sections 302 and 498-A of the Indian Penal Code, 1860 (for short I.P.C). The learned Additional Sessions Judge, Sundargarh by his judgment and order of sentence dated 21.03.2014 and 22.03.2014 respectively convicted the Appellant for both the offences. He was sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to suffer R.I. for two years under Section 302 of IPC. He was also sentenced to suffer R.I. for two years and to pay a fine of Rs.2,000/- in default to suffer R.I. for further period of six months under Section 498-A IPC. The sentences were ordered to run concurrently with the benefit of set off in accordance with law.

2. Being aggrieved by the aforesaid verdict, the Appellant has preferred the present appeal.

THE PROSECUTION CASE

3. The prosecution case as narrated in the F.I.R. and the impugned judgment is that, the Appellant was married to one Bhajamati, sister of the informant about two years prior to the occurrence; he was in the habit of subjecting her to cruelty on account of dowry; deceased Bhajamati on several occasions had intimated such facts to her parental family; the matter of discord between the Appellant and the deceased for not meeting the demand of the Appellant for a motorcycle came to such a pass that once in the recent past the deceased had to take shelter in the house of her parents for about two months; finally after a decision in the meeting of the village gentries (Samaj), she joined the Appellant in her matrimonial home; on 15.02.2013, in the night the matter of death of the deceased was intimated to the family of her father over phone. Next day around 1.30 PM, the informant (P.W.6) came to the house of the Appellant where he found her sister to be dead. He suspected that the Appellant had killed her by throttling her neck by means of a rope. Thus, he reported the matter at Lephripada Police Station in writing. The F.I.R. vide Ext.7 was scribed by one Jenamani Mahanandia, P.W.11 and

registered. The I.O., P.W.16 investigated into the matter and submitted charge sheet against the Appellant under Sections 498-A/302/304-B of the IPC and Section 4 of the D.P. Act.

In due course the case was committed for trial to the Court of Sessions and charge under Sections 498-A/302/304-B of IPC were framed.

DEFENCE PLEA

4. The defence plea is one of complete denial of facts alleged by the prosecution. From the suggestion to the witnesses and evidence of D.W.1 it is found that deceased Bhajamati was not interested to marry the Appellant.

THE PROSECUTION WITNESSES

5. Prosecution has examined sixteen (16) witnesses to prove the charge. P.W.6 is the informant. P.Ws 1, 9, 10, 11, 12, 13 and 15 are witnesses to different seizures. P.Ws.8 and 14 brother and one uncle of the deceased respectively are witnesses to inquest. P.Ws. 2 and 3 are witnesses to recovery of a rope from the house of the Appellant at the instance of the Appellant. P.W.4 is a co-villager of the Appellant. P.W.7 is the father of the deceased. P.W.5 is the Medical Officer, who conducted autopsy over the dead body of the deceased. P.W.16 is the I.O.

CONCLUSION ARRIVED AT BY LEARNED TRIAL JUDGE

6. In Paragraph-19 and 20 of the impugned judgment learned Trial Court has held thus:

> *"19. The deceased was the wife of the accused. She was found dead in his house. The accused was present when the occurrence had taken place. He had informed her relatives in the first place that she was ill and subsequently that she was no more. He did not divulge to any of them in the night of occurrence about the real reason of her death. Her relatives on their visit found her dead body lying on a cot with a ligature mark around her neck. The accused did not tell them there what was the cause of her death though he was present at that time. He had also not reported the matter of his wife's death to either the "Panch" or police. There is no evidence that the death of the deceased was suicidal. P.W 3 has stated that the father of the accused told him that his daughter in law had been murdered. A rope from his house was seized by the police. The dead body of the deceased was sent for medical examination. The doctor who conducted P.M examination on her dead*

body opined the death was caused due to asphyxia on account of strangulation and it was homicidal in nature. That there was marital discord between the accused and the deceased was proved from Ext.4 and Ext.A. The doctor has opined that the rope which was produced before him and his colleague by police for examination and opinion was capable of causing the injury vide the P.M. examination report. His report reveals that the death of the deceased was unnatural.

20. All these fully established facts in the chain of circumstances available in this case when joined together prove beyond all reasonable doubt that the accused has subjected the deceased who was his legally married wife to such cruelty as attracts the provision under explanation (a) of section 498-A of the I.P.C. They also prove beyond reasonable doubt that the accused had caused the death of the deceased by strangulation with the help of the seized rope with the intention of causing her death. The chain of evidence is so complete that it does not leave any reasonable ground for a conclusion consistent with the innocence of the accused."

SUBMISSION OF THE LEARNED COUNSELS

7. Mr. Saharanshu Sourav, learned counsel for the Appellant submitted that, none of the witnesses except the official witnesses have supported the prosecution case to the extent they have been examined for and that the conviction of the Appellant is based solely on the cause of death of the deceased as mentioned in the post-mortem report. Except the homicidal death of the deceased and the opinion of the Medical Officer about the cause of death and about the use of rope, that is alleged to have been seized from the house of the Appellant, there is nothing on record to connect the Appellant with the offence of murder as alleged. So far as the offence under Section 498-A IPC is concerned, learned trial Court in Pragraph-14 of the impugned judgment has disbelieved P.Ws.6, 7 and 14 so far as demand of motorcycle is concerned, but on the basis of Ext.4 and Ext.A, he has come to a conclusion that, the Appellant was tormenting the deceased, which fact has been corroborated by P.Ws.6, 7 and 14. The reasoning of learned trial Court to arrive at a conclusion regarding the guilt of the Appellant under Section 498-A IPC is not at all reasonable and real. Learned counsel for the Appellant placed reliance on a decision of Hon'ble the Supreme Court in the case of ***Nagendra Sah Vs.The State of Bihar (2021) 10 SCC 725*** to support his contention.

Further, it is submitted by learned counsel for the Appellant that, the circumstances relied on by the prosecution has not at all been proved and the inference drawn by learned trial judge is more illusory than real. He further

submitted that, the Appellant was living in his house with his parents and there is evidence of P.W.4 to the effect that, deceased was liking another person of her village. The rustic people like the Appellant does not live in protected houses, as found from the spot map. The spot house is a small one room house and anybody could have entered the house to kill the deceased. He further submitted that, P.Ws.2 and 3, who had gone to the house of the deceased on being called by father of the Appellant had seen the dead body of the deceased on the front platform of the house, but the informant and others including the I.O., saw the dead body inside the house lying on a cot. These aspects throw doubt, so far as the spot of occurrence is concerned.

8. Mrs. Saswata Patnaik, learned Additional Government Advocate appearing for the Respondent-State submitted that, the defence plea being one of denial and the medical evidence being specific to the point that, the death of the deceased was homicidal in nature and caused by the rope seized from the house of the Appellant, there is no escape for the Appellant. She submitted further that, admittedly, the Appellant and the deceased were staying together under the same roof and therefore, Section 106 of the Indian Evidence Act, 1872 (for short 'the Evidence Act') will apply. Therefore, the burden was on the Appellant to explain how the death of the deceased had occurred. The Appellant having failed to discharge the burden under Section 106 of the Evidence Act, the trial Court judgment is to be confirmed.

CONSIDERATION OF SUBMISSIONS

9. We have given merited consideration to the submission advanced at the Bar. The prosecution case is based entirely on circumstantial evidence. The learned Additional Sessions Judge, as found from our discussion supra in Paragraphs-19 and 20 of his judgment has set out various facts, which according to him constituted a complete chain of circumstances against the Appellant.

10. After going through the trial Court judgment in detail, we are of the view that the author of the judgment goes on detours and tangents and his reasoning in the judgment is convoluted.

OFFENCE UNDER SECTION 498-A I.P.C.

11. So far as offence under Section 498-A IPC is concerned, it is based on direct evidence. P.W.6 is the informant, who happens to be the elder brother

of the deceased. P.W.7, the father of the deceased and P.W.14, the uncle of the deceased are asserted to have testified about the demand of a motorcycle by the Appellant. P.W.6 in Paragraph-3 of his evidence has testified thus:

> *"3. I suspected the hand of the accused in killing my sister as in the past he was assaulting her for dowry. He was demanding a motor cycle as dowry and my sister on being harassed by the accused had once come away from his house and agreed to go there again after intervention by the Panch where the accused had executed a document to the effect that he would not subject her to cruelty."*

In cross-examination Paragraph-5 P.W.6 has stated thus:

> *"…In the said document the fact that the accused was demanding a motor cycle and assaulting her on that account has not been reflected..."*

In the said Paragraph-5 of his testimony P.W.6 has specifically testified that only once his sister had come to their house alone. On all occasions, she was visiting their house with the Appellant. On the occasion when she had come to their house alone, she had disclosed that she was subjected to cruelty by the accused, who was demanding a motorcycle. During her stay in their house, the village gentries of the village of the Appellant had come to their village and a Panch was held, which amongst others was attended by him where the minutes of the meeting was reduced to writing.

From the evidence of this witness it is clear that, the deceased had come once only alone to her father's house and on that occasion only she had disclosed about the demand of a motorcycle. The evidence of P.W.6 to the effect that, the deceased had conveyed them such facts about 7 to 8 months after the marriage of the Appellant and the deceased, when the deceased was carrying cannot therefore be believed, because there was no occasion for the deceased to say about the demand on any other occasion, as each time the Appellant was accompanying her to his in-laws house. P.W.6 in Paragraph-5 of his deposition has further testified that when they confronted the accused, he denied to have made any such demand. If the Appellant would have made any demand for motor cycle, he could have said about such demand when confronted but here it is seen that the Appellant is denied to have made any such demand. The document was reduced to writing for harassment meted out to the deceased to meet the demand of a motorcycle. Same is the evidence of P.W.7 (father of the deceased) in Paragraph-2 of his evidence. The relevant evidence of P.W.7 is quoted below:

"2. The accused during the marriage was frequently making a demand for motor cycle before us and on one occasion when my daughter had come away from the house of the accused and stayed for about two months had disclosed before us that she was being assaulted by the accused as his demand for a motor cycle was not being met. On that occasion the accused came to our village with his villagers, agreed not to assault my daughter again in the meeting which was attended by his and our villagers and a document was prepared to that effect. I was present in the said meeting".

In his cross-examination Paragraph-4 P.W.7 has testified thus:

"……..*The document that was reduced to writing in the village meeting mentioned as above did not reflect the fact of demand of a motor cycle by way of dowry by the accused……."*

12. P.W.8, who is another brother of the deceased and has been examined as a witness to inquest is completely silent about such demand of a motorcycle as dowry by the Appellant.

13. There is mention about P.W.14 corroborating Ext.4 and Ext.A in the trial Court judgment, but P.W.14 has not whispered a word about the demand of a motorcycle by the Appellant in his evidence. Especially when the deceased is the niece of P.W.14.

14. Ext.4, which has been proved being marked as exhibit by P.W.4 is the document reduced to writing before the Panch. There is nothing in that document regarding the demand of motorcycle and consequent harassment of the deceased by the Appellant for that. Ext.A is another document proved by the defence through said P.W. 4 with objection by the prosecution but same is the fact there. However, contents of both the documents have not at all been proved by any competent witness, though they have simply been marked as exhibits.

15. From the evidence of P.Ws.6 and 7, it is crystal clear that, the Appellant was subjecting the deceased to cruelty for fulfillment of demand of a motorcycle and she (deceased) had disclosed about such facts when she had come alone to her father's house. Accordingly, a Panch meeting consisting of villagers of the Appellant and the villagers of the father of the deceased was held and the document vide Ext.4 was prepared. There is, however, nothing in that document regarding the demand of motorcycle, as admitted by P.Ws.6

and 7 themselves and, as found from the contents of Ext.4 (though not proved). If the very object of harassment and cruelty goes, there is no reason for Appellant to subject the deceased to harassment and cruelty and so far as this aspect is concerned, learned trial Judge has misdirected himself and reached a wrong conclusion.

For the reasons as aforesaid, the conviction of the Appellant under Section 498-A IPC must fail.

DISCOVERY OF THE ROPE

16. So far as the death of the deceased is concerned, there is evidence of the Medical Officer (P.W.5) only to the effect that, death of the deceased was caused by asphyxia owing to strangulation and was homicidal in nature. The post-mortem report was proved vide Ext.5. The I.O. caused production of the rope seized from the house of the Appellant before the Medical Officer and elicited his opinion, as to whether the injuries on the body of the deceased were possible by the said rope. P.W.5 and one Dr. B.K. Patel, who was assisting P.W.5 in autopsy over the dead body of the deceased-Bhajamati Majhi opined that, the ligature mark noticed in Ext.5 could be possible by the said rope.

The I.O. P.W.16 in his evidence has testified that, on 17.02.2013, he arrested the Appellant from the 'Pada' of the village and recorded his statement under Section 27 of the Indian Evidence Act as he disclosed to give recovery of the rope which, he has kept concealed in the eve of the house. His statement to this effect was recorded by him (P.W.16) in presence of the witnesses. He also stated to give recovery of the said rope and accordingly in presence of witnesses, namely, Brusava Bag, P.W.2 and Balaram Dandasena, P.W.3., the Appellant led to his house and gave recovery of the plastic rope kept concealed in the eve of the house from under the thatched thereon. Brusava Bag P.W.2 and Balaram Dandasena P.W.3, however, have not supported the prosecution case on this aspect. Taking into consideration the sequence of events and the positive evidence of P.Ws.2 and 3, it is not safe to rely on the evidence of P.W.16 alone on this aspect of recovery of the rope under Section 27 of the Evidence Act at the instance of the Appellant in as much as rope is a commonly available item in a village house and there is doubt as to why the Appellant preserved a commonly available item which may incriminate him in the eve of his house by keeping thatch over it to make it look like concealed.

CULPABILITY ON THE GROUND OF HOMICIDAL DEATH ONLY

17. It is to be seen, therefore, whether the Appellant can be inculpated on the ground that death of the deceased was caused in his house and such death of the deceased was homicidal in nature. In this regard, we feel persuaded to discuss the judgment of Hon'ble the Supreme Court in the case of ***Nagendra Sah Vs. State of Bihar (2021) 10 SCC 725*** relied on by learned counsel for the Appellant, which reads thus:

> *"16. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In the case of* ***Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*** *in paragraph 153, this Court has laid down five golden principles (Panchsheel) which govern a case based only on circumstantial evidence.*
>
> *Paragraph 153 reads thus : -*
>
> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:*
>
> *Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.*
>
> *(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*
>
> *(4) they should exclude every possible hypothesis except the one to be proved, and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*
>
> *Paragraphs 158 to 160 of the said decision are also relevant which read 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 started 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."

18. In the case of **Nagendra Sah** (supra) the Appellant was alleged to have 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 the existence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis of the guilt of the appellant."*

19. Hon'ble the Supreme Court in the case of ***M.G. Agarwal Vs. State of Maharashtra AIR (1963) SC 200 followed in (1973) 4 SCC 17***, has held that, inference of guilt can be drawn only, if the proved facts are wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is well established rule of criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. But in applying the principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt.

From the aforesaid decision of Hon'ble the Supreme Court it is clear that, the primary or basic facts are to be treated as "proved" or "disproved" and there cannot be anything in between them.

20. In the present case, as mentioned above there is no evidence except the fact that, the death of the deceased was caused in the house of the Appellant in the night. If the demand of motorcycle for dowry goes, there is no evidence on record to show that the relationship between the Appellant and the deceased was strained. None of the co-villagers of the Appellant examined in the present case have testified that, the relationship between the Appellant and the deceased was strained. Though, P.W.4 has been disbelieved by the trial Court on the ground of discrepancy, he in Paragraph-3 of his evidence, has testified that the deceased while alive was not interested to stay with the accused and was interested to live with another person of her village and that was the reason why she was frequently remaining absent from the house of her husband. P.W.4 is a rustic witness. In the evidence of such a witness discrepancies are bound to be there, as they do not possess an informed mind but they say exactly about the things they have seen or heard. This evidence of P.W.4 therefore cannot be disbelieved to the hilt. There must be some reasons which the prosecution and the defence might be suppressing but P.W.4 being a rustic has testified what he had heard or seen.

21. The parents of the Appellant in a single room house of the Appellant were staying together with the Appellant at the time of occurrence and in the morning succeeding next to the night of occurrence, the father of the Appellant called the villagers saying that, his daughter-in-law has been murdered. Hearing such fact from the mouth of the Appellant's father Balaram Dandasena (P.W.3) and others co-villagers went to the house of the Appellant and saw the dead body of the wife of the Appellant there on the front platform of the house. P.Ws.6, 7, 14 and the I.O., however, testified that, they saw the dead body of the deceased lying on a cot inside the room. These facts give rise to questions in our mind, as to whether death of the deceased was caused outside the house or it was caused inside the house? Who shifted the dead body of the deceased from the front platform of the house to the room inside? Whether the murder was caused while the deceased was awake or while she was asleep? There is also nothing on record to show that, the deceased had raised any alarm nor there is any mark of struggle on her dead body. Whether she had come outside for some purpose and she was strangulated to death by that "any other person" of her father's village remains a question mark in the entire case. There is also a question, as to whether any other person in the house excluding the Appellant has caused the death of the deceased especially when the spot house is a one room house and the Appellant's parents were also staying there. All these questions that arise

in our mind drive us to hold that there could more than one hypothesis which cannot altogether be excluded. Therefore, it cannot be said that, the facts established do not rule out the existence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis that is of the guilt of the Appellant.

BURDEN OF THE ACCUSED UNDER SECTION 106 EVIDENCE ACT.

22. We do not have to labour much so far as the submission of Mrs. Saswata Patnaik, learned Additional Government Advocate regarding application of Section 106 of the Evidence Act in the present case is concerned. Because, Hon'ble the Supreme Court in the case of ***Nagendra Sah*** (supra) has dealt with the question in a similar facts situation in the following words:

> *"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 especially 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 contrary, 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 can always 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 by the 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."

23. We have already held and concluded in this case that, the circumstances established by the prosecution do not lead to only one possible inference regarding the guilt of the Appellant.

24. Therefore, the question that survives for consideration is whether only on the basis of opinion of the Medical Officer (P.W.5), who conducted the autopsy over the dead body of the deceased regarding cause of death and their opinion regarding the rope seized from the house of the Appellant if used can cause such death, can be held to be sufficient to hold the Appellant guilty. We are of the merited view that, only on the basis of post-mortem report and opinion of the Medical Officers when other circumstances are held to be disproved the Appellant cannot be convicted for the offence punishable under Section 302 of the IPC. (See ***Balaji Gunthu Dhule vs. State of Maharashtra (2012) 11 SCC 685***).

25. In the result, the appeal is allowed. The impugned judgment and order of sentence passed by the learned Additional Sessions Judge, Sundargarh in S.T. Case No.118/11 of 2013 are hereby set aside. The Appellant be set at liberty forthwith, if his detention is not required in any other case.

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2022 (II) ILR - CUT- 87

BISWAJIT MOHANTY, J.

W.P.(C) NO. 3373 OF 2022

NAMITA SAGARIA ……..Petitioner

.V.

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

ODISHA SCHEDULED CASTES, SCHEDULED TRIBES & BACKWARD CLASSES (Regulation of Issuance and Verification of Caste Certificate) Act, 2011 – Sections 6 & 7 – Whether the Tahasildar has any jurisdiction to cancel a caste certificate – Held, No. – The Tahasildar has no jurisdiction to cancel caste certificate after coming into force of the 2011 Act. (Para-7)

For Petitioner : M/s. Anirudha Das, G.P. Panda, A. Das, S.C. Mishra & A. Sahoo

For Opp. Parties : Mr. D.K. Mohanty, Addl. Standing Counsel

JUDGMENT Date of Hearing : 19.05.2022 : Date of Judgment: 20.05.2022

BISWAJIT MOHANTY, J.

The petitioner has filed the present writ petition praying for quashing of the order dated 22.01.2022 under Annexure-2 whereby, her Caste Certificate issued under Annexure-1 was cancelled.

2. The case of the petitioner is that, she happens to be a permanent resident of village Kusumi under Tentulikhunti Police Station in the district of Nabarangpur. She applied for issuance of a Caste Certificate in her favour before the Tahasildar, Tentulikhunti (opposite party No.3). The opposite party No.3 conducted the enquiry through concerned Revenue Inspector and being satisfied about the caste of the petitioner as "Dambo" which is recognized as Scheduled Caste under Constitution (Scheduled Castes) Order, 1950 issued Caste Certificate in her favour on 18.01.2022 under Annexure-1. Suddenly without any rhyme and reason and without issuing any notice to the petitioner to show cause and without causing any enquiry, the Tahasildar, Tentulikhunti abruptly intimated cancellation of the above noted Caste Certificate vide letter dated 22.01.2022 issued under Annexure-2 to the Election Officer cum-Block Development Officer, Tentulikhunti. The petitioner came to know about such cancellation from the Office of Block Development Officer, Tentulikhunti. It is the further case of the petitioner

that the father of the petitioner Gangadhar Harijan belongs to "Dombo" caste, which would be clear from the Record of Rights issued under Annexure-3 series. Similarly, the title "Sagaria" which happens to be the title of the husband of the petitioner also comes under "Dombo" caste as would be clear from the Record of Rights issued in favour of the ancestors of the husband of the petitioner under Annexure-3 series. Thus all throughout the petitioner belongs to "Dombo" caste and also married in the Dambo caste and as such there was no reason available with the opposite party No.3 for cancelling her caste certificate, which was rightly issued under Annexure-1 without giving any notice to her. Such cancellation is politically motivated as she was taking part in the last panchayat election and was issued in haste and since the same has been passed in violation of principles of natural justice, the same should be quashed.

3. In the counter affidavit filed by the opposite party Nos.2 & 3, the stand of the said opposite parties is that the petitioner had applied for a Scheduled Caste Certificate on 20.12.2021. Since after marriage, she is presently living in village Kusumi, in order to ascertain the birth caste of the applicant, such application was forwarded to the Tahasildar, Nabarangpur. After receipt of report from the Tahasildar, Nabarangpur along with the report of Revenue Inspector, Chikili and basing on the said reports, the certificate was approved on 18.01.2022. However, on 18.01.2022, an objection under Annexure-A/2 was received from the villagers of Kusumi to the effect that the petitioner and her family members are practicing Christianity, Christian customs and traditions so she cannot belong to scheduled caste as her present religion is Christian. Accordingly, on 20.01.2022, the opposite party No.3 along with the Revenue Inspector, Anchalguma went to village Kusumi to do a preliminary enquiry into the objection filed by the villagers. There they recorded the statements of some villagers. Such statement has been filed as Annexure-B/2 and accordingly, the application of the applicant which was approved on 18.01.2022 was reverted back i.e. was put on hold and now the present status of the case is that the application of the petitioner is under process and final order in the case has not yet been passed. After following the due procedure, the case will be disposed of. When on 22.01.2022, the Block Development Officer-Cum-Election Officer, Tentulikhunti sought for a clarification on the genuineness of the certificate produced by the petitioner, the impugned letter under Annexure-2 was issued.

4. In the rejoinder affidavit filed by the petitioner, she has stated that Section 7(1) of the Odisha Scheduled Castes, Scheduled Tribes and Backward Classes (Regulation of Issuance and Verification of Caste Certificates) Act, 2011 (for short 'the Act') makes it clear that only the Scrutiny Committee constituted under the said Act can cancel and confiscate the certificate after enquiry into the correctness of such certificate and after giving the person an opportunity of being heard in the matter. Since the cancellation intimation order has been issued under Annexure-2 without following the above noted mandatory provisions, the same ought to be set aside.

5. Heard Mr. A. Das, learned counsel for the petitioner and Mr. D.K. Mohanty, learned Additional Standing Counsel.

6. The undisputed facts in the case are as follows:

On 20.12.2021, the petitioner had applied for her Caste Certificate before opposite party No.3. On receipt of such application, her application was forwarded to the Tahasildar, Nabarangpur and Revenue Inspector, Chikili. After the report was received from the Tahasildar, Nabarangpur and Revenue Inspector, Chikili on 17.01.2022, the Caste Certificate under Annexure-1 was issued on 18.01.2022. The stand of opposite party Nos.2 & 3 is that, it was only approved on 18.01.2022 and later on, on account of objection by the villagers on the same day, it was put on hold with the present status that the application of the petitioner is still under process, cannot be accepted as in para-8 of their counter, they themselves have averred that the certificate was produced by the petitioner before the Block Development Officer-Cum-Election Officer, Tentulikhunti, who sought for a clarification about the genuineness of the said certificate. Further such plea flies in the face of the certificate enclosed at Annexure-1. Therefore, this Court is not willing to accept the contention of opposite party Nos.2 & 3 that the application of the petitioner which was only approved was put on hold after receiving the objection from the villagers. Further, the language of Annexure-2 also clearly indicates that the Scheduled Caste Certificate issued to the petitioner has been reverted back which may be treated as cancelled. A combined reading of both the Annexures-2 & 1 would show that the Caste Certificate under Annexure-1 was issued to the petitioner after approval and later on, on account of some complain, such certificate was cancelled. In Annexure-2 though the opposite party No.3 has used the phrase "reverted

back" however, the same also makes it clear that the same be treated as cancelled. Thus, the opposite party No.3 has tried to obfuscate the issue.

7. Now the question arises whether such cancellation under Annexure-2 can be sustained legally. No documentary evidence has been filed on behalf of opposite party Nos.2 & 3 to show that prior to communicating cancellation order under Annexure-2, the petitioner was given an opportunity of hearing or was given any show cause by the appropriate authority, which has been authorized to issue such cancellation order. In this context, let us refer to the provisions of Sections 6 & 7 of "the Act" which are quoted hereunder:

> "6. (1) The Government shall constitute by notification in the Official Gazette, one or more Scrutiny Committees for verification of Caste Certificates issued by the Competent Authorities under sub-section (1) of section 4 specifying in the said notification the functions and the area of jurisdiction of each of such Scrutiny Committees.
>
> (2) The appointing authority of the Government, Central Government, Local Authority, public sector undertakings, educational institutions, Co-operative Societies or any other Government aided institutions may make application, in such form and in such manner as maybe prescribed, to the Scrutiny Committee concerned for the verification of the Caste Certificate, if any doubt arises about the genuineness of the Caste Certificate produced by any person to get any benefit on the basis of such Certificate:
>
> Provided that the Scrutiny Committee shall also have the power to verify suo-motu the genuineness of a Caste Certificate issued by the Competent Authority:
>
> Provided further that the person whose Caste Certificate has been subjected to verification shall not be debarred to avail the benefit nor shall discontinue to avail the benefit until the Caste Certificate is cancelled by the Scrutiny Committee.
>
> (3) The Scrutiny Committee shall follow such procedure for verification of the Caste Certificate and adhere to the time limit for verification and grant of validity certificate as may be prescribed.
>
> 7.(1)Where, before or after the commencement of this Act, it comes to notice that a person not belonging to any of the reserved category has obtained a false Caste Certificate to the effect that either himself or his children belong to such reserved category, the Scrutiny Committee may, suo-motu or otherwise, call for the record and enquire into the correctness of such Certificate and if it is of the opinion that the Certificate was obtained fraudulently, it shall, by an order, cancel and confiscate the Certificate by following such procedure as maybe prescribed after giving the person concerned an opportunity of being heard and communicate the same to the concerned person and the concerned authority, if any.

> (2) The order passed by the Scrutiny Committee under this Act shall be final and shall not be challenged before any authority or court except the High Court under article 226 of the Constitution of India."

A perusal of section 6 of the 'Act' makes it clear that only Scrutiny Committee constituted under 'the Act' has been empowered to verify the genuineness of the caste certificate. For such purpose as provided under Sub-Section (1) of Section 7 of 'the Act' when it comes to notice that a person, who does not belong to any of the reserved category has obtained a false Caste Certificate, then the Scrutiny Committee can suo-motu or otherwise call for the records and enquire into the correctness of such certificate and after giving the person concerned an opportunity of being heard can cancel or confiscate the certificate and communicate the same to the person concerned and the concerned authority, if any. In this case, there is nothing to show that prior to issuance of cancellation communication under Annexure-2, the above noted provisions of law have been followed. Thus there has been a gross violation of the provisions of law and principles of nature justice as contained therein. Even if the above noted provisions were not there, then also the Caste Certificate under Annexure-1 could not have been cancelled at least without giving an opportunity of hearing to the petitioner and without issuing a show cause containing the details of allegations made against her as such cancellation certainly visits the petitioner with civil and evil consequences. In any case, the above noted provisions of law have been clearly violated in the present case inasmuch as the cancellation order has not been passed by the Scrutiny Committee as the said committee is only authorized to verify the genuineness of such certificate and issue cancellation order. Thus the impugned communication under Annexure-2 has been issued without jurisdiction as after coming into force of 'the Act', Tahasildar, Tentulikhunti (opposite party No.3) has no jurisdiction to cancel a Caste Certificate. Thus, there has been a total non-application of mind by the opposite party No.3 while communicating the cancellation of Annexure-1 under Annexure 2. In such background, this Court has no hesitation in quashing the communication under Annexure-2 since it is a product of arbitrary exercise of power. Accordingly, the impugned communication is hereby quashed.

8. However, if anybody has any grievance relating to the genuineness of the Caste Certificate issued in favour of the petitioner, an appropriate motion as permitted under "the Act" can be made before the Scrutiny Committee, who in turn can redress such grievance in accordance with law.

9. Accordingly, the writ petition is disposed of.

2022 (II) ILR - CUT- 92

Dr. B.R. SARANGI, J.

W.P.(C) NO. 7990 OF 2016

RAMAKANTA PARIJA .....Petitioner

.V.

DEPUTY CHIEF MINING ENGINEER, SUB-AREA MANAGER, BELPAHAR .....Opp. Party

SERVICE LAW – Departmental proceeding – Illegal termination – Re-instatement – Application for promotion – Maintainability of such application questioned – Opposite party pleaded that, as the petitioner has not worked, is not entitle to get promotion – No fault of petitioner pleaded – Action of the Authority challenged – Held, petitioner is entitled to get promotion.

Case Laws Relied on and Referred to :-

1. AIR 1991 SC 2010 : Union of India Vs. K.V. Jankiraman.
2. AIR 2004 SC 977 : Union of India Vs. Madhusudan Prasad.
3. 2021 (I) OLR 707 : Dr. Bijayananda Naik Vs. Fakir Mohan University
4. AIR 2007 SC (Supp.) 637 : J.K. Synthetics Vs. K.P. Agarwal.
5. 2014 (II) ILR CUT 165: Jute Corporation of India Ltd. Vs. Judhistira Swain.
6. 119 (2015) CLT 281 : Akhilananda Sahoo Vs. Joint General Manager, OSFC & Ors.

For Petitioner : Mrs. U.R. Padhi.

For Opp. Party : M/s. B. Mohanty & T.K. Pattnayak.

JUDGMENT Date of Hearing & Judgment: 14.02.2022

Dr. B.R. SARANGI, J.

The petitioner, who was working as a Dumper Operator and terminated from service on 07.11.1990 and subsequently reinstated in service on 27.05.2009, has filed this writ petition seeking to quash the order dated 01.03.2016 under Annexure-1, by which he has been denied the benefit of promotion and other reliefs.

2. The factual matrix of the case, in brief, is that the petitioner was appointed as a Dumper Operator and joined in service on 13.02.1984. After completion of his probation period on 12.02.1985, his post was designated as EPGE (Shovel). At that point of time, he was issued with a charge sheet on the allegation that on 05.05.1986 some tyres were stolen from the store of the

company, when the key of the store was with the petitioner-workman. The same was specifically denied by the petitioner and it was stated that he was never handed over with the keys of the store during the relevant period and he never remained in-charge of the store at any point of time. During the enquiry neither the list of documents nor the list of witnesses was supplied to the petitioner and, as such, there was non-compliance of the principles of natural justice in a domestic inquiry. But, thereafter, he has been terminated from service.

2.1 Challenging the order of termination, the petitioner approached the industrial forum by filing conciliation proceeding. Thereafter, the matter was referred to the Industrial Tribunal in Clause-(d) of sub-section (1) and sub-section (2A) of Section 10 of Industrial Disputes Act, 1947, for adjudication vide letter dated 11.11.1993 with following terms of reference:-

> *"Whether the action of the management of the IB vally area of SEC Ltd. in dismissing Sri Ramakanta Parija from company's service is legal and justified. If not to what the concerned workman is entitled to and from what date?"*

On reference being made, the same was registered as I.D. Case No.26 of 1997 (C) before the Presiding Officer, Industrial Tribunal, Rourkela and after due adjudication, the tribunal vide award dated 26.10.1999 held as follows:

> *"xxx …… So I find there was no prima facie case against the 2nd party and the domestic enquiry was not conducted properly adhering to the principles of natural justice. So his dismissal basing on this domestic enquiry is not legal and justified."*

The Presiding Officer also stated in the order that the petitioner is entitled to reinstatement in service with full back wages.

2.2 Aggrieved by the order dated 26.10.1999 passed by the tribunal, the opposite party preferred writ petition before this Court in OJC No.4054 of 2001 and this Court, vide order dated 19.02.2009, affirmed the order passed by the industrial tribunal, by holding that no impropriety and illegality can be said to have been committed by the tribunal so as to warrant any interference by this Court.

2.3 Nothing has been placed on record to show that challenging the aforesaid order passed by this Court, the opposite party preferred any appeal

before the apex Court. In any case, pursuant to the order dated 19.02.2009 passed by this Court in OJC No.4054 of 2001 and considering the findings arrived at by the tribunal in the impugned award dated 26.10.1999 in ID Case No.26 of 1997, the Project Officer issued a memorandum of settlement, vide letter dated 21.05.2009, as per Rule-58 in Form-H, regarding reinstatement of the petitioner along with back wages. Accordingly, a sum of Rs.6, 52,245.07 was deducted from the net amount of Rs.16, 18,124.47 and an amount of Rs.9, 65,879.40 was disbursed to the petitioner. As a consequence thereof, the order of the tribunal has not been complied with in full, as the benefit of notional promotion has not been given to the petitioner. Though the petitioner has been reinstated with full back wages, but his entitlement for consequential benefits have not been determined and paid to him. One N.K. Mohapatra, a similarly situated workman, though has been granted the consequential benefits, but the petitioner has been discriminated. It is stated that even though the petitioner is entitled to get promotion, after his reinstatement, but the same has not been given to him and, as such, the same has been kept in a sealed cover, thereby denying him to get the consequential benefits by re-fixing his salary,.

2.4 Thereafter, due to non-extension of the aforesaid benefit, the petitioner filed W.P.(C) No.22316 of 2010, which was disposed of vide judgment dated 09.10.2015 with the following observations:-

> *"6. The petitioner was made to suffer for no reason by the action of the Management, which has been nullified fully by the Industrial Tribunal. The award of the Industrial Tribunal has been confirmed by this Court in OJC No.4054 of 2001. Had the petitioner worked, he would have reasonably expected to get promotion. Though not a right, promotion is an incidence of service. If a person is entitled to be brought under the zone of consideration, he has a right to be considered for promotion. In the present case, it is alleged by the petitioner that persons similarly circumstanced with him have been promoted up to the Special Grade and they are getting higher scale of pay. Had the petitioner been in service throughout the period, he would have also got promotion keeping in view his service record, merit and domeanour, etc. There is nothing in the counter affidavit by the opposite party to show that except the alleged misdeed which has been erased by the award of the Industrial Tribunal, the petitioner had any other misdeed disentitling him to promotion. In view of such fact and in view of the nature of award passed by the Industrial Tribunal as confirmed by this Court, the petitioner should have been reinstated in service with full back wages along with all the consequential service benefits including promotion.*

> *7. Taking into consideration the aforesaid fact, the writ petition is disposed of with the direction to the opposite party to consider the case of the petitioner for promotion notionally, as he has already retired from service in the meantime, and to fix his pay in the grade equal to the co-workers similarly circumstanced with him have been serving. The entire exercise be completed within a period of four months from the date of receipt of a certified copy of this order, and the retiral benefits to the petitioner be given in accordance with the promotional post he is entitled to be fitted in according to the consideration of the opposite party."*

2.5 In view of the aforesaid observation made by this Court, the petitioner is entitled to get promotion notionally, as he has already retired from service in the meantime on attaining the age of superannuation, and his pay is to be re-fixed in the grade equal to the similarly circumstanced co-workers. Though a time limit had been fixed, but the benefit has not been extended to the petitioner and, as such, the petitioner has retired on 28.02.2011 as a category-D employee by virtue of the notice dated 02.11.2010. For non-extension of the benefits in terms of the award passed by the tribunal, which was affirmed by this Court, and also despite specific direction issued by this Court in subsequent writ petition, the petitioner has approached this Court seeking consequential benefits.

2.6 The direction, which was given by this Court in W.P.(C) No.22316 of 2010 disposed of on 09.10.2015, has not been complied with by passing the order dated 01.03.2016 under Annexure-1 to the following effect:-

> *"1) The eligibility for promotion to the next higher post is based on working experience of the present post which is attained by working daily. Here he has no such working experience.*
>
> *2) ACR for last 3 years is required for any promotion to the next higher post which is given by his reporting officer based on his performance of work. In this case ACR cannot be filled as he has not performed any work.*
>
> *3) Minimum attendance of 240 days/year for at least two years in last 3 years is required for promotion, in this case he has Nil Attendance."*

In view of the above, the petitioner has been denied the benefit of promotion to the next higher grade. Hence this application.

3. Mrs. U.R. Padhi, learned counsel for the petitioner contended that the opposite party, instead of adhering to the directions given by the industrial tribunal to extend the notional benefits of promotion to the petitioner, which

was affirmed by this Court, rejected the claim of the petitioner vide Annexure-1 dated 01.03.2016, without any application of mind. Thereby, the same cannot be sustained in the eye of law. It is contended that the case of the petitioner with regard to promotion should have been considered in the light of the judgment of the apex Court in the case of ***Union of India v. K.V. Jankiraman, AIR 1991 SC 2010*** and consequentially the petitioner should have been extended with the consequential benefits as due and admissible to him in accordance with law.

4. Mr. T.K. Pattnayak, learned counsel for the opposite party, referring to the counter affidavit, contended that in compliance of the order passed by the tribunal, the petitioner was reinstated in service along with back wages w.e.f. 07.11.1990 to 31.03.2009. It is further contended that against the order passed by this Court in W.P.(C) No.22316 of 2010 disposed of on 09.10.2015, the opposite party preferred writ appeal bearing W.A. No.109 of 2016 and, therefore, the claim of the petitioner cannot be sustained in the eye of law and is liable to be rejected.

5. This Court heard Mrs. U.R. Padhi, learned counsel for the petitioner and Mr. T.K. Pattnayak, learned counsel for the opposite party through 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.

6 On the basis of the undisputed facts, as narrated above, this Court finds that the petitioner has been reinstated in service by virtue of the order passed by the tribunal in ID Case No.26 of 1997 disposed of on 26.10.1999, which was confirmed by this Court in OJC No. 4054 of 2001 disposed of on 19.02.2009 and, as such, it is admitted by the opposite party that the petitioner was reinstated in service along with the back wages. But, after reinstatement in service in his previous job, pursuant to the award passed by the Presiding Officer, Industrial Tribunal in ID Case No.26 of 1997 disposed of on 26.10.1999, the petitioner is entitled to get notional promotion, it comes under the meaning of "consequential service benefits" as due and admissible to the petitioner. More so, it was brought to the notice of the authority that similarly situated persons, those who had joined along with the petitioner, have extended with the benefit of promotion and some of the juniors to the petitioner have also got such benefit. Thereby, when the petitioner has been reinstated in service, he is entitled to get the benefit of

promotion, which has been extended to the similarly situated persons and also his juniors. But, while considering the same, in the order impugned the benefit of promotion has been denied to the petitioner, by simply stating that eligibility for promotion to the next higher post is based on working experience of the present post which is attained by working daily and, as such, the petitioner has no such working experience. If for the laches caused by the management, the petitioner-workman is deprived of gaining such working experience, then for no fault of him he cannot be denied the benefit of promotion as due and admissible to him in accordance with law. More so, the petitioner only claims notional promotion and fixation of his scale of pay admissible to the post and consequential revised financial benefits admissible to him from the date of reinstatement in service till he was superannuated and subsequent fixation of his retirement benefits. The reasons, which have been assigned in Annexure-1 dated 01.03.2016 to the above extent at sl.no.1, cannot sustain in the eye of law. As such, if at the fault of the employer the workman is deprived of fulfilling such eligibility criteria for promotion, he ought to have been extended with the benefit of promotion as due and admissible to him.

7. In ***Union of India v. Madhusudan Prasad, AIR 2004 SC 977***, the apex Court held as follows:-

> *"xxxx It may be noticed that the respondent was removed from service without any enquiry and he was not even given show cause notice prior to his dismissal from service. There was fault on the part of the employer is not following the principle of natural justice. These relevant facts were considered and the learned Single Judge and also the Division Bench ordered the payment of back wages. xxxxxx"*

Similar view has also been taken by this Court in ***Dr. Bijayananda Naik v. Fakir Mohan University, 2021 (I) OLR 707***.

8. In view of the above mentioned judgments, if there was no fault on the part of the employee and after due adjudication the industrial tribunal has come to a conclusion that there was non-compliance of principle of natural justice and consequentially directed to reinstate the petitioner in service with all back wages, the petitioner is entitled to get all consequential benefits, including promotion, fixation of seniority and all financial benefits admissible to the post.

9. Next comes the reason assigned in clause-(2) of the order dated 01.03.2016 in Annexure-1, that ACR for last three years is required for any promotion to the next higher post, which is given by his reporting officer based on his performance of work and, as such, ACR cannot be filled as the petitioner has not performed any work. But fact remains, due to laches on the part of the management as the petitioner was deprived of discharging his duty, the question of filling up of ACR does not arise. Furthermore, due to intervention of the Court, the opposite party having reinstated the petitioner in service with full back wages, by virtue of the Court's order, now it is precluded from raising any such objection with regard to non-filling of ACR for last three years. As a consequence thereof, the petitioner is entitled to get the benefits as claimed in the writ petition itself.

10. As regards the objection raised in clause-(3) of the order dated 01.03.2016 in Annexure-1, that minimum attendance of 240 days/year for at least two years in last three years is required for promotion and, as such, the petitioner has nil attendance, this objection could be raised by the authority due to illegal dismissal of the petitioner from service. In other words, the petitioner was deprived of to discharge his duty only for the laches on the part of the employer. If the employee has been kept away from discharging the duty, without any fault of his own, the benefit admissible to him cannot be denied by the authority.

11. In view of the discussions made above, it is made clear that the authority has not applied its mind while assigning the above reasons, especially when the benefit claimed was to be granted to the petitioner in compliance of the order dated 09.10.2015 passed by this Court in W.P.(C) No. 22316 of 2010. Though the opposite party contended in the counter affidavit, that against the order passed in the writ petition, W.A. No.106 of 2016 is pending, but nothing has been placed on record to show whether any interim order has been passed in the said appeal restraining compliance of the order passed by the learned Single Judge, nor has anything been indicated with regard to disposal of the said writ appeal. The counsel appearing for the opposite party has also not stated anything with regard to status position of the writ appeal itself. Thereby, in absence of any interim order passed by the Division Bench, while entertaining the W.A. No.109 of 2016, this Court proceeded with the matter, as it is an old case of the year 2014, directing the opposite party to extend the benefits as due and

admissible to the petitioner, including notional benefit of promotion and revised financial benefits.

12. Law is well settled that in view of reinstatement in service with all back wages, the petitioner is also entitled to get all consequential service benefits.

In ***J.K. Synthetics v. K.P. Agarwal, AIR 2007 SC (Supp.) 637***, the apex Court held as under:

> *"There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case."*

13. In ***Jute Corporation of India Ltd. v. Judhistira Swain, 2014 (II) ILR CUT 165***, taking into consideration the judgment in J.K. Synthetics (supra), in paragraph-11 this Court held as follows:-

> *"In view of the above, "consequential benefit" to a person does not mean only back wages. It includes much more things beyond back wages, such as promotion, fixation of seniority and grant of financial benefits admissible to the post etc. Therefore, if the termination of the opposite party-workman in the guise superannuation has been declared as illegal and unjustified, then the opposite party-workman is entitled to get all the consequential service benefits admissible to the post. Back wages may be one facet of getting monetary benefits, but that is not the conclusive one. On the other hand, service benefit, which would have accrued to him had he continued in service cannot be denied by the petitioner-Management."*

Relying upon the above mentioned judgments, this Court in ***Akhilananda Sahoo v. Joint General Manager, OSFC and others, 119 (2015) CLT 281***, extended the benefits to the petitioner therein.

14. In ***Dr. Bijayananda Naik*** (supra), this Court, taking into consideration the aforementioned judgments directed the authorities to calculate and pay

the financial claim of the petitioner with continuity of service which includes promotion, fixation of seniority and grant of financial benefits admissible to the post. As the petitioner has already retired from service on attaining the age of superannuation, such benefits shall be extended to him as expeditiously as possible.

15. The reference which has been made by learned counsel for the petitioner with regard to ***Janki Raman***, wherein the apex Court held that in a departmental or criminal proceeding initiated against the employees when charge memo issued and if charges are serious, employee can be suspended and if found innocent, entitles him to all benefits which he would have otherwise entitled to. Thereby, the law laid down by the apex Court, as mentioned above, is squarely applicable to the present case.

16. In view of the facts and law, as discussed above, this Court is of the considered view that the order passed by the authority, vide Annexure-1 dated 01.03.2016, denying the benefits to the petitioner for grant of notional promotion to the next higher grade and consequential fixation of salary and financial benefits admissible to him, cannot be sustained in the eye of law and is liable to be quashed and is hereby quashed. The opposite party is directed to grant the benefit of notional promotion to the petitioner and accordingly fix his salary and grant the differential pay as due and admissible to him, as expeditiously as possible, preferably within a period of four months from the date of passing of this judgment.

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

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2022 (II) ILR - CUT- 100

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

W.P(C) NO. 1363 OF 2022

M/s. JSW STEEL LTD. & ANR. .....Petitioners

.V.

INDIAN BUREAU OF MINES, BHUBANESWAR & ORS. .....Opp. Parties

(A) MINERAL CONSERVATION AND DEVELOPMENTAL RULES, 2017 – Rule 45(7) and rule 45(8) (iii) – Whether the principles of natural justice are required to be compiled with for alleged violation of rule 45(7) and 45(8) (iii) of the MCDR, 2017? – Held, Yes. – The authorities should take a decision on the show cause replies submitted by the petitioner company in response to the notice of show cause, in consonance with the principle of natural justice. (Para-32)

(B) MOULDING OF RELIEF – Power of the High Court – Whether the High Court exercising jurisdiction U/A 226 can mould the relief even without the prayer of the parties? – Held, Yes. (Para-14-19)

Case Laws Relied on and Referred to :-

1. (2010) 13 SCC 427 : Oryx Fisheries Private Limited Vs. Union of India.
2. (1987) 4 SCC 431 : K.I. Shephard Vs. Union of India.
3. (2007) 7 SSC 1 : DIT (International Taxation, Mumbai) Vs. Morgan Stanley & Co.
4. (2007) 12 SCC 166 : Commissioner of Customs, Mumbai Vs. Clariant (India) Ltd.
5. (2001) 3 SCC 71 : Worli Solidaire India Ltd. Vs. Fairgrowth Financial Services.
6. (2001) 8 SCC 470 : Union of India Vs. Popular Construction Co.
7. 1993 Supp(l) SCC 522 : State of Rajasthan Vs. Gopi Kishan Sen.
8. AIR 1951 SC 41 : 1950 SCR 869 : Charanjitlal Vs. Union of India.
9. AIR 1962 SC 1161 : (1962) Supp.3 SCR 105 : Satyanarain Vs. District Engineer, P.W.D.
10. AIR 1964 SC 847 : (1964) 5 SCR 528 : Life Insurance Corporation Vs. Sunil Balo Kumar.
11. (1988) 8 SCC 326 : Chandigarh Admn. Vs. Laxman Roller Flour Mills (P) Ltd.
12. AIR 1975 SC1709 : Pasupuleti Venkateswarlu Vs. The Motor & General Traders.
13. AIR 1992 SC 700 : Ramesh Kumar Vs. Kesho Ram.
14. (2010) 3 SCC 470 : Sheshambal (dead) through LRs Vs.. Chelur Corporation Chelur Building.

For Petitioners : Dr. A.M. Singhvi & Mr. Gopal Jain, Sr. Adv
M/s. S.S. Mohanty, S.Rout, N. Agrawal & J.Nirupam.

For Opp. Parties : Mr. P.K. Parhi, ASGI & Mr. Jateswar Naik, CGC (O.Ps.1 & 3)

Mr. Ashok Kumar Parija, Advocate General,
Mr. P.P. Mohanty, Addl. Govt. Adv., (O.P.2)

JUDGMENT Date of Hearing: 07.03.2022 : Date of Judgment: 16.03.2022

Dr. B.R. SARANGI, J.

The petitioner no.1, a company registered under the Indian Companies Act, 1956, having its registered Office at JSW Centre, Bandra Kurla

Complex, Bandra (East), Mumbai and one of its offices at Barbil in the district of Keonjhar, Odisha, has filed this writ petition through its authorized signatory- petitioner no.2 seeking following reliefs:

> *a) Issue a writ of Certiorari of any other appropriate writ, order or direction setting aside and quashing the impugned decision dated 12.01.2022 issued by the Opposite party No. 1 revising the Average Sale Price for the month of September and October, 2021 for the State of Odisha;*
>
> *b) Issue an appropriate writ directing the Opposite Parties to not take any decision to revise or determine or publish the Average Selling Price (ASP) excluding the ex-mine prices at domestic sale transactions of the lessee(Petitioner herein);*
>
> *c) Issue a writ of Mandamus or any other appropriate writ directing the Opposite Party No 3 to issue an office memorandum of guidelines on interpretation of Rule 45(8) (III) and Rule 45(8) (IV) of the MCDR, 2017;*
>
> *d) Issue a writ of Certiorari or any other appropriate writ directing the Opposite Parties to furnish the record of the file pertaining to revision or the determination of the Average Selling Price (ASP) for the State of Odisha; and*
>
> *e) As a consequential relief; issue a writ of Certiorari or any other appropriate writ, order or direction setting aside and quashing the Notices dated 16.12.2021 issued by the Opposite Party No. 1 to the Petitioner in respect of its Jajang Iron Ore mine and the Nuagaon Iron Ore mine in the State of Odisha;*
>
> *Pass any other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case to meet the ends of justice."*

2. The factual matrix of the case, in brief, is that opposite party no.1-the Indian Bureau of Mines, which was established in the year 1948, as a multidisciplinary governmental organization under the Department of Mines, Ministry of Mines, Government of India, is engaged in the promotion of conservation, scientific development of mineral resources and protection of environment in mines other than coal, petroleum and natural gas, atomic minerals and minor minerals. Opposite party no.1 is also tasked with maintaining the National Mineral Inventory, and approving mining plans, closure of operations and the conservation of mineral material, as the national regulator for State Governments.

2.1 Opposite party no.2-State of Odisha represented through the Directorate of Mines, is functioning under the administrative control of Steel & Mines Department of Odisha. The major functions of the Directorate are-

administration of mines & minerals, processing of mineral concession applications, collection of mineral revenue, prevention & control of illegal mining & smuggling of minerals, enforcement of statutory provisions for exploration of minerals, peripheral development of mining areas, chemical analysis of ores & minerals etc. As such, opposite party no.2 is responsible for implementation of the ASP (Average Sale Price) published by opposite party no.1 and collection of royalties and other contributions from mining companies based on the same.

2.2 Opposite party no.3 is the Ministry of Mines, Government of India, which is the principal organ of the Union of India for legislation, policy formulation and administration of mines and minerals in the country. It has also the duty to issue clarifications and guidelines on the interpretation of and manner of implementation of various mining laws, including rules and regulations, which will have bearing on mining operations and transactions across the country.

2.3 Pursuant to reforms initiated by the Government of India in July, 1991 in the fiscal, industrial and trade regimes in force in the country, the National Mineral Policy was announced in March, 1993. The National Mineral Policy recognized the need for encouraging private investment and for attracting state of the art technology in the mineral sector paving the wave of private sector in the exploration and mining activities in India. It was in furtherance of the objectives of the said National Mineral Policy, the Mines and Minerals (Development and Regulation) Act, 1997 (for short "MMDR Act, 1957"), the Mineral Concession Rules, 1960 (for short "MCR, 1960") and the Mineral Conservation and Development Rules, 1988 (for short "MCDR, 1988"), having been framed under the MMDR Act, 1957, have been modified from time to time to deliver a fair concession regime for mining development in India and to invite private sector investment in the country. With the aforementioned objectives of ensuring grater private sector participation in the mining sector, opposite party no.3 introduced (1) Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016 (for short "MCR, 2016"), which, unlike the earlier MCR, provides for mechanisms for grant of concessions through auction, transfer of concessions as well as saving clauses to protect the rights of mineral concession licensees under the old regime, (2) The Mineral Conservation and Development Rules, 2017 (MCDR, 2017) which deals with the rights of the reconnaissance or prospecting licensees or mining leaseholders and (3) Mineral Auction

(Amendment) Rules, 2017, which provides for greater flexibility in the auction process to enhance participation in auctions and ensuring that such auctions are successful.

2.4 In this backdrop of the development of law, the Government of Odisha, in exercise of power conferred under Section 10B of the MMDR Act, 1957 read with Mineral (Auction) Rules, 2015, issued a Notice Inviting Tender ("NIT") for auction of mining lease for iron ore and manganese minerals, the lease period of which was to expire on 31.03.2020 in terms of Section 8A(6) of the MMDR Act, 1957. The NIT invited bids for 12 mineral blocks of iron ore, two mineral blocks of manganese and 6 mineral blocks for iron ore and manganese. These blocks included Jajang Iron Ore block, Nuagaon Iron Ore block, Narayanposhi Iron Ore and Manganese block and the Gonua Iron Ore block. The State Government issued detailed tender documents for each individual mining block and also published information regarding Mine Block Summary, which contains the extracts from the Geological Study Report for each mining block on the e-auction platform, and the same was accessible to all bidders. The e-auction of the said blocks was conducted by the Government in accordance with the aforesaid NIT on various dates. In the said e-auction, JSW Steel Ltd., the petitioner no.1 herein, submitted the highest final offer for Jajang Iron Ore block, Nuagaon Iron Ore block, Narayanposhi Iron Ore and Manganese block and the Gonua Iron Ore block and was declared as the 'Preferred Bidder' for grant of the aforementioned mining blocks by the Director of Mines, Odisha. Out of the said four blocks, Jajang and Nuagaon are non-captive mines and Narayanposhi and Gonua are captive mines. In March, 2020, in pursuance of the deposit of the first installment of 10% upfront payment, the Government of Odisha issued Letters of Intent to the petitioner-company in respect of the aforementioned mining blocks in terms of Rule 10 of the Mineral (Auction) Rules, 2015.

2.5 The MCR, 2016 was amended on 20.03.2020 by inserting a new Rule 12-A, which provided for imposition of additional conditions for commencement and continuation for production as per Section 4B of the MMDR Act, 1957. The newly inserted Rule 12A further provided that during the first two years, from the date of the execution of a new lease deed, the holder of a mining lease, to whom the order of vesting of the rights, approvals, clearances, licenses and the like have been issued under Section 8B of the MMDR Act, 1957, shall maintain such level of production so as to

ensure minimum dispatch of eighty percent of the average of the annual production of two immediately preceding years on pro rata basis, failing which appropriate actions in accordance with the Mine Development and Production Agreement ("MDPA") shall be initiated. In May, 2020, the vesting orders were issued by the State Government in favour of the petitioner-company in respect of the mining blocks, for which it was the preferred bidder, in terms of Rule 9(A)(1) of the MCR, 2016.

2.6. On 24.06.2020, after payment of the second instalment of the upfront payment and furnishing of the Performance Bank Guarantee, the petitioner-company was declared as the 'Successful Bidder'. As a consequence thereof, MDPA was executed between the State Government and the petitioner-company on 25.06.2020. In terms of the MDPA, after payment of third instalment of the upfront payment, the State of Odisha executed the mining lease deeds with the petitioner-company in respect of Jajang Iron Ore block and Nuagaon Iron Ore block on 27.06.2020. Mining Operations in the said mines were commenced on 01.07.2020. Thereby, in view of provisions contained in Rule 12A(1) of MCR, 2016, the petitioner-company was to comply with the production and dispatch level in respect of Jajang and Nuagaon Mines. At the end of the first year of mining operations, the petitioner-company was imposed a penalty of Rs.696 crores on 07.09.2021 towards shortfall in meeting the minimum dispatch targets from Jajang mines. The same was challenged before this Court in W.P.(C) No. 28232 of 2021, wherein the demand notice was directed to be kept in abeyance till the disposal of the writ petition, vide order dated 27.09.2021. In view of the plummeting demand of iron ore in the international market from July, 2021, there was consequent fall in international prices of iron ore and thereby, there was a consequent decline in the exports of iron ore from the State of Odisha leading to an insignificant demand, particularly of low grade ore.

2.7. In view of dwindling demand of iron ore in the international market and the consequent fall in international prices, the petitioner-company was compelled to undertake sale of its production at the price discovered at the e-auction so as to achieve the minimum dispatch as mandated under Rule 12A of the MCR, 2016 and to avoid hefty penalties under the MDPA. In order to ensure that the prices at which the iron ore of various grades is sold in a transparent manner, the petitioner-company started conducting e-auctions through the MSTC e-commerce platform of the Government of India. As such, the petitioner-company conducted the said auctions on eleven occasions

between 24.08.2021 and 12.12.2021 for iron ore from Jajang Mines. The price so discovered in the e-auction for the iron ore sold from Jajang Mines was also used for the sale of comparable grades of iron ore sold from Nuagaon Mines. As per requirements of Rule-45(7) of the MCDR, 2017 read with Form F-1, the petitioner-company has been duly submitting its monthly returns to opposite party no.1 and providing rectification and explanation as and when required in accordance with guidelines formulated by Indian Bureau of Mines, Nagpur (central body) and published by opposite party no.3.

2.8. On 16.12.2021, opposite party no.1 issued a violation-cum-show cause notice to the petitioner-company in respect of its Jajang Iron Ore Mines and Nuagaon Iron Ore Mines in the State of Odisha for alleged violations of Rule 45(7) and Rule 45(8)(III) of the MCDR, 2017 directing to give reasons within 30 days from the date of issue of the notice as to (a) why all mining operations and dispatches of the Mines should be not stopped; (b) why the petitioner should not be prosecuted under the rules; and (c) recommend termination of the mining lease for suppression or misrepresentation of information indicates abetment or connivance of illegal mining.

2.9 When the matter thus stood, opposite party no.1 on the very same day, vide letter dated 16.12.2021 addressed to the Director (Statistics) and In-charge MMS Division of the Indian Bureau of Mines, referring to the sale of various grades of iron ore by the petitioner-company from its iron ore mines at Jajang and Nuagaon, had recommended that the ASP of the State of Odisha may be calculated excluding the ex-mine price of the above mines as the same were allegedly not on "arm's length basis". In response to the violation-cum-show cause notice dated 16.12.2021, the petitioner-company submitted its reply on 18.12.2021 in terms of Rule 45(7A) of the MCDR, 2017 addressing to CCOM (MDRD) of the Indian Bureau of Mines, Nagpur, with a request that unless and until the said reply is considered, no decision may be taken to revise the ASP already published excluding the domestic sale transactions of the lessee (petitioner-company herein) under the pretext that the same were not qualifying sale transactions under Rule 45(8)(III) of the MCDR, 2017. In addition to the same, the petitioner-company furnished further reply on 27.12.2021 stating, inter alia, that the notices do not fulfil the statutory conditions for issuance thereof and ex-facie do not show any violation or other cause of action, for which action is contemplated therein. Opposite party no.1 published the ASP f or September, 2021 and October,

2021 on 30.11.2021 and 29.12.2021 respectively and marked ASP for Iron Ore for the State of Odisha as "P" or "Provisional" for few grades, for which the published ASP was lower by more than 20% from the published ASP of August, 2021. Instead of taking any decision on the reply of the petitioner-company to the notice of show-cause, opposite party no.1 proceeded to exclude the ex-mines price of the petitioner-company for the period in question and calculated and published the ASP for the State.

2.10 At that point of time, the petitioner-company approached Delhi High Court by filing W.P. No.845 of 2022 on 12.01.2021 challenging the notice and seeking relief against issuance and implementation of final ASP for September, 2021, October, 2021 and November, 2021 excluding the ex-mine price of the petitioner-company's mines, but subsequently the said writ petition was withdrawn on 17.01.2021 with a liberty to proceed before this Court.

2.11 While deciding the replies dated 18.12.2021 and 27.12.2021 given by the petitioner-company to the notice of show-cause, opposite party no.1 proceeded to declare and publish the ASP for the months of September, 2021 and October, 2021 excluding the ex mine price of the petitioner-company at 9 PM on 12.01.2022. Hence this writ petition.

3. Dr. A.M. Singhvi and Mr. G. Jain, learned Senior Counsel appearing along with Mr. S.S. Mohanty, learned counsel for the petitioners urged before this Court that the impugned decision dated 12.01.2022, whereby the opposite party no.1 has proceeded to publish the revised/final ASP for September, 2021 and October, 2021 excluding the ex-mine prices of the petitioner-company, suffers from illegality, failure to follow due process of law, principle of natural justice, jurisdictional error and predetermined mindset, and thereby violates Articles 14 and 19 (i) (g) of the Constitution of India. He emphatically contended that the impugned decision and publication of ASP was issued without considering the replies dated 18.12.2021 and 27.12.2021 submitted by the petitioner-company, pursuant to show-cause notice dated 16.10.2021, and without passing any specific order thereon. It is further contended that the said fact has not been disputed by opposite party no.1-IBM in its counter affidavit. Interestingly, the decision to exclude ex-mine prices was made on the very same day, when the show cause notice was issued by opposite party no.1-IBM, i.e., on 16.10.2021. On the date of issuance of show cause notice, the opposite party no.1-IBM wrote a letter to

the Director (Statistics) and in-charge MMS Division of the IBM, recommending that ASP of the State of Odisha may be calculated excluding the ex-mine price of the mines, namely, Jajang Iron Ore and Nuagaon Iron Ore, which itself shows predetermined mindset of IBM and renders the entire exercise an empty formality.

It is further contended that the petitioner-company's sales with related parties have been executed at prices discovered through transparent, fair and competitive e-auction and applied uniformly for both related and unrelated parties and are therefore at arm's length. It is further contended that the petitioner-company conducted 11 auctions through MSTC between August, 2021 and December, 2021 for carrying out price discovery, pursuant to which 50 players participated, of which only three are related parties, who were successful bidders also only on three occasions and three related parties got only a small quantity of 667550 MT, out of the total sold quantity of 2654400 MT, which is approximately 25%. Traders were allowed to participate only in one auction and even in the same, they were permitted to participate for end-use (not for resale). Direct sales with traders who in turn have sold to related parties are at comparable auction discovered price and therefore at arm's length. Hence all sales of the petitioner-company in September, October and November, 2021 with both related parties and traders were at prices equal to or more than the price determined at e-auction and applied for transactions with unrelated parties.

It is further urged that Rule 45(8)(b)(III) of MCDR, 2017 permits sales to related parties, if done on arm's length basis, and the said rule lays down a twin-test and prescribes that while computing the ASP, the opposite party no.1-IBM should not recognize a transaction, where the sale has occurred between related parties and where the same is not on arm's length basis. It is contended that Section 188(1) 4th proviso to the Companies Act, 2013 defines the expression "arm's length transaction" as "a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest". If the petitioner-company's transactions are to be taken up, the sale-purchase transactions for iron ore between the petitioner-company and the related party end users having steel manufacturing plant are transactions necessarily in the 'ordinary course of business'. It is further contended that Rule 45(8) of the MCDR, 2017 framed later in time i.e. notified on 27.01.2017 and thus necessarily and mandatorily informs the exercise of computation of ASP under Rule 42 of MCR, 2016

notified on 04.03.2016. Thereby, rule of construction is well settled that the later enactment prevails over an earlier one. Therefore, Rule 42(2)(c) of MCR, 2016 includes the phrase "arm's length basis", the said words must be given meaning to, failing which they would be rendered otiose. Therefore, any possible ambiguity in the reading of the clause, gets resolved when read harmoniously with Rule 45(8)(b)(III) of the MCDR, 2017 and a harmonious construction of the two provisions would indicate that related party sales cannot per se or ipso facto be excluded by opposite party no.1-IBM in computation of ASP without examining whether such related party sales satisfy the arm's length test or not.

It is further contended that Rule 45(8)(b) of MCDR, 2017 replaced the earlier Rule 45(8)(b) of MCDR, 1988 which provided that sales with related parties would not be recognized as a sale at all, whereas the present Rule 45(8)(b) of MCDR, 2017 introduces the nuance of arms length, thereby necessitating an application of mind as to whether these sales with related parties are at arm's length or not. It is further contended that the impugned ASPs published by the opposite party no.1-IBM do not reflect the true market price, particularly for low grade fines (below 60% FE grade) where the international market slashing so far as iron ore is concerned. Thereby, the ASP fixed by the IBM is not sensitive to the drastic reduction in market price. As a consequence thereof, the volume of mineral intended to be sold affects the price of the mineral and higher volume corresponds to low price and as such, does not correctly indicate the true market price and auction floor price has to correspond to the market price to get bidders/buyers.

It is further contended that exclusion of petitioner's ex-mines prices would have a significant impact on the overall ASP, when the petitioner had dispatched 71% of the total low grade iron ore from the merchant mines in the entire State of Odisha during that period. It is further contended that the IBM has created an illusion of higher prices resulting in putting the petitioner-company to sustain loss and cause grater hardship for its survival.

To substantiate his contentions, he has relied upon ***Oryx Fisheries Private Limited v. Union of India***, (2010) 13 SCC 427; ***K.I. Shephard v. Union of India***, (1987) 4 SCC 431; ***DIT (International Taxation, Mumbai) v. Morgan Stanley & Co***., (2007) 7 SSC 1; ***Commissioner of Customs, Mumbai v. Clariant (India) Ltd., Worli***, (2007) 12 SCC 166; ***Solidaire India Ltd. V. Fairgrowth Financial Services***, (2001) 3 SCC 71; ***Union of India v.***

Popular Construction Co., (2001) 8 SCC 470 and ***State of Rajasthan v. Gopi Kishan Sen***, 1993 Supp(I) SCC 522.

4. Per contra, Mr. A.K. Parija, learned Advocate General of Odisha appearing along with Mr. P.P. Mohanty, learned Additional Government Advocate for opposite party no.2 vehemently refuted the contentions raised by the learned Sr. Advocates appearing for the petitioner-company and contended that the price slash given by the petitioner-company, with reference to the document annexed as Annexure-A/2, the ex-mine price of iron ore reported by different bidders from July, 2021 to December, 2021 in monthly returns filed by opposite party no.1, is not a realistic price slash in comparison to other similarly situated leaseholders, and further the document under Annexure-A/1 filed by opposite party no.1-IBM i.e. mine-wise, grade-wise domestic sale reported in monthly return for the month of September, 2021 clearly indicates that the sale had been made to self, though the initial sale, may be at some stages, indicates to be made to the traders, but ultimately the dispatch was made to the traders "end users" and the "end users" are none else but the petitioner-company. Though they are named as different companies, but said companies are acquired by the petitioner-company. As such, it is not applicable to the petitioner, rather it is a camouflaged manner of sale made by the petitioner-company to self by the traders and, as such, it shows trader transaction and effectively the purpose of the Act and Rules have not been adhered to in letter and spirit.

It is further contended that the petitioner-company has tried to club two issues, namely, fixation of price by opposite party no.1-IBM, and secondly with regard to non-compliance of the principle of natural justice, pursuant to show cause notice issued for non-compliance of the statutory provisions contained in the Rules itself. It is also contended that the argument advanced by learned Senior Counsel appearing for the petitioner-company, that there is non-compliance of the principle of natural justice, pursuant to show-cause notice dated 16.12.2021, to which the petitioner-company replied on 18.12.2021 and 27.12.2021, has nothing to do with the fixation of price and both run separately. As such, there is no provision under the Act and Rules to give any hearing for fixation of price. It is emphatically argued before this Court that if the price, which has been fixed, will be taken into consideration, then State will lose highest revenue which could have been collected from the mining resources of the State. As a consequence thereof, it affects the State revenue and, more so, if the petitioner-company is aggrieved

by the fixation of such price, an alternative statutory remedy is available under Rule-161 of MCDR, 2017. Thereby, the writ petition is not maintainable and liable to be dismissed at the threshold.

It is also contended that the prayer, as made in the writ petition, on the face of it, is purely confusing. As such, the petitioner seeks to set aside and quash the impugned decision dated 12.01.2022 issued by opposite party no.1 revising the ASP for the month of September and October, 2021 for the State of Odisha, but no such document is available on record in any manner. Therefore, the claim made by the petitioner to quash the said decision cannot sustain. It is further contended that seeking direction not to take any decision to revise and determine the average different price, excluding ASP, is a domestic transaction of the lessee. As such, the petitioner-company cannot claim such relief before this Court. It is further contended that fixation of price is within complete domain of opposite party no.1-IBM, to which the petitioner, by way of filing writ petition, cannot regulate in any manner, as similarly situated many other leaseholders have not challenged such action knowing fully well the jurisdiction of this Court in such issues. It is also further contended that the relief sought before this Court, for direction to issue office memorandum on interpretation or implementation of Rule 45 (8)(III) and Rule 45 (8)(IV) of the MCDR, 2017, cannot be granted, as the Statute itself is very clear in that regard. So far as production of records is concerned, it is the petitioner, who has to furnish all documents before the Court and, thereby, the production of records pertaining to ASP for the State of Odisha is an absolutely misconceived relief sought before this Court. It is further contended that in one hand the argument has been advanced that pursuant to show-cause notice dated 16.12.2021 issued by opposite party no.1-IBM in respect of Jajang Iron Ore Mines and Nuagaon Iron Ore Mines in the State of Odisha, the petitioner-company has filed replies on 18.12.2021 and 27.12.2021 seeking compliance of the principle of natural justice, and on the other hand, claims for quashing of such notice, which is an absolutely misconceived one. Thereby, he seeks for dismissal of the writ petition.

5. Mr. P.K. Parhi, learned Assistant Solicitor General of India appearing along with Mr. J. Naik, learned Central Government Counsel for opposite parties no.1 & 3, referring to counter affidavit, contended that the replies dated 18.12.2021 and 27.12.2021 submitted by the petitioner-company, pursuant to notice of show-cause issued on 16.12.2021, are under consideration and, as such, publication of ASP is all together a different

process itself as per laid down procedure. It is also contended that the publication of final ASP is without consideration of reply to show-cause, is not correct, as the action of opposite party no.1-IBM is still under consideration. Thereby, the relief sought by the petitioner cannot be granted. He has supported the argument advanced by learned Advocate General, Odisha appearing for opposite party no.2 and also laid emphasis on the fact that the claim of the petitioner-company for compliance of the principle of natural justice is all together a different issue than that of fixation of ASP, and both are proceeded in different procedure of law. It is further contended that since there is alternative remedy available under the Statute, instead of availing the same, the petitioner could not have approached this Court by filing this writ petition. As a consequence thereof, the writ petition has to be dismissed at its threshold.

6. This Court heard Dr. A.M. Singhvi and Mr. G. Jain, learned Senior Advocates appearing along with Mr. S.S. Mohanty, learned counsel for the petitioners; Mr. P.K. Parhi, learned Assistant Solicitor General of India appearing along with Mr. Jateswar Naik, learned Central Government Counsel for opposite parties no.1 & 3-Indian Bureau of Mines; and Mr. A.K. Parija, learned Advocate General of Odisha along with Mr. P.P. Mohanty, learned Additional Government Advocate for the opposite party-State, by hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. On the basis of the undisputed factual matrix, as delineated above, the following issues emerge for consideration:-

(i) Whether the reliefs sought as per the prayer made by the petitioners can be granted?

(ii) Whether the principles of natural justice are required to be complied with or not for alleged violation of Rule 45(7) and Rule 45(8)(III) of the MCDR, 2017?

(iii) Whether the fixation of price and issuance of ASP is legally tenable or not?

8. **Issue no.(i)**

Whether the reliefs sought as per the prayer made by the petitioners can be granted?

At the outset, Mr. A.K. Parija, learned Advocate General of Odisha raised preliminary objection with regard to the prayer made in the writ

petition and contended that the relief sought cannot be granted to the petitioners and the writ petition should be dismissed in absence of any specific relief sought. He lays emphasis on the prayer no.(a) of the writ petition wherein the petitioners have prayed for direction to set aside or quash the impugned decision dated 12.01.2022 issued by opposite party no.1 revising the ASP for the months of September and October, 2021 for the State of Odisha. As such, on perusal of the records, no such document has been annexed to the writ petition, therefore, the prayer made for quashing of such document, is absolutely misconceived one. But fact remains in paragraph-xxiii of the writ petition, the petitioners have pleaded as follows:

> *"In Complete disregard of and without considering and /or disposing of the reply furnished by the petitioner to the Notices and the letter dated letter dated 18.12.2021 addressed by the petitioner to the CCOM (MDRD) OF THE Indian Bureau of Mines, Nagpur and with the sole purpose to circumvent the due to process of law, the Opposite party no. 1 proceed to declare and publish the ASP for the months of September, 2021and October,2021 excluding the ex-mine price of the Petitioner at 9.00PM on 12.01.2022, i.e. after the filling and service of advance copy of the Writ Petition (C) No.845 of 2022, solely with the intention to circumvent the due process of law."*

In view of such pleadings made available on record, the claim has been made, that as per the decision taken on 12.01.2022, opposite party no.1-IBM proceeded to decide and publish the ASP for the month of September, 2021 and October, 2021, excluding ex-mine price of the petitioner, at 9 PM on 12.01.2022. Therefore, fixation of such ASP has been made, pursuant to the decision taken on 12.01.2022, which is the subject matter of the dispute in the case itself. In prayer (b), it has been sought to direct the opposite parties not to take any decision to revise or determine or publish the ASP, excluding the ex-mine price, at domestic sale transactions of the lessee. It is contended that since such decision has not been placed on record, merely averring the same in paragraph-xxiii of the writ petition, the relief cannot be granted to the petitioners.

9. In ***Charanjitlal v. Union of India***, AIR 1951 SC 41 : 1950 SCR 869, the apex Court held that a word about prayer for a particular writ in the petition. Courts have very wide discretion in the matter of framing their writs to suit the exigencies of particular cases, and an application cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for.

10. In ***Satyanarain v. District Engineer, P.W.D***., AIR 1962 SC 1161 : (1962) Supp.3 SCR 105, wherein the apex Court held that appropriate relief may be granted due to changed circumstances and because of the prayer for grant of any other relief in the petition. But that has got restriction to the extent that the same principle would not apply in case where the cause of action which had brought the petitioner to the court no longer subsisted.

11. In ***Life Insurance Corporation v. Sunil Balo Kumar***, AIR 1964 SC 847 : (1964) 5 SCR 528, the apex Court held that a party is not disentitled to claim the same relief on a basis alternative to one pleaded in his petition.

12. In ***Chandigarh Admn. v. Laxman Roller Flour Mills (P) Ltd.,*** (1988) 8 SCC 326, the apex Court held that unless the allegations are made in the writ petition and a relief to that effect is also prayed for in the writ petition, the High Court is not justified in issuing any order in excess of the relief prayed for in the writ petition. In the absence of pleading and prayer in the writ petition, the High Court fell in error in issuing directions to the appellant to issue completion certificate to the writ petitioner, when the challenge in the writ petition was for quashing cancellation of lease deed and dispossession from the plot by the Chandigarh administration.

13. In the present case, even though the petitioners pleaded in paragraph-Xiii of the writ petition and made prayer in Clause-(a) (b) with regard to quashing of the decision taken on 12.01.2022, but nothing has been placed on record about such decision. Therefore, even if prayer has not been specifically made, but in view of the pleadings available on record, the petitioners cannot be disentitled to seek relief in the High Court in exercise of power under Article 226 of the Constitution of India and, as such, the High Court can mould the relief sought by the petitioners.

14. "Moulding of relief" principle was recognized by the Supreme Court in ***Pasupuleti Venkateswarlu*** *v.* ***The Motor & General Traders,*** AIR 1975 SC 1709. It was observed therein that though the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding, the principle that procedure is the handmaid and not the mistress of the judicial process is also to be noted. Justice ***VR Krishna Iyer*** observed:

> *"If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice*

of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decrotal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

15. In ***Ramesh Kumar v. Kesho Ram***, AIR 1992 SC 700, the Supreme Court again following this principle, i.e. "moulding of relief", observed as follows:

"6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief."

16. In ***Sheshambal (dead) through LRs v. Chelur Corporation Chelur Building,*** (2010) 3 SCC 470, the apex Court laid down the conditions in which the relief can be moulded:

"(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;

(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and

(iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."

17. In ***Samir Narain Bhojwani*** *v.* ***Aurora Properties and Investments,*** (2018) 17 SCC 203 the apex Court observed that principle of moulding of relief could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage.

18. In ***Premalata Panda v. State of Odisha,*** 2015 (II) OLR 214, relying upon ***State of Rajasthan*** *v.* ***M/s. Hindustan Sugar Mills Ltd.,*** AIR 1988 SC 1621 : (1988) 3 SCC 449 where the apex Court held that the High Court which was exercising high prerogative jurisdiction under Article 226 could have moulded the relief in a just and fair manner as required by the demands of the situation, this Court, in exercise of such power under Article 226 of the Constitution of India even though no specific prayer was made in the writ petition, taking into consideration the facts and circumstances of the case, was inclined to mould the relief and passed order/direction as deemed fit and proper as prayed for by the learned counsel for the petitioner in the writ petition.

19. In view of the law laid down by the apex Court, so far as "moulding of relief" is concerned, this Court is of the considered view that even if there is no such specific prayer made in the writ application, this Court can grant such relief, as has been advanced before this Court in course of hearing of the matter, at the final stage by "moulding the relief".

Accordingly, the preliminary objection raised by learned Advocate General, Odisha is answered in favour of the petitioners.

20. **Issue no.(ii)**

> Whether the principles of natural justice are required to be complied with or not for alleged violation of Rule 45(7) and Rule 45(8)(III) of the MCDR, 2017?

Before delving into this issue, the relevant provisions of the Acts and the Rules are required to be referred to:-

(a) **Mines and Minerals (Development and Regulation) Act, 1957** ("MMDR Act, 1957" in short)

> ***"9. Royalties in respect of mining leases.—****(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease` or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*
>
> *(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by*

his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972 (56 of 1972) shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.

(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years."

(b). Minerals (Other Than Atomic and Hydrocarbon Energy Minerals) Concession Rules 2016, ("MCR 2016" in short)

CHAPTER XII
MINERALS VALUATION

38. ***Sale Value.*** *- Sale value is the gross amount payable by the purchaser as indicated in the sale invoice where the sale transaction is on an arms' length basis and the price is the sole consideration for the sale, excluding taxes, if any.*

Explanation *– For the purpose of computing sale value no deduction from the gross amount will be made in respect of royalty, payments to the District Mineral Foundation and payments to the National Mineral Exploration Trust.*

39. Payment of royalty. *- (1) in case processing of run-of-mine is carried out within the leased area, then royalty shall be chargeable on the processed mineral removed from the leased area.*

(2) In case run-of-mine is removed from the leased area to a processing plant which is located outside the leased area, then royalty shall be chargeable on the unprocessed run-of-mine and not on the processed product.

(3) Wherever the Act specifies that the royalty in respect of any mineral is to be paid on an Ad valorem basis, the royalty shall be calculated at the specified percentage of the average sale price of such mineral grade/ concentrate, for the month of removal / consumption, as published by the Indian Bureau of Mines.

(4) Wherever the Act specifies that the royalty in respect of any mineral is to be paid based on London Metal Exchange or London Bullion Market Association price, the royalty shall be calculated at the specified percentage of the average sale price of the metal for the month as published by the Indian Bureau of Mines, for the metal

contained in the ore removed or the total by-product metal actually produced, as the case may be, of such mineral for the month.

(5) Wherever the Act specifies that the royalty of any mineral is to be paid on tonnage basis, the royalty shall be calculated as product of mineral removed or consumed from the lease area and the specified rate of royalty.

40. Provisional Assessment and Adjustment. *- (1) At the time of removal or consumption of mineral from the mining lease area, the lessee shall calculate the amount of Royalty, payment to the District Mineral Foundation, payment to the National Mineral Exploration Trust, based on the latest available average sale price of the said mineral grade and pay the same to the Government as provisional payment for the same.*

(2) After the publication of the Average Sale Price of the Minerals for the month by the Indian Bureau of Mines, due adjustment of the actual amounts payable against the provisional payment may be made:

Provided that if for a particular mineral grade / concentrate, the average sale price for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade / concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the month for which assessment is done shall be used, failing which the latest information for All India for the mineral grade / concentrate, shall be used.

41. XXX XXX XXX

42. ***Computation of average sale price.*** *- (1) The ex-mine price shall be used to compute average sale price of mineral grade/ concentrate.*

(2) The ex-mine price of mineral grade or concentrate shall be: -

(a) where export has occurred, the free-on-board (F.O.B) price of the mineral less the actual expenditure incurred beyond the mining lease area towards transportation charges by road, loading and unloading charges, railway freight (if applicable), port handling charges/export duty, charges for sampling and analysis, rent for the plot at the stocking yard, handling charges in port, charges for stevedoring and trimming, any other incidental charges incurred outside the mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity exported.

(b) where domestic sale has occurred, sale value of the mineral less the actual expenditure incurred towards transportation, loading, unloading, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity sold.

(c) where sale has occurred, between related parties and/or where the sale is not on arms' length basis, then such sale shall not be recognized as a sale for the purpose of this rule and in such case, sub-clause (d) shall be applicable.

(d) where sale has not occurred, the average sale price published monthly by the Indian Bureau of Mines for that mineral grade / concentrate for a particular State:

Provided that if for a particular mineral grade / concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade / concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be used, failing which the latest information for All India for the mineral grade / concentrate, shall be used.

(3) The average sale price of any mineral grade/concentrate in respect of a month shall be the weighted average of the ex-mine prices of the non-captive mines, computed in accordance with the above provisions, the weight being the quantity dispatched from the mining lease area of mineral grade / concentrate relevant to each ex-mine price.

43. Publication of average sale price. *- The Indian Bureau of Mines shall publish the average sale price of each mineral grade/concentrate removed from the mining leases in a month in a State within 45 days from the due date for filing the monthly returns as required under the Mineral Concession Development Rules, 1988.*

44. *XXX XXX XXX*

45. Formula for calculating average sale price for metallurgical grade Bauxite to be used in alumina and aluminium extraction, Limestone, Tungsten. *– (1) The State Government shall arrive at the average sale price of metallurgical Bauxite in the following manner:*

Average sale Price = 52.9/100 x Percentage of Al2O3 in bauxite on dry basis x Average aluminium price in Indian rupee for the month as published by IBM x Conservation factor as notified by the Central Government.

(2) The following procedure shall be used by IBM for publishing the average sale price of Limestone:

(a) Weighted average of non-captive prices computed for all India for the month; or

(b) 115% of the weighted average captive prices for the State for the month, whichever is higher.

(3) The following procedure be used by IBM for publishing the average sale price of Tungsten concentrate:

$$\text{Average Sale Price} = \frac{\text{Lowest price of WO3 per metric tonne for the month} + \text{Highest price of WO3 per metric tonne for the month}}{2} \times \text{Average of RBI reference rates for the month}$$

The monthly prices available in Mineral Industry Surveys of USGS shall be taken by the IBM for compiling the average sale price of tungsten concentrate.

(c) **Mineral Conservation and Development Rules, 2017 ("MCDR 2017" in short).**

CHAPTER VI
NOTICES AND RETURNS

45. Monthly and annual returns. *– (1) The holder of a mining lease, or any person or company engaged in trading or storage or end-use or export of minerals mined in the country, shall cause himself to be registered online with the Indian Bureau of Mines as per application specified in Form K of the Schedule and the registration number so allotted by the Indian Bureau of Mines shall be used for all purposes of online reporting and correspondence connected therewith.*

(2) For the purpose of registration under sub-rule (1), the holder of a mining lease, or any person or company engaged in trading or storage or end-use or export of minerals, shall apply for registration in electronic form, within one month from the date of registration of the lease deed or before the commencement of trading operation or storage or end-use or export of minerals, as the case may be.

(3) The Indian Bureau of Mines shall allot and record the registration number in the register referred to in sub-rule (4).

(4) The Indian Bureau of Mines shall maintain an online register giving details of the holder of a mining lease, or any person or company engaged in trading or storage or end-use or export of minerals, as the case may be, as registered under the provisions of these rules, which shall be made available to the general public for inspection on demand, and also posted on the website of the Indian Bureau of Mines.

(5) The holder of a mining lease shall submit online returns in respect of each mine to the Regional Controller or any other authorised official of the Indian Bureau of Mines in the following manner, namely:-

(a) a daily return which shall be submitted through in electronic form through the application developed by the Indian Bureau of Mines, by 1800 hours of the third day following the day of reporting, which may be edited before the time deadline provided in this regard;

(b) a monthly return which shall be submitted before the tenth day of every month in respect of the preceding month in electronic form along with a signed print copy of the same if it is not digitally signed, in the respective form as indicated below:-

(i) for all minerals except copper, gold, lead, pyrite, tin, tungsten, zinc, precious and semi-precious stones, in Form F1 of the Schedule;

(ii) for copper, gold, lead, pyrite, tin, tungsten and zinc, in Form F2 of the Schedule; and

(iii) for precious and semi-precious stones, in Form F3 of the Schedule;

(c) an annual return which shall be submitted before the 1st day of July each year for the preceding financial year in electronic form, along with a signed print copy of the same if it is not digitally signed, in the respective Form as indicated below:-

(i) for all minerals except copper, gold, lead, pyrite, tin, tungsten, zinc, precious and semi-precious stones, in Form G1of the Schedule;

(ii) for copper, gold, lead, pyrite, tin, tungsten and zinc, in Form G2 of the Schedule;

(iii) for precious and semi-precious stones, in Form G3 of the Schedule:

Provided thatin the case of abandonment of a mine, the annual return shall be submitted within one hundred and fifty days from the date of abandonment.

(6) Any person or company engaged in trading or storage or end-use or export of minerals, shall submit online to the Indian Bureau of Mines and concerned State Government, where the said person or company is sourcing the minerals, the returns in electronic form, along with a print copy of the same if it is not digitally signed, in the following manner, namely:-

(a) a monthly return which shall be submitted before the tenth day of every month in respect of the preceding month in Form L of the Schedule;

(b) an annual return which shall be submitted before the first day of July of each year for the preceding financial year in Form M of the Schedule.

(7) If it is found that the holder of a mining lease or the person or company engaged in trading or storage or end-use or export of minerals, as the case may be, has submitted incomplete or wrong or false information in daily or monthly or annual returns or fails to submit a return within the date specified; then,–

(a) in the case of mining of minerals by the holder of a mining lease, the Regional Controller of Mines may advise the State Government to,-

(i) order suspension of all mining operations in the mine and to revoke the order of suspension only after ensuring proper compliance;

(ii) take action to initiate prosecution under these rules;

(iii) recommend termination of the mining lease, in case such suppression or misrepresentation of information indicates abetment or connivance of illegal mining;

(b) in the case of trading or storage or end-use of minerals, the State Government, where the person or company engaged in trading or storage or end-use of minerals is sourcing the minerals, shall order suspension of–

(i) trading licence (by whatever name it is called);

(ii) all transportation permits issued to such person or company for mineral transportation (by whatever name it is called);

(iii) storage licence for stocking minerals (by whatever name it is called); (iv) permits for end-use industry of minerals (by whatever name it is called);

as the case may be, of such person or company engaged in trading or storage or end-use of minerals, and may revoke the order of suspension only after ensuring proper compliance;

(c) in the case of export of minerals, the Directorate General of Foreign Trade shall order suspension of permits for carrying out such exports of minerals of such person or company engaged in export of minerals, and may revoke the order of suspension only after ensuring proper compliance:

Provided that the holder of a mining lease or the person of company engaged in trading of storage or end user or export of minerals, as the case may be, referred to in clause (a), (b) and (c) above, shall be informed in writing about the violation and if the violation is not rectified within a period of forty-five days, a show cause notice shall be given asking reasons why the mining operations should not be suspended and, further, if no satisfactory reply is received within a period of thirty days, the mining operations may be suspended.

(8) In case of mining of minerals by the holder of a mining lease, the–

(a) sale value is the gross amount payable by the purchaser as indicated in the sale invoice, where the sale transaction is on an arms' length basis and the price is the sole consideration for the sale, excluding taxes, if any.

Explanation.– For the purpose of computing sale value, no deduction from the gross amount shall be made in respect of royalty, payments to the District Mineral Foundation and payments to the National Mineral Exploration Trust;

(b) ex-mine price of mineral grade or concentrate shall be,–

(I) where export has occurred, the total of, sale value on free-on-board (F.O.B) basis, less the actual expenditure incurred beyond the mining lease area towards –

(i) transportation charges by road;

(ii) loading and unloading charges;

(iii) railway freight (if applicable);

(iv) port handling charges or export duty;

(v) charges for sampling and analysis;

(vi) rent for the plot at the stocking yard;

(i) handling charges in port;

(ii) (viii) charges for stevedoring and trimming;

(iii) (ix) any other incidental charges incurred outside the mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity exported;

(II) where domestic sale of mineral has occurred, the total of sale value of the mineral, less the actual expenditure incurred towards loading, unloading, transportation, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity sold;

(III) where sale has occurred, between related parties and is not on arms' length basis, then such sale shall not be recognised as a sale for the purposes of this rule and in such case, sub-clause (IV) shall be applicable;

(IV) where the sale has not occurred, the average sale price published monthly by the Indian Bureau of Mines for that mineral grade or concentrate for a particular State:

Provided that if for a particular mineral grade or concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade or concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be referred, failing which the latest information for all India for the mineral grade or concentrate, shall be referred;

(V) the per unit cost of production in case of captive mines.

(9) In case of trading or storage or end-use or export of minerals, for purpose of filing of returns, the value of the mineral grade or concentrate shall be,–

(a) where sale of the mineral grade or concentrate has occurred and the sale transaction is on an arms' length basis and the price is the sole consideration for the sale, the sale value of the mineral grade or concentrate recorded in the invoice;

(b) where sale has not occurred, the product of average sale price published monthly by the Indian Bureau of Mines for a particular mineral grade or concentrate for a particular State and the quantity dispatched or procured:

Provided that if for a particular mineral grade or concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the

last available information published for that mineral grade or concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be referred, failing which the latest information for all India for the mineral grade or concentrate, shall be referred.

(10) If more than one mineral is produced from the same mine, return shall be submitted along with the relevant parts of the specified forms for each mineral separately.

(11) In case of temporary discontinuance of mining or suspension of mining, or temporary discontinuance or suspension of trading or storage or end-use or export of minerals, the holder of a mining lease, or the person or company engaged in trading or storage or end-use or export of minerals, as the case may be, shall submit return in the specified form for the mineral for which return had been submitted earlier and furnish relevant particulars, inclusive of "Nil" information, if any.

(12) In case ownership of the mine or the trading or storage or end-use or export company changes during the reference period, separate returns shall be filed by each owner for the respective periods of ownership.

(13)For the purpose of regulation of transportation of minerals, all persons and companies owning trucks or any other motorised vehicle used for transportation of mineral byroad or through water way shall be required to be registered with the Directorate of Mining and Geology or the Department handling mining matters in the State Government, and the lessee shall maintain trip-sheets (either in the form of written record or on computers) of the vehicles, the nature and weight of mineral and the approximate time of the trip and its destination.

CHAPETER IX
REVISION AND PENALTY

61. Revision.- *(1) Any person aggrieved by any order made or direction issued under these rules by any authorised officer excepting the State Government, as the case may be, may within thirty days of the communication of such order or direction, apply to the Controller General or the Director, Atomic Minerals Directorate for Exploration and Research, as the case may be, for a revision of the order or direction:*

Provided that any such application may be entertained after the said period of thirty days if the applicant satisfies the Controller General or the Director, Atomic Minerals Directorate for Exploration and Research, as the case may be, that he had sufficient cause for not making the application within time: Provided further that if any order made or direction issued by an officer subordinate to the Chief Controller of Mines, the application shall be made to the Chief Controller of Mines who shall deal with the application in the manner provided hereunder.

(2) Every order against which a revision application is preferred under sub-rule (1) shall be complied with pending receipt of the decision of the Controller General or the Director, Atomic Minerals Directorate for Exploration and Research or the Chief Controller of Mines, as the case may be:

Provided that the Controller General or the Director, Atomic Minerals Directorate for Exploration and Research or the Chief Controller of Mines, as the case may be, may suspend the operation of the order against which the revision has been preferred, pending disposal of the revision application.

(3) On receipt of an application for revision under sub-rule (1), the Controller General or the Director, Atomic Minerals Directorate for Exploration and Research or the Chief Controller of Mines, as the case may be, after giving a reasonable opportunity of being heard to the aggrieved person, may confirm, modify or set aside the impugned order.

(4) Any person aggrieved by any order made or direction issued by the Chief Controller of Mines may within thirty days of the communication of such order or direction, prefer an appeal to the Controller General as against the said order or direction:

Provided that any such appeal may be entertained after the said period of thirty days, if the applicant satisfies the Controller General that he had sufficient cause for not making the application within time.

(5) On receipt of any such appeal under sub-rule (4), the Controller General may confirm, modify or set aside the order or direction made or issued by the Chief Controller of Mines or may pass such orders in relation to the applicant, as it may deem fit and such decision shall be final.

(6) Every order against which appeal is preferred under sub-rule (4), shall be complied with pending receipt of the decision of the Controller General: Provided that the Controller General may, on an application made by the applicant, suspend operation of the order or direction appealed against pending disposal of the appeal.

(7) Every application submitted under the provisions of this rule shall be accompanied by a bank draft for ten thousand rupees as application fee drawn on a scheduled bank in the name of 'Pay and Accounts Officer, Indian Bureau of Mines' payable at Nagpur or by way of a bank transfer to the designated bank account of the Indian Bureau of Mines:

Provided that in case the application under sub-rule (1) is made to the Director, Atomic Minerals Directorate for Exploration and Research, the amount of ten thousand rupees shall be remitted as per the details specified by the Director, Atomic Minerals Directorate for Exploration and Research in this regard.

62. Penalty.– *Whoever contravenes any of the provisions of these rules shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five lakh rupees, or with both, and in the case of a continuing contravention, with additional fine which may extend to fifty thousand rupees for every day during which such contravention continues after conviction for the first such contravention:*

Provided that any offence punishable under these rules may either before or after the institution of the prosecution, be compounded by the person authorised under section 22 of the Act to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government, of such sum specified in this regard by the Controller General or the Director, Atomic Minerals Directorate for Exploration and Research, in respect of minerals specified in Part B of the First Schedule to the Act where the grade of such atomic minerals is equal to or above the threshold value limits declared under Schedule-A of the Atomic Minerals Concession Rules, 2016, as the case may be:

Provided further that in case of an offence punishable with fine only, such sum shall not exceed the maximum amount of fine which may be imposed for that offence:

Provided also that where an offence is compounded under these rules, no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, if in custody, shall be released forthwith.

FORM F1

[See rule 45(5) (b) (i)]

For the month of_20

MONTHLY RETURN

[To be used for minerals other than Copper, Gold, Lead, Pyrites, Tin, Tungsten, Zinc and preciousand semi-precious stones]

To

(i) The Regional Controller of Mines
Indian Bureau of Mines
……. Region,

PIN:

(Please address to Regional Controller of Mines in whose territorial jurisdiction the mines falls as notified from time to time by the Controller General, Indian Bureau of Mines under rule 62 of theMineral Conservation and Development Rules, 1988)

(ii) The State Government

PART – I
(General and Labour)

1. Details of the Mine:	
(a) Registration number allotted by Indian Bureau ofMines (to give registration number of the Lessee/ Owner)	
(b) **Mine Code** (allotted by Indian Bureau of Mines)	
(c) Name of the Mineral	
(d) Name of Mine	
(e) Name(s) of other mineral(s), if any, produced from the same mine	
(f) **Location of the Mine :**	
Village	
Post Office	
Tahsil/Taluk	
District	
State	
PIN Code	
Fax no:	E-mail:
Phone no:	Mobile:
2. Name and address of Lessee/Owner (along with fax no. and e-mail):	
Name of Lessee/Owner	
Address	
District	
State	
PIN Code	
Fax no:	E-mail:
Phone No:	Mobile:
3. Details of Rent/ Royalty / Dead Rent/ DMF /NMET amount paid in the month	
(i) Rent paid (₹)	
(ii) Royalty paid (₹)	
(iii) Dead Rent paid (₹)	
(iv) Payment made to the DMF (₹)	
(v) Payment made to the NMET (₹)	
4. Details on working of mine:	
(i) Number of days the mine worked:	

(ii) Reasons for work stoppage in the mine during the month (due to strike, lockout, heavy rain, non- availability of labour, transport bottleneck, lack ofdemand, uneconomic operations, etc.) and the number of days of work stoppage for each reason separately	Reasons	No of days

5. Average Daily Employment and Total Salary/Wages paid #:

Work place	Direct		Contract		Total Salary/Wages (₹)	
	Male	Female	Male	Female	Direct	Contract
Below ground						
Opencast						
Above ground						
Total						

To include all employees exclusive to the mine and attached factory, workshop or mineral dressingplant at the mine site

PART-II
(PRODUCTION, DESPATCHES AND STOCKS)
(To be submitted separately for each mineral)
(Unit of Quantity in Tonnes)

1. Type of ore produced:
(*Applicable for Iron ore only; tick mark whichever is applicable*)

(a) Hematite
(b) Magnetite

2. Production and Stocks of ROM ore at Mine-head

Category	Opening stock	Production	Closing stock
(a) Open Cast workings			
(b) Underground Workings			
(c) Dump workings			

3(i) Grade-wise ROM ore despatches from mine head ($):

Grade of ROM@	Despatches from mine-head	Ex-mine Price (₹)

($): Applicable for iron ore and chromite only. For other minerals data of dispatches to be reported in 3(ii)

3(ii) Grade-wise Production, Dispatches, Stocks and Ex-mine prices:

Grades**	Opening stock at mine-head	Production	Despatches from mine-head	Closing stock at mine-head	Ex-mine price (₹/Tonne)

3(iii) In case the mineral is being pulverized in own factory, please give the following particulars(*):

Grade**	Total quantity of mineral Pulverized (in tonnes)	Total quantity of pulverized mineral produced (for each mesh size)		Total Quantity of pulverized mineral sold during the month		
		Mesh size	Quantity (tonne)	Mesh size	Quantity (tonne)	Ex-factory Sale value (₹)

3(iv) Average cost of pulverization (*) : ₹_____per tonne.

(*): Not applicable for Iron ore, Manganese ore, Bauxite and Chromite

4. Details of deductions made from sale value for computation of Ex-mine price (₹/ Tonne)

Deduction claimed #	Amount (in ₹/ Tonne)	Remarks
a) Cost of transportation (indicate loading station and distance from mine in remarks)		
b) Loading and unloading charges		
c) Railway freight, if applicable (indicate destination and distance)		
d) Port handling charges/ export duty(indicate name of port)		
e) Charges for sampling and analysis		
f) Rent for the plot at Stocking yard		
g) Other charges (specify clearly)		
Total (a) to (g)		

 # Not applicable for captive dispatches and ex-mine sales

5. Sales/ Dispatches effected for Domestic Purposes and for Exports:

Grade (^)	Nature of Despatch (*indicate whether Domestic Sale or Domestic Transfer or Captive consumptionor Export)*	For Domestic Purposes				For export		
		Registration number as allotted by the Indian Bureau of Mines to the buyer ##	Consigneename ##	Quantity	Sale value (₹)	Country	Quantity	F.O.B Value(₹)

(^): To indicate the grades of ores as mentioned below (see @ and **) ## *To indicate separately if more than one buyer.*

NOTE:- Mine owners are required to substantiate domestic sale value/ FOB value for each grade of ore quoted above with copy of invoices (not to be submitted with the return; to be produced whenever required).

6. Give reasons for increase/decrease in production/nil production, if any, during the monthcompared to the previous month.

a)

b)

c)

7. Give reasons for increase/decrease in grade wise ex-mine price, if any, during the monthcompared to the previous month.

a)

b)

c)

I certify that the information furnished above is correct and complete in all respects.

Place: Signature

Date:

Name in full:

Designation: Owner/Agent/Mining Engineer/Manage”

21. In view of the provisions contained in Section 9 of the MMDR Act, 1957, the holder of a mining lease granted on or after the commencement of the Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

22. To give effect to the Rules, the MCR, 2016 in Chapter XII deals with Mineral Valuation. Rule-38 states about the sale value; Rule 39 deals with payment of royalty; Rule 40 deals with provisional assessment and adjustment; Rule 42 deals with computation of average sale price; Rule 43 deals with publication of average sale price, whereas formula to that has been provided at Rule 45 as mentioned above. The MCR, 2016, which has been framed in exercise of the powers conferred under Section 13 of the MMDR Act, 1957, has come into force on its publication in the gazette of India on 04.03.2016.

23. Similarly, in exercise of power concerned under Section 18 of the MMDR Act, 1957 and in supersession of the Mineral Conservation & Development Rules 1988, except as respects things done or omitted to be done before such supersession, the Central Government has framed MCDR, 2017, which has come into force with effect from 27.02.2017 on its publication in the gazette of India. Chapter-VI thereof deals with Notices and Returns. Rule 45 deals with monthly and annual returns. As such, Form F1 has been provided for furnishing the monthly return, and Part-II thereof deals with Production, Despatches and Stocks. Clause 4 of Part-II deals with details of deductions made from sale value for computation of Ex-mine price. Therefore, the purpose of providing such Form F1 under Rule 45 (5) (b)(i) is to keep track of the mineral used by the leaseholder for the purpose of determination of its royalty and dead rents and other statutory dues to be payable to the authority concerned.

24. Explanation (b) to Section 188 (1) of Companies Act, 2013 provides the meaning of "arm's length transaction" to the following effect:-

> *"the expression ―arm's length transaction means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest."*

Fourth proviso to Section 188 (1) of the Companies Act, 2013 provides that "*nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis*".

25. The transaction of the petitioner-company is in the ordinary course of business. In Black's Law Dictionary, "ordinary course of business" means "normal routine in managing trade or business". Therefore, the sale purchase transactions of iron ore between the petitioner-company and the related party and users having steel manufacturing plants are transactions necessarily in the ordinary course of business.

26. The petitioner-company, as per the requirement of Rule 45 (7) of the MCDR, 2017, read with Form F1 has to submit the monthly returns to the opposite party no.1-IBM and providing rectification and explanation as required in accordance with the guidelines formulated by the Indian Bureau of Mines and published by the opposite party no.3. Even though the petitioner-company complies such provisions scrupulously, on 16.12.2021, the opposite party no.1-IBM issued a violation-cum- show cause notice to the petitioner-company in respect of Jajang Iron Ore Mines and Nuagaon Iron Ore Mines in the State of Orissa, alleging violation of Rule 45 (7) and Rule 45 (8)(III) of the MCDR, 2017 and directed the petitioner-company to give reasons within 30 days from the date of issue of the notice as to why not-

> *"(a) All mining operations and dispatches of the mine should be stopped.*
>
> *(b) You should be prosecution under these rules.*
>
> *(c) Recommended termination of the mining lease for suppression or misrepresentation of information indicates abatment or connivance of illegal mining."*

27. In response to the said notice, the petitioner-company submitted its reply on 18.12.2021 to the CCOM (MDRD) of Indian Bureau of Mines, Nagpur, requesting that unless and until the above stated reply is considered, no decision may be taken to revise the ASP already published excluding the domestic sale transactions of the lessee, the petitioner-company, herein, under the pretext that the same were not qualifying sale transactions under Rule 45 (7) and Rule 45 (8)(III) of the MCDR, 2017. When such reply to show cause was pending for consideration, on 27.12.2021, the petitioner-

company furnished another reply stating that the notices do not fulfill the statutory conditions for issuance thereof and ex-facie does not show any violation of other cause of action for which action is contemplated therein. But surprisingly, on the date of issuance of show cause notice, i.e. 16.12.2021, an internal correspondence was made by opposite party no.1-IBM to the Director, (Statistics) and In-Charge MMS Division of the Indian Bureau of Mines, whereby, referring to the sale of various grades of iron ore by the petitioner-company from its iron ore mines in Jajang and Nuagaon, it was recommended that ASP of the State of Odisha may be calculated excluding the ex-mine price of the above mines, as the same were allegedly not on arm's length basis.

28. Dr. Singhvi, learned Senior Advocate appearing for the petitioners emphatically submitted that when such a letter has been addressed, may be an internal communication, and the petitioner-company has filed its show cause replies on 18.12.2021 and 27.12.2021, i.e. in relation to allegation of violation of certain conditions of the provisions of law, i.e. Rule 45 (7) and Rule 45 (8)(III) of the MCDR 2017, the authorities have proceeded with determination of ASP, that itself amounts to violation of principle of natural justice. It is further contended that the opposite party no.1 has published ASP for September, 2021 and October, 2021 on 30.11.2021 and 29.12.2021 respectively and marked ASP for Iron Ore for the State of Orissa as "P" or "Provisional" for few grades for which the published ASP was lower by more than 20% from published ASP of August, 2021. Thereby, contended that till the grievances of the petitioner-company are meted out, pursuant to reply given by it to the notice of show cause dated 16.12.2021, the petitioner-company should be permitted to sell on the provisional price fixed for month of September, 2021, instead of insisting upon to go for higher price, which would prejudice the interest of the petitioner-company.

29. In **Oryx Fisheries Private Limited** (supra), the apex Court at paragraphs-31, 32 and 33 of the judgment observed as follows:-

> *"31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony*

and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi- judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it."

30. Similarly, in **K.I. Shephard** (supra), the apex Court at paragraph-16 of the judgment observed as follows:-

"We may now point out that the learned Single Judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional heading. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could now represent and their cases could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then given them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."

31. In view of the law laid down by the apex Court, as discussed above, it is made clear that the show cause notice cannot be read hyper-technically and it should be read reasonably and, as such, it must give an effective opportunity to rebut such allegations contained in the show cause notice and prove his innocence. Merely asking for show cause reply and the reply is submitted thereto and non-consideration of the same amounts to empty formality, thereby such show cause notice does not commence as a fair procedure especially when it is issued in a quasi- judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence. As such, while issuing the show cause

notice the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and especially when he has the power to take a punitive step against the person after giving him a show cause notice. The subsequent judgment of the apex Court, which has been mentioned above, also reveals the same view where the apex Court held that there is no justification to throw the employees out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity as a condition precedent to action.

32. Therefore, if the above principles are applied in letter and spirit to the present context, certainly alleging violation of Rule 45 (7) and Rule 45 (8)(III) of the MCDR, 2017, a notice of show cause was given on 16.12.2021, to which the petitioner-company submitted its reply on 18.12.2021 and subsequently on 27.12.2021, and the same are pending before the authority for consideration. However, on the date of issuance of show cause notice, the internal commutation dated 16.12.2021 was issued recommending that ASP of Odisha may be calculated excluding ex-mine price of Jajang and Nuagaon mines, as the same are allegedly not on "arm's length basis". Therefore, it can be safely construed that opposite parties have not yet complied the principle of natural justice for having not taken a decision on the show cause replies submitted by the petitioner-company. As a matter of fact, the authorities should take a decision on the show cause replies submitted by the petitioner-company, in response to the notice of show cause issued on 16.12.2021, in consonance with the principle of natural justice. Thereby, Issue No.(ii) is answered in affirmative in favour of the petitioner-company.

33. **Issue No. (iii).**

Whether the fixation of price and issuance of ASP is legally tenable or not?

In view of the pleadings available on record, the notice of show cause issued on 16.12.2021 for violation of certain procedures envisages under Rule 45 (7) read with Rule 45 (8)(III) of the MCDR, 2017, stands on a completely different footing than that of fixation of price of royalty by the opposite parties.

34. In view of the provisions of Section 9 of the MMDR Act, 1957, the holder of a mining lease granted on or after the commencement of the Act shall pay royalty in respect of any mineral removed or consumed by him or

by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

35. To give effect to such provisions, MCR, 2016 came to effect. Chapter XII thereof deals with Mineral Valuation. Rule-38 states that 'sale value' is the gross amount payable by the purchaser as indicated in the sale invoice where the sale transaction is on an "arms' length" basis and the price is the sole consideration for the sale, excluding taxes, if any. Rule 39 deals with payment of royalty, meaning thereby the determination to pay the amount has to be made under sub-rule (3) of Rule 39, which specifies that wherever the Act specifies that the royalty in respect of any mineral is to be paid on an *ad valorem* basis, the royalty shall be calculated at the specified percentage of the average sale price of such mineral grade/ concentrate, for the month of removal / consumption, as published by the Indian Bureau of Mines. Sub-rule (5) of Rule 39 made it clear that wherever the Act specifies that the royalty of any mineral is to be paid on tonnage basis, the royalty shall be calculated as product of mineral removed or consumed from the lease area and the specified rate of royalty. Rule 40 deals with provisional assessment and adjustment; Rule 42 deals with computation of average sale price. Sub-rule (1) of Rule 42 states, that the ex-mine price shall be used to compute average sale price of mineral grade/ concentrate. The ex-mine price of mineral grade or concentrate has been provided in Sub- rule (2) of Rule 42. Rule 43 deals with publication of average sale price fixing 45 days limit from the due date for filing the monthly returns, as required under the Mineral Concession Development Rules, 1988.

36. The MCDR, 2017 has nothing to do with the MCR, 2016 and both the rules stand on separate footing altogether, as per the nomenclature given to the Rules itself. Chapter VI of the MCDR, 2017 deals with notices and returns, which compels the holder of a mining lease, or any person or company engaged in trading or storage or end-use or export of minerals mined in the country, shall cause himself to be registered online with the Indian Bureau of Mines as per application specified in Form-K of the Schedule and the registration number so allotted by the Indian Bureau of Mines shall be used for all purposes of online reporting and correspondence connected therewith.

37. As per sub-rule (5)(b)(i) of Rule 45, a monthly return shall be submitted for all minerals except copper, gold, lead, pyrite, tin, tungsten, zinc, precious and semi-precious stones, in Form F1 of the Schedule. Form F1, as mentioned above, requires a monthly return to be used for minerals other than the minerals specified therein. Thereby, it casts an obligation on the part of the holder of a mining lease, or any person or company engaged in trading or storage or end-use or export of minerals mined in the country to furnish such details, which provides elaborate utilization of the minerals unit of quantities in tones. The purpose of furnishing such returns is to indicate that the holder of mining lease cannot make any misutilization of minerals rather he shall adhere to such monthly/annual returns scrupulously.

38. Under sub-rule (7) of Rule 45, it has been indicated that, if it is found that the holder of a mining lease or the person or company engaged in trading or storage or end-use or export of minerals, as the case may be, has submitted incomplete or wrong or false information in daily or monthly or annual returns or fails to submit a return within the date specified; then, he is liable for penal action as specified therein under clauses-(a) to (c). Even the opportunity also been given to the parties, if any violation is pointed out, to rectify the same within a period of 45 days, otherwise the action should be taken. Thereby, the rule is very sacrosanct for furnishing notice and returns.

39. Rule 45(8)(III) of MCDR, 2017 also specifies that where sale has occurred, between related parties and is not on arm's length basis, then such sale shall not be recognized as a sale for the purposes of this rule and in such case, sub-clause (IV) shall be applicable. Thereby, for alleged violation of Rule 45 (7) read with Rule 45 (8)(III) of the MCDR, 2017, the show cause notice was issued on 16.12.2021, to which the petitioner-company had given replies on 18.12.2021 and 27.12.2021. That has got nothing to do with the fixation of payment of royalty in terms of Rules 38, 39, 40 and 42 of MCR, 2016. Even though MCDR, 2017 has come into force on 27.02.2017, it will apply in the context the Rule has been framed, which has no bearing with the MCR, 2016, which came into force with effect from 04.03.2016 and framed in a different context altogether. Thus, two separate rules have been framed for two separate purposes to achieve the ultimate goal under the MMDR Act, 1957. Hence, the steps taken against the petitioner-company by issuing a notice of show cause on 16.12.2021 on the allegation of violation of Rule 45 (7) read with Rule 45 (8)(III) of the MCDR, 2017 is totally different than that of the fixation of price to be made under MCR, 2016.

40. In the counter affidavit filed on behalf of the opposite parties no.1 and 3, in paragraphs-II and LL, it has been stated as follows:-

> *II. Allegation of petitioner that the publication of Final ASP is without considering reply of show cause notice is not correct, as action on the show cause notices on the part of respondent no.1 is still under consideration and computation and publication of ASP is altogether is different process and it is as per laid down procedure.*
>
> *xxx xxx xxx*
>
> *LL. Allegation of petitioner that the publication of Final ASP is without considering reply of show cause notice is not correct, as action on the part of respondent no.1 is still under consideration and computation and publication of ASP is altogether is different process and it is as per laid down procedure.*

Thereby, there is no dispute that pursuant to the show cause notice issued, the opposite party no.1 has received the reply, which is still under consideration. Therefore, this Court already held that the same should be considered in compliance to the principle of natural justice, while answering Issue No.(ii). But, so far as the determination of ASP is concerned, that being dealt with under MCR, 2016, reliance has also been placed on the documents annexed to the counter affidavit filed on behalf of opposite parties no.1 and 3 as Annexures-A/1 and A/2. Annexure-A/1 prescribes Mine wise, grade wise domestic sale reported in monthly return for the month of September, 2021 so far as the petitioner-company is concerned. From the entry available, it is found that quantity has been dispatched to a trader and trader to user which is none else but the company acquired by the petitioner-company. For example, so far Sl. No.1 is concerned, the trader is M/s Seven Hills Minerals Private, to whom the quantity has been dispatched, who in turn sold it to the user, i.e., M/s Bhushan Power & Steel Ltd (company acquired by M/s. JSW Steel Ltd, the petitioner-company herein). As such, the sale price in which the lessee sold to the trader has been shown as 1336.70, whereas the sale price at which the trader sold to the user has been shown as 1354.18. As such, in the remark column, it has been clearly indicated that the JSW Steel Ltd. routed iron ore through M/s. Seven Hills Mineral Private Ltd. to M/s. Bhushan Power & Steel Ltd, which JSW Steel owns. It is further revealed that under the heading "Fe Grade 55 to below 58% Fine", the transaction has been made between the petitioner-company and petitioner-company in the guise of the trader's name M/s Seven Hills Minerals Private Ltd. Similarly, under the heading "Fe Grade 58 to below 60% Fines", the Trader name is M/s. Brahmani River

Pellets Limited and it has sold to JSW Steel Ltd., but reported as domestic sale, which is a related party to JSW Steel Ltd., as confirmed by JSW Steel itself. Likewise, if each transaction contained in Annexure-A/1 is verified, it will be evident that the same is nothing but a transaction of the leaseholder with that of the very same person, but by intervening different traders' name in between, and the amount, as has been shown, is detrimental to the interest of the State, who is the ultimate beneficiary of the revenue from the mining operation

41. Similarly, if Annexure-A/2 will be taken into consideration, the ex-mine price of iron ore reported by various non-captive leaseholders from July, 2021 to December, 2021 of monthly returns has been indicated. The petitioner's name finds place at Sl. No. 8 and 9. So far as Nuagaon Iron Ore Mines is concerned, in August, 2021, the ex-mine price has been shown at 4204, but for the months of September, 2021 it has been shown as 1358.76, October, 2021- 575.3, November, 2021 -767.38 and December, 2021 - 1590. So far as Jajanga Iron Mines is concerned, which has been placed at Sl. No. 9, in August 2021, the ex-mine price has been shown at 4204, but for the months of September, 2021 it has been shown as 1485.01, October, 2021-782.14, November, 2021 - 675 and December, 2021 - 641.87. If the same is compared with the other owners of the mines, the figure provided by the petitioner-company, appears to be not a realistic price slash, as such the sale has been made to the petitioner-company itself. As a consequence thereof, there is a gross loss to the State revenue. More so, under the Rules of MCR, 2016, no provision of hearing has been prescribed in compliance to principle of natural justice.

42. By giving an unrealistic price slash, a huge loss has been caused to the revenue of the Government, which is against public interest. Needless to say, Rule 40 of MCR, 2016 deals with provisional assessment and adjustment, whereas computation of average sale price is to be made pursuant to Rule 42 of the said Rules. If such computation is made by the authority in terms of the said rules, it cannot be said there is arbitrary and unreasonable exercise of power by the authority in violation of Articles 14 and 19(1)(g) of the Constitution of India. As such, Rule 43 of MCR, 2016 empowers the publication of average sale price by the Indian Bureau of Mines in respect of each mineral grade/concentrate removed from the mining leases in a month in a State within 45 days from the due date for filing the monthly returns as required under the Mineral Concession Development Rules, 1988. Adhering

to Rule 43, if the computation has been made fixing ASP basing on the monthly returns, it cannot said that the authorities have acted arbitrarily, unreasonably and contrary to the provisions of law so as to cause interference by this Court. Since MCR, 2016 and MCDR, 2017 operate separately and distinctly in separate areas, irrespective of their date of commencement, they have to govern in their respective field. Therefore, the question of construction of Rules that the later enactment prevails over the earlier one, cannot have any justification.

43. Rule 42 (c) of MCR, 2016 prescribes the phrase "arm's length basis" and that would be taken into consideration in common parlance vis-à-vis the provisions contained in Section 188 (1) of the Companies Act, 2013, which also explains the expression "arms' length transaction" as a transaction between two related parties that is conducted as if they are unrelated, so that there is no conflict of interest. Therefore, the computation of ASP under Rule 42 of MCR, 2016 has been made taking into consideration the sale was occurred on "arm's length basis", as specified therein. Even though there was price slash in international and domestic market of the different grades of the iron ore fines, the same can only be considered and adjudicated in terms of MCR, 2016 on the basis of the monthly returns filed by the respective mines owners/lessees as per rule 42 of MCR 2016.

44. It is urged emphatically by the petitioner-company that the exclusion of petitioner-company's ex-mine price would have significant impact on the overall ASP and, as such, the petitioner-company has dispatched 71% of total low grade ore from the merchant mines in the entire State of Orissa in that period. This Court is not competent to make an assessment on the dispatch or production, rather it is within the complete domain of the opposite party no.1-IBM, who used to receive the monthly returns in terms of MCR, 2016 and fixes ASP for respective parties. The allegations made that opposite party no.1-IBM has artificially created illusion of high price by replacing the ex-mine price of several other lessees, apart from the petitioner-company, that cannot also be taken into consideration, in view of the documents available on record under Annexures-A/1 and A/2, which is apparently clear how the transaction has been taken place and how the price slash has got an impact in respect of other similarly situated lessees and, as such, none of the lessees, save and except the petitioner-company, has challenged the same by filing writ petition. Therefore, this Court is of the considered view that the fixation

of ASP in terms of MCR, 2016 is to be answered in affirmative in favour of the opposite parties and answered accordingly.

45. In view of the facts and law, as discussed above, this Court is of the considered view that the fixation of ASP in terms of MCR, 2016 cannot be held to be illegal or arbitrary.

46. In terms of the observations/directions give in the foregoing paragraphs, the writ petition stands disposed. There shall be no order as to costs.

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2022 (II) ILR - CUT- 141

ARINDAM SINHA, J.

W.P.(C) NO. 21972 OF 2015

S.D.O. (ELECT.), KANISI SUPPLY DIV. & ANR. .....Petitioners
.V.
PERMANENT LOK ADALAT & ANR. .....Opp. Parties

LEGAL SERVICE AUTHORITIES ACT, 1987 – Section 22(C) (8) – Permanent Lok Adalat – Ambit of – For the purpose of dispute settlement, as provided under the Act, a mechanism has been provided through the Lok Adalat – Dispute before the Lok Adalat cannot be with regard to adjudication of rights or liabilities – The dispute must relate to terms of possible settlement? – The term of possible settlement formulated by the PLA was misconceived, as such the PLA exceeded its authority in making impugned award – It is set aside and quashed.

For Petitioners : Mr. P. K. Tripathy
For Opp. Parties : Mr. A.K.Sharma, AGA

ORDER Date of Order: 26.04.2022

ARINDAM SINHA, J.

1. Mr. Tripathy, learned advocate appears on behalf of petitioners and submits, impugned is award dated 23rd June, 2015 made by the Permanent

Lok Adalat (PLA). His client is the electricity supply company. He draws attention to annexure-2 in the writ petition being chart showing billing and payment statement in respect of opposite party no.2. He points out therefrom that bills for consumption between July to September, 2014 were not paid by said opposite party. There was disconnection. Then opposite party paid Rs.5,471/- in aggregate, without protest. Supply was restored and, thereafter, said opposite party moved the PLA.

2. He refers to impugned award, from which following is extracted and quoted below.

> ***"****The parties to the application were given adequate opportunity to produce evidence in support of their respective claims and to file Addl. Statement and reply, if any. Parties to the application did not adduce their respective evidence in shape of affidavit. However, the applicant has produced the electric bill for the month of* ***September, 2014*** *furnished by the respondent-Supply Engineer where due date of payment was inserted as* ***31.10.2014****. Besides, the applicant has produced voucher dated* ***29.10.2014*** *showing deposit of bill amount for the* ***month of September, 2014*** *and R.C/D.C charges of Rs.150/-, Viz;* ***Annexure-I & II*** *respectively.****"***

3. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of State, representing opposite party no.1.

4. Service has been made on opposite party no.2 but said opposite party goes unrepresented.

5. Evidence referred to in the award is only that opposite party no.2 had produced electric bill for September, 2014 and a voucher dated 29th October, 2014 showing deposit of bill amount for the month of September, 2014 and other charges for Rs.150/-. The award also shows that respondent no.1 (SDO) attached to the supplier had filed written statement pleading that opposite party no.2 was defaulter in respect of Rs.5,471/-.

6. On above evidence of opposite party no.1 and the pleading by the supplier, following term of possible settlement was framed by the PLA.

> *" When there is dis-connection of power supply in breach of statutory provisions of Electricity Act, 2003 and Regulations framed there under, the Licensee shall pay a "reasonable compensation."*

It was not possible for above term being framed on basis of the disconnection having been in breach of statutory provision in Electricity Act, 2003. Where the supplier alleged default for successive three months, payment of charges in consequence of default and, thereafter, reconnection, a bill for month of September, 2014 and voucher dated 29th October, 2014, were insufficient evidence for the PLA to find that the disconnection was in breach of statutory provisions. More so, because respondent no.1 before the PLA had clearly alleged default without conceding to payment having been made in respect of one the months of the default. It is noticed that the above referred statement by annexure-2 also states that Rs.5,471/- was received on 29th October, 2014. The term of possible settlement could not have been a term to achieve settlement, since it went against the very contention of the supplier. Impugned award says that petitioner did not sign the settlement. The PLA thereupon proceeded to adjudicate on invoking sub-section (8) under section 22C in Legal Services Authorities Act, 1987.

7. For purpose of settlement of disputes, as provided under the Act, a mechanism has been provided through the Lok Adalats. Sub-section (8) under section 22C must, therefore, be interpreted in the context of what is the dispute before the Lok Adalat. Dispute before the Lok Adalat cannot be regarding adjudication of rights or liabilities. The dispute must relate to terms of possible settlement. Adjudication of rights or liabilities must be had by litigants, from Court. This alternate mode of disputes redressal is by settlement. The authority to decide, therefore, cannot be in matters where the parties are completely and totally opposed to settlement.

8. As aforesaid, the term of possible settlement formulated by the PLA was misconceived. It could not have achieved settlement between the parties by indicting the supplier of having committed breach in disconnecting the supply. As such, the PLA exceeded its authority in making impugned award. It is set aside and quashed.

9. The writ petition is disposed of.

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2022 (II) ILR - CUT- 144

D.DASH, J.

SA NO. 245 OF 1994

PUSPALATA ROUT .....Appellant

.V.

DAMODAR ROUT .....Respondent

HINDU MARRIAGE ACT, 1955 – Section 13 (i-b) – Whether decision of the lower appellate Court on the question of desertion was correct both on fact and law in as much as it had not given finding that animus deserendi had been established? – Held, No. – Mere separate living for any length of time by one party does not amount to desertion on his/her part and the most fundamental and essential element of desertion is the intention on the part of the party deserting the other – In the present case we cannot say for a moment that wife had all the intention to desert the plaintiff (husband) and there was no Animus deserndi – Appeal allowed.

For Appellant : Mr.A.N.Routray

For Respondent : Mr.B.H. Mohanty, Sr. Adv, Mr.D.P. Mohanty & R.K. Nayak.

JUDGMENT Date of Hearing & Judgment: 07.04.2022

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 20.07.1994 and 04.08.1994 respectively passed by the learned 2nd Additional District Judge, Bhubaneswar in Title Appeal No.77/3 of 1990/89.

By the same, the First Appeal filed by the present Respondent (Plaintiff) has been allowed and the judgment and decree dated 30.01.1989 and 14.02.1989 respectively passed by the learned Sub-Judge, Bhubaneswar in O.S. No.28 of 1987 (I) have bee set aside.

At this stage, it may be mentioned that the Appellant (Defendant) is the wife of the Respondent (Plaintiff). Before the Trial Court, the Respondent (husband), as the Plaintiff, had initiated a proceeding under section 13 of the Hindu Marriage Act (hereinafter called as 'the HM Act') seeking a decree of dissolution of marriage between them. The Trial Court, having dismissed the suit. The Respondent (Husband) being aggrieved by it, had carried the First

Appeal wherein he has been successful in obtaining a decree of divorce. Hence, the Appellant (wife), who was the Defendant in the Trial Court, is before this Court.

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. Facts necessary for the purpose are stated as under:-

On 18.06.1979, the marriage between the parties took place and out of said wedlock, they have been blessed with two sons.

It is alleged that the Defendant's father being a rich man, she was used to a high standard living and that was interfering in the marital life, as the Defendant's father was a petty contractor. It is further stated that due to non-availability of Government quarters, the Plaintiff was not in a position to take the Defendant to the place of service for their stay together and, therefore, she was staying with his family members including the three unmarried sisters. It is stated that despite all the desire of the Plaintiff to bring the Defendant to his service place, it could not be possible because he was not in a position to afford the house rent for a suitable house for their living at the place of service. It is stated that the Defendant ultimately left the village on 16.12.1980 with her father when the Plaintiff was there at Puri. It is the further case of the Plaintiff that he as well as the Defendant jointly filed an application in the Court of the learned Sub-Judge, Bhubaneswar for dissolution of marriage on mutual consent and a decree was passed when the Plaintiff had also paid a sum of Rs.10,500/- to the Defendant. This was, however, challenged by the Defendant on the ground that her consent in that regard had been fraudulently obtained. The Plaintiff having contested the said proceeding, ultimately became unsuccessful and final order of dissolution of marriage of the parties, on mutual consent, stood set aside. Thereafter, the present suit has been filed by the Plaintiff (husband) for dissolution of marriage on the ground desertion.

4. The Defendant (wife) contested the proceeding. Having narrated as to how fraud had been practiced by the Plaintiff upon her as well as upon the Court, on the earlier occasion when the decree of dissolution of marriage on mutual consent had been obtained by the Plaintiff, it has all through been

pleaded that there was never any desertion from her side and her separate stay was for all such reasons which are attributable to the Plaintiff, his behavior, attitude and style of living in neglecting the Defendant in every respect and not taking any care whatsoever.

5. Faced with the rival pleadings, the Trial Court having framed eight (8) issues, has rightly taken up issue nos.5 and 6 which relate to the ground on which the Plaintiff has claimed divorce. Upon discussion of evidence and their evaluation, the Trial Court has given a finding that no case of desertion has been established by the Plaintiff by leading clear, cogent and acceptable evidence for the period as required. With such finding, the suit having been dismissed, the aggrieved Plaintiff (husband) had carried the First Appeal. The First Appellate Court has allowed the Appeal recording a finding on issue nos.4 and 5, which are contrary to that of the Trial Court.

6. This Appeal has been admitted on the substantial questions of law as indicated in Paragraph 8(1) to 8(4) of the Memorandum of Appeal.

At the outset, learned counsel for the parties fairly submit that the substantial question of law as at paragraph 8(3) of the Memorandum of Appeal should be answered first, as according to them, the answer to that substantial question of law, if is recorded in favour of the case of the Defendant, who was contesting the divorce proceeding; the other substantial question of law would no more survive for being answered.

The substantial question of law as at paragraph 8(3) of the Memorandum of Appeal runs as under:-

> "Whether the decision of the lower appellate court on the question of desertion was correct both on facts and in law in-as-much as the lower appellate court had not given finding that animus deserendi had been established?"

7. Mr.A.Routray, learned counsel for the Appellant (wife) submits that in the present case, the evidence on record let in by the parties when are accepted on their face value, it cannot be said that those are enough for grant of divorce on the ground of desertion from the side of the Defendant. He further submits that the facts and circumstances of the case, as it reveal from the evidence on record, when are taken into account in their proper perspectives, the minimum period that the law requires for the parties to have

been in separate living on account of desertion by one, is not going to be fulfilled. He, therefore, submits that the First Appellate Court having not bestowed its attention on these important aspects without any justifiable reason, has granted the decree of divorce.

8. Mr.D.P.Mohanty, learned counsel for the Respondents (husband) submits all in favour of the finding recorded by the First Appellate Court. According to him, when admittedly for a long period, the parties are living separately having no connection between then whatsoever, in that event the intention on the part of the Defendant to desert the Plaintiff has to be presumed. He, however, submits that the evidence on record when reveal that the Defendant had voluntarily left the house of the Plaintiff without any reasonable and justifiable cause attributable to the Plaintiff and then with her continuance in the separate residence for such a long period, clearly a case of desertion as projected by the Plaintiff is made out and, therefore, the First Appellate Court did commit no mistake in passing a decree dissolving the marriage between the two.

9. Keeping in view the submissions made, I have carefully gone through judgments passed by the Courts below.

10. Admitted facts stand that on 18.06.1979, the marriage between the parties had taken place. First son was born to the said wedlock on 12.05.1980 and thereafter, they were blessed with another son on 19.08.1981. As ill luck would have it, even before expiry of half a year from the birth of the second son, who was then under complete care of the Defendant (mother), the Plaintiff filed an application under section 13-B (1) of the HM Act wherein it has been said that this Defendant was also the party and the application was a joint one presented by both before the Court. The Court then decreed the same vide O.S. No.48 of 1982. The decree being passed on 10.08.1982, the Defendant, on 23.08.1982, filed an application under Order 47 Rule 1 read with section 151 of the Code for recall of the said order dissolving the marriage between the parties by a decree of divorce upon mutual consent. The ground taken was that the consent of the Defendant had been obtained by the Plaintiff by practicing fraud upon her as well as upon the Court passing the decree on mutual consent. Registering Misc. Case No.575 of 1982, the Court then sat upon to have an enquiry into the matter. Finally, the decree for divorce stood recalled as the Court arrived at a satisfaction that the Plaintiff, by practicing fraud upon the Defendant as well as on the Court, had

managed to obtain the same. The Plaintiff being aggrieved by that order of recall of the judgment and decree of dissolution of marriage between the parties on mutual consent, had carried the matter finally to this Court in C.R. No.469 of 1984. That has been decided by this Court on 15.05.1986. This Court then affirmed the order passed by the original Court. Thus, the decree passed on mutual consent stood nullified. When the matter stood thus, the present suit has been filed on 27.07.1987.

11. Section 13 (i-b) of HM Act narrates that any marriage on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. Position of law is well settled that mere separate living for any length of time by one party does not amount to desertion on his/her part and the most fundamental and essential element of desertion is the intention on the part of the party deserting the other. In the present case, when the facts finally stand decided that the Plaintiff (husband) had obtained the consent of the Defendant (wife) by practicing fraud upon the Defendant (wife) and the Court as well, the cause for separate stay of the parties for the entire period till that date of finalization of the recall proceeding by the order of this Court on 15.05.1986, cannot be attributed to the Defendant (wife) as we cannot say for a moment that she had all the intention to desert the Plaintiff and there was the 'animus deserendi'. The pleading as well as the evidence of the Plaintiff (husband) are silent on the score that thereafter since from which particular date, the Defendant (wife) expressed her intention that under no circumstance, she does not want to stay with the Plaintiff (husband) under one roof keeping the marital tie alive and thereby refusing to perform all her social and moral obligation arising out of the marital tie towards the Plaintiff. Moreover, the Plaintiff (husband) having been found by the Court to have practiced fraud in obtaining the consent of the Defendant (wife) in finally obtaining the decree of divorce on mutual consent thereby practicing fraud also upon the Court in the earlier proceeding wherein the decree has been annulled on that ground; in my considered view, he cannot thereafter take advantage in asserting that the Defendant (wife) had deserted him for all those period and seek dissolution of marriage on that ground of desertion as if he after that, having taken a holy deep got freed from all the blames. In addition to the above, it is also seen that the Trial Court, on just and proper analysis of evidence, had said that here it is clear that the Plaintiff deserted the Defendant and she had not stayed separately with an intent to

severe the marital tie which this Court finds to have been erroneously upset by the First Appellate Court.

For all the aforesaid, the answer to the substantial question of law as at paragraph 8(3) of the Memorandum of Appeal stands returned in favour of the Defendant (wife) in saying that the First Appellate Court is not right in setting aside the judgment and decree passed by the Trial Court where under the Plaintiff (husband) had been rightly declined to be granted with the relief of dissolution of his marriage with the Defendant (wife) in refusing to draw a decree of divorce.

12. In the result, the Appeal stands allowed with costs throughout.

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2022 (II) ILR - CUT- 149

BISWANATH RATH , J.

CMP NO. 319 OF 2022

ZOBEDA KHATUN .....Petitioner

.V.

Md. HABIBULLAH KHAN & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XXI Rule 97,99 and 101 – Whether a third party has any scope to move an application under Order 21 Rule 97,99 and 101 after rejection of his application under Order 1 Rule 10 of C.P.C? – Held, Yes – This Court observes that exercise of power involving the application under Order 1 Rule 10 of C.P.C and exercise of power under the provision of Order 21 Rule 97, 99 and 101 of C.P.C are completely different – The scope under Order 21 Rule 97,99 and 101 of C.P.C. is even much wider – Thus Court finds there is no prohibition in bringing such application even after rejection of such endeavour in exercising of power under Order 1 Rule 10 of C.P.C. (Para-3)

For Petitioner : M/s. S.A.Nayeem, M. Abid & S.S. Akhtar
For Opp. Parties: None.

JUDGMENT Date of Hearing & Judgment: 26.04.2022

BISWANATH RATH, J.

1. This C.M.P. involves allowing an Application being moved by a third party in an Execution Proceeding taking resort to the provision under Order 21 Rules 97, 99 & 101 of C.P.C.

2. Assailing the impugned order, Mr.Nayeem, learned counsel for the Petitioner-Plaintiff submits that the third party having already moved an Application under Order 1 Rule 10 of C.P.C. and being defeated in his such move on rejection of the Application under Order 1 Rule 10 of C.P.C. had no scope for moving the Application on the selfsame issue in the guise of Order 21 Rules 97, 99 & 101 of C.P.C. Learned counsel for the Petitioner however has no dispute with regard to the third party already involving in an independent Suit involving the same property and the third party having lost in the Suit undertaken an Appeal exercise where he has got a decree involving the very same property. Learned counsel for the Petitioner further submits that being aggrieved by the appellate decree in favour of the third party, the Plaintiff has come in Second Appeal bearing RSA No.571/2014, which is pending in this Court. In the background of rejection of an Order 1 Rule 10 of C.P.C. Application, the impugned order is opposed even involving a challenge to the entertainability of Application under Order 21 Rules 97, 99 & 101 of C.P.C.

3. Heard the submissions of the learned counsel for the Petitioner on admission. Considering the submission of the learned counsel for the Petitioner, this Court finds, undisputedly the third party moving the Application under Order 21 Rules 97, 99 & 101 of C.P.C. had undertaken an exercise of Civil Suit and after the loss in the Civil Suit, such party even undertaken the Appeal exercise and there is a decree in favour of such party involving the very same property involved in the Execution Proceeding at hand. Even though the Second Appeal is filed by the present Plaintiff, admittedly, the Second Appeal is pending for consideration of this Court and the appellate decree is not disturbed as of now. Admittedly, there exist two decrees passed by two different courts at the instance of third party and the other at the instance of the Plaintiff-Petitioner involved here in the Execution Proceeding, i.e., the decree holder and the third party as Plaintiff in the other. For the opinion of this Court, the third party

has definite stake in the event of execution of the decree in the earlier Suit is attained and has thus been rightly allowed to join the Execution Proceeding. So far as the ground assailing the impugned order that once such Appeal is rejected in exercise of power under Order 1 Rule 10 of C.P.C., there is no further scope to bring the Application under Order 21 Rules 97, 99 & 101 of C.PC., this Court observes, exercise of power involving the Application under Order 1 Rule10 of C.P.C. and exercise of power under the provision of Order 21 Rules 97, 99 & 101 of C.P.C. are completely different. Further scope under Order 21 Rules 97, 99 & 101 of C.P.C. is even much wider. In the circumstance, this Court finds, there is no prohibition in bringing such Application even after rejection of such endeavor in exercise of power under Order 1 Rule 10 of C.P.C.

4. In the circumstance and reading through the observations of the Executing Court, this Court finds, there is right exercise of power and the observation clearly discloses the findings of this Court even. In the circumstance, this Court finds, there is no impropriety or illegality in allowing such Application requiring to be interfered with.

5. While approving the impugned order, this Court rejects this C.M.P. for having no merit.

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2022 (II) ILR - CUT- 151

BISWANATH RATH, J.

W.P.(C) NO. 39436 OF 2021

ORISSA STATE CO-OPERATIVE MARKETING FEDERATION LTD. BBSR. & ANR. ……..Petitioner(s)

.V.

TULASI MODERN RICE MILL, KENDRAPARA & ANR. ……Opp. Party(s)

MICRO,SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Section 18 (3) – The Council passed award without following the procedure, laid down in the statute – Effect of – Held, not tenable in the eyes of law – Thus not only the proceeding / award are bad, all subsequent proceeding arising out of and involved in award also stand terminated. (Para-5)

For Petitioner (s) : Mr. D. Mohapatra.
For Opp. Party(s) : Mr. S.K. Jethy, Mr. R.P. Mahapatra, Addl. Govt . Adv.

ORDER Date of Order: 29.04.2022

BISWANATH RATH, J.

1. Short question involved herein is; once a proceeding is initiated on a complaint U/s.18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter in short be reflected as "the Act, 2006"), whether in the first go the Council following the provision at Section 18 of the Act, 2006 should undertake recourse of conciliation? and in case of failure of conciliation, for the provision at Sub-Section 3 of Section 18 of the Act, 2006 the proceeding is to land in a dispute and in such case if the Council is justified in deciding the dispute without taking recourse to the provision of the Act, 1996 ?

2. Advancing his submission while not raising the dispute that there involves a Section 18 proceeding Mr. Mohapatra, learned counsel for the Petitioners taking this Court to the observations of the Council at page 121 of the brief contended that the Council while passing the award did not comply the provision under Sub-section 3 of the Section 18 of the Act, 2006 and there is no taking recourse to the provision of the Act, 1996. Referring to the discussions in two paragraph above the award portion, a contention is raised that the conciliation proceeding was lastly taken up on 30.12.2020 and undisputedly the conciliation failed. Looking to the provision at Sub- section 3 of Section 18 of the Act, 2006 Mr. Mohapatra, learned counsel for the Petitioner contended that in the above situation it becomes a bounden duty of the Council to convert the proceeding to a dispute and to decide the same in terms of the provision in the Act, 1996. For the Council not following the procedure at Sub-section 3 of Section 18 of the Act, 2006, Mr. Mohapatra, learned counsel for the Petitioners contended that there is no scope for award and even if an award is passed such award is *non est* in the eye of law. Mr. Mohapatra, learned counsel for the Petitioners taking this Court to the condition in the agreement between the parties for having an Arbitration clause, said that once there is Arbitration clause provided in the contract between the parties, there is no question of taking up the matter through the Council under the Act, 2006. It is, at this stage of the matter, Mr. Mohapatra, learned counsel for the Petitioners also brought to the notice of this Court through the pleadings that in the meantime the Petitioners before

even commencement of the conciliation, have already undertaken the exercise under the provision at the Act, 1996. It is thus contended that once the proceeding of arbitration in terms of the contract is invoked, nothing prevented the contesting Opposite Parties particularly the Opposite Party No.1 to attend to the Arbitration proceeding and get its disputed resolved through Arbitration. Mr. Mohapatra, learned counsel for the Petitioners also to support his case, relied on a decision of the Madras High Court in W.P(MD) No.13870 of 2021 decided on 7.09.2021 and reading through paragraph no.39 & 40 therein, attempted to submit that the impugned order is otherwise also against the Law and claims that the matter be remitted back to the Council for its fresh exercise strictly in terms of the provision at Section 18(3) of the Act, 2006. Mr. Mohaptra, learned counsel for the Petitioners also brings to the notice of this Court a decision of this Court in ARBP No.39 of 2017 decided on 9.03.2018 to support his case.

3. In his opposition Mr. Jethy, learned counsel for the Opposite Party No.1 while strongly opposing the move of the Petitioners for availability of a provision for appeal prescribed U/s.19 of the Act, 2006, also contended that the Arbitration proceeding did not involve the claim of the Petitioners. It is further contended by Mr. Jethy, learned counsel for the Opposite Party No.1 that even though the Opposite Party No.1 has already attended to the Arbitration Proceeding, there is no possibility of resolution of the dispute being raised by the Petitioner. Mr. Jethy, learned counsel for the Opposite Party No.1, therefore, strongly objected to the claim of the Petitioners on the maintainability of the proceeding, for there is already existing of arbitration proceeding, the proceeding involved remains not maintainable. Mr. Jethy, learned counsel for the Opposite Party No.1 while not disputing that upon failure of conciliation, in an attempt of the Council in exercise of power U/s.18(2) of the Act, 2006 the proceeding has been converted to a dispute, at the same time also did not dispute to the submission of Mr. Mohapatra, learned counsel for the Petitioners that after initiation of such dispute by the Council under Sub-section 3 of Section 18 of the Act, 2006, there has been no fresh calling of counter and following up of provisions in the Act, 1996. Mr. Jethy, learned counsel for the Opposite Party No.1, however, taking this Court to the provisions at Section 19 of the Act, 2006 contended that even though there is provision for appeal, but the Petitioners did not prefer the same and on the other hand the Petitioners are praying this Court for exercising the power under Article 226 of the Constitution of India with an attempt to avoid the statutory forum. Mr. Jethy, learned counsel for

the Opposite Party No.1 here relying on a decision of this Court dated 29.07.2021 in W.P.(C) No.12584 of 2021, contended that for the view of the Hon'ble Single Judge the appeal shall lie. Mr. Jethy, learned counsel for the Opposite Party No.1 contended that the writ petition, in the circumstance, is not entertainable at this stage.

4. Considering the rival contentions of the parties, this Court finds, undisputedly there is commencement of proceeding U/s.18 of the Act, 2006 on a complaint being made by the Opposite Party No.1 and a reference arising out of it. For the relevancy of the provision at Section 18 of the Act, 2006, this Court takes note of the provision at Section 18 and Sub-sections (1)(2)(3) of the Act, 2006 herein below:-

> **"18. Reference to Micro and Small Enterprises Facilitation Council.-**
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> (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council
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> (2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.
>
> (3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act,1996 (26 of 1996) shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act."

5. It is reading through the aforesaid provision, this Court finds, for the undisputed fact involved herein, reference based on the complaint of the Petitioner has been undertaken in a conciliation process under the provision of Sub-section 2 of Section 18, of the Act, 2006 by the Council and there is further disclosure through the impugned order that there has been failure of conciliation through the proceeding dated 30.12.2020. Looking to the

question framed hereinabove, taking into account the provision at Sub-section 3 of Section 18 of the Act, 2006 also taken note hereinabove, this Court finds, once the Statute prescribes a specific procedure i.e. after the conciliation failure report is submitted without any settlement between the parties and involving an unsuccessful attempt, the Council shall either itself take up the dispute for arbitration or referrer it to any Institution or Centre providing alternate dispute resolution for such arbitration and in such event the provision of the Act, 1996 shall come into play, here looking to the impugned order at Annexure-4, this Court finds, the Council has made the following observation:-

> "Both the parties were present before the Council in its 84th Sitting of MSEFC held on 30.12.2020. The Petitioner submitted that he has supplied the materials to the O.P. since 2016. But the O.P. has made part payment leaving a balance of rupees thirty lakhs along with interest as per MSMED Act-2006.
>
> The Council observed that so many hearings has been made on 16.11.2019,19.02.2020,20.08.2020, 24.09.2020 & 30.12.2020 in which O.P. was present on 25.06.2020, 20.08.2020, 24.09.2020 & 30.12.2020. The Petitioner submitted that the conciliation process with the O.P. was terminated without any settlement as per Section-18(2) of MSMED Act-2006. The Council perused the claim petition and counter submitted by both the parties. It is found that the claim of the petitioner was genuine and decided to make an award as follows.
>
> AWARD
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> The Council ordered that the O.P. i.e. Managing Director, Odisha State Cooperative Marketing Federation Limited (MARKFED) At- Old Station Road, Kalapana Squre, Bhubaneswar, Dist.-Khurda-751006 to pay the principal amount of Rs.30,00,000 (Rupees Thirty lakhs) only and interest amount of Rs.21,96,756.50 (Rupees Twentyone lakhs nintysix thousand seven hundred fiftysix rupees and fifty paise) only calculated up to 15.09.2019 as per Sectoin 15 & 16 of MSMED Act, 2006. Further, compound interest with monthly rests shall be payable at the rate of three times of the Bank rate as notified by Reserve bank of India from time to time till realization of dues. The O.P. is directed to pay the outstanding dues within 30 days."

Reading through the above there is no doubt that both the parties were noticed to attend the 84th sitting of the Council on 30.12.2020, but it further goes to make it clear that the conciliation attempt failed in the 84th sitting of the Council i.e. on 30.12.2020. This Court here finds surprise that when the Statute says after the conciliation fails and the proceeding is taken

up as a dispute, then the only option available with the Council is either itself to take up the dispute for arbitration or refer it to any Institution or Centre providing alternate dispute resolution services and again if the dispute is undertaken by the Council itself, the same is to be undertaken following the provision at the Arbitration and Conciliation Act, 1996. This Court here finds, the Council observing that there is failure in the conciliation has straightway jumped to the award and therefore there is no following of the procedure U/s.18(3) of the Act, 2006. Thus not only the proceeding vide Annexure-4 is bad but all subsequent proceedings arising out of and involved in Annexure-4 also stand terminated.

At this stage this Court also takes up the contentions raised by Mr. Mohapatra, learned counsel for the Petitioners that for there is already an arbitration proceeding under the terms of contract, the Opposite Parties has scope for undertaking their claim exercise in such proceeding, this Court here observes, for the dispute involving the arbitration initiated by the Petitioner is in the trap of counter claim against the Opposite party No.1 and did not involve the claim of the Opposite Party No.1, the Opposite Party No.1 may not have a recourse on their claim involving such arbitration proceeding. In any event Opposite Party No.1's claim also requires to be decided by way of a dispute by the Council but however, following the provisions in the Act, 1996. It is at this stage of the matter coming to the objection of Mr. Jethy, learned counsel for the Opposite Party No.1 on the maintainability of the writ petition for the availability of provision of appeal at Section 19 of the Act, 2006 and to support his stand taking help of decision in W.P.(C) No.12584 of 2021, this Court observes, for the observation of this Court that the Council has not undertaken the exercise following the provision at Sub-section 3 of the Section 18 of the Act, 2006, the impugned order becomes non est in the eye of law and since there is requirement of undertaking a fresh dispute exercise, it may be futile to ask the Petitioners at this stage to go in appeal in such situation as it will be only wastage of time and the dispute since not decided in accordance with Law, has to come back to the Council. Further, Law has also been settled even through the Hon'ble Apex Court that when the Petitioners establish, there is infraction of legal provision, technicality on availability of alternate remedy has no room to play. This Court, therefore, turns down the objection on the maintainability of the writ petition being raised by Mr. Jethy, learned counsel for the Opposite Party No.1.

In the circumstance, this Court interfering in the order at Annexure-4 sets aside the same and declares, all further proceedings arising out of same are bad and deemed to be dropped. However, considering that there is requirement of fresh undertaking of the dispute in exercise of provision at Section 18(3) of the Act, 2006, this Court remits the matter back to the Council to re-commence the dispute proceeding from the date after 30.12.2020. Since the matter is decided in presence of both the contesting parties, this Court while directing both the parties to appear before the Council on 9.05.2022 also directs the Petitioners to put up their counter before the Council on the same date and it may be open to the Council to undertake the dispute exercise and dispose of the same strictly in terms of the provision at Sub-section 3 of Section18 of the Act, 2006, but however, on involvement of Petitioners and Opposite Party No.1.

6. The writ petition succeeds, but however, with an order of remand.

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2022 (II) ILR - CUT- 157

S.K. SAHOO, J.

CRLLP NO. 13 OF 2019

REPUBLIC OF INDIA .....Petitioner

.V.

SRI SANTOSH NAYAK .....Opp. Party

CODE OF CRIMINAL PROCEDUER, 1973 – Section 378 – Interference of High Court – Scope – Limited – There must exist very strong and compelling reasons in order to interfere with the same – Reasons indicated. (Para- 9)

Case Laws Relied on and Referred to :-

1. A.I.R. 2015 SC 1206 : Vinod Kumar Vs. State of Punjab
2. (2018) 69 OCR925 : Kishore Kumar Swain Vs. State of Odisha (Vigilance)
3. A.I.R. 2013 S.C. 3368 : State of Punjab Vs. Madan Mohan Lal Verma.
4. (2009) 44 OCR 425 : State of Maharashtra Vs. Dnyaneshwar.
5. A.I.R. 2002 S.C. 486 : Punjabrao Vs. State of Maharashtra.
6. A.I.R. 2016 S.C. 2045 : V. Sejappa Vs. State.
7. A.I.R. 1979 S.C. 1191 : Panalal Damodar Rathi Vs. State of Maharashtra.
8. (2016) 64 OCR (S.C.) 1016 : Mukhitar Singh Vs. State of Punjab.

9. (2011) 6 SCC 450) : State of Kerala Vs. C.P. Rao.
10. A.I.R. 1983 SC 308 : Babu and others Vs. State of Uttar Pradesh.
11.(2018) 5 SCC790 : Bannareddy & Ors. Vs. State of Karnataka & Ors.
12. (2008) 10 SCC 450 : Ghurey Lal Vs. State of Uttar Pradesh.

For Petitioner : Mr. Sarthak Nayak, Special Public Prosecutor (CBI).
For Opp. Party : Mr. H.K. Mund.

ORDER Date of Order: 16.02.2022

S.K. SAHOO, J.

Heard Mr. Sarthak Nayak, learned Special Public Prosecutor (CBI) and Mr. H.K. Mund, learned counsel for the opposite party.

2. This leave petition under section 378 of Cr.P.C. has been filed by the Republic of India seeking for leave to file an appeal against the impugned judgment and order dated 16.05.2018 passed by the Special Judge, C.B.I.-II, Bhubaneswar in T.R. Case No.04 of 2006/R.C. No.25(A) of 2005 in acquitting the opposite party Santosh Nayak of the charges under sections 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act').

3. The opposite party faced trial for the aforesaid offences on the accusation that he accepted bribe money of Rs.6, 000/- (rupees six thousand) from the informant S.Chandrasekhar, who is the son-in-law of the deceased employee Late Dula Oram for disbursement of widow/children pension under Employees' Pension Scheme of EPF Organization in favour of his mother-in-law Smt. Tersa Oram (P.W.11). It is the case of the informant that his late father-in-law Dula Oram was working as a worker in M/s. Ores India Ltd., a private contractor in Kalta Iron Ore Mines. The said Dula Oram expired on 24.09.1994 and his widow Smt. Tersa Oram had submitted an application for disbursement of widow/children pension under Employees' Pension Scheme of EPF Organization and the said application was received in the EPFO Sub-Regional Office, Rourkela on 06.02.1996 and was processed. The arrear pension of Rs.17,159/- for the period from 25.09.1994 to 31.10.1996 was paid to P.W.11 and her two children and thereafter, pension for the months from November 1996 to May 1997 was also paid. It is the specific case of the informant that P.W.11 could able to get Rs.22,000/- (twenty two thousand) as pension for the period from 2003 to 2005, but the arrear pension for the

period from 1994 to 2003 was not paid till 03.06.2005. It is the further prosecution case that since P.W.11 was an illiterate lady and was not in a position to pursue the matter at EPFO Office, Rourkela, she entrusted her son in-law, the informant to pursue the matter of arrear pension. It is the specific case of the prosecution that the informant visited the EPFO Office, Rourkela on 03.06.2005 to enquire about the position of arrear pension and he met the opposite party in his office. On enquiry, the opposite party told the informant that since the matter was an old one and complicated, if latter would pay a bribe of Rs.6,000/- (six thousand) to him, he would process the file, so that payment of arrears pension would be released to P.W.11 at the earliest. The opposite party also intimated the informant that the pension amount would be around rupees one lakh and if the informant failed to pay the said amount, the file would not be processed. It is the specific case of the prosecution that the opposite party told the informant to give him the demanded bribe of Rs.6,000/- on 06.06.2005 at the restaurant near SRP Office in Railway Colony, Rourkela at 10.00 a.m. when the opposite party would come on his way to his office. As the informant was not willing to pay any bribe to the opposite party, being aggrieved, he submitted a F.I.R. before the D.S.P., C.B.I, Rourkela Unit on 06.06.2005, who in turn forwarded the said F.I.R. to the S.P., C.B.I., Bhubaneswar to take further action. Basing on such F.I.R., the S.P., C.B.I., Bhubaneswar registered R.C. Case No. 25(A) of 2005 and took up investigation of the case. After the trap was laid and the formalities of preparation for laying the trap was over, they proceeded to the office of the opposite party and it is the prosecution case that the trap was successful and tainted note was recovered from the possession of the opposite party which he had kept in his pocket after accepting the same from the informant and the hand wash of the opposite party taken in sodium carbonate solution turned pink. Hand wash in sample bottles were collected and sealed which was sent for chemical analysis. On completion of investigation, sanction order to prosecute the opposite party was obtained and charge sheet was submitted against the opposite party.

4. The informant in the case, namely, S.Chandrasekhar could not be examined as he expired before commencement of the trial.

During course of trial, the prosecution examined eleven witnesses. P.W.1 N. Kishore Kumar, who was working as Asst. Accounts Officer, EPFO Sub-Regional office, Rourkela, is a witness to the note prepared by the opposite party in the pension payment order file of Late Dula Oram. P.W.2

Pradeep Kumar Mishra, who was the Regional Provident Fund Commissioner, Rourkela is a witness to the seizure of letters and office orders as per seizure list Ext.2. P.W.3 Sarat Kumar Behera, who was the Section Supervisor, Branch Office, EPFO, Rourkela, is a witness to the seizure of one pension file. P.W.4 Satyabrata Barik was the Senior Social Security Assistant of EPFO, Rourkela, who dealt with the pension file (Ext.1). P.W.5 Nirmal Kumar Prasad was the Regional Provident Fund Commissioner, Ranchi who accorded sanction to prosecute the opposite party and proved the sanction order (Ext.7). P.W.6 Kishore Kumar Pradhan stated to have given a note calculating the arrear pension of P.W.11 and her children, which was approved and file was given to the opposite party. P.W.7 Akhila Mohan Panda is another independent witness to the entire pre- trap and post-trap proceeding and is a witness to the demand and acceptance of bribe money. P.W.8 Biswa Ranjan Paikray is the over hearing witness and is a witness to the transaction of bribe money. P.W.9 L.T. Salu, who was the Inspector, C.B.I., Rourkela Unit, is a witness to the demand and acceptance of bribe money. P.W.10 Prasanna Kumar Panigrahi is the T.L.O.-cum-Investigating Officer and P.W.11 Tersa Oram is the widow of Late Dula Oram.

The prosecution exhibited sixteen numbers of documents. Ext.1 is the note prepared by the opposite party, Exts.2, 4, 5 are the seizure lists, Ext.3 is the copy of the documents produced by P.W.2, Ext.6 is the personal file of opposite party, Ext.7 is the sanction order, Ext.8 is the list, Ext. 9 is the pre-trap memorandum. Ext.10 is the post-trap memorandum, Ext.11 is the spot map, Ext.12 is the formal F.I.R., Exts.13 and 14 are the search list, Exts.15 and 16 are the chemical examination reports.

The prosecution proved six material objects. M.O.I, M.O.II and M.O.III are the sample bottles, M.O.IV is the cover containing G.R. notes, M.O.V is the bottle containing pant pocket wash of opposite party and M.O.VI is the cover containing pant of the opposite party.

5. The defence plea of the opposite party is that the opposite party had sold his old T.V. set to the informant and the latter handed over the sale proceeds of Rs.6,000/- to the opposite party on the day of trap and the amount in question was not the bribe amount.

One witness i.e. D.W.1 Santosh Nayak examined on behalf of the defence.

6. The learned trial Court after carefully analyzing the materials on record and the evidence of all the witnesses, has been pleased to hold that P.W.11 Tersa Oram had never entrusted the informant S. Chandrasekhar to look after her pension matter nor had she handed over any document to the informant for getting the pension. Rather, P.W.11 had given one document to her son in order to get pension of her husband from one office at Rourkela, but the prosecution has failed to examine and cite the son of P.W.11 who is another claimant of the family pension, as a witness. It was held that from the evidence of P.W.1 as well as P.W.11, it is seen that the informant had no role to play to look after the pension matter of P.W.11. it was further held that from the evidence of P.W.2, it is clear that on 03.06.2005, the pension file of P.W.11 was not with the opposite party but from the evidence of P.W.6, it is forthcoming that it was with the Assistant Commissioner. Thus, the prosecution has failed to prove that the opposite party had demanded and accepted any bribe money from the informant voluntarily and consciously, and the evidence of P.Ws. 7, 8, 9 and 10 cannot be safely relied upon to conclude beyond reasonable doubt that the opposite party had accepted cash of Rs. 6000/- (rupees six thousand) from the informant as bribe or illegal gratification. It was further held that the oral as well as documentary evidence of the prosecution coupled with the circumstances leading to trap and recovery of the tainted government currency notes from the opposite party is not a definite pointer to the conclusion that the opposite party had accepted illegal gratification or bribe money from the informant. The learned trial Court analysed the evidence of P.W.1 and held that nothing incriminating has been brought out in the cross-examination by the prosecution to disbelieve his version. The learned trial Court found P.W.7, P.W.8 and P.W.9 to be unreliable witnesses and further held that the version of these witnesses along with the evidence of P.W.10 as regard demand of bribe on 03.06.2005 and 06.06.2005 was not free from reasonable doubt and accordingly, held the opposite party not guilty.

7. Mr. Sarthak Nayak, learned Special Public Prosecutor (CBI) contended that the impugned judgment and order of acquittal is perverse and not sustainable in the eye of law. He argued that law is well settled that even if the decoy did not support the case of the prosecution, but if the evidence of the shadow witness is clinching and believable, basing on the corroborative evidence of trap laying officer, the conviction can be sustained. Learned counsel further submitted that shadow witness has stated about the demand of money made by the opposite party at the spot of trap and also offering of the

money by the decoy to the opposite party on the date of occurrence towards bribe and further stated about the recovery of the same from the possession of the opposite party. It is further argued that the hand wash of the opposite party which was taken in the sodium carbonate solution turned pink which justified the presence of phenolphthalein powder in the hands of the opposite party by touching the bribe money and when the evidence of the official witnesses are clinching, the order of acquittal which has been passed mainly basing on thedefence plea is not sustainable. He placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Vinod Kumar -Vrs.- State of Punjab reported in A.I.R. 2015 Supreme Court 1206***.

Mr. H.K. Mund, learned counsel for the opposite party, on the other hand, supported the impugned judgment and contended that in the present case of this nature, the demand of bribe, acceptance and recovery thereof are the three essential ingredients to establish the charge. He further submitted that the stand of the opposite party in the learned trial Court was that he had received the amount towards sale of an old TV and since acceptance and recovery were admitted by the opposite party, his hand wash is also of no consequence. Learned counsel further submitted that the only question that needs careful scrutiny is as to whether the opposite party demanded the amount as bribe or he received the same towards sale consideration for the TV. Learned counsel for the opposite party further submitted that demand is the sine-qua-non in a prosecution under sections 7 and 13(1) (d) of the Act. According to him, since the informant was not examined, the allegation relating to demand of bribe on 03.06.2005 was not proved and therefore, the only thing remains to be seen as to whether the opposite party demanded the bribe on 06.06.2005 at the time of trap. Placing reliance on the evidence of D.W.1, it is argued that the learned trial Court rightly accepted the defence plea.

8. In the case at hand, the acceptance of Rs.6, 000/- by the opposite party from the informant (who is dead) is not disputed. It is also not disputed that there was recovery of Rs.6, 000/- from the opposite party. The only issue that arises for consideration is whether such amount was demanded by the opposite party from the informant as bribe for processing the arrear pension bill of the father in-law of the informant as per the prosecution case and it was paid on the date of trap or the amount in question was the sale price of old T.V. as per the defence plea.

Now, let me analyze the demand of bribe as stated by the shadow witness (P.W.8). In his deposition, he has stated that at the time of trap when the opposite party came to the spot, the informant asked him to process the pension paper and the opposite party demanded the money and the informant gave the money. The conversation between the informant and the opposite party was in Hindi as stated by P.W.8 who has not spoken about the exact words used during such conversation. The evidence of P.W.8 that when the opposite party came in a motor cycle, the informant asked him to process the pension papers is not corroborated by P.W.7 and P.W.9, though both of them stated about the demand. Section 60 of the Evidence Act mandates that oral evidence must be direct and if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it. Therefore, what is admissible in evidence is the exact words heard by P.W.8 during the conversation and not the opinion formed by him or inference drawn by him from the said conversation. The exact words uttered were required to be brought on record clearly, otherwise it is difficult to accept the demand part particularly when the informant could not be examined on account of his death. In my humble view, demand appears to be in consonance with the defence plea that the opposite party was due to get Rs.6, 000/- from the informant towards the sale amount of the T.V., which has been proved through D.W.1. Thus, in this case demand of bribe is not proved.

From the evidence of Tersa Oram (P.W.11), it does not appear that she had entrusted the informant to look after her pension matters rather she stated to have given one document to her son for such purpose. There is also no clinching material on record that any work relating to the pension of Tersa Oram (P.W.11) was pending with the opposite party at the time of alleged occurrence rather as per the evidence of P.W.1, the file was passed by him to the Asst. Commissioner for taking further action. Therefore, no work was pending at the level of opposite party to make a demand of bribe rather the available circumstances appearing on record negatives the theory of demand of bribe.

In the case of ***Kishore Kumar Swain -Vrs.- State of Odisha (Vigilance) reported in (2018) 69 Orissa Criminal Reports 925***, it is held that mere receipt of the amount by the accused is not sufficient to fasten his guilt in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by

bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. In a case where the accused offers an explanation for receipt of the alleged amount, while invoking the provisions of section 20 of 1988 Act, the Court is required to consider such explanation on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. Therefore, to determine whether all the ingredients of the offences i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety and the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then burden of proving the defence shifts upon the accused. The proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(1)(d) of the 1988 Act and in absence thereof, the charge would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would not be sufficient to bring home the charge under these two sections of the 1988 Act. (Ref:- ***State of Punjab -Vrs.- Madan Mohan Lal Verma reported in A.I.R. 2013 S.C. 3368, State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 S.C. 486, V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045, Panalal Damodar Rathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191, Mukhitar Singh -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016, State of Kerala -Vrs.- C.P. Rao reported in (2011) 6 Supreme Court Cases 450***).

The factual scenario in the case of Vinod Kumar (supra), reliance on which was placed by the learned Special Public Prosecutor is different than the present case. The Hon'ble Supreme Court in that case held that the prosecution proved the demand, acceptance and recovery of the amount, which is not the case here.

9. Law is well settled as held in case of ***Babu and others -Vrs.- State of Uttar Pradesh reported in A.I.R. 1983 Supreme Court 308*** that in appeal against acquittal, if two views are possible, the Appellate Court should not interfere with the conclusions arrived at by the trial Court unless the

conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the Appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The Appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it.

Thus, an order of acquittal should not be disturbed in appeal under section 378 of Cr.P.C. unless it is perverse or unreasonable. There must exist very strong and compelling reasons in order to interfere with the same. The findings of fact recorded by a Court can be said to be perverse, if the findings are arrived at by ignoring or excluding relevant materials on record or by taking into consideration irrelevant/inadmissible materials. The finding can also be said to be perverse, if it is against the weight of evidence, or if the finding outrageously defies logic so as to suffer from the vice of irrationality.

The right of appeal against acquittal vested in the State Government should be used sparingly and with circumspection and it is to be made only in case of public importance or where there has been a miscarriage of justice of a very grave nature.

In case of ***Bannareddy and others -Vrs.- State of Karnataka and others reported in (2018) 5 Supreme Court Cases 790***, it is held as follows:-

> "10….It is well-settled principle of law that the High Court should not interfere in the well- reasoned order of the trial court which has been arrived at after proper appreciation of the evidence. The High Court should give due regard to the findings and the conclusions reached by the trial court unless strong and compelling reasons exist in the evidence itself which can dislodge the findings itself".

In case of ***Ghurey Lal -Vrs.- State of Uttar Pradesh reported in (2008) 10 Supreme Court Cases 450***, it is held as follows:-

> 75….The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be

slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

10. After going through the impugned judgment and order of acquittal passed by the learned trial Court, it seems that the learned Court has passed a reasoned judgment after proper appreciation of the evidence and I find no infirmity or illegality or perversity in the impugned judgment, rather the order of acquittal of the opposite party is quite justified in the facts and circumstances of the case and therefore, I am not inclined to grant leave to the petitioner Republic of India to prefer any appeal against the impugned judgment and order of acquittal.

Accordingly, the CRLLP petition stands dismissed.

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2022 (II) ILR - CUT- 166

S.K. SAHOO, J.

CRLA NO. 33 OF 2016

BIJAY NAIK ……..Appellant

.V.

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Offences under NDPS Act – Section 42 –Total Non-compliance – Effect of – Held, It would be very risky to uphold the conviction – Delayed in compliance with satisfactory explanation would have been an acceptable compliance of section 42, but since it is a case of total non-compliance of requirement of the mandatory provision under section 42 of the Act, is not acceptable in the eyes of law – Criminal Appeal is allowed. (Para-8 & 9)

Case Laws Relied on and Referred to :-

1. 2019 (II) OCR 49 : Sumit Kumar Behera & Anr Vs. State of Odisha.
2. 2019 (I) OLR 34 : Biswanath Patra Vs. State of Odisha.
3. 2016 (I) OLR 831 : Bayamani Mandinga Vs. State ofOdisha.
4. (2009) 8 SCC 539 : Karnail Singh Vs. State of Haryana.
5. (2010) 15 SCC 369 : State by Inspector of Police Vs. Rajangam
6. (2010) 4 SCC 445 : Bahadur Singh Vs. State of Haryana.
7. 2020 CLJ 730 : Manoj Kumar Panigrahi Vs. State of Odisha.

For Appellant : Mr. Suryakanta Dwibedi.

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

JUDGMENT Date of Hearing & Judgment: 24.02.2022

S.K. SAHOO, J.

The appellant Bijay Naik faced trial in the Court of the learned 1st Additional Sessions Judge, Sambalpur in T.R.Case No. 18/3 of 2013-2014 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that he was hoarding 80 kgs. of ganja, which was recovered from his house.

The learned trial Court vide impugned judgment and order dated 07.10.2015 found the appellant guilty under section 20(b) (ii) (C) of the N.D.P.S. Act and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1, 00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for a period of two years.

2. The prosecution case, in short, is that on 01.05.2013 at around 8.15 a.m., when Sri Seshadeb Das (P.W.11), the Inspector of Excise, District Mobile, Sambalpur along with other staff were performing patrol duty at village Angabira under Naktideul police station, they received reliable information that the appellant was hoarding huge quantity of ganja in his dwelling house. On receiving such information, P.W. 11 after intimating his superior authority, proceeded to the house of the appellant and in presence of independent witnesses and Executive Magistrate, searched the house of the appellant and recovered 80 kgs. of ganja from his house. P.W.11 from his experience and conducting test found the same to be ganja and thereafter collected two samples of ganja of 50 grams each and kept the same in two envelopes and the rest ganja in two jerry bags marked 'A' and 'B' and put identification marks on the sample ganja as 'A/a' and 'A/b' and sealed the same with paper slips and brass seal impression. The brass seal was left in the zima of P.W.8 Soudamini Naik vide zimanama Ext.3. The appellant was arrested on the very day i.e. on 01.05.2013 after explaining the grounds of arrest and he was produced before the learned Sessions Judge -cum- Special Judge, Sambalpur along with the seizure list, memo of arrest, forwarding report and the seized articles. P.W.11 made a prayer before the learned Special Judge to send the samples for chemical analysis to the D.E.C.T.L.

(Northern Division), Sambalpur for examination and opinion, who in turn directed the learned S.D.J.M., Rairakhol to send the sample Ext. 'A/a' for chemical examination. The learned Special Judge also directed the Superintendent of Excise, Sambalpur to keep the seized bulk ganja packets in safe custody due to constraints of space in Court Malkhana. The learned S.D.J.M., Rairakhol as per the order of the learned Special Judge,Sambalpur sent the sample exhibit 'A/a' drawn by P.W.11 to the Chemical Examiner, D.E.C.T.L (Northern Division), Sambalpur on 02.05.2013 for chemical examination and opinion after verifying the seal cover and resealing the same. The broken seals were also resealed. P.W.11 produced the other sample Ext. 'A/b' in Court Malkhana and kept the bulk ganja 'A' and 'B' in the office of the Superintendent of Excise, Sambalpur. P.W.11 demarcated the house of the appellant with the help of the Revenue Inspector, Batagaon on the orders of the Tahasildar, Naktideul and after completion of investigation and on receipt of chemical examination report to the effect that the sample marked as Ext. 'A/a' was found to be ganja, submitted the prosecution report against the appellant under section 20(b) (ii) (C) of the N.D.P.S. Act.

3. The appellant was charged under section 20(b) (ii) (C) of the N.D.P.S. Act for conscious possession of 80 kgs of ganja, which he refuted, pleaded not guilty and claimed to be tried.

4. During the course of trial, in order to prove its case, the prosecution examined eleven witnesses.

P.W.1 Biswanath Sahu is the Executive Magistrate in whose presence the search and seizure of the house was made.He has also proved the search notice issued to the appellant as per Ext.1. He is a witness to the seizure of ganja and the sample packets as per Ext.2 and also zimanama as per Ext.3. He also proved his signature on M.O.I, the envelop containing sample ganja.

P.W.2 Debaraj Mahapatra, who is an independent witness, proved his statement made before the I.O. vide Ext.5 and also an affidavit sworn before the Notary, Sambalpur as per Ext.6.

P.W.3 Arakhita Sahu, who is also an independent witness, proved the affidavit sworn before the Notary, Sambalpuir as per Ext.7.

P.W.4 Santosh Kumar Sahu, who is also an independent witness did not support the prosecution case and was declared hostile. He proved his signatures on the affidavit sworn as per Ext.8 and Ext.8/1.

P.W.5 Sita Biswal who is an independent witness, turned hostile.

P.W.6 Bijay Kumar Barik is the Excise Constable, Sadar Charge, Sambalpur and he was a member of the patrolling party, who stated about the arrest of the appellant and recovery of the contraband ganja from the house of the appellant. He has also proved the option notice issued to the appellant as to whether the search is to be made in presence of any Gazetted Officer or Magistrate as per Ext.1. He is also a witness to the seizure of ganja as per seizure list vide Ext.2 and also a witness to the zimanama vide Ext.3 and also a witness to the memo of arrest of the appellant vide Ext.4.

P.W.7 Raghunandan Badhei is the Revenue Inspector, Batagaon, who demarcated the house of the appellant situated in Mouza Angabira as per the direction of the Tahasildar, Naktideul on being shown by the A.S.I of Excise, Gandhi Behera and proved his report vide Ext.10.

P.W.8 Soudamini Naik, who is a witness to the zimanama of brass seal, has been declared hostile by the prosecution, rather she stated that she neither knew the appellant nor P.W.11 and nothing was given to her in zima.

P.W.9 Harihar Pradhan did not support the prosecution case and was declared hostile.

P.W.10 Pramod Kumar Dash was the then Tahasildar,Naktideul, who directed R.I., Batagaon (P.W.7) to demarcate the land shown by the Excise Officer and proved the demarcation report submitted R.I. vide Ext.12, which was in turn submitted to P.W.11.

P.W.11 Seshadeb Das was the Inspector of Excise,District Mobile, Sambalpur and he is the investigating officer of the case, who on completion of investigation submitted the prosecution report.

The prosecution exhibited fifteen documents. Ext.1 is the option notice served on the appellant, Ext.2 is the seizure list, Ext.3 is the zimanama, Ext.4 is the grounds of arrest, Ext.5 is the statement of the appellant, Ext.6 is

the affidavit sworn to by P.W.2, Ext.7 is the affidavit sworn to by P.W.3, Exts.8 & 8/1 are the signatures on the affidavit of P.W.4, Ext.9 is the statement of P.W.5 recorded under section 67(c) of the N.D.P.S.Act, Ext.10 is the demarcation report submitted by P.W.7, Exts.11 and 11/1 are the signatures of P.W.9 on the affidavit,Ext.12 is the report of the Tahasildar, Naktideul, Ext.13 is the forwarding report of the S.D.J.M., Rairakhol for chemical examination, Ext.14 is the chemical examination report and Ext.15 is the statement of the appellant.

The prosecution also proved one material object M.O. I i.e., the sample packet marked 'A/b'.

5. The defence plea of the appellant was one of complete denial.

Two witnesses were examined on behalf of the defence.

D.W.1 Sanjay Naik, who is the son of the appellant stated that his family consists of grandfather, brother and sisters and the house consists of four rooms where all the family members are residing.

D.W.2 Kubera Naik is a neighbour of the appellant,who also stated that the appellant was staying with his family members consisting of two sons and daughter in the house having four rooms and two verandahs.

6. The learned trial Court after analyzing the ocular as well as the documentary evidence on record came to hold that the prosecution has proved that the appellant was found in possession of 80 kgs. of ganja in his house and accordingly, held that the prosecution has successfully established its case against the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Mr. Suryakanta Dwibedi, learned counsel for theappellant contended that in the case at hand, the ganja wasfound hoarding on the floor of one of the rooms of the house,which was weighed and found to be 80 kgs., but there is no evidence that the room in question was in the exclusive possession of the appellant, rather the documentary evidence as well as oral evidence indicates that the plot over which the house was standing was recorded jointly in the names of a number of persons and the oral evidence has also come that a number of persons were residing in the house and in such a scenario, in absence of any clinching material relating to the exclusive

possession with the appellant, the conviction of the appellant is not warranted. Learned counsel further submitted that the independent witnesses have not supported the prosecution case and the order of conviction has been passed mainly relying on the statements of the official witnesses. He argued that the brass seal which is stated to have been handed over to P.W.8 was not produced when the bulk ganja along with sample were produced and it was also not produced during trial and there is no material relating to the verification of the seal on the sample and bulk ganja packets or comparison of the seals either by the learned Special Judge or by the learned S.D.J.M., Rairakhol prior to sending of the same for chemical analysis. It is further argued that since section 55 of the N.D.P.S. Act requires that the contraband ganja sample should be kept in the malkhana of the nearby police station, but the same has not been done, thereby it has caused prejudice to the appellant. While concluding his argument, it is contended that it is a case where there is total non-compliance of the provision under section 42 of the N.D.P.S. Act and though on receipt of reliable information, P.W.11 conducted search and seizure in the house in question, but after he returned back to the Excise Office, neither he has reduced the same into writing nor sent the same to the higher authority within 72 hours. It is further urged that P.W.11 himself conducted the search and seizure and also conducted investigation and submitted the prosecution report, which was not proper and justified and therefore it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. D.K. Pani, learned Additional Standing Counsel for the State, on the other hand, supported the impugned judgment and contended that on account of independent witnesses not supporting the prosecution case in a case under the N.D.P.S. Act, the prosecution case cannot be disbelieved, particularly when the defence has not pointed out that the official witnesses are in any way interested or they have a motive to falsely entangle the appellant in a case of this nature. He argued that the versions of the official witnesses are clear, trustworthy and therefore, the learned trial Court has not committed any illegality in accepting their evidence. It is further submitted that the evidence on record indicates that it is a one room house and the house was in possession of the appellant and merely because the plot has been recorded in the names of a number of persons, that cannot be a ground to disbelieve the prosecution case that ganja was seized from the exclusive possession of the appellant. It is further submitted that the question of compliance of section 55 of the N.D.P.S. Act is not required in this case as

the Inspector of Excise (P.W.11), after seizure formalities were over, produced the seized articles on the very same day before the learned Sessions Judge -cum- Special Judge, Sambalpur and the order sheet also clearly reveals the same and as per the direction of the learned Sessions Judge -cum- Special Judge, learned S.D.J.M., Rairakhol sent the sample for chemical analysis. Learned counsel further submitted that when P.W.11 was on patrol duty, he got the reliable information regarding hoarding of ganja for which he could not reduce the same into writing and immediately proceeded to the spot for search and seizure and produced the seized articles before the Court and in such state of affairs, it cannot be said that there is any non-compliance of the provisions under section 42 of the N.D.P.S. Act nor it can be said that the investigation conducted by P.W.11 has caused any prejudice to the appellant in any manner. Learned counsel for the State placed reliance on the decision of the Five Judge Bench in the case of ***Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 10 Supreme Court Cases 120***.

8. Adverting to the contentions raised by the learned counsel for the respective parties, the following points are required to be addressed:

(i) Whether the prosecution has adduced evidence about the exclusive possession of the house in question with the appellant;

(ii) Effect of non-production of brass seal in Court;

(iii) Non-compliance of the provisions of section 42 of the N.D.P.S. Act;

(iv) Excise Officer conducting search and seizure becoming the investigating officer;

(v) Non-compliance of the provision under section 57 of the N.D.P.S. Act;

Point No.(i)

Whether the prosecution has adduced evidence about the exclusive possession of the house in question with the appellant:

P.W.11 stated that when he entered into the house of the appellant with the Executive Magistrate, he found ganja was spread over the floor of the house. He stated that he sent requisition to the Tahasildar, Naktideul to verify the land records of the house and on the direction of the Tahasildar, the Revenue Inspector, Batagaon demarcated the land and submitted the report vide Ext.10 and the report of the Tahasildar, Naktideul is marked as Ext.12.

P.W.11 stated that during investigation, he noticed Santosh Kumar Sahu (P.W.4), Arakhita Sahu (P.W.3), Debaraj Mahapatra (P.W.2) of village Angabira, the Sarpanch of Jamujori Gram Panchayat, Smt. Sita Biswal (P.W.5) and the Ex-Sarpanch of Jamujori Harihar Pradhan (P.W.9) and they appeared before him and their statements were recorded. In cross-examination, P.W.11 has stated that there was only one room in the house searched and there was no verandah of the house, but he has not prepared any sketch map of the house.

P.W.7 was the Revenue Inspector, Batagaon, who has stated that on 09.10.2013 he demarcated the house on being shown by Gandi Behera, A.S.I. of Excise in village Angabira and according to him, the house stands in Plot no. 884, Khata No. 27 of Mouza Angabira and recorded jointly in the names of Dharmu Naik, Gopi Naik, Andhari Naik, all are sons of Kastu Naik of village Angabira and accordingly, he submitted the report vide Ext.10 to the Tahasildar, Naktideul. On perusal of Ext.10, it appears that Plot no. 884, Khata No. 27 of Mouza Angabira is recorded in the names of Dharmu Naik, Gopi Naik, Andhari Naik, sons of Kastu Naik; Uccab Naik, Jata Naik, Kartik Naik, sons of Bairagi Naik; Bisi Naik, wife of Bairagi Naik and Binak Naik, son of Thuru Naik.

P.W.2 has stated that the family of the appellant consisted of seven members. Out of the independent witnesses whom the I.O. examined, P.W.4, P.W.5 and P.W.9 have not supported the case and they have been declared hostile. P.W.7 is totally silent about the possession of the house in question by the appellant.

The defence has examined two witnesses, out of which D.W.2 has stated that there are four rooms and two verandahs in the house of the appellant who has got two sons and a daughter and they were residing with him.

In view of the oral as well as documentary evidence,when the land in question stood recorded in the names of so many persons and there is no clinching material that the place from where the ganja was seized was in exclusive possession of the appellant and no other family members of the appellant have been arrayed as accused and no explanation has been offered by the prosecution in that respect, it is difficult to accept that the appellant was in exclusive possession of the house in question from where the seized ganja has been recovered.

Point No. (ii)
Effect of non-production of brass seal in Court:

The evidence of the I.O. (P.W. 11) indicates that after the ganja was weighed, he collected two samples of ganja each of 50 grams and kept the same in two envelopes and he sealed the samples of ganja with paper slips and impression ofbrass seal. Similarly the bulk ganja weighing 79kg. 900 grams were kept in two jerry bags, which were marked as 'A' and 'B'and jerry bag marked 'A' was containing 40 kg and the jerry bagmarked 'B' was containing 39kg. 900 grams and those weresealed with paper slips and impression of brass seal was left onit. The I.O. stated that he left the brass seal in the zima of one Soudamini Naik (P.W.8) vide zimanama Ext.3. Though the zimanama indicates about the same, but P.W.8 has not supported the evidence of the I.O. regarding keeping of brass seal in her zima for which she was declared hostile by the prosecution. The brass seal was neither produced in Court at the time of production of seized ganja and sample packets nor even during trial. Learned Special Judge as per order dated 01.05.2013 though mentioned about the production of different documents as well as the appellant and further mentioned that the seized articles were produced under seal, but he has not compared the seal that is appearing on the seized articles with the brass seal kept under the zima of P.W.8 under zimanama Ext.3 as P.W.8 did not produce the same. Similarly, the learned S.D.J.M., Rairakhol before whom the sealed sample 'A/a' was produced on 02.05.2013, simply mentioned in the order sheet that the seal cover was opened and resealed in his presence and the sealed sample marked 'A/a' was handed over to the I.O. with a direction to produce the same to the Chemical Examiner, D.E.C.T.L. (Northern Division), Sambalpur. In the order sheet, there is no mention about comparison of the seal available on the sample packets with the specimen seal impression given to P.W.8 in zima.

In the case of ***Sumit Kumar Behera and another -Vrs.- State of Odisha reported in 2019 (II) Orissa Law Report 49***, it is held that it is the requirement of law that when the contraband articles are seized and sealed with the seal impression then the brass seal has to be left in the zima of a reliable person under zimanama and instruction is to be given to such person to produce it before the Court for verification at the time of production of articles.

In the case of ***Biswanath Patra -Vrs.- State of Odisha reported in 2019 (I) Orissa Law Reviews 34***, it is held that handing over the brass seal to a reliable person andasking him to produce it before the Court at the time of production of the seized articles in Court for verification are notempty formalities or rituals but is a necessity to eliminate thechance of tampering with the articles.

In the case of ***Bayamani Mandinga -Vrs.- State of Odisha reported in 2016 (I) Orissa Law Reviews 831***, it isheld that if the brass seal remains with the person who haseffected search and seizure, then chance of tampering cannot beruled out.

Thus, from the evidence on record, it is apparent that there was no verification of the specimen seal impression, which was kept in the zima of P.W.8 as per zimanama Ext.3 withthe seal impression appearing on the sample packets by theCourt. That apart, the evidence of P.W.8 also does not reveal that she produced the seal as per Ext.3 before the Court for comparison.

Point No. (iii)
Non-compliance of the provisions of section 42 of the N.D.P.S. Act :

The I.O. (P.W.11) has stated that while he was performing patrol duty at about 8.15 a.m. at village Angabiranear Naktideul police station, he received credible informationabout the appellant hoarding huge quantity of ganja in his house and he informed the matter to the Superintendent of Excise, Sambalpur over phone and proceeded to the spot. In the cross-examination, he specifically stated that he received credible information near the house of the appellant and he did not reduce the information into writing and sent it to his higher official. He further stated that he intimated his higher official about the information over phone. The Superintendent of Excise, Sambalpur has not been examined to corroborate that any such information was given by P.W.11.

In the case **of *Karnail Singh -Vrs- State of Haryana reported in (2009) 8 Supreme Court cases 539***, it has been held as follows:-

> "35. In conclusion, what is to be noticed is ***Abdul Rashid*** did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did ***Sajan***

Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person has to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period that is after the search, entry and seizure. The question is one of urgency and expediency.

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

In view of the ratio laid down in the aforesaid case, if P.W.11 received information while he was on patrol duty and the information required immediate action and any kind of delay in taking prompt action would have resulted in the removal of the evidence, then after taking action under clauses (a) to (d) of section 42(1), he should have recorded the information in writing and forthwith informed the same to his official superior. Delayed compliance with satisfactory explanation about the delay would have been an acceptable compliance of section 42, but since it is a case of total non-compliance of the requirement, I am of the humble view that the mandatory provisions under section 42(1) and 42(2) of the N.D.P.S. Act has not been complied with.

Point No. (iv)

Excise Officer conducting search and seizure becoming the investigating officer:

P.W.11 is the Officer who conducted the search and seizure and he also investigated the matter and submitted prosecution report finding prima facie case against the appellant.

In the case of ***State by Inspector of Police -Vrs.-Rajangam reported in (2010) 15 Supreme Court Cases 369***, it is held as follows:-

> "8. The short question which falls for consideration of this Court is whether P.W.6 who registered the crime could have investigated the case or an independent officer ought to have investigated the case.
>
> 9. The learned Counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In ***Megna Singh v. State of Haryana 1995 CriLJ 3988***, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:
>
> 4....We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

In the case of **Mukesh Singh** (supra), a five-Judge Bench of the Hon'ble Supreme Court held that whether the investigation conducted by the informant concerned was fair investigation or not is always to be decided at the time of trial. The informant/investigator concerned will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant-cum-investigator but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not the judicial approach to distrust and suspect him without good grounds. It was further held that in a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal.

In view of the principles decided by the Hon'ble Supreme Court in the aforesaid cases, merely because P.W.11 investigated the case after he conducted search and seizure of the contraband articles from the house in question and submitted prosecution report, it cannot be said that his investigation suffers from the vice of unfairness or bias.

Point No. (v)
Non-compliance of the provision under section 57 of the N.D.P.S. Act:

Section 57 of the N.D.P.S. Act states that whenever any person makes any arrest or seizure under this Act, he shall, within the next forty eight hours of such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

In the case of ***Bahadur Singh -Vrs.- State of Haryana reported in (2010) 4 Supreme Court Cases 445***, it is held that the provision under section 57 of the N.D.P.S. Act is not mandatory and that substantial compliance would not vitiate the prosecution case. In the case of ***Manoj Kumar***

Panigrahi -Vrs.- State of Odisha reported in 2020 Criminal Law Journal 730, it is held that even though section 57 of the N.D.P.S. Act is held to be not mandatory but the official conducting search and seizure cannot totally ignore such a provision which is directory in nature as the same has got a salutary purpose and if he ignores such a provision then adverse inference should be drawn against the prosecution.

9. In view of the glaring inconsistencies in the evidence of prosecution witnesses, non-compliance of provisions under section 42 of the N.D.P.S. Act, non-production of the brass seal in Court and absence of clinching evidence regarding exclusive possession of the house in question from which ganja was seized with the appellant, I am of the humble view that it would be very risky to uphold the impugned judgment and order of conviction.

Accordingly, the Criminal Appeal is allowed. The impugned judgment and order of conviction and sentence passed by the learned Trial Court is hereby set aside and the appellant is acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellant who is in jail custody shall be released forthwith if his detention is otherwise not required in any other case.

The trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

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2022 (II) ILR - CUT- 179

K.R. MOHAPATRA, J.

CMP NO. 720 OF 2021

SAKUNTALA MISHRA & ORS. .....Petitioners

.V.

JAGDEEP PRATAP DEO & ANR. .....Opp. Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order XXI Rule 25 (2) – Whether the procedure prescribed under the sub-rule 25 is mandatory? – Held, Not mandatory – If the Court as well as parties to the execution proceedings are satisfied with the report submitted by the commissioner, then examination of the commissioner under sub-rule (2) of Rule 25 will be futile one. (Para-14)

(B) WORDS AND PHRASES – "Shall" and "may" in a statue – Uses – The word "shall" or "may" in a statue is not decisive by itself – It must be given a purposive interpretation taking into consideration of the object and intent of the provision in which it is used. (Para-13)

Case Laws Relied on and Referred to :-

1. (2003) 8 SCC 289 : Ravindra Kaur Vs. Ashok Kumar & Anr.
2. 2009 (II) OLR 201 : Swastik Agency Vs. State Bank of India, Bhubaneswar.
3. (2010) 11 SCC 500 : Dinesh Chandra Pandey Vs. High Court of Madhya Pradesh & Anr.
4. AIR 1999 SC 1281 : Babu Verghese Vs. Bar Council of Kerala.

For Petitioners : Mr. Upendra Kumar Samal.

For Opp. Parties: Mr. Prafulla Kumar Rath, (For Opp. Party No.1)
Mr. Prasant Kumar Khuntia, (For Opp. Party No.2)

ORDER Date of Order: 21.04.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Perused the kind minutes of Hon'ble the Chief Justice at Flag-X of the brief assigning the matter to this Bench.

3. This CMP has been filed assailing the order dated 18th November, 2021 (Annexure-8) passed in Execution Case No. 10 of 2004 (arising out of T.S. No.3 of 1998), whereby learned Senior Civil Judge, Sundargarh directed to issue a letter to the learned District Judge, Sundargarh requesting for nomination of Salaried Amin Commissioner for execution of the decree passed in T.S. No.3 of 1998.

4. Mr. Samal, learned counsel for the Petitioners submits that Execution Case No.10 of 2004 has been filed by the Opposite Party No.1- Decree Holder (D.Hr.) for execution of the decree passed by learned Civil Judge (Senior Division), Sundargarh in T.S. No.3 of 1998 declaring right, title and interest over the suit land, recovery of possession through Court and also permanently restraining the Defendants (present Petitioners) from raising any construction over the suit land. During pendency of the execution case, taking into consideration an application filed by the D.Hr.-Opposite Party No.1, one Sri R.N. Sahu was appointed as Salaried Amin Commissioner for execution

of the decree, being nominated by learned District Judge, Sundargarh. Vide Order dated 12th February, 2020, learned Senior Civil Judge, Sundargarh directed to issue a writ to the Commissioner to deliver vacant possession of land of an area Ac.0.070 decimals out of Plot No.3/4035/2 (Goda-I) and Ac.0.070 decimals of land out of Plot No.3/4035/1 (Goda-I) in total Ac.0.140 decimals of Hal Khata No. 507 situated in mouza-Talsankara (for short 'the suit land') to the D.Hr. Pursuant to the said order, the D.Hr.-Opposite Party No.1 also deposited one day salary of one Inspector, one male S.I., one female S.I., two Havildars and ten constables (including four women constables). However, the Salaried Amin Commissioner returned the writ vide his letter under Annexure-4 endorsing as under:

> *".....That the Decree holder has purchased land measuring 7 decimals each vide Sale Deed No.1059 and 1060 on 09.10.1990. In Sale Deed No.1060 land has been described as plot No.3/4035/1, area 7 decimals, and in the said sale deed the trace map of part plot is not available. Similarly, in sale Deed No.1059, trace map of land plot No. 3/4035/2, measuring land 7 decimals of part plot is not available. Further, I am to inform that the land of these two sale deeds are the decreetal land, in which I have been directed to demarcate the aforesaid land. In this regard further I am to mention that the trace map submitted by the DHr prepared by the Amin of M.I. Division, Sundargarh shows in 2 nos. of trace map that Plot No.3/4035, area 7 decimals and plot No.3/4035 area 7 decimals, which are not tallying with the suit plots.Specifically there is also no mention that which portion of the said plot is 3/4035/1 or 3/4035/2 for 7 decimals each.*
>
> *In the above context, it is not practically possible to execute the decree given in the decree. So finding no other alternative, I am compelled to return herewith the writ in question along with the documents with a prayer to re-issue the same after proper rectification of the land in question in the trace map for demarcation of the land....."*

5. Subsequently, the D.Hr.-Opposite Party No.1 filed an application to recall the order of appointment of Civil Court Amin Commissioner and to execute the writ through the bailiff on identification of the suit land through the D.Hr. The said application was rejected vide order dated 28th February, 2020 observing that the D.Hr. may take further adequate steps for execution of the decree. Subsequently, due to superannuation of Sri R.N. Sahu, who was appointed as Commissioner, the executing Court vide its order dated 18th November, 2021 directed for issuance of fresh writ for execution of the

decree and further directed to write a letter to the learned District Judge, Sundargarh for nomination of fresh Salaried Amin Commissioner. The said order is under challenge in this CMP.

6. Mr. Samal, learned counsel for the Petitioners referring to the provisions of Order XXI Rule 25(2) C.P.C. further submits that when the Commissioner returns the writ with an endorsement that he is unable to execute the process, the Court shall have to examine him touching his inability, and may, if it thinks fit, summon and examine the witnesses as to such inability, and shall record the result. Learned Senior Civil Judge, Sundargarh did not at all adhere to the aforesaid mandatory provision of law for which request for nomination of fresh Salaried Amin Commissioner is uncalled for and cannot be given effect to. It is his submission that since the statute has provided a specific provision, the Court has to adhere to the same strictly in the manner prescribed. In support of his contention, Mr. Samal, learned counsel relied upon the decision in the case of ***Babu Verghese v. Bar Council of Kerala, reported in AIR 1999 SC 1281***, wherein the Hon'ble Apex Court at paragraph-31 has observed as follows:

> *"31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor (1875) 1 Ch D 426 which was followed by Lord Roche in Nazir Ahmad v. King Emperor, 63 Ind App 372 : AIR 1936 PC 253 who stated as under:*
>
> *"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."*

7. Mr. Samal, learned counsel also submits that the Commissioner in his report has specifically stated that the decree is in-xecutable. Thus; appointment of fresh Salaried Amin Commissioner will be an abuse of process of the Court and will cause further harassment of the Petitioners-J.Drs. In that view of the matter, he prays for setting aside the impugned order and to drop the execution proceeding.

8. Mr. Rath, learned counsel for the Opposite Party No.1 refuting such submission argued with vehemence that the executing Court has duly followed the procedure in proceeding with the execution case. Referring to the Order XXVI Rules 18-A and 24 C.P.C., he submits that the provisions of

Order XXVI (Commissions) is squarely applicable to an execution proceeding. Referring to Rule 10(3) of Order XXVI C.P.C, Mr. Rath, learned counsel submits that examination of the Commissioner by the Court under Rule 25(2) of Order XXI C.P.C, is directory and not mandatory. Sub-rule (3) of Rule 10 of Order XXVI C.P.C. reads as follows:

> *"(3) Commissioner may be examined in person- Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."*

9. It is his submission that when the Court records its dissatisfaction or disagreement with the report submitted by the Commissioner, it may examine the Commissioner in person. As such, the provision of Rule 25(2) of Order XXI C.P.C. is directory and not mandatory. The word 'shall' used in sub-rule (2) should be read as 'may'. In the instant case, when the Court is satisfied with the report submitted by the Commissioner, there was no requirement for his examination. Further, nowhere either before the Executing Court or before this Court, the Petitioners-J.Drs. have stated that they are prejudiced due to non-examination of the Commissioner, who submitted a report endorsing his inability to execute the decree. He further submits that identification of the suit land cannot be questioned by the Salaried Amin Commissioner and in fact, he has never said in his report that the suit land is not identifiable. He has only reported that the trace maps submitted by the Amin of M.I. Division did not tally with the plaint schedule. Thus, there can be no impediment in issuing a fresh process for execution of the decree. Mr. Rath, learned counsel relying upon the decision in the case of ***Ravindra Kaur -Vs- Ashok Kumar and Another, reported in (2003) 8 SCC 289***, submits that when the J.Drs. have made desperate attempts to raise objection with regard to identification of the land and have failed in all their attempts up to the Hon'ble Supreme Court, they cannot raise such an objection at this stage in the execution proceeding. He further submits that the issue of examination of the Commissioner on his report has now become academic as Shri R.N. Sahu, who was earlier appointed, has already been superannuated from service in the meantime and a fresh Salaried Amin Commissioner has to be appointed for execution of the decree. In that view of the matter, he submits that this CMP merits no consideration and is liable to be dismissed.

10. Mr. Khuntia, learned counsel for the Opposite Party No.2 supports the case of the Petitioners and contended that since the statute provides a definite

procedure for examination of the Commissioner on submission of his report endorsing his inability to execute the decree, the same has to be followed in its letter and spirit before appointment of a fresh Commissioner for execution of the decree. The Opposite Party No.2 starting from the appellate stage had all throughout raised objection with regard to identification of the suit land. In support of his case, he also relied upon the decision in the case of ***Swastik Agency v. State Bank of India, Bhubaneswar,*** *reported in* ***2009 (II) OLR 201***, wherein this Court at Paragraphs-38, 41 and 46 held as under:

> ***"PROCEDURE — PRESCRIBED INLAW—TO BE FOLLOWED:***
>
> ***38.*** *When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that, where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius" meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (Vide Taylor v. Taylor, (1876) 1 Ch D 426; NizirAhmed v. King Emperor, AIR 1936 PC 253; Deep Chand v. State of Rajasthan, AIR 1961 SC 1527; Patna Improvement Trust v. Smt. Lakshmi Devi, AIR 1963 SC 1077; State of Uttar Pradesh v. Singhara Singh, AIR 1964 SC 358; Hukam Chand Shyam Lal v. Union of India, AIR 1976 SC 789; Chettiam Veetil Ammad v. Taluk Land Board, AIR 1979 SC 1573; State of Bihar v. J.A.C. Saldanna, AIR 1980 SC 326; State of Mizoram v. Biakchhawna, (1995) 1 SCC 156 : (1995 AIR SCW 1497); J.N. Ganatra v. Morvi Municipality, Morvi, AIR 1996 SC 2520; Haresh Dayaram Thakur v. State of Maharashtra(2000) 6 SCC 179 : (AIR 2000 SC 2281), Dhanajaya Reddy v. State of Karnataka etc. etc., (2001) 4 SCC 9 : (AIR 2001 SC 1512), Commissioner of Income Tax Mumbai v. Anjum M.H. Ghaswala, (2002) 1 SCC 633 : (AIR 2001 SC 3868), Prabha Shankar Dubey v. State of Madhya Pradesh, AIR 2004 SC 486; Ram Phal Kundu v. Kamal Sharma, AIR 2004 SC 1657; Indian Banks' Association v. Devkala Consultancy Service, AIR 2004 SC 2615; Parle Biscuits (P) Ltd. v. State of Bihar, (2005) 9 SCC 669; Harinarayan G. Bajaj v. Rajesh Meghani, (2005) 10 SCC 660 and Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184 : (AIR 2007 SC (Supp) 1448).*

WRIT Court'S -DUTY:

41. Writ Jurisdiction is discretionary in nature and must be exercised in furtherance of justice. The Court has to keep in mind that its order should not defeat the interest of justice nor it should permit an order to secure dishonest advantage or perpetuate an unjust gain or approve an order which has been passed in contravention of the statutory provisions : (vide Champalal Binani v. CIT, West Bengal, AIR 1970 SC 645; M.P. Mittal v. State of Haryana, AIR 1984 SC 1888; State of U.P. v. U.P. State Law Officers Association, AIR 1994 SC 1654; Dr. Arundhati A. Pargaonkar v. State of Maharashtra, AIR 1995 SC 962; Chandra Singh v. State of Rajasthan, AIR 2003 SC 2889; ONGC Ltd. v. Sendhabhai Vastram Patel, (2005) 6 SCC 454; and K.D. Sharma v. Steel Authority of India Ltd., 2008 AIR SCW 6654).

***STATUTORY PROVISION — TO BE ENFORCED**:*

46. It is settled law that when the action of the State or its instrumentalities is not as per the rules or regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid."

It is his submission that in the facts and circumstances of the case, appointment of a fresh Commissioner is without jurisdiction and the impugned order is, therefore, not sustainable.

11. I have heard learned counsel for the parties at length and perused the materials on record including the statutory provisions as well as the case laws cited by learned counsel for the respective parties.

12. Rule 25 of Order XXI C.P.C. provides for 'Enforcement of Process'. Sub-rule (2) of Rule 25 provides for examination of the Commissioner when he gives an endorsement to the effect that he was unable to execute the process. Rule 25 of Order XXI C.P.C reads as follows;

"25. Endorsement on process- (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay or if it was not executed the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

The provision under sub-rule (2) has been introduced in the Code with a definite purpose to find out as to whether the requirements of sub-rule (1) to Rule 25 has been complied with and also to find out the reason for non-execution of the process by the Commissioner to enable the Executing Court to take steps accordingly for smooth and effective execution of the decree. It can never be the object and intent of the provision to create bottleneck in execution of the decree. Examination of the Commissioner will be necessary, when either the Court is not satisfied or has raised doubt about the endorsement made in the report submitted or any of the parties to the execution proceeding raises objection to the said report. Otherwise, examination of the Commissioner will be an empty formality and will be a futile exercise. It may also result in the abuse of the process of Court. In cases, where, even after the Commissioner is examined, the executing Court requires more information touching the alleged inability of the Commissioner to execute the process, it may summon and examine witnesses as to such inability. In the instant case, a report has been submitted by the Commissioner stating that he could not execute the decree as the trace map prepared by the Amin of M.I. Division did not tally with the land schedule of the plaint. The said report was never objected to by either the D.Hr. or the J.Drs. It was also accepted by the Court.

13. Mr. Samal, learned counsel for the Petitioners submits that the word 'shall' used in sub-rule (2) connotes that the examination of the Commissioner is mandatory, when he returns the process with an endorsement that he could not execute the same. The word 'shall' or 'may' in a statute is not decisive by itself. It must be given a purposive interpretation taking into consideration the object and intent of the provision in which it is used. In the case of ***Dinesh Chandra Pandey -v- High Court of Madhya Pradesh and another***, reported in (2010) 11 SCC 500 , the Hon'ble Supreme Court held at Paragraph-15 as follows:

"15. The Courts have taken a view that where the expression "shall" has been used it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of the Rules, the purpose

> *sought to be achieved and the object behind implementation of such a provision. This Court in Sarla Goel v. Kishan Chand [(2009) 7 SCC 658], took the view that where the word "may" shall be read as "shall" would depend upon the intention of the legislature and it is not to be taken that once the word "may" is used, it per se would be directory. In other words, it is not merely the use of a particular expression that would render a provision directory or mandatory. It would have to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated."*

14. As discussed earlier, if the Court as well as parties to the execution proceeding are satisfied with the report submitted by the Commissioner, then examination of the Commissioner under sub- rule (2) of Rule 25 will be a futile one. It is, of course, when the Court is not satisfied with or raised doubt about the endorsement made in the report or any of the parties to the execution proceeding raises objection to the same, then the examination of the Commissioner under sub-rule (2) becomes inevitable. Rule-3 of Order XXVI also makes the same abundantly clear. Rules-18-A (Odisha amendment) and 24 of Order XXVI C.P.C. provide that the provisions under the said Order are applicable to the execution proceeding. In Sub-rule (2) of Rule 25 both 'shall' and 'may' has been used. But, that by itself does not make the word 'shall' mandatory. As discussed above, it has to be given a purposive interpretation. Thus, the word 'shall' used in sub-rule (2) is directory and not mandatory. Hence, non-examination of the Commissioner is not fatal to the execution proceeding.

15. In the report under Annexure-4, the Commissioner has also suggested for re-issuance of writ after rectification of the description of suit land in the trace map for demarcation of the land. Although he has used the words "*it was not possible to execute the decree on his part*", but in view of the suggestion given by him, it is clear that he could not execute the decree because of defective preparation of the map. That having been accepted by the Court and the parties to the execution proceeding, there was no requirement of further examination of the Commissioner by the Court in terms of sub-rule (2) of Rule 25 of Order XXI C.P.C.

16. In the instant case, the Commissioner, who had submitted the report under Annexure-4, is superannuated from service in the meantime. Accepting his report and suggestion, the Executing Court has directed to request learned

District Judge, Sundargarh for nomination of a fresh Salaried Amin Commissioner. Thus, the objection raised by Mr. Samal, learned counsel for the Petitioners, which is supported by Mr. Khuntia, learned counsel for the Opposite Party No.2, is not sustainable. Further, they have never raised such an objection in the execution proceeding itself. Mr. Samal, learned counsel for the Petitioners also could not satisfy the Court as to how the J.Drs. will be prejudiced, if the Commissioner is not examined in terms of sub-rule (2) of Rule 25 of Order XXI C.P.C.

17. There is no dispute to the case law cited by the respective parties. On perusal of the order sheet annexed to the CMP, this Court finds that the executing Court has followed the procedure under law while passing the impugned order under Annexure-8. Thus, I find no infirmity in the same.

18. Accordingly, the CMP being devoid of any merit stands dismissed. The executing Court shall take steps for expeditious disposal of execution case (Execution Case No.10 of 2004) by executing the decree passed in T.S. No. 3 of 1998.

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2022 (II) ILR - CUT- 188

K.R. MOHAPATRA, J.

W.P.(C) NO. 275 OF 2018

PUSTAM SAHU .....Petitioner

.V.

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

ODISHA LAND REFORMS ACT, 1960 – Section 19(1) (c) – Whether the revenue officer is empowered to determine the share of the Co-sharer? – Held, No – The revenue officer has no power to ascertain / determine the share of the co-sharer Raiyats unless they amicably consent to such partition. (Para-9)

For Petitioner : Mr. Anurag Pati

For Opp. Parties: Mr. Swayambhu Mishra, Additional Standing Counsel (For Opp. Party Nos.1 to 5)
Mr. Ramchandra Rath, (For Opp. Party Nos. 6 to 10)

ORDER Date of Order: 26.04.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioner in this writ petition seeks to assail the order dated 22nd November, 2017 (Annexure-5) passed in O.L.R. Revision Case No.01 of 2016, whereby the Additional District Magistrate, Bargarh holding that the Revenue Officer is not empowered to pass order determining the share in the land in question under Section 19(1) (c) of the Odisha Land Reforms Act, 1960 (for short 'the Act'), allowed the revision filed by Opposite Party Nos.6 to 10.

3. Short narration of facts necessary for adjudication of the case is that an application under Section 19(1)(c) of the Act was filed by the father of Opposite Party Nos. 6 to 8 along with Opposite Party Nos. 9 and 10 for partition of the property in Chaka No.423 under Chaka Khata No.37 and Chaka No.423/487 under Chaka Khata No.213 to a total extent of Ac.18.28 decimals in Mouza Dang (for short 'the case land'), which was registered as Mutation Case No. 13 of 2005. The Tahasildar, Bargarh vide his letter dated 6th October, 2005 determined the share of parties and allotted the share in their favour. Being aggrieved, the present Petitioner filed O.L.R. Appeal No.2 of 2014 before the Sub-Collector, Bargarh under Section 58 of the Act, who by his order dated 17th October, 2015 allowed the appeal and remitted the matter back to the Tahasildar, Bargarh with a direction to enquire and ascertain the share of the Petitioner, if any, from the joint family property in Chaka Khata No.37 of Mouza-Dang. Being aggrieved, the Opposite Party Nos. 6 to 10 filed O.L.R. Revision Case No.1 of 2016 under Section 59 of the Act and the impugned order under Annexure-5 has been passed.

4. Mr. Pati, learned counsel for the Petitioner submits that the Sub-Collector, Bargarh has committed no error in remitting the matter back to the Tahasildar, Bargarh to determine the share of the Petitioner from the joint family property in Chaka Khata No.37 of mouza Dang. The revisional authority by misreading the provision under Section 19(1)(c) of the Act allowed the revision for which this writ petition has been filed.

5. Mr. Rath, learned counsel for the contesting Opposite Party Nos. 6 to 10 refuting such submission contends that the Tahasildar, Bargarh while

entertaining the application under Section 19(1) (c) of the Act cannot decide the matter on merit by determining share of the parties. He can only allot the share between the parties on mutual agreement/consent. Thus, the revisional authority has committed no error in allowing the revision. He also draws attention of this Court to Rule-19 (7) and (8) of the Odisha Land Reforms (General) Rules, 1965 (for short 'the Rules'), which reads as follows:

> ***"19.Manner in which a partition can be ordered by a Revenue Officer under Clause (c) of Sub-section (1) of Section 19-***
>
> *xxx xxx xxx*
>
> *(7) The application can be allowed only when all the co-sharer raiyats give their consent to the partition applied for.*
>
> *(8) If there is any difference of opinion among the co-sharer raiyats, the application for partition shall be rejected.*
>
> *xxx xxx xxx"*

6. It is his submission that a petition under Section 19(1) (c) of the Act can be allowed only when all the co-sharer raiyats give their consent to the partition applied for and if there is any difference of opinion among the co-sharer raiyats, the application for partition shall be rejected. Thus, the Tahasildar-cum-Revenue Officer, Bargarh has no jurisdiction to determine the share of the co-sharer raiyats in an application under Section 19(1)(c) of the Act. It is his submission that a civil suit in C.S. No.72 of 2018 is pending before learned Senior Civil Judge, Bargarh for partition in which the Petitioner has been arrayed as Defendant No.1. In that view of the matter, this writ petition merits no consideration and is liable to be dismissed.

7. Section 19 of the Act provides for partition among co-sharer raiyats. Section 19 (1) of the Act reads as under:

> ***"19. Partition among co-sharer raiyats how to be effected –***
>
> (1) No partition of a holding among co-sharer raiyats shall be valid unless, made by
>
> *(a) a registered instrument; or*
>
> *(b) a decree of a Court or ; or*
>
> *(c) an order of the Revenue Officer in the manner prescribed, on mutual agreement.*
>
> *xxx xxx xxx"*

8. Section 19(1) of the Act provides different modes to effect partition between co-sharer raiyats. An application for effecting partition can be made under Clause (c) of Section 19(1) of the Act. The procedure to deal with application under Section 19(1) (c) of the Act has been provided under the corresponding Rule 19 of the Rules. Sub-rules (7) and (8) of Rule-19 of the Rules is relevant for discussion in the instant case. Along with other requirements of Rule-19 of the Rules, the Revenue Officer must take into consideration the requirement of sub-rules (7) and (8) while entertaining an application under Section 19(1)(c) of the Act. Close reading of the aforesaid provisions makes it abundantly clear that the Revenue Officer does not have any jurisdiction to entertain an application under Clause (c) of Section 19(1) of the Act, unless the co-sharer raiyats give their consent to the partition applied for.

9. In the instant case, grievance of the Petitioner is with regard to allotment of share made by the Revenue Officer in the application under Section 19(1)(c) of the Act, which was not done on consent of the parties. The Sub-Collector, Bargarh, without considering the effect of law, as aforesaid, remitted the matter back to the Revenue Officer to determine the share of the co-sharer raiyats in the properties situated in mouza Dang. The Additional District Magistrate, Bargarh, while exercising power under Section 59(1) of the Act, however, got it corrected and set it right holding that the Revenue Officer, Bargarh has no power to ascertain/determine the share of the co-sharer raiyats unless they amicably consent to such partition. It further appears that Civil Suit No.72 of 2018 for partition of the property in question is pending before learned Senior Civil Judge, Bargarh in which the present Petitioner has been arrayed as Defendant No.1.

10. In view of the position of law and the facts and circumstances of the case, stated above, I am not inclined to entertain the writ petition, which is accordingly dismissed being devoid of any merit. But, in the circumstances, there shall be no order as to costs.

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2022 (II) ILR - CUT- 192

B.P. ROUTRAY, J.

CRLMC NO. 675 OF 2022

N. SANTOSH KUMAR CHOUDHURY .....Petitioner

.V.

STATE OF ODISHA .....Opp.Party

(A) CODE OF CRIMINAL PROCEDUER, 1973 – Section 167 (2) r/w section 36-A(4) of the NDPS Act – Offences under section 20 (b) (ii) (c)/ 29 of the NDPS Act – The petitioner did not pray for default bail in time and by the time he prays for it, the chemical examination report was already submitted and cognizance was already taken and admittedly, the petitioner does not challenge the cognizance order – Effect of – Held, the right of default bail in favour of the accused is extinguished. (Para-13)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 173 (2) – Final Report – Offences under section 20(b)(11)(c)/29 of the NDPS Act, – Whether a police report under section 173 (2) of the Cr.P.C can be considered as complete if it is not accompanied by the chemical examination report? – Held, No. – Chemical examination report needs to be submitted along with the charge-sheet under section 173(2) of the Cr.P.C and without such report it would be considered as incomplete.

Case Laws Relied on and Referred to :-

1. CRR No.712-2021 : Vinay Kumar @ Vicky Vs. State of Haryana.
2. (2015) 3 SCC 417 : Narendra Kumar Amin Vs. Central Bureau of Investigation.
3. Crl. Rev.No.4659 : Ajit Singh @ Jeeta Vs. State of Punjab.
4. (2021) 2 SCC 485 : M.Rabindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence.

For Petitioner : Mr.T.K.Sahu.

For Opp. Party : Mr.K.K.Das, ASC.

ORDER Date of Order: 20.4.2022

B.P. ROUTRAY, J.

1. Heard Mr.Sahu, learned counsel for the Petitioner and Mr.Das, learned Additional Standing Counsel for the State- Opposite Party.

2. The Petitioner has prayed for his release on default bail. The Petitioner was arrested for commission of offence under Sections 20(b)(ii)(C)/29 of the N.D.P.S.Act along with four other co-accused persons in connection with Padwa P.S.Case No.85 of 2019 in the district of Koraput corresponding to T.R.Case No.35 of 2019 pending on the file of the learned Additional Sessions Judge-cum-Special Judge, Koraput for possession and transportation of 344 Kg. 800 Grams of contraband ganja in a Max Pick Up Van.

3. The Petitioner was remanded to custody on 26th November, 2019. The investigation continued and charge-sheet was filed on 23rd May, 2020. Consequently, cognizance was taken on the same day and thereafter charge was framed on 7th July, 2021. Presently five witnesses have already been examined in course of trial. The Petitioner filed an application on 22nd February, 2022 praying to release him on default bail under Section 167(2) of the CrPC read with Section 36-A(4) of the N.D.P.S. Act. It is the specific contention of the Petitioner that though charge-sheet was filed on 23rd May, 2020 within the period of 180 days, but the same was incomplete being not accompanied with the chemical examination report and as such, the right of default bail accrued in favour of the Petitioner.

4. Learned counsel for the Petitioner in support of his contention relies on the decision of the Punjab and Haryana High Court in the case of ***Vinay Kumar @ Vicky vs. State of Haryana in CRR No.712-2021*** dated 14.10.2021. In the said case, the Punjab and Haryana High Court has allowed the Petitioner to be released on default bail in terms of Section 167(2) of the Cr.P.C. by holding that in a case concerning offences under the N.D.P.S. Act, the report of FSL forms foundation of the case for prosecution and when the same is not filed, the entire case of prosecution falls.

5. In reply, Mr. Das, learned Additional Standing Counsel for the State relies on a decision of the Calcutta High Court reported in 2022 SCC OnLine Cal 623 (Raju Mandal vrs. State of West Bengal). In the said case, the Calcutta High Court upon referring to different other judgments including the decision of the Supreme Court in the case of ***Narendra Kumar Amin vrs. Central Bureau of Investigation,(2015) 3 SCC 417*** have held that the police having filed the supplementary charge-sheet containing chemical examination report subsequently and the cognizance being taken thereof, the

right of default bail of the Petitioner is extinguished upon taking of cognizance and further, the Petitioner did not assail the order of cognizance.

6. Delhi High Court in the case of ***Mohd. Arbaz vs- State of NCT, Delhi, CRL. Rev. P. 1219/2019, decided on 3rd November, 2020***, has considered the issue as to whether a police report under Section 173 (2) of the Cr.P.C can be considered as such if it is not accompanied by the chemical examination report, and finally rejected the contention of the Petitioner for his release on default bail.

7. In the case of ***Ajit Singh @ Jeeta vrs. State of Punjab, Crl. Rev.No.4659*** of 2015, the Punjab and Haryana High Court held that chemical examination report needs to be included along with the charge-sheet under Section 173 (2) of the CrPC and without such report it would be considered incomplete and would essentially result in giving rise to default benefit to the accused.

8. The Bombay High Court in the case of ***Sunil Vasantraw Phulbande and State of Maharashtra, (2002) 3 Mah LJ 689***, held that the charge-sheet filed must fulfill the requirements of Section 173 (2) and (5) of the Criminal Procedure Code and only on such compliance, it will be construed as a complete report.

9. Now looking back to the instant case, it is seen that the learned trial court has relied on a decision of the Supreme Court in the case of ***M.Rabindran v.The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485*** wherein it is held that, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished.

10. The Supreme Court in the case of *Narendra Kumar Amin* (supra) have held that the word "shall" used in sub-section (5) of Section 173 cannot be interpreted as mandatory and the same has to be construed as directory and non-filing of full set of documents with the charge-sheet within the statutory period does not entitle the accused to default bail so long as the charge-sheet is in compliance with Section 173(2) of the Criminal Procedure Code. It is

further held that when the order of taking cognizance remains unchallenged, the order of High Court rejecting the prayer for default bail is upheld.

11. In the instant case, admittedly, the chemical examination report was not filed along with the charge-sheet on the date of submission of the same. The fact of submission of the C.E. report subsequently thereto, is not disputed. For the offences relating to the NDPS Act particularly under Section 20(b)(ii)(C) where the question of possession of contraband is vital, the report of the chemical examiner is crucial to satisfy the requirement that the seized article is a 'Narcotic drug' within the definition of Section 2(xiv). Therefore, non-submission of the same along with the charge-sheet becomes a relevant consideration for accepting the charge-sheet as a complete one. Thus, in absence of the same, the charge-sheet is treated as incomplete for the purpose of Section 173(2) of the Cr.P.C.

12. However in the instant case, it is seen that, the petitioner did not pray for default bail in time and by the time he prays for default bail i.e. on 22nd February, 2022, the chemical examination report was already submitted and cognizance was already taken and admittedly, the petitioner does not challenge the cognizance order.

13. So, applying the principles settled in the cases of *M. Ravindran* (supra) and *Narendra Kumar Amin* (supra), as discussed earlier, the right of default bail in favour of the accused is extinguished. It is relevant to reiterate here that, the order of cognizance is dated 26th November, 2019 and the application for default bail was submitted much after to that. As such, the Petitioner fails in his contention to get any benefit of default bail under Section 167(2) Cr.P.C.

14. In the result, the prayer is rejected and the CRLMC is dismissed.

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2022 (II) ILR - CUT- 196

S.K. PANIGRAHI, J.

W.P.(C) NOS. 8065, 8844, 8873, 8905 & 9852 OF 2022

Dr. SON PATTNAIK & ORS. .....Petitioners

.V.

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

In W.P.(C) No. 8844 of 2022
Dr. SIBANGI PATNAIK & ORS. .....Petitioners

.V.

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

In W.P.(C) No.8873 of 2022
Dr. SUJATA SAHOO & ORS. .....Petitioners

.V.

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

In W.P.(C) No.8905 of 2022
Dr. SATYA RANJAN ACHARYA & ORS. .....Petitioners

.V.

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

In W.P.(C) No.9852 of 2022
NIHAR RANJAN MOHANTY & ORS. .....Petitioners

.V.

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

APPOINTMENT – Equality before Law – Applicability – Held, the principle of equality does not mean that every law must have universal application to all the persons who are not by nature, attainment or circumstances in the same position – The classification is permissible subject to fulfilment of conditions – Conditions enumerated. (Para-19 & 20)

Case Law Relied on and Referred to :-

1. 1952 AIR 75 : State of West Bengal Vs. Anwar Ali Sarkar.

For Petitioners : Mr. Avijit Mishra, Mr. Madan Sundar Behera & Mr. Pratik Dash.

For Opp. Parties : Mr. S.K. Samal, AGA (for O.P.1)
Mr. R.C. Mohanty (for O.P. No.2-DMET)
Ms. Pami Rath (for Interveners)

JUDGMENT Date of Hearing:12.05.2022 : Date of Judgment:16.05.2022

S.K. PANIGRAHI, J.

I. Factual background:

1. Doctors are at the core of our health system. For decades, India has been struggling with a shortage with the latest estimates suggesting that only 0.9 doctors are available per 1000 population, which is far less than the WHO is recommended minimum of 1/1000. The situation is worse in rural areas which is home to 72% of India's population but are served by only 40% of India's doctors. Thepolicy with respect to the Bond Doctors have been amended, relaxed, cancelled, and re-implemented at least ten times since the inception of such policy in 1996. Subsequently, the Post-PG bond doctors also joined the band wagon in order to rectify the issue of misdistribution of doctors in the State.

2. At the ground level such doctors face myriad hurdles impeding their motivation to serve in the rural areas. In order to encourage such Doctors, after completion of their Post-graduation, the serve as post PG bond service for 2 years, and in order to infuse fresh motivation, the State Government have allowed to count such service towards the teaching experience of 2 years as SR. The Director Medical Education and Training, Odisha vide its notice dated 17.03.2022 modified its Bond conditions as;

a. The Bond notification No.32988/H. dated 09.12.2021 shall be applicable retrospectively from the year 2017.

b. The post P.G. Bond service of two years shall be counted towards the teaching experience of two years as SR.

3. The present Writs petitions raise the issue of allowing the post PG bond doctors to participate in the selection process of SR like the fresh PG candidates, despite the fact that their service of two years shall be counted towards the teaching experience of two years as SR as per the policy of the Government.

4. The centrality of the issue revolves around the fact that the Director of Medical Education and Training, Odisha floated an advertisement dated 16.03.2022 inviting candidates for filling up the posts of Senior

Residents/Tutors in Govt.Medical colleges and Hospitals of the State. Accordingly, the eligible candidates were invited for walk-in interview for the said selection of the posts of Senior Residents (SRs) and Tutors in different disciplines of the Government Medical Colleges. However, in the said advertisement, there is a specific instruction inscribed limiting the candidates who are continuing as post-PG bond services to participate in the interview process since they are entitled for teaching experience certificates as SR for 2 years for the period of post PG bond service against minimum requirement for Assistant Professor only one year as Senior Resident as per TEQ of NMC.

5. Prior to 2017, there was no such bond service doctor for which there was little scope for getting teaching experience certificate as SR except for participating in the selection process of SR. Since there were only three Medical Colleges in the state, the scope for selection of S.R. was further squeezed. In the meanwhile, the state Govt has opened eight Medical Colleges for which the appointment of senior residents is required as per the regulations of Medical Council of India/NMC and at the same time Asst. Professors are also required which the projected demand for the SRs also expanded with maximum age limit is 45 years as recommended by MCI/NMC.

6. The petitioners have completed their post-Graduation in the year 2021 and they are serving 2 years Post-PG Bond service doctors under the state government and as per the government notification dated 17.03.2022, the post-PG bond service of 2 years shall be counted towards the teaching experience of 2 years as SR. Accordingly, this is mirrored in the advertisement in terms of eligibility and qualification for Senior Residents/Tutors:

> "*(4.1) For the post of Senior Resident (non academic) in Clinical Departments (Speciality) the candidate must possess MD/MS/MDS/DNB or any equivalent degree in concerned discipline applied for oras prescribed by MC/NMC/DCI in "minimum qualifications for Teachers in Medical Institutions Regulations, 1998 notified for amended from time to time in force (NB. The MDS qualification is required for S.R. in dental stream)"*

The clause 4.5 of the said advertisement, further eligibility reverberates as under:-

> *"4.5.1 the candidate must be a citizen of India 4.5.2 the candidate must not be continuing or have completed the tenure as Senior Resident /Tutor in any MCI/NMC/DCI permitted/ approved/ recognized Institute.*
>
> *4.5.3 The candidate whose service as Senior Resident/Tutor has been terminated by any govt. medical dental college in the state for whatsoever reason will not be considered for reengagement."*

7. The PG qualified Doctors who have completed their PG course prior to 2017, are unable to compete with the younger doctors insofar as their career marking is concerned and hence will not be able to be selected to undergo SRship. In order to encourage and give opportunity to such doctors to do SR, the advertisement was issued on 16.03.2022 for filling up the post of Senior Residents/Tutors in medical colleges and Hospitals of the state. In the said advertisement it is specifically mentioned that for the post of Senior Residents (non-academic). The post PG doctors are entitled for teaching experience certificate as SR for 2 years and hence shall not apply. The said negative enforcement was quite inelastic in nature and precisely restricted the scope of the petitioners to participate in the selection process.

8. The petitioners herein have invoked the Writ jurisdiction of this Court seeking a direction from this Court to allow them to participate in the process of selection for the posts of Senior Resident in their respective disciplines pursuant to advertisement/ Annexure-8 and if they are selected, they will be allowed to complete the tenure of senior Resident-ship in their respective field. Initially, this court allowed the petitioners to participate in the selection process as per schedule in their respective discipline vide interim order dated 05.04.2022 passed in I.A. No.4168 of 2022 arising out of W.P.(C) No.8065 of 2022, order dated 07.04.2022 passed in I.A. No.4611 of 2022 arising out of W.P.(C) No.8873 and order dated 07.04.2022 passed in I.A. No.4589 of 2022 arising out of W.P.(C) No.8844 of 2022. Since many aspects of the issue was not properly placed before this court especially the nature of counselling and the specific bar in the advertisement dated 16.03.2022 for debarring the petitioners to participate in the selection process which eventualized in passing of the interim orders dated 05.04.2022 and 07.04.2022 allowing the petitioners to participate in the selection process. It

was with the intervention of the intervention Applicants and the OP No.2/DMET, certain aspects of the matter which were hitherto hazy, it was further got crystallized and this Court passed another order dated 13.04.2022 passed in I.A. No.4760 of 2022 arising out of W.P.(C) No.8065 of 2022 directing the OP No.2 /DMET to not to appoint any SR till the final disposal of this Writ Petition.

II. Submissions of Petitioners:

9. Learned Counsel for the petitioners, Mr. Avijit Mishra submitted that even though the petitioners are entitled to teaching experience certificate as SR for 2 years for the period of post PG bond service, they cannot be denied to participate in the process of selection for the post of Senior Residents and Tutors conducted by the state following the due process of selection as the so-called teaching experience certificates which are being promised to be issued to the petitioners have been challenged by different candidates before this Court on the ground that teaching experience issued by state to the candidates working in medical institutions other than Medical colleges are not correct from legal stand point and that will not be accepted by MCI/NMC as a full-fledged SR and the same are pending before this Court.

10. He further submitted that the petitioners, at present, have not completed 1 years of their post PG bond services and they have not yet been issued with experience certificate. Added to this, there is an inherent apprehension of taking risks in this unchartered or new territories of the so-called gift SRship. In fact, they cannot deny the petitioners to participate in the process of selection for the post of Senior Resident/Tutor which is conducted through a proper process of selection.

11. It is further submitted that the petitioners who are continuing in post-PG bond services do not have or have been offered the job responsibilities of the Junior Residents (JR) & Senior Residents (SR)/Tutors as has been mentioned in schedule-A of the said resolution/Guidelines) dated 13.12.2018 and for which Clause-4.5. of the impugned advertisement is not at all applicable to the petitioners.

12. He further stressed that the teaching experience of 2 years as Senior Resident as has been promised by the government to the petitioners is not acceptable as per the MCI/NMC norms as the same is being issued working

in medical institutions other than medical colleges and even the petitioners who are continuing in medical colleges are working for a full tenure of one year as they have been directed to work in trauma centers and medical college on rotation basis. Hence, above justification amply justifies for the Op No.2/DMET for ratification of the claim of the petitioners in allowing participation in the regular process of selection for the posts of Senior Residents even though they are being issued with teaching experience certificate after completion of 2 years post PG bond service.

13. The Petitioners do not have any friction on the issue of notifying the post PG bond service period will be counted towards teaching experience as Senior Resident but the same cannot be a rationale to deny the petitioners to participate in the regular process of selection for the post of Senior Resident and to fetch a better and valid teaching experience certificate after serving in the said post/department which would help in shining their future career.

III. Submissions of DMET

14. Learned Counsel for the DMET, Mr. Rajani Ch. Mohanty, submits that the petitioners, who are already eligible for SR certificate for two years, do not need any more certificates. Hence, the reason for praying to participate the selection for the purpose of the same certificate which they are anyway acquiring is well known to them. It seems by entering into the recruitment mode for selection of SR, which is meant for freshcandidates or candidates sans any such SR certificate; want to compete only because they want a change in placement other than place of posting under post PG bond service. In such view of the matter, facts and reasons indicated above for the greater interest of state and to allow more candidates to have the experience certificate of one year, instead of allowing the same candidates to do SR repeatedly is just a colossal waste educational resources of the State. Hence the instant writ petition is liable to be dismissed being devoid of merit.

IV. Submissions of the Interveners:

15. Learned Counsel for the Intervention Applicants, Ms. Pami Rath who is representing some of the doctors who after completion of PG in their respective streams have applied for the post of SR in response to the advertisement which is open for all including them as they areeligible.On 7.4.2022 counseling was held and a merit list was drawn and reflected in the

notice board at the counseling center. The present interveners awaken to know from the notice that the present Writ has been filed and the petitioners though expressly prohibited to participate in response to the advertisement, they have been allowed to participate vide the interim orders dated 05.04.2022 and 07.04.2022 passed by this Court.

16. It is further contended that the Writ Petitioners are a distinct group hence the tone and tenor of the advertisement dated 16.3.2022 has specifically refused to accommodate their aspirations for SR as they are smoothly fetching a SR certificate without undergoing any selection process. The State has floated the present advertisement for SR for, making it available for those Doctors who have had neither the benefit of such post PG based SR certificate nor have been able to get SR Post prior to this recruitment. The State has benevolently allowed the post PG students a SR experience certificate, without competing with other doctors for regular SR post. They are being given SR certificate for the period served under the government.

17. It is further submitted that due to the participation of the petitioners and allowing appointment to the petitioners, will greatly prejudice the Interveners in terms their career interest. She further contended that the orders dated 05.04.2022 and 07.04.2022 which were passed by this Court was due to impoverished presentation of proper facts by the petitioner. The nature of counseling and the specific bar in the advertisement dated 16.03.2022 has not been brought to the notice of this Court resulting in passing of the interim orders dated 05.04.2022 and 07.04.2022. Accordingly, the selection proceeded, the present writ petitioners would be joining as SR snatching away the rights of other candidates who either did not get their place of choice or no post at all because of the participation of these otherwise ineligible candidates.

V. Analysis and Reasoning:

18. Heard learned Counsel for the parties. The submissions of the petitioners contending that even though the petitioners are entitled for teaching experience certificate as SR for 2 years for the period of post-PG bond service, they cannot be denied to participate in the process of selection for the post of Senior Residents and Tutors has little force. In fact, the Writ Petitioners are a distinct group and are not entitled to be considered pursuant

to the advertisement dated 16.3.2022 as they are already going to get SR Certificate. The State has floated the present advertisement for SR, for making it available for those Doctors who have had neither the benefit of such post-PG based SR certificate nor have been able to get SR Post prior to this recruitment. The State has benevolently allowed the post PG students a SR experience certificate, without any competition with others doctors for regular SR post.

19. The argument of equality before law in terms of allowing the petitioners in the selection process cannot be raised in the facts of instant case as equality before the law, means that amongst equals should be equal and equally administered and that like should be treated alike. The principle of equality does not mean that every law must have universal application to all the persons who are not by nature, attainment or circumstances in the same position. The varying needs of different classes of persons require different treatment. In order to pass the test for permissible classification two conditions must be fulfilled, namely: (1) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) the differentia must have a rational nexus with the object sought to be achieved by the statute in question. Hence, the contention of equality in getting the opportunity for competing with other candidates even after they are on the verge of fetching SR certificate due to their current posting, is quite illogical and against the tenor of equality.

20. Such position of law has been succinctly echoed by the Supreme Court in ***State of West Bengal v. Anwar Ali Sarkar***[1], wherein it was held that there must be some rational nexus between the basis of classification and the object intended to be achieved. The expression "intelligible differentia" means difference capable of being understood as enunciated. In other words, classification must have a rational nexus with the object sought to be achieved by the statute in question. The state government has the power to give designation of SR and the petitioners are going to be armed with such a certificate hence the advertisement has rightly debarred them from participating in the Selection process of SR which will likely to unnecessarily corner the share of the fresh non-PG bond doctor candidates.

1. 1952 AIR 75

VI. Conclusion and Order:

21. The aspirational trajectory of the petitioners are worth appreciating but considering the stipulations in the advertisement and post-PG based SR certificate to be offered to them during their current postings, fails to convince this Court for granting any relief. This Court appreciates their service to the people and fire in the belly to strive high in their vocation. However, in view of the discussion made hereinabove, the Opposite Party No.2/ DMET to redraw the merit list of the selected SRs by excluding the petitioners and publish the result within three days from receipt of the copy of this order. Accordingly, the earlier order dated 05.04.2022 passed in I.A. No.4168 of 2022 arising out of W.P.(C) No.8065 of 2022, order dated 07.04.2022 passed in I.A. No.4589 of 2022 arising out of W.P.(C) No.8844 of 2022 and order dated 07.04.2022 passed in I.A. No.4611 of 2022 arising out of W.P.(C) No.8873 of 2022 are vacated and the Writ Petitions are dismissed.

22. All the aforesaid Writ Petitions are, accordingly, disposed of as dismissed.

23. Consequently all the pending I.As. are disposed of.

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2022 (II) ILR - CUT- 204

MISS. SAVITRI RATHO, J.

CRLREV NO. 59 OF 2021

SAILESH MUDULI @ SAILESH KUMAR .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 457 – Release of Vehicle – Offences U/s 272 of I.P.C. r/w Section 52 (a) of the Orissa Excise Act, 2008 – Bar U/s 71 of the 2008 Act – Whether interim release of vehicle can be allowed? – Held, Yes – Once the confiscation proceeding initiated, though there is a bar in section 71 of the Orissa

excise Act for interim release of vehicle but keeping in mind the decision of the Hon'ble Supreme Court as well as this Hon'ble Court, direction issued for interim release of vehicle subject to certain conditions. (Para-13)

Case Laws Relied on and Referred to :-

1. (2019) 73 OCR 663: (2019) 1 OLR 275 : Ghasana Mohapatra Vs. State of Odisha.
2. (2022) 85 OCR 705 : 2022 SCC OnLine Ori 510 : Ashis Ranjan Mohanty Vs State of Odissa & Ors.

For Petitioner : Mr. R.N. Rout.

For Opp. Party : Mr. S.S. Pradhan, A.G.A.

ORDER Date of Order: 29.04.2022

MISS. SAVITRI RATHO, J.

1. This is an application under Section 401 read with Section 397 of Cr.P.C. challenging the order dated 18.11.2020 passed in C.M.C. No.80 of 2020 arising out of G.R. Case No.588 of 2019 pending before the learned S.D.J.M., Karanjia, rejecting the application of the petitioner filed under Section 457 of the Code of Criminal Procedure refusing to release the vehicle registered in his name which had been seized in G.R. Case No.588 of 2019 registered for commission of offence punishable under Section 272 of the IPC and Section 52(a) of Odisha Excise Act.

2. I have heard Mr. R.N. Rout, learned counsel for the petitioner and Mr. Sibani Shankar Pradhan, learned Addl. Govt. Advocate for the State through hybrid mode.

3. The petitioner is the registered owner of Indigo CS Car LX TCIC bearing registration No.OR-02-BF-2992, which had been seized on 19.12.2019 by the I.O. in connection with Karanjia P.S. Case No.198 of 2019 registered for commission of offences punishable under Section 52 (a) of the Orissa Excise Act 2008 and Section 272 of the I.P.C against one Sailendra Muduli.

4. The prosecution allegations in brief are that on receipt of information that one Sailendra Muduli was procuring ID liquor and adulterating it at his house in ward No 10, Karanjia and thereafter delivering it to various street

sellers and at the relevant time was coming in Indigo CS Car LX TCIC bearing registration No. OR-02- BF-2992 with such liquor, on 19.12.2019 the vehicle was detained and was found to be driven by Sailendra Muduli loaded with about 100 litres of liquor kept in a big black tube concealed under a bag without any supporting documents. samples were drawn and the vehicle and liquor were seized and case registered .

5. Mr. R.N. Rout, learned counsel for the petitioner submits that, the petitioner had filed an application under Section 457 of Cr.P.C. for release of the vehicle No. OR-02-BF-2992 and this application was erroneously rejected vide order dated 18.01.2020 in CMC 6 of 2020 on the ground that confiscation proceeding has already started against the seized vehicle as per the report of the I.O. The petitioner had thereafter filed CMC-65 of 2020, but it was dismissed as the petitioner had not filed anything to disbelieve the earlier report of the I.O. The petitioner thereafter filed another application under Section 457 of Cr.P.C. (CMC No.80 of 2020) with the report of the P.I.O cum Superintendent of Excise, Mayurbhanj which indicated that the confiscation proceeding was under process. On 18.11.2020, this application was erroneously rejected. The learned counsel for the petitioner submitted that the impugned order is liable to be set aside and the vehicle released in favour of the petitioner as confiscation proceedings had not been initiated against the petitioner when the impugned order had been passed. His further submission was that since the date of seizure the vehicle is lying under the open sky exposed to the sun and rain for which its value is deteriorating every day and it would not be in the interest of the State even if the vehicle was ultimately directed to be confiscated. His final submission is that he is the registered owner of the vehicle and is ready to abide with any condition which may be imposed by the Court for granting interim release of the vehicle.

6. Mr. S.S. Pradhan, learned Addl. Govt. Advocate objects to the said prayer submitting that since the confiscation proceeding has in the meanwhile been initiated against the petitioner and notice has been issued to him, the petitioner can wait for outcome of the said proceeding and his application under section-457 Cr.P.C cannot be entertained. Referring to section 71 of the Orissa Excise Act, he submits that there is bar for interim release of the vehicle during pendency of the confiscation proceedings and as the petitioner is the accused in the case, the vehicle should not be released his custody. He relies on the decision of this Court rendered in ***Ghasana Mohapatra v. State***

of Odisha reported in (2019) 73 OCR 663: (2019) 1 OLR 275, in support of his submissions.

7. Section 71, Section 72 and Section 75 of the Orissa Excise Act are relevant for deciding this case.The provisions are extracted below :

> ***Section – 71. Seizure of property liable to confiscation*** *:- (1) (a) When there is reason to believe that any offence under this Act has been committed, the intoxicant, materials, stills, utensils, implements apparatus, receptacles, package, coverings, animals, carts, vessels, rafts, vehicles, or any other conveyances or articles or materials used in committing any such offence may be seized by the Collector or any Officer of the Excise Police, Customs or Revenue Departments.*
>
> *(b) any intoxicant lawfully imported, transported, manufactured in possession or sold along with, or in addition to, any intoxicant which is liable to seizure under clause (a) and the receptacles, packages and coverings in which any such intoxicants as aforesaid, or any such materials, stills, utensil, implement or apparatus as aforesaid, is found and the other contents, if any, of such receptacles or packages, and the animals, carts, vessels, rafts, vehicles or other conveyances used in carrying the same, shall likewise be liable to seizure.*
>
> *(2) Every officer seizing any property under this section shall, except where the offender agrees in writing to get the offence compounded under Section-75, produce the property seized before the Collector, or an officer, not below the rank of a Superintendent of Excise, authorized by the State Government in this behalf by notification (hereinafter referred to as 'Authorized Officer').*
>
> *(3) Where the Collector or the Authorized Officer seized any property under Sub-section (1) or where the property seized is produced before him under Sub-section (2) and he is satisfied that an offence under this Act has been committed in respect thereof, he shall, without prejudice to any other punishment to which the offender is liable under this Act, order confiscation of the property so seized or produced together with all other materials, articles, vehicles or conveyances used in committing such offence, whether or not a prosecution is instituted for the commission of such an offence.*
>
> *(4) No order confiscating .any property shall be made under Sub section (3) unless the person from whom the property is seized is given.*

(a) a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and

(c) a reasonable opportunity of being heard in the matter.

(5) Without prejudice to the provisions of Sub- section (4), no order of confiscation under Sub-section (3) of any articles, materials, vehicles or conveyances shall be made if the owner thereof proves to the satisfaction of the Collector or the Authorized Officer, as the, case may be, that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of such property, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.

(6) Any person aggrieved by an order passed under Sub-section (3) may, within thirty days from the date of such order, appeal to the Excise Comissioner, who shall after giving an opportunity to the parties to be heard, pass such order as he may think fit.

(7) The property seized under this Section shall be kept in the custody of the Collector, the Authorized Officer or the other officer seizing such property or with any third party, until the amount for compounding the offence or the sum equal to the prevailing market value of the seized property or both are paid or until it is confiscated as the case may be:

Provided that the seized property shall not be released during pendency of the confiscation proceedings even on the application of the owner of the property for such release.

(8) Whenever property seized is liable to confiscation under this section and the offender or the person entitled to possession is not known or can not be found, the case shall be inquired into and determined by the Collector or the Authorized Officer, who may order confiscation :

Provided that no such order shall be made until the expiration of one month from the date of seizing of the property to be confiscated, or without hearing any person who may claim any right within the said period and the evidence if any, which he produces in support of his claim.

(9) If the property seized is liable to speedy and natural decay, or if the Collector or the Authorized Officer, as the case may be, is of the opinion that sale would be for the benefit of its owner, such officer may, at any time, direct it to be sold and the provisions of this section shall, as nearly may be practicable, apply to the net proceeds of the sale.

(10) Subject to the rules as may be made by the State Government under Section 90, the Collector or the Authorized Officer, while making an order of confiscation, may also order that such of the properties to which the order of confiscation relates, which in his opinion to be recorded in writing cannot be preserved or not fit for human consumption, may be destroyed.

(11) Where the Collector or the Authorized Officer after passing an order confiscation under Sub-section (3) is the opinion that, it is expedient in the public interest so to do, he may order the confiscated property or any part thereof to be sold by public auction or dispose of departmentally.

(12) The Collector or the Authorized Officer shall submit a full report of all particulars of confiscation to the Excise Commissioner within twenty-four hours of such confiscation.

(13) The Collector or the Authorized Officer shall, for the purposes of this Act, have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 5 of 1908, while making inquiries under this section in respect of the following matters namely :-

(a) receiving evidence on affidavit;

(b) summoning and enforcing the attendance of any person and examining him on oath; and

(c) compelling the production of documents.

***Section 72. Bar of other proceedings during pendency of confiscation proceedings** :– Notwithstanding anything contained in the Code of Criminal Procedure 2 of 1974, when the Collector or the Authorized Officer or the Appellate Authority is seized with the matter of confiscation of any seized property under Section 71, no Court shall entertain any application in respect of the same property and the jurisdiction of the Collector or the Authorized Officer or the Appellant Authority with regard to the disposal of the same shall be exclusive.*

> ***Section 75. Compounding of offences and releasing property liable to confiscation*** *:– (1) The Collector or any Excise Officer specially empowered by the State Government in this behalf, not below the rank of Superintendent of Excise may, subject to any restrictions as may be prescribed, accept from any person whose exclusive privilege, licence, permit or pass is liable to be cancelled or suspended under clause (a), (b) or (c) of Sub-section (1) of Section 47 or who is reasonably suspected of having committed an offence punishable under any section of this Act other than Sections 55,58,59 and 67, payment of a sum of money as may be prescribed in lieu of such cancellation or suspension or by way of composition for such offence, as the case may be, and in any case in which any property has been seized being liable to confiscation under Section 71, may release the property on payment of equal sum of the prevailing market value thereof as estimated by the Collector or such Excise Officer : Provided that where such person intended to evade excise revenue, the sum to be paid by such person in lieu of cancellation or suspension or by way of composition for such offence as aforesaid shall in no case be less than five times of such revenue intended to be evaded : Provided further that where the property so seized is a liquor manufactured in contravention of this Act, such liquor shall not be released but shall be disposed of in such manner as may be prescribed. (2) When the payments referred to in Sub-Section (1) have been duly made, the person, if in custody, shall be discharged, and the property seized if any, shall be released and no further proceedings shall be taken against such person or property.*

8. A perusal of the proviso to Section 71 (7) reveals that there is a bar for release of the seized property during pendency of the confiscation proceedings and perusal of Section – 72 reveals that once the Collector or Authorised officer is seized with the matter of confiscation, their jurisdiction will be exclusive with regard to disposal of the property and no court shall entertain any application in respect of the same property. Under Section- 75, the Collector or the Authorised Officer has the power to release such property which is liable for confiscation vehicle subject to payment "payment of equal sum of the prevailing market value thereof as estimated by the Collector or such Excise Officer".

9. The Supreme Court in the case of Sunderbhai Ambala 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 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."*

This Court in several decisions has held that if this Court that unless the vehicle has been produced before the Collector or Authorised Officer and the confiscation proceeding has been initiated, the bar under Section 72 of the Orissa Excise Act, 2008 shall not apply. It has also been held that if the owner is an accused, the vehicle cannot be released in his favour.

This Court in the case of **Ghasana Mohapatra** (supra) after setting aside the order rejecting the application for interim release of the petitioner has remanded the matter to the learned SDJM interalia holding as follows:

> *"…8. However, perusal of the order reveals that the learned S.D.J.M., Boudh has rejected the petition only on the ground that Section 72 of the Orissa Excise Act bars the criminal court from entertaining the petition. It was not ascertained by him whether actually the vehicle has been produced before the learned Collector or the Authorised Officer and a confiscation proceeding has been started. The law is very well settled that whenever valuable property like vehicle is seized then it should be produced before the officer, so authorised in this case. Collector or Authorised Officer duly notified, should be produced within a reasonable time and confiscation proceeding should be started. Since right to property under Article 300-A of the Constitution of India is a legal right, though it is not a fundamental right, it is incumbent on the part of the Government Functionary to see that*

the confiscation proceeding is taken up as early as possible, especially, when there is a protection given to the innocent owner of the vehicle etc.

9. In a case involving provision of Narcotic Drugs and Psychotropic Substances Act, 1985, a Bench of this Court having taking into consideration various judgments of this Court, in the case of ***Kishore Kumar Choudhury v. State of Orissa, (2017) 66 OCR 1124****, has allowed interim release of vehicle seized. So, in that view of the matter, the CRLMC is allowed in part. The order dated 29.03.2018 passed by the learned S.D.J.M., Boudh rejecting the application is hereby set aside and the matter is remanded back to the lower Court for fresh hearing .The learned S.D.J.m Boudh shall first call for a report from the Investigation Agency whether the vehicle has been produced before the learned Collector Boudh or the designated Authorised Officer within a reasonable time and whether a confiscation proceeding has been initiated . If within a month , vehicle is not produced before the Collector or Authorised Officer and the confiscation proceeding is not completed within a reasonable period of three months from appearance of the owner of the vehicle after receiving notice as envisaged under Sub=section (4) and Section – 71 of the Orissa excise Act , then inspite of proviso to Sub – Section (7) , the Criminal Courts shall have jurisdiction to entertain the application under Section 451 and 457 of the Cr.P.C and pass appropriate orders . But it is confined to cases where the owner of the vehicle is not an accused. "….*

But recently a Division bench of this Court in the case of ***Ashis Ranjan Mohanty vs State of Odissa and others*** reported in ***(2022) 85 OCR 705 : 2022 SCC OnLine Ori 510***, 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, after the decision of this Court in ***Ghasana Mohapatra*** (supra) was brought to its notice has held as follows :

"12. The Court's attention has been drawn to a judgment dated 4th January, 2019 passed by the learned Single Judge of this Court in ***Ghasana Mohapatra v. State of Odisha, (2019) 1 OLR 275,*** *wherein it was held that in excise cases when the accused is the owner of the seized vehicle, the same cannot be released in his favour.*

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 the present case, in order to resolve the doubt regarding the date of initiation of confiscation proceedings, the learned State Counsel had been granted time to obtain instructions. Accordingly an affidavit dated 03.12.2021 had been filed on 04.12.2021, by the S.I of Karanjia Police Station enclosing letter No.1028 dated 09.07.2021 of the Superintendent of Excise, Mayurbhanj addressed to the IIC, Karanjia Police Station (Annexure-A/1) stating that Confiscation Proceeding had been registered at Sl. 38 of Confiscation register and was under process, without stating the date when the proceeding had been initiated. Copy of letter No 1877 dated 01.11.2021 of the Superintendent of Excise addressed to the IIC Karanjia Police Station

(Annexure B/1) had been enclosed with the said affidavit and it was stated therein that Confiscation Proceeding had been initiated and recorded at serial No.39/2019-2020 of the Confiscation Register and the owner had been noticed to appear vide Notice No. 1029 dated 09.07.2021 and he had appeared on 27.07.2021 through counsel and had prayed for time and was repeatedly taking time in the case . The copy of the notice dated 17.11.2021 of the Court of the Authorised Officer cum Superintendent of Excise, Mayurbhanj addressed to the petitioner had also been enclosed as Annexure C/ 1 asking him to appear on 26.11.2021.

As the affidavit dated 03.12.2021 did not disclose the date of initiation of the confiscation proceedings, on 09.12.2021 officer concerned had been asked to produce the relevant page of the confiscation register or an attested photocopy thereof.

On 22.12.2021, Sri Satya Narayan Kallo, Sub-Inspector of Police Karanjia Police Station, Dist.- Mayurbhanj had appeared in court and produced the copy of letter no.3322 dated 20.11.2021 of the Superintendent of Excise, Mayurbhanj enclosing the attested copy of page 4 the Confiscation Register of Superintendent of Excise,Mayurbhanj which contained the details of Karanjia P.S. Case No.198 of 2019 at Sl. No.39.

11. Perusal of the document –relevant page of the confiscation register reveals that the relevant entry is at Serial No 39 and dated of request has been mentioned to be 09.01.2020 and dated of request initiate has been mentioned as 09.07.2021 and the valuation of the vehicle has been indicated to be Rs 10,9000/-. From these entries, it is clear that confiscation proceeding had not been initiated when the first application under Section 457 of Cr.P.C. and was rejected on 18.01.2020. By the time, the last application under Section 457 of Cr.P.C. was rejected on 18.11.2020, although the case had been entered in the confiscation register but confiscation proceeding had not been initiated and such proceeding was initiated only on 09.07.2021 which is about eight months after the impugned order dated 18.11.2020 was passed.

12. When the case was listed on 25.04.2022 under the heading, the learned Additional Govt. Advocate submitted that the petitioner had appeared in the Confiscation Proceeding and was taking adjournment and the proceeding was still pending.

13. In view of the aforesaid discussion, although there is a bar in Section 71 of the Orissa Excise Act for interim release of the vehicle once the confiscation proceeding has been initiated, and ordinarily such an application filed by the owner who is an accused deserves to be rejected, but in the peculiar facts of the present case where the applications of the petitioner under section-457 of the Cr.P.C for interim release of the vehicle had been rejected on three occasions by the learned SDJM on the ground that confiscation proceedings were under process when in reality, it had not been initiated and as its has been urged that the vehicle in question is lying in the open being exposed to sun and rain since 19.12.2019 for which its value is going down every day and keeping in mind the decisions of the Supreme Court in the case of **Ambala Sundarbhai**(supra) and this Court in **Ashis Ranjan** (supra) , in order ensure that the vehicle is not reduced to a worthless piece of junk when it is ultimately confiscated / released at the end of the confiscation proceedings, I am inclined to set aside the order dated 18.11.2020 passed by the learned S.D.J.M., Karanjia in CMC No.80 of 2020 arising out G.R. Case No.588 of 2019 and direct for interim release of the vehicle i.e. Indigo CS Car LX TCIC bearing registration No. OR-02-BF-2992 in favour of the petitioner subject to the following conditions and any other condition that may be imposed by the learned S.D.J.M., Karanjia keeping in mind the decision of this Court in **Ashis Ranjan** (supra), during pendency of the confiscation proceedings :-

(i) the petitioner shall produce the original registration certificates, insurance papers before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the investigating officer/I.I.C. of the police station;

(ii) the petitioner shall furnish cash surety as per the valuation of the vehicle which should be done within a period of two weeks from receipt of certified copy of this order .

(iii) the petitioner shall keep the vehicle insured at all times till the conclusion of the trial and produce the insurance certificates before the Trial Court as and when required;

(iv) the petitioner shall not change the colour of any part of the vehicle or engine or tamper with the engine and chassis numbers of the vehicles;

(v) the petitioner shall furnish two photographs of the vehicle before taking delivery of the same;

(vi) the petitioner shall not transfer the ownership of the vehicle during pendency of the Confiscation case and criminal case ;

(vii) the petitioner shall produce the vehicle before the trial Court or the Authorised Officer as and when called upon to do so ;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence;

(ix) the order of interim release shall be subject to the final order to be passed in the confiscation proceeding.

14. The CRLREV is accordingly allowed.

—— o ——

2022 (II) ILR - CUT- 218

MRUGANKA SEKHAR SAHOO, J.

W.P.(C) NO. 2292 OF 2014

SASMITA SAHOO .....Petitioner

.V.

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

APPOINTMENT– Hindi Teacher – Equivalent certificate – When the petitioner has the required Teacher Training Degree, which has been declared equivalent by an University of State i.e the Berhampur University and the matter has been actively considered by the Utkal University and to add the National Council for Teacher Education, has granted recognition to the Dakshin Bharat Hindi Prachar Sabha, Madras for granting B.ED in Hindi medium with specialization of Hindi teaching method, a council undertaken by the said institution – Whether any further certificate is required? – Held, No.

(Para-19 & 20)

Case Law Relied on and Referred to :-

1. 2022(1) OLR SC 64 :: 2021 SCC OnLine SC 1116 : Devender Bhaskar & Ors. Vs. State of Haryana.

For Petitioner : Mr. K.K.Swain

For Opp. Parties: Mr. Sangram Jena, Standing Counsel, SC, S&ME (for O.P.Nos.1 to 3)
Mr. Tarananda Pattanayak (For O.P.No.4-University)

JUDGMENT Date of Hearing :28.03.2022 :Date of Judgment: 06.05.2022

MRUGANKA SEKHAR SAHOO, J.

1. This matter is taken up through Hybrid mode.

2. The writ petition has been filed by the petitioner challenging the order dated 18.01.2014 (Annexure-4) passed by opposite party no.3, District Education Officer, Khordha.

The operative portion of the said letter is quoted herein:-

"You are hereby directed to submit equivalent certificate from Hindi Sikshyan Parangat for Kendriya Hindi Santhan, Agra/B.H.Ed from Utkal University/HTTC from B.S.E.(O), Cuttack as to B.Ed. course in Hindi awarded by Dakshina Bharat Hindi Prachar Sabha, Madras by 31st January-2014 positively, failing which steps will be taken for cancellation of your engagement which has been issued to you vide this office order No.10805 dated 27.09.2013."

3. The petitioner essentially has challenged the portion of the letter which proposes for cancellation of the engagement of the petitioner that was issued by the self-same office of the District Education Officer, Khordha vide order No.10805 dated 27.09.2013 (Annexure-2).

The order dated 27.09.2013 is quoted herein:

"DISTRICT EDUCATION OFFICE, KHORDHA
ENGAGEMENT ORDER
No.10805/ Date: 27.09.2013.

On execution of an agreement dated 27.09.2013 between Sri/Smt./Kumari Sasmita Sahu, W/o. Ganeswar Sahu, At-Haladipada, P.O.Baradandi, Via-Bolagarh, Dist-Khordha and District Education Office, Khordha, S. Sahu is hereby engaged as a Contract Teacher (Hindi) in Sagargaon H/S for a period w.e.f. the date of his/her actual joining upto the end of February-2014 on fixed monthly remuneration of Rs.9300/-subject to the following terms and conditions:-

1. The teacher shall be engaged in classes by the Headmaster as assigned to other teachers.

2. He/She will work under the administrative control of the Headmaster In charge of the school to which he/she is assigned. He/She shall perform duties as will be entrusted to him/her by the concerned Headmaster.

3. He/She may be assigned any other work by the District Education Officer or any other authorities decided by Government in School & Mass Education Department from time to time.

4. He/she shall attend training programme as fixed by Government from time to time.

5. He/she shall must complete OTET on 31.03.2015 felling which his/her contract will not be renewed.

R.M. Panda
District Education Officer,
Khordha.

Memo No.10806 dated 27.09.2013

Copy forwarded to the person concerned for information and necessary action. He/she is directed to join the post on 03.10.2013 positively, falling which this engagement order shall stand cancelled automatically.

District Education Officer,
Khordha.

Memo No.10807 dated 27.09.2013

Copy forwardedto the Headmaster/Headmistress, Sagargaon H/s. information and necessary action. He/she is requested to verify the original certificates/documents, medical certificate, character certificates etc. at the time of joining & keep a Xerox copy of the said documents for official records.

The date of joining of the person concerned may please be intimated to this office immediately.

District Education Officer,
Khordha."

4. While issuing notice in the matter vide order dated 10.02.2014, the interim order was passed, which is quoted herein for reference:-

> *"As an interim measure, it is directed that if the petitioner is still continuing as Hindi Teacher in Sagarguan High School in the district of Khordha, she shall not be disengaged till next date."*

5. Counter affidavit on behalf of opposite party no.3 has been filed sworn to by the District Education Officer, Khordha dated 04.05.2016. Though no counter affidavit has been filed on behalf of opposite party no.4-University, learned counsel appearing for opposite party no.4 produces a letter dated 13.01.2014 issued by the Assistant Registrar to the Controller of Examinations, Utkal University along with a memo, which is taken on record.

6. To consider the rival contentions, the conditions of eligibility as mentioned in the advertisement for engagement of Contract Teachers in Govt. High Schools, Odisha 2013-14 (Annexure-1) have to be considered. Internal page-2 of the advertisement (page-11 of the writ petition) provides as follows:-

> *"(d). As regards eligibility of candidates for engagement of contractual teachers, he/shemust have obtained Bachelor's degree in Arts, Science along with a degree of Bachelor of Education from a recognized University. The University must have recognized by NCTE and equivalency declared by the Universities of the State) for being considered as Trained Graduate Teacher."*
>
> *(underlined to supply emphasis)*

7. Perusal of the eligibility conditions provided in the advertisement (Annexure-1 as quoted above) for engagement of contractual teachers indicates :

> (i) he/she must have obtained Bachelor's degree in Arts, Science along with a degree of Bachelor of Education from a recognized University;
>
> (ii) the University must have been recognized by NCTE;
>
> (iii) equivalency declared by the Universities of the State) for being considered as Trained Graduate Teacher.

The rival contentions raised at the bar revolves around the interpretation of the above conditions and whether the petitioner as a candidate satisfies the conditions.

8. Learned counsel for the petitioner submits that the appointment order as at Annexure-2, was issued to the petitioner considering her educational qualification as well as training qualification required for contractual teacher and there was no occasion for issuance of Annxure-4 by the self-same authority.

It is further submitted, assuming that the authority can seek further clarification regarding qualification of the petitioner, the petitioner's training qualification as a teacher, i.e., "B.Ed. in Hindi Medium with specialization of Hindi teaching method from Dakshin Bharat Hindi Prachar Sabha, Madras" has been recognized by the National Council for Teacher Education (for short 'NCTE') and after grant of recognition by the NCTE, the eligibility criteria as quoted above is satisfied from the advertisement.

9. To indicate the grant of recognition by the NCTE, the petitioner has relied upon the letter of the NCTE dated 19.09.2013 enclosed to the writ petition marked asAnnexure-7. The relevant extract of the letter is reproduced herein for reference:-

"…

Sl. No.	*Information Sought*	*Remarks*
	After completing B.Ed in Hindi Medium with specialization of Hindi teaching method from Dakshin Bharat Hindi Prachar Sabha, Madras can one be appointed as a Hindi teacher in Hindi sector Yes/no with reason.	*Yes after completing B.Ed in Hindi Medium with specialization of Hindi teaching method from Dakshin Bharat Hindi Prachar Sabha Madras, one can be appointed as a Hindi teacher in Hindi Sector as SRC, NCTE has grantedrecognition to the above said institution.*

(underlined to supply emphasis)

10. Learned Standing Counsel for the School and Mass Education Department, relying on the counter affidavit submits that the petitioner does not possess the requisite qualification for the post of Contract Teacher (Hindi). In support of his contentions, he relies on paras-8 and 9 of the counter affidavit dated 04.05.2016, which are reproduced herein for reference:-

> *"8. That the Contractual engagement of Smt. Sahoo has been made wrongly, even though she does not possess the requisite qualification for the post of Contractual Teacher (Hindi) as stipulated in the advertisement.*
>
> *9. That, it is learnt that, the B.Ed. Degree in Hindi of Smt. Sahoo from Dakhina Bharat Prachar Sabha, Madras had not submitted equivalency certificate from Hindi Sikshyan Parangata for Kendriya Hindi Sansthan Agra/B.H.Ed. from Utkal University/HTTC from BSE(O), Cuttack which does not satisfy the qualification prescribed in the above said advertisement"*

11. In response, learned counsel for the petitioner referring to the advertisement at Annexure-1 as quoted above, particularly to the eligibility, submits that petitioner'steachertraining qualification is recognized by the NCTE as per the letter dated 19.09.2013 (Annexure-7) and as required by the advertisement, the equivalency of the degree has been declared by "an University of the Sate", i.e., the Berhampur University, Berhampur, by letter dated 05.02.2014 (Annexure-16: enclosed to the rejoinder).

12. In the writ petition, the equivalency certificate issued by University of the State (Berhampur University) to another candidate, has also been enclosed which is marked as Annexure-11.

13. Learned counsel for opposite party no.4- University relying on the letter dated 13.01.2014 issued by the Asst. Registrar submits that the process of declaration of the equivalence of the teacher training qualification was initiated way back in 2014, though he has no up-to-date instruction but in all likelihood, the declaration could have been made by now.

14. Learned counsel for the petitioner submits that the instruction of the University submitted through the learned counsel, fortifies the contentions that the teacher training degree is equivalent, but again it is reiterated that Berhampur University being a University of State that would suffice the

equivalence certificate granted by the Berhampur University, which is adequate enough to meet the requirement of the advertisement.

15. Learned Standing Counsel submits that the specification in the advertisement that the University must have been recognized by NCTE and equivalency declared by the Universities of the State for being considered as Trained Graduate Teacher and the requirement may not be strictly applicable to the petitioner's case, i.e., the petitioner cannot take help of the said requirements.

16. Learned Standing Counsel relies on the decision of the Hon'ble Supreme Court in ***Devender Bhaskar and others v. State of Haryana: 2022(1) OLR SC 64 :: 2021 SCC OnLine SC 1116*** to buttress the point that equivalence of qualification is a matter for the State as recruiting authority to determine. Decision of the Government regarding equivalence of educational qualifications is a technical question based on proper assessment and evaluation of the relevant academic standards and practical attainments of such qualification and is based on the recommendation of an expert body-It is not for Courts to decide whether a particular educational qualification should or should not be accepted as equivalent to the qualification prescribed by the authority.

17. In considered opinion of this Court, the proposition of law as argued by the learned Standing Counsel has to be accepted. But that not help the contentions raised by the State in their counter affidavit and submissions for the following reasons :

the petitioner is found to be qualified as per the eligibility conditions provided in the advertisement as summed up in paragraph-7 above.

18. The more important aspect is that the Expert Body like the State University-Berhampur University has declared the equivalence and the National Counsel for Teacher Education has granted recognition to the Dakshin Bharat Hindi Prachar Sabha, Madras as far as the B.Ed. degree is concerned. As a matter of fact this Court has not gone into the concept of equivalence of a degree as the same is not required for adjudication.

19. The learned counsel for the petitioner submits that the eligibility criteria cannot be read in such a manner so as to make it differentially

applicable to different categories of applicants, more so, in a single advertisement for similar kind of posts.

It is submitted that the reading of the eligibility criteria should not end up in discriminating the different candidates by categorizing them into different groups which cannot be the object of a recruitment process.

20. It is also brought to the notice of this Court that the petitioner is continuing in her present post for about nine years and her performance has been up to the mark, as assessed by the superior authority and during pendency of the writ petition, the Utkal University has also processed the matter for declaration of equivalence of the degree.

21. In view of the aforesaid discussions, in considered opinion of this Court, it has to be held that the petitioner has the required Teacher Training Degree, which has been declared equavalant by an University of State, the Berhampur University, the matter has been actively considered by the Utkal University and to add to that though not specifically indicated in the impugned order under Annexure-4, the National Council for Teacher Education, (a statutory body of the Govt. of India, Southern Regional Committee) has granted recognition to the Dakshin Bharat Hindi Prachar Sabha, Madras for granting B.Ed. in Hindi Medium with specialization of Hindi teaching method, a course undertaken by the said institution.

The order passed by the opposite party no.3 as at Annexure-4 being devoid of merit is set aside.

22. The petitioner shall continue in her engagement as Contract Teacher (Hindi) as per the order dated 27.09.2013 (Annexure-2) issued by opposite party no.3, District Education Officer, Khordha.

23. The writ petition is allowed accordingly. However, in the facts and circumstances of the case there shall be no order towards costs.

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2022 (II) ILR - CUT- 226

SASHIKANTA MISHRA, J.

CRLREV NO. 879 OF 2014

SHANTANU @ PRIYABRATA SENAPATI .....Petitioner

.V.

STATE OF ORISSA ……Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 227 – Framing of charge – Duty of Court – Held, at the stage of framing of charge, duty is cast upon the Court to look at the evidence placed before it to see whether or not there is sufficient ground to proceed against the accused. (Para-7)

There must be some nexus or link between the accused and the occurrence which is ex-facie available to be seen or inferred from the materials placed before the Court – Only then the statutory requirements of "sufficient ground" as per section 227 Cr.P.C. be said to have been satisfied. (Para-10)

Impugned order is set aside – The accused petitioner be discharged from the offences U/s 493/417/306 of IPC.

Case Laws Relied on and Referred to :-

1. (1979) 3 SCC 4 : Union of India Vs. Prafulla Kumar Samal & Ors.
2. (1977) Cri.L.J. 1606 : State of Bihar Vs. Ramesh Singh.
3. (2002) 2 SCC 135 : Dilawar Balu Kurane Vs. State of Maharashtra.
4. (2009) 16 SCC 605 : Chitresh Kumar Chopra Vs. State (Govt. of NCT of Delhi).
5. (2013) 1 SCC (Cri) 146 : Parveen Pradhan Vs. State of Uttaranchal.

For Petitioner : Mr. S.S. Das, Sr. Adv.
M/s. Suman Modi, P.K. Ghosh, S.S. Pradhan,
M. Pattnaik & S. Pradhan.

For Opp.Party : Mr. A. Pradhan, Addl. Standing Counsel.

JUDGMENT Date of Judgment 8.03.2022

SASHIKANTA MISHRA, J.

The petitioner in the present revision seeks to challenge the order dated 25.09.2014 passed by learned 2nd Addl. Sessions Judge, Cuttack in S.T. Case No. 435 of 2013 whereby, his application filed for discharge from the offences under Section 493, 417 and 306 IPC was rejected.

2. The brief facts of the case are that on 04.09.2012 an FIR was lodged by one Rajalaxmi Mohapatra before the IIC, Mahila Police Station, Cuttack alleging that her daughter, namely, Pratikhya Priyadarsini Biswal (Pinki), the deceased, was living with one Nihar Ranjan Pradhan (Pintu) since 2006. Both of them were committing crime and had been jailed on some occasions. The present petitioner happens to be the advocate of Nihar and the deceased. It is alleged that taking advantage of the imprisonment of Nihar, the petitioner secretly married the deceased and kept her as his wife in a house at C.D.A., Sector-11 on rent. It is further alleged that the deceased insisted that the said marriage should be solemnized as per Hindu rites and customs, but the petitioner had though assured to do so, yet fell back from his word, as a result of which, the deceased committed suicide. Basing on such FIR, Mahila P.S. Case No.146 of 2012 was registered under Sections 493/417/306 of IPC. Upon completion of investigation, however, charge sheet was submitted under Sections 493/417/406/306 of IPC and cognizance was taken of the said offences. The case was thereafter committed to the Court of Session for trial and is pending in the Court learned 2nd Addl. Sessions Judge, Cuttack.

3. On 25.09.2013, the petitioner-accused filed an application under Section 227 of Cr.P.C. in the Court below with prayer to discharge him from the offences mainly on the ground that the essential ingredients of the same do not exist. The learned Court below after taking into consideration the settled position of law and the allegations made in the FIR held that in so far as the offence under Section 406 of IPC is concerned, there is absolutely no material on record to proceed against the accused and accordingly discharged him from the said offence. However, it was held that the materials on record, prima facie, satisfy the allegations against the accused under Section 493/417/306 of IPC. The said order is impugned in the present revision.

4. Heard Mr. S.S. Das, learned Senior Counsel for the petitioner and Mr. A. Pradhan, learned Addl. Standing Counsel for the State.

5. Mr. S.S. Pradhan, learned Sr. Counsel would argue that criminal prosecution being a serious matter affecting the liberty of a person, can be allowed to proceed only if there are sufficient materials on record justifying the same. Referring to the allegations made in the FIR and the statements of the witnesses recorded under Section 161 Cr.P.C., it is submitted by Mr. Das that the prosecution case, even if accepted on its face value, does not in any manner establish the offences alleged. Referring to the decision of the

Hon'ble Supreme Court in the case of ***Union of India vs. Prafulla Kumar Samal and others,*** reported in (1979) 3 SCC 4, it is contended by Mr. Das that the Court while framing charge under Section 227 of Cr.P.C. must find out whether or not prima face case against accused had been made out and whether such materials disclose grave suspicion against the accused, which had not been properly explained. According to Mr. Das, mere suspicion cannot justify continuance of a criminal proceeding.

6. Per contra, Mr. A. Pradhan has submitted that facts of the present case clearly reveal that there are sufficient materials before the Court to presume that the offences under Sections 493/417/306 of IPC were committed by the accused and therefore, there is no illegality in the impugned order.

7. A brief reference to the relevant position of law would be apposite at the outset. In the case of ***Prafulla Kumar Samal*** (supra) referred to by learned senior Counsel, the apex Court held as under:

> *"The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."*

Therefore, at the stage of framing charge, duty is cast upon the Court to look at the evidence placed before it to see whether or not there is sufficient ground to proceed against the accused.

8. In the case of ***State of Bihar vs. Ramesh Singh,*** reported in (1977) Cri.L.J. 1606, the Apex Court held that the suspicion that the accused has committed an offence must not be simple but grave. In other words, there must be a grave suspicion as against mere suspicion before the Court can frame charge against the accused.

9. In the case of ***Dilawar Balu Kurane vs. State of Maharashtra,*** reported in (2002) 2 SCC 135, it was held that where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Cr.P.C. and for such purpose he has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before him without making a roving enquiry into the pros and cons of the matter.

10. From the above narration it is evident that only a grave suspicion can justify framing of charge against an accused. To further explain, suspicion per se may be entirely in the realm of speculation or imagination and may also be without any basis, whereas grave suspicion is something which arises on the basis of some acceptable material or evidence. Only because there is no other explanation for the alleged occurrence, the needle of suspicion should point at the accused cannot be a reasonable basis to proceed with the trial against him. But to do so, there must be some nexus or link between him and the occurrence which is *ex facie* available to be seen or inferred from the materials placed before the Court. Only then will the statutory requirement of "sufficient ground" as per Section 227 Cr.P.C. be said to have been satisfied.

11. The facts of the case now need to be viewed in the light of aforementioned legal propositions. A reading of the FIR and the statement of the witnesses recorded under Section 161 Cr.P.C. do not even remotely suggest the commission of offence under Section 493 IPC. On the contrary, it is the admitted case that the petitioner and the deceased had secretly married and were residing together in a rented house. Therefore, the question of accused deceitfully inducing a belief of lawful marriage on the deceased for cohabitation does not arise.

12. As regards the offence under Section 417 of Cr.P.C., the only allegation is that the accused cheated the deceased by not marrying her despite promising to do so. As has already been narrated hereinbefore, the petitioner and the deceased had already married secretly but the deceased wanted their marriage to be solemnized as per Hindu rites and customs. It is

otherwise borne out from the materials on record that in deference to such desire of the deceased, the accused had made arrangements to solemnize their marriage at Sri Ramanigameswar Temple at Chahata, Cuttack. It is significant to note that such marriage was supposed to take place on 02.09.2012, but for some reason the same did not happen. The deceased committed suicide on the next date. It is not forthcoming from the materials on record as to why the marriage did not take place on 02.09.2012. There is simply no material to suggest that the marriage was called off at the instance of the accused or that he refused to marry the deceased despite having made arrangements for the marriage to be solemnized on 02.09.2012. So, this much alone cannot persuade the Court to presume that the accused had any fraudulent intention to cheat the deceased.

13. Coming to the offence under Section 306 of IPC, it is argued by learned Senior Counsel that the basic ingredient thereof i.e. of abetment within the meaning of Section 107 of IPC is not made out at all inasmuch as, there is neither a suicide note written by the deceased blaming the accused for her death nor there is an oral dying declaration recorded by any person, whereby, she blamed the accused. The allegation according to Mr. Das appears to be omnibus in nature and not based on any material at all. Mr. A. Pradhan, learned Addl. Standing Counsel on the other hand would contend that since the accused went back on his promise to have their marriage solemnized in the temple, the deceased became depressed to such extent as to commit suicide. In the FIR it is simply alleged that as the accused did not marry the deceased, she did not wish to live any further and therefore, committed suicide. It is obviously a bald allegation without reference to any specific incident or happening. In the statement of the informant recorded under Section 161 Cr.P.C. it is also alleged that the accused refused to marry the deceased, for which she committed suicide being unable to bear her mental agony. The aunt of the deceased has also given a similar statement but the same appears to be based on the information she received from the informant. Similar is the statement given by the younger brother of the deceased. No other witnesses have stated anything in this regard excepting for their knowledge that the deceased had committed suicide.

14. On the above evidence, the question that the Court would pose for determination is whether it is sufficient to presume that the accused had abetted commission of suicide by the deceased. Fact remains that both of them had already been secretly married but the deceased is said to have

insisted for solemnization of marriage as per Hindu rites and customs. The deceased, it must be kept in mind, was 26 years old at the relevant time and such secret marriage with the accused was subsequent to a live-in relationship she had with Nihar Ranjan Pradhan since 2006. The marriage was to take place on 2nd September, 2012, but for some reason it did not happen on that date and the deceased committed suicide on 3rd September, 2012. As already been discussed, there was neither any suicide note nor any dying declaration nor even any statement made by the deceased before anybody prior to committing suicide making any allegation against the accused or expressing that she was depressed because of non-solemnization of the proposed marriage. So it becomes rather far-fetched, particularly in the absence of any acceptable material to hold that only because the proposed marriage could not be solemnized on the date fixed, it caused such mental imbalance in the deceased that led her to commit suicide. Thus, while there is no material showing any positive act having been committed by the accused, the allegation against him is one of omission as noted above. But then, even assuming for the sake of argument that the deceased had lost her mental balance or became mentally depressed because their marriage could not take place on the date fixed, the question is, whether the same can be treated as abetment within the meaning of Section 107 of IPC.

15. Section 107 of IPC reads as follows:

> *"**107. Abetment of a thing**.—A person abets the doing of a thing, who—*
> *First— Instigates any person to do that thing; or*
>
> *Secondly —Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> *Thirdly— Intentionally aids, by any act or illegal omission, the doing of that thing.*
>
> *Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."*

In the case of ***Chitresh Kumar Chopra vs. State (Govt. of NCT of Delhi),*** reported in (2009) 16 SCC 605 as well in the case of ***Parveen***

Pradhan vs. State of Uttaranchal, reported in (2013) 1 SCC (Cri) 146, the apex Court held that to constitute 'instigation' a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by 'goading' or 'urging forward'.

16. In the instant case, there is nothing on record to show that the accused had instigated the deceased either by his words or actions so as to lead her to commit suicide. Nothing has been placed on record as to the reasons for the marriage not taking place on the date fixed despite arrangements having been made therefor. Whether the marriage was not held only because the accused refused to marry the deceased is simply not forthcoming from the materials on record, rather the informant appears to have simply presumed that the accused refused to marry her daughter and because of such reason she committed suicide. As already stated, there being no reasonable basis for such presumption nor suspicion, the accused cannot be made to suffer the ignominy of undergoing the criminal trial, that too, for a sessions triable offence. In other words, the prosecution case read as a whole does not justify a trial of the accused for the alleged offences.

17. For the foregoing reasons therefore, this Court has no hesitation in holding that the impugned order in so far as it relates to not discharging the accused from the offences under Sections 493/417/306 of IPC cannot be sustained. Consequently, the Revision is allowed. The impugned order is set aside. The accused-petitioner be discharged from the offences under Section 493/417/306 of IPC.

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2022 (II) ILR - CUT- 232

SASHIKANTA MISHRA, J.

WPC (OA) NO.1805 OF 2017

DAMODAR MEHER ……..Petitioner

.V.

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

(A) ODISHA CIVIL SERVICE (Classification, Control And Appeal) Rules, 1962 – Rule 15(9-A) – Whether mandatory? – Held, Yes. – The disciplinary authority is bound to give charge wise specific views on the findings of the Enquiring Officer – The statutory requirement cannot be dispense with more so when the same is mandatory in nature. (Para-13)

(B) PRINCIPLE OF NATURAL JUSTICE – Reiterated – Held, in domestic enquiry fairness in the procedure is a part of the principles of natural justice – Suspicion or presumption cannot take place of proof even in a domestic enquiry.

Case Laws Relied on and Referred to :-

1. (2009) 1 SCC (L & S) 394 : Union of India & Ors. Vs. Prakash Kumar Tandon.
2. (2009) 2 SCC 570 : Roop Singh Negi Vs. Punjab National Bank & Ors.
3. (1998) SCC (L &S) 865 : Ministry of Finance & Ors. Vs. S.B. Ramesh.
4. (2020) 3 SCC 423 : State of Karnataka and another Vs. N. Gangaraj.
5. (2011) 14 SCC 682 : Om Prakash Vs. State of Punjab & Ors.
6. (1969) 3 SCC 775 : State of Uttar Pradesh Vs. Om Prakash Gupta.

For Petitioner : M/s. S.N. Patnaik, U. Patnaik, C. Panda, K.C. Panigrahi & S. Mohapatra.

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

JUDGMENT Date of Judgment: 05.04.2022

SASHIKANTA MISHRA, J.

In the present writ application, the petitioner challenges the order of punishment imposed on him vide order dated 16.08.2017 after being found guilty of misconduct in a departmental proceeding held against him. It is claimed that the departmental proceeding was not conducted as per rules and against the principles of natural justice.

2. The facts of the case are that the petitioner is an officer belonging to Odisha Welfare Service-II. While he was working as Assistant District Welfare Officer, Dhenkanal, he was promoted to the rank of O.W.S.-IIGroup-B and posted as District Welfare Officer, Rayagada vide notification dated 03.08.2011. By office order dated 15.12.2011, the petitioner was transferred from Rayagada and posted as Special Officer, DKDA, Parsali but at that time the petitioner claims to have been on official duty at Bhubaneswar to attend a meeting at SC & ST, RTI, Bhubaneswar presided by opposite party no.1. While at Bhubaneswar, the petitioner further claims

to have fallen ill and therefore applied for leave from 19.12.2011, which was sought to be extended from time to time. In the meantime, being aggrieved by his transfer as Special Officer, DKDA, Parsali, the petitioner approached the Odisha Administrative Tribunal in O.A. No. 4573 (C) of 2011. Initially, the learned Tribunal, vide order dated 21.12.2011 directed the parties to maintain status quo as on that date and thereafter on 23.03.2012, learned Tribunal directed the opposite party no.1 to take immediate steps to post the petitioner in any district as DWO or in any equivalent post in any nearby district. By a Memo dated 31.07.2012, the petitioner was communicated with a set of charges in a departmental proceeding initiated against him for disobedience of Government orders and misconduct on the allegation that though he was relieved from the office of the DWO, Rayagada w.e.f. 16.12.2011 (AN), he had not handed over the detailed charge to his reliever nor had joined in his place of posting at Parsali nor applied for leave. It is alleged by the petitioner that the documents sought to be relied upon as per the memo of evidence were never supplied to him. Nevertheless, he submitted his written statement of defence intimating the interim orders passed by the learned Tribunal. Again, vide order dated 14.09.2012, he was served with additional charges to the effect that despite direction of the learned Tribunal in its order dated 23.03.2012, he had not joined in his new place of posting by remaining unauthorizedly absent from his duty from 17.12.2011. The petitioner submitted a reply to the additional charges also. The written statement of defence submitted by him not being accepted, it was decided to hold an enquiry by appointing the Director (OBC) as enquiring officer and DWO, Rayagada as marshalling officer. It is further alleged that the enquiring officer did not examine any witness either on behalf of the department or the delinquent and submitted his report dated 17.05.2013 by holding the petitioner guilty of the charges only on perusal of relevant records produced by the DWO, Rayagada. A copy of the enquiry report having been served upon the petitioner, he submitted his reply. Again, vide order dated 22.07.2014, he was served with a 2nd show cause notice indicating the proposed penalties to be imposed on him. He submitted his representation against the same on 27.08.2014. However, without considering his reply, the opposite party no.1 passed final order on 16.08.2017, enclosed as Annexure-14 to the writ petition, by imposing the following penalties:

(i) withholding one increment with cumulative effect and

(ii) the unauthorized period of absence be treated as leave due and admissible.

The aforementioned order imposing penalty is impugned in the present writ application.

3. A counter affidavit has been filed by opposite party no.1 disputing the averments of the writ petition. On facts, it is stated that consequent upon joining of his substitute, Sri Santosh Kumar Mishra as DWO, Rayagada,the petitioner was relieved by the Collector, Rayagada w.e.f. 16.12.2011 (AN) and directed to handover the detailed charges to his successor immediately, but the petitioner did not sign the OGFR and rather, left the office without obtaining permission of the higher authorities. As a result, on 17.12.2011, the office chamber of DWO, Rayagada was found locked and it was not possible to open the office as its key was with the petitioner. Further, despite being relieved from his duty as aforesaid, the petitioner neither joined in his new place as Special Officer, DKDA, Parsali nor applied for leave in spite of instructions issued by the Department vide letter dated 01.02.2012 along with newspaper publication vide notice dated 01.02.2012. Therefore, a disciplinary proceeding was initiated against him for disobedience of orders of the higher authorities and for remaining absent in his place of posting unauthorizedly and causing dislocation of official work. It is further stated that since the learned Tribunal vide order dated 23.03.2012 in O.A. No. 4573 (C) of 2011 had directed the opposite party no.1 to post the petitioner as DWO or in any equivalent post in any nearby district, despite his unauthorized absence, he was posted as Special Officer, ITDA, Phulbani vide office order dated 25.04.2012. However, he did not join in the said place of posting nor submitted any leave application, for which additional charges were framed vide memorandum dated 14.09.2012. It is admitted that the enquiry report was finalized by the enquiring officer after perusal of records produced by ADWO (Hqrs.), Rayagada on behalf of DWO, Rayagada in presence of the petitioner.

On the legal grounds urged by the petitioner, it is stated that the initiation of departmental proceeding and the final order passed in imposing penalty was with due approval of the Government as also the Odisha Public Service Commission. It is further stated that the petitioner was given ample opportunity to defend himself by issuing notices to him on different dates but he attended the enquiry only once. The disciplinary authority after going through the enquiry report and the representations made by the petitioner decided to impose the punishment on him.

4. Heard Mr. S.N. Patnaik, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

5. In assailing the impugned order of imposition of penalty (Annexure-14) Mr. S.N. Patnaik has made a three-fold argument: -

> (i) Framing of charges, appointment of enquiring officer, first show cause notice and 2nd show cause notice were not issued by the competent authority, but by the Secretary to the Department.
>
> (ii) There were gross procedural irregularities in conduct of the enquiry causing serious prejudice to the petitioner; and
>
> (iii) The petitioner's representation has not been properly considered by the enquiring officer or the opposite party no.1.

6. Elaborating his arguments, Mr. Patnaik, contends on point no.(i) as above that communication of the memorandum of charges, appointment of enquiring officer, first show cause notice and 2nd show cause notice by the Commissioner-cum-Secretary to the Department is illegal as Government is the competent authority to do so.

As regards point no. (ii), it is argued by Mr.Patnaik that the enquiry was conducted in a manner contrary to the provisions under Rule-15(6) of the OCS (CCA) Rules, 1962, which mandates that the enquiring authority shall consider documentary evidence and also oral evidence as may be relevant or material in regard to the charges and in such event, the Government servant (delinquent) shall be entitled to cross-examine the witnesses so examined. In the case at hand, not a single witness was examined by the enquiring officer. Secondly, the memo of evidence attached to the memorandum dated 31.07.2012 reveals that the department sought to prove all the three charges on the basis of different office orders and letters issued by different authorities. Similarly, three additional charges were sought to be proved on the basis of some office orders and letters. Mr. Patnaik forcefully contends that it was necessary to examine the authors of such documents so that the documents would have been formally proved and the petitioner could have had an opportunity to cross-examine them.However, the enquiring officer simply finalized the enquiry by himself perusing the documents. It is also argued by Mr. Patnaik that when DWO,

Rayagada was appointed as the marshalling officer by the Government, the ADWO (Hqrs), Rayagada could not have been allowed to act on his behalf.

With regard to point no.(iii), it is argued by Mr. Patnaik that as per Rule-15(9-A), the disciplinary authority is duty bound to give specific views charge-wise on the findings of the enquiring officer. In any event, the punishment imposed on the petitioner is highly disproportionate to the charges of misconduct proved against him.

In support of his contentions as narrated above, Mr. Patnaik has relied upon the following decisions:

Union of India and others vs. Prakash Kumar Tandon, reported in (2009) 1 SCC (L & S) 394; ***Roop Singh Negi vs. Punjab National Bank and others***,reported in (2009) 2 SCC 570 and ***Ministry of Finance and others vs. S.B. Ramesh***, reported in (1998) SCC (L &S) 865.

7. On the other hand, Mr. H.K. Panigrahi, learned Addl. Standing Counsel has argued that none of the grounds raised by the petitioner to challenge the order of punishment are valid or tenable in the eye of law. With regard to point no. (i), it is argued by Mr. Panigrahi that a reference to the DP file would reveal that the Government order was obtained at every stage and only because such fact was not reflected in the communications made by the Commissioner-cum-Secretary of the Department, the same cannot render the communications illegal. On point no.(ii), it is argued that though no witness was examined to formally to prove the documents, yet the same by itself cannot vitiate the entire proceeding unless the petitioner can prove to the satisfaction of the Court that he was seriously prejudiced thereby. According to Mr. Panigrahi, the enquiry was conducted strictly as per rules by affording full opportunity to the delinquent to defend himself and even assuming there were some irregularities of procedure at some stage or the other, the same by itself cannot nullify the entire proceeding unless it is proved that it had prejudiced the petitioner. Moreover, the documents considered by the enquiring officer are all official correspondences and known to the petitioner. As regards non-recording of reasons by the disciplinary authority for accepting the findings of the enquiring officer, it is argued by Mr. Panigrahi that detailed reasons are required to be recorded only when the disciplinary authority decides to differ from findings of the enquiry.

In support of his contentions, Mr. Panigrahi has relied upon the decisions of the Apex Court in the case of ***State of Karnataka and another vs. N. Gangaraj***, reported in (2020) 3 SCC 423 and ***Om Prakash vs. State of Punjab & Others***, reported in (2011) 14 SCC 682.

8. As regards the contentions urged under point no. (i) that the departmental proceeding was not conducted by the competent authority and so also the order of punishment, in course of argument, considering the stand taken by the petitioner in this regard, this Court had directed the learned Addl. Standing Counsel to produce the original departmental proceeding file relating to the petitioner. A perusal of the file clearly reveals that at every stage of the proceeding beginning from the decision to conduct the disciplinary proceeding, communication of the charges, appointment of enquiring officer/marshaling officer, first show cause notice, second show cause notice and the order of punishment have all been issued with due approval of the Government, i.e., the Minister of the concerned Department. It may be noted here that perusal of the file also reveals that originally the proposed penalty was approved by the Commissioner-cum-Secretary and forwarded to the OPSC for concurrence but vide letter dated 27.03.2015, the OPSC sought for clarification as Government Order had not been obtained. Accordingly, the file was again processed and approval of the Hon'ble Minister was taken and thereafter again sent to the OPSC. Thus, concurrence was received, whereupon the final order was passed in the disciplinary proceeding. Therefore, the contention advanced by Mr. Patnaik is found to be factually incorrect and hence, not acceptable.

9. On point no.(ii), the first argument made by Mr.Patnaik is that the disciplinary authority having appointed the DWO, Rayagada as the marshalling officer in the departmental proceeding, the ADWO (Hqrs), Rayagada could not have been permitted to represent him and the same having been done in the instant case, vitiates the entire proceeding. To the above, Mr. Panigrahi has argued that at best this is an irregularity, which does not go to the root of the matter and in any case, the petitioner cannot be said to have been prejudiced thereby.

10. A perusal of the enquiry report, enclosed as Annexure-10/1 to the writ petition, reveals that on 13.04.2013 the ADWO, Hqrs, Rayagada produced the relevant records on behalf of the DWO, Rayagada, who was the marshalling officer and also filed hazira. Reference to the original DP file

produced by learned State Counsel would reveal that the Director (OBC) was appointed as the enquiring officer and DWO, Rayagada as the marshaling officer on orders of the Government passed on 15.01.2013. Rule 15(4) of OCS (CCA) Rules, 1962 provides that on receipt of the written statement of defence or if no such statement is received within the time specified, the disciplinary authority may itself enquire into such of the charges as are not admitted or, if it considers it necessary so to do, appoint a board of enquiry or an enquiring officer for the purpose. Sub-Rule(5) provides that the disciplinary authority may nominate any person to present the case in support of the charges before the enquiring authority. As already stated, the DWO, Rayagada was nominated by the disciplinary authority to act as the marshalling officer in the enquiry. The DP file does not reveal any such nomination being subsequently issued in favour of the ADWO, Hqrs, Rayagada to act as the marshalling officer or to produce the relevant records on behalf of the marshalling officer. Thus, by allowing a person not authorized/nominated by the disciplinary authority to produce the relevant records on behalf of the marshaling officer, the enquiring officer has in effect, acted in violation of the orders of the disciplinary authority. Nothing is forthcoming from the record as to why the DWO, Rayagada did not produce the relevant records despite being nominated as the marshalling officer by the disciplinary authority. Though it is argued by learned State counsel that this is a mere irregularity without going to the root of the matter, this Court is of the view that the provisions under Rule-15 being enacted to lay down the procedure for imposing penalties on the delinquent Government servant, have to be construed strictly. So if Sub-Rule (5) provides for nomination of a person to present the case in support of the charges (marshaling officer) no other person can be allowed to perform such role. This Court is therefore constrained to hold that the procedure adopted by the enquiring officer as narrated above is contrary to Rules.

Coming to the 2nd argument put forth under point no.(ii), it is the case of the petitioner that though several documents were mentioned in the memo of evidence as being the basis for proving the charges, the same were not formally proved by the authors thereof. In this context, Sri Patnaik, would argue that unless the author of the document is examined, it would not be possible for the delinquent to properly defend himself for want of opportunity to cross-examine him. It is further submitted that had the author of the document in question been examined, the delinquent could have cross-examined him on the contents and various aspects thereof. In response, Mr.

Panigrahi submits that when the documents themselves are not disputed, being part of the official records, the formal proof thereof was rightly dispensed with by the enquiring officer.

Reference to the enquiry report does not reveal that the enquiring officer had passed any order specifically dispensing with the examination of the authors of the documents mentioned in the memo of evidence. Nevertheless, the documents have apparently been considered and findings given basing thereon. The memo of evidence shows that the specific charges were sought to be proved on the basis of certain documents of "office of the Collector Rayagada" and "office of the P.A., ITDA, Phulbani". Therefore, either the Collector himself or anyone acquainted with the documents in question should have been examined to formally prove them and to be cross-examined by the delinquent in relation thereto. Similarly, either the P.A., ITDA, Phulbani himself or any other person acquainted with the documents in question should have been examined.

Mr. Patnaik has referred to Sub-Rule-(8) of Rule- 15 in this context which reads as follows:

> *"**15. Procedure for imposing penalties** –*
>
> *Xx xx xx*
>
> *8. The record of enquiry shall include:*
>
> *i) The charges framed against the Government servant and the statement of allegations furnished to him under sub-rule (2)*
>
> *ii) His written statement of defence, if any;*
>
> *iii) The oral evidence taken in the course of the inquiry;*
>
> *iv) The documentary evidence considered in the course of the inquiry;*
>
> *v) The orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry;*
>
> *vi) A report setting out the findings on each charge and the reasons therefore; and*
>
> *vii) The recommendations of the inquiring authority, if any, regarding the punishment to be inflicted.*

Clause(ii), (v) and (vii) contain the expression "if any",suggesting that the said aspects are not mandatory, but the other clauses do not contain

such expression, which suggests that the same are mandatory and have to be followed. Thus, relying on clause (iii) of sub-Rule(8) of Rule-15, it is argued by Mr. Patnaik that oral evidence is a must in the inquiry.

Upon a reading of the provision referred to by Mr.Patnaik and the entire scheme laid under Rule-15, this Court is unable to accept the contentions advanced by Mr. Patnaik that in all cases oral evidence has to be mandatorily adduced, rather, this Court finds it not unreasonable to hold that oral evidence, if and when necessary, has to be adduced. For instance, if the proceeding is drawn up entirely on the basis of admitted and undisputed documents there may not be any necessity of adducing oral evidence to prove the charge. However, in the case at hand, there is nothing on record to suggest that the documents indicated in the memo of evidence were admitted by the petitioner. A reading of the representation submitted by the petitioner against the findings of the enquiry officer clearly suggest that he had a plea to raise and an explanation to make with regard to the charges. To such extent therefore, this Court is willing to accept that in the absence of the author of the documents, the petitioner was deprived of his valuable right of cross-examination with reference to the points raised by him in his defence. It is well settled that in a domestic enquiry fairness in the procedure is a part of the principles of natural justice as held by the apex Court in the case of ***State of Uttar Pradesh vs. Om Prakash Gupta, reported in (1969) 3 SCC 775***.

In the case of ***Roop Singh Negi*** (supra), relied upon by Mr. Patnaik, the apex Court held as follows:

> *"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."*

Similarly, it is well-settled that suspicion or presumption cannot take the place of proof even in a domestic enquiry, as held by the apex Court in the case of Central Bank of India Ltd. v. Prakash Chand Jain (1969) 1 SCR 735.

11. Coming to the facts of the case, it can be safely inferred that in the absence of formal proof of the documents and examination of the persons authoring the same, the petitioner was seriously prejudiced. While this Court reminds itself that it is not sitting in appeal over the findings of the enquiring officer, yet if the same are based on merely ipse dixit or surmises and conjectures and the inferences drawn are not supported by any evidence, it would be justified for the writ Court to interfere. The following observations made in ***Roop Singh Negi*** (supra) are highly relevant.

> *"23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the criminal court on the basis of selfsame evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."*

12. As it appears, the enquiring officer has evidently perused the documents from the side of the department and has drawn inference basing thereon by rejecting the written statement of defence submitted by the petitioner at the threshold by observing that he has "cunningly denied all the charges levelled against him". The enquiry officer has also observed as under:

> *"As a responsible Government servant, Sri Meher should be duty bound and such an officer cannot deliver proper justice to the poor and downtrodden working in the district"*

Obviously, the enquiring officer was not alive to the specific role assigned to him, i.e., of giving his findings on each of the charges based on evidence. Instead of confining himself to such role assigned to him, he proceeded to deliver moral diktats, as evident from a bare perusal of aforequoted observation. Again, at another stage, the enquiring officer has observed as under:

> *"The written statement of Sri Meher only speaks of his illness, suffering from suffocation due to high blood pressure and gastric problem, for which he has availed long leave. He may be referred to State Medical Board. If the Medical Board considered not fit for holding the post, he may be declared medically unsuitable/unit."*

The above observations are not only uncalled for but also are a clear attempt to exceed the brief entrusted to the enquiring officer. In the process, the enquiring officer has failed to consider even the possibility of the petitioner being prevented from joining in his new place of posting because of his ailments. Evidently, the enquiring officer was attempting to be more loyal than the King himself! Instead of giving his findings on the charges impartially he chose to go a step ahead by offering unsolicited advice to the Government. Thus, considered as a whole, the manner of conduct of the inquiry is a gross violation of the principles of natural justice besides being contrary to the rules as referred to hereinbefore and therefore, cannot be sustained in the eye of law.

This Court also finds that the charges have purportedly been proved merely on perusal of the documents produced on behalf of the department. The explanation offered by the delinquent has been summarily brushed aside. The findings of the enquiring officer appear to be mechanical apparently to somehow hold the petitioner guilty than to render proper reasons for his findings on each of the charges.

13. The final point canvassed by Mr. Patnaik is that as per Rule-15(9-A) the disciplinary authority not being the enquiring officer has to give specific opinion charge- wise from the findings in the enquiry report. A perusal of the original disciplinary proceeding file does not reveal anywhere that the disciplinary authority had recorded its findings on each of the charges levelled against the petitioner. Mr. Panigrahi argued that as the disciplinary

authority did not have any reason to disagree with the findings of the enquiry officer, it was not obligatory on its part to record its any finding on each charge.

As it appears, sub-rule (9-A) of Rule-15 was inserted on 16.10.2015. The use of word "shall" in the said provision clearly shows the mandatory nature thereof. The legislature in its wisdom thought it prudent to insert such provision evidently to ensure proper application of mind and just consideration of the facts of the case by the disciplinary authority so as to discard the possibility of mechanical acceptance of the findings of the enquiring officer. The statutory requirement as above cannot be dispensed with more so when the same is mandatory in nature as discussed above.

14. For the forgoing reasons therefore, this Court has no hesitation in holding that the disciplinary proceeding was held in gross violation of the principles of natural justice, and in a manner contrary to the statutory rules of procedure and the findings of guilt on each of the charges are mechanical without any acceptable evidence being adduced in support thereof.

15. Resultantly, the inquiry report dated 17.05.2013 vide Annexure-10/1 and the order of punishment dated 16.08.2017 as at Annexure-14 are hereby quashed.

16. The writ petition is therefore allowed. No order as to costs.

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2022 (II) ILR - CUT- 244

A.K. MOHAPATRA, J.

WPC(OA) NO.1052 OF 2012

LINGARAJ GOUDA .....Petitioner

.V.

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

SERVICE LAW – Appointment – Irregularities in the appointment – But no illegality in the appointment – However show cause notice issued

seeking reply on termination of service – No fault of petitioner – Impugned show cause notice challenged – Held, it is not open to the authority to take advantage of the irregularities committed by them and penalize the petitioner by terminating his service – Although some irregularities have been observed by this court while conducting selection process, the same should have been regularized by taking post-facto approval from the authorities. (Para- 20)

Case Laws Relied on and Referred to :-

1. (2011) 3 SCC 436 : State of Orissa & Ors. Vs. Mamata Mohanty.
2. (2008) 3 SCC 512 : K. Manjusree Vs. State of Andhra Pradesh & Anr.
3. (2006)12 SCC 33 : Siemens Ltd. Vs. State of Maharashtra & Ors.
4. 2012(I) OLR 839 : Biswambar Behera Vs. State & Ors.

For Petitioner : Mr. S.K. Das, Mr. P. Mohapatra.

For Opp. Parties : Mr. P.C. Das, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 24.02.2022: Date of Judgment: 31.03.2022

A.K. MOHAPATRA , J.

1. The grievance of the petitioner in the present writ petition is that though he has been appointed by the Presiding Officer State Education Tribunal, Bhubaneswar, who is the competent authority, to a substantive post and after following due procedure of selection, has now been issued with a notice in pursuance to the impugned order issued by the Opposite Party No.1 requiring the petitioner to file his show-cause as to why his services shall not be terminated. The impugned order issued by the Opposite Party No.1 as well as consequential show-cause notice having been issued on the basis of a letter dated 10.04.2012 of the Finance Department, Government of Odisha, which has no application to the facts of the present case.

2. The present writ petition has been filed by the petitioner with a prayer to quash the impugned order dated 16.08.2012 issued by the Opposite Party No.1 and the consequential notice dated 24.08.2012 issued by the Opposite Party No.2.

3. The factual back drop of the case, bereft of all unnecessary details,is that to fill up one vacant post of Peon in the office of the Opposite Party No.2, the Opposite Party No.2 issued an advertisement on 05.04.2012. It is revealed from the said advertisement that the post which is sought to be filled

up by the Opposite Party No.2 had fallen vacant due to promotion of the incumbent of that post. Therefore, it is pleaded in the writ petition that the post is sought to be filled up as the said regular post is having the budgetary sanction by the Finance Department and that filling up the vacancy in the said post is absolutely necessary for smooth functioning of the office of the Opposite Party No.2.

4. Upon perusal of the advertisement, it is further seen that the requisite qualification as mentioned in the advertisement is being possessed by the petitioner and accordingly, the petitioner submitted his candidature against the said post. Further upon due scrutiny of the application, the office of the Opposite Party No.2 found that the petitioner is suitable for the said post and accordingly, the petitioner was invited to attend an interview, which was scheduled to be held on 07.05.2012.

5. After successfully qualifying in the interview, where the petitioner stood first, the petitioner was given appointment against the substantive post of Peon in the office of the Opposite Party No.2 with a scale of pay Rs.4,440-7,440/- with grade pay of Rs.1,300/- along with other allowances as admissible under the rules. Thereafter, the applicant joined in service on 09.05.2012. After joining his service, he was discharging his duties to the utmost satisfaction of the authorities pursuant to regular appointment order. The petitioner had been sanctioned house rent allowances w.e.f. 01.06.2012 by order dated 27.06.2012 by the Opposite Party No.2.

6. To the utter surprise of the petitioner, he received a show-cause notice dated 24.08.2012 issued by the Opposite Party No.2 along with letter dated 10.04.2012 and 16.08.2012 of the Finance Department,Government of Odisha. Under the impugned show-cause notice at Annexure-6, the petitioner has been asked to show cause as to why his appointment shall not be cancelled and his service shall not be terminated since his appointment to the post of Peon by the Opposite Party No.2 is not in accordance with the provisions laid down under the Finance Department letter. Accordingly, the present writ petition has been filed by the petitioner challenging the show-cause notice as well as letter issued by the Finance Department, Government of Odisha under Annexures-6 and 8 respectively.

7. A counter affidavit has been filed on behalf of the Opposite Party No.1 in this case primarily objecting to the appointment of the petitioner on

the ground that the said appointment has been made in contravention of law as incorporated by Finance Department Resolution dated 10.04.2012. As such, the claim of the petitioner has been resisted by the Opposite Parties on the ground that the appointment of the petitioner is illegal and contrary to the Finance Department Resolution dated 10.04.2012.

8. In the counter affidavit filed by the Opposite Party No.1, the Government has taken a stand that for filling up vacancies in the regular establishment, the candidate must satisfy the eligibility criteria fixed by the State Government, Finance Department. Further, the Finance Department in its resolution dated 10.04.2012 while trying to regulate the expenditure out of the Annual Budget for the year 2012-13 have imposed restriction on the creation and filling up of new posts. Further, it has been stated in the resolution that such posts which are essential for delivery of public service, those posts should be filled up after obtaining concurrence of the Finance Department. Further, it is alleged that while filling up the posts, in the present case, by appointing the petitioner, no concurrence was taken from the Government and as such, the appointment of the petitioner is illegal and contrary to the resolution dated 10.04.2012.

9. It has also been stated in the counter affidavit that while filling up the post of Peon by the office of the Opposite Party No.2 no advertisement was issued as averred by the petitioner. Only a notice was affixed to the Notice Board and on the very next day, the incumbent got appointment. In the said context, the Opposite Parties had relied upon a judgment of the Hon'ble Supreme Court of India in the matter of ***State of Orissa and others vrs. Mamata Mohanty: reported in (2011) 3 SCC 436***. It has also been stated in the counter affidavit that the advertisement in the present case was not given wide publicity by either publishing the same in the local daily newspaper or by advertising the said post in the Electronic Media.

10. In the counter affidavit filed by the Opposite Party No.1, a stand has also been taken to the effect that although the petitioner stood first in the interview held for the post of Peon in SET, due to lack of proper advertisement only four persons applied for the said post and participated in the interview. The case of the Opposite Parties is that had the advertisement been given wide publicity as indicated hereinabove, then many eligible candidates would have participated in the interview.Further, it is stated that the recruitment in the present case contravenes provisions of Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 and Rule, 1960.

11. Heard Mr. S.K. Das, along with Mr. P. Mohapatra, learned counsel for the Petitioner as well as Mr. P.C. Das, learned Additional Standing Counsel for the State. Perused the writ petition as well as documents annexed to the writ petition.

12. Learned counsel for the petitioner submits that the Opposite Party No.2 Office has not committed any illegality at all in the matter of selection and appointment of Peon of the SET. It is further submitted by Mr. Das that the Finance Department Circular dated 10.04.2012 came into force after vacancy in the present case was notified. Therefore, he strenuously argued that the circular dated 10.04.2012 has no application so far as the recruitment in the present case is concerned.

13. Learned counsel for the State, on the other hand, submits that although the circular of the Finance Department came into force after notification of the vacancy, the applicant had applied for the post on 18.04.2012 and all steps for filling up the said post were taken subsequent to the circular dated 10.04.2012 came into force. Therefore, the plea of the petitioner that the Finance Department Circular in question is not applicable to the fact of this case is not correct. He further submits that even there are so many earlier circulars of the Finance Department prior to the one issued on 10.04.2012 making such appointment of the petitioner by the Opposite Party No.2 contrary to the executive instruction and rules. It is further submitted by learned counsel for the State that since the concurrence of the Finance Department as well as Higher Education Department has not been obtained in the present case to fill up the posts, the appointment is illegal and void *ab initio.*

14. In reply to the aforesaid stand of the Government, learned counsel for the petitioner submits that the petitioner was appointed against a regular and substantive post after following due selection procedure. Moreover, the circular dated 10.04.2012 came into force after vacancy was notified. Therefore, the Opposite Party No.2 has not committed any illegality at all in going ahead with the selection process and appointing the present petitioner, who had requisite qualification and stood first in the interview. He further submits that the selection was made basing upon the notice dated 05.04.2012 at Annexure-1. In such eventuality, according to the counsel for the petitioner, the same would amount to changing the rules of the game while the game is on. Therefore, he submits that the selection to the post of Peon

has been made strictly on the basis of advertisement dated 05.04.2012. In support of his contentions, the learned counsel for the petitioner relies upon a judgment of the Hon'ble Supreme Court in the matter of ***K. Manjusree vrs. State of Andhra Pradesh and another :*** *reported in* ***(2008) 3 SCC 512***. In the aforesaid judgment of the Hon'ble Supreme Court, the criterion for selection is sought to be changed after the advertisement was issued for filling up the post and rules were finalized for selection and while the process of selection was on. While analyzing the facts of that case, Hon'ble Supreme Court of India has held that no doubt the authorities have power to fix selection criterion, however, the attempt to change the same while selection process was on is not permissible under the law. In other words the decision under resolution dtd.10.04.2012 was brought into force after the recruitment process was advertised/notified by SET i.e while the selection process had already commenced, therefore, such decision is not applicable to the selection process under challenge in the present case as the same would amount to changing the rules of game while the game is on. Applying ratio laid down by the Hon'ble Supreme Court to the facts of the present case, this Court is of the considered view that the circular dated 10.04.2012 is not applicable to the facts of the present case as the same came into force after the recruitment process was notified in the present case.

15. In reply to the contention of the learned counsel for the State to the effect that it is not open for the petitioner to challenge a show-cause and the present writ petition challenging the show-cause notice is not maintainable, the learned counsel for the petitioner submits that show cause notice dated 24.08.2012 has been issued only as a formality and the decision to cancel the order of appointment of the petitioner has already been taken by the Opposite Party No.1 vide order under Annexure-8 even before issuance of show-cause notice. Therefore, he submits that the cancellation of appointment was a foregone conclusion already arrived at by the Opposite Party No.1 and the issuance of show cause notice is a mere formality sought to be observed by the Opposite Party No.2. In such view of the matter, learned counsel for the petitioner submits that the Tribunal has not committed any illegality in entertaining the O.A. application, which was later transferred to this court after abolition of the Odisha Administrative Tribunal.

16. In the aforesaid context, learned counsel for the petitioner submits that where a show-cause notice has been issued with a premeditation and outcome of such notice is apparent and predictable, a writ petition would

always be maintainable. So far as the present case is concerned, the authorities have already formed an opinion to terminate the services of the present petitioner. Show-cause notice issued by the Opposite Party No.2 is mere follow up action of the formality to the final decision already taken at the level of Opposite Party No.1. To support his contention, learned counsel for the petitioner relies upon a judgment of the Hon'ble Supreme Court of India in the matter of ***Siemens Ltd. vrs. State of Maharashtra and others :*** *reported in* ***(2006)12 SCC 33*** wherein the Hon'ble Supreme Court of India has held that when a notice was issued with pre-meditation, a writ petition would be maintainable as because in such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose.

17. Considering the pleadings in the present case, this Court is of the considered view that the ratio laid down in ***Siemens Ltd. case*** (supra) squarely applied to the facts of the present case, therefore, the present writ petition is maintainable and the objection of the State counsel in this regard is unsustainable in law.

18. This Court feels that the argument of the learned counsel for the petitioner to the effect that from a plain reading of Paragraph-(vi) of the letter under Annexure-7, a post which is to be created and is to be subsequently filled up after 10th April, 2012 can only be done after getting concurrence of the Finance Department and that in the instant case since post in which the petitioner was appointed validly and is a substantive and existing post available to be filled up prior to the issuance of the circular dated 10.04.2012, prior approval of the Finance Department is not at all required, has force in it.

19. Moreover, the circular dated 10.04.2012 cannot be given any retrospective effect. In other words, appointment, which were advertised/notified after 10.04.2012 would be governed under the terms contained in circular dated 10.04.2012. Even assuming that the concurrence of the Finance Department was required in the present case, the appointment having not been made by following due selection procedure and in absence of any specific condition that the appointment would be rendered invalid in the event it is found that the same has been done in violation of Finance Department resolution, the appointment in the present case can at best be said to be an irregular appointment, which can be regularized by obtaining

post-facto approval of the concerned department of the Government. Therefore, the defect, if any, is curable and it doesn't vitiate the entire selection process adopted in the present case. Further no fault can be found with the petitioner in the present case, hence, he should not be penalized for the irregularities committed by the appointing authority.

20. With regard to the allegations concerning the advertisement/notice in question to fill up the vacant regular post or giving it wide publicity is concerned, this Court upon consideration of the rival contentions of the parties, as well as upon perusal of the record is of the concerned view that the Opposite Party No.2 has not committed any illegality that would render the entire selection procedure ab nitio void. Pursuant to the advertisement four candidates appeared in the interview and the petitioner, who stood first, was selected and given appointment. In absence of any complain by any of the candidates who was desirous to be appointed to such posts and did not get any opportunity to participate in the selection process, it is not open to the authority to take advantage of the irregularities committed by them and penalize the petitioner by terminating his service. No doubt some irregularities have been observed by this Court while conducting the selection process, the same should have been regularized by taking post-facto approval from the authorities. In this context, the ratio of the judgment of this Court in the case of ***Biswambar Behera vrs. State and others :*** *reported in* ***2012(I) OLR 839*** relied upon by learned counsel for the petitioner supports the contention of the petitioner.

21. In view of the aforesaid facts and circumstances and analysis of the legal position, this Court is of the considered view that the decision of the Government under letter dated 10.04.2012 is not applicable to the facts of the present case and therefore, the letter dated 16.08.2012 under Annexure-8 and the show-cause notice dated 24.08.2013 under Annexure-6 are highly illegal and untenable in law and as such, the same are liable to be quashed and are hereby quashed.

22. The writ petition is allowed. However, there shall be no order as to cost.

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2022 (II) ILR - CUT- 252

V. NARASINGH, J.

CRLMC NO. 2373 OF 2021

PRADEEP BISWAS ……..Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offences under section 20 (b) (11) (c),27A / 29 of the NDPS Act, 1985 – The power of the High Court in dealing with an order of cognizance under section 482 of Cr.P.C. questioned – Held, it bears no repeation that wider the power greater should be the circumspection in exercising the same – On prima-facie consideration of the materials on record vis-a-vis the accusation relating to the petitioner, this Court finds that allegation of petitioner's involvement does not appear to be frivolous and vexatious, no infirmity in the order of cognizance and accordingly the CRLMC dismissed. (Para-18)

Case Laws Relied on and Referred to :-

1. 2014 (I) OLR 761 : Jyotiranjan Mohapatra Vs. State of Odisha.
2. (2020) Vol.80 OCR (SC) 641 : Tofan Singh Vs. State of Tamil Nadu.
3. AIR 1998 SC 128 : M/s. Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate & Ors.
4. 2007 SCC online Mad 978: Mohammed Ashan Vs. The Senior Intelligence Officer, Directorate of Revenue Intelligence, Chennai-17.
5. Tofan Singh Vs. State : (2020) vol.80 OCR 641
6. (2002) 3 SCC 496 : Haryana Financial Corporation Vs. Jagdamba Oil Mills

For Petitioner : Mr. Sanjeev Udgata
For Opp. Party : Ms. S. Mishra, ASC

JUDGMENT Date of Hearing & Judgment: 20.04.2022

V. NARASINGH, J.

1. Invoking power of this Court under Section 482 of Cr.P.C.(hereinafter referred to the Code of Criminal Procedure) petitioner seeks to assail the order dated 09.04.2021 passed by the Learned Sessions Judge-cum-Special Judge, Malkangiri in T.R. No.98 of 2022, taking cognizance of offence under Sections 20(b)(ii)(C)/27A/29 of the NDPS Act, 1985. Petitioner is one of the accused being charge sheeted. And the contraband seized is to the tune of 1318.250 kgs.

2. It is submitted by the learned counsel for the petitioner that entire allegation against the petitioner, accepting the charge sheet at its face value is one made under Section 29 of the NDPS Act and the sole basis of implication being co accused statement and since there is no other credible material to connect accused with the offence the proceeding is liable to be quashed qua the petitioner. And, its continuance is an abuse of process of law.

3. In support of his contention learned counsel for the petitioner relied on the following judgment:

Jyotiranjan Mohapatra v. State of Odisha - 2014 (I) OLR 761, judgment of the Apex Court in the much celebrated case of ***Tofan Singh v. State of Tamil Nadu - (2020) Vol.80 OCR (SC) 641*** and the Apex Court's decision reported in ***M/s. Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others - AIR 1998 SC 128*** and the judgment of the Madras High Court in the case of ***Mohammed Ashan v. The Senior Intelligence Officer, Directorate of Revenue Intelligence, Chennai-17 – 2007 SCC online Mad 978.***

4. Learned counsel for the State opposing the prayer relies on the recitals in the case diary which is on record. Contents of the Case Diary relevant for adjudication is extracted hereunder;

> *"The investigation of the case is not yet complete and the primafacie U/s-20(b)(ii)(C) NDPS Act against the accused persons Sanjay Ray (45) S/o-Lt. Shyamakanta Ray of Vill BhagabanpurJarldhi, P.s.-Bustamnagar Dist-Malda (West Bengal) and U/S 20(b)(ii)(C)/27(A)/29 NDPS Act against the accused persons (i) Shymal Ray S/o-Kiran Ray of Village MV-83, P.S-Malkangiri*
>
> *(ii) Nishikanta Mandal S/o Dayal Mandal, (iii) Ranjan Biswas S/o-Upen Biswas (iv) Pradeep Biswas, S/o-Bijaya Biswas all are of village MV-84,P.s/Dist-Malkangiri, and Bhiku Sekh S/o-Kurban Sekh of Kalia Chawk, P.S-Kalia Chawk, Dist Malda (W.B) showing as absconder with keeping investigation of the case open. Submitted C.S. vide No.53 Dt.- 09.04.2021 with keeping investigation open."*

5. The learned counsel for the State relied on the following Judgments in support of his submission that the case does not merit interference;

> ***i). State of Karnataka Vrs. M. Devendrappa & another - (2002) 3 SCC 89***
>
> ***ii). Sonu Gupta Vrs. Deepak Gupta -(2015) 3 SCC 424***

iii). Sau Kamal Shivaji Pokarnekar vrs.State of Maharashtra & others -(2019) 74 OCR (SC) 131

iv). Mohd. Allauddin Khan vrs. State of Bihar - (2019) 6 SCC 107

6. The above judgments relied on by the State have categorically out lined the duty cast on the Court while examining an order of cognizance while exercising inherent power under Section 482 Cr.P.C.. It is trite law that such power is to be exercised sparingly, and the High Court exercising such power should not embark upon a detailed enquiry.

7. In the judgment ***Sau Kamal Shivaji Pokarnekar (Supra)*** the Apex Court has sounded a caution that while scrutinizing an order of cognizance, the Court is not required to evaluate the merits of the materials or evidence in support of the accusation because the Court must not undertake that exercise to find out whether the materials would lead to a conviction or not.

8. Keeping the contours fixed by the Apex Court, while exercising the power of the Court under Section 482 of the Cr.P.C. in dealing with an order of cognizance, the grounds advanced by the learned counsel for the petitioner have to be examined.

9. On the bare perusal of the charge sheet which have been extracted herein above, it can be seen that the investigation in the case at hand has been kept open and petitioner has been charged under Sections 20(b)(ii)(c)/27A/29 of the NDPS Act.

10. The learned counsel for the petitioner has relied on the judgments which have been referred to hereinabove to fortify his submission that in the case at hand the order of cognizance and the proceeding vis-a-vis the petitioner is to be quashed on the basis of law laid down in the judgments cited.

11. In 2014 (1) OLR 761 relied on by the petitioner, this Court quashed the proceeding while exercising the power under Section 482 Cr.P.C. as two of the accused persons who had faced trial and on the basis of whose statement the petitioner was being implicated therein, have been acquitted of the charge under Sections 20(b)(ii)(c) of the NDPS Act.

12. Second judgment relied upon ***AIR 1998 SC 128*** deals with the powers of the High Court in dealing with an order of cognizance under Section 482 Cr.P.C of the Code without relegating one to prove innocence in the trial or to seek discharge. There cannot be two opinions relating to the power conferred on this Court under Section 482 Cr.P.C. It bears no repetition that wider the power greater should be the circumspection in exercising the same.

13. The judgment reported in ***(2020) vol.80 OCR 641 Tofan Singh V. State,*** has no application in the case at hand, at the present juncture.

14. The last judgment on which reliance is placed by the learned counsel for the petitioner is of the Hon'ble Madras High Court. It is seen that the said judgment is at the stage of framing of charge.

15. It is trite law as decided by the Apex Court in the Case of State of ***Haryana Financial Corporation V. Jagdamba Oil Mills (2002) 3 SCC 496***, a judgment is not to be read as Euclid's Theorem. Judgment has to be applied in the given facts and cannot have universal mechanical appreciation.This salutory principle is lost sight of by the learned counsel for the petitioner in relying on the aforesaid judgments. In as much as, this Court at the stage of cognizance is called upon to make an elaborate microscopic examination of the materials on record.

16. As held by the apex Court in the cases cited by the prosecution at the stage of evaluation of an order of cognizance the Court does not function as an Appellate Court or a Revisional Authority and it is not open to the Court to "embark upon enquiry whether the evidence of question is reliable or not, or whether on a reasonable appreciation of its accusation would not be sustained that is the function of the Trial Judge".

17. In the case of ***Sonu Gupta vrs. Deepak Gupta (Supra),*** Apex Court has held thus;

> *"9. It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicate above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case".*

18. On prima facie consideration of the materials on record vis à-vis the accusation relating to the petitioner this Court finds that the allegation of petitioner's involvement does not appear to be frivolous and vexatious.

19. On a conspectus of materials on record this Court does not find any infirmity in the order of cognizance and accordingly the CRLMC is dismissed. There shall be no order as to cost. However, it is made clear that the opinion expressed in the case at hand relating to the petitioner should not be considered as expressing any conclusive opinion relating to the complicity of the petitioner which has to be considered by the Court concerned on its own merits at an appropriate stage.

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